

The Five O'Clock News[®]

from America's Premier Career-Coaching and Outplacement Service

\$4.95

Nov - Dec 2003

A Publication of The Five O'Clock Club[®]—www.FiveOClockClub.com

Vol. 17 No. 10

"One organization with a long record of success in helping people find jobs is The Five O'Clock Club."
FORTUNE

THE LAW AND THE WORKPLACE

Supreme Court Rulings on Race and Retribution:

Implications for the Workplace

by Peter Hillman with David Madison, Ph.D.

The following article is based on Mr. Hillman's address to the Employment Roundtable. For a description of this organization, its mission statement and roster of membership, see the end of this article.

With thousands listening in on April 1, 2003 the Supreme Court heard the arguments in *Gratz vs. Bollinger* and *Grutter vs. Bollinger*, suits challenging the race-conscious admissions policy of the University of Michigan and its law school.

For only the second time in its history, the Court even allowed audio recording of the arguments, because of heightened public interest (the *Bush vs. Gore* case to settle the 2000 election was the first time). The recording was released within an hour of the dramatic confrontation, and even now is readily available on the Internet.

The University of Michigan found itself the target of lawsuits, and subsequently the focus of national attention, because of its policy of using race as a factor in weighing applications for



admission. There were actually two separate cases before the Court because the policies of the undergraduate school and the law school differed. The undergraduate school used a point system that prompted one justice to observe, "If nothing else, this is a thinly disguised quota." Points were awarded, for example, for high GPAs and SAT scores, serving in leadership roles, and for being African-American, Hispanic or Native American.

The law school, in contrast, welcomed minorities without using points, quotas or explicit

goals. While it avoided a numbers game, it didn't hide the fact that it sought a critical mass of diverse people: if two applicants had equal qualifications, it would favor the African-American, Hispanic or Native American if it felt to do so would help maintain minority representation and balance.

Affirmative Action: Now Deeply Rooted

These admissions policies—obviously forged with the very best intentions—almost inevitably

Continued on page 3

THE CHANGING ROLE OF ACCOUNTING PROFESSIONALS

KATE AND DALE TALK JOBS

Do Yourself a Favor: HIRE MY BROTHER

Everyone has a handicap—something they think will hold them back in their careers. It could be that they feel they are too young or too old, have too little education or too much, are of the wrong race, creed, nationality, sex or sexual orientation, or are very aware that they have a physical disability.

In fact, serious prejudice does exist. The subject is so sensitive that there is rarely honest discussion between people with opposing points of view. I hope articles like Peter's will get more dialogue going. Yet, in managing their own careers, people must try to forget about discrimination. Those who are too self-conscious about their perceived handicaps will hold themselves back. To advance, they must simply plow ahead and find an open window when doors are slamming shut all over town.

I got this attitude from my family. My younger brother, Robert, developed spinal meningitis when he was two years old. The medical specialists could not help. We all loved him, but in his grade school years we assumed he was mentally deficient. What he actually had was an uncorrectable speech and hearing defect.

Instead of sending him to high school, my parents sent him to a trade school to make sure he could earn a living. There, he became brave and asked his teachers to face him when they spoke so he could read their lips. When they forgot, he reminded them, and he graduated first in his class.

To make up for his lack of a high

school education, he went to junior college. Then he majored in metallurgy at the University of Pennsylvania—all the while insisting that his teachers face him so he could read their lips.

For much of the past 20 years, he's traveled the world as a marketing manager with corporations that have a metals specialty. His physical limitation is barely noticeable, he works like a demon and, as it turns out, he is as smart as can be.

"No excuses. Do your best. Get on with it." Because of my brother, that's what I've always told myself and that's what I tell my clients.

To managers, I say this: "Most of you do not understand. You have no idea what it's like to be judged on something other than your skills, talents and personality."

Bruce Faulk, a young, clean-cut, gifted actor—and a Five O'Clock Clubber—learned our techniques and did well in his career. He played in *Hamlet* on Broadway and toured Europe with *Hair*. Then they played in the U.S. One night after a show in Boston, Bruce went out for pizza. A few policemen stopped him and asked where he thought he was going. Bruce did not answer as respectfully as he might have. He was thrown in jail. Of course, Bruce is black.

Most of the black male professionals and executives I know have been treated unfairly by policemen. Or have been mistaken for messengers or delivery men. When I ask white male executives if they have ever experienced this sort of

thing, they can barely understand my question. It is so foreign to them.

