

ALI-ABA Course of Study
**Current Developments in Employment Law:
*The Obama Years***

July 22 - 24, 2010
Santa Fe, New Mexico

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ALI-ABA Course of Study
**Current Developments in Employment Law:
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July 22-24, 2010
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PROGRAM

Wednesday, July 21, 2010

4:00-6:00 p.m. Early Registration

Thursday, July 22, 2010

7:30 a.m. Registration and Continental Breakfast

8:25 a.m. Administrative Announcements — *ALI-ABA Staff*

Webcast Segment A

8:30 a.m. Introductory Remarks and Course Overview

8:40 a.m. Welcome – *Judge Black*

8:45 a.m. **U.S. Supreme Court Employment Law Developments** – *Mr. Fitzpatrick*

- *Gross v. FBL Financial Services, Inc.*, its application to other statutes, and the continuing viability of *McDonnell Douglas Corp. v. Green*
- *Lewis v. City of Chicago* and Title VII charge filing in disparate impact cases
- *Perdue v. Kenny A.* and enhancement of attorney fees
- *Staub v. Proctor Hospital* and the cat's paw doctrine
- *Conkright v. Frommert* and ERISA deference
- This term's arbitration cases, including *Stolt-Nielsen*, *Coffee Beanery*, and *Rent-A-Car West*
- *New Process Steel, L.P. v. NLRB* and the legal authority of a two-member NLRB
- *City of Ontario v. Quon* and informational privacy
- *NASA v. Nelson* and informational privacy
- False Claims Act public disclosure clause
- *Thompson v. North American Stainless L.P.* and associational claims
- *Kasten v. Saint-Gobain Performance Plastics Corp.* and verbal complaints as protected activity
- *Townes v. Jarvis* and the continuing viability of *Swierkiewicz v. Sorema N.A.*

9:45 a.m. **Judges' Commentary on the U.S. Supreme Court Term** – *Judges Pallmeyer and Smith*

10:15 a.m. Networking and Refreshment Break

10:30 a.m. **Mock Hearing on Motion to Dismiss after *Iqbal* and *Twombly*** – *Judges Grimm and Pallmeyer presiding; Ms. Barasch for the plaintiff and Mr. Ellis for the defense*
A panel of federal trial judges oversees oral argument on mock cross-motions to dismiss in which both counsel rely on the holdings in *Iqbal* and *Twombly*. Defense counsel seek to dismiss a case remarkably similar in its facts to the Supreme Court's *Swierkiewicz* case, and plaintiff's counsel argues that the defendant's affirmative defenses should be dismissed because they do not satisfy *Iqbal*'s plausibility standard.

11:30 a.m. **Hot Topics in Federal and State Wage and Hour Litigation** – *Mr. Fitzpatrick and Ms. Kearns*

- Assistant managers
- Doffing and donning
- Tips
- Exemptions
- Fluctuating work weeks
- Automatic meal deductions
- Pre- and post-work time

12:30 p.m. **Lunch Break and Tour of the Santiago E. Campos U.S. Courthouse**

U.S. District Judge Bruce Black leads a tour of the historic federal Greek Revival courthouse in Santa Fe. Completed in 1889 and listed in the National Register of Historic Places, the courthouse contains six murals of landscapes commissioned as a WPA project and a Kit Carson memorial.

Webcast Segment B

2:00 p.m. **Evidence Issues in a Digital World: A Mock Rule 26(f) Discovery Conference** – *Judge Grimm; Mr. Ball for the plaintiff and Mr. Ellis for the defense*

Chief Magistrate Judge Grimm conducts a mock discovery conference with counsel in which bench and bar discuss a host of timely e-discovery questions, including: spoliation questions, the sufficiency of record retention and litigation holds, metadata, and ESI in native format, TIFFs, and text-searchable PDFs.

3:00 p.m. Networking and Refreshment Break

3:15 p.m. **Current Issues in E-Discovery** – *Moderator: Mr. Fitzpatrick; Judge Grimm and Mr. Ball*

Working from a series of fact patterns provided to the registrants in advance, the moderator poses questions regarding electronic discovery to a panel of nationally-recognized electronic discovery experts, and the experts provide state-of-the-art advice.

4:30 p.m. **Professionalism and the Practice of Employment Law** – *Judge Grimm, Professor Martyn, and Mr. Schwarz*

- Sedona Cooperation Protocol
- Competency with digital technology

5:30 p.m. Adjournment for the day; **Networking Reception for Registrants and Faculty**

Friday, July 23, 2010

7:30 a.m. Networking Session and Continental Breakfast

Webcast Segment C

8:00 a.m. **New Mexico Private and Public Sector Employment Law Developments** – *Mr. Schwarz*

- Employee handbooks as contracts
- Reverse offers of judgment
- New whistleblower statute
- Anti-arbitration statute

