



K&L GATES

Seventh Annual  
“Under the Wire”  
CLE Seminar

## Table of Contents

1. Agenda
2. Speaker Biographies
3. Presentation and Supplementary Materials
4. Presentations
  - i. Session I: Increasing Pro Bono Participation - *Ethics Presentation*
  - ii. Session II: General Counsel Panel: The Age of the Chief Legal Officer
  - iii. Session III: Policies, Practices and Pitfalls in the Employment Context
  - iv. Session IV: Notable Developments in Privacy and Cybersecurity
  - v. Session V: e-Discovery 101 and Beyond
  - vi. Session VI: The North Carolina Business Court: Now Open for More Business
  - vii. Session VII: Beating Burnout: Practical Strategies to Live a Life that Keeps Burnout at Bay - *Mental Health / Substance Abuse Presentation*

Attendees seeking CLE credit should fill out the 'CLE sign in sheet', which can be found outside of the main conference room. In addition, please fill out, and leave behind, the supporting evaluation sheet

Thursday, January 31  
8:00 a.m. – 5:00 p.m.

**K&L GATES SEVENTH ANNUAL UNDER THE WIRE CLE CONFERENCE**  
*CLE Credit: 4.25 General Credits; 1.0 Ethics Credit; and 1.0 Substance Abuse Credit*

08:00 - 8:30	<b>Registration and Breakfast</b>
08:25 - 8:30	<b>Opening Remarks / Welcome - Gary Qualls, Partner (Research Triangle Park)</b>
08:30 - 9:30	<b>Increasing Pro Bono Participation - Ethics Presentation</b> Presented by <b>Sylvia Novinsky, Director (NC Pro Bono Resource Center)</b>
09:30 - 10:30	<b>General Counsel Panel Discussion</b> Presented by <b>David Fountain, Senior VP - Legal, Chief Ethics &amp; Compliance Officer, and Corporate Secretary at Duke Energy, John Lawlor, General Counsel and Data Protection Officer at Jaggaer, Jennifer Venable, General Counsel at Capitol Broadcasting Company</b> Moderated by <b>Gina Bertolini, Partner (Research Triangle Park)</b>
10:30 - 10:45	<b>Break</b>
10:45 - 11:30	<b>Policies, Practices, and Pitfalls in Workplace Investigations</b> Presented by <b>David Lindsay, Partner (Raleigh), Kristi Nickodem, Associate (Raleigh), Leann Walsh, Associate (Raleigh)</b>
11:30 - 12:15	<b>Notable Developments in Privacy and Cybersecurity</b> Presented by <b>Julia Jacobson, Partner (Boston)</b>
12:15 - 01:00	<b>Lunch Break</b>
01:00 - 02:00	<b>e-Discovery 101 and Beyond</b> Presented by <b>Julie Anne Halter, Partner, (Seattle)</b>
02:00 - 02:45	<b>The North Carolina Business Court: Now Open for More Business</b> Presented by <b>John Gardner, Partner (Raleigh), Matthew Houston, Associate (Raleigh)</b>
02:45 - 03:00	<b>Break</b>
03:00 - 04:00	<b>Beating Burnout: Practical Strategies to Live a Life that Keeps Burnout at Bay - Mental Health/Substance Abuse Presentation</b> Presented by <b>Courtney Leak, LCSW, LISW-CP, Owner/Therapist (Embracing Abundance Counseling and Consulting) and Counselor/Outreach Coordinator, (Winthrop University)</b>
04:00	<b>Closing Remarks/ Thank You - Lee Hogewood, Administrative Partner (Raleigh)</b>
04:00 - 05:00	<b>Reception</b>



## David B. Fountain

Duke Energy - Senior Vice President, Legal, Chief Ethics and Compliance Officer and Corporate Secretary

### **Raleigh**

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David Fountain oversees communications with Duke Energy's board of directors and ensures they are apprised of corporate governance and compliance matters. In addition, he has responsibility for corporate legal issues, such as employee relations, mergers and acquisitions and disclosures, and fostering an accountable, transparent and ethical culture. He assumed his current position in November 2018. Previously, David served as Duke Energy's North Carolina President, serving approximately 3.3 million electric retail customers and 717,000 natural gas customers. He was responsible for the financial performance of Duke Energy's regulated utilities in North Carolina and managing state and local regulatory and government relations, and community affairs.

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## John Lawlor

JAGGAER - General Counsel

### **Morrisville**

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John Lawlor is General Counsel at JAGGAER, a global SaaS spend management provider headquartered in Morrisville, NC. He is responsible for all legal matters within the company. John joined JAGGAER (formerly SciQuest) in 2008 and since then has helped steer the company and legal department through approximately 700% revenue growth, an IPO, a take private and significant global expansion. Prior to JAGGAER, John was corporate counsel at Axcelis Technologies, a global semiconductor equipment manufacturer. John received his undergraduate degree from the University of Notre Dame and his law degree from Northeastern University School of Law.



## Courtney Leak

Embracing Abundance Counseling and Consulting -  
Owner/Therapist  
Winthrop University - Counselor/Outreach Coordinator  
LCSW, LISW-CP

### Charlotte

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Courtney Leak, LCSW, LISW-CP is a dynamic therapist, podcaster, and empowerment speaker who utilizes direct honesty wrapped in humor in order to spread the message of living a life full of purpose and courage. Courtney received her Masters of Social Work from Winthrop University and has over 9 years in the field of therapy and human services. Through her own experiences and the experiences of the numerous individuals, couples, and families that she has worked with over the years, Courtney has developed insight into the struggles of everyday living and how they are often compounded by the history and patterns of pain that so many people are living with today. Courtney's fundamental belief is that everyone is naturally equipped with what they need to find and meet their purpose but it is often hidden under fear, hurt, and negative views of ourselves. However, if we are willing to own our story, minus the fear and shame, we can embrace our true selves and live abundantly in our purpose.

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## Sylvia Novinsky

North Carolina Pro Bono Resource Center - Director

### Raleigh

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Sylvia Novinsky (cont.)

Sylvia K. Novinsky is the Pro Bono Resource Center's inaugural director. Chief Justice Mark Martin launched the North Carolina Pro Bono Resource Center, the newest program of the North Carolina Equal Access to Justice Commission, in 2016. The Pro Bono Resource Center is tasked with increasing pro bono participation statewide. It will also provide a way for North Carolina lawyers to report on their pro bono service to clients in need, and will encourage and support this work through recruitment, training and communication. The Center is one of only a handful of statewide pro bono resource centers in the country.

Sylvia comes to this role after nearly twenty years of service to the University of North Carolina School of Law, where she most recently held the role of Assistant Dean for Public Service Programs. During her tenure at Carolina Law, Sylvia founded and advised the UNC Law Pro Bono Program, a national model for inspiring students and alumni to participate in pro bono service. She has also served as the institution's Associate Director for Public Interest Law, Assistant Dean for Student Affairs, and Associate Dean for Student Affairs. Sylvia also spends time inside the classroom as an adjunct professor, teaching "Spanish for American Lawyers" and "Leadership for Lawyers."

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## Jennifer Venable

Capitol Broadcasting Company - General Counsel

### Raleigh

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Jennifer Venable is General Counsel at Capitol Broadcasting Company in Raleigh. Prior to joining Capitol Broadcasting, Jennifer served as General Counsel at Alfresco, an open source software company. Jennifer began her legal career at Brooks, Pierce, McLendon, Humphrey & Leonard, worked as corporate counsel at iBEAM, and then as commercial counsel followed by Senior Partner Management at Red Hat. Jennifer received her undergraduate degree from The College of William and Mary and her law degree from UNC School of Law.



## Gina Bertolini

Partner

### **Research Triangle Park**

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Ms. Bertolini is a partner in the Research Triangle Park office. Concentrating exclusively on health law, Ms. Bertolini primarily represents academic medical centers, health systems, and community hospitals. She counsels boards of directors and senior leadership on governance, transactional, operational, and regulatory matters, including state and federal regulations such as the Stark and Antikickback Statutes, EMTALA, HIPAA, and the Affordable Care Act. Ms. Bertolini has structured joint ventures and contractual relationships between and among health care entities, providers, managed care, and others, including the creation of an Accountable Care Organization. Ms. Bertolini has handled employment and collective bargaining issues in the health care setting, and is an expert at navigating medical staff matters. Having managed hundreds of administrative policies for academic medical centers, Ms. Bertolini is skilled at drafting, reviewing, and revising hospital policies and procedures. Ms. Bertolini also has managed sensitive HIPAA data breaches and a wide range of privacy issues within the health care setting. Ms. Bertolini has managed multiple health system legal departments through organizational growth and transition, implementing systems and teams to efficiently manage the provision of high quality legal services. Additionally, Ms. Bertolini has successfully managed multiple enterprise-wide projects, for example: assisting in the design and implementation of a credentialing verification organization; managing the physician acquisition process for an AMC-owned community physician network and assisting in the development of an effective onboarding process; restructuring and managing the physician contracting process for a 700+ bed, four-hospital health system; providing legal advice and guidance for the development and implementation of an enterprise-wide EMR; and advising and assisting in the opening of a community-based hospital. Prior to joining the firm, Ms. Bertolini worked for The University of Michigan as an associate vice president and deputy general counsel for the University of Michigan Health System, and as an assistant general counsel for The University of North Carolina Health Care System.



## John R. Gardner

Partner

### Raleigh

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Mr. Gardner is a partner in the Raleigh office and focuses his practice on the representation of secured and unsecured creditors in the structuring and restructuring of financial transactions, as well as representation of creditors and mortgage servicers in federal and state court litigation, including bankruptcy proceedings, receivership and foreclosure actions, and with regulatory compliance. Prior to joining the firm, Mr. Gardner served as law clerk for the Hon. J Rich Leonard, United States Bankruptcy Court, Eastern District of North Carolina, 2004-2005.

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## Julie Anne Halter

Partner

### Seattle

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Ms. Halter is a partner in the Seattle office of K&L Gates. Her practice includes complex commercial and business litigations, arbitrations and government and internal investigations, particularly, as they relate to managing large, document-intensive cases, specifically those involving electronic discovery. For more than a decade, Ms. Halter has counseled clients regarding discovery in cases involving intellectual property, securities and banking, including SEC and FINRA investigation matters, antitrust, products liability, real estate and employment litigation, as well as other government and internal investigations and public records act requests.

## Julie Anne Halter (cont.)

She is a member of the e-Discovery Analysis and Technology Group (e-DAT), a dedicated practice group that implements proven business processes and advanced technology to provide clients with efficient and cost-effective electronic discovery counseling and document review services.

Ms. Halter also counsels clients on information governance and litigation readiness issues, providing advice and assistance regarding information governance policies, practices and schedules, employee training and other recommendations to maintain legal compliance, lower record management costs, and reduce liability risks. Ms. Halter is a member of The Sedona Conference Electronic Document Retention and Production working group and is a frequent author and speaker on discovery issues.

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## A. Lee Hogewood III

Administrative Partner

### Raleigh

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Mr. Hogewood is a partner in the Raleigh office and concentrates his practice on complex commercial litigation, with an emphasis on representing creditors in litigation, bankruptcy and insolvency proceedings. Mr. Hogewood litigates in all North Carolina state and federal courts, including bankruptcy court. He handles a wide variety of business disputes including commercial and corporate contract disputes, real estate disputes and matters involving fraud, misrepresentation and unfair and deceptive trade practices. He also has significant experience defending commercial and consumer lenders in litigation in federal, state, and bankruptcy court in a wide variety of lender liability actions. Mr. Hogewood maintains an active appellate practice, representing clients before the United States Court of Appeals for the Fourth Circuit, the North Carolina Supreme Court, and North Carolina Court of Appeals.

## A. Lee Hogewood III (cont.)

In addition, Mr. Hogewood regularly advises clients regarding the resolution of financial disputes through consensual out of court restructurings and also represents purchasers of assets from financially distressed companies, particularly through the Section 363 bankruptcy sale process. Mr. Hogewood served as the chair of the North Carolina Bar Association's Bankruptcy Section from 2009-10 and continues to be active in the Bankruptcy Section and the North Carolina Bar Association.

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## Matthew T. Houston

Associate

### **Raleigh**

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Matthew Houston is an associate in the Raleigh office and focuses his practice on complex commercial disputes, with an emphasis on financial services litigation, contract disputes, and corporate restructuring and bankruptcy. His practice also encompasses labor and employment and real estate litigation matters.

Mr. Houston's experience includes litigating and resolving a variety of commercial contract disputes, representing lenders in litigation and loan workout matters, advising and representing secured and unsecured creditors in bankruptcy proceedings, receivership actions, and foreclosures, and defending clients in bankruptcy preference actions.

Mr. Houston also represents and advises clients in lease disputes, summary ejectment proceedings, and other real estate litigation matters, and he also advises employers as to employment-related disputes and liability evaluations.



## Julia B. Jacobson

Partner

### **Boston**

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Julia Jacobson is a partner in the Boston office of K&L Gates LLP. Ms. Jacobson's practice focuses on privacy and data protection and marketing, advertising and promotions. She has significant experience counseling clients in the consumer products goods, ecommerce and technology industries.

Ms. Jacobson regularly counsels clients on an array of data privacy, security, transfer and acquisition matters. She regularly assists clients with the design and development of privacy-sensitive policies for collection and use of personal data, incident response, information governance and vendor management across the globe. Ms. Jacobson's particular expertise is on helping businesses manage and monetize their data, and data privacy issues associated with business sales, combinations and acquisitions. Most recently, Ms. Jacobson has advised clients on compliance with the General Data Protection Regulation and ePrivacy Directive and preparations for compliance for New York Department of Financial Services Cybersecurity Regulations and California Consumer Privacy Act.

Ms. Jacobson advises clients in traditional marketing and advertising campaigns, as well as internet, mobile, social media, telemarketing (state and federal), text message and email marketing and promotions. She drafts and negotiates co-branding, sponsorship, commercial coventure and other agreements associated with the advertising, marketing and promotion of products and services.

Ms. Jacobson has significant experience with the legal and business issues related to trademark and brand licensing. Her licensing experience also includes technology licensing, including drafting and negotiating joint development, SaaS, end-user, enterprise, hosting, mobile application and other technology-centric agreements.

Ms. Jacobson is a Fellow of Information Privacy of the International Association of Privacy Professionals (IAPP).

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## David C. Lindsay

Partner

### Raleigh

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David Lindsay focuses his practice on defending employment discrimination lawsuits and class and collective wage and hour actions, advising businesses on complex employee relations issues and assisting clients on international employment matters. He advises clients on questions relating to state and federal employment law, including questions relating to the Family and Medical Leave Act, the Fair Labor Standards Act, the Americans with Disabilities Act and OSHA regulations. As part of his practice, he also regularly enforces covenants not to compete on behalf of employers.

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## Kristi A. Nickodem

Associate

### Raleigh

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Kristi A. Nickodem (cont.)

Kristi Nickodem is an associate in the Raleigh office, focusing her practice on labor, employment, and workplace safety. Ms. Nickodem has experience advising employers on a wide variety of labor and employment issues, including employee separations, compliance with the Fair Labor Standards Act and various state wage and hour laws, the provision of reasonable accommodations to employees under the Americans with Disabilities Act, responding to citations issued by the Occupational Safety and Health Administration, and the provision of leave pursuant to the Family and Medical Act and various state and local leave laws. As part of her practice, she also drafts handbooks, policies, employment agreements, and restrictive covenant agreements for employers. Ms. Nickodem has helped represent employers in a wide variety of administrative and civil litigation matters, including authoring pleadings, motions, and legal memoranda in matters involving trade secrets, contractual breaches, discrimination claims, and wage and hour issues. Ms. Nickodem also conducts employment due diligence and advises on complex employment compliance issues arising in the context of mergers and acquisitions.

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## Gary S. Qualls

Partner

**Research Triangle Park**  
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Mr. Qualls focuses his practice on representing health care clients. He litigates, arbitrates, and mediates healthcare disputes, including disputes involving the following issues: certificate of need; licensing and certification; payment and reimbursement; HIPAA; contracts of all types; medical staff privileges; EMTALA; and civil monetary penalties. He provides a broad range of legal services to the following types of providers: hospital systems; nursing facilities; adult care facilities; continuing care retirement facilities; home health and hospice agencies; dialysis providers; clinical laboratories; physician groups; and other health care providers.



## Leann M. Walsh

Associate

### **Raleigh**

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Leann Walsh is a senior associate in the firm's Raleigh office where she is a member of the labor, employment & workplace safety practice group and health care practice group.

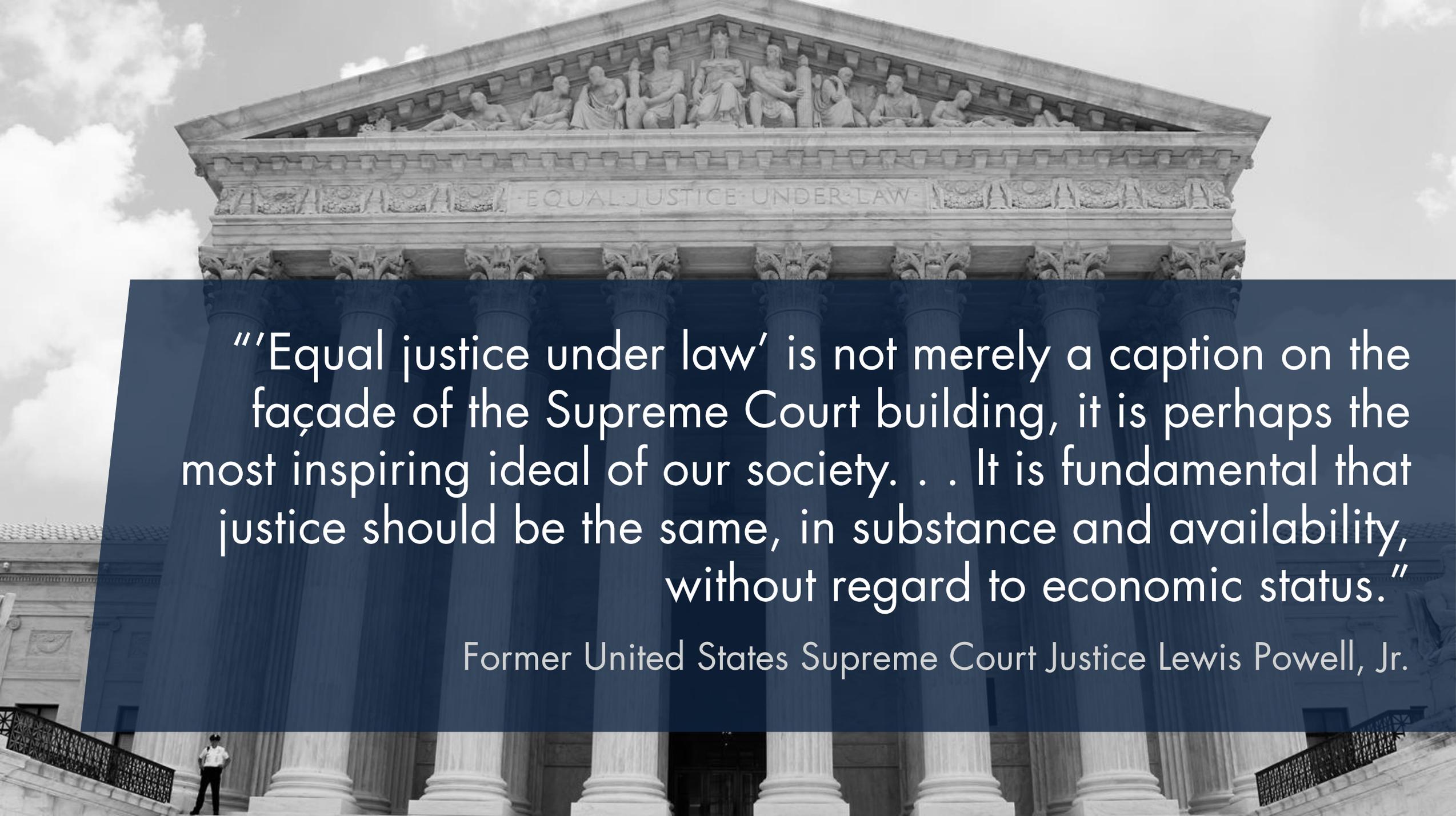
Ms. Walsh focuses her practice on counseling businesses on difficult employee relations issues, conducting internal employment investigations, advising clients regarding complex labor and employment issues relating to mergers and acquisitions, and defending employers in civil and administration employment litigation matters.