Dear

Manager: Try to understand. Give different people a chance. Young people. Older people. People with physical limitations. People of different races, different ethnicities, different genders or sexual orientations. You will find plenty who work harder and are smarter than you would have imagined. You will be the winner for it.

And you will have hired my brother.
Kate Wendleton, President



THE FIVE O'CLOCK NEWS

from America's Premier Career-Coaching
Network

VOL. 17 No. 10 ISSN 1082-3492 Nov-Dec
2003

The Five O'Clock News is a publication of The Five O'Clock Club, published ten times a year for \$49. The Five O'Clock Club is a non-denominational organization based on traditional religious ethics. It provides affordable, state-of-the-art outplacement services directly to individuals and via the corporate market. Services include lectures and career counseling in small groups through a nationwide network of branches, and private job-search as well as executive coaching through certified Five O'Clock Club counselors.



Address all comments, questions & suggestions:

KATE WENDLETON

The Five O'Clock News
300 East 40th Street - Suite 6L
New York, N.Y. 10016

Kate Wendleton, President, Editor-in-Chief
David Madison, Associate Editor

Voice messaging system:
212-286-4500 ext.600 for information on
becoming a member and subscribing to
The Five O'Clock News.

Email: Info@FiveOClockClub.com

Copyright ©2003 by The Five O'Clock Club. No portion of this publication may be reprinted without the express written consent of The Five O'Clock Club. The writings contained within the pages of this publication do not necessarily reflect the opinions of The Five O'Clock Club. The Five O'Clock Club® and Workforce America® names and logos are registered trademarks. All rights reserved.



Peter Hillman

forced the issue of reverse discrimination, prompting the suits against the undergraduate school and law school. The issue in these cases was racial preference. The plaintiffs in both cases were

women (actually a man and a woman in the undergraduate case), but discrimination because of gender was not a factor. In fact, there are now more women than men in law school (51 percent to 49 percent).

Discrimination because of gender was not a factor. In fact, there are now more women than men in law school.

Affirmative action has been the subject of debate since the concept was born several decades ago, and these 2003 cases represented an opportunity for the Supreme Court to weigh in again on the topic—with potentially far-reaching consequences. The first famous case challenging affirmative action was that of Allan Bakke, a white man who sued the University of California for its race-conscious admissions policy. But the 1978 Supreme Court ruling in the Bakke case—even though Bakke won and was admitted to the medical school—had helped the cause of affirmative action because of Justice Powell's opinion (with the majority of the court agreeing) that race can be used as a plus factor in evaluating admissions. The EEOC, the Department of Labor and Office of Contract Compliance, among many others, have used Powell's 1978 opinion as a guideline.

The University of Michigan had other grounds as well for assuming that its race-conscious admissions policy had the blessings of government and law. Anyone who does business with the Federal government knows the importance of Executive Order 11246, issued in

September 1965 by President Johnson. The essence of this order is that anyone who sells products or services to the Federal government, at more than a token level, must take 'affirmative action' to employ and promote women, minorities and the disabled. And the government doesn't just take it on faith that companies are doing their best. They must develop affirmative action plans and be audited. Furthermore, the Civil Rights Act of 1964 provides that, in cases where a jury has found intentional discrimination, the adoption of an affirmative action plan is deemed a remedy.

Title Six applies specifically to higher education, and stipulates that schools that receive Federal monies must implement affirmative action plans. This has had far-ranging impact because so many schools do get Federal funds. Over the years many states have followed the example of the Federal legislation, adopting parallel statutes in support of affirmative action. Many companies, valuing diversity as part of their corporate cultures—and simply wanting to be good citizens—have voluntarily put affirmative action policies into place.

Companies have recognized that individuals from diverse backgrounds bring valuable differences in perspective and experience to all aspects of corporate decision-making.

Input from the Business Community

One measure of the keen interest in the University of Michigan cases was the volume of amicus curiae or 'friend of the court' briefs (more than 200) submitted to the Supreme Court by parties wanting to throw their support to—and marshal arguments on behalf of—one side or the other. And a measure of the degree to which affirmative action has become entrenched in American life and in the way we do business is the stature of the friends of the court who stepped forward to support the University of Michigan—or who at least didn't want to see affirmative action appreciably damaged or

diminished.

