ABA SECTION OF ANTITRUST LAW

COMPLIANCE AND ETHICS SPOTLIGHT

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MESSAGE FROM THE CHAIRS

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MESSAGE FROM THE CHAIRS

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The Compliance and Ethics Committee is pleased to publish our first newsletter of 2019. Please be sure to attend the Committee's programs at the Section's 67th Annual Spring Meeting. Registration is open at www.ambar.org/atspring. We hope to see you there.

Please feel free to reach out to us if you have any ideas regarding future programs or have any interest in publishing an article in this newsletter. We appreciate your input.

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MESSAGE FROM THE EDITORS

Thomas J. Lang

Casey Erin Lucier

Dear Colleagues,

Happy New Year! The Compliance and Ethics Committee looks forward to offering many exciting and informative programs in 2019. Most importantly, the Antitrust Section Spring Meeting will be in Washington, DC from March 26-29, 2019. The meeting will feature dozens of panels discussing the latest antitrust developments, numerous opportunities to hear enforcers from around the world discuss competition and consumer protection policy, and countless occasions to network with your colleagues at receptions and at the Spring Dinner. Registration is open at https://www.americanbar.org/events-cle/mtg/inperson/242472360/ and special pricing is available until February 8th. So register early!

We would also like to highlight an upcoming program from our Compliance and Ethics Committee. On February 13th we are sponsoring a 90-minute teleconference titled **What Makes an Antitrust Compliance Program Effective**. Panelists from academia and inside and outside counsel will discuss the elements of an effective antitrust compliance program and strategies for antitrust compliance training and monitoring that can help a company to avoid antitrust liability. Registration is available here: https://www.americanbar.org/events-cle/mtg/teleconference/353420949/

We would like to thank the authors who contributed to this newsletter. In this edition, **Joe Murphy** exposes the dangerous weaknesses in many compliance and ethics programs that help explain why such programs are not more effective. Next, **Peter Gronvall and Nathaniel Huber-Fliflet** describe the utility of predictive modeling techniques combined with key word searching to segregate privileged documents and content in document productions. Finally, **C.J. Donald and Tom Lang** survey the rapid spread of employee no-poach investigations and litigation across the country, particularly in the context of franchise agreements.

We hope you find this edition of the Compliance and Ethics Spotlight informative.

Best regards,

Tom and Casey

*   *   *

Dangerous Weaknesses in Compliance & Ethics Programs

By Joe Murphy, CCEP[*]

Compliance and ethics (C&E) programs play an essential role in preventing corporate crime and misconduct, including antitrust violations. But we need to face some hard realities. While we know that no anti-crime effort will be 100% effective, we need to realize that there have been serious violations at companies that at least purported to have C&E programs. What is the message from this? My view, based on experience and study of the field, is that there are certain common mistakes made in C&E programs that can fatally undermine such programs.[1]

The purpose of this article is to point out the dangerous weaknesses in C&E programs and emphasize the need to improve. The six flaws identified below help explain why C&E programs are not more effective.

1. Not recognizing executives as the highest risk

We hear people talking about "rogue" employees, and usually point to field sales people in this context. But when the corporate indictments roll in, generally the executive suite is involved. Sometimes the executives are at fault for failure to respond or for covering up illegal conduct. But too often the executives are the perpetrators, either engaging in the illegal conduct directly or encouraging subordinates to "do whatever it takes" to make a sale, regardless of the law. In the antitrust field, there is a depressing consistency in cartel conduct involving executives.[2]

People in power positions often just do not get it. I am aware of one example where a corporate executive's administrative assistant called the company's online training provider requesting that the boss be marked down as having already had the online ethics training, because, after all, he already knew this stuff and he did not have the time to take it. (The request was refused.) Cheating on ethics training? Really? By an executive?

Rather than address this high-profile risk, C&E practitioners tend to look elsewhere. Yet an honest risk assessment should focus considerable attention on the C-suite. Effective training should not be limited to a brief summary for these powerful corporate leaders; it should be full scale and intensive. Audits would not be limited to reviews of the administrative assistants; they would probe the executives' conduct as well. Controls would not be focused on blue collar workers, but on where the money and power reside: the C-suite.

2. CECOs are underpowered, not connected, and not independent

It is basic management: if you want something done, you need to put someone in charge of getting it done. If you want to control executives, you need someone in charge who is positioned and empowered to act effectively at that level.

Instead, chief ethics and compliance officers ("CECOs") are often positioned to fail.[3] For

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[1] This discussion is based on, Murphy, J. Policies in conflict: Undermining corporate self-policing, 69 Rutgers U.L. Rev. 421 (2017), *available at* http://www.rutgerslawreview.com/wp-content/uploads/2017/07/Joseph-Murphy-Policies-in-Conflict-69-Rutgers-U.-L.-Rev.-421-2017.pdf.

[2] *See* Andreas Stephan, "Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels," CCP Working Paper 09-09 (July 2009) *available at* http://www.uea.ac.uk/polopoly_fs/1.122147!ccp09-9wp.pdf.

example, consider some of the compliance officers in companies today. How could an "associate general counsel" be considered an "officer" for any purpose, let alone when confronting senior executives who are real officers with real power? How could a major corporation with enormous C&E issues assign this difficult, time-consuming task to an already overworked company general counsel who has no chance of devoting the necessary time and energy to this task? How is a compliance officer who can be fired at any moment, without board approval, supposed to stand up to strong managers? How is a compliance officer who has no say over the treatment of compliance liaisons in the field supposed to have effective reach outside of corporate headquarters?

Consider the significance of the first weakness identified above – high-risk executives. A weak CECO exacerbates this flaw. In the corporate world, asking someone to "police up," i.e., trying to enforce rules against people superior to them, is a recipe for failure. What corporate person wants to confront his or her boss? What person feels protected when dealing with colleagues capable of causing him or her great career and financial harm?

Where the CECO is in a position of weakness the employees' faith in the entire C&E program is undermined. For example, strong language prohibiting retaliation in a company "code of conduct" is ineffective if employees know that senior managers can ignore a powerless CECO. Fear of retaliation becomes worse where the CECO and the program are known by employees to be toothless. Indeed, the weakness of a CECO either drives or makes worse the variety of other weaknesses in compliance programs.