Ms. Walsh's client base spans numerous industries and sizes, from start-ups to publicly traded companies, with concentrations in health care, high education, technology, and life science.

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# INCREASING PRO BONO PARTICIPATION

North Carolina Pro Bono Resource Center  
ncprobono.org | @ncprobono | #celebrateprobono

The image shows the front facade of the United States Supreme Court building. At the top, a pediment contains a relief sculpture of figures. Below it, a frieze features the inscription "EQUAL JUSTICE UNDER LAW" in capital letters. The building is supported by a series of tall, fluted columns. A dark blue semi-transparent rectangular box is overlaid on the lower half of the image, containing white text. The text is a quote from Justice Lewis Powell, Jr. The sky is bright with some clouds, and a person can be seen walking on the steps in the bottom left corner.

“‘Equal justice under law’ is not merely a caption on the façade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

Former United States Supreme Court Justice Lewis Powell, Jr.

An American flag is shown waving in the wind against a clear blue sky. The flag's red and white stripes are prominent, and the blue field with white stars is visible in the upper left corner. The lighting suggests a bright, sunny day.

# **Liberty and Justice for All\***

\*Offer not available in some areas, prices subject to change.



# WHO CAN'T AFFORD JUSTICE IN NC?

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

**People who face unfair disparity:** people of color, people who are disabled, women, seniors, etc.

**People who work:** nearly 42 percent of children in families where parents worked are still considered low-income

**People who are geographically isolated:** the 40 counties with the highest rates of poverty in NC are all rural



# WHO CAN'T AFFORD JUSTICE IN NC?

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

North Carolina has the 13<sup>th</sup> highest rate of poverty in America

2.2 million North Carolinians are eligible to be served by civil legal aid providers

The average household income for legal aid clients is \$12,875 per year



# THE ACCESS TO JUSTICE GAP IN NC

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CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

There is only 1 legal aid attorney for almost every 10,000 of those eligible to be served

More than 70,000 individuals ask for free civil legal services each year

More than 35,000 of those have to be turned away because of lack of capacity



# THE ACCESS TO JUSTICE GAP (2017)

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

- 86% of the civil legal needs of people in poverty went unmet
- 71% of all low-income households experienced a civil legal problem
- 25% of low-income households experienced 6 or more civil legal problems

# WHAT ARE THE LEGAL NEEDS GOING UNMET?



preventing homelessness by stopping an unfair and unlawful eviction



accessing benefits for a veteran with service-related injuries



helping victims recover from a hurricane or other natural disaster



clearing dismissed charges or unnecessary fines from a criminal record



protecting a mom and her children from an abuser



providing peace of mind by drafting and executing end-of-life documents

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# NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 6.1

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.

**In fulfilling this responsibility, the lawyer should:**

## **NC RPC 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE**

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

**6.1(a)(1)**

persons of limited means;

**6.1(a)(2)**

charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or

**6.1(a)(3)**

individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or [6.1(a)(2)] organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

**In fulfilling this responsibility, the lawyer should:**

## **NC RPC 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE**

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

(b) provide any additional services through:

**6.1(b)(1)**

the delivery of legal services described in paragraph (a) at a substantially reduced fee; or

**6.1(b)(2)**

participation in activities for improving the law, the legal system or the legal profession.

**PREAMBLE**

It is the basic responsibility of each lawyer to provide community service

# NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 6.1

NORTH  
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In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

LEGAL AID NC



**charlotte** center  
for **legal advocacy**

justice lives here.



**PISGAH**  
LEGAL SERVICES

# 2018 ABA REPORT: SUPPORTING JUSTICE

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER



lack of time and other obligations



being directly asked to volunteer



lack of necessary skills and experience



limited scope representation opportunities available



lack of malpractice insurance



selection from online description of opportunities

# NORTH CAROLINA **PRO BONO** RESOURCE CENTER

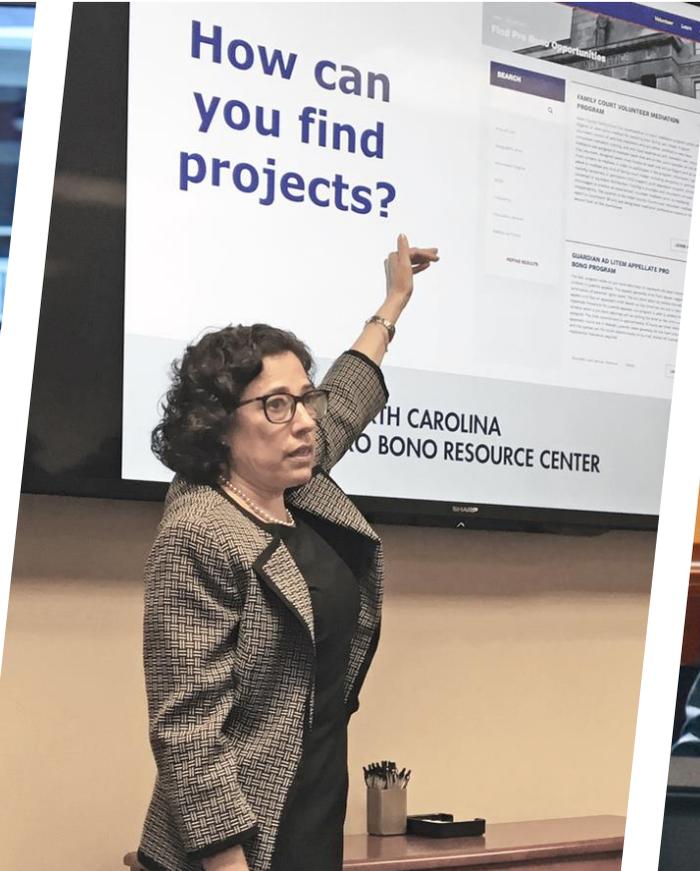
A Program of the NC Equal Access to Justice Commission  
founded to increase pro bono participation in NC



**PRO BONO  
PROJECTS**



**REGIONAL  
COUNCILS**



**ONLINE  
PORTAL**



**TRAININGS  
& CLE**

# REASONS TO DO PRO BONO: FOR ATTORNEYS

NORTH  
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**PRO BONO**  
RESOURCE  
CENTER



Improve Access to Justice



Gain Legal Experience



Reduce Social Inequities



Market Your Practice or Firm



Feel Like a "Good" Person



Uphold Our Profession

# REASONS TO DO PRO BONO: FOR ATTORNEYS

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RESOURCE  
CENTER

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Stu's Views © 2002 Stu All Rights Reserved www.stus.com



"You're going to nag me about my lousy pro bono record, aren't you?"



# PRO BONO GOALS: FOR ATTORNEYS

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**PRO BONO**  
RESOURCE  
CENTER



Carve out time to volunteer



Take at least one pro bono case per year



Volunteer regularly at a help desk or clinic



# PRO BONO GOALS: FOR ATTORNEYS

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER



Be a voice for those who cannot advocate for funding for legal services



Serve as a trainer



Don't wait for the call!



# PRO BONO GOALS: FOR FIRMS

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Encourage attorneys to carve out time for pro bono legal service

Adopt and promote a pro bono policy within the firm

Give “billable time” credit for pro bono work



# PRO BONO GOALS: FOR FIRMS

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

- Recognize and reward lawyers who do pro bono work
- Lend an attorney or paralegal
- Host pro bono trainings



# PRO BONO GOALS: FOR FIRMS

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CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Stu's Views

© Stu All Rights Reserved [www.STUS.com](http://www.STUS.com)

"Pro Bono Lawyer of the Year!"  
I'd like to thank my law firm--  
I couldn't have done it without  
your begrudging support.





# HOW TO GET INVOLVED

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Visit [ncprobono.org](https://ncprobono.org) to find available volunteer opportunities

Connect with [@ncprobono](https://twitter.com/ncprobono) on social media



# HOW TO FIND PROJECTS

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

“Equal justice under law  
of our noble profession: North Carolina  
lawyers move us ever closer to this goal  
through pro bono legal service.”

**MARK D. MARTIN**

CHIEF JUSTICE, SUPREME COURT OF NORTH CAROLINA

## ATTORNEY VOLUNTEER

The Pro Bono Resource Center makes it easy to find the perfect legal volunteer opportunity for you. Explore our project listings to see what projects are available and to find one you can get excited about.

[FIND OPPORTUNITIES](#)

## LEGAL SERVICE PROVIDER

The Pro Bono Resource Center can help you recruit volunteer attorneys for your established pro bono projects. Tell us about your available opportunity and let us help you find the volunteer support you are looking for.

[GET STARTED](#)

## GENERAL PUBLIC

The Pro Bono Resource Center cannot provide legal services directly to clients — we instead connect attorneys to established projects and legal aid organizations. Use this link to find information about other legal resources.

[FIND HELP](#)

HOME / VOLUNTEER /

# Find Pro Bono Opportunities

# HOW TO FIND PROJECTS

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

## SEARCH



Area of Law

Geographic Area

Volunteers Eligible

Skills

Frequency

Population Served

Additional Filters

**REFINE RESULTS**

## APPELLATE PRO BONO PROJECT

STATEWIDE

### NC Bar Association Appellate Practice Section, NC Pro Bono Resource Center, & NC Court of Appeals

The Appellate Pro Bono Project seeks pro bono attorneys to help pro se litigants for cases before the NC Court of Appeals or the NC Supreme Court that meet the following requirements: (1) The appeal involves one or more pro se litigants who would qualify for in forma pauperis status, as set out in N.C. Gen. Stat. § 1-288, regardless of whether the litigant has applied for in forma pauperis status; (2) The appeal presents at least one non-frivolous issue; and (3) The pro se litigant consents to be represented by a pro bono attorney and an attorney, chosen from a list maintained by the NCBA's Appellate Practice Section, consents to represent the litigant free of charge. The Program will be coordinated by the Pro Bono Committee of the N.C. Court of Appeals, which will consist of Court of Appeals judges selected by the Court, and by the NCBA's Appellate Practice Section and its Pro Bono Committee.

Animal Rights

Bankruptcy

Benefits (Government

Veterans

etc.)

Civil Rights

Consumer

Disability

Domestic and Sexual Violence

Education

Elder

Employment

Environmental

Expunction

Family

Guardianship

Health/Healthcare

Housing

Prisoner

**LEARN MORE**

## BOARD OF IMMIGRATION APPEALS PRO BONO

REMOTE

HOME / VOLUNTEER / FIND PRO BONO OPPORTUNITIES /

## NC Disaster Legal Services (DLS) Hotline

The North Carolina Bar Association, Federal Emergency Management Agency (FEMA), Young Lawyers Division of the American Bar Association and Legal Aid of North Carolina (LANC), with support from the North Carolina Bar Foundation, are collaborating to provide immediate pro bono legal assistance to survivors of Hurricane Florence through the NC DLS program. Volunteer Expectations DLS pro bono attorneys agree to provide: - Basic counseling, advice and limited-scope representation; - Extended representation; and/or - Outreach at FEMA Recovery Centers Clients with cases that require more significant representation will be directed to the NCBA Lawyer Referral Service at 1.800.662.7660, M-F 8am-5pm (Spanish-speaking operators are available). Volunteer Training/Resource Materials Training and informational resource materials are available to support volunteer attorney work at [www.ncbar.org/florence](http://www.ncbar.org/florence).

### PROJECT FREQUENCY

Ongoing

### PROJECT TIME COMMITMENT

Volunteer Timeline A Legal Aid of NC staff member will pair you with a DLS hotline client referral after callers are processed through intake. Please note that you may not receive a referral immediately after signing up to serve as a volunteer -- please be patient, and stay engaged with us. We expect that NC residents affected by this disaster will have need for legal assistance for a year or more post-event. In the first few weeks, we expect that those affected by Hurricane Florence will be focused on initial FEMA/insurance claims, government benefits, school enrollment, landlord/tenant and real property issues, document replacement and income protection. Two to six months out from the event, we expect that those affected by the Hurricane will require assistance with FEMA/SBA appeals, housing displacement, repair and contractor scams, powers of attorney, and emergency custody and parenting order modifications. In the longer term (6+ months post-event), affected residents may need advice and assistance regarding foreclosure, insurance disputes, bankruptcy, and disaster relief tax applications.

### PROJECT LOCATION

Remote Electronic (service completed by phone or internet)

### TO VOLUNTEER:

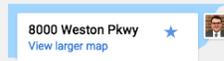
<https://docs.google.com/forms/d/e/1>

### QUESTIONS? CONTACT:

**Nihad Mansour**  
[probono@ncbar.org](mailto:probono@ncbar.org)

### NCBF AND LANC

8000 Weston Parkway, Cary,  
27513 NC



# HOW TO FIND PROJECTS

NORTH CAROLINA  
PRO BONO  
RESOURCE  
CENTER

### AREA OF LAW

- Advance Directives (Wills Powers of Attorney Living Wills etc.)
- Bankruptcy Benefits (Government Veterans etc.) Consumer
- Education Elder Employment Family Housing

### GEOGRAPHIC AREAS

- Statewide

### PROJECT FOR

- Newly Licensed Attorney Attorney Retired Attorney

### POPULATION SERVED

- General Low Income People who are Homeless

### SKILLS TO BE DEVELOPED

- Client Advice and Counseling Document Drafting (Contracts)
- Advance Directives Petitions etc.) Statutory Interpretation and Advocacy

#### Training Provided for Project Volunteers

Yes

#### Malpractice Insurance Provided for this Project

Yes

#### Volunteers Who Speak an Additional Language Requested for this Project

Yes

#### Mentorship Provided for this Project

No



# PRO BONO REPORTING

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

## NC RPC 6.1 COMMENT 12

Lawyers are encouraged to report pro bono legal services to [...] the North Carolina Equal Access to Justice Commission [...] in order that such service might be recognized and serve as an inspiration to others.

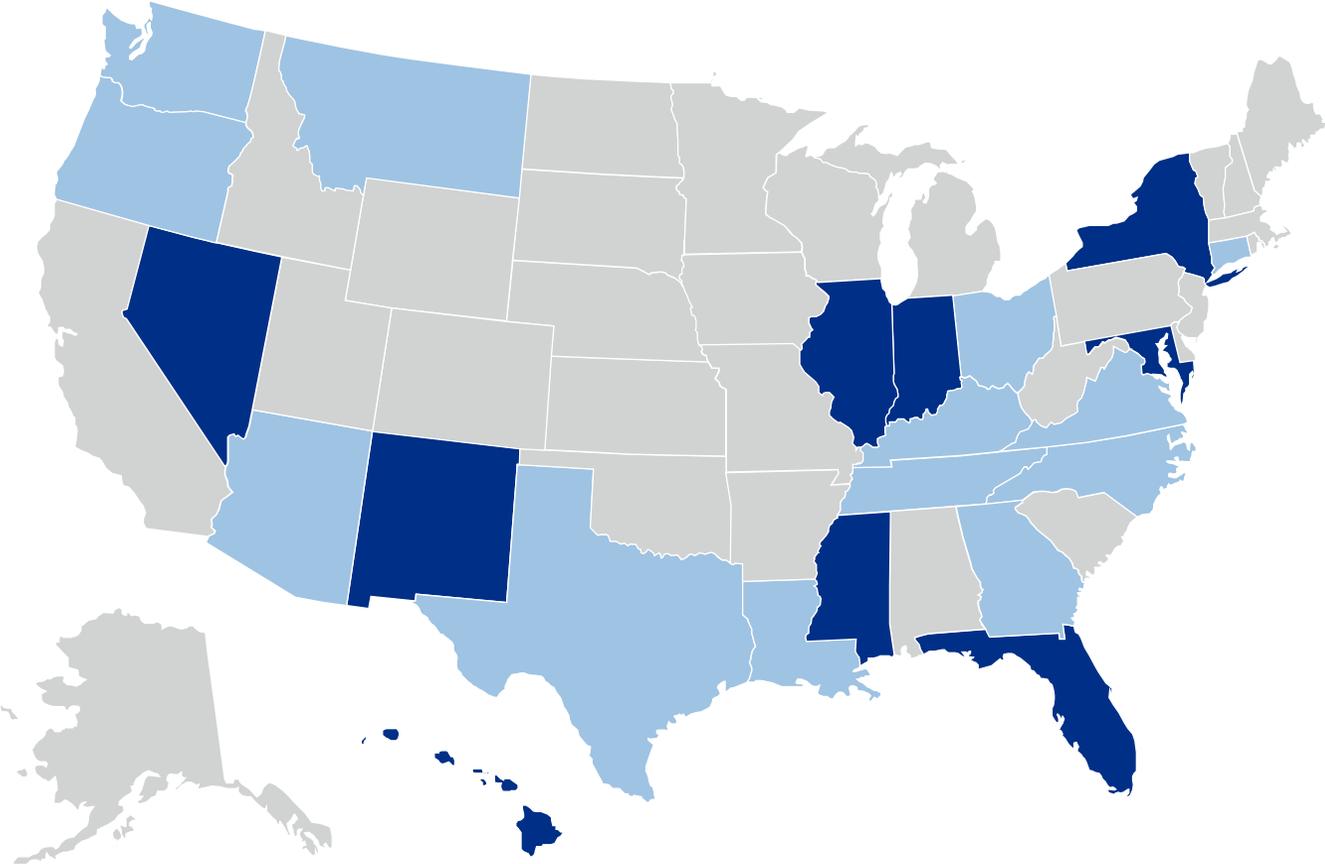


# PRO BONO REPORTING

NORTH CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

**MANDATORY  
REPORTING**

**VOLUNTARY  
REPORTING**





# PRO BONO REPORTING

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

- Report information about your prior year's legal services each January-March at [ncprobono.org](https://ncprobono.org)
- Opt out of recognition if you want to stay anonymous
- Provide limited information about the all the activities in NC RPC 6.1



# NC PRO BONO HONOR SOCIETY

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Attorneys who report fifty or more hours of pro bono legal services (NC RPC 6.1 (a)) in a given year are inducted into that year's NC Pro Bono Honor Society

Each Honor Society inductee receives a certificate from the Supreme Court of North Carolina honoring their achievement



# OUT-OF-STATE & RETIRED ATTORNEYS

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Pro Bono Practice Status allows inactive/retired (pro bono emeritus status) and out-of-state (out-of-state pro bono status) lawyers to provide pro bono legal assistance under the supervision of a NC licensed attorney working within a nonprofit corporation qualified to render legal services



# DISASTER LEGAL SERVICES PROGRAM

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Provide advice to Disaster Legal Services Hotline Callers for victims of Hurricane Florence

Staff Disaster Recovery Centers

[ncprobono.org/disaster](https://ncprobono.org/disaster)



# VETERANS' CLINICS

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

Clinic locations in Durham and Fayetteville

Major topics include:

- Military Discharge Upgrades\*
- Veterans Benefit Appeals\*
- Family Law
- Estate Planning
- Criminal Law

\*Must be VA Accredited



# SECOND CHANCE MOBILITY PROJECT

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

- Restore driver's license privileges for low income clients impacted by driver's license suspensions and traffic fees
- Participate in clinics or handle individually identified cases for clinic participants with unique issues