For example, the highly respected Equal Employment Advisory Council, a consortium of industry leaders, weighed in with a brief that included eloquent arguments in favor of diversity—testifying to an enormous shift from the climate of the business world that prevailed at the time of the Bakke case a quarter century ago:

American corporations today operate in an extraordinarily diverse environment. Internally, that diversity is reflected in employee populations that consist increasingly of individuals drawn from widely varied backgrounds, reflecting the growing diversity of the nation as a whole. Externally, that diversity is reflected in diverse consumers often spread across global marketplaces. To be successful, American companies must be able to operate effectively in such an environment. This will occur only if the corporate leaders of tomorrow are themselves diverse and are comfortable living and working with individuals having different backgrounds and experiences.

The 'business case for diversity' is strong and well-documented. Its basis is three-fold.

First, changing national demographics will require companies increasingly to fill key management positions with diverse candidates, both to communicate with potential customers and to manage effectively a workforce composed of employees of differing backgrounds.

Second, U.S. companies increasingly are entering the global marketplace, creating a need for employees at all levels who are skilled in dealing with the culture of each customer country.

Third, companies have recognized that individuals from diverse backgrounds bring valuable differences in perspective and experience to all aspects of corporate decisionmaking, from operations to marketing to communications to human resources. For all these reasons, cultivating a diverse workforce leads to a demonstrable increase in the 'bottom line'....

Input from Military Leaders

Perhaps the most compelling and intriguing brief in support of the

University of Michigan was filed by senior (retired) representatives of the nation's military, including Generals Wesley Clark, Norman Schwarzkopf and Hugh Shelton, among many others. Their statement noted that, at the end of the Vietnam War, only three percent of Army officers were African-American. Today 19 percent are minority (African-American, Hispanic, Asian and Native American), and this realignment was accomplished only because of race-conscious recruiting practices, which, they argued, must be kept in place. The brief included the following points:

Thomas Jefferson did not mean what *we* mean by 'all men are created equal.' *Men meant male and white.*

But we can see the implications of the words even if he could not have.

At present, the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies.

The military has made substantial progress towards its goal of a fully integrated, highly qualified officer corps. It cannot maintain the diversity it has achieved or make further progress unless it retains its ability to recruit and educate a diverse officer corps. This court and others have recognized that in certain contexts, the government may take race-conscious action not only to remedy past discrimination, but to further other compelling government interests...the military must be permitted to train and educate a diverse officer corps to further our compelling government interest in an effective military.

In full accord with Bakke and with the Department of Defense Affirmative Action Program, the service academies and the ROTC have set goals for minority officer candidates and worked hard to achieve those goals. They use financial and tutorial assistance, as well as recruiting programs, to expand

the pool of highly-qualified minority candidates in a variety of explicitly race-conscious ways. They also use race as a factor in recruiting and admissions policies and decisions.

Today, there is no race-neutral alternative that will fulfill the military's, and thus the nation's, compelling national security need for a cohesive military led by a diverse officer corps of the highest quality to serve and protect the country.

The military cannot maintain the diversity it has achieved unless it retains its ability to recruit and educate a diverse officer corps.

What Would George Washington Do?

The nation's top brass even reached back to words of our first commander-in-chief, George Washington, for a quote in favor of diversity. In a letter to Alexander Hamilton in 1796, Washington had reflected on the positive impact of having an army drawn from many parts of the country:

The Juvenal period of life, when friendships are formed, & habits established that will stick by one; the Youth, or young men from different parts of the United States would be assembled together, & would by degrees discover that there was not that cause for those jealousies & prejudices which one part of the nation had imbibed against another part...What, but the mixing of people from different parts of the United States during the War rubbed off these impressions? A century in the ordinary intercourse, would not have accomplished what the Seven years association in Arms did.

Leaders sent a message to the high court: don't do anything that will set back the clock on affirmative action.

This argument might sound like a

stretch to some, since Washington would not have had multi-racial exposure in mind. And Thomas Jefferson did not mean what *we* mean by 'all men are created equal.' Jefferson meant *men* as in *male*, and, for him, all *men* meant all *white* men. But we can see the implications of words written by Washington and Jefferson even if they could not have.

It is clear from these two *amici curiae* that important business and military leaders were attempting to send a message to the high court: whatever you decide to do with the University of Michigan, don't do anything that's going to set back the clock on affirmative action and diversity—both are too important: America's competitive edge and national security will be in jeopardy if either are weakened.

The Supreme Court has given the green light to schools—and by extension businesses—to use less subtle ways than a point system to take race into account.

