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RACE DISCRIMINATION

Section 1981 race discrimination claims pose unlimited liability risk for TX employers

by Jacob M. Monty, Monty & Ramirez LLP

Race discrimination and retaliation claims under Section 1981 of the Civil Rights Act of 1866 have no cap on the damages that can be awarded. In a recent case from the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers), an employee was awarded $366 million in damages made possible by Section 1981. On appeal, however, the court determined the Section 1981 claims were barred by a six-month limitations provision in the employment contract. This reduced the employer's damages to no more than the $300,000 cap on the alternative claims filed under Title VII of the Civil Rights Act of 1964.

No cap on damages for claims under Section 1981

The employment-related claims that subject employers to the most potential exposure are those that carry prolonged limitation periods and no damages caps. Section 1981, which prohibits race discrimination and retaliation, poses a risk of double exposure to employers. You should be aware that, unlike discrimination claims filed under Title VII, Section 1981 claims have no cap on compensatory or punitive damages.

Jennifer Harris, an African American woman, worked as a sales executive for FedEx. She was fired in 2020 and filed race discrimination and retaliation claims under Section 1981 in May 2021—16 months later.

FedEx asked the court for summary judgment (dismissal without a trial) in its favor because Harris' employment contract contained a six-month limitations provision, and thus her claims were time-barred. She responded by amending her complaint with discrimination and retaliation claims under Title VII. The trial court denied the employer's summary judgment request, determining the limitations provision was contrary to public policy. It allowed her amended claims to proceed to trial.

At trial, the jury awarded Harris $120,000 for past pain and suffering and $1,040,000 for future pain and suffering. It awarded an additional $365,000,000 in punitive damages.

Importantly, the size of the award was only possible because of the inclusion of the Section 1981 claims. Title VII claims are subject to a statutory cap of $300,000 (including punitive damages). Juries cannot award an employee more than the statutory maximum under Title VII. However, Section 1981 claims have no such limits on exposure, resulting in the jury's ability to award substantial damages.

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Statute of limitations for Section 1981 claims

Section 1981 lacks an express statute of limitations, so courts have adopted the most similar state-law limitations period. In Texas, an employee generally has four years from the date of the alleged discriminatory act to file a claim under Section 1981. Courts in the past have ruled that "the limitations period for [Section] 1981 . . . employment discrimination cases commences when the [employee] knows or reasonably should know that the [challenged] discriminatory act has occurred."

Fortunately, the 5th Circuit in *Harris* recognized the validity of waivers of the statute of limitations within an employment contract provision and enforced a six-month contractual limitations period to bar Section 1981 claims. FedEx included a provision in its employment contract that limited all actions against it to six months from the date of the event forming the basis of the lawsuit. The 5th Circuit found this provision wasn't contrary to public policy, dismissing Harris' contention that she hadn't read the provision and thus it shouldn't apply. *Harris v. Fed Ex Corporate Services.*

Takeaways

The main takeaway from the *Harris* decision for employers is that you can limit overall liability exposure under discrimination claims such as Section 1981 by reducing the period within which the claims must be filed and have employees waive any statute of limitations to the contrary. You are wise to consult with employment law counsel when preparing employment agreements, offer letters, job applications, and arbitration agreements to include limitation provisions that will stand up to legal attacks in court. This strategic move significantly reduces the number of timely filed claims and, consequently, your potential exposure.

Jacob M. Monty is the managing partner at Monty & Ramirez LLP in Houston and can be reached at 281-493-5529 or jmonty@montyramirezlaw.com. ■

REASONABLE ACCOMMODATIONS

East Texas court vindicates religious freedom

by Michael P. Maslanka, UNT-Dallas College of Law

A recent case from the U.S. Supreme Court on religion in the workplace was applied by a federal trial court in Tyler, Texas, to the benefit of an employee.

Then came COVID . . .

Derek Troutman was enjoying a great career with drug giant Teva Pharmaceuticals, first as a salesperson, then as a district manager supervising salespeople. All was well until Teva, in light of the COVID-19 pandemic, required all of its employees with forward-facing duties (i.e., meeting with others face-to-face, including doctors) to get a vaccination protecting against the virus.