The CECO needs to be a senior officer in title, appearance and power. The CECO needs strong, regular, unfiltered personal access to the board or a board committee that controls the CECO's treatment. A CECO needs sufficient independence so he or she can make decisions based on professional standards[4] without fear.

A CECO needs empowerment to make things happen. Resources are necessary so that the work can get done. The CECO needs line of sight into what is going on throughout the company. The CECO must be able to establish C&E advocates or liaisons in all parts of the business. She or he needs to be part of the key decision making and connected to the real power in the company.

3. Not recognizing the power of incentives

To my knowledge, I have written the only extensive analysis on using incentives in C&E programs.[5] Why me? Apparently, no one else thought it important enough, even though incentives make up part of the compliance program requirements in the Sentencing Guidelines.[6] But why are incentives so important? For the same reason businesses use them: they actually drive human behavior. And what is C&E about? Driving human behavior.

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[3] *See* Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance Officer (August 2007) *available at* http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO_Definition_8-13-072.pdf; Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds (RAND 2009) *available at* http://www.rand.org/pubs/conf_proceedings/CF258/.

[4] *See* Code of Professional Ethics for Compliance and Ethics Professionals, *available at* http://www.corporatecompliance.org/Resources/View/tabid/531/ArticleId/675/CODE-OF-PROFESSIONAL-ETHICS.aspx.

[5] Murphy, J. "Using Incentives in Your Compliance and Ethics Program" (Society of Corporate Compliance and Ethics; Nov. 2011), *available at* http://www.corporatecompliance.org/Resources/View/tabid/531/ArticleId/814/Using-Incentives-in-Your-Compliance-and-Ethics-Program.aspx.

[6] United States Sentencing Commission Guidelines Manual, §8B2.1(b)(6).

In the words of the late management expert Peter Drucker:

> "[C]hanging habits and behavior requires changing recognitions and rewards. People in organizations, we have known for a century, tend to act in response to being recognized and rewarded – everything else is preaching. . . . The moment they realize that the organization rewards for the right behavior they will accept it."[7]

Power comes with the ability to control incentives including pay, promotions and recognition. As they say in investigating fraud, "follow the money."

Yet weaknesses in this area are endemic. In antitrust, the weakness can be seen in the well-regarded guidance for antitrust compliance provided by the International Chamber of Commerce (ICC).[8] In its Antitrust Compliance Toolkit, a valuable source that I recommend to those doing antitrust compliance work, the ICC waffles only on the issue of using incentives in C&E programs:

> However unlike more mainstream antitrust compliance programme measures, such as training and in-depth antitrust legal assessments, incentives have often proven to be controversial in theory and difficult to implement in practice. Therefore, you should carefully consider what incentives your company wishes to (or can legally) provide to ensure that antitrust compliance processes are followed.

So, in antitrust, an area largely driven by economic analysis, the entire role of incentives in driving C&E programs is left hanging by the ICC.

There are many who ascribe corporate crime and misconduct to an undue focus on short-term business results. Of course, to the extent this is true it comes from the misdirection of incentives. There are, however, a number of ways in which to apply the Sentencing Guidelines standard relating to incentives. One of the most important and obvious is that the CECO needs to be "in the room" when the incentive system is being developed.

Some companies give awards for C&E leadership. Some have little check boxes on evaluation forms. Asking. "Is this enough?" is like asking, "For training, is it enough to have a 15-minute code of conduct video?" It might be a small step in the right direction, but it takes much more to be effective. Notably, the Department of Justice's Fraud Section's Foreign Corrupt Practices Act (FCPA) enforcement guidance said that prosecutors will consider, *inter alia*, "How a company's compliance personnel are compensated and promoted compared to other employees."[9] The Fraud Section's FCPA guidance shows there is much that can be done with incentives to meet the Sentencing Guidelines, change corporate culture, and prevent illegal conduct in companies.

4. Relying on trust as a control

I once heard a respected colleague in the C&E field lament that his company had to learn the hard way that "trust is not a control." Yet I see this approach of untested trust throughout the compliance and ethics landscape. Whether it is corporate boards trusting their senior management, or C&E people relying on training and messages, or C&E

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[7] Drucker, "Don't change culture – use it," Wall Street Journal A14 (Mar. 28, 1991).

[8] International Chamber of Commerce, The ICC Antitrust Toolkit: Practical antitrust compliance tools for SMEs and larger companies (2013), *available at* http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2013/ICC-Antitrust-Compliance-Toolkit/.

[9] United States Department of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*," available at* https://www.justice.gov/opa/file/838386/download.

conferences where the focus of attention is on various forms of communications, there continues to be a resistance to focusing on the "harder edge."

What is included in this harder edge? Compliance auditing, monitoring, internal controls and discipline. Here are some examples of the gaps.

Item 1 of the Sentencing Guidelines elements says "standards and procedures" yet almost every description of Item One treats it as if it says "standards and standards." The Guidelines Commentary is quite clear in including "internal controls" in the definition of "procedures." But no one notices.[10]

What is the best way to prevent misconduct? Behaviorists may point to the use of psychology. Culture experts will point to an effective culture. But logically the best way to prevent misconduct is to make the misconduct impossible. For example, if you do not want people to steal cash, try to remove cash from the process. The next best option after that is to make the misconduct extremely difficult and unsafe. This is part of the internal control process.

When the Sentencing Guidelines refers to auditing it is specifically described as being for the purpose of "detect[ing] criminal conduct." This is a tough, difficult standard, and not at all a popular topic. In a Society of Corporate Compliance and Ethics survey of antitrust compliance programs, most respondents did not meet even the minimum standard of the Sentencing Guidelines in their auditing; this weak survey result is likely biased <u>in favor</u> of companies because there was no verification of what auditing was actually being done.[11] Even where audits are conducted, there is enormous reluctance to use modern technological tools such as data screening.

Today the compliance literature is awash with rhapsodic references to culture. Culture counts, but it is no cure-all. Those who focus on culture are dealing with averages and "typical" participants in an organization. In a C&E program, success is not determined by averages; corporate crime is not committed by majority vote. Unfortunately, the reality is that a certain percentage of the population is composed of psychopaths and sociopaths. Especially as one moves up in a company (to the high risk executive groups) the percentage of narcissists increases.[12] These people are not going to be controlled by the culture or anything else in the corporate air. However, holding bad actors accountable can also contribute to a strong, ethical culture.