The Justices Speak: Clarifying Rules for Affirmative Action

A majority of the justices relied heavily on the two briefs quoted above, and seem to have heard the message loud and clear. On June 23, 2003 the Court issued its rulings in the two University of Michigan cases. A 5-4 majority, with Justice O'Connor regarded as the swing vote, upheld the law school's program (the Grutter case), which considers race as a factor in admissions but does not assign specific weight to it, i.e., it does not give a numerical value to race or otherwise strive for a rigid quota. That policy was narrowly held *not* to be a violation of the equal protection clause of the Fourteenth Amendment. That is, the preference program does not unconstitutionally discriminate against white students. But, a broader majority (6-3) overturned the undergraduate school's program (the Gratz case) that gave some minority students an automatic 20-point bonus on a 150-point evaluation scale. The program upheld in Grutter was found to be 'nar-

rowly tailored’ “. . .to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” The Court declared that a broad social value may be gained from diversity in the classroom. The stricken program in Gratz, in contrast, was not ‘narrowly tailored.’

Thus the Supreme Court has given the green light to schools—and by extension businesses—to use less *subtle* ways than a point system to take race into account in admissions and employment decisions. The critical caveat is that schools and businesses must structure these programs *the right way*. On August 28, the University of Michigan announced that a new policy was being implemented:

“It will be a much more individualized review,” university spokeswoman Julie Peterson said Wednesday. “And clearly with the volume of applications, we’re going to have to add staff, which we’ve said from the beginning that we’re ready to do.” A new application for prospective students also was to be available beginning Thursday, according to the school’s website. Peterson said the new admissions process has been developed during the past several weeks to comply with the Supreme Court’s ruling. University President Mary Sue Coleman has said the rulings provided ‘a reasonable and moderate pathway to fair and equal educational access.’ She also has said the new policy will continue to factor in race. (Associated Press, as quoted on www.CNN.com)

The Supreme Court on Punitive Damages: Impact on the Employment Practices

The high court also ruled this year in another case that has implications for the workplace. Employers don’t just have to worry about discrimination in hiring; they also have to deal with issues such as racial, ethnic and gender bias on the job. Any employer who is attempting to resolve discrimination cases will find that *punitive damages* is an area of the law fraught with danger—and spectacular cases of excess and abuse have become notorious and common. Although the

Supreme Court has shown a reluctance to enter arenas that it doesn’t *have* to, when lower courts indulge in egregious rulings, it will take cases that offer opportunities to address imbalances.

Employers don’t just have to worry about discrimination in hiring, but also with racial, ethnic and gender bias on the job.

The issue at hand is the desire for fair balance or ratio between compensatory and punitive damages. Put most simply, if a court awards you *compensatory* damages following an auto crash in which your car was totaled, you get money equal to the value of your car and other out-of-pocket losses: you are compensated for your loss.

Punitive damages are much broader in scope, and are usually meant to serve two purposes:

(1) Deterrence, the theory being that a heavy fine is likely to make people think twice about doing harm or damage to someone else. Attorneys who plead with juries for punitive damage awards have been known to aim for the highly dramatic, e.g., “I want you, ladies and gentlemen of the jury, to send a message. What you decide here will be heard by all Fortune 500 companies. The sound of shattering glass [as in a glass ceiling being broken] will be heard throughout Wall Street.” One lawyer, making this point, even broke a glass.

Excessive punitive damage awards can themselves cause damage and work against justice and fairness.

(2) Retribution or punishment. That is, someone who has committed a wrong with intended malice should be punished. Juries can be highly sympathetic to plaintiffs whom they feel have been treated unfairly with malicious intent by an employer. In the employment litigation arena, few things seem to count for more than the violation of fair play. Juries seem to relish the opportunity to strike back.

The presumed wealth of the defendant also becomes a factor when juries consider punishment. Self-styled ‘country lawyer’ Gerry Spence has won huge cash awards for his clients using variations on his famous ‘this is peanuts’ formula: “Here’s the annual statement of the company. Its profit last year was \$500 million. All my client is asking for is one percent of that—this is peanuts.”

This has introduced what might be called ‘the lottery factor’ into the legitimate business of redressing employment grievances—which puts businesses and their representatives at genuine risk. Companies and lawyers may be reluctant to take very defensible employment cases to full trial if the prospect exists for runaway punitive damages. It’s so hard to predict, let alone control, what a jury will do behind closed doors. The alarm bells go off particularly with claims of sexual harassment—especially when physical touching or verbal abuse is involved—or when the charge is egregious race, gender or sexual orientation bias. In 2003, Leona Helmsley lost her case against Charles Bell, who had claimed he was fired as a Helmsley hotel manager because he is gay. The jury awarded Bell \$1.17 million in compensatory damages and \$10 million in punitive damages. After a flurry of post-trial motions, the judge substantially reduced the awards, and appeals have ensued. But most people remember only the initial headlines. Clearly the judge and many others who worry about the long-term impact of such actions might agree with Mrs. Helmsley’s attorney that the punitive award was “irrational.”