Employees could ask for a religious exemption. Troutman submitted a detailed request explaining that he could not be vaccinated. In part, it read:

- "My body is a temple," and "[I am commanded] to honor God, our Creator, and possessor of our very bodies by not defiling [it]."
- Taking a vaccine violates this deeply held belief, especially because the vaccine contains fetal cells. He cited biblical verses to support this position.
- God created the human immune system, and therefore, "it is an assault to many Christians including myself to be forced to be injected with a man-made substance in an effort to 'improve' the immune system."

Teva's response came 11 days later:

> Due to your customer-facing responsibilities in your role as Sr. Mgr. Regional Sales and the credentialing requirements of Teva's customers that prevent you from entering some customer premises unless you are fully vaccinated against COVID-19, Teva is unable to grant your requested accommodation as it presents Teva [with] an undue hardship for you to perform only a limited portion of the job functions required for your position.

Troutman countered:

- None of my clients is requiring vaccinations or mask-wearing.

- I can work virtually and submit to weekly testing for the virus. My job as a manager does not require extensive face-to-face contact with doctors, and it mostly involves remote managing of the sales force.

Teva's reply came two days later in a two-sentence email saying, essentially, you are fired.

Troutman filed a lawsuit alleging religious discrimination and failure to accommodate under Title VII of the Civil Rights Act of 1964. Teva asked the court to dismiss the claims, but the court denied the request.

No bona fide religious belief

Teva argued that Troutman's refusal to be vaccinated wasn't based on a bona fide religious belief. The court was not impressed.

According to the court, "In nearly two full pages of text, [he] described the source and basis of his religious belief, its connection to his wider religious outlook on life, and its conflict with Teva's 'jab or jib' policy." That was sufficient for the court to conclude it will be up to a jury to decide whether he has a sincere and bona fide religious belief. Strike one.

No reasonable accommodation could be made

Troutman's job duties required face-to-face contact, and thus Teva claimed no accommodation to his religious beliefs was possible.

But Teva's "evidence" was made up of generalized surveys of what doctors were requiring, not an individualized assessment of Troutman's explanation of what his specific customer base was or was not requiring.

Relying on barroom generalities, not Troutman's specific facts, was fatal to this argument. Strike two.

We will suffer an undue hardship

Teva also engaged in conclusions when it broadly asserted that giving Troutman the accommodation he requested (an exemption from being vaccinated) would place an undue hardship on its operations.

The U.S. Supreme Court recently held that employers asserting this defense must demonstrate that the burden on them is "substantial" in the overall context of their business. No dice on this defense. The district court held that it would be up to an East Texas jury to decide whether a multimillion-dollar international company would suffer an undue hardship by allowing Troutman to work virtually with weekly testing.

Teva's big mistake, though, was this: It failed completely to discuss Troutman's suggestions, ignoring the mandate of the U.S. Supreme Court that employers have an affirmative obligation to engage in a "thorough examination of any and all [reasonable accommodation] alternatives" to the employers' mandate. Teva's approach was a binary "take-it-or-leave-it" approach.

No way, no how. Discussion must be held, in good faith, with the employee. Truncating this legal obligation is a violation of the law.

HR Technology

AI found to save workers an hour a day. The use of artificial intelligence (AI) is saving workers an average of one hour each day, according to The Adecco Group's 2024 Global Workforce of the Future survey of 35,000 workers. The time saved is allowing more time for creative tasks, thinking more strategically, or helping achieve a better work/life balance. The time savings appear consistent across sectors, according to The Adecco Group. Workers in the energy, utilities, and clean technology sectors reported the highest time savings of 75 minutes a day, while the lowest—in aerospace and defense—reported savings of 52 minutes a day. Workers in tech saved an average of 66 minutes a day, financial services 57 minutes, and manufacturing 62 minutes. The survey suggests that time saved is being used to add greater value, with 28% of users saying they use the extra time for more creative work, 26% saying AI has allowed them to spend more time on strategic thinking, and 27% saying AI has helped them achieve a better work/life balance.

