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March 11, 2016

Myles Link, Chair
Standing Committee on Ethics and Professional Responsibility
American Bar Association
321 North Clark Street
Chicago IL, 60654

Re: **Proposed Amendments to Model Rule 8.4**

Dear Myles:

I have been admitted in the District of Columbia since 1968, and in Maryland since 2008. My practice is generally in the fields of employment discrimination and civil rights. I have spent my entire professional life— more than 46 years since leaving the U.S. Commission on Civil Rights—fighting discrimination based on race, national origin, sex, sexual orientation, age, disability, harassment, and retaliation. I represent primarily employees and persons with civil rights claims, and also serve as an arbitrator and a mediator. I went to law school in 1965 because of the civil rights movement. My biography and the focus of my practice are set forth on my website, www.rickseymourlaw.com.

I write solely on my own behalf, and not on behalf of any of the organizations with which I have been involved over the years.

Regretfully, I oppose the proposed amendment to Model Rule 8.4 that would

expand the reach of the measure to apply to everything related to the attorney's own law practice, i.e., to everything that happens in the office or anywhere else that is related to the practice.

I urge the Committee to return to the drafting board and to revise its proposal to avoid the problems that are pointed out below.

A. Introduction

I fully appreciate the intentions of the proponents of the change. Racial and sexual and other forms of discrimination still exist in all sectors of our economy, and retaliation is unfortunately still the knee-jerk response of many employers and other entities to any criticism of their activities. The motivation for the adverse actions against complainants is often difficult to prove, just as the motivation in employment discrimination cases is often difficult to prove.

Uncertainty exists in both directions, however. It can be difficult and expensive to prove that a challenged action was taken for nondiscriminatory and nonretaliatory reasons, just as it can be difficult to prove the opposite.

B. Restrictions on Speech

The problems are multiplied by the following sentence in the proposed Comment to the new Model Rule 8.4(g):

> Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation.

This makes quite clear that the new Model Rule 8.4(g) will forbid undefined speech that does, or could be perceived as, referring to "any particular status or group." A water-cooler conversation of the breakdown of primary voters by ethnic group would fall afoul of the letter of the new rule. A bright-line test of an overbroad restriction is that it would apply to things far outside the intended reach of the drafters.

It does no good to say that no one would complain of such a thing; if over 47 years at the bar have taught me anything, it is that someone will. I believe it my duty, and the duty of every attorney, to oppose this provision in particular.

C. Discrimination and Retaliation Cases Are Difficult to Prove and Rebut

The difficulties in proof are one reason for my opposition to the proposed amendment. People simply do not admit that they have engaged in unlawful conduct.

The courts have emphasized the rareness of direct proof of discrimination, and the corresponding need to rely on inferential proof. *Hunt v. Cromartie*, 526 U.S. 541 (1999), a racial redistricting case, stated: "Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Accord*, *Sanders v. New York City Human Resources Administration*, 361 F.3d 749, 755 (2d Cir. 2004) ("Courts recognize that most discrimination and retaliation is not carried out so openly as to provide direct proof of it."); *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 599 (7th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004), stated: "For obvious reasons, we rarely encounter direct evidence." (Citation omitted.)

To prove discrimination or its absence, the parties must routinely rely on an enormous variety of circumstantial evidence. I co-authored, with highly-respected management attorneys, fifteen editions of EQUAL EMPLOYMENT LAW UPDATE, copyright American Bar Association, 1996-2007. Each edition covered decisions of the Supreme Court and reported decisions of the U.S. Courts of Appeals for the two years covered by the book. The chapters dealing with proof of discrimination, and the number of pages devoted to each in the Summer 2007 edition, the last in the series, were:

Chapter	**Title**	**Separate Items in Detailed Chapter Table of Contents**	**Total Pages in Chapter**
14	The *McDonnell Douglas* / *Burdine* / *Hicks* Model	132	231
15	Comparators	6	47
16	Statistics	28	25
17	Direct Proof and Stray Remarks	16	60
18	Mixed Motives	16	14
19	Other Circumstantial Proof as to Intentional Discrimination	22	65
Total for Six Chapters on Proof		220	442

Clearly, proof of employment discrimination and retaliation, and rebuttals of that proof are complicated.

It necessarily follows that individuals do not often have proof of discrimination or retaliation. Even in meritorious cases, the evidence has to be pieced together from a multitude of different sources. Multiple depositions and the productions of tens of thousands of pages of documents are often required in order to get a solid handle on the facts.