Excessive punitive damage awards can themselves cause damage and work against justice and fairness. We all end up paying for excessive damage awards when our homeowner or auto insurance premiums go up—and when doctors go on strike or opt out of the profession altogether because they can’t afford malpractice insurance rates. The issue is not punitive damage itself, but *runaway awards*. There often are legal caps on punitive damages, depending on the applicable laws, jurisdiction and nature of the violation, but matters can still appear to be a free-for-all. A federal or state cap has no bearing if a suit is based on a local

statute; the Helmsley case, for example, was based on a New York *City* law with no caps.

We all end up paying for excessive damage awards when our homeowner or auto insurance premiums go up—and when doctors go on strike or opt out of the profession altogether because they can't afford malpractice insurance rates.

The Justices Look for Balance

The Supreme Court decided to take a case where the runaway award for punitive damages appeared to exceed all standards of common sense and logic. In April 2003 it handed down its decision in the case of *State Farm vs. Campbell*, which involved a punitive damage judgment by a lower court of \$145 million against State Farm, in comparison to \$2.6 million in compensatory damages. This represented a ratio of about 56 to 1, which the Court considered enormously out of line, favoring a ratio of 1 to 1 instead. Even a worst-case scenario ratio, the court felt, would be 9 to 1.

Although the State Farm case has many aspects and nuances that limit its applicability to many other cases (e.g., Campbell had not suffered physical injury at the hands of State Farm), American business in general has been much comforted by this decision—especially since the Court has already sent cases involving huge dollar judgments against Ford Motors back to lower courts for review and analysis in light of the State Farm ruling.

The State Farm ruling appears to make the future a little brighter for employers eager and willing to defend themselves fully against discrimination suits, where state or local laws place no caps on punitive damages. For example, in an age discrimination suit involving a highly paid senior executive, compensatory damages might conceivably reach \$2.6 million (the State Farm amount), if a

company is required to compensate for back pay, lost benefits, pain and suffering caused, etc. Since the Supreme Court considered the 9 to 1 ratio 'the worst case scenario,' punitive damages could probably be held at a low single digit ratio. ●

Members of The Employment Roundtable

Stephen Atamanchuk, VP, Resource Planning and Development, Sithe Energies
 Richard Bayer, Ph.D., Chief Operating Officer, The Five O Clock Club
 Jean Broom (Co-Chair), SVP, Human Resources & General Affairs, Itodu International, Inc.
 Michael L. Dolfman, Ph.D, Regional Commissioner, Bureau of Labor Statistics
 Michel Franck, AIA, Principal, Owen and Mandolfo, Inc.
 Gayle George, VP, Human Resources, Fried, Frank, Harris, Shriver & Jacobson
 William E. Hartman, Senior Director Cushman & Wakefield, Inc.
 Peter Hillman, Practice Head, Chadbourne & Parke
 Diane Kenney, SVP, Human Resources, Random House Publishing
 Martin Kohli, Senior Economist, U.S. Bureau of Labor Statistics
 George Lumsby, Managing Director, GNL & Associates (executive search) Executive Search
 Patrick Oden, Managing Advisor, Healthcare
 Alan Richter (Co-Chair), Founding Partner, QED Consulting
 Marian Stoltz-Loike, CEO, SeniorThinking
 Wendy Alfus Rothman, Managing Partner, The Wenroth Group, a Human Capital Consultancy
 Marilyn Shea, Regional Director US DOL, Employment & Training Administration
 William R. Sheridan National Foreign Trade Council, Inc.
 Frank Thoelen (Co-Chair), CFO, JAD Corp of America
 Kate Wendleton, President, The Five O Clock Club
 David Madison, Consultant to Roundtable, The Five O Clock Club ●

The Employment Roundtable

is a group of leaders from business, government and think tanks,

The Job-Search Buddy System

Do you wish you had someone to talk to fairly often and informally about the little



things? Here's what I'm planning to do today in my search? What are you planning to do? Let's talk tomorrow to make sure we've done it. You and your job-search buddy could keep each other positive and on track, and encourage each other to do what you told the small group you were going to do: Make that call, send out those letters, write that follow-up proposal, focus on the most important things that should be done rather than (for example) spending endless hours responding to job postings on the Web.

