Focus

LAW

INSIDE

It's in the fine print

Attorneys Todd Leishman and Chris Bennett cite a Utah case where usage of "boilerplate," the non-deal-specific clauses in a contract, was not used properly and came back to damage the client. Such terms are essential in that they govern how contract disputes are resolved and how a court will enforce the contract.
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OFFICE ROMANCE

There's probably no law that will stop it, but relationships between co-workers can cause all sorts of trouble in the corporate setting

Brice Wallace
The Enterprise

Love your work? Great. Love at your work? Maybe not-so-great.

Whether romance in the workplace involves a supervisor with an underling, an employee with a vendor or two folks in the same department, it is replete with possible, shall we say, entanglements.

Even if the relationships are legal, possible trouble snags can exist, making workplace romance a many-splintered thing.

Speaking at a breakout session during Parsons Behle & Latimer's 30th annual Employment Law Seminar in Salt Lake City, attorney Liz Mellem said her advice is similar to what the law firm suggests to companies every year on various topics: "You can let this happen, but we don't advise you to let it happen because it can cause you problems down the road."

Mellem, a member of the firm's Litigation, Trials and Appeals practice group, the Employment Law practice group and the Product Liability practice group, detailed many reasons for a company to institute a dating policy. They include alleviating turmoil, preventing loss in productivity and reducing the possibility of sexual harassment charges. Even consensual office relationships can lead to accusations of favoritism, workplace violence or retaliation if an employee believes he or she is being professionally disadvantaged because they aren't dating a supervisor — unlike a fast-tracked colleague who is.

Liz Mellum

"Favoritism may not be wrong under the law, but — oh, my gosh — the headache it's going to cause for you," Mellem told the crowd. That's especially true if there are a lot of young employees and they complain that other workers got a good work schedule by dating a boss. "Just the extra headache that this type of a thing can cause HR, you try to limit that, try to decrease it."

Despite the growing need for workplace dating policies, only one audience member at the breakout session indicated one was in place at his office.

Still, statistics indicate the workplace romance is prevalent. While CareerBuilder's annual Valentine's Day survey this year reported a 10-year low in the number of workers dating co-workers — 36 percent, down from 41 percent the prior year — the percentage of workers who have dated their own boss was 22 percent, up from 15 percent in 2017.

Other survey results indicate that 31 percent who began dating at work ended up marrying, 24 percent had an affair with a co-worker where one person involved was married at the time, nearly one in 10 women workers whose romance soured left their job because of it, and 41 percent of workers had to keep their romance a secret.

"Office romance is experiencing a dip and whether it's impacted by the current environment around sexual harassment or by workers not wanting

see ROMANCE page 22

A DIFFERENT KIND OF TAKEOVER

Here are some ideas for a trial lawyer taking a colleague's case to court

There is a joke in large law firms that making partner is like winning a pie-eating contest in which the prize is more pie. If you have a low-to-moderate appetite for pie, the prize is not worth the effort. The same could be said of a practice niche I fell into somewhere over the past 30 years — taking over cases that are about to go to trial. Fortunately, I really, really like pie.

Taking over a case shortly before trial — "shortly" being a relative term — is something I have been asked to do on numerous occasions. The request has come from partners in my own firm, lawyers in other firms who want to co-counsel and clients who have grown dissatisfied with their current counsel.

Most clients — and some lawyers — do not begin with a trial in mind. Typically, clients are looking for the quickest and least expensive resolution possible, and that frequently means an early settlement or dispositive motion. However, often the early settlement effort ends in an impasse and the motion is rejected for disputed issues of fact. Or sometimes the emotions or principles or dollar value on either side is too great to compromise and a trial becomes inevitable. At that time, it is not uncommon for clients and lawyers to begin to consider a transition in counsel.

There are reasons not to make a change in lawyers just as much as there are reasons to do so. Those reasons mostly pertain to cost and uncertainty about whether a change is necessary. This article presents some tips to consider if you are a client wondering how to get over that hurdle, or if you are a trial lawyer faced with a takeover request.

1. Cost. Making a change in lawyers will cost more money, but not as much as you might think. Whether the takeover comes during discovery, motion practice or literally right before trial, the trial preparation tasks largely are the same whoever is performing them. Depending on the size of the case, it will take the new trial team some time to get up to speed. For example, in a significant case that will take two or three weeks to try, an experienced trial team can get into a position to continue discovery or perform pre-trial tasks within 100 hours or so. Also, if you have an experienced trial team with well-developed procedures, it can make up quite a few of those 100 hours with pre-trial preparation efficiency.