It also follows that individuals who were not discriminated or retaliated against make complaints in good faith because they are not aware their rights were not violated. For example, well under 5% of the harassment inquiries I receive from potential clients bear any relationship to what the courts would consider actionable harassment. Many ordinary citizens believe that it is harassment to have to show up on time, or do their assigned duties. They may also think that something is discriminatory even though persons of a different race or gender or age were treated the same. When I tell them that such things are not discrimination or harassment, they are often relieved that whatever was done to them was actually okay, and not unlawful, because people often do not like to believe they were victims of discrimination.

Sorting the good complaints from the bad complaints is difficult.

D. The Entire Field of Employment Discrimination Law is Complex

It is not just proof of discrimination that is difficult and complicated; the law governing what is or is not actionable discrimination, retaliation, and harassment is also difficult and complicated. Each edition of EQUAL EMPLOYMENT LAW UPDATE ran over 1,600 pages.

The employment discrimination treatise most often cited by the courts is GROSSMAN, LINDEMANN AND WEIRICH, EMPLOYMENT DISCRIMINATION LAW, copyright American Bar Association. Now in its 5th edition, it consists of two large volumes with a 59 pages of detailed table of contents, and a large 2015 supplement about equal in size to the large volumes.

E. There is a High Volume of EEO Charges and Lawsuits

The complexity of the descriptions of employment discrimination law reflected above is a result of the large extent of litigation on employment discrimination claims. There is no way to capture the extent of fair-employment litigation in State courts, but all attorneys in the field recognize it as substantial. Still, the amount filed in Federal court is also substantial. The following is taken from the Preface to the Summer 2007 edition of EQUAL EMPLOYMENT LAW UPDATE at viii-ix:

> Fair-employment filings represent a large but declining proportion of the civil workload of Federal district courts. A total of 272,067 new civil cases were filed in Federal courts during the twelve months ending June 30, 2007. EEO cases were therefore 5.0% of all civil filings in Federal court, compared with 6.7% nearly two years earlier. This is one of every 20 civil filings, compared to one of every 15 civil filings a year earlier. Federal-question EEO cases are 8.8% of all Federal-question cases, compared with 12.5% nearly two years earlier. These are one in every 11 Federal-question cases, compared with one in every 8.0 such cases nearly two years earlier.
>
> * * *
>
> The pace of litigation is also declining in the Courts of Appeals. A total of 497 Federal-question EEO cases were decided after oral argument in the twelve months ending June 30, 2007, compared with 611 almost two years earlier. This is the category of cases most likely to result in published opinions. In the twelve months ending June 30, 2007, EEO cases were 16.3% of all civil Federal- question cases decided after oral argument, or one in every six civil Federal-question cases decided after oral argument.
>
> Federal-question fair-employment cases are substantially more likely than general Federal-question civil cases to reach oral argument: 26.3% of EEO federal-question appeals filed during this period made it to oral argument, compared with only 15.3% of all civil Federal-question cases filed during this period.
>
> The aggregate volume of published and unpublished decisions in the Courts of Appeals is impressive: 1,096 employment discrimination cases were decided on the merits in the twelve months ending June 30, 2007, and another 808 employment discrimination appeals were resolved on procedural grounds during that period. On June 30, 2007, a total of 1,720 Federal-question employment discrimination cases were pending action in the U.S. Courts of Appeals, down 90 cases from the prior year.

The U.S. Equal Employment Opportunity Commission received 89,385 charges of discrimination or retaliation in FY 2015.

F. <u>There is No Basis to Assume There Would Not Be a High Volume of Charges and Complaints Against Attorneys and Law Firms</u>

No part of the economy has been free from either discrimination and retaliation, or at least perceptions of discrimination and retaliation, and therefore no part has been free from claims of discrimination and retaliation. The legal press routinely lists high-profile claims filed against law firms, and it is safe to assume there are a lot of similar claims that did not capture the attention of the legal press.

G. Government Enforcement Agencies Have Great Trouble in Investigating and Resolving Discrimination, Harassment, and Retaliation Claims

The U.S. Equal Employment Opportunity Commission and a national network of State and local fair employment practice agencies have expertise in discrimination, harassment, and retaliation claims, and have statutory authority to investigate and resolve them. The EEOC in particular receives substantial Federal funding annually to help it achieve these goals. In FY 2015, Congress appropriated $364,500 to the EEOC, which has 2,347 staff members.[1]

Experience has shown that even this level of funding is nowhere near enough to be adequate.