# QUESTIONS?

NORTH  
CAROLINA  
**PRO BONO**  
RESOURCE  
CENTER

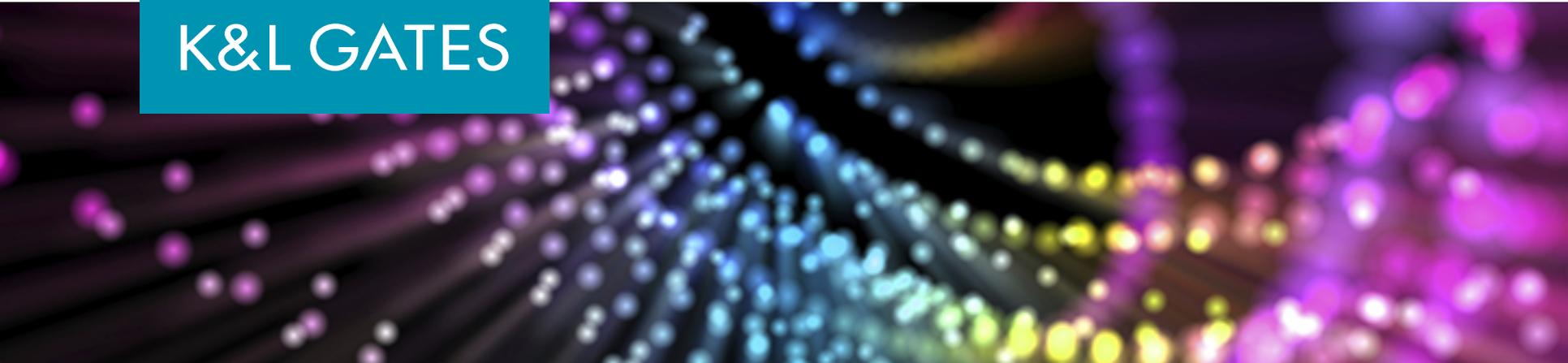


[ncprobono.org](https://ncprobono.org)  
[@ncprobono](mailto:@ncprobono)



Sylvia Novinsky, Director  
[sylvia@ncprobono.org](mailto:sylvia@ncprobono.org)





K&L GATES

## General Counsel Panel: The Age of the Chief Legal Officer

**David B. Fountain**, Sr. Vice President, Legal, Chief Ethics and Compliance Officer and Corporate Secretary of Duke Energy

**John Lawlor**, General Counsel & Data Protection Officer of JAGGAER

**Jennifer Venable**, General Counsel of Capitol Broadcasting Company

*Moderated by Gina L. Bertolini, Partner, K&L Gates (Research Triangle Park, NC)*

## “THE AGE OF THE CHIEF LEGAL OFFICER”\*

- **David B. Fountain**, Sr. Vice President, Legal, Chief Ethics and Compliance Officer and Corporate Secretary, Duke Energy
- **John Lawlor**, General Counsel & Data Protection Officer, JAGGAER
- **Jennifer Venable**, General Counsel, Capitol Broadcasting Company

\*ACC Chief Legal Officers 2018 Survey

# THE GENERAL COUNSEL/CLO AS BUSINESS PARTNER

- **Legal Expert & Business Strategist:** aligning business growth with regulatory and compliance requirements
- **Legal MD:** delivering the right legal advice in the right setting at the right time
- **Legal MBA:** understanding the business as a critical aspect of providing legal services and developing trusting relationships
- **Legal/Regulatory Prognosticator:** advising on problems when they arise, preventing problems from arising, and proactively addressing legal and regulatory trends to help the company meet its business objectives

# THE GENERAL COUNSEL/CLO AS BUSINESS PARTNER

## Legal Expert & Business Strategist

- Making sure a robust framework is in place to address emerging laws and regulations
- Becoming part of the business planning process, assure valid assumptions are built into the planning process
- Building structure and scaling service as the company grows and changes (e.g., 700% in 10 years!)
- Developing a sense of trust, connectivity – make sure the business team knows that you know their business

# THE GENERAL COUNSEL/CLO AS BUSINESS PARTNER

## Legal MD & Legal MBA

- Be practical – understand your company’s appetite for risk: when is “good enough” okay?
- Figure out how you become valuable to your client – who generates revenue?
- Understand the culture & use your political capital/trust at the right time
- Manage up – teach your client how to effectively use legal resources

# THE GENERAL COUNSEL/CLO AS BUSINESS PARTNER

## Legal/Regulatory Prognosticator: Top Issues Identified LAST Year

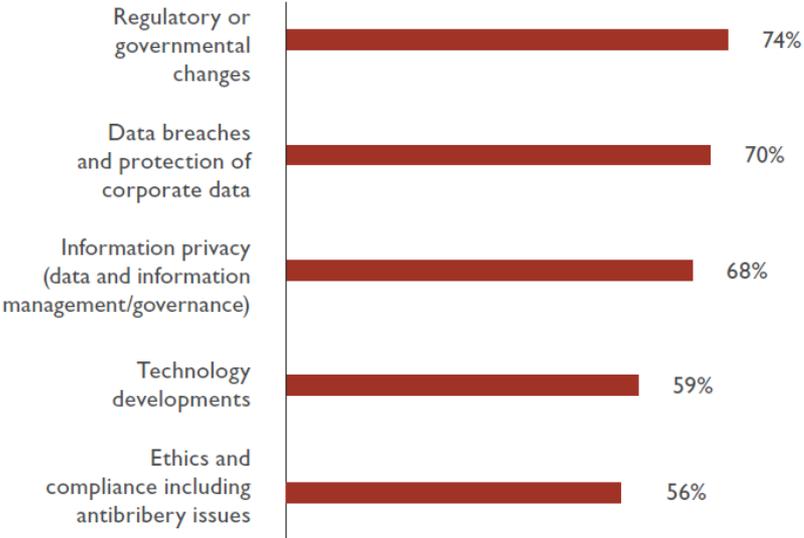
- Ethics & Compliance
- Data Privacy & Cyber Security
- Regulatory Changes

## Legal/Regulatory Prognosticator: Top Issues Identified THIS Year (*look familiar?*)

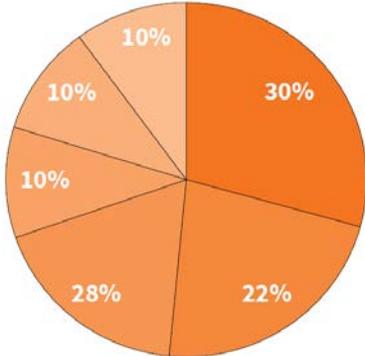
- Ethics & Compliance
- Data Privacy & Cyber Security
- Regulatory Changes

# LEGAL/REGULATORY PROGNOSTICATOR

**TOP ISSUES KEEPING CLOS UP AT NIGHT** \*  
 PERCENTAGE WHO RATED ISSUE EXTREMELY OR VERY IMPORTANT IN NEXT 12 MONTHS



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- Regulatory changes relating to data privacy **30%**
- Increased amounts of electronic data **22%**
- Lack of information governance **18%**
- Cost of data protection **10%**
- Increased use of personal devices in the workplace **10%**
- Targeted cyber attacks **10%**

\*\*General Counsel Report: Facts & Analysis, *Consero*, January 2019

# LEGAL/REGULATORY PROGNOSTICATOR

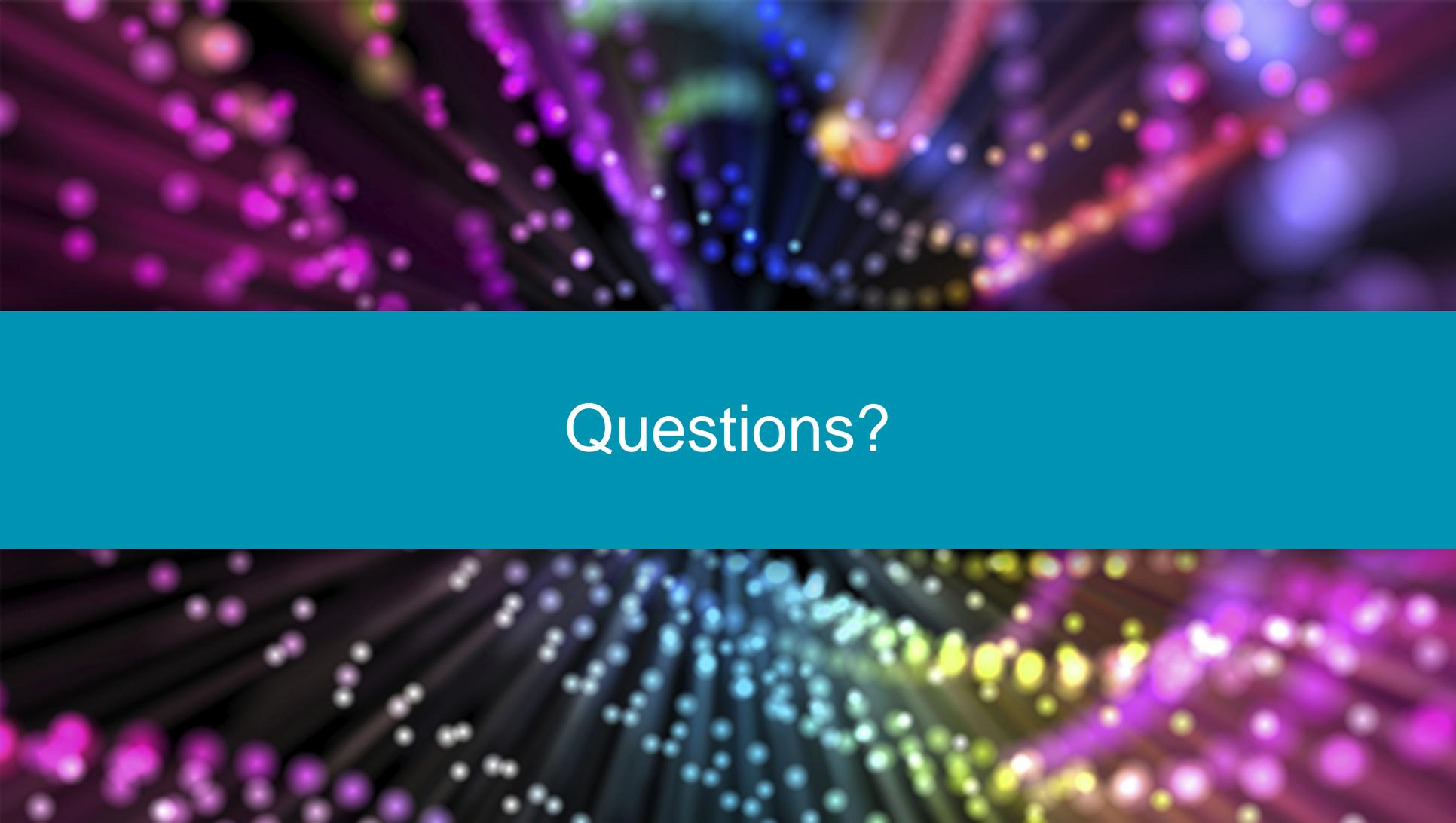
## Top Issues Identified This Year...with a twist

- **Ethics & Compliance**
  - Creating a culture of overall compliance: setting the right tone from the top
  - #MeToo
- **Data Privacy & Cyber Security**
  - EU General Data Protection Regulation (GDPR)
  - The California Consumer Privacy Act of 2018
  - North Carolina's "Act to Strengthen Identity Theft Protections" (proposed)
- **Regulatory Changes**
  - Heavily regulated industries keep a watchful eye on Washington and Raleigh
  - Global regulatory issues, including geopolitical changes (e.g., Brexit – what will happen?)
  - Environment, Social, and Governance (ESG)

# THE GENERAL COUNSEL/CLO AS BUSINESS PARTNER

## Legal Business Unit

- Legal Operations Professionals
- Workflow and Process Redesigns
- Enhanced and Greater Use of Technology
- Innovative Programs for Lawyer Advancement/Development



Questions?

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The logo for K&L GATES is displayed in white, uppercase letters on a teal rectangular background. The background of the slide features a blurred bokeh of colorful lights in shades of purple, blue, and yellow.

K&L GATES

## Internal and External Investigations in the Employment Context

David C. Lindsay, Partner, K&L Gates (Raleigh)  
Leann Walsh, Associate, K&L Gates (Raleigh)  
Kristi A. Nickodem, Associate, K&L Gates (Raleigh)

## INTRODUCTION

- *Internal* investigations are important because they help employers defend against future *external* investigations.
- External investigations are also on the rise.
- A government investigation regarding employment practices (or triggered by an employee whistleblower) can be the “tip of the spear” into a broader investigation of your organization.
- “An ounce of prevention is worth a pound of cure.”





**INTERNAL INVESTIGATIONS:  
*BEST PRACTICES AND COMMON PITFALLS***

# WHY CONDUCT AN INTERNAL INVESTIGATION?



## ***FARAGHER/ELLERTH*** **AFFIRMATIVE DEFENSE**

- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
- Investigating allegations of employee misconduct is a crucial step in establishing this defense.
- Investigation must be reasonable and effective.

## HYPOTHETICAL #1

- You are the Director of Nursing at an ambulatory surgical center. A panicked nurse notifies you that he has just noticed that some drugs are missing. How do you begin to investigate?
- Can you:
  - Interview employees?
  - Require employees to submit to a search of their lockers, cars, and bags?
  - Drug test all employees?
  - Search all employees?

## STAGES OF INTERNAL INVESTIGATION

- Decide whether to conduct an investigation
- Retain counsel?
- Define scope – issues and plan
- Gather and review documents
- Interview employees
- Prepare findings
- Determine where and how to use and/or disclose report (e.g., board, government)

## HYPOTHETICAL #2

You are the Company's Chief Human Resources Officer. Mary, Vice President of Marketing at your company, comes into your office one Friday afternoon and closes the door. She immediately starts crying and says that she has something to tell you about a workplace problem, but she needs you to first promise that it will remain confidential. She insists on this before she will speak further. What do you do?

## HYPOTHETICAL #3

Once Mary finally starts talking, she tells you that the Company's Chief Finance Officer has been making lewd advances to her over the course of the last year during their monthly one-on-one budget meetings. She has decided that she wants you to investigate, but she requests to be on paid leave during the investigation because she finds being at work too upsetting and she is stressed about the turmoil the investigation will cause.

What do you do?

## INTERIM MEASURES

- During an investigation, the employer has a duty to take necessary steps to eliminate from the workplace any discrimination or harassment about which the complainant has complained.
- Be wary of allowing a complainant paid time off for an unknown duration during pendency of investigation.
- Be careful about telling a complainant that he or she must keep the allegations confidential.
- Knowledge of the complaint and the investigation should be limited to those who have a business need to know.



## TIMING MATTERS



- *Meritor Savings Bank, F.B. v. Vinson*, 497 U.S. 57, 106 S. Ct. 2399 (1986) (U.S. Supreme Court directed employers to take “prompt” and effective action to remedy sexual harassment in the event of a complaint).
- Promptness in concluding an investigation is also important. See *Baker v. City of Oceanside*, Cal. Sup. Ct. Nos. N56730 and N57926 (February 10, 1994) (\$1.2 million verdict where employer’s investigator failed to complete investigation and clear plaintiffs for over a year in violation of policy requiring investigation and notification of results in a timely manner).

## CONDUCTING EMPLOYEE INTERVIEWS

- Thoroughness matters!
- Use open-ended questions and allow witnesses the opportunity to provide a narrative response.
- Give alleged harasser a fair opportunity to respond to questions about the actual allegations at issue.
- An investigation may be deemed incomplete if it fails to follow up and perform second interviews of the complainant and/or others after interviews or other evidence raise new questions.

## SHOULD YOU RETAIN OUTSIDE COUNSEL?

- Generally, non-lawyers should bring lawyers into any investigation as early as possible to maximize attorney-client privilege.
- Then consider whether inside or outside lawyers should conduct the investigation.
- Factors to consider:
  - Size of issues and facts.
  - Budget.
  - Subject-matter expertise.
  - Contacts with potential investigative agency.

## ETHICAL CONSIDERATIONS

- Ethical considerations for counsel (inside or outside): investigations are authorized by Board, committee of Board, or management. It is important that a lawyer always knows the identity of the client.
- American Bar Association Rule 1.13—Organization As Client
  - Lawyer hired by organization represents that organization through its duly authorized constituents.
  - Lawyer must explain nature of representation when he or she knows or reasonably should know that organization's interests are adverse to employees.
  - Under certain circumstances, lawyer can represent both employee and organization, subject to conflict of interest provisions of Rule 1.7 (more later).

# ETHICAL ISSUES IN EMPLOYEE INTERVIEWS, PART 1

- Give *Upjohn* warning:
  - Interview is covered by attorney-client privilege, but that privilege belongs to the company, not the employee.
  - Company may, in its sole discretion, decide to waive privilege, and disclose substance to third parties, including government.
  - Ask if interviewee has any questions, and confirm fully understands warning.
  - Obtain agreement to proceed with interview.
- *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

## ETHICAL ISSUES IN EMPLOYEE INTERVIEWS, PART 2

- Where individual has criminal exposure, may need separate counsel.
- American Bar Association Rule 4.2—Communication with Person Represented by Counsel: “In representing client, lawyer shall not communicate about subject of representation with person lawyer knows to be represented by another lawyer in the matter, unless lawyer has consent of other lawyer or is authorized to do so by law or court order.”

# GATHERING, RETAINING, AND CREATING DOCUMENTS

- Avoid spoliation of evidence (e.g., document destruction) or any conduct that could be construed as obstruction.
- Put files under counsel's control.
- DOJ will consider deliberate obstruction to be an acknowledgement of criminality.
- Ethical obligations for lawyers.
- Preserve the attorney-client privilege for documents at issue and work product.

## HYPOTHETICAL #4

Your new associate general counsel proposes a form confidentiality statement to be signed at the beginning of all internal investigation interviews that will state:

*“I understand that in order to protect the integrity of this investigation, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.”*

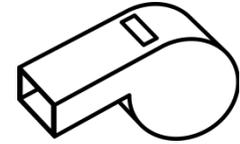
Is this lawful?

## **SEC: *IN THE MATTER OF KBR***

SEC determined the template language impeded communications between employees and the SEC by prohibiting discussion of the substance of interviews without permission from KBR's law department under penalty of disciplinary action, despite having:

- No knowledge of anyone actually prevented from communicating with SEC about potential violations, and
- No knowledge of enforcement by KBR to prevent communication with SEC.

# PREVENTING RETALIATION AGAINST WHISTLEBLOWERS



- Implement a robust written anti-retaliation policy
  - State broadly, and then consider specific restatement in particular policies.
  - Include a reporting mechanism for violations.
- Monitor enforcement of policy in practice.
- Witnesses who are interviewed in the course of an investigation of a discrimination or harassment complaint are protected from retaliation, even if they did not initiate the complaint.

## POST-INVESTIGATION: FOLLOWING UP WITH EMPLOYEES

- Consider how your company has responded to similar situations, if any.
- Implement disciplinary measures for an offender (target of investigation).
- Consider whether the complainant needs to be made whole.
- Consider other group measures.
- Follow up with the employees involved (especially the complainant) where appropriate to help prevent a retaliation claim.

## HYPOTHETICAL #5

You have just concluded your internal investigation into a claim by one of your customer service representatives, Sara, regarding a recent group training. Sara claimed that in the training, the training leader (a new hire to your Company) made an offensive joke about Muslims and also touched two of your Muslim service representatives inappropriately during a team role-playing exercise. You thoroughly investigated the matter (there were numerous witnesses) and confirmed the allegations to be completely false. During the investigation, you learned that Sara dislikes the trainer personally because Sara herself had been seeking a promotion into that position. You determined that Sara purposefully made the complaint in bad faith in order to malign the trainer.

What do you do now?

## BAD FAITH/FALSE COMPLAINT

- Be cautious about disciplining an employee for such a report.
- You may note:
  - Your company fully investigated the matter and found it to be false.
  - Evidence that the complainant knew it was false at the time the complaint was made and that it was made for an impermissible reason.
- *“At this time, the Company concludes that your report was not only unfounded but also a knowingly false report made in bad faith. Please be advised that such conduct is unacceptable and may warrant disciplinary action, up to and including the termination of employment, should it continue.”*
- Remind employee of continued ability to report in good faith violations of Company policies/the law and that the employee will remain protected from retaliation for engaging in such legally protected conduct.

## HOW CAN AN INTERNAL INVESTIGATION GO WRONG?

- Case study: *Mendoza v. Western Medical Center Santa Ana*, 222 Cal. App. 4th 1334 (2014)
  - Nurse complained that he was being sexually harassed by another male hospital employee, and then was fired after the hospital's investigation.
  - The court focused on the multiple deficiencies in the investigation:
    - Failing to take witness statements;
    - Delaying employee interviews;
    - Interviewing Mendoza and the employee he accused at the same time;
    - Failing to interview witnesses other than Mendoza and the person he accused; and
    - Using Mendoza's supervisor to conduct the investigation.