5. Being mesmerized by clichés, buzz-words and other shiny objects

Compliance and ethics is a multidisciplinary field, drawing from a variety of other areas. C&E people use the wisdom and tools in these different disciplines to build the right culture and take the right steps to prevent and detect misconduct. However, this multidisciplinary approach also has been an invitation to these other fields to claim that C&E is a mere wholly-owned subsidiary of their discipline or profession.

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[10] See Murphy, "Where Do the Sentencing Guidelines Say "standards and standards"?" <u>Compliance & Ethics Professional</u> 76 (Sept./Oct. 2012).

[11] Murphy, "Antitrust Compliance Programs: SCCE's Survey Says They Are Less Than They Should Be", *available at* http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/ (June 20, 2012).

[12] See, e.g., Gene Marks, 21 percent of CEOs are psychopaths. Only 21 percent?, Washington Post online (Sept. 16. 2016), *available at* https://www.washingtonpost.com/news/on-small-business/wp/2016/09/16/gene-marks-21-percent-of-ceos-are-psychopaths-only-21-percent/?utm_term=.33b6c26b9699.

Also, as a relatively young field, C&E too often tends to be tossed around by newbies who arrive, like Moses from the mount, to announce to us misguided souls that we have been wrong all along, and all we need to do is follow their bright, shiny ideas.

Thus, we may hear "it's all about culture" or "it's all about having the right people" or "it's all about behavioral elements" and so on. We have even heard that instead of fighting corporate crime, we should use compliance programs to champion social activism. We have witnessed acronym and buzzword eruptions, with GRC, ERM, CSR[13], sustainability, etc. Each may contribute valuable information, yet each needs to be placed intelligently in perspective and not used as a replacement for doing our jobs.

Much of this collection of buzzwords and shiny objects comes with the urging to "go beyond the Sentencing Guidelines." And therein lies the heart of this fifth dangerous weakness. Those who try to buzzword through this space seem never to have actually read the Sentencing Guidelines or given serious thought to what they actually say. Repeatedly, when there is an attempt to "summarize" the Guidelines the result is to bulldoze out much of the hard work and the real genius in those standards. The Guidelines are a list of sound management tools. That is the reason they are there, and that is why they work. Like any management system, there are smart ways and dumb ways to use them. But if one does not use available management tools in an organization, nothing changes, and nothing gets done.

A final shiny object is one that should be considered good advice but is often misapplied: "tone at the top." In the real world, "tone at the top" is wrongly translated into "talk at the top." Instead of mere talk, the key to setting a tone is action. The CEO needs to support fully what the CECO is doing and be an active participant in the C&E program.

6. Shopping the Sentencing Guidelines

The Sentencing Guidelines set out the minimum steps for an effective compliance program. While this is literally only true in the United States, the core management steps are similar among program standards globally. Any company following the Sentencing Guidelines' standards will be well-positioned under any other international standard, with relatively minor adjustments. Within those minimum standards, companies have enormous flexibility. Thus, the approach has been well-described as "structured flexibility." This should mean that no program gets credit or recognition unless it covers all the elements.

Yet people tend to ignore this point and treat the seven Sentencing Guideline elements as a list of options from which one can choose as one pleases. This has been true both for companies developing programs, and for government agencies borrowing from the Sentencing Guidelines' standards. For example, it would be straightforward for prosecutors and regulators, when requiring companies to implement or enhance programs, to start with a fundamental point: the program must meet the minimum standards of the Sentencing Guidelines. Yet this has been absent. Even the Antitrust Division, in imposing a compliance program in both a criminal case[14] and a civil case[15], failed to take this simple step, instead using a different approach in each case.

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[13] GRC is "governance, risk and compliance;" ERM is "enterprise risk management;" and CSR is "corporate social responsibility."

[14] United States v. AU Optronics Corporation et al, Cr-09-0110 Si, Declaration Of Heather S. Tewksbury, N.D. Cal., September 20, 2012, Exhibit C, http://www.justice.gov/atr/cases/f286900/286934_7.pdf.

[15] United States v. Apple, Inc., Nos. 1:12–CV–2826, 1:12–CV–3394, 2013 WL 4774755, at *4–5 (S.D.N.Y Sept. 5, 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

Picking and choosing from the list is a serious error. The points that are omitted, while they may only appear to be small parts of any given Sentencing Guidelines element, are vital to the success of any program. These types of "shopping" errors include:

1. Omitting "internal controls" as part of Item One, and reading it as if it only said "codes of conduct".
2. Ignoring Item Three's requirement that promotions be screened to prevent those with a likelihood for misconduct from being promoted.
3. Failing to provide full "training" to boards of directors, as set forth in Item Four, instead giving only high-level presentations on the program.
4. Not conducting monitoring and auditing as required in Item Five, designed "to detect criminal conduct" (instead just counting numbers of people trained).
5. Not fulfilling Item Five's requirement to evaluate the program for effectiveness. All aspects of the program need to be measured.
6. Not following Item Five's directive to prevent retaliation. Language in a code barring retaliation is meaningless if nothing is done to back it up.
7. Ignoring Item Six's direction to impose discipline for failure to take reasonable steps to prevent and detect violations. Companies only disciplining workers for offenses fail this test.
8. Not using incentives to promote the program, as directed by Item Six. This is a major error, as noted above.
9. Ignoring the commentary's requirement that a program be up to industry practice. If a program is not at least as good as others in the applicable industry, it does not meet the minimum standards.

Of the dangerous flaws in C&E programs, this last flaw is one where the fault likely rests directly with government enforcers. If the government had made it clear from the beginning that "minimum" means "minimum," that the Sentencing Guidelines' standards were not a collection of synonyms, and that each element was in the standards for a reason, companies would have started to get the message.

Here is the constant theme in these six dangerous weaknesses. Fighting corporate crime and misconduct is hard, gritty work. You cannot rely on magic fairy dust to succeed. Read, listen and learn what you can from new approaches. But keep your bearings. Most importantly, test things out. Find what works and drop what does not. And recognize how important your daily work of preventing corporate crime truly is.

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For 40 years, ***Joe Murphy***, CCEP, has been a tireless champion of compliance and ethics in organizations and has done compliance work on six continents. Joe has published over 100 articles and given over 200 presentations in 19 countries. Joe is author of 501 Ideas for Your Compliance & Ethics Program and A Compliance & Ethics Program on a Dollar a Day. He is a Certified Compliance & Ethics Professional and a member of the board of the Society of Corporate Compliance & Ethics. Joe was named one of The National Law Journal's 50 Governance, Risk and Compliance Trailblazers and Pioneers 2014 and was a recipient of the SCCE Compliance and Ethics Award.