Survey finds need for greater balance between tech and human skills. A survey released in October from Deloitte found that 94% of surveyed workers worry future generations won't be equipped with adequate human skills. On-the-job observation and shadowing could close the gap, with 57% of employees wanting more of those opportunities, according to the survey. The survey found that while 87% of workers see human skills like adaptability, leadership, and communications as integral to their career advancement, only 52% think their company values employees with human skills more than those with technical skills. Also, three in five surveyed employees believe their company focuses more on immediate business needs than providing the training they may need for long-term success. This could signal challenges for companies down the line, Deloitte says, with 94% of respondents expressing concern that future generations will enter the workforce without the necessary human skills.

Need for more cybersecurity workers noted. Data from CyberSeek—a source of information on the U.S. cybersecurity workforce—shows that a decade of employment growth in the cybersecurity workforce hasn't been enough to narrow the talent gap. CyberSeek says nearly 265,000 more cybersecurity workers are required to address current staffing needs, and there are enough workers to fill only 83% of the available cybersecurity jobs. While employers have slowed their search for technology workers generally, positions in cybersecurity have been less affected. In the 12 months between September 2023 and August 2024, employer job postings for IT occupations declined by 28%. Postings for cybersecurity jobs saw a 22% decrease. ■

Federal Watch

Agency takes action on worker surveillance. In October, the federal Consumer Financial Protection Bureau (CFPB) issued guidance aimed at protecting workers from what it calls unchecked digital tracking and opaque decision-making systems. The guidance warns that companies using third-party consumer reports—including background dossiers and surveillance-based "black box" artificial intelligence or algorithmic scores about their workers—must follow Fair Credit Reporting Act (FCRA) rules. That means employers must obtain workers' consent, provide transparency about data used in adverse decisions, and allow workers to dispute inaccurate information. The CFPB guidance addresses the use of third-party consumer reports by employers to make employment decisions about their workers. The reports increasingly extend beyond traditional background checks and may encompass a range of information and assessments about workers. For example, some employers require workers to install apps on their personal phones that monitor their conduct.

NLRB memo addresses noncompete and "stay-or-pay" provisions. National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued a memo in October expanding on her May 2023 memo stating her position that overbroad noncompete agreements are unlawful because they chill employees from exercising their rights under Section 7 of the National Labor Relations Act (NLRA), which protects employees' rights to take collective action to improve their working conditions. In the October memo, Abruzzo lays out her intent not only to prosecute employers that require their employees to sign noncompete and "stay-or-pay" provisions but also to remedy as fully as possible the harmful monetary effects employees experience because of those provisions. The memo outlines her proposed framework for assessing the lawfulness of a range of stay-or-pay provisions, including training repayment agreement provisions, educational repayment contracts, quit fees, damages clauses, sign-on bonuses, or other types of cash payments tied to a mandatory stay period.

Union petitions up 27% since fiscal year 2023. From October 1, 2023, to September 30, 2024, the NLRB received 3,286 union election petitions, which is up 27% since fiscal year (FY) 2023, when the agency received 2,593 petitions. This is more than double the number of petitions received since FY2021, when the Board received 1,638 petitions. Also, the NLRB reports that from FY2023 to FY2024, unfair labor practice charge filings increased 7% (from 19,869 to 21,292 cases). The Board's field offices received a total of 24,578 cases, the highest total case intake in over a decade. ■

Strike three. Off to trial you go. *Troutman v. Teva Pharmaceuticals USA et al.* (E.D. Tyler, 2024; Case No. 6:22-cv-395-JDK).

Bottom line

It's a new day for religious discrimination claims. Proceed with caution. Once upon a time, the only prayer these claims had was prayer. No longer.

- Don't assume you know the legal definition of religion. It's much broader than you suspect. Talk to an employment lawyer. It isn't what you know that hurts you; it's what you think is so but isn't.
- Don't judge an employee's belief. Be grateful we live in a society welcoming of differing beliefs and values.
- Don't automatically reject an employee's suggestion(s) for a reasonable accommodation. Don't assume what is possible as an accommodation. Don't rely on general factual beliefs, but do rely on the facts involving the employee in question.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

HOSTILE WORK ENVIRONMENT

Failing to list all facts results in employer win

by Michael P. Maslanka, UNT-Dallas College of Law

Employees alleging a hostile work environment must list all the facts supporting their claims. After all, employers are entitled to know all the allegations against them—it's only fair. A new case from the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) stands for these propositions, so read on for the details.