***EXTERNAL INVESTIGATIONS:***  
**WHAT TO DO WHEN THE**  
**GOVERNMENT COMES KNOCKING**

## WHY DOES THE GOVERNMENT COME KNOCKING?

- Common types of cases:
  - Health Care
  - Government Contracting
  - Environmental
  - Wage and Hour Audit
  - Immigration Audit
  - Occupational Health and Safety Inspection
- How Does the Government Come Knocking?

# RESPONDING TO ADMINISTRATIVE SUBPOENAS, CIDS, AND ADMINISTRATIVE DOCUMENT REQUESTS

- First steps:
  - Promptly implement retention and hold notice.
  - Contact lead government investigator to determine whether the company can negotiate scope of requests, time for compliance, and production protocol and format.
  - Determine whether company/employees will collect documents or whether document collection will be coordinated by counsel and IT professionals.
- Do not provide more than what is explicitly requested!

## DATA PRESERVATION AND RETENTION

- Promptly identify and notify any employees who may have potentially responsive information that they:
  - Have a duty to preserve and retain potentially relevant records.
  - Must not alter, modify, destroy, or delete any potentially relevant records.
- Suspend any routine document destruction procedures.
- Consider possible need to image hard drives or do other computer forensics investigation.

## HOW TO PREPARE EMPLOYEES

- Proactively train employees about what to do in the event of an investigation.
- Designate a trained “crisis response team,” including in-house counsel. Maintain the team’s contact list.
- Designate a “crisis response designee” for each company site.
- Maintain a list of outside counsel to call in the event of a civil or criminal investigation.

## HYPOTHETICAL #6

- FBI agents arrive at your Company's reception area and request to perform an immediate search with K-9 dogs.
- Can your receptionist:
  - Respond: "I do not have authority to consent to a search, please allow me to call the right person"?
  - Request that the agents wait for three hours in a designated private room until your team leader arrives?
- Once your team leader/crisis response designee arrives, can she:
  - Ask to see credentials and get a card from every agent?
  - Contact legal counsel and ask the agents to wait further until counsel arrives?
  - Request copy of any search warrant and accompanying affidavit?
  - Accompany agents as they conduct search?
  - Keep an inventory of any documents/materials taken by agents?
  - Take note of all of agents' questions and statements?

# CAN THE GOVERNMENT SPEAK TO MY EMPLOYEES?

- Yes! Company may advise current or former employees:
  - They can speak to investigators if they wish, but they are under no obligation to do so.
  - Employee has right to confer with counsel before deciding whether or not to be interviewed.
  - Consider whether Company should offer to refer employees to qualified counsel and offer to indemnify/advance fees to employees.
- No matter what, employees should be told to always be truthful if they speak to government investigators.

## AFTER THE GOVERNMENT SPEAKS TO AN EMPLOYEE

- Employee should be contacted and asked by counsel:
  - What the government agent told him/her about the investigation.
  - Whether the agent told him/her the targets of the investigation.
  - What the agent told him/her about any alleged wrongdoing.
  - What questions the agents asked him/her. What answers he/she gave the agents.

## AVOID RETALIATION CLAIMS

- Employers should be careful in their actions towards an employee who they learn has been a whistleblower or provided unfavorable information during a government investigation.
- Denial of promotion, refusal to hire, removal of supervisory responsibilities, demotion, suspension, discharge, and denial of job benefits constitute adverse action for purposes of establishing retaliation.
- EEOC takes a broad view of the actions that it considers materially adverse. Some courts have joined in this viewpoint, finding that any conduct that dissuades employees from participating in protected activity may constitute retaliatory harassing conduct, even if it is not severe or pervasive.

# INVESTIGATIONS FACED BY EMPLOYERS: DOL WAGE AND HOUR AUDIT

- Employers are selected for wage and hour investigations:
  - In response to an employee's complaint to the DOL;
  - By the DOL as a targeted investigation of certain industries and businesses; and
  - At random.



## DOL WAGE AND HOUR AUDIT

- The DOL has the authority to:
  - Enter and inspect the workplace (announced or surprise), including touring facilities, inspecting records, and interviewing employees;
  - Make an initial determination about violations of the law;
  - Determine if the employer owes money to its employees;
  - Enter into a voluntary conciliation agreement with the employer for the payment of wages owed to employees; and
  - Assess civil and criminal penalties in addition to wages and benefits owed.

## DOL WAGE AND HOUR AUDIT

- A DOL Inspector arrives at your headquarters for an unplanned inspection. What can you do?
  - Ask the investigator about the focus and scope of the investigation.
  - Ask to reschedule the investigator's visit to allow for adequate preparation and minimize disruption to the business.
  - Inform the investigator that you want your attorneys to participate.
  - Inform the investigator if time is needed to gather the necessary information in a useful manner.

## DOL WAGE AND HOUR AUDIT

- On receiving notice of a *planned* DOL investigation, an employer should:
  - Immediately direct the notice to the appropriate person or department in the organization.
  - Determine whether to engage outside counsel to represent the employer.
  - Identify an appropriate individual or team of individuals to coordinate the compilation and delivery of documents, communicate with the investigator, and attend all site visits and meetings with the investigator.

## DOL WAGE AND HOUR AUDIT

- On receiving notice of a *planned* DOL investigation, an employer should also:
  - Instruct all involved parties about the employer's policy prohibiting retaliation against any employee who is known or suspected to have complained about any employment practices or who cooperates with the DOL investigation.
  - Conduct an internal review of pay practices and records (again, consider privilege issues and engagement of outside counsel) to determine any potential areas of noncompliance with the FLSA prior to the audit.

# INVESTIGATIONS FACED BY EMPLOYERS: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) INSPECTION

- What Triggers an OSHA Inspection:
  - Programmed inspections: arise out of a targeted OSHA plan focused on certain workplace hazards or industry sectors.
  - Unprogrammed inspections can arise from:
    - Employee complaint filed with OSHA.
    - Significant (reportable) injury or accident.
    - Violations in plain view to a compliance officer.
    - Previous citations.
    - Employer responses to a written inquiry from OSHA.

# OSHA INSPECTION

- OSHA Inspection Protocol
  - Inspection is conducted by an OSHA compliance officer:
    - Opening conference.
    - Review of records.
    - Inspection of the worksite.
    - Employee interviews.
    - A closing conference.

## OSHA INSPECTION

- Inspect compliance officer's credentials.
- Ask about the reason for the inspection.
- Ask about the scope of the inspection.
- Take your own photographs or videos.
- Instruct your supervisors to prepare for the inspection (e.g., general clean-up, appropriate PPE on all employees, performing work safely)—but be careful!

# OSHA INSPECTION

- Reviewing Records
  - Documents OSHA will likely want to review:
    - OSHA Form 300 Injury and Illness Log.
    - Form 201 Incident Reports.
    - Form 300A Summary of Work-Related Injuries and Illnesses.
    - Employer's own business records, including internal audits and workplace policies regarding health or safety.
  - Ask compliance officer to put requests for copies of documents in writing. Keep a list of any information given to officer and keep a duplicate copy of any documents provided.

# OSHA INSPECTION

- Inspection of the Facility:
  - An OSHA violation spotted by an officer in “plain view” can be the basis for a citation, even if entirely unrelated to initial basis for the investigation.
  - Employer has a right to have an employer representative accompany compliance officer. Employees have the same right. Pay close attention to what the officer says and does!
  - Prepare employees:
    - Act courteous, but don’t get caught up in small talk. Compliance officers may try to build friendly rapport with an employee and later use that employee’s statements in support of a citation.

## HYPOTHETICAL #7

- You are the Director of Human Resources at a large hospital. An OSHA compliance officer arrives and tells you he has received a report that a nurse was bitten by a psychiatric patient. You were not aware that this incident occurred. The compliance officer wants to interview the nurse first, and then interview her supervisor.
  1. Can you sit in on the nurse's interview? What if the nurse tells the OSHA officer she wants you to be present?
  2. Can you sit in on the supervisor's interview?
  3. After the OSHA compliance officer leaves, can you discipline the nurse for failing to report the incident internally per the hospital's policies?

# OSHA INSPECTION

- Employee Interviews
  - OSHA does not permit management or supervisory personnel to sit in on interviews of non-supervisory personnel, even at an employee's request.
  - If the compliance officer interviews supervisory or management personnel, the employer does have the right to have a company representative or attorney present during these interviews.
- Supervisory and management employees are viewed as agents of the employer, and their statements, admissions, and knowledge can and will be imputed to the company.
- Avoid post-reporting or post-interview disciplinary measures that could be deemed retaliatory.

# INVESTIGATIONS FACED BY EMPLOYERS: I-9 AUDIT BY US IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

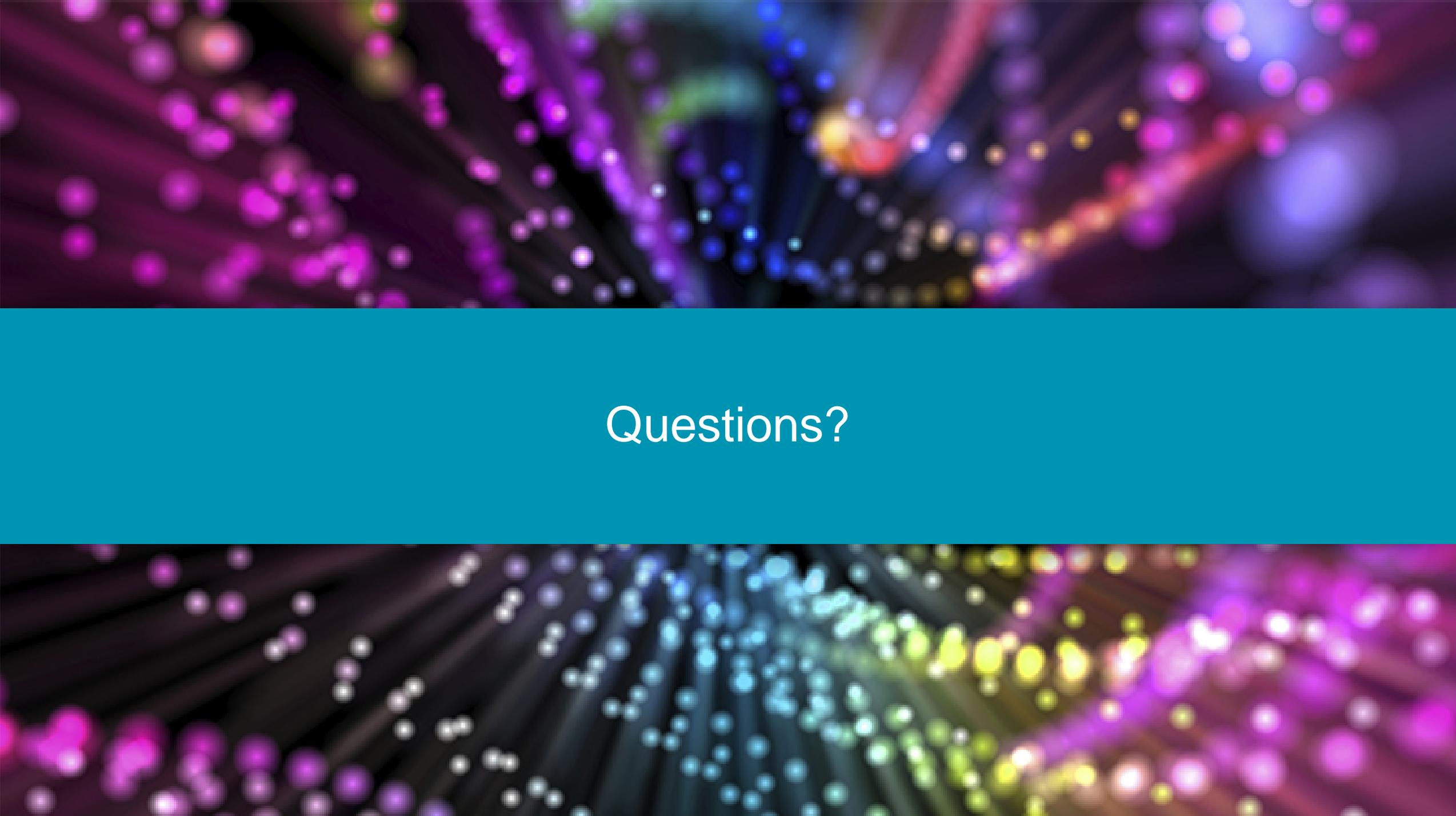
- New Developments
  - In January 2018, ICE announced a revised worksite enforcement strategy that targets employment law violators. The strategy includes:
    - Form I-9 inspections and civil fines.
    - Enforcement through arrests of:
      - Employers that are knowingly employing undocumented workers; and
      - Unauthorized workers for violating the law by working without authorization.
  - ICE greatly ramped up its worksite enforcement in FY2018 and is expected to continue in FY2019.

## I-9 AUDIT BY ICE

- ICE's Tools:
  - Inspecting and reviewing an employer's Form I-9s.
  - Arresting unauthorized employees, who may testify against employer.
  - Reviewing Social Security no-match records and E-Verify records.
  - Informants and undercover operations.
- Basis for Inspection:
  - A complaint by an individual or entity.
  - ICE's own initiative.
  - A referral from another government agency.

## I-9 AUDIT BY ICE

- ICE may issue a Notice of Inspection to employers for a random I-9 audit.
- ICE must give employers advance notice of at least three business days.
- ICE will likely want to see:
  - Original Form I-9s, copies of employee authorization documents supporting Form I-9s, payroll records, business documents such as articles of incorporation or licenses, and tax statements.
- ICE agents evaluate:
  - Whether Form I-9s have been properly and timely completed for each employee.
  - Whether documents presented by employees for the Form I-9 process are authentic.
  - The employer's E-Verify participation, if any.
  - How social security no-match letters have been handled, if any.

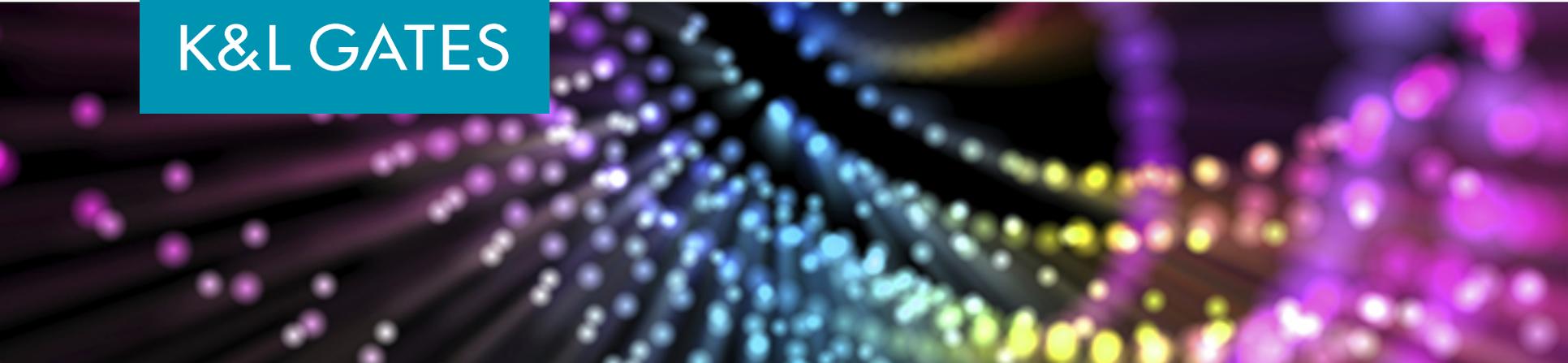


Questions?

K&L GATES

The logo for K&L GATES, featuring the text in white on a teal rectangular background.

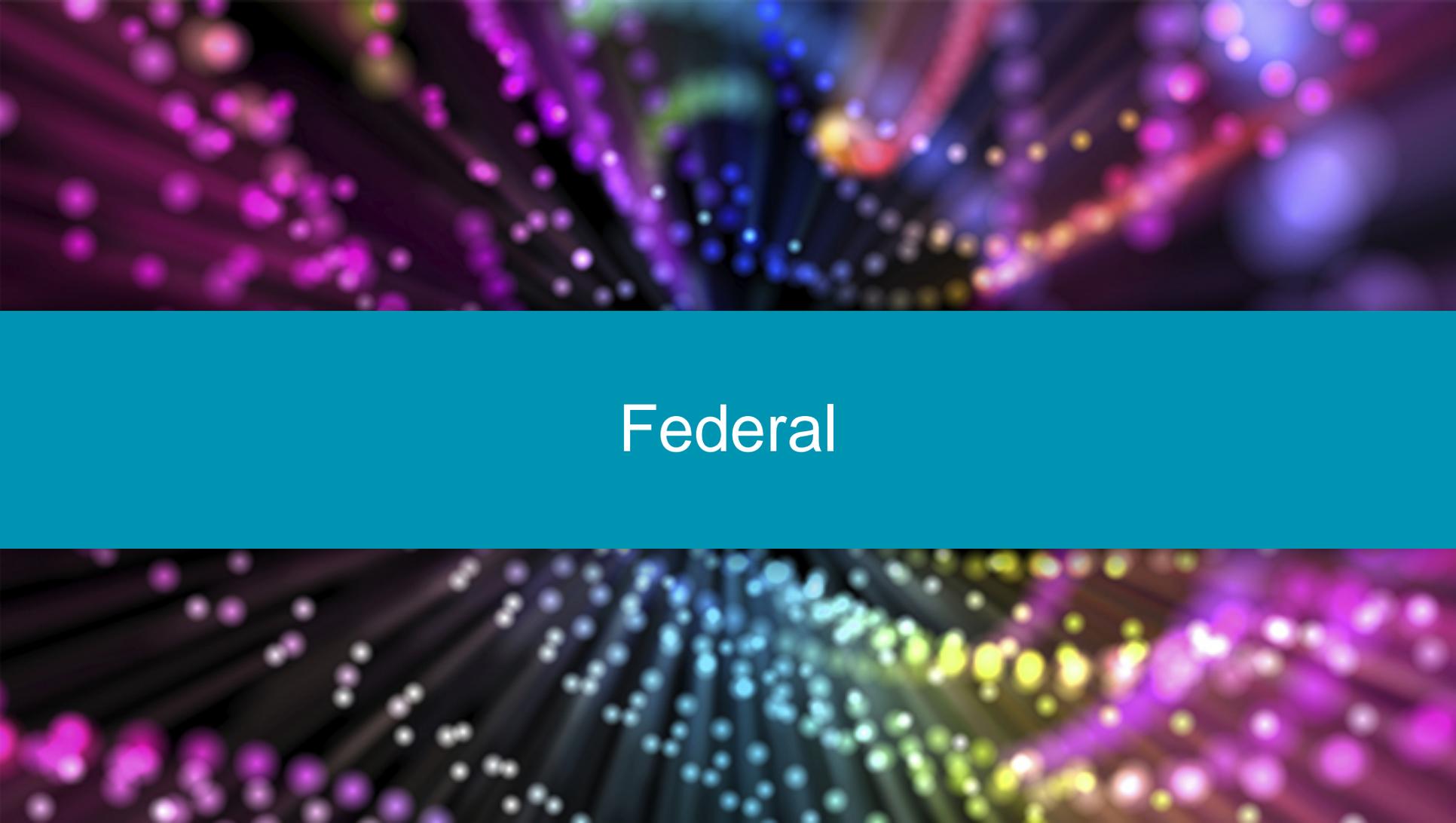
K&L GATES

An abstract background image showing a perspective view of a tunnel or hallway with many small, colorful lights (purple, blue, yellow) on the walls and floor, creating a bokeh effect.