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Applied Legal Ethics: Analyzing the Effectiveness of Utilizing Legal Technology to Protect Privileged Documents from Disclosure

By: Peter Gronvall and Nathaniel Huber-Fliflet

The Ethical Obligation of Protecting Privileged Documents from Disclosure

There may be no stronger imperative in litigation and investigation matters than protecting privileged communications and data from disclosure to adverse parties. Corporations and their legal teams are singularly focused on this objective, because of the substantial and potentially irreversible risks that could result from a failure to achieve this objective. The obligation to protect privileged documents supersedes case litigation considerations; it stems from fundamental ethical obligations of legal practice. The protections of legal privilege are central to effective client advocacy: they foster and protect creative and thoughtful discourse between client and attorney, and they remain an essential part of the U.S. legal advocacy process.[1]

Protecting privileged information from disclosure is a long established legal principle ensuring attorneys open and presumptively non-discoverable communication channels through which to render legal advice to clients.[2]

It is important to note, however, that attorneys invoking the protections of legal privilege to withhold client communications or related work-product materials are subject to errors and mistakes in designating materials as privileged. Claiming attorney-client privilege (or its related work-product doctrine protection) today requires a nuanced and thoughtful approach, subject to scrutiny by requesting parties. Determining when the privilege applies in the context of a document review requires an element of sophistication in assessing claims of privileged relationships between senders and recipients of communications. It is not surprising that in modern legal practice, the application or claim of privilege can occur in a number of circumstances, and attorneys must account for all of those scenarios in making privilege determinations.

In today's legal practice, there are at least twenty-four scenarios in which the production of otherwise privileged documents could result in the nullification or "waiver" of privilege.[3] It has been observed that "few issues arise with greater frequency in civil litigation than whether a document is privileged, to prevent those communications from compelled disclosure by virtue of the attorney-client or work-product doctrine privilege."[4]

In matters that involve massive volumes of potentially-relevant data, today's legal teams risk nullifying or waiving privilege protections, if privileged documents are somehow 'missed' during the document review process and thus disclosed. As a result, attorneys could easily put privileged documents at risk to be produced to the requesting or opposing party. As any reader of this article knows, inadvertent production of privileged communications or work-product documents can have substantial implications; disclosure of privileged

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[1] J. Unger, "Maintaining the Privilege: A Refresher on Important Aspects of the Attorney-Client Privilege," Business Law Today, Oct. 2013, Retrieved from https://www.americanbar.org/publications/blt/2013/10/01_unger.html.

[2] E. Epstein, "The Attorney-Client Privilege and the Work-Product Doctrine, Volume 1." American Bar Association, 2007, pp. 4-5.

[3] *Id*. at 398.

[4] *Id*. at 2.

information could be devastating to the legal claims or defenses at hand, because those documents could provide an opposing party with insights into a client's proposed legal strategy, case-planning decision-making process, or internal – and confidential – investigation findings.

So an essential question is, in today's data-intensive matters, what can lawyers do to help ensure that privileged documents are identified, flagged, and protected from disclosure? An important part of the answer to that question, in our view, lies in the use of technology. To wit, technology solutions can be deployed in a defensible and repeatable manner – beyond simple search terms, for example – to identify and withhold privileged documents.

This article will briefly explore some of the key concerns around using technology to help with that important, practical requirement.

Today's Data Volumes Place Critical Stress on Lawyers' Ethical Obligations to Protect Privileged Documents from Disclosure, and the Answer to that Challenge May Be the Use of Technology Solutions

At this point in corporate law, data volumes have grown so large that it has been difficult for lawyers to remain apace with their obligations to keep their clients' privileged data confidential. As a result, attorneys are turning to new tools to identify privileged documents to withhold from disclosure. Data volumes at issue in modern litigation are truly staggering. It is estimated that by current rates, by the year 2020, the accumulated digital universe of data will grow from 4.4 zettabytes today to around 44 zettabytes, or 44 trillion gigabytes.[5] This statistic alone is daunting.

The practical challenge is clear, with data volumes now irreversibly large, how can attorneys abide their ethical obligations to protect privileged documents from disclosure? While the solution will not be simple, it will undoubtedly embrace the use of technology.

Using Advanced Analytics – Beyond Search Terms – to Protect Attorney-Client Privileged Material from Inadvertent Disclosure and Waiver

Legal teams today are increasingly relying upon text analytics to search for and identify privileged documents in order to withhold them from production to requesting parties. Using search terms is an important part of that. But to further improve their results, lawyers are now looking to predictive modeling techniques to enhance the results and to improve their productions.

Properly deployed, keyword searching and predictive modeling are used to identify and then eliminate privileged documents from disclosure. While keyword searching has been a core element of privilege review for decades, and while predictive modeling is becoming more popular as a technique for that type of filtering, the research indicating how well those separate technologies actually performed is still sparse.

To this end, Ankura performed a study to measure how effectively keyword searching and predictive modeling techniques performed when tasked with both targeting and segregating privileged content, as well as withholding the segregated content from disclosure.

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[5] B. Marr, "Big Data: 20 Mind-Boggling Facts Everyone Must Read," Forbes, 2015, Retrieved from https://www.forbes.com/sites/bernardmarr/2015/09/30/big-data-20-mind-boggling-facts-everyone-must-read/#3d83169417b1.

Analysis of Common Market Methodologies Used to Identify and Protect Privileged Data from Disclosure

Ankura examined how effectively keyword searching and predictive modeling techniques protect against the disclosure of privileged information. The intent of our study was to evaluate the strengths and weaknesses of traditional and advanced approaches in litigation scenarios – to see how keyword searching performed as compared to predictive modeling – and not necessarily to determine whether one approach was more effective than the other. Further, our approach was to evaluate the efficacy of the two approaches measured against the ethical requirements to protect privileged data incumbent on legal practitioners. As such, the study examined the following important considerations:

- Utilizing Keyword Searches to Identify Privileged Documents
    - How much of the privileged-document population do keywords successfully help identify?
    - In keyword searching scenarios, how many 'not privileged' documents are typically also reviewed to conduct a comprehensive privilege review?
- Deploying Predictive Modeling Technology to Identify Privileged Documents
    - Can predictive models effectively target privileged content?
    - Can predictive models find privileged content that keyword searching cannot necessarily identify?