Attorneys for employees and attorneys for employers agree that there are major problems with the EEOC's accomplishment of its goals. Because they seem relevant to my comments, I have attached copies of two blogs I have written on the subject.

On the employer side see, *e.g.*, the testimony Camille Olson of the Seyfarth Shaw law firm presented in 2014 on behalf of the U.S. Chamber of Commerce, to the U.S. House of Representatives Committee on Education and The Workforce Subcommittee on Workforce Protections. It can be downloaded from https://www.uschamber.com/testimony/camille-olson-testimony-eeoc-enforcement.[2]

Any fair-minded observer would have to admit that one of the sources of difficulty in resolving claims of discrimination, harassment, or retaliation, is that some claims have merit at least in part, and some have none, at least in part.

Attorneys on both sides of the employee/employer divide will agree that some portion of the grants of summary judgment are properly granted, and some are not properly granted, although we may disagree among ourselves on what the various percentages are. And everyone will agree that employers win some trials and employees win some trials.

H. The Nine Main Problems with the Proposed Rule

This brings me to the nine main problems I see with the proposed rule.

First, the ethics bodies of State and local bar organizations do not have the training, experience, or funding to make reliable determinations whether an attorney

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[1] See http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm, downloaded today.
[2] I downloaded this statement today.

engaged in forbidden discrimination, retaliation, or harassment. The result of adoption of the rule will be many misfires, and erroneous disciplinary rulings.

Second, preserving the credibility of ethics enforcement bodies is important. Making disciplinary rulings that are overturned in court will, as well as making a lot of erroneous determinations, will damage their credibility and weaken the Bar.

Third, the proposed amendment and its Comment contains an extraordinary and ill-defined restriction on speech. Many State Bars are mandatory, so such a restriction on the content of speech is subject to stringent First Amendment standards that I think are clearly not met here. Even with voluntary bars, ill-defined restrictions on speech are a major mistake. One only has to look at the demands for political correctness on college campuses, and the surrender of administrators to the demands of the mob, to see how quickly such restrictions degenerate into an intolerable situation.

Fourth, I believe that the primary focus of the rules of ethics should be on the manner in which attorneys practice law, represent their clients, and make themselves available to practice law. Ensuring that attorneys have good hearts in all their activities is a matter for their consciences and religion, not for the Bar.

Fifth, we have seen from the efforts of the Equal Employment Opportunity Commission and State and local Fair Employment Practice Agencies, and from courts and arbitrations, that the investigation and determination of the merits of discrimination and harassment claims is complex and often far from easy. Requiring State Bar authorities to replicate their work, in the context of deciding whether an attorney is still fit to practice law, would swamp the work of ethics bodies and divert them from their existing functions, with disastrous effects on the public.

Sixth, it is no answer to say that Bar committees can simply rely on the results of civil litigation, because a mere preponderance of the evidence in an ordinary EEO case, as found by a particular judge or jury on a particular day and when the attorney is not even a party and has no opportunity to defend his or her conduct and name, is not enough to justify threatening an attorney's livelihood and good name.

Seventh, complaints from employees of law firms will be filed during the administrative investigations and litigation or arbitration of their claims, threatening the integrity and fairness of the proceedings. The parties injured by the inquiries would be well-advised to seek writs under the All Writs Act, 28 U.S.C. § 1651, or State-law equivalents, to prevent such interference with the administrative bodies and tribunals to which their claims and defenses have been submitted. It does not seem to me well-advised to place ethics bodies in this situation.

Eighth, articles in the legal press show that claims against law firms are not uncommon, and the nuclear threat of jeopardizing an attorney's livelihood and good

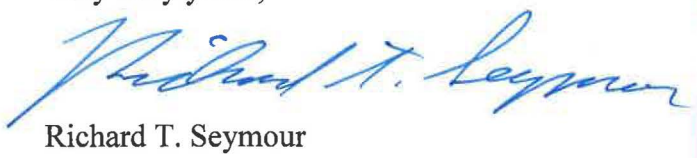
name merely by threatening or filing such a complaint would be abused and lead to unjustly strong pressures to settle and pay money to the complainant to get a withdrawal of the complaint or prevent its filing, even where the attorney has engaged in no wrong. This is flat-out wrong, and no such opportunity should be presented.

Ninth, the rule could turn out to be self-defeating, because the dire consequences may lead ethics committees and courts to look the other way in all but the most egregious cases.

I. Conclusion

I urge you to reject the proposed amendment and its Comment.