2018 Year in Review

# Privacy and Cybersecurity

Julia Jacobson, Partner, K&L Gates (Boston)



Federal

# FEDERAL: NOTABLE DEVELOPMENTS

**Clarifying Lawful Overseas Use of Data (CLOUD) Act**  
(Enacted and Effective March 23, 2018)

**FTC Informational Injury Report** (October 19, 2018)

- Injury  $\approx$  medical identity theft, “doxing,” “private” information disclosure but consensus is more research needed to define informational injury

**Standing in Data Breach Litigation** – the debate continues

- breach alone  $\neq$  sufficient injury in fact (including Fourth Circuit)
- breach + increased risk of identity theft = sufficient injury in fact

# FEDERAL: SECURITY AND EXCHANGE COMMISSION (SEC)

- Statement and Guidance on Public Company Cybersecurity Disclosures (February 21, 2018)
  - Updates and expands 2011 cybersecurity guidance
- \$35 million against Yahoo! for misleading investors by failing to disclose data breach (April 24, 2018)
- Enforcement of Identity Theft Red Flags Rule for the first time (September 26, 2018) that emphasized importance of developing effective cybersecurity policies/procedures *and* following them

# FEDERAL: PROPOSALS

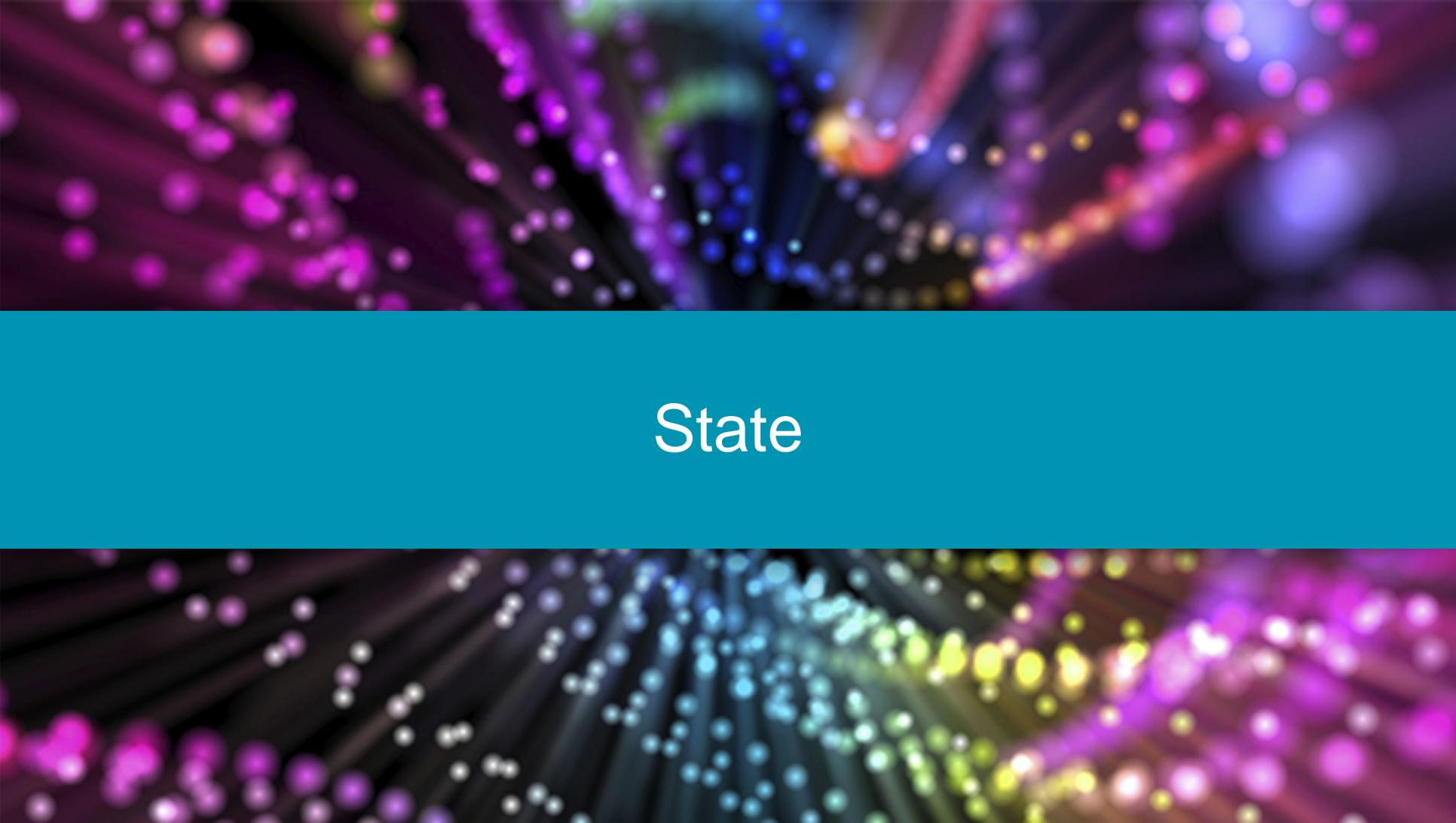
- **Cybersecurity Disclosure Act** (hearings – June July 2018) – would require public company to disclose whether any board member has cybersecurity expertise and, if not, board actions to prioritize cybersecurity
- **Senate Hearing on Federal Privacy Law** - (September 26, 2018) - discussed various proposals for federal privacy legislation

# FEDERAL: PRIVACY LAW PROPOSALS

Title and Date Introduced	Applies to:	Definition of Personal Information	Data Breach Notification?	Pre-empt State Law?	Pre-empt Federal Law?	Private Right of Action?
<b>Social Media Privacy Protection and Consumer Rights Act of 2018 (S. 2728)</b> April 23, 2018	“any public-facing website, web application, or digital application, including a social media network, ad network, mobile operating system, search engine, email service, or internet access service”	“individually identifiable information about an individual”	Yes	No	No	No
<b>The Information Transparency &amp; Personal Data Control Act (HR.6864)</b> September 20, 2018	“any operator providing services to the public involving the collection, storage, processing, sale, sharing with third parties, or other use of sensitive personal information”	“sensitive personal information” is “identified or identifiable information relating to an identified or identifiable individual...”	No	No	No	No

# FEDERAL: PRIVACY LAW PROPOSALS

Title and Date Introduced	Applies to:	Definition of Personal Information	Data Breach Notification?	Pre-empt State Law?	Pre-empt Federal Law?	Private Right of Action?
<b>Consumer Data Protection Act</b> SIL18B29 November 1, 2018	All “covered entities” (per Federal Trade Commission Act), with <b>exemptions for smaller entities</b> (i.e., less than \$50M average annual gross receipts and personal information for fewer than 1M consumers/devices) for which collecting personal information is not a substantial part of its business.	“any information ... that is reasonably linkable to a specific consumer or device.”	No	No	No	No
<b>Data Care Act of 2018 (S.3744)</b> December 18, 2018	“An online service provider”	any data collected over the internet or other digital network <u>and</u> reasonably linkable to a specific end user or computing device associated with/ routinely used by a specific end user	<b>Yes</b>	No	No	No



State

# STATE: NOTABLE 2018 DEVELOPMENTS

## ■ Ohio Cybersecurity Law

- A legal ‘safe harbor’ (affirmative defense to tort claims) for covered entities that voluntarily implement a cybersecurity program based on “industry recognized cybersecurity frameworks,” which include NIST and ISO 270001.

## ■ Vermont Data Broker Law

- Effective January 1, 2019
- “Data broker” = a business ... “that knowingly collects and sells or licenses to third parties the brokered personal information of a consumer with whom the business does not have a direct relationship”

# STATE: NOTABLE 2018 DEVELOPMENTS

- **NYDFS Cybersecurity Regulations**
  - In force except for third-party risk management (March 1, 2019 compliance deadline)
- **Information Security Laws**
  - Including Colorado, Iowa and Nebraska (among others)
- **Data Breach Laws**
  - Amended in Arizona, Louisiana and Oregon (among others)
  - Alabama and South Dakota – final states to enact data breach notification laws

# STATE: CALIFORNIA 2018 DEVELOPMENTS

## California Consumer Privacy Act (CCPA)

- Enacted June 2018 and amended September 2018
- Effective January 1, 2020 but no enforcement until the earlier of (i) six months after the publication of the final regulations and (ii) July 1, 2020
- Public hearings in January and February 2019
- Regulations – who knows when?
- Consumer
  - A California “resident” as defined in California’s personal income tax regulations
  - Employee?
- Broad and confusing definition of personal information

# STATE: CALIFORNIA 2018 DEVELOPMENTS

## California Consumer Privacy Act (CCPA)

CCPA applies to a for-profit entity that:

- collects consumers' personal information *directly or through a third party*; and
- *alone or jointly* determines how consumers' personal information is used; and
- does business in the State of California; and
- meets one of the following thresholds:
  - has annual gross revenues in excess of \$25,000,000;
  - alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices; and
  - derives 50 percent or more of its annual revenues from selling consumers' personal information

<p>“Personal information” (§1798.140 (o))</p>	<p>“Deidentified” Information (§1798.140 (h))</p>
<p>Information that identifies, relates to, describes, is capable of being associated with, or could <b>reasonably be linked</b>, directly or indirectly, with a particular consumer or household. Personal information includes, but is not limited to, the following if it identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular <b>consumer or household...</b></p>	<p>Information that cannot <b>reasonably</b> identify, relate to, describe, be capable of being associated with, or be linked, directly or indirectly, to a particular <b>consumer</b>, provided that a business that uses deidentified information:</p> <ol style="list-style-type: none"> <li>(1) Has implemented technical safeguards that prohibit reidentification of the consumer to whom the information may pertain.</li> <li>(2) Has implemented business processes that specifically prohibit reidentification of the information.</li> <li>(3) Has implemented business processes to prevent inadvertent release of deidentified information.</li> <li>(4) Makes no attempt to reidentify the information</li> </ol>
<ul style="list-style-type: none"> <li>• “reasonably” qualifies “linked” only</li> </ul>	<ul style="list-style-type: none"> <li>• “reasonably” qualifies “identify, relate to, describe”</li> </ul>
<ul style="list-style-type: none"> <li>• personal information if “reasonably linked” to a “consumer or household”</li> </ul>	<ul style="list-style-type: none"> <li>• “deidentified “ refers only to a “particular consumer.”</li> </ul>

# HOT OFF THE PRESS

## Illinois Biometric Privacy Act – *New Decision*

*Issue:* whether a plaintiff is “aggrieved” and may seek liquidated damages and injunctive relief even if he or she has not alleged some actual injury or adverse effect other than violation of his or her rights under the statute

*Holding:* Yes - “the Act ... has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information ... when a private entity fails to comply .. that violation constitutes an invasion, impairment, or denial of the statutory rights of any person [who] would clearly be “aggrieved” ... No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual’s or customer’s statutory cause of action.” (Supreme Court of State of Illinois in *Rosenbach v, Six Flags* (January 25, 2019))

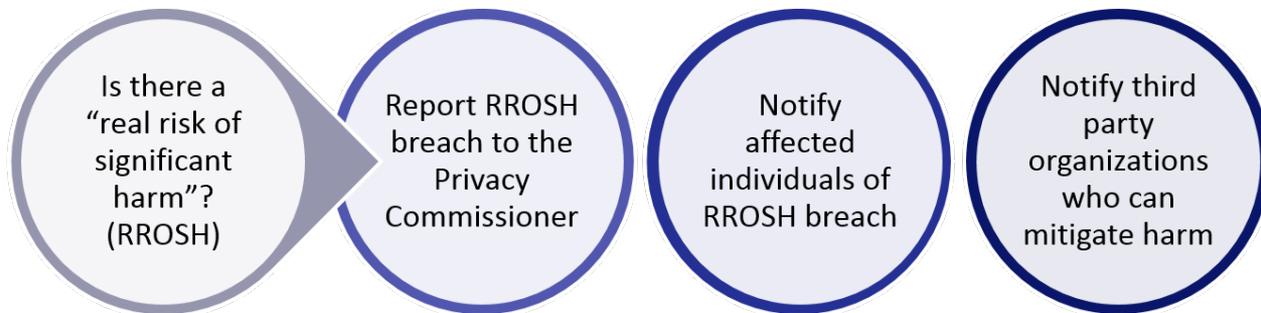


International

# INTERNATIONAL: 2018 DEVELOPMENTS

## Canada - Breach of Security Safeguard Regulations as of November 1, 2018 (PIPEDA)

Breach of security safeguards = the loss of, unauthorized access to or unauthorized disclosure of personal information resulting from a breach of an organization's security safeguards (per PIPEDA) or from a failure to establish those safeguards + RROSH



# INTERNATIONAL: 2018 DEVELOPMENTS

## Canada – new “meaningful consent” guidelines effective January 1, 2019

1. Emphasize key elements (i.e., what and why personal information is collected, used or disclosed and risk of harm)
2. Allow individuals to control the level of detail they get and when.
3. Provide individuals with clear options to say ‘yes’ or ‘no’.
4. Be innovative and creative.
5. Consider the consumer’s perspective.
6. Make consent a dynamic and ongoing process.
7. Be accountable: stand ready to demonstrate compliance.

# 2018 YEAR IN REVIEW – GDPR

- Effective May 25, 2018
- Extra-territorial scope
- Key new requirements
  - Personal data breach reporting
  - Data subjects rights and responses
  - Data processing agreements
  - *May* require a data protection officer (who has “expert knowledge,” directly reports to “highest management level” and no conflict of interest) and/or record of processing
  - Data Protection Impact Assessment (DPIA) for “high risk” processing

# 2018 YEAR IN REVIEW – GDPR

## Clarifications from regulators

- Territorial scope
  - Meaning of “establishment in the EU” broad
  - Guidelines on “targeting individuals in the EU”
- Third countries and adequacy
  - Japan and adequacy ruling
  - UK and adequacy ruling – Brexit?

# HOT OFF THE PRESS

**CNIL imposes €50M fine against Google for “*for lack of transparency, inadequate information and lack of valid consent regarding the ads personalization*” (January 21, 2019)**

- **Information is not easily accessible, clear or comprehensive**  
“Essential information are .. excessively disseminated across several documents, with buttons and links on which it is required to click to access complementary information.”
- **User consent to ad personalization is not sufficiently informed or “specific” (or “unambiguous”)**  
“...the user is asked to tick the boxes «*I agree to Google’s Terms of Service*» and «*I agree to the processing of my information as described above and further explained in the Privacy Policy*» in order to create the account. Therefore, the user gives his or her consent in full, for all the processing operations purposes carried out by GOOGLE based on this consent (ads personalization, speech recognition, etc.). However, the GDPR provides that the consent is “specific” only if it is given distinctly for each purpose.”

# 2018 YEAR IN REVIEW – INTERNATIONAL

## ■ Brazil

- Passed in August 2018
- Applies to the personal data of residents of Brazil regardless of the location of the entity collecting the data – GDPR-like
- As of December 28, 2018, in-force date extended to August 2020

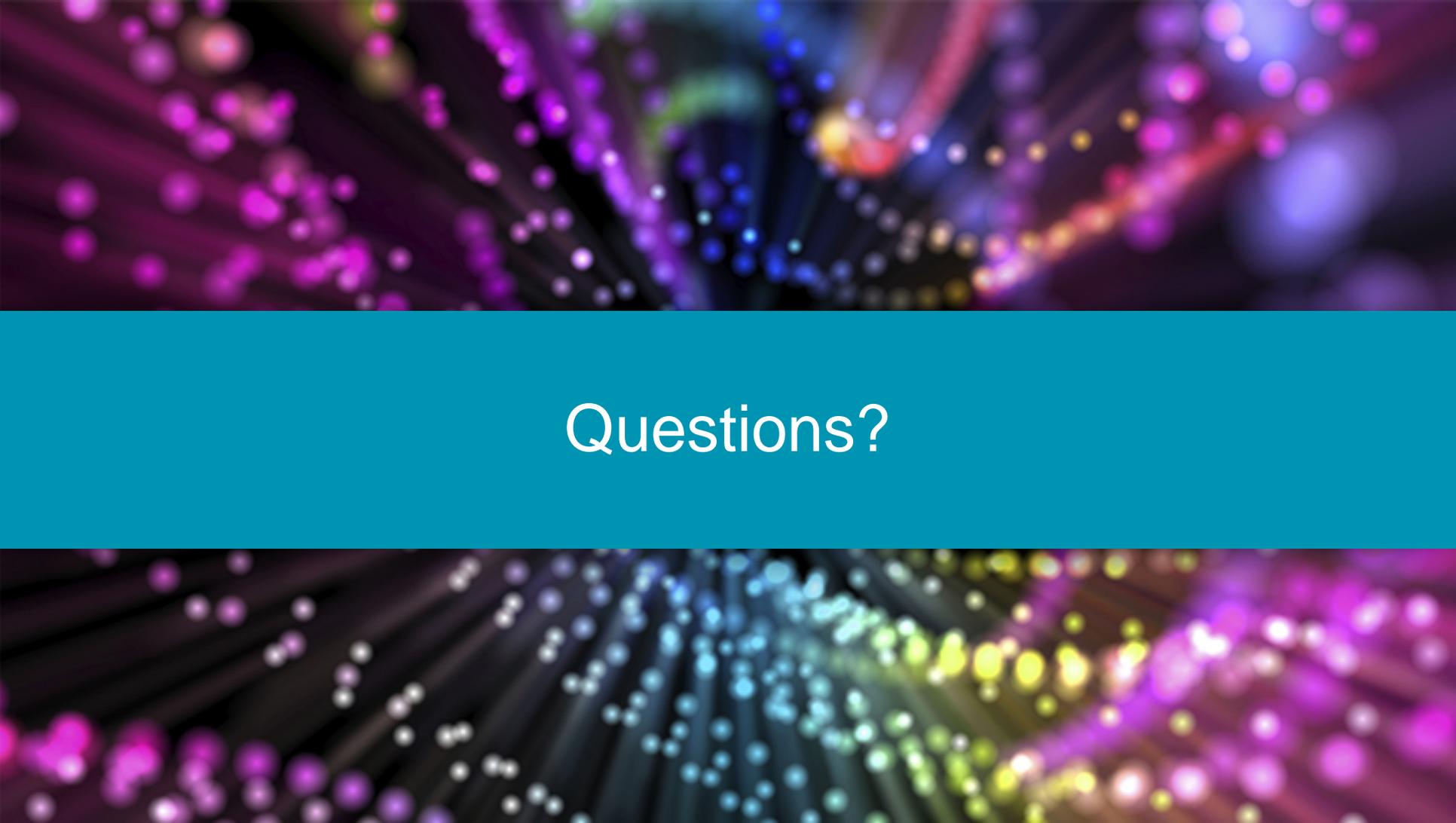
## ■ Australia

- February 2018 - mandatory data breach notification effective
- December 2018 – encryption law - in effect but under review

## ■ Vietnam

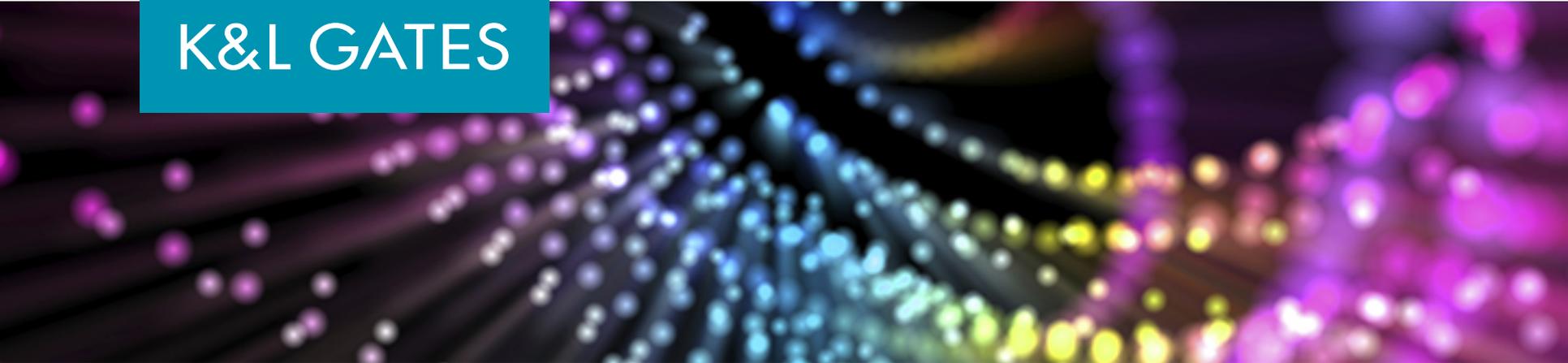
- Cybersecurity law effective January 1, 2019
- Includes data localization requirements for services provided via telecommunications networks that collect or process personal data of residents of Vietnam

## ■ India (proposed)



Questions?