Ankura conducted this study by performing a 'look-back' on documents associated with three confidential, recently-active corporate legal matters.[6] The data sets from these matters were comprised of an array of data types, including email, Microsoft Office documents, PDFs, and other text-based documents. Prior to the study, teams of attorneys had reviewed all documents in each of the data sets. Their coding designations of those documents as 'privileged' or 'not privileged' were used to measure the effectiveness of each privilege-targeting technology: keyword searching and predictive modeling.

Figure 1. Data Set Details

Data Set Name	Total Documents	Privileged Documents Coded by Attorneys	Not Privileged Documents Coded by Attorneys	Privilege Richness Rate
Matter A	360,531	46,756	313,775	12.97%
Matter B	397,289	14,326	382,963	3.61%
Matter C	8,715,165	536,788	8,178,377	6.16%

[6] Those clients assented to our confidential use of those data sets, including the coding designations in those data sets.

Experiments and Results

Keyword Searching

Keyword searching experiments evaluated the performance of each matter's keyword terms using a comprehensive list of keywords developed by attorneys. Matters A, B, and C contained 845, 6,771, and 7,140 search terms, respectively. The search term lists consisted of words including 'privileged', 'legal', and 'attorney-client,' as well as search terms representing known email addresses, law firm names and email domains.

After applying each matter's keyword search term list to its respective data set, we calculated the recall and precision of each search term list. These measurements were made possible because the attorney-review coding was transparently available for each matter. As industry participants know, recall and precision are two commonly-known metrics that are regularly used to evaluate the effectiveness of text analytics technologies within the legal industry. These metrics helped Ankura interpret the strengths and weaknesses of the privileged-document targeting technologies. The following are brief definitions:

- Recall – This measurement quantifies the proportion of privileged documents in the data set that are identified by the privilege-targeting method. This metric helps to confirm the completeness of the privilege review. The higher the recall rate, for example, the better for the producing party. High recall rates in a document set result in more privileged documents being segregated and targeted for review by the attorneys, and ultimately protected by being withheld from production.
    - For example, in high-recall rate scenarios, if there are 100 privileged documents in a hypothetical data set of 1,000 documents and 75 privileged documents are identified by the targeting method, the recall rate would be 75%.
- Precision – This measurement quantifies the proportion of documents identified by the privilege-targeting method that are actually privileged. This metric helps confirm the efficiency of the review for privileged documents. As with the recall rate, the higher the precision rate, the better, however, no privilege-targeting method is perfect. During privilege review this study found that there will be nonprivileged documents flagged as keyword term hits or by the predictive model – resulting in the review of some categorically not privileged documents by attorneys.

A high precision rate minimizes the number of nonprivileged documents that legal teams must review in order to identify the privileged documents. With a maximized precision rate thus enhancing the privilege review, the ultimate production results in better quality and reduced costs.

- By way of example, if 150 documents are identified as potentially privileged by the targeting method within the hypothetical 1,000 document data set and 75 of those are coded privileged by the review team, then the resulting precision rate would be 50%.

Recall and precision are usually inversely proportionate measures: as recall rates increase, precision rates usually decrease, and vice versa. Ankura observed that it was unlikely that keyword searching and predictive modeling would maximize both metrics of recall and precision.

Figure 2. Keyword Searching Results

Data Set Name	Recall	Recall Details	Precision	Precision Details
Matter A	93.78%	The term list hit on 43,848 of 46,756 privileged documents	22.72%	22 out of every 100 documents that hit on the term list were privileged
Matter B	94.73%	The term list hit on 13,571 of 14,326 privileged documents	3.68%	3 out of every 100 documents that hit on the term list were privileged
Matter C	94.74%	The term list hit on 508,553 of 536,788 privileged documents	20.39%	20 out of every 100 documents that hit on the term list were privileged

The results of these experiments demonstrated that keyword searching could be a very effective privilege-targeting technology in some circumstances. The search term lists from these matters contained an extensive list containing both broad as well as specific terms. Each matter's search term list identified more than 93% of the privileged documents in the data set.

To achieve that level of recall, the precision rates resulting from these search term lists required extensive document review. For example, Matter C's results required review of more than 6.5 million not privileged documents to achieve a 94.74% recall rate. These results also showed that roughly 6% of the privileged documents were missed by keyword searching alone. While no search technique is perfect, this became an important observation to consider, especially as data volumes increase.

Additional Finding: Less comprehensive and less thoughtfully-crafted search term lists may not provide recall results comparable to those in this study.

Predictive Modeling as a Technique to Identify Privileged Documents

Ankura's experiments evaluated the performance of predictive modeling's ability to effectively target privileged documents, as compared to keyword term searching. Specifically, we set out to answer an important question: could predictive modeling help find privileged documents that keyword searching techniques would have otherwise missed?

How Does Predictive Modeling Work?

Predictive modeling uses advanced machine learning techniques to automatically classify unreviewed documents into predefined categories of interest (e.g., in this instance, attorney-client privilege or work-product documents). Predictive modeling techniques employ text classification, a form of supervised learning, to make a binary decision – to designate a document as privileged or not privileged. Utilizing training documents (documents previously identified by lawyers to teach the machine what is and what is not a privileged document), a predictive model analyzes the textual content of each 'privileged' and 'not privileged' training document.

When our model was trained and deployed, it was then used to rank each document in the unreviewed data set with a probability score (ranked from 0-100 in terms of likelihood of falling into those 'privileged' or 'not-privileged' categories) and that score indicated the likelihood that each document was either privileged or not privileged. We found that it follows from this approach that a higher 'privileged' score indicates a greater chance that a document contains privileged material, and thus could be withheld from disclosure.

During this study, Ankura developed a predictive model for each matter using a random sample of 5,000 training documents pulled from each data set. As stated previously, the data sets were reviewed by attorneys, and their coding was used to develop and test the predictive models.