2. Transition. Moving from one lawyer or law firm to another can be awkward, but once you get past the first telephone call, the transition almost always is smooth. Whether prior counsel withdraws immediately, remains counsel of record for a transition period of weeks or months, or remains on the case as second chair, the transition begins simply with obtaining the file. Even when prior counsel withdraws immediately, you should ask for permission to call if questions arise, because questions always arise. Prior counsel can be helpful in providing important information about opposing counsel and judges, caution about a witness, provide thoughts about key documents, or present ideas they have for trial strategy.

3. Understand the scope of the case. Knowing the issues in dispute, what is at stake, the number of documents in production, the number and identity of fact and expert witnesses and the anticipated length of trial is imperative. In all but the simplest cases, you cannot accomplish a takeover without a deep bench and knowing the scope will allow you to staff the case appropriately with your partners, associates and paralegals.

4. Begin with the end in mind. In every trial, both sides will have enough evidence to support their theory of the case. But it is the best story that will win. Whether the case is large or small, you should begin by preparing a case theme outline that will turn into an opening statement. This may seem counterintuitive, but beginning with the big picture will help you as you process and prepare to present the law and the evidence in a short period of time. The case theme outline always begins with a summary that contains the complete story in four or five paragraphs. If you cannot tell your story in summary fashion, your story is not simple enough for trial.

5. Begin at once to prepare the jury instructions and special verdict form. Preparing the jury instructions and special verdict form early is even more important in a takeover case. You need to prepare the case from the jury's point of view and the jury instructions and the special verdict form are the container into which you will fit the evidence. Knowing the correct law, and the areas where the law is not clear, is also necessary for the case theme outline and the trial story.

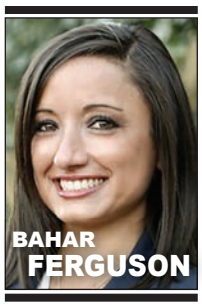
6. Attack the evidence and the law from the top down. The sequencing inherent in the Rules of Civil Procedure is to build the case from the ground up, one brick — or one piece of evidence — at a time. That also is the natural inclination of most lawyers. You do not have that luxury when you take over a case close to trial, nor does the client want to pay you to start over. The best way to get your arms around the facts and the law is to build from the top down rather than the bottom up. Use what prior counsel already has developed. Start with the complaints and counterclaims, but after that you should read the most recent filings first, whether they are court orders, summary judgment papers, mediation statements, case evaluations or discovery motions. From there, you should understand the depositions, deposition exhibits and then the broader database of documents.

7. Get to know the trial witnesses and evidence. In a takeover situation, especially when you have not participated in discovery, you must make a conscious and concerted effort to identify and organize the evidence before trial. Meet and interview as many witnesses as you can to assess how they will present to a jury, which often comes across differently in person than on reading a cold transcript. Identify the documents you need to tell your story and determine how, when and through which witnesses you will introduce them into evidence.

8. Embrace the advantage of the takeover. One of the great advantages of taking over a case close to trial, building the case theme from the end rather than the beginning and attacking the evidence from the top down, is that you will have the same perspective and orientation as the jurors. Jurors hear and understand a case on a level much higher, with much less detail and with fewer nuances than the lawyers who build and present the case. Often trial lawyers have command of so much detail that they let it get in the way of the simple story the jury needs to hear. With a takeover, you usually don't have time to amass that level of detail. The takeover lawyer needs to learn to embrace the case on the same level as the jurors see it. This does not mean it is acceptable for the lawyer to go in unprepared and simply wing it. But you also can take comfort in having the same perspective as the jurors.

Matthew L. Lalli is a trial and litigation attorney with Snell & Wilmer in Salt Lake City who has tried dozens of cases in courts and arbitration tribunals in Utah, California and throughout the United States. He is the firm's litigation practice group leader, a member of the firm's ethics committee and loss prevention counsel to the firm.

After what seems like an eternity in a room, sifting through thousands of seemingly bottomless boxes of Bates-stamped documents, the art of the case starts coming together. The exciting breaks for your client and the documents supporting your theory to build a case to best achieve victory for your client, make all the countless hours working worthwhile.



You share these ideas with your team. You may even send email ideas as reminders to your own email. Your team emails late-night revelations, brainstorms and exciting angles to pursue. Joyous emails are shared after finding supporting comments and interpretations from depositions. The inner workings of your case, your reputation and your client's future are sent electronically among your team.

You trust your team with the information. You trust they won't share the information with the wrong individuals. As for tech privacy, you don't know how often they change their passwords, but you haven't received any fraudulent emails from them confirming a hacked account and they haven't noticed anything suspicious.