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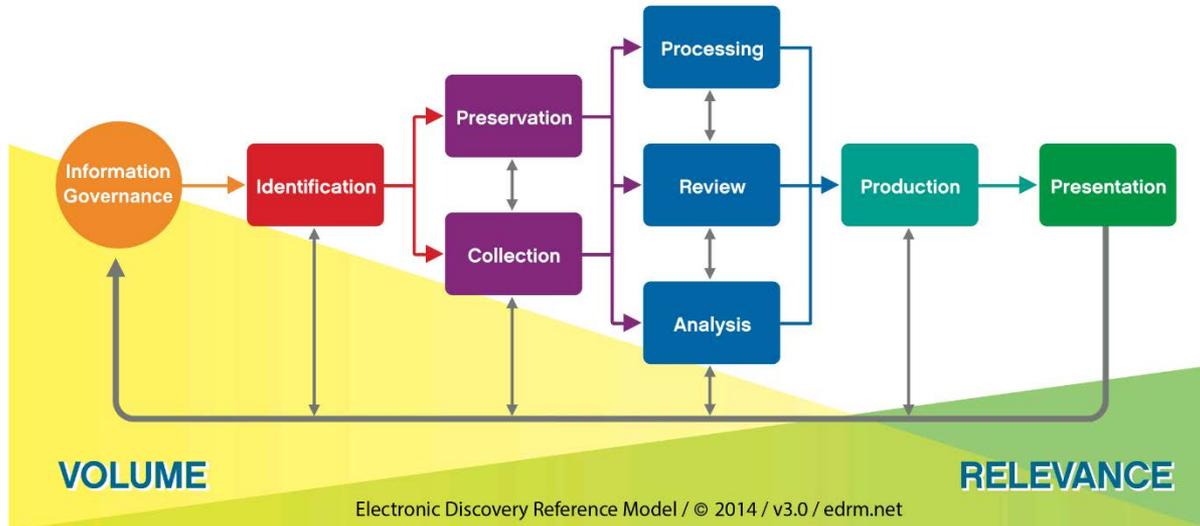
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# e-Discovery 101 and Beyond

Julie Anne Halter, Partner, K&L Gates (Seattle)

# EDRM (EDRM.NET), DUKE UNIVERSITY, SCHOOL OF LAW

## Electronic Discovery Reference Model



# So We're All on the Same Page ...

## LEGAL to IT LANGUAGE TRANSLATION (VOCAB LIST)

“CUSTODIAN” = “USER” = “EMPLOYEE”

“LEGAL HOLD” = “NOTIFY USERS & PRESERVE DATA”

“DOCUMENTS” OR “ESI” = “DATA”

“DATA COLLECTIONS” = “SECURING THE DATA”

# Information Governance

## What do you have?

- ESI
- Hard copy
- Tangible things

## Where do you have it and who has access?

- Custodians
- Non-custodial repositories



## Why do you have it?

- Legal need/Legal hold
- Business need
- Inertia

klgates.com

## When can you dispose of it?

“Information Governance’ . . . means an organization’s coordinated, inter-disciplinary approach to satisfying information compliance requirements and managing information risks while optimizing information value.”

– The Sedona Conference®, *Commentary on Information Governance* (2014)

# IDENTIFICATION & PRESERVATION



- Scope: Relevant & proportional
  - Fed. R. Civ. P. 26(b)(1)
  - CR 26
  - Fed. R. Civ. P. 37(e)
  
- Preservation Triggers
  - Ninth Circuit
    - “Not precisely defined” – *Apple, Inc. v. Samsung Elecs., Ltd.* 888 F. Supp. 2d 976 (N.D. Cal. 2012)
  
    - “[T]rial courts in this Circuit generally agree that, “[a]s soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.” – *Id.*
  
  - Washington:
    - No general duty - *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448 (Div. III, 2015)
    - Spoliation sanctions? (1) potential importance or relevance, (2) culpability



Important Notice

# Litigation Holds

- Communicates preservation obligation
  - What is the case about?
  - What is subject to preservation (generally)?
  - What should the custodian do? (or not do?)
  - Who can the custodian contact with questions?
- Consider your audience!
  - Not lawyers
  - Use common sense:
    - e.g., What language does the custodian speak?

# Supervision

- *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004): “A party’s discovery obligations do not end with the implementation of a ‘litigation hold’—to the contrary, that’s only the beginning. **Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce relevant documents.**”
- *Knickerbocker v. Corinthian Colls.*, 298 F.R.D. 670 (W.D. Wash. 2014): “**Counsel bear responsibility for coordinating their clients’ discovery production.** See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y.2004) (“Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”) As such, counsel’s failure to oversee a client’s discovery efforts may merit sanctions.” (Citation omitted.)
- *GFI Acquisition, LLC v. Amer. Federated Title Corp. (In re A&M Florida Props. II, LLC)*, 09-01162 (AJG) (Bankr. S.D.N.Y. Apr. 7, 2010): **Counsel has an obligation to not just request documents of his client, but to search for sources of information.** *Id.* at \*5. Counsel must communicate with the client, identify all sources of relevant information, and “become fully familiar with [the] client’s document retention policies, as well as [the] client’s data retention architecture.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y.2004).

# COLLECTIONS

“The exigencies of litigation, governmental inquiries, and internal investigations generally require that ESI and its associated metadata should be collected in a manner that is **legally defensible, proportionate, efficient, auditable, and targeted.**”

– EDRM (edrm.net)



- Methodologies
    - Targeted
    - Full
    - Manual
  - Custodian interviews
  - Metadata
  - Data management
- 
- *Burd v. Ford Motor Co.*, No. 3:13-cv-20976 (S.D. W. Va. July 8, 2015)

# DEFENSIBLE DATA COLLECTION BASICS

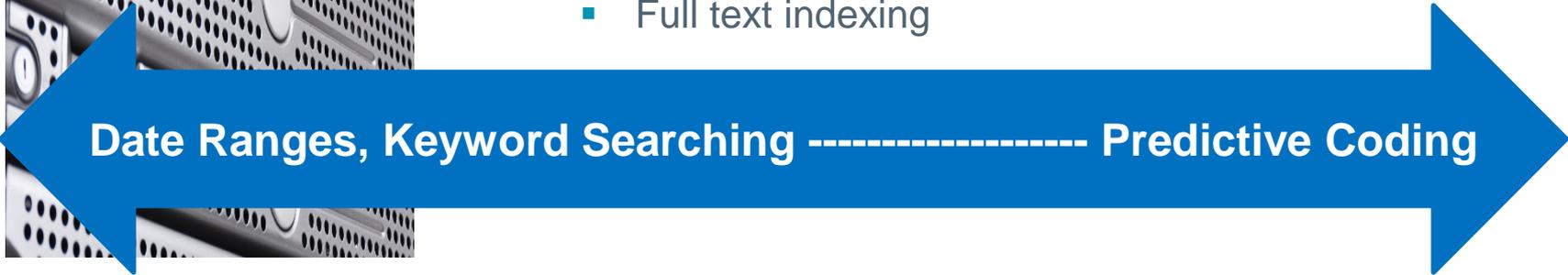
- **Forensic Principles Should Guide, Not Control**
  - ❑ Custodian Tracking
  - ❑ Chain of Custody (Source Tracking)
  - ❑ Metadata Preservation
  - ❑ File Hashing
- **Targeted Collections are Key**
  - ❑ Hard Disk Imaging vs. Surgical Collections
  - ❑ Targeted Systems
  - ❑ Caution on Contextual Collections
- **Scale is Important to Costs**
  - ❑ Legal Hold Solution
  - ❑ Custodian Questionnaires
  - ❑ ESI Collection Technology



# PROCESSING



- Prepare
  - Data restoration
  - Extraction
  - Conversion
  - Exception handling
    - Corrupt files
    - Encrypted data
    - Container files
  - Full text indexing
- Select
  - Search terms
  - Predictive coding
  - Other
- Export
- Technologies



# REVIEW



- Consider your purpose
- Choose your method
  - Search & Provide
  - Manual review
  - Predictive coding
  - Hybrid approach
  - *Hyles v. New York City*, 10 Civ. 3119 (AT)(AJP) (S.D.N.Y. Aug. 1, 2016)
- Audit and adjust

# ANALYSIS



- Applicable at every phase

- ECA (**E**arly **C**ase **A**ssessment)
  - EDA (**E**arly **D**ata **A**ssessment)
- Analytics:
  - Patterns
  - Relationships
  - Predictive coding (e.g, potential relevance)

# PRODUCTION

- Relevant Rules
  - Fed. R. Civ. P. 26(f)
  - Fed. R. Civ. P. 34/CR 34
  - Non-waiver: [Evidence Rule] 502
- Potential pitfalls:
  - “reasonably useable”
  - Metadata
  - Federal vs. State rule
- *Morgan Hill Concerned Parent Assoc. v. California Dept. Educ.*, No. 2:11-cv-3471 KJM AC (E.D. Cal. Feb. 2, 2017)
- *Wilson v. Washington*, No. C16-5366 BHS (W.D. Wash. Feb. 8, 2017)

**KNOW THE  
RULES!**



# Beyond EDRM: *Key Concepts*

- **Competence**
  - RPC 1.1
  - CA Formal Opinion 2015-193

## RPC 1.1 Competence

**Comment [8]** – To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology  
...

“An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation.”

- The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193

“The typical attorney possesses the subject matter knowledge (legal and technical) required to effectively counsel clients on e-discovery matters.”

**18% Strongly Disagree**      **45% Disagree**      **36% Neutral**  
- 2017 Federal Judges Survey, Exterro, Inc.

# Beyond EDRM: *Key Concepts*

- **Cooperation**
  - Fed. R. Civ. P. 1
  - Sedona Conference®, *Cooperation Proclamation*
  - *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008)

## **Fed. R. Civ. P. 1. Scope and Purpose**

. . . [The Rules of Civil Procedure] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

### **Committee Notes:**

. . . Most lawyers and parties cooperate to achieve these ends.

## **Escalating Costs of Civil Litigation Task Force**

- WSBA Board of Governors supported recommendation to have mandatory discovery conferences in superior and district court, 12-2
- WSBA BOG supported “requiring cooperation as a guiding principle,” 14 - 0

**Scope of Preservation, Key Custodians, Format of Production, 502(d), Phased Discovery, Inaccessible Data, Metadata, Privilege Logs, Production Dates, Search Terms. . .**

# Beyond EDRM: *Key Concepts*

- **Proportionality**
  - Fed. R. Civ. P. 26(b)(1)
  - CR 26(b)(1)(A)-(C)

## **Fed. R. Civ. P. 26(b)(1) (b) Discovery Scope and Limits.**

(1) *Scope in General.* . . . : Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and **proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.** . . .

## **CR 26(b)(1)(A)-(C) (b) Discovery Scope and Limits.**

(1) \* \* \* \* \*

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. . . .

# LEVERAGING TECHNOLOGY TO ACHIEVE PROPORTIONALITY

## Predictive Analytics

Where a responding party wishes to use predictive coding, Courts have said yes:.

Da Silva Moore v. Publicis  
Global Aerospace Inc. v. Landau Aviation LP  
In re Actos  
EORHB, Inc. v HOA Holdings LLC  
Cambridge Place. Inv. Mgmt. Inc. v Morgan Stanley & Co.

Where a party asks a Court to force another party to use predictive coding, Courts have said no.

Kleen Products v. Packaging Corp of America  
In re Biomet  
Fosamax/Alendronate Sodium Drug Cases  
Hyles v New York City

Courts have suggested that the parties use predictive coding.

EORHB, Inc. v. HOA Holdings LLC  
Gordon v. Kaleida Health  
Hinterberger v. Catholic Health Systems, Inc.

# PREDICTIVE ANALYTICS CAN ENHANCE PROPORTIONALITY



**Exclude Likely Irrelevant Docs from Human Review, Reducing Costs / Speeding Compliance**



**Identify Reviewers with High Error Rate**



**Issue/Key Coding**

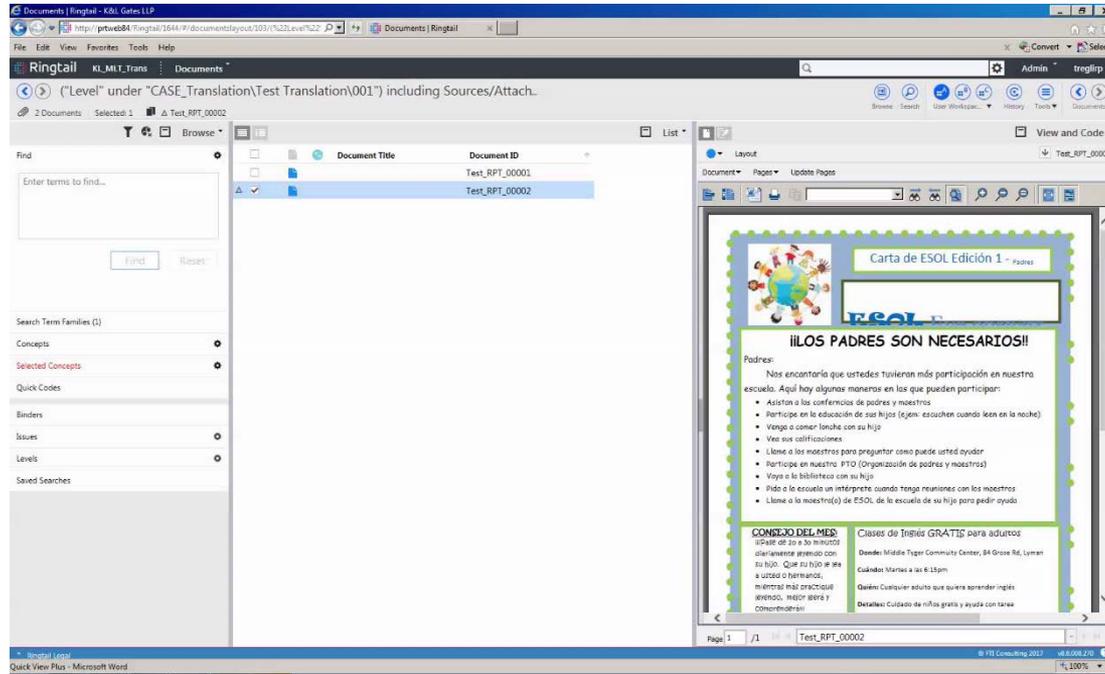


**Sometimes Recall More Relevant Docs than Keywords with Less Review**



**Prioritize Key or Likely Relevant Docs Into Review First**

# USING MACHINE TRANSLATION TECHNOLOGY TO HELP ACHIEVE PROPORTIONALITY



# Leveraging Machine Translation Technology for Multi-Lingual Arbitrations

By Julie Anne Halter (Partner) and Lori Steidl (Staff Attorney) | K&L Gates' e-Discovery Analysis and Technology Practice Group

## **INTRODUCTION – LANGUAGE ISSUES IN INTERNATIONAL ARBITRATION**

As arbitration matters span across borders, so too do the legal teams working on those matters. This unavoidable reality of international arbitration presents a number of logistical issues. These range from mundane issues, such as standard paper/binder sizes, to schedule challenges presented by relevant participants (counsel team members, witnesses, experts, and tribunal members) residing in multiple time zones to what can be the biggest logistical challenge of all: language barriers.

If you have qualified personnel with proficiency in the languages at issue in your matter, inclusion of a few bilingual team members may be all you require to address your high-level needs in terms of planning, strategy, and day-to-day case functions. However, if the expected document volumes exceed what can comfortably be handled by bilingual team members, you will need to assess translation options.

Formal translation services are available to ensure key documents being relied upon in a matter are provided in whatever languages are required. These translations are typically completed by individuals with a very high level of proficiency in the languages both from and to which they are translating and accompanied by a certification guaranteeing the accuracy of the translation.

Procuring translations with such a high degree of accuracy comes with a steep price tag. This level of investment may be necessary for the core set of documents on which a matter hinges, but the expense is often impractical when a party is simply trying to sift through a large universe of documents in order to locate those key documents.

## **MACHINE TRANSLATION TECHNOLOGY**

Machine translation technology can offer a viable solution to this dilemma. Admittedly, even limited use of basic online translation tools reveals that automated translation suffers from accuracy issues. Fortunately, although machine translation is unlikely to reach the level of precision required for an official translation (at least for some considerable time), this rapidly evolving technology is already more than adequate to assist in assessing the basic relevance of most documents.

Taking advantage of machine translation can greatly expand your options for staffing a project with the appropriate resources. The ready availability of passable, working translations of your documents allows you to push work to team members with the most suitable level of subject-matter knowledge and appropriate billing rate for the specific task at hand, rather than those decisions being driven entirely by the individual's linguistic proficiency. Not only may machine translation enable you to avoid the expense of outsourcing document review, it can keep the matter running efficiently by ensuring a basic translation of documents designated by the review team as relevant is immediately available to your core team members.

Once you have determined that machine translation is appropriate for your project, there are a number of practical considerations in selecting the correct service and setting up a sound workflow to ensure you get the best possible value and work product.

## **PRICING**

Like most vendor services, machine translation services can vary considerably in cost — so it pays to shop around. Translation services may charge per word, per page, or per document. If available, per-document options typically afford both the best pricing and the greatest cost certainty.

## **INTEGRATION**

The level of integration with your current document review platform is another variable to consider. Many translation services require that translation take place outside the client's litigation support platform, with the results then being loaded back into the litigation platform and linked to the original documents. This process can add considerable time to the review process and interrupt workflow.

Another option to explore is the availability of tools that can be fully integrated into the review platform, allowing users essentially to request translation "on the fly." "On the fly" translations promote workflow efficiency: not only does the more immediate return of results lessen disruption for users, it also allows them to be more selective in what they submit for translation.

## **LANGUAGE SELECTION ISSUES**

Consider the nature and scope of the language support that the tool provides. Does the tool cover the language(s) you need? Does the tool (or the platform it is tied to) have the ability to automatically detect the underlying language of a document? Auto-detection can be extremely valuable in allowing a more automated means of proactively identifying and queuing files for translation. Can the user specify the languages from and into which a document will be translated (both as default values and with the ability to override the default if needed)? These capabilities may be of value in completing translations in a more timely and accurate fashion.

## **OTHER CONSIDERATIONS**

There are a number of factors that can affect the quality of the translations you receive. Awareness of these factors will enable you to tailor your workflow to account for likely errors, explore options to address anticipated shortcomings, and assess whether the expected benefits of possible remedial steps outweigh the time and cost of implementing them.

One such factor is the availability and quality of underlying text. Electronic files from which text is extracted directly will tend to yield the most accurate translations. Scanned documents or other documents that need to undergo optical character recognition (OCR) to create text are likely to yield lower-quality translations, particularly if the original scan is of poor quality.

If OCR needs to be added, the best results will be realized by having the documents OCR'ed based upon the language in which they originated to account for different characters that may be unique to that language. While this is most obvious for documents that originate in character-based languages, it is equally true for alphabet-based languages. For example, an OCR tool set with Spanish as the underlying language will recognize the character "ó" correctly, whereas an OCR tool set with English as the underlying language is likely to read the same symbol as the number "6." If the underlying text submitted for translation contains errors such as this, the word will not be recognized and/or translated

correctly. Many processing tools have a language recognition feature that can aid in identifying the predominant language of a file, allowing you to select the optimal settings for OCR.

Another factor that impacts the required translation quality is the intended downstream use of the translations. Is the translation intended for a human reader, or will it be subjected to further automated processes? Minor discrepancies in a translation may be easily recognized and reconciled by a person reading the translation, particularly if they have a rudimentary understanding of the underlying language. However, if you plan to run searches against your machine-rendered translations, these errors may have a greater impact. You may need to take steps to correct recurrent errors prior to running searches or adjust your search strategies (e.g., employing wild cards and fuzzy searching) to work around them.

## **CONCLUSION**

While the results may not be perfect, use of machine translation provides a practical option for handling files in multiple languages, where your resources in the underlying languages are limited. Machine translation will not replace the need for certified translations of documents to be used in legal proceedings, but the technology can be a valuable addition to your arsenal as you look to streamline the review of documents, reduce costs for clients, and optimize your staffing for international projects.