Figure 3. Predictive Model Training Sets

Data Set Name	Total Training Documents	Privileged Documents Coded by Attorneys	Not Privileged Documents Coded by Attorneys	Privileged Richness Rate
Matter A	5,000	689	4,311	13.78%
Matter B	5,000	170	4,830	3.40%
Matter C	5,000	326	4,674	6.52%

In this predictive modeling experiment, the following algorithm and parameters were selected to develop the predictive models:

- Ankura deployed the Logistic Regression machine learning algorithm to create the predictive models. One of Ankura's prior studies demonstrated that predictive models generated with the Logistic Regression algorithm perform quite well on legal matter documents.[7]

- Ankura employed other parameters for modeling, including 'bag of words' with 1-gram and normalized frequency, and 20,000 tokens were used as features.

After generating the study's predictive models, Ankura examined the precision of each model, measured against similar recall rates previously-achieved using keyword searching techniques. This analysis provided Ankura with the ability to accurately compare the results of the predictive modeling and keyword searching technologies.

[7] R. Chhatwal, N. Huber-Fliflet, R. Keeling, J. Zhang and H. Zhao, "Empirical Evaluations of Preprocessing Parameters' Impact on Predictive Coding's Effectiveness," Proc. 2016 IEEE International Big Data Conference.

Figure 4. Predictive Modeling Results and Keyword Searching Comparison

Data Set Name	**Predictive Modeling**		**Keyword Searching**		**Precision Comparison**
	Recall	Precision	Recall	Precision	
Matter A	93.78%	30.11%	93.78%	22.72%	7.39%
Matter B	94.74%	4.44%	94.73%	3.68%	0.76%
Matter C	94.74%	17.43%	94.74%	20.39%	-2.96%

Analyzing the results from the figure above, Ankura found that predictive modeling performed just as well as, if not sometimes better than, keyword term searching. In Matter A, at a recall rate of 93.78%, the resulting precision rate was more than 7% higher when compared to the results produced by its corresponding keyword searching experiment. For Matter B, a higher predictive modeling precision rate was observed against its corresponding keyword searching experiment. For Matter C, the precision rate of predictive modeling was nearly 3% lower than its corresponding keyword searching experiment.

Another observation from these experiments stemmed from the significant impact that the resulting precision rates had on the resulting document review. For instance, in Matter A, a 7% increase in precision resulted in reviewing 25,0000 fewer documents. At an estimated cost of $1.00 a document for first pass review, this precision rate translated into an estimated saving of at least $25,000.

In sum, Ankura's results demonstrated that predictive modeling, properly deployed, can be a very effective technology-based solution for identifying privileged documents, both from accuracy and cost-savings perspectives.

Figure 5. Documents Identified by Predictive Modeling That Did Not Hit on Keyword Search Terms

Data Set Name	**Total Documents at 50% Precision or Greater and Did Not Hit on a Keyword Search Term**	**Coded Privileged by an Attorney**	**Coded Not Privileged by an Attorney**
Matter A	6,075	1,062	5,013
Matter B	2	2	0
Matter C	72,295	6,924	65,371

In recent years, keyword term searching was one of the only technologies available to target and withhold privileged documents from disclosure. The risk when deploying keyword searching is that a keyword term list could be too narrow, thus resulting in missing key documents, including by failing to find outside counsel domains or attorney names.

To evaluate a predictive model's ability to address this risk, Ankura performed additional experiments to determine if predictive modeling could identify privileged documents that did not hit on each matter's keyword search terms.

These additional experiments targeted a population of potentially privileged documents that fell within a precision rate of 50% or higher for each model and also did not hit on a keyword search term. As a result, Ankura observed that predictive modeling identified privileged documents that did not hit on a keyword search term utilized by the attorneys. For Matters A and C, more than 1,000 privileged documents were identified using predictive modeling that would have otherwise been missed by keyword searching.

These results were compelling. They evidenced how predictive modeling technologies enhance the ability to efficiently target privileged documents when compared to using keyword searching as a standalone privilege-targeting method.

Conclusion: Dynamic Use of Keyword Searching Combined with Predictive Modeling Can Enhance the Effective Protection of Inadvertent Disclosure of Privileged Documents in Legal Matters

Protecting privileged communications and data from inadvertent disclosure is a fundamental ethical obligation for counsel. Today, the challenges of privilege review require the use of intelligent solutions, combining keyword search terms and predictive modeling techniques.

This study demonstrated that keyword searching is a powerful privileged-document targeting technology by itself. Indeed, comprehensive search term lists can find the vast majority of privileged communications. But perhaps most importantly, this study also validated that predictive modeling as also a very effective privilege-targeting tool, and sometimes can outperform keyword searching. Importantly, predictive modeling can help to identify privileged documents that do not hit on keyword search terms, making it a powerful addition to any privilege review that sets out to utilize keyword search terms alone as a strategy.

The legal community should continue to develop a robust and comprehensive review strategy to manage the protection of privileged content, especially as it relates to disclosure and production issues. Lawyers are understandably concerned with meeting their ethical obligations and thus should be willing to advance those ethical goals through the use of technology. Technology is here to help lawyers, and lawyers in turn should embrace it.

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LITIGATION OVER EMPLOYEE "NO-POACH" AGREEMENTS CONTINUES TO PICK UP STEAM

By: C.J. Donald and Thomas J. Lang

Companies sometimes enter into so-called "no-poach" agreements: a pact not to compete for each other's employees. If such a covenant is not reasonably necessary to any separate, legitimate business collaboration between those companies, the no-poach agreement is considered "naked." Because they eliminate free competition, naked no-poach agreements are per-se unlawful.[23] In October 2016, the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") issued *Antitrust Guidance for Human Resources Professionals*[24] (the "Guidance") and an accompanying document called *Antitrust Red Flags for Employment Practices*[25] ("Red Flags"). The Guidance and Red Flags were a warning to Human Resources professionals that "naked" employee no-poach agreements might be prosecuted criminally by the DOJ going forward.