Unfortunately, cyberattacks are not always immediately noticeable. You may be a current victim of an attack and not even know. Hackers don't strike for any one particular reason. They don't always immediately encrypt your network, transfer money or send infected emails. Some attacks are silent. The attackers watch quietly — or they set up rules in your email, like forwarding certain emails to their account or BCCing all outgoing emails to their account — in case you end up changing your password and they lose access. They read the incoming and outgoing email, giving them access to the strategies and breakthroughs — those very breakthroughs you feel are pivotal to your case.

This information can later be used by hackers for financial gain. They may ask for payment as a condition of not releasing such information. Or the hacker may exploit other users in the case or general correspondence for their own financial gain. They may learn your writing techniques or invoicing patterns for collecting from clients and spoof your clients into sending funds to them instead of you. They also may simply be morally opposed to the purpose of the case and seek to cause havoc in order to stop the potential legal outcome. The reasons are endless.

You may wonder how this could happen and how your account could become compromised. You don't leave your laptop unattended. You lock your machine when you leave the proximity. You may even have a 13-digit, alphanumeric, upper- and lowercase, punctuated password of beauty. It may be the more common occurrence where someone sends a bad link and you input your username and password, giving the hacker access to those credentials.

However, even if you were one of the rare cases who went to this extent to be protected and don't ever click anything inappropriate, there may be one thing you do. You keep this password for multiple logins for other sites. One of which may at some point have had its user information compromised. While the compromised site forced you to change that password, you didn't change that same password used on other sites.

Hackers regularly take compromised data and use the information to pursue other channels. With the engrained hatred for overly complex passwords and the need to remember so many passwords, it is easy to default to using the same password across numerous accounts. Hackers are well aware of this tendency and will take passwords from compromised accounts and try them on various other login portals, with email being one of the easiest and most commonly successfully hacked.

Here are three quick techniques to help avoid some of these attacks:

1. Password Managers. Download and use a password manager like LastPass or DashLane. These applications can be downloaded to your PC, tablet and smartphone. It allows you to fully randomize every password for all accounts you access. It stores the information for easy access and can allow you to avoid having any duplicate passwords. While this can be seen as a single point of failure by having all passwords in one location, it is safer than using the same passwords across multiple sites, writing the passwords on a sticky note on your monitor or even putting all passwords in an Excel file. There is a bit of time to get this up and rolling but it's time well spent, and the maintenance and access of passwords later is incredibly easy.

2. Multifactor Authentication. This can be on your domain for the server and various programs as well as your email. For Office 365, it simply requires any new machine you log into to require a second factor to authenticate it is, in fact, you. It can be a text message or phone call. This way, if your account is compromised, the hacker may try to log in, but they won't be able to pass the second authentication piece. The multifactor authentication in Office 365 is a free addition and is easily turned on by your IT team.

3. Training. You can have the most sophisticated system available but if a user clicks something they shouldn't, your entire network can be compromised. Regular training by your IT team can help keep people informed of the latest tricks and hacks and serve as a reminder to always slow down and be hyper-vigilant. Hacking trends are constantly changing and we must keep people aware of trends in order to help reduce the chances of individuals falling victim to various attacks.

Hackers accessing your systems to infect machines, lure large wired payments to foreign accounts, etc., are more commonly discussed attacks where you more quickly realize your computer, account or network has been compromised. However, that is only a segment of the attacks. The quiet attacks are significantly harder to spot and even more caution must be used to ensure these are not active or to reduce the likelihood of them occurring. It is important to ensure your IT team has all of the standard processes in place to protect your network and to educate the users on how to protect themselves. Should there ever be a suspicious email, link, invoice, etc., always reach out to your IT team or verbally reach out to the sender to ensure the email was legitimate.

You've worked too hard to let any of the effort go to waste.

Bahar Ferguson is the president of Wasatch I.T., a Utah provider of outsourced IT services for small and medium-sized businesses.