- 8:45 a.m. **The Effects of the Patient Protection and Affordable Care Act** – *Messrs. Morris and Utz*
 This segment focuses on how, on a day-to-day basis, the recently enacted health care legislation will affect employers and employees. Our faculty members review any statutory amendments, courts decisions, or pending litigation affecting the new law, and they address the key issues for employment attorneys, including:
- The employer “mandate” to provide health coverage, and the consequences of failing to do so
 - Mandatory benefits
 - The impact on collectively bargained and multiemployer plans
 - Disclosure obligations
 - New nondiscrimination rules
 - Grandfathered plan rules
 - The “Cadillac plan” tax
 - The impact on cafeteria plans, HSAs, and HRAs
- 9:45 a.m. Networking and Refreshment Break
- 10:00 a.m. **Recurring Evidence Issues in Employment Cases** – *Moderator: Judge Grimm; Judge Pallmeyer, Ms. Barasch, Mr. Ellis, and Professor McLain*
- Admissibility of evidence from social networking sites (Facebook, MySpace, Twitter) and other digital evidence (Rules 401-403, 901 and 902)
 - Character evidence and related issues (Rules 404, 412, 414, and 415)
 - Attorney client privilege and work product doctrine in employment cases, including *Mohawk Industries* issues (Rule 502)
 - Hearsay Rule and its exceptions applied to typical (and not-so-typical) employment situations (Rules 801-804)
 - The latest spoliation cases and what they mean to employment litigators
 - Evidentiary implications of the *Quon* decision
- 12:00 noon **Lunch Break**
- Webcast Segment D**
- 1:30 p.m. **New Federal Legislation and the Obama Agencies** – *Messrs. Fitzpatrick and Morris*
- New COBRA rules in the Economic Stimulus Bill (The American Recovery and Reinvestment Act of 2009)
 - McCaskill whistleblower provisions applicable to certain federal contractors and state and local governments in the ARRA
 - Genetic discrimination regulations issued under the Genetic Information Nondiscrimination Act (GINA)
 - Vice President Biden’s task force on families and its priorities
 - The Franken Amendment
 - OFCCP enforcement of Executive Order 11246
 - Employment Non-Discrimination Act (ENDA)
- 2:30 p.m. Networking and Refreshment Break

- 2:45 p.m. **Americans With Disabilities Act (ADA) Developments** – *Moderator: Judge Pallmeyer; Messrs. East and Morris*
 This segment includes a discussion of the impact of the ADA Amendments Act, the proposed EEOC regulations, and the annual *tour de force* review of recent cases.
- 3:45 p.m. **Retaliation and Whistleblower Developments** – *Messrs. Fitzpatrick and Panken*
 Retaliation has become the add-on cause of action allowing jury trial access even if other discrimination claims are weak or dismissible. As a result, there were over 10,000 reported cases last year involving retaliation claims. This segment addresses:
- Knowledge of protected activity
 - Mistaken belief
 - The “materially adverse” standard of *Burlington Northern* and recent case law developments
- 4:45 p.m. **Emerging Employment Issues under State Law** –*Mr. Fitzpatrick*
- Social networking sites
 - Which state law applies
- 5:30 p.m. Adjournment for the day

Saturday, July 24, 2010

7:30 a.m. Networking Session and Continental Breakfast

Webcast Segment E

- 8:00 a.m. **Ethics and Professional Responsibility** – *Judge Grimm and Professor Martyn*
 Representation agreements (engagement letters) are like prenuptial agreements. If all goes well, they are largely unimportant and remain buried in a file. But when trouble arises, they become critical. Representation agreements run the gamut from non-existent to epic agreements of over 50 pages. This session shows you what to look for and how to craft your current representation agreements to:
- Obey the "ten commandments" of representation agreements
 - Clearly and ethically identify your client or clients, and define the terms of the relationship
 - Avoid the common and not-so-common pitfalls of legal representation
 - Address emerging issues, including digital-age confidentiality, and privilege issues
 - Lay the basis for a successful attorney-client relationship
- 9:00 a.m. **Alleged Employee Misconduct: Claims and Counterclaims** – *Messrs. Ellis, Fitzpatrick, and Morris*
- Computer Fraud and Abuse Act
 - Faithless servant doctrine
 - Employer claim for contribution from employee
 - Claims against in-house counsel for using confidential information in claims against company
 - Tortious interference/misappropriation of trade secrets
 - Sanctioning for document removal
 - Breach of fiduciary duty
 - Breach of contractual confidentiality agreement
 - Enforcement of contractual clawbacks
- 10:00 a.m. Networking and Refreshment Break

10:15 a.m. **Gender Compensation Issues** – *Mr. Utz*

- Lily Ledbetter Fair Pay Act developments
- Potential impact of Paycheck Fairness Act
- Major litigation vulnerabilities

11:15 a.m. **Discrimination and Harassment in the Workplace: Race, Sex, Age, National Origin, and Military Status** – *Messrs. Fitzpatrick and Panken*

- EEOC's ADEA and ROA Regulations
- Sex stereotyping developments in *Schroer v. Billington* (D.D.C.), *Prowel v. Wise Business Forms, Inc.* (3rd Cir.), and *Lewis v. Heartland Inns of America, L.L.C.* (8th Cir.)

12:30 p.m. Adjournment

Total 60-minute hours of instruction: 18.5, including one hour of ethics and one hour of professionalism

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