Racial slur used

Anthony Woods claimed a racial epithet was directed at him—in front of coworkers—by his immediate supervisor on June 22, 2018. He filed an internal grievance, and his employer investigated. The supervisor received a suspension and was required to attend training.

Stating that he was "satisfied with this disciplinary action," Woods took no further action, but he was fired on August 23, 2019. He then filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on October 21, 2019, alleging a hostile work environment and later filed his lawsuit alleging violations of Title VII of the Civil Rights Act of 1964.

Incomplete and untimely charge

The details matter.

A discrimination charge for a hostile work environment must be filed within 300 days of the last incident supporting the claim. Here, Woods listed only one incident in the charge supporting the hostile environment claim—the racial epithet. But he filed his charge 486 days after the incident. It was too late, so the employer asked the court to dismiss the lawsuit.

But wait, wait. Woods essentially argued, *"I endured a hostile work environment until the day of my termination. Trust me! So, my lawsuit is timely and shouldn't be dismissed."*

The court looked high and low for any mention in the charge of these other incidents. It looked at the date the charge was filed and counted back 300 days to see if there was any other allegation of a hostile work environment. If so, then the original incident—while untimely on its own—would piggyback on the timely allegation and be part of the lawsuit.

But the court found zip! The mere assertion of *"trust me, it happened"* without including the details in the charge isn't sufficient. *Woods v. N'Gai Smith et al.* (5th Cir., November 4, 2024).

Bottom line

Always examine the charge carefully. An employee's failure to cross the T's and dot the I's can work in your defense.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

RACE DISCRIMINATION

Title VI case proceeds on antisemitism claim

by Michael P. Maslanka, UNT-Dallas College of Law

Yes, you read that right—Title VI, not Title VII. What is Title VI? It was passed as part of the Civil Rights Act of 1964 along with Title VII and prohibits discrimination based on actual or perceived shared ancestry or ethnic characteristics. Title VI covers any entity or program receiving federal financial assistance. It was highlighted in recent lawsuits by Jewish students at universities claiming a hostile environment because of their shared ethnicity or ancestry—being Jewish. Employers concerned with Title VII have much to learn from this sister section of the Civil Rights Act.

October 7, 2023, attack

This was the date of the brutal terrorist attack on Israel. Antisemitism and anti-Israel agitation—as you might recall from the news—surged at schools of higher education across the United States, including Harvard University, which was sued under Title VI by some of its Jewish students. The trial court refused to dismiss the claims. Here are two of several claims made in the lawsuit:

- A Harvard medical student encountered numerous protests on campus celebrating the attack as an "act of justified resistance by brave freedom fighters" and seeking the eradication of Israel. She became distressed and started working almost exclusively from her apartment.
- Some supporters of the attack physically accosted Jewish students on campus. They were criminally charged by the local district attorney.

Other incidents involved faculty members discriminating against or threatening Jewish students.

What did Harvard do in response?

Not much, according to the lawsuit. An outside law firm was hired to conduct an investigation into these complaints and others but wasted several months to start.

A congressional investigation was opened into Harvard's response in December 2023, but expressions of antisemitism continued at Harvard through the spring semester of 2024.

What do the students need to show?

The burden in a Title VI case is higher than in a Title VII case. The students who filed suit must demonstrate that the school knew of the conduct and showed "deliberate indifference" in addressing it. It's a tough burden to meet because they must show more than just that the school's response was less than ideal—namely that the school chose to do the wrong thing, or do nothing, despite knowing that the law requires an appropriate response.

The trial court dispatched Harvard's defense to the lawsuit:

> Harvard contends that its response was reasonable because . . . it affirmatively launched an outside investigation into the alleged harassment. But this argument misconstrues the nature of [the] claims. The alleged unreasonableness in Harvard's response arises from its failure (for more than a year) to take any remedial action based on the results of one investigation and its failure (for months on end) to meaningfully advance the other. To conclude that the mere act of launching an investigation without any further follow-through necessarily defeats a deliberate indifference claim, would be to prioritize form over function.