LAW FIRMS

Ranked by Number of Utah Attorneys

THE List

List Development Laneace Gregersen I laneace@slenterprise.com

	Company Name Address	Phone Web	No. of Utah Attorneys	No. National Attorneys	No. of Utah Partners	No. of Utah Paralegals	No. Utah F/T Employees	No. National Locations	Areas of Specialty	Year Established	Managing Partner
1	**Kirton McConkie** Kirton McConkie Bldg. 50 E. South Temple SLC, UT 84111	801-328-3600 kmclaw.com	150	150	95	16	262	3	*	1964	Lee A. Wright
2	**Parsons Behle & Latimer** 201 S. Main St., Ste. 1800 SLC, UT 84111	801-532-1234 parsonsbehle.com	110	145	76	8	187	6	Full-service corporate law firm	1882	Hal J. Pos
3	**Ray Quinney & Nebeker PC** 36 S. State St., Ste. 1400 SLC, UT 84111	801-532-1500 rqn.com	103	103	68	10	177	2	Full-service law firm	1940	Arthur B. Berger
4	**Durham Jones & Pinegar** 111 S. Main St., Ste. 2400 SLC, UT 84111	801-415-3000 djplaw.com	90	90	60	10	123	4	Business/finance, litigation, real estate, intellectual property, estate planning, bankruptcy/creditors rights	1991	N. Todd Leishman
5	**Parr Brown Gee & Loveless PC** 101 S. 200 E., Ste. 700 SLC, UT 84111	801-532-7840 parrbrown.com	78	78	60	8	114	1	Corporate law, structure, finance, securities, M&A, real estate	1975	Jonathan O. Hafen President
6	**Fabian VanCott PC** 215 S. State St., Ste. 1200 SLC, UT 84111	801-531-8900 fabianvancott.com	69	75	31	4	95	2	*	1874	David N. Kelley
7	**Strong & Hanni Law Firm** 102 S. 200 E., Ste. 800 SLC, UT 84111	801-532-7080 strongandhanni.com	65	65	41	17	131	2	*	1888	Graden P. Jackson
8	**Jones Waldo Holbrook & McDonough** 170 S. Main St., Ste. 1500 SLC, UT 84101	801-521-3200 joneswaldo.com	63	64	38	9	113	6	Real estate, litigation, corporate and securities	1875	Keven Rowe
9	**Snell & Wilmer** Gateway Tower West 15 W. South Temple, Ste. 1200 SLC, UT 84101	801-257-1900 swlaw.com	60	431	27	6	109	11	Bankruptcy, commercial finance, corporate, intellectual property, litigation, natural resources, real estate	1938	Wade R. Budge Brian D. Cunningham
10	**Snow Christensen & Martineau** 10 Exchange Place, 11th Floor SLC, UT 84111	801-521-9000 scmlaw.com	55	55	35	15	112	2	CRE, construction, corporate & business, finance, employment, healthcare, intellectual property, transportation, trusts & estates	1886	Andrew M. Morse
11	**Dorsey & Whitney LLP** 111 S. Main St., 21st Floor SLC, UT 84111	801-933-7360 dorsey.com	51	569	24	10	88	20	*	1912	Nolan Taylor
12	**Workman Nydegger PC** 60 E. South Temple, Ste. 1000 SLC, UT 84111	801-533-9800 wnlaw.com	45	45	31	7	112	2	Intellectual property prosecution & litigation	1984	Thomas R. Vuksinick
13	**Maschoff Brennan** 111 S. Main St., Ste. 600 SLC, UT 84111	801-297-1850 mbr.com	39	46	26	7	97	3	Intellectual property & complex litigation	2011	Eric L. Maschoff
14	**Prince Yeates & Geldzahler** 15 W. South Temple, Ste. 1700 SLC, UT 84101	801-524-1000 princeyeates.com	35	35	27	4	52	1	*	1971	Thomas R. Barton
15	**Clyde Snow & Sessions** 201 S. Main, Ste. 1300 SLC, UT 84111	801-322-2516 clydesnow.com	34	34	24	3	52	3	Business, NR, labor & employment law, GOV/independent, WCC & regulatory defense, civil litigation, banking, family law, trusts/estates	1951	Edwin C. Barnes President
16	**Thorpe North & Western LLP** 8180 S. 700 E., Ste. 350 Sandy, UT 84070	801-566-6633 tnw.com	32	32	13	2	55	2	Intellectual property, patents, trademarks and copyright, including prosecution and litigation	1979	Garron Hobson
17	**Ballard Spahr LLP** One Utah Center, Ste. 800 201 S. Main St. SLC, UT 84111	801-531-3000 ballardspahr.com	28	640	9	5	42	15	Real estate, complex litigation, employment, business, emerging companies, cybersecurity	1885	Mark Gaylord
18	**Cohne Kinghorn PC** 111 E. Broadway, 11th Floor SLC, UT 84111	801-363-4300 cohnekinghorn.com	25	25	17	2	34	2	Business, bankruptcy, real estate, litigation, healthcare, divorce	1975	John Bradley
19	**TraskBritt PC** 230 S. 500 E., Ste. 300 SLC, UT 84102	801-532-1922 traskbritt.com	20	20	5	9	50	1	*	1973	H. Dickson Burton
20	**Smith Hartvigsen PLLC** 257 E. 200 S., Ste. 500 SLC, UT 84111	801-413-1600 smithhartvigsen.com	15	15	6	2	30	1	Water	2002	J. Craig Smith
21	**Babcock Scott & Babcock** 370 E. South Temple, Ste. 400 SLC, UT 84111	801-531-7000 babcockscott.com	10	10	6	1	13	1	Construction industry issues	1995	Robert F. Babcock