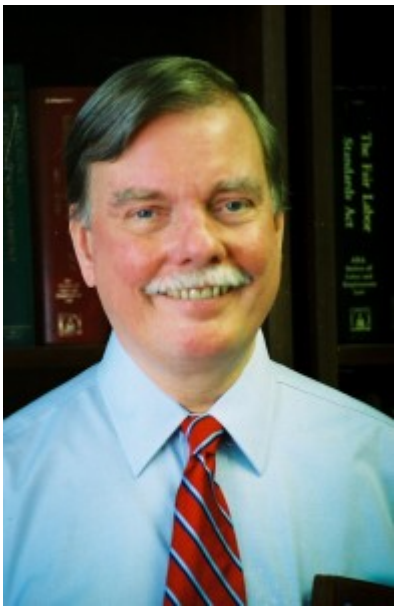
Very truly yours,



Richard T. Seymour

Why Does the EEOC Make Mistakes? Keeping a Fair Perspective

Posted on June 8, 2014 by Richard T. Seymour



Rick Seymour

Over the years, the U.S. Equal Employment Opportunity Commission has been routinely criticized by charging parties, plaintiffs' attorneys, respondents, and attorneys for respondents, as to virtually every aspect of the Commission's activities including the filing, investigation, and conciliation of charges, and the Commission's litigation.

The courts have added their voices to the criticisms by charging parties and their counsel, with numerous courts coming to the rescue of charging parties by holding that the EEOC's interim charge-processing steps are not jurisdictional prerequisites to a private suit and echoing the early words of the Fifth Circuit:

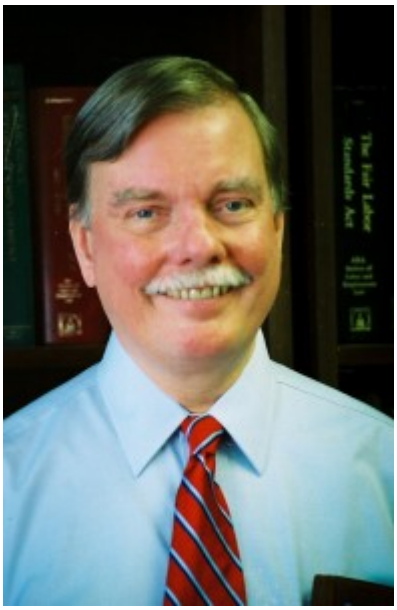
> *"Significantly, under EEOC regulations, a right to demand and receive such a notice accrues sixty days after the charge is filed regardless of any act or omission by the EEOC. Were this regulation not written, we would read it into the Act lest a claimant's statutory right to sue in federal court become subject to such fortuitous variables as workload, mistakes, or possible lack of diligence of EEOC personnel."*

Beverly v. Lone Star Lead Const. Corp., 437 F.2d 1136, 1140 (5th Cir. 1971) (footnotes omitted). The period for requesting a notice of right to sue was later expanded, of course, to 180 days. 29 C.F.R. § 1628(a).

The courts have also echoed some of the concerns raised by respondents and their counsel, and have sometimes added teeth to the criticisms by sanctioning the EEOC for perceived failures in investigation, conciliation, and litigation. *E.g.*, *E.E.O.C. v. CRST Van Expedited, Inc.*, 2013 WL 3984478, 119 Fair Empl.Prac.Cas. (BNA) 739 (N.D.Iowa Aug. 1, 2013) (No. 07-CV-95-LRR),