The Louis Brandeis Center for Human Rights Under Law et al. v. President and Fellows of Harvard College et al.

Bottom line

While Title VII and Title VI serve different purposes, they share one common and important theme: Knowledge of improper conduct triggers an obligation to act. An ostrich-like attitude of self-delusion is a losing strategy. Ask yourself: What is a proportionate response to what I know, and how will I implement the response?

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

PERFORMANCE EVALUATION

Make your feedback concrete

by Michael P. Maslanka, UNT-Dallas College of Law

We all either give or receive feedback on work performance. While we say it's important, we don't always treat it as important. It often devolves into barroom generalities, personality-based observations, or negative stereotypes. My eyes were opened by a very actionable article published on November 1, 2024, in the Harvard Business Review titled "High Performers Need Feedback, Too," by Rocki Howard, a thought leader in HR, inclusion, and work culture.

Avoid vapid language

What's the problem with the following employee feedback?

"Your questions in last week's meeting were great! You rarely miss a chance to show your thinking skills, and it was helpful to all of us."

Is the employee better off after hearing this comment? No. It's too much fluff, like telling a person not to drive faster than the speed limit.

Make it useful instead: *"Your questions were insightful because they opened up the discussion on how we'll approach the Q4 earnings call."*

This is concrete. It uses the key word "because." Specificity is key.

Never make it personal!

In her article, Howard makes the useful observation that women often get comments like *"You're the most helpful person on the team—a joy to work with."* She writes that women are 22% more likely to get feedback on their personality than men. It's "greeting card" nice, but the employee doesn't receive any actionable feedback. She just receives a compliment, nothing more.

Instead, make it useful: *"Your clear communication and openness to working with your colleagues helped us put together a more cohesive pitch to the potential client. Let's find more opportunities to work on pitches so we can use your skills and hone them."*

Howard notes that you must refocus from personality traits to skills and behaviors. Impart the message that you want to help employees develop their demonstrated skills even further.

Avoid negative stereotypes

"Your colleagues find you difficult to work with."

Howard tells us that avoiding negative stereotypes is especially important with those who are likely to internalize feedback. An example of perpetuating a negative stereotype in the workplace would be telling a female manager that she can be too emotional. Here's Howard:

> Research also [finds] that 42% of Black employees recall being called "unlikeable" in feedback, while White employees are two times as likely to be called "likeable" over any other group at work. These labels can undermine even the most talented individuals and reinforce stereotypes about specific groups.

Resorting to stereotypes is, well, lazy management. When in doubt, resort to the concrete, such as: *"I've noticed during our team discussions that you tend to shut down others before they complete their thoughts. This makes them feel dismissed and affects their trust in your leadership. Let's work on ways to facilitate their contributions."*

Avoid labels; embrace facts.

Bottom line

Once you get into the mindset of giving specifics, you'll see immediate results. The advice also works when you give compliments. Would you rather hear *"Good job on getting that article published in our trade publication"* or *"I read the synopsis of your new article. I really liked the actionable advice you gave on [XYZ] topic. It will help a lot of readers"*?

The second response shows real interest. The person took the time, and that's special because time is our most precious resource. Spend it freely!

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

HUMAN RESOURCES

'Rethinking' training: Consider a cognitive spin

by Michael P. Maslanka, UNT-Dallas College of Law

I just finished reading Magic Words: What to Say to Get Your Way by Jonah Berger, a marketing professor at the Wharton School of Business. It's especially useful to HR professionals, who are often tasked with training duties and helping improve employee performance. Here are three training gems Berger offers.

Gem No. 1: Leverage the power of the concrete

We all share the desire to be heard, understood, and acknowledged. Consider customer service. Cognitive researchers conduct studies along these lines. For example, a shoe salesperson is waiting on a customer and is fielding a customer request to find a specific type of shoe. Which response is the best?

- (a) "I will go look for them."
- (b) "I will go look for those shoes."
- (c) "I will find those lime green Nikes."

And the winner is . . . that's right. It's (c).

Try this: If you're responding to a call about a package delivery, which response should you choose?

- (a) "The package will be arriving there."
- (b) "The package will be arriving at your place."
- (c) "The package will be arriving at your door."