Before October 2016, the antitrust agencies had typically pursued employment-related antitrust violations as *civil* antitrust violations. For example, the DOJ entered into consent decrees in 2014 with eight well-known technology-related companies that had reached reciprocal agreements to not "cold-call" or hire each other's employees.[26] The DOJ contended that these agreements violated Section 1 of the Sherman Act because the agreements were an unreasonable restraint of trade. The no-poach agreements allegedly eliminated competition and deprived employees of access to better job opportunities, compensation, benefits, and working conditions. The DOJ investigation eventually led to civil class actions against Apple, Google, Intel, Adobe, Intuit, Pixar, and Lucasfilm that ultimately settled for over $435 million in total.[27]

In early 2018, the DOJ's Assistant Attorney General for Antitrust, Makan Delrahim, expressed public surprise at the number of no-poach agreement investigations underway at the DOJ.[28] Shortly thereafter, the DOJ announced a civil settlement with rail equipment suppliers Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. ("Wabtec") over allegations of a long-running no-poach agreement.[29] Because Knorr-Bremse and

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[23] U.S. DEP'T OF JUSTICE, NO MORE NO-POACH: THE ANTITRUST DIVISION CONTINUES TO INVESTIGATE AND PROSECUTE "NO-POACH" AND WAGE-FIXING AGREEMENTS (Spring 2018), *available at* https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

[24] U.S. DEP'T OF JUSTICE ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDANCE FOR HUMAN RESOURCES PROFESSIONALS (2016) ("Guidance"), *available at* https://www.justice.gov/atr/file/903511/download.

[25] U.S. DEP'T OF JUSTICE ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION, ANTITRUST RED FLAGS FOR EMPLOYMENT PRACTICES (2016) ("Red Flags"), *available at* https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_red_flags.pdf.

[26] *See generally* U.S. DEP'T OF JUSTICE, *Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements* (May 1, 2014), *available at* https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements.

[27] *In re High-Tech Employee Antitrust Litig*., No. 11-CV-02509-LHK, 2015 WL 5159441, at *3 (N.D. Cal. Sept. 2, 2015); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-2509-LHK, 2014 WL 10520477, at *2 (N.D. Cal. May 16, 2014).

[28] Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are in The Works*, LAW360 (Jan. 19, 2018), *available at* https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works.

[29] U.S. DEP'T OF JUSTICE, *Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (Apr. 3, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete. Following on the DOJ's settlement, 21 civil class action cases were filed on behalf of former employees of Knorr-Bremse AG and Wabtec. Those cases have been

Wabtec terminated their agreement before the DOJ's 2016 guidance was issued, the DOJ pursued the case as a civil Section 1 matter, rather than bringing criminal charges.

Since the DOJ's action against the rail equipment suppliers, there has been a veritable flood of employee no-poach investigations, lawsuits and settlements, at both the state and federal levels, around the country in a multitude of industries – particularly those industries where franchise relationships are prevalent. In industries where franchise relationships are common, a typical employee no-poach clause prohibits or limits one franchisee from recruiting or hiring the employees of other franchisees and/or from corporate-owned outlets. Franchisors claim that employee no-poach agreements are ancillary to legitimate franchise agreements and that they are needed to incentivize franchisees to train and invest in employees, particularly in industries with typically high employee turnover. In other words, franchisors do not believe their no-poach agreements are "naked," because each agreement is reasonably necessary to achieve legitimate business collaboration.

A State Attorney General Leads the Charge Against No-Poach Agreements

Although the DOJ has clearly raised the stakes when it comes to investigating employee no-poach agreements, arguably the most impactful recent legal efforts against employee no-poach agreements in the franchise agreement context have emanated not from the DOJ's Antitrust Division in Washington, D.C., but instead from the State of Washington. In 2018, Washington Attorney General Bob Ferguson reached "assurance of discontinuance" agreements with 50 national chains[30] in the fast food,[31] fitness,[32] auto repair,[33] and other industries.[34] Assurance of discontinuance agreements require franchisors to stop enforcing and to remove employee no-poach agreements from their franchise agreements. Ferguson's efforts were

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consolidated in a multidistrict litigation ("MDL") proceeding in the U.S. District Court for the Western District of Pennsylvania under Judge Joy Flowers Conti. *See In re Ry. Indus. Employee No-Poach Antitrust Litig.*, 326 F. Supp. 3d 1381, 1382 (U.S. Jud. Pan. Mult. Lit. 2018).

[30] Office of the Att'y Gen., *AG Ferguson's Initiative to End No-Poach Clauses Nationwide Secures End to Provisions at 50 Corporate Chains* (Jan. 14, 2019), *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-secures-end-provisions.

[31] A&W, Arby's, Applebee's, Auntie Anne's, Baskin Robbins, Bonefish Grill, Buffalo Wild Wings, Burger King, Carl's Jr., Carrabba's Italian Grill, Church's Chicken, Cinnabon, Denny's, Dominos, Dunkin Donuts, FireHouse Subs, Five Guys, IHOP, Jack in the Box, Jamba Juice, Jimmy John's, Little Ceasers, McDonald's, Menchie's, Outback Steakhouse, Panera, Papa John's, Pizza Hut, Popeyes, Quiznos, Sonic, The Original Pancake House, Tim Hortons, Wingstop, , , ,. *See, e.g.* Office of the Att'y Gen., *AG Ferguson Secures End to No-Poach Provisions at Eight More Restaurant Chains Nationwide* (Sept. 13, 2018), *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-secures-end-no-poach-provisions-eight-more-restaurant-chains; Office of the Att'y Gen., *AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide* (Jul. 12, 2018), *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

[32] Anytime Fitness and Planet Fitness. Office of the Att'y Gen., *AG Ferguson Announces Major Milestones in Initiative to Eliminate No-Poach Clauses Nationwide, Files Lawsuit Against Jersey Mike's* (Oct. 15, 2018), *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-major-milestones-initiative-eliminate-no-poach-clauses.

[33] Jiffy Lube and Valvoline. *See generally* Office of the Att'y Gen., *AG Ferguson's Initiative to End No-Poach Clauses Nationwide Continues with Seven Additional Chains* (Dec. 20, 2018), *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-continues-seven.