With your buddy, practice your Two-Minute Pitch, get ready for interviews, bounce ideas off each other. Some job-search buddies talk every day. Some talk a few times a week. Most of the conversation is by phone and e-mail.

Sometimes people match themselves up as buddies. Just pick someone you get along with in your small group. Sometimes, your coach can match you up. However you do it, stay away from negative people who talk about how bad it is out there. They will drag you down.

The small group changes over time: people get jobs; new people come in. If you lose one buddy who got a job, get another buddy.

Your buddy does not have to be in your field or industry. In fact, being in the same field or industry could keep you focused on the industry rather than the process. But you do have to get along! The relationship may last only a month or two, or go on for years. Some buddies become friends.

Of course, you should see your Five O Clock Club career coach

Taking Aim at Corporate Delinquents: Reform Legislation Benefiting the Workplace

by David Madison, Ph.D., Director of The Five O'Clock Club Guild of Career Coaches

On September 8, 2003, The HR Network, co-sponsored by Marsh and the Five O'Clock Club, met at the Marsh headquarters in Manhattan; the topic was the 2002 Sarbanes-Oxley law. The experts on the panel were Rob Harwood, William Henderson and Peter Hillman. This article is based on their comments and superb handouts, and we thank them for their hard work to make the seminar a great success.

Being an employer should be viewed, by those who assume the role, as a *sacred trust*. This is for two reasons:

- ♦ Because an employer provides the setting and tone for an eight-hour day
- ♦ and establishes a workplace environment that may endure for years and may, in fact, be the context in which people fashion their futures and their careers

... an employer has the power to determine, in large measure, both the *morale* and *fate* of the people hired. In other words, the short and long-term happiness of employees is in the hands of management, the people who do the hiring.

Whether it's a mom and pop business with five employees or a multinational corporation with five thousand on the payroll, the responsibility toward those hired remains the same. This is not the mindset of outdated paternalism—this is just the reality of welcoming people on board in a modern world where labor expended is such a major portion of life itself.

In recent years we have seen spectacular violations of this sacred trust. Names such as Enron, WorldCom, Arthur Andersen and Tyco have become synonymous with scandal, greed, fraud, mismanagement—and a disregard for the well-being of employees. Thousands of people who put trust in their employers have seen their careers and secure

futures ruined. On the evening news we have followed the stories of Enron employees whose life savings were manipulated into oblivion; people with decades of service saw their hopes for retirement blasted. The people at the top who didn't care about such consequences had no sense of their obligation as employers and no regard for the scared trust.

An employer has the power to determine, in large measure, both the morale and fate of the people hired.

There Ought to Be a Law

The public outcry was, of course, heard in Washington, and in the summer of 2002 Congress passed landmark legislation authored by Maryland Senator Paul Sarbanes and Ohio Congressman Michael Oxley. It is one of the most sweeping acts of business reform adopted since the 1930s. Although Sarbanes-Oxley hasn't exactly become a household word in the fifteen months since its passage, its ultimate impact will be huge. The literature about it is already massive and grows daily. Anyone researching the topic will soon have a sense of information overload; as of mid-September 2003 a Google search on Sarbanes-Oxley produced about 175,000 results (just for comparison, a search on *Roe vs. Wade*, which was 30 years ago, produced 62,000 results). The law itself can't be read and digested in one sitting—a PDF of the full text of the bill running 66 pages can quickly be found through a Google search. Anyone wishing to explore this law in-depth can go directly to www.sarbanes-oxley.com. This is a very wide-ranging piece of legislation, covering many aspects of corporate governance.

Thousands of people who put trust in their employers have seen their careers and secure futures ruined.

The Altered Landscape for Everyone

The Sarbanes-Oxley law has in fact, fundamentally changed the way corporations do business—not just publicly held companies targeted by the bill, but all other companies as well, since the business *environment* has been altered. The impetus for the bill was the desire to cure the crisis in confidence prevailing in the wake of major corporate scandals. Everyone had the feeling that something was terribly wrong when CEOs could walk away rich, unindicted and unpunished—while thousands of employees sat dazed in the rubble of corporate collapses. The public outrage was too intense, so the old cliché about the rich getting richer could no longer be considered business as usual.

Expectations have been changed about the way business should be done.