Common-Sense Suggestions to the EEOC

Posted on June 20, 2015 by Richard T. Seymour



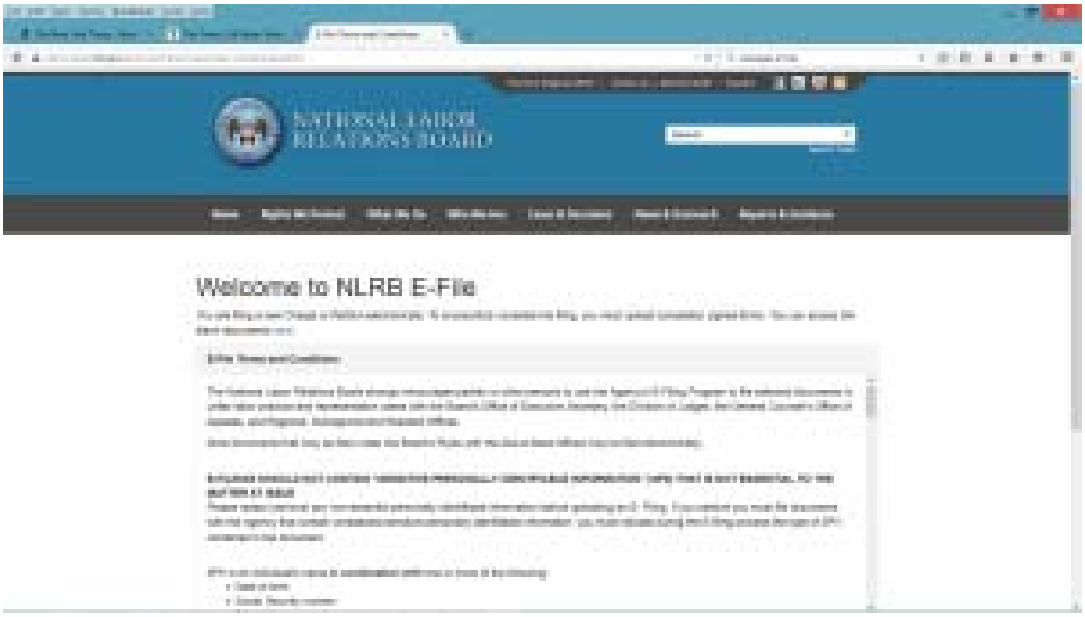
Richard T. Seymour

1. The EEOC has extremely important tasks in receiving charges on time, avoiding keeping potential charging parties "on hold" for month after month after month, drafting charges that capture what people are complaining about and do not inadvertently drop important claims, giving useful notice to employers, and investigating the charges. The EEOC is not performing these tasks well, in part because it insists on serving as a gatekeeper and does a poor job of it, does not have effective procedures, allows local offices to follow procedures that serve no one well, stiff-arms the charging parties and their counsel in the investigation, and causes problems for both sides in its conciliation efforts. Some common-sense changes would work far better for the Commission, the charging parties, and employers, and would redirect the Commission's resources to more productive activities. Here are my ideas of common-sense solutions to longstanding problems.

2. Make it easy for people to file timely charges of discrimination, and eliminate the present procedures that can consume months of waiting before charging parties are allowed to file charges, sometimes resulting in the loss of all their rights because the Commission fails to hurry its slow processes in order to meet the charge-filing deadlines.

3. Make it easy for employers to know what the charge is about, stopping the EEOC's practice of concealing the specifics and making charges vague and general. There are more direct remedies for retaliation and destruction of documents, and employers do need better notice of the problems involved in the charge.

4. Put a fill-in form on the EEOC website, allowing people to sign and file charges electronically and immediately, and serving the charges upon employers immediately. They can always be amended later, and the amendments promptly served. This will also eliminate the claim-killing problems that arise when the EEOC staff incorrectly draft the charges, leaving out harassment claims, promotion claims, or retaliation claims. The IRS does it for taxes, and the NLRB does it for unfair labor practice charges. Here is the NLRB example; go to http://www.nlrb.gov/resources/forms for a library of on-line forms:

5. 

NLRB On-Line Charge-Filing Form

6. The Commission can do it too, and everyone will benefit: employees can meet their deadlines with accurate charges, the EEOC can do quality control afterwards without endangering the timeliness of the charge, the EEOC can save time filling out forms and stop making mistakes when doing so, and employers can get faster notice and a better idea of what the charge is about.

7. In the on-line filing system, the Commission can lead charging parties to preserve their rights by asking questions, the same way tax preparation software does, and filling out the charge based on answers. The software should insert the State and local FEPAs automatically, and allow for more than one because coverage remedies may differ from one FEPA to another. (Example: The New York State Human Rights Law provides for compensatory damages but no punitive damages, but the New York City law provides for pnitive damages as well.) Insert a place where the charging party can identify counsel, and have the software ensure that counsel are always notified of events.

8. In any re-writings of charges, train staff so that they stop dropping claims by mistake, neglect, and inadvertence.

9. Put facts into the charges, and end the practice of replacing facts with uninformative boilerplate.

10. Allow charging parties to submit changes of address and changes of counsel online.

11. Do not hurt the agency's credibility.

a) Stop taking the respondent's words as golden and burning incense in front of it. This tells employers and employees alike that the Commission does not care about the facts. Only a real, questioning, examination of facts will restore credibility.

b) Train the Commission's staff in critical thinking, give them performance standards, and eliminate those who cannot perform. Fifty years of experience has shown that sweeping performance problems under the rug does not work.

c) Stop premature kick-outs of properly-filed charges shortly after they are received. Same-day kick-outs should be barred. There is no excuse for the Commission utterly failing to perform its duties. Position statements should be required for all charges alleging problems over which the Commission has jurisdictipon.