That's right. It's (c) again. Why? Here's what Berger has to say:

> The [c answer] uses more concrete language. . . . The words used are more specific, tangible, and real. These variations might seem like simple turns of phrase, but they had an important impact on how customers felt about the interaction. Using concrete language significantly increased customer satisfaction. When customer service agents used more concrete language, customers were more satisfied with the interaction and thought the agent had been more helpful.

Yes, it takes a bit more effort for the employee, but a small effort provides a solid return on the time investment. And, as the saying goes, we make our habits, and our habits make us. Once you get used to speaking more concretely, it becomes second nature.

Cutting-Edge HR

Employers ready to crack down on "coffee-badging." A survey from ResumeTemplates.com has found many employees are getting around their employer's return-to-office (RTO) policies, and that's leading companies to crack down on "coffee-badging," a practice in which employees come to the office the required number of days per week but stay barely long enough to grab a cup of coffee. The survey, conducted in September 2024, included 713 business leaders. It found the most common strategy employees use to circumvent RTO policies is to not show up on required days, with 47% of companies reporting the tactic. Another 40% said workers aren't staying for the full day, and 7% reported that employees manipulate swipe-in or sign-in systems to appear compliant. The survey found that 22% of companies said they will definitely enforce RTO more strictly in 2025, while 30% said they probably will step up enforcement.

Survey finds human skills more in demand than digital skills. A report from workforce agility solutions provider Cornerstone OnDemand Inc. has found that demand for artificial intelligence (AI), machine learning (ML), and generative artificial intelligence (GenAI) is on the rise, with AI and ML job postings increasing by 65% since 2019 and GenAI-related job postings seeing a 411% surge. However, the demand for human skills—or soft skills—such as leadership, communication, and emotional intelligence consistently exceeds the need for digital skills across all regions. Globally, human skills were found to be two times more in demand than digital skills. The research also found that demand for GenAI skills goes beyond the tech industry. Although those skills are concentrated in industries such as software development and IT consulting, demand is rising in financial services, health care, pharmaceuticals, and banking.

Many Gen Z workers using side hustles to upgrade their skills. A survey from personal finance software provider Quicken has found that many Americans—especially Gen Z—are taking on side hustles to build skills. Nearly one in five (18%) Americans with a side hustle say they are building skills for future careers, showing that side hustles are more than just a means to earn extra income. When looking at Gen Z members of the group with side jobs, the number jumps to 44%. The desire for independence and self-sufficiency is another reason people choose to have a side hustle, with 72% of people with multiple jobs reporting they enjoy working for themselves more than being tied to a corporation. Nearly three-fourths (73%) of those who prefer self-employment say they are happier managing multiple jobs than investing all of their efforts into one. ■

Gem No. 2: Turn verbs into nouns

This gem involves creating an identity for employees, who will then act consistently with that identity. Illustration:

- Rather than describing employees as "hardworking," describe them as "hard workers."
- Rather than describing coworkers as "innovative," call them "innovators."
- Instead of asking a colleague to "help with cleaning up a computer program," try asking, "Can you be a helper in cleaning up this computer program?"

Back to Berger:

> Category labels often imply a degree of permanence or stability. Rather than noting what someone is or does, feels or felt, category labels hint at a deeper essence: Who someone is. Regardless of time or situation, this is the type of person they are. That they will always be that way.

The employees so labeled will rise to that level. As Berger writes, "Want people to listen? Ask them to be a listener. Want them to lead? Ask them to be a leader. Want them to work harder? Encourage them to be a top performer."

Gem No. 3: Change 'can'ts' to 'don'ts'

Here's a study conducted by cognitive scientists. Rather than saying "I can't do XYZ because _____" when fending off the temptation to act unethically, say, "I don't do XYZ because _____."

"I can't" implies your actions are being dictated by external forces—rules and regulations. It's a compelled version of acting ethically.

"I don't" is more successful in dodging unethical temptation. As Berger points out, "Rather than being some temporary constraint, now the driver of saying no is something more permanent; it's an entrenched attitude." It's an internal and unwavering moral strength, not an external and ever-changing force.

There's plenty more in the book. Give it a read!

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

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Editorial inquiries should be directed to Content Manager Sean Richardson, srichardson@blr.com.