# The Relative Rewards and Risks of Predictive Coding

Julie Anne Halter (Partner), Rob Noreus (Staff Attorney), and Mike Goodfried (Staff Attorney) |  
K&L Gates' e-Discovery Analysis and Technology Practice Group

As personal computers, laptops, tablets, smartphones, social media, cloud computing, and other devices proliferate in the workplace, so has the number of different software applications that allow us to communicate from anywhere, at any time, and in virtually any format. As a result, the amount of information businesses create has exploded. Over the next 15 years, the digital universe is expected to more than double every two years, going from 4.4 trillion gigabytes to 44 trillion gigabytes. While generating and sharing information is critical for any business, one unexpected yet significant consequence of these enormous data volumes is the increasingly prohibitive cost of collecting, filtering, reviewing, and producing massive volumes of electronically stored information (ESI) in dispute resolution proceedings.

Electronic discovery commentators estimate that at least 50 percent of ESI maintained by a given organization is duplicative, outdated, or unnecessary for business purposes. Accordingly, when faced with legal proceedings, clients often find that most of the ESI they collect is irrelevant. The challenge for lawyers is how to best leverage rapidly evolving technologies to reduce the time and expense associated with document review, while not compromising their duties as zealous advocates for their clients.

Some document review solutions have been available for many years, but are enhanced with better technology. For example, the use of key words to search for and capture potentially relevant electronic documents, and leave aside the vast majority of likely irrelevant documents, has been prevalent for more than a decade. Newer technologies allow for more complex searching and categorization of documents. Some of these tools are enhanced with concept clustering functionality, which uses linguistics analysis and algorithms to identify key concepts in documents and allow lawyers to quickly and easily organize them so that documents containing similar subject matter or concepts can be reviewed together. Because the reviewing lawyer is able to make relevancy and other important decisions based on groups of similar documents, instead of on a document-by-document basis, the overall document review process can be less expensive, more efficient, and more accurate. These tools continue to add helpful and sophisticated analytics to their offerings. Many now provide a framework for conducting statistical analyses of the document review, permitting the supervising lawyers to measure the effectiveness of keywords and to conduct a sampling of documents not captured by keywords to ensure nothing relevant has been missed.

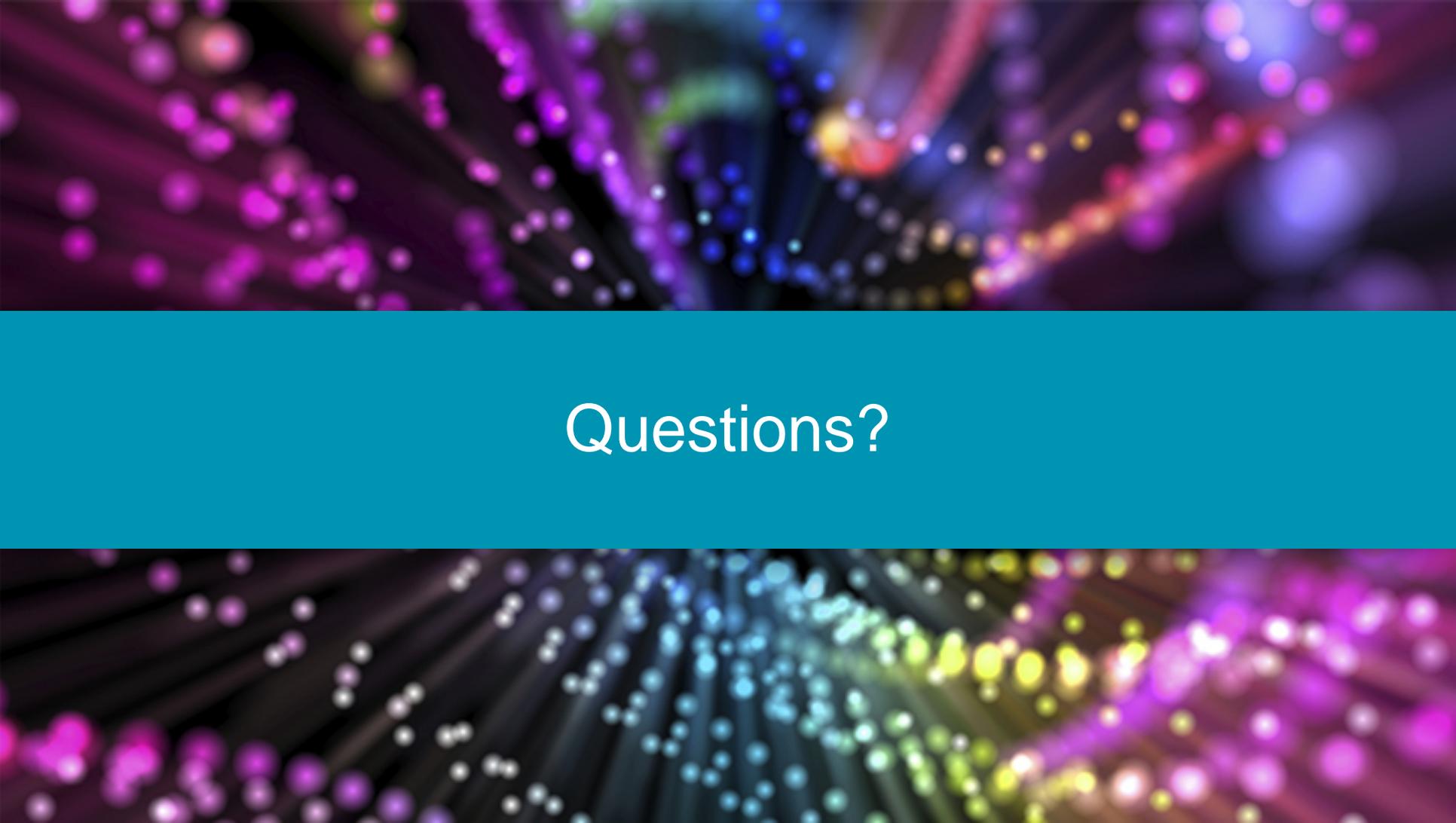
One of the most recent technologies to assist with document review has garnered a great deal of publicity in recent years: predictive coding. Predictive coding is a process that involves the use of a machine-learning algorithm designed to distinguish relevant from nonrelevant documents, based on a set of training documents, known as a seed set, that has been reviewed and coded by a subject matter expert. The fundamental premise behind predictive coding technology is that once ESI has been collected and loaded into a database, a lawyer or a small number of lawyers with the most comprehensive legal and factual case knowledge about the matter reviews a set of documents that is either randomly selected or gathered using keyword terms. Using the decisions applied to this seed set, the tool's algorithm then identifies other documents within the data set that must be reviewed for the system to further learn and distinguish what is relevant and not relevant. During the training

process, the relevant documents are available for lawyer review as appropriate to ensure the algorithm correctly categorized the material. Often, adjustments must be made to fine-tune the results. In addition, it is critical that a sampling of the documents identified as not relevant by the predictive coding technology is also reviewed, so that further adjustments can be made if necessary. Once the system is “fully trained,” it analyzes the remaining documents in the un-reviewed dataset and categorizes them as relevant or not relevant based on what it learned through the seeding process.

There are a number of potential benefits to predictive coding, including: 1) it can be deployed against massive data sets quite efficiently because it leverages decisions applied to representative samples of documents to find other relevant and/or irrelevant documents; 2) it limits the number of documents that a lawyer may need to review to only those necessary to form an adequate seed set; and 3) the results can be validated statistically in case of subsequent discovery challenges. As with all review technology, you should consider whether predictive coding is appropriate for your specific case. What subject matter is covered within your documents, and how do you anticipate that it will relate to the issues in your case? Given the number and complexity of the issues, as well as the volume of documents at issue, is predictive coding the most cost-effective solution? Is predictive coding technology readily accepted within your jurisdiction, or is it viewed with skepticism? What protocols and strategies will you employ for the predictive coding review? Anecdotal evidence suggests that the iterative process of training the predictive coding tool can be extensive and expensive. This is particularly true given that the predictive coding model generally requires the seed set to be a statistically significant sample to ensure the system is adequately trained. As a result, it may be necessary to engage in multiple rounds of seed set review before an acceptable level of precision and recall is reached.

The use of predictive coding technology has made headlines in the United States and more recently in Ireland. Many courts in the United States have expressed general agreement that using technology to assist in document review is appropriate and acceptable for efficiency and cost savings and may be “better” than a manual document-by-document review, particularly where there are vast quantities of documents at issue; see Da Silva Moore v. Publicis Groupe & MSL Group, No. 11 Civ. 1279 (ALC) (S.D.N.Y. Feb. 24, 2012). While predictive coding has not been as widely adopted in Europe as in the United States, a recent Irish court decision appears to be the first by courts in Europe to endorse its use; see Irish Bank Resolution Corporation Limited & Ors v. Sean Quinn & Ors, [2015] IEHC 175.

In conclusion, whatever technology is used to facilitate legal review and analysis of email and other electronic documents and, even more importantly, whatever protocol and strategies are deployed in using that technology, they must be well planned and documented. Moreover, given the various implications that the use of technology may have on the ultimate outcome of a matter, it is prudent to carefully consider and discuss the alternatives with the legal team, and it is quite often an advisable (and, in some cases, a required) matter of disclosure and discussion with your adversary.



Questions?

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The logo for K&L GATES, featuring the text in white on a teal rectangular background. The background of the slide is a blurred image of colorful lights in shades of purple, blue, and yellow.

K&L GATES

## The North Carolina Business Court: Now Open for More Business

John R. Gardner , Partner, K&L Gates (Raleigh)  
Matthew T. Houston, Associate, K&L Gates (Raleigh)

## STRUCTURE OF THE TRIAL LEVEL COURTS IN NORTH CAROLINA

- North Carolina State Courts
  - District Court (\$25,000 and below and family/domestic cases)
  - Superior Court (Above \$25,000)
- Administration of North Carolina state cases
  - Cases managed by judges and court staff within County division where case filed.
  - Case is not guaranteed to stay with a particular judge.
    - Different motions or trial could be held before different judges based on court schedule.
    - Often, this means a different judge for each hearing
  - Judges hear both civil and criminal cases.
  - All motions are set for hearing without the requirement of filing briefs

## STRUCTURE OF THE TRIAL LEVEL COURTS IN NORTH CAROLINA

- Federal Court
  - United States District Court
    - (1) Cases involving questions of federal law (e.g., US Constitution), or (2) cases between parties of different states with more than \$75,000 in dispute.
    - Eastern, Middle, and Western Districts of North Carolina.
    - Limited Number of U.S. District Court Judges and U.S. Magistrate Judges.
  - United States Bankruptcy Court
    - Certain disputes related to bankruptcy proceedings may be adjudicated in Adversary Proceedings in Bankruptcy Court.
    - Eastern, Middle, and Western Districts of North Carolina.

## CREATION OF NORTH CAROLINA BUSINESS COURT

- Established in 1996
  - The first court was located in **Greensboro**, and the initial judge was the Hon. Ben F. Tennille.
- Expanded in 2005 into **Raleigh** and **Charlotte** and added two new judges: the now-retired Hon. John R. Jolly, Jr. (Raleigh) and Hon. Albert Diaz (Charlotte, but who now serves on the Fourth Circuit Court of Appeals).
  - 2006 revisions allowed parties to designate cases directly to the business court, as opposed to seeking the recommendation of a county superior court judge.
- Expanded again in 2016 by adding the Hon. Michael Robinson in **Winston Salem**.

## CURRENT BUSINESS COURT JUDGES

- Hon. Louis A. Bledsoe, III (Charlotte)
  - Current Chief Business Court Judge
- Hon. Adam M. Conrad (Charlotte)
- Hon. James L. Gale (Greensboro)
- Hon. Gregory P. McGuire (Raleigh)
- Hon. Michael L. Robinson (Winston-Salem)

## CREATION OF NORTH CAROLINA BUSINESS COURT (cont'd)

- The NC Business Court is a specialized forum of the North Carolina State Court's Superior Court division.
  - Business Court has its own court facilities, clerks, filing system, and local rules, but files continue to be “maintained” by the county clerk.
  - Cases involve complex and significant issues of corporate and commercial law.
  - Business Court Judges are “Special Superior Court Judges” appointed by the Governor and confirmed by the General Assembly.
    - The Chief Justice designates certain Special Superior Court Judges as Business Court Judges.
    - Judges serve five-year terms.

## BUSINESS COURT MODERNIZATION ACT (SL2014-102 (SB 853))

- Enacted by General Assembly in 2014 significantly expanding the types of actions that can be designated to the Business Court.
  - Most parts became effective October 1, 2014.
  - Some became effective as recently as January 1, 2019
- The Act was modeled after the Delaware Court of Chancery.
- The Act has been successful in increasing the Business Court case load.
  - The Business Court issued 113 opinions in 2017.
  - These opinions can be found on Westlaw, Lexis, etc.

**CASES THAT *MAY BE DESIGNATED TO THE BUSINESS COURT INVOLVE A MATERIAL ISSUE RELATED TO (N.C. GEN. STAT. § 7A-45.4(a))*:**

- Laws governing corporations, limited liability companies, or partnerships;
- Securities laws;
- Anti-trust laws;
- Trademark laws;
- Intellectual property;
- Trade secrets; or
- Breach of contract cases between businesses with at least \$1 million in dispute.
  - All parties must consent to the designation in a breach of contract case.

## CASES THAT *MUST* BE DESIGNATED TO THE BUSINESS COURT (N.C. GEN. STAT. § 7A-45.4(b)):

- Contested tax lawsuits or a constitutional challenge to a tax statute;
- Certain cases about electric/telephone poles; and
- Actions involving corporate governance, securities laws, anti-trust laws, trademark laws, intellectual property, or trade secrets with at least \$5 million in dispute.

## APPEALS OF BUSINESS COURT JUDGMENTS (N.C. GEN. STAT. § 7A-27(a)(2)-(3))

- Parties now have a right of direct appeal to the North Carolina Supreme Court from:
  - any final judgment of the Business Court; and
  - any interlocutory order of the Business Court that affects a substantial right; determines the action and prevents an appealable judgment; discontinues the action; or grants or refuses a new trial.
- Allows parties to bypass the uncertainties and delays in the North Carolina Court of Appeals.
  - This reflects a level of “trust” in NC Business Court Judges and their determinations

# ADVANTAGES OF BUSINESS COURT

- Subject Matter Expertise of Business Court Judges
  - Judges typically possess extensive corporate litigation experience, often from private practice.
  - Specialized court where entire case load is based on complex business cases and expertise is developed – no distractions to handle criminal and other unrelated matters.
- Efficient Case Management
  - Business Court cases generally remain with the same judge from complaint through trial (jury trials held in county of initial filing).
    - Allows for consistent decision making throughout a case, and reduces time needed for multiple judges to “get up to speed” on a complex issue.
  - Experience with complex electronic discovery issues.
  - Judges also have devoted clerks who can assist in research and opinion writing

## ADVANTAGES OF BUSINESS COURT

- Uniformity of Decisions
  - Judges are required to issue written decisions.
  - Although Business Court judges are not bound by rulings of other Business Court Judges, the general practice of the Judges has been to enter rulings consistent with others made by the Business Court.
- Procedural Rules Similar to Federal Court
  - Electronic filing (with hard copies filed with the County Clerk)
  - Court approved case management schedule created at outset of case.
  - Supporting briefs required for substantive motions.
  - Certain motions may be decided without the expense of a hearing.
  - Hearings may be held electronically or telephonically for cost-effectiveness

# PROCEDURE FOR DESIGNATING A COURT FOR BUSINESS COURT PROCEEDINGS (N.C. GEN. STAT. § 7A-45.4)

- File a “notice of designation” (i.e., similar to a notice of removal).
  - Similar to federal court removal, but it does not divest the Superior Court of jurisdiction
  - Plaintiffs: Must file designation contemporaneously with the Complaint.
  - Defendants: Must file within 30 days of service of the Complaint.
  - Amended Pleadings: May allow a party to designate case to Business Court at a later date if the amendment “substantially alters the nature of the action.”
  - Filing fee: \$1,100.00.

## PROCEDURE FOR DESIGNATING A COURT FOR BUSINESS COURT PROCEEDINGS (CONT'D)

- Qualifying cases are then assigned to the Business Court by the Chief Justice of the North Carolina Supreme Court.
  - Once designated by the Chief Justice, cases are assigned to a particular Business Court Judge by the Chief Business Court Judge.
  - Geography is a consideration in judicial assignment, but not determinative.
    - Cases are often (but not always) assigned to the Business Court Judge for the county or region where the case is pending
- A party may oppose the designation as a complex business case, to be heard and decided by a Business Court Judge.

## GENERAL CONSIDERATIONS IN VENUE DECISIONS

- NC Superior Court, NC Business Court, Federal Court, Bankruptcy Court (where applicable).
- Complexity of the issues, costs of litigation, timing.
  - Superior Court can be faster and less expensive for a plaintiff if you do not expect defendant to contest.
  - Business Court offers predictability, specialized expertise, and opportunities to brief motions.
    - Federal Court is similar but can be more expensive

# BUSINESS COURT OPINION EXAMPLE

- *Wheeler v. Wheeler*, 2018 NCBC 117
  - **Issue**: Is an officer and director of a corporation entitled under North Carolina law to the advancement of costs and attorneys' fees by the corporation in a lawsuit against that corporation.
  - **Facts**: Plaintiff shareholder and former officer/director sued his corporation and asserted claims for breach of fiduciary duty, constructive fraud, unfair or deceptive trade practices and judicial dissolution of the company. Defendant corporation asserted counterclaims for breach of contract, conversion, fraud, among other claims.
  - Pursuant to the corporation Bylaws, Plaintiff demanded that Defendant advance his reasonable expenses incurred in defending against the counterclaims. Defendant denied the request and concluded that Plaintiff's alleged conduct made him ineligible for indemnification under the Bylaws, and thus, prohibiting advancement of his costs and fees. Plaintiff filed a motion for a preliminary injunction.

# WHEELER CASE CONTINUED...

- Conclusions of the Business Court:
  - Plaintiff demonstrated that he had a clear right to advancement, and thus, a likelihood of success on the merits.
    - The court concluded that (1) Plaintiff served as an officer, director, and employee of the Defendant; (2) Plaintiff defended against the Counterclaims, by which Defendant sought to hold him liable “by reason of the fact” that he served in such capacities; (3) the Bylaws mandate the advancement of Plaintiff’s reasonable expenses incurred in defending against the Counterclaims; and (4) Plaintiff provided an undertaking to repay any advanced fees in the event he is ultimately determined not to be entitled to indemnification.
  - However, the Court determined that Plaintiff had not demonstrated irreparable harm to entitle him to injunctive relief and his motion for preliminary injunction was denied.
    - The Court concluded that the mere denial of advanced costs and fees does not, in and of itself, constitute irreparable harm.
    - Additionally, the Court concluded that Plaintiff had not clearly shown that failure to receive advanced fees and costs had impacted his litigation strategy.

## BUSINESS COURT OPINION EXAMPLE

- *WORLDWIDE INS. NETWORK, INC. v. MESSER FIN. GRP., INC.*, 2018 NCBC 102
  - **Issue:** Does a carve-out in an arbitration clause require the Court to decide questions of arbitrability even though the clause also incorporates the AAA Rules?
  - **Facts:** Plaintiff sold insurance and other financial products using a network of independent agents. Plaintiff sued some of its former agents, alleging that they conspired to obtain Plaintiff's confidential information and to use that information to compete against it. Plaintiff asserted claims for breach of the non-compete, non-solicitation, and confidentiality restrictions in each contract. It also asserted a number of non-contract claims, including conspiracy, unjust enrichment, misappropriation of trade secrets, and tortious interference with contract.
  - Defendants contended that all of these claims were subject to binding arbitration and asked the Business Court to compel arbitration of all claims and to stay the case pending arbitration.