[34] Batteries Plus Bulbs, Budget Blinds, Circle K, Comfort Keepers, Edible Arrangements, Frontier Adjusters, GNC, Jackson Hewitt, LaQuinta, Management Recruiters International, Massage Envy, and Merry Maids. *See generally* Office of the Att'y Gen., AG Ferguson's Initiative to End No-Poach Clauses Nationwide Continues with Five Additional Chains (Dec. 5, 2018), *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-continues-five.

largely spurred by an economic paper published by Princeton University economists Alan Kruger and Orley Ashenfelter, which concluded that employee no-poach agreements cause downward pressure on affected employees' wages.[35] The economists examined franchise agreements of 156 companies with over 500 U.S. franchise locations and found that 58 percent of those major franchisors' contracts contained employee no-poach agreements.[36]

Ferguson claims that over 100,000 stores and millions of workers nationwide will benefit from his settlements with 50 companies, and that he is investigating additional no-poach agreements in a variety of industries including: hotels, car repair services, gyms, cleaning services, home healthcare services, convenience stores, tax preparation, parcel services, electronics repair services, child care, custom window covering services, travel services, and insurance adjustor services.[37]

Several chains that settled with Ferguson and removed no-poach provisions from their franchise agreements have nevertheless been hit with nationwide class action lawsuits in federal district courts around the country (*e.g.*, McDonald's, Papa John's, and Jiffy Lube[38]) while the tax preparation chain, H&R Block, is also battling state AG investigations and federal class action litigation over its employee no poach agreements involving both franchisee and corporate-owned outlets.[39]

Key Legal Issues Will Require Resolution

The class plaintiffs characterize the employee no-poach agreements as *per se* wage fixing agreements that result in lower wages paid for the employees' services. The complaints follow a similar template. First, they describe the specific franchise model used by the defendants. Second, they cite labor policy papers and statistics demonstrating the impact of no-hire agreements on employee mobility and wages. Third, the complaints allege that the plaintiffs were unable to move to a franchisee that offered superior pay or benefits, or that was more conveniently located, resulting in the plaintiff's, and all putative class members, suffering depressed wages and benefits.

Surprisingly, there is very little case law on whether the *per se*, *quick-look*, or *rule of reason* standard should apply to a Sherman Act Section 1 claim based on a no-poach provision in a franchise agreement. For example, the judge overseeing the recently filed district court action against McDonald's rejected application of the *per se* standard in favor of the *quick look* approach – a truncated form of the *rule of reason* analysis – because he found that the employee no-poach provisions at issue were ancillary to an otherwise procompetitive franchise agreement. The distinction is important because under the "quick look" review, McDonald's will be able to present procompetitive justifications for the agreements.[40]

Nor is it clear whether the *Copperweld* doctrine[41] applies to the relationship between a franchisor and franchisee. Generally, the *Copperweld* doctrine bars anti-trust claims against members of one

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[35] Alan B. Krueger, Ph.D. and Orley Ashenfelter, Ph.D., *Theory and Evidence on Employer Collusion in the Franchise Sector*, (Nat'l Bureau of Econ. Research Working Paper No. 24831, 2018).

[36] *Id*. at 3–4.

[37] See supra note 30. AG Ferguson also filed a lawsuit in Washington state court in October 2018, against a single "hold out" chain, fast food operator Jersey Mike's with 1300 locations nationwide. *Washington v. Jersey Mike's Franchise Sys., Inc.*, No. 18-2-25822-7SEA (King Cty. Sup. Ct. *filed* Oct. 15, 2018), *available at* https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/20181015_Complaint_Filed_Conformed.pdf.

[38] *See, e.g.*, *Deslandes v. McDonald's USA LLC*, No. 1:2017cv04857, 2018 WL 3105955, at *1 (N.D. Ill. June 25, 2018); *Houstonv. Papa John's Intern'l*, No. 3:18-cv-835 (W.D. Ky. *filed* Dec. 14, 2018); *Fuentes v. Royal Dutch Shell PLC*, No. 2:18cv05174 (E.D. Pa. *filed* Dec. 3, 2018);

[39] *Maurella v. H&R Block Inc.*, No. 1:18cv07435 (N.D. Ill. *filed* Nov. 8, 2018).

[40] *See Deslandes*, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018).

[41] *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 777 (1984).

corporate family. One older district court opinion, *Williams v. IB Fischer Nevada,*[42] applied *Copperweld's* intra-enterprise conspiracy rule to a franchise agreement's no-poach provision and dismissed Section 1 antitrust claims on the basis that the franchisor and franchisee -- despite lacking a formal parent, subsidiary or affiliate relationship – should nevertheless be viewed as a single entity for Section 1 purposes:

> "In the twenty-four page franchise agreement, Foodmaker sets operating policies dictating things such as the restaurants hours of operation, the type of equipment that can be used by the restaurant, that the franchisee carry insurance that is approved by Foodmaker and even how far the owner of the franchise may live away from the restaurant. The agreement goes even farther in allowing Foodmaker to micro-manage the restaurant by requiring that Fischer comply with all of the specifications contained in detailed manuals supplied by Foodmaker. Whatever label the parties choose to attach to their relationship it is clear that Foodmaker exercises almost complete control over all of the decision effecting the operation of the restaurant. This plenary control, in addition to Foodmaker's and Fischer's common economic goals, make them a single enterprise, incapable of competing for purposes of Section 1 of the Sherman Act."[43]

The many civil no-poach franchise agreement cases filed in recent months are still in their early stages, and many may not proceed as *per se* cases or survive *Copperweld* analysis. Nevertheless, no-poach provisions in any industry create a real threat of a government investigation and potential employee class action litigation.

Meanwhile, plaintiffs are also challenging employee no-poach agreements in industries where franchise agreements are not at issue, and where the per se rule may potentially apply:

- **Travel Nurse Providers** – A California Court of Appeals recently affirmed a trial court ruling invalidating under California law an employee non-solicitation provision in confidentiality and non-disclosure agreements with travel nurses who temporarily staff medical facilities around the country.[44]

- **University Hospital Faculty** – A class was certified in an action against the University of North Carolina and Duke University Health Systems challenging a medical faculty no-hire agreement between the neighboring university medical systems.[45]

As a result, companies utilizing employee no-poach provisions – whether in a franchise agreement or otherwise – would be wise to consult with legal counsel to consider ways to mitigate the significant risk of a potential investigation and possible litigation related to such provisions.

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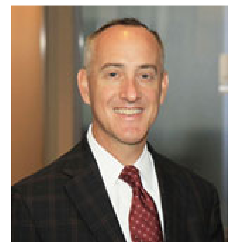

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[42] *Williams v. Nevada*, 794 F. Supp. 1026, 1033 (D. Nev. 1992), *aff'd sub nom. Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (noting that the franchises constituted "a common enterprise . . . incapable of intra-enterprise competition.").

[43] *Williams*, 794 F.Supp. at 1032.

[44] *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, No. D071924, 2018 WL 5669154 (Cal. App. 2018).

[45] *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2018 WL 671239, at *1 (M.D.N.C. Feb. 1, 2018). Class certification was granted on February 1, 2018. Defendants' summary judgment motions are pending, and trial is currently set for July 2019.