12. Help the EEOC do more with fewer resources. The EEOC cannot do it all, and pretending it can do so just wastes time and resources.

a) Use the information available, instead of turning up the Commission's nose at the available help. The greatest source of information with which to evaluate the position statement is the charging party and her or his counsel.

b) Charging parties and their counsel need to be given copies of respondents' position statements and all their attachments, and invited to submit responses.

c) The position statements need to be served on the charging party and counsel as soon as they are received, ending the absurd practice in some offices of providing them only after the Commission receives a file-stamped copy of the court Complaint.

d) The Commission should end the absurd practice in some offices of having staff members paraphrase the position statements, or re-write them. It burns up staff time and is not nearly as useful as providing the actual documents.

e) Those responses should be a great help to the Commission in focusing its investigation. Its offices should be required to follow up on the responses, instead of ignoring them, accepting the employer's word as golden, lighting incense, and bowing a ritual three times before the employer's position statements.

f) The responses should be provided to the employer for its comments. Again, the employer is in the best position to respond. If the employee's rebuttal has something wrong, the employer is in the best position to explain where it went wrong and to provide documents showing that its view of events is the correct one.

g) More than one cycle may be needed. The important point is that the Commission needs the parties to inform the Commission as to a lot of the facts, and the responses will allow a narrowing of the dispute.

13. The Commission should again become a national agency, instead of the present system of 50-odd principalities making up their own standards and procedures. The Commission's pendulum of control tends to get stuck at the extremes, and the present system of letting every office do what it wants has not worked at all well. The myth of "local conditions" cannot justify local variations in access to documents or charge processing. Many employers are covered by more than one office, and there needs to be a uniform nationwide set of standards and procedures.

14. The Commission should make it easy to contact every staff member. It should have an online directory of names, titles, locations, mailing addresses, telephone numbers, and e-mail addresses. Agencies like the State Department do this as a matter of routine. I went onto www.state.gov and searched for "Telephone Directory" and this led me to the following screen shot of http://www.state.gov /documents/organization/112065.pdf:

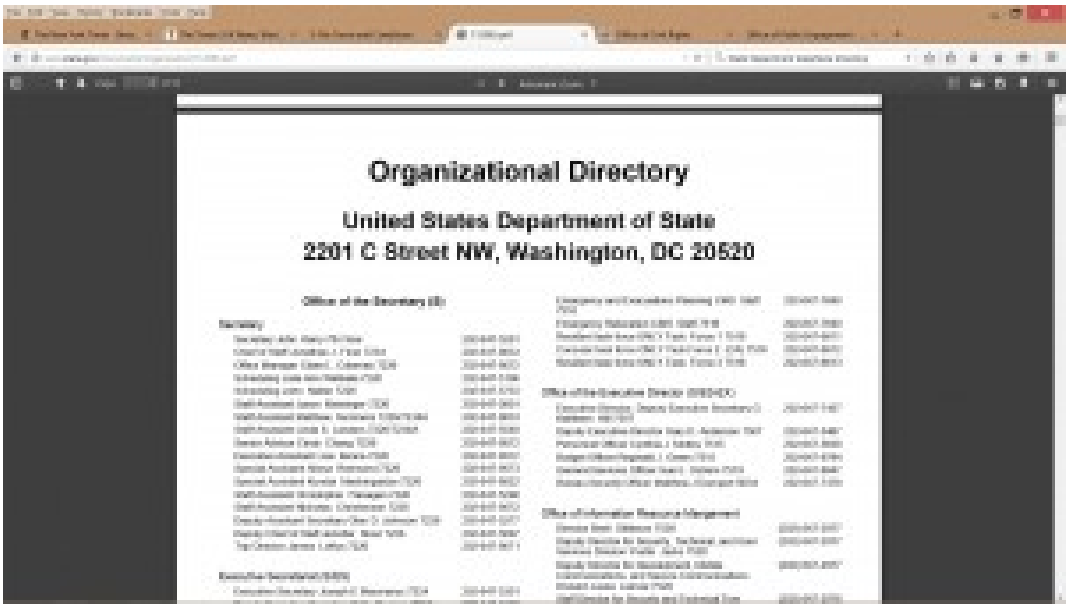
15. 