## ***WORLDWIDE INSURANCE CASE CONTINUED...***

- Conclusions of the Business Court
  - Because one of the three contracts in dispute included an express carve-out, stating that neither party “will be compelled to arbitrate: (i) any claim or dispute involving actual or threatened disclosure or misuse of confidential information; (ii) a breach of any covenant not to compete; or (iii) a violation of non-solicitation provisions,” the Court concluded that the parties intended to divide questions of arbitrability between the Court and the arbitrator.
  - Ultimately, the court compelled arbitration to certain defendants and stayed all claims pending the arbitrator’s decision on the arbitrability of the claims asserted against those Defendants. However, the court concluded that the claims asserted against the other Defendants concerning the contract with the carve-out were not arbitrable and denied the motion to compel.

## BUSINESS COURT OPINION EXAMPLE

- *GLOBAL TEXTILE ALLIANCE, INC. v. TDI WORLDWIDE ET AL.*, 2017 CVS 7304
  - **Issue**: Are foreign subsidiaries of a North Carolina corporation subject to personal jurisdiction in North Carolina?
  - **Facts**: Plaintiff produces textiles for the home furnishings industry. Plaintiff sued some of its former officers, employees and certain related entities, alleging that they conspired to usurp business opportunities that belonged to Plaintiff and asserted claims for breach of fiduciary duty, fraud, conspiracy and unfair and deceptive trade practices, among others.
  - The first, second and third-tier subsidiaries of a North Carolina corporate defendant, which were organized under the laws on the Netherlands, China and El Salvador moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. In support of its argument that the foreign entities were subject to jurisdiction in North Carolina, Plaintiff contended that the foreign entities had substantial contacts with North Carolina which included purchasing certain raw materials from North Carolina companies, having U.S. bank accounts, having North Carolina-based directors and having a North Carolina ultimate parent company.

## ***GTA V. TDI CASE CONTINUED...***

- Conclusions of the Business Court
  - The motion to dismiss was granted as to three of the four entities.
  - Ultimately, the court concluded that the contacts of three of the four foreign subsidiaries were not sufficient to render those entities “at home” in North Carolina. The court held that North Carolina was principal place of business for the Dutch holding company because the incorporation documents filed in the Netherlands listed the parent company’s North Carolina address as its principal place of business.
  - The concept of personal jurisdiction has evolved over time. In its most recent decisions on the subject, the U.S. Supreme Court has taken a narrow view of jurisdictional issues. If these issues are important to your company, they should be under regular surveillance.

## BUSINESS COURT OPINION EXAMPLE

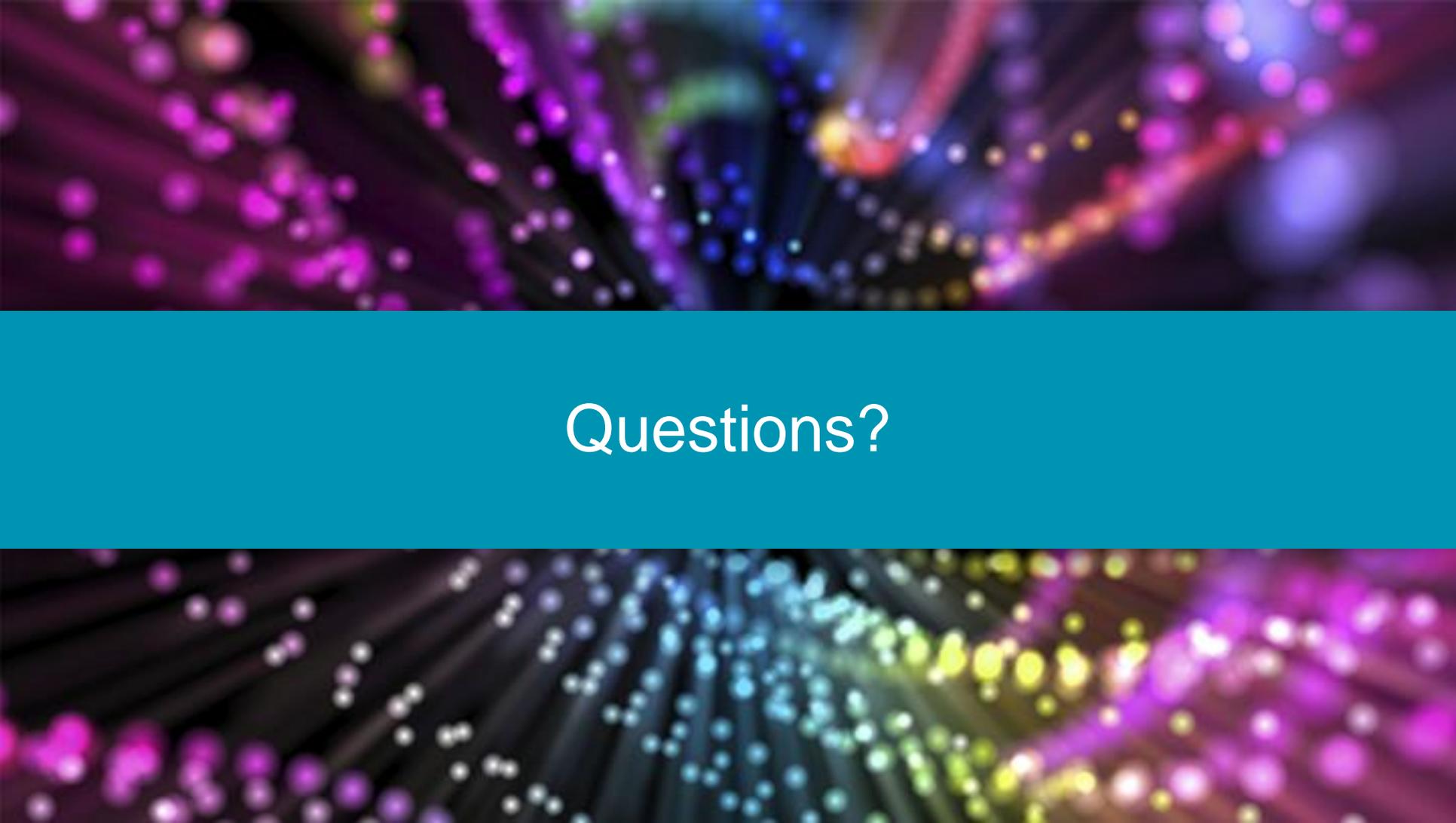
- *W&W Partners, Inc. v. Ferrell Land Company, LLC, et al.*, 2017 CVS 9998
  - **Issues:**
    - (1) Is a defendant liable for unfair and deceptive trade practices where the substance of the plaintiffs' complaint relates only to disputed interpretations of a contract?
    - (2) Are member-managers of a closely held LLC or general and limited partners of a partnership personally responsible for contractual obligations of the LLC or partnership?
  - **Facts:** Ferrell Land and W&W Partners entered into a development agreement in 1996 for the development of real property that might be purchased by Ferrell Land. The agreement also contained a purported listing agreement with Chase Properties for the sale of such land. W&W Partners and Chase subsequently brought suit against Ferrell Land, Ferrell Investments Limited Partnership (an entirely different entity), and two owners of Ferrell Land merely because they are closely held, alleging breach of contract, UDTPA, and various other claims, with an attempt to pierce the corporate veil.
  - **Motion to Dismiss:** Defendants moved to dismiss a portion of the plaintiffs' claims on the basis that a dispute over contract interpretation could not lead to an UDTPA claim and because the Plaintiffs failed to identify any basis for piercing.

## FERRELL CASE CONTINUED...

- Conclusions of the Business Court:
  - The motion to dismiss was granted as to both the UDTPA claim and the piercing argument.
  - **First**, the court recognized that a general contract dispute does not rise to the level of an UDTPA claim
    - This is the case even for an intentional breach of contract
    - There must be “something more” (e.g., fraud in the inducement, bad faith, etc.)
  - **Second**, the court dismissed the piercing “claim” because Plaintiffs failed to plead any facts demonstrating a lack of corporate formalities, lack of capitalization, etc.
    - In effect, a piercing “claim” is not viable merely because a company is closely held
    - There must be some evidence of ignoring corporate formalities
    - This is why it is vital to observe corporate formalities

## MORE BUSINESS COURT INFORMATION

- NC Business Court website:  
<https://www.nccourts.gov/courts/business-court>
  - Business court locations
  - Business court judges
  - Local rules and court procedures for Business Court
  - E-filing
  - Search and view Business Court dockets
  - Review Business Court opinions



Questions?

K&L GATES

# Beating Burnout

Practical Strategies to live a life that keeps burnout at bay

Courtney Leak Nesbitt, LCSW  
Embracing Abundance Counseling and Consulting

# Burnout

- ▶ Physical or mental collapse caused by overwork or stress
  - ▶ Physical Symptoms
    - ▶ Chronic fatigue, Insomnia, Forgetfulness, Illness, Loss of appetite, Anxiety, Depression, Anger
  - ▶ Emotional Symptoms
    - ▶ Feelings of apathy, Increased Irritability, Lack of productivity, Loss of enjoyment, Pessimism, Isolation

# The Difference Is

- ▶ Burnout - tired
- ▶ Compassion Fatigue - tired of caring
- ▶ Vicarious Trauma - absorbing the traumatic experiences of others and then experiencing the symptoms of trauma



# Imposter Syndrome

- ▶ The psychological pattern of doubting personal accomplishments and internalized fear of being exposed as a “fraud”
  - ▶ How does imposter syndrome feed burnout?

# The Facts

- ▶ **The Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyers Assistance Programs published a study in 2016**
  - ▶ A sample of 12,825 licensed, employed attorneys completed surveys, assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.
  - ▶ 20.6% of participants scored at a level consistent with problematic drinking
  - ▶ 36.4% of participants scored at a level consistent with hazardous drinking and/or possible alcohol abuse
    - ▶ The risk became exponentially higher in the 15 years after law school

# The Facts Continued

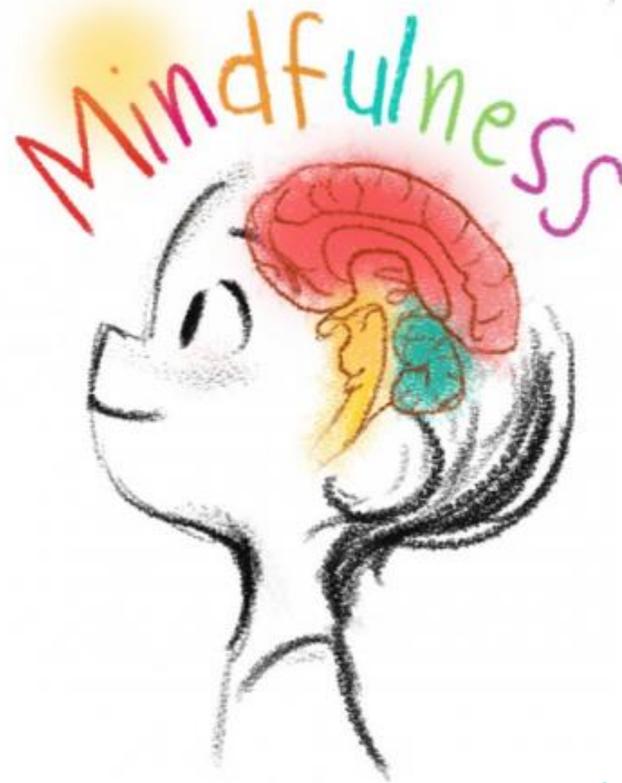
- ▶ Anxiety - 61.1%
- ▶ Depression - 45.7%
- ▶ Social Anxiety - 16.1%
- ▶ ADHD - 12.5%
- ▶ Panic Disorder - 8%
- ▶ Bipolar Disorder - 2.4%
- ▶ Suicidal Thoughts - 11.5%
- ▶ Self Injurious Behaviors - 2.9%

# Prevention and Coping

- ▶ Routine Self-Care, Resilience Building, Healthy Connection and Good Mental Health practices are the keys to preventing Burnout
- ▶ Self-care - not just baths and pedicures
- ▶ Boundaries
- ▶ Healthy Lifestyle
- ▶ Emotional Literacy
- ▶ Therapy

# Lets Practice

- ▶ Take a piece of paper and list the following items
  - ▶ 1 thing you are grateful for
  - ▶ 1 person you are grateful for
  - ▶ 1 person you are currently holding anger or hurt with
  - ▶ 1 goal you want to achieve in 2019



# Questions





**Bradley Davidson, MS, SPHR**  
*Your Personal and Professional Life Coach*

## ***Drawing Effective Personal Boundaries***

Clear and healthy boundaries are critical to living your vision and creating a fulfilling life. Both in your personal and professional life, a lack of boundaries will pull you away from being your best. This quick guide will help you identify key boundaries that may need your attention and will provide some practical tools to get you started thinking about setting and maintaining the boundaries.

### **What are Boundaries?**

Personal Boundaries are designed to protect and honor important parts of our lives. They are created to clarify what are acceptable and unacceptable behaviors from others. Just as a fence protects and preserves our real property, so should personal boundaries protect our personal selves.

### **Key Areas to Protect Using Boundaries**

Just as we have property we preserve and protect with physical boundaries, there are several key areas of our lives that should be protected by personal boundaries:

- ❖ **Your Time** – In today’s world, time is an important and valuable asset. We often feel we never have enough time to focus on what’s really important in our lives yet time is often what we least protect through effective boundaries. Do you have friends who drop by unexpectedly? Do you have co-workers or employees who demand your time in unreasonable ways? Do you have tasks that could just as easily be completed by someone else? These are examples of violators of our time boundaries.
- ❖ **Your Emotions** – Your emotions are where your love and caring come from. This should be well-protected. Often, people in our lives may say or do hurtful things (often unintentional) that can damage our emotions and our hearts. Has someone in your life made hurtful remarks or comments? Been thoughtless? These are examples of violations of our emotional boundaries.
- ❖ **Your Energy** – Your energy is the well-spring from which you function. This energy can come from many sources; your “alone time”, your inner peace, activities that invigorate you, etc. When others do or say things that rob you of this energy (such as invade your privacy, create turmoil, make unreasonable demands, keep you from prayer, meditation, etc.), you are less likely to function effectively.
- ❖ **Your Personal Values or Other Areas of Importance to You** – Anything in your life that is important to you (such as your personal values, needs, family, etc.) can be areas that can benefit from effective boundaries. What other areas of your life need boundaries?

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*The content of this worksheet should not take the place of sound judgment or the advice of other qualified professionals and is provided for informational and learning purposes only.*

## Ways to Create Your Personal Boundaries

There are a number of ways to create and honor boundaries that are important to you. Here are just a few examples:

- Be clear about the boundary to both yourself and others – Make sure you have been thoughtful about the boundary issue and have defined for yourself and others what is acceptable and unacceptable.
- Once a boundary is crossed, remind the individual of your boundary and ask for his/her help in maintaining that boundary.
- If the individual continues to violate the boundary, ask firmly and politely for the behavior to stop. If the behavior continues, consider what further action is appropriate to stop the behavior. Remember that while you may be firm, you should also remain respectful of the other individual.
- Identify ways to position yourself in a time and place that minimizes the opportunity for your boundaries to be crossed.
- Thank those people around you who honor your boundaries and thank those who have honored your requests to start observing your boundaries.
- Always seek to understand and honor the boundaries of others.

## Understanding and Creating Your Personal Boundaries

In the space provided, list at least 5 boundaries (either from the key areas above or other areas in your life) that need strengthening. In the space next to the boundary, identify a potential solution to that boundary issue. The solution could be anything from having a conversation with the offender to removing yourself from the situation. You may review the “Ways to Create Your Personal Boundaries” above for ideas. I’ll “prime the pump” by providing you with a couple of examples:

The boundary being crossed is...	The action I will take is...
<i>Example: A classmate has made a habit of telling me jokes that are racially or sexually degrading. These comments are at odds with my values and beliefs and are causing me to dread being around him.</i>	<i>I plan to discuss the jokes and comments with my classmate and let him know how they make me feel. I will let him know that I would prefer not to hear those types of jokes in the future.</i>
<i>Example: I need to complete a weekly report at work each Friday morning but am continually interrupted by traffic in our office. This has caused me to miss a couple of deadlines.</i>	<i>I plan to try to negotiate an arrangement with my manager that will enable me to work from home two hours each Friday morning so that I can complete the report without distractions.</i>
1.	
2.	
3.	
4.	
5.	

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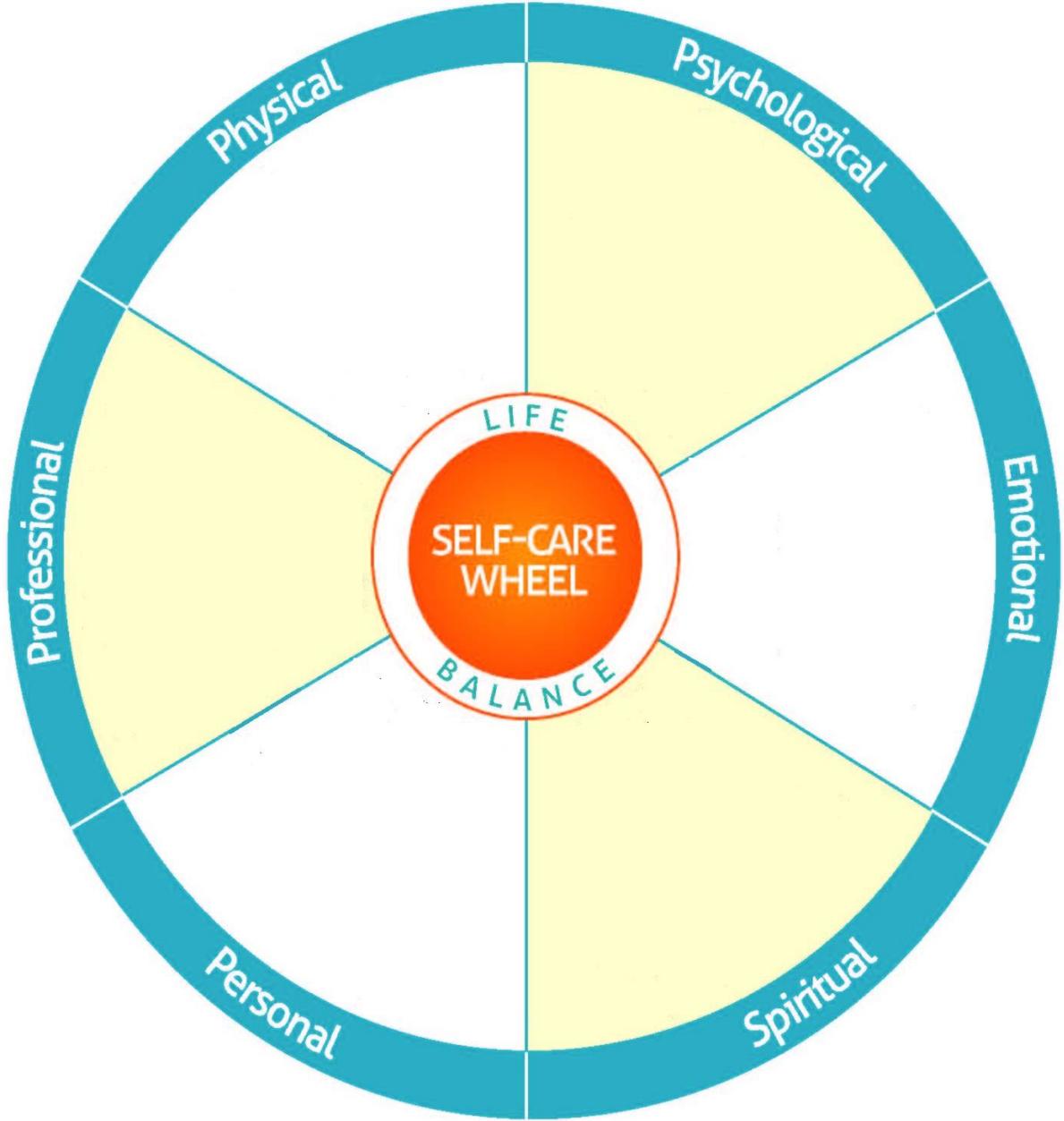
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*The content of this worksheet should not take the place of sound judgment or the advice of other qualified professionals and is provided for informational and learning purposes only.*



# SELF-CARE WHEEL



# Thank You!!

▶ “Self care is how you  
take your power back.” –  
Lalah Delia

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