One barometer of the impact of Sarbanes-Oxley might be the fall from grace of Dick Grasso as head of the New York Stock Exchange in September 2003. The NYSE is a private company, and thus is not directly impacted by the law. *But expectations have changed across the board about the way business should be done.* Hence no one will be shielded from media scrutiny. The NYSE disclosed compensa-



tion details, and obviously Grasso's \$187 million package was a natural for tabloid headlines; it also went against the grain at a time of economic hardship for so many. But the chairman of Home Depot sitting on the NYSE compensation committee at the same time that Grasso served on the Home Depot board of directors meant that it had become far too easy for the rich to help each other get richer. The law was meant to send a message to *everyone* and rein in such abuses in corporate governance. Thus everyone is impacted—public companies, private, not-for-profit—whether they've heard of the law or not.

Sarbanes-Oxley is one of the most sweeping acts of business reform adopted since the 1930s.

Restrictions for Accountants and Auditors

It's probably not an overstatement to say that Sarbanes-Oxley ended self-regulation by the accounting industry. And the government grew a bit in the process: the act created a new body called the Public Company Accounting Oversight Board to regulate the audits conducted by accounting firms. The PCAOB has the power to:

- ◆ License public accounting firms that conduct audits of public companies.
- ◆ Establish the rules for auditing, quality control, ethics and independence.
- ◆ Conduct inspections, investigations and disciplinary proceedings—and impose sanctions for non-compliance.

And, especially in the wake of the Arthur Andersen debacle, audit companies are prohibited from providing many of the non-audit services that had become part of the standard menu of service. For example, the following are no longer allowed:

- ◆ Bookkeeping
- ◆ Financial information system design and implementation
- ◆ Appraisal, evaluation or actuarial services
- ◆ HR or other management functions
- ◆ Broker dealer, investment banking or

investment advisor

- ◆ Legal and other expert services, including litigation support

In other words, the lawmakers thought it best that auditors should stick to auditing. Of course it is unfair to assume that all business leaders, unconstrained by the law, will be out to thwart the public good; but it would also be naïve for lawmakers to overlook the *human element*, the inclination to minimize the law if something is to be gained. Hence Sarbanes-Oxley put a few barriers in place to reduce human interference. For example the law stipulates that an accounting firm cannot audit a company if its CEO, CFO, controller or chief accounting officer was employed by that accounting firm and participated in the prior year's audit. Furthermore, when a long-term relationship has been established, every five years the lead audit partner must rotate off the audit.

Something was terribly wrong when CEOs could walk away rich, unindicted and unpunished.

The Buck Stops You Know Where

Of course it was president Harry Truman who had the plaque on his desk, "The buck stops here"—his way of making the point that he wouldn't shirk responsibility for anything. How far we had fallen from that standard became clear during the Watergate era when another saying became part of our political vocabulary, "What did he know, and when did he know it?" That question was raised anew as the corporate scandals broke and prominent CEOs and CFOs appeared before congressional committees, claiming that *they had no idea* the books had been cooked.

Sarbanes-Oxley requires that heads of companies know what they *should* know. CEOs and CFOs must certify that they have established and maintain internal controls at their companies, and *they must sign off on the accuracy of financial statements*. Furthermore, they must certify:

- ◆ Whether there are any significant changes in the control environment and whether they have taken action with

regard to internal control deficiencies.

- ◆ That any fraud involving officers or employees involved in internal controls has been disclosed to the Audit Committee.

No doubt public outcry and indignation played a role in the criminal penalties stipulated by Sarbanes-Oxley. CEOs and CFOs who are guilty of false certification are subject to 10 years in prison and a \$1 million fine; willful false certification can bring 20 years in prison and a \$5 million fine.

The law was meant to send a message to everyone and rein in such abuses in corporate governance.

Crime and Punishment

Since Sarbanes-Oxley was written from the perspective of witnessing how far wrong things can go, and the errors of omission and commission that produced the problems, it's no surprise that the law ended up defining new crimes and beefing up penalties for old crimes—which means that we will see a lot of corporate litigation over the next few years. Suits will probably fall into three primary categories:

- ◆ Suits on behalf of shareholders. With increased disclosure required by law and heightened media coverage, people will be able to see when companies fail because they are ulcerated with fraud. Shares may have been purchased in good faith in companies whose executives did not *manage* in good faith. In such cases the sinking value of the stock cannot be blamed on the market or the economy, but on bad judgment, abuse of power and greed.
- ◆ There will be derivative lawsuits, i.e., shareholders will go after officers and directors themselves.
- ◆ Employees and employee groups will sue on behalf of themselves, for the loss of their jobs, livelihoods and retirement funds.