Illustration: State Department's Online Directory

16. The Chamber of Commerce issued a report in 2014, if memory serves, on the EEOC's conciliation efforts, and found major problems. The study is not–or is no longer–available on its web site. I know and respect the authors of the study, Randel K. "Randy" Johnson of the Chamber of Commerce and Camille Olson of Seyfarth Shaw, and believe the study is a fair description of very real problems in the EEOC's conciliation efforts. Plaintiffs' attorneys have also experienced major problems in the EEOC's conciliation, stemming from failures to considet eh facts showing strengths or weaknesses of the case and consequent unrealistically low or unrealistically high demands. The Commission clearly has major problems in its conciliation efforts. Those need to be tackled seriously. With the Supreme Court's decision in Mach Mining, LLC v. EEOC, __ U.S.__, 135 S.Ct. 1645 (2015), requiring limited judicial review of conciliation efforts in cases where the employer makes an adequate showing of a problem, agency credibility is at stake. The Commission should think about creating an internal appeal procedure to the Commission whenever a respondent thinks conciliation staff have done it wrong. That will take Commission time, but provide an invaluable insight, show the Commission

which offices need retraining, and will reduce the number of matters to be reviewed by the courts.

17. See also my blog, "Why Does the EEOC Make Mistakes? Part 1: Keeping a Fair Perspective."

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"I represent the dispossessed of the Earth, and executives recently shown the door."

"When the mindless become ruthless, call me."

I also act as a case mechanic for other attorneys or law firms, and serve as a neutral mediator and arbitrator.

Admitted to the District of Columbia and Maryland Bars.

awarding $4,694,442.14 in defendant's attorneys' fees and costs against the EEOC for perceived failures of conciliation and for litigation missteps.

Some employers are using the courts' criticisms in an effort to tie up the Commission's enforcement efforts in red-tape preliminaries that could require more effort than the litigation they are trying to stave off. The Courts of Appeals are split as to whether respondents have an affirmative defense for the EEOC's failure to conciliate reasonably, and the issue is now before the U.S. Supreme Court in *Mach Mining, LLC, v. E.E.O.C.*, No. 13-1019 (scheduled for conference on June 19, 2014). Both sides have agreed that the Supreme Court should take the case and resolve this question, and we will shortly find out whether the Court will grant review. The Seventh Circuit had decided that courts could not enquire into the reasonableness of the EEOC's conciliation efforts. *E.E.O.C. v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013). The Commission's response to the petition for certiorari, however, shows at pp. 3-4 the degree to which allowing such inquiries will stymie the EEOC's enforcement efforts:

> *2. In 2008, a woman who had unsuccessfully applied for a mining position with petitioner filed a charge of unlawful employment discrimination with the Commission. . . . She contended that petitioner, which had never hired a woman for a mining position, refused to hire her based on her gender. . . . The Commission investigated the charge, found reasonable cause to believe petitioner had discriminated against a class of women who applied for mining-related jobs, and invited petitioner to conciliate. . . . From late 2010 to late 2011, the Commission attempted conciliation with petitioner, but no agreement was reached. . . .*
>
> *The Commission then filed this lawsuit, contending that petitioner engaged in a pattern or practice of unlawful employment discrimination and used employment practices that had a disparate impact on female applicants. . . . In its answer, petitioner asserted a failure-to-conciliate affirmative defense, contending that the complaint should be dismissed because the Commission had failed to expend sufficient efforts on conciliation. . . . The Commission responded that Title VII includes no such failure-to-conciliate affirmative defense, and it moved for partial summary judgment on that basis. . . . In the meantime, petitioner submitted "extensive discovery requests"—**including more than 600 requests for admissions of fact**—that "s(ought) information about the EEOC's investigation and conciliation efforts." . . . . Petitioner also "slowed discovery on the merits" by objecting to the Commission's merits-related discovery requests on "failure to conciliate" grounds. . . .*

(Emphasis supplied.) The petition, response, and reply can all be downloaded from http://www.scotusblog.com/case-files/cases/mach-mining-v-equal-employment-opportunity-commission/. (ScotusBlog, www.scotusblog.com, is an extraordinarily useful website.) The text of the response makes a compelling case why there is no judicially-enforceable duty to conciliate; a later blog posting will address that question.

In the face of all these criticisms, fair-minded persons need to pause and consider how all these perceived problems came to exist.

First, expectations for the EEOC have always been very high. The Fourth Circuit's view of the "public avenger" role of the EEOC after the 1972 amendments to Title VII giving it the power to sue in its own name were echoed by many courts in more prosaic opinions. Here is how the Fourth Circuit put it:

> *"But, unlike the individual charging party, the EEOC, when it sued, did so 'to vindicate the public interest' as expressed in the Congressional purpose of eliminating employment discrimination as a national evil rather than for the redress of the strictly private interests of the complaining party. Because of this significant difference, the EEOC's suit was 'broader (in scope) than the interests of the charging parties. It follows that the standing of the EEOC to sue under Title VII cannot be controlled or determined by the standing of the charging party to sue, limited as he is in rights to the vindication of his own individual rights. To hold otherwise, as did the District Court, would be to continue treating the sole purpose of the Title to be the correction of individual wrongs rather than of public or 'societal' wrongs as well as to deny to the EEOC the right to be any more than a mere proxy for the charging party rather than what Congress by the Amendments of 1972 intended, i.e.,* ***the public avenger by civil suit of any discrimination uncovered in a valid investigation and subjected to conciliation under the Act****. We find no warrant whatsoever for placing such limitation on the right or standing of the EEOC to bring suit; indeed, were such limitation to be imposed, it would be in our opinion a clear nullification of the legislative intent in enacting the Amendments of 1972. . . . "*

Equal Employment Opportunity Commission v. General Electric Co., 532 F.2d 359, 373 (4th Cir. 1976) (footnotes omitted; emphasis supplied).

Second, the EEOC has always been starved for resources, and the starvation has become endemic:.

President	EEOC Authorized Staff When He Took the Oath of Office	EEOC Authorized Staff When He Left Office	Reduction from January 1981: No.	Reduction from January 1981: %
Ronald Reagan	January 1981: 3,696	January 1989: 3,198	498	14.1%
George H.W. Bush	January 1989: 3,198	January 1993: 3,071	625	17.7%
Bill Clinton	January 1993: 3,071	January 2001: 3,055	641	18.2%
George W. Bush	January 2001: 3,055	January 2009: 2,556	1,140	32.3%
Barack Obama	January 2009: 2,556	N.A. Currently 2,347	1,349	38.2%

Source, EEOC Budget figures, http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm, last visited June 8, 2014, with my calculations in the last two columns.

During this same time period, the EEOC has been given very substantial new responsibilities, including the Older Workers Benefit Protection Act of 1990, the Americans with Disabilities Act of 1990, and the Genetic Information Nondiscrimination Act of 2008.

Similarly, the EEOC's web site shows that 93,727 charges were filed in FY 2013, compared with 72,302 in FY 1992, the earliest year with reported data. That is a 22.9% increase.

Moreover, during this period Congress has required the EEOC to devote a substantial part of its budget to help fund State and local fair employment practice agencies.

Third, the recent difficulties in financing government operations make realistic planning very difficult. Not only do agencies know whether the Office of Management and Budget will recommend budget figures for the next year comparable to those of the current year, the present dysfunction in Congress makes it impossible to tell what will be appropriated. There may be government-wide hiring freezes lasting for years. When those are lifted, agencies hire as many as possible, because they do not know when they will be able to hire again. Meanwhile, salaries and rents increase with inflation, and the training budget is among the first to be cut. The lack of professional training for attorneys, investigators, and others harms many aspects of the Commission's operations.

Fourth, while many EEOC staff members are extremely well-skilled and dedicated, not all meet those criteria. The EEOC has never taken seriously the idea in the Civil Service Reform Act of 1978 that it should adopt truly objective and fair performance standards, train staff to meet those objective standards, and terminate staff who either cannot or will not come up to objective and fair performance standards. It has routinely refused to take action against unwilling or incompetent employees, and incoming Chairs have sometimes withdrawn pending disciplinary charges against large numbers of employees in a misguided effort to build good will, and an understandable but still mistaken effort to avoid the large amounts of management time that would have to be devoted to cleaning house.

Now consider: What private firm would have a chance of meeting its goals under these conditions: heavily increased workload, almost a 40% reduction in staff, little technology to make up the slack, no money for training, an inadequate effort to identify and get rid of poor performers, and the need to give a lot of discretion to untrained staff regardless of their performance?

It is close to a miracle that the EEOC can accomplish anything at all. Yet it has provided very useful guidance to employers, unions, and employees, and has recovered substantial amounts in resolutions of charges and in litigation.

When we criticize the agency, we need to be mindful of the difficulties under which it labors.

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I represent the dispossessed of the Earth, and executives recently shown the door.

I also act as a case mechanic for other attorneys or law firms, and serve as a neutral mediator and arbitrator.

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