Getting at the Evidence: Hindering Shredders and Helping Whistleblowers

When we think of the high profile

corporate scandals of the last few years, one of the most enduring images is that of an executive or underlying laboring into the night at the shredding machine—trying to eliminate as many documents as possible. Sarbanes-Oxley provides enhanced penalties for such attempts to thwart the work of investigators and law enforcement. For example, destruction or falsification of records to impede investigation by Federal agencies, or in a bankruptcy case, can result in a 20-year prison term; destruction of audit records by an *accountant* could mean 10 years in prison. The electronic equivalent of shredding is also recognized by the law, so the deletion of applicable email records is also a crime.

The law also seeks to protect employees at publicly listed companies who have seen fraudulent or illegal behavior but who may be hesitant to come forward for fear of retaliation. While employees may file for administrative agency investigations, if there is no response from the Department of Labor, Sarbanes-Oxley enables workers to sue for being retaliated against. Many forms of retaliation are recognized, e.g., being fired, demoted, reassigned or relocated; being given a cut in pay or title or moved to an inferior office. If the retaliation included being fired, the worker may be reinstated while the case is pending. If the employee wins, he/she is entitled to full back pay with interest, and payment of attorney fees. Furthermore there are heavy fines for a company found guilty of retaliation.

Sarbanes-Oxley ended self-regulation by the accounting industry.

Implications for Human Resources

Compliance with Sarbanes-Oxley will have significant impact on staffing, training, and the management of talent in general—all the domain of HR. The law mandates, for example, that boards become more involved in company affairs, including financial reporting, the setting of executive compensation, succession planning, auditing, compliance and internal investigations. It is incumbent on HR professionals to learn

Sarbanes-Oxley and the demands of compliance across the board, especially in terms of additional staff for auditing and accounting procedures. Just as seminars have been put in place over the years to train managers about diversity and discrimination issues, training should now be required on the serious dangers posed by document destruction, how to handle whistleblowers and the liabilities for retaliation.

Sarbanes-Oxley enables workers to sue for being retaliated against.

It is likely that, over the next few years, employees will show greater willingness to speak up—whether or not strictly covered by Sarbanes-Oxley. This raises the issue of providing a hotline or other channels for complaints—and will push HR into an investigative role more so than in the past. HR officers who have been content with limited horizons, focused mainly on traditional HR functions such as payroll, benefits administration and annual reviews, will find that the new law has placed HR in an important partnership role with senior management.

Stay Tuned for More Developments

Sarbanes-Oxley was enacted to deal with an immediate crisis that gripped American business in the wake of very high profile scandals. For the next few years we will be in the test-drive phase with this legislation. To date, for example, there is very little case law based on Sarbanes-Oxley to guide lawyers, judges and juries as we go forward. And the law itself recognized that it was only a first step. It directs many U.S. agencies to conduct studies that may result in further legislation over the next few years to fine-tune the process of regulating all aspects of corporate governance. Under this study mandate, for example, are the SEC, the General Accounting Office, the U.S. Sentencing Commission, as well as various registered securities associations and state regulators. In years to come Sarbanes-Oxley will likely be viewed as the platform on which many more reforms will be built. ●

The HR Network

briefings for the informed professional

For HR Executives:

Below are the panelists who spoke at the HR Network in New York on **Sarbanes-Oxley: and how it impacts HR in public, private and not-for-profit organizations**

Peter N. Hillman, of Chadbourne & Parke LLP, has addressed the HR Network before on the subject of Restrictive Covenants. This lively speaker will tell you the Sarbanes-Oxley-related issues that you should address in your own firm -- whether or not you are covered by the Act. He is a frequent lecturer and author for publications such as *Andrew's and Mealey's*.



Peter Hillman, head of employment practice, Chadbourne & Parke

William Henderson, SVP, Marsh, is an attorney and CPA and former federal prosecutor. Because of the impact of Sarbanes-Oxley, Bill expects people in most companies to speak up more. You'll need more regulatory, compliance and legal help, and will see an increase in HR-related hotline complaints. He'll tell you what else to expect.



Robert I. Harwood is a partner in the law firm of Wechsler Harwood LLP in New York. He specializes in the plaintiffs' securities class action field and has extensive experience prosecuting all types of directors and officer's liability claims. Definitely a man to listen to! Rob will tell you how plaintiffs' litigation strategy is developing in the aftermath of Sarbanes-Oxley.



Rob Harwood, partner, Wechsler Harwood LLP, initiates lawsuits against organizations!

The next breakfasts in New York:
Friday, December 5th
Friday, January 30th