THE Enterprise
UTAH'S BUSINESS JOURNAL

*Did not disclose. Please note that some firms chose not to respond, or failed to respond in time to our inquiries.
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Proper use of 'fine print' is critical for you and your client

Most contract clauses fall into one of two classifications: 1. Deal-specific clauses, or 2. Boilerplate clauses. Deal-specific clauses, such as pricing, receive the primary focus of most parties when drafting a contract and

will substantively differ from contract to contract. In contrast, a boilerplate clause, often referred to as "fine print" or "boilerplate," is contract language that is substantively uniform from contract to contract.

However, although "boilerplate" may not define minutiae of a particular transaction and may be substantively uniform from contract to contract, the terms are extremely essential because they govern how contract disputes are resolved and how a court will enforce the contract.

A recent Utah Supreme Court decision reaffirmed the essentiality of "boilerplate" and its role in governing contract disputes and enforcement. In this particular case, *Mounteer Enterprises Inc. v. Homeowners Association for the Colony at White Pine Canyon, 2018 UT 23*, the boilerplate in contention was a contract clause colloquially known as an "anti-waiver" clause. An anti-waiver clause is a provision that allows a party to accept goods or services, deficient in adhering to the terms of the contract, without such party losing their right to a remedy of the deficiency. Without the aforementioned anti-waiver clause, a party who accepted deficient goods or services could possibly lose their right to seek a remedy of the deficient goods or services. Consequently, rather than lose their rights to a remedy both parties would likely cease to continue performance under the contract in order to retain such legal rights.

Particularly in contracts with a continual provision of service and goods, any halt to performance would lead to a disruption of both parties' businesses. Therefore, including an anti-waiver clause allows both parties to continue working under the contract and not disrupt their businesses without losing their legal rights.

In *Mounteer Enterprises*, the Homeowners Association for the Colony at White Pine Canyon (HOA) entered into a contract with Mounteer Enterprises Inc. (Mounteer) in 2006. The contract required Mounteer to maintain a minimum amount of liability insurance and contained an anti-waiver provision to the effect that the HOA's failure to request evidence of compliance or failure to identify a deficiency of compliance would not be considered a waiver of Mounteer's obligation to maintain such insurance. During the term of the contract, Mounteer never maintained the required minimum of insurance yet the HOA continued to pay Mounteer for its services despite the coverage deficiency and despite Mounteer submitting evidence of the coverage deficiency to the HOA. In 2010, the parties renegotiated the contract on similar terms but three months into the contract the HOA discovered the insurance coverage deficiency and terminated the contract.

During litigation, Mounteer argued the HOA had lost its right to enforce the termination due to insufficient insurance because the HOA had been receiving evidence of Mounteer's breach and yet continued to accept the deficient performance for an extended period of time. The HOA counter-argued they had not lost their legal right to a remedy because the anti-waiver clause precluded such loss of right. Upon review, the Supreme Court of the state of Utah ruled because of the anti-waiver clause the HOA had not lost its legal right to a remedy despite its acceptance of the deficient performance by Mounteer and despite having evidence of the deficiency for a long period of time.

Practically, this case underscores the importance for all parties to use properly drafted commercial contracts which include much more than deal-specific terms. In addition to deal-specific terms, a properly drafted contract must include an appropriate selection of "boilerplate" which is essential to build the governing framework upon which all contracts work.

N. Todd Leishman is a shareholder at Durham Jones & Pinegar in Salt Lake City whose practice concentrates on corporate and business law. He frequently negotiates and drafts complex commercial contracts such as manufacturing, licensing, lending and distribution agreements and advises clients about governance issues in entities. Chris Bennett is an associate at Durham Jones & Pinegar in the Business & Finance section focusing on complex business transactions, mergers, acquisitions, public and private securities offerings, public company representation, stock exchange rules and requirements and advising businesses on various aspects of corporate governance and tax.

ROMANCE

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to admit the truth, the fact remains that office romance has been around forever and will continue to be," said Rosemary Haefner, chief human resources officer at CareerBuilder. "To avoid negative consequences at work, it's important to set ground rules within your relationship that help you stay professional in the office and keep your personal life private."

"Setting ground rules" is what a dating policy is all about, according to Mellem.

"One of the points of having a company dating policy is that you make sure that your employees know that … you want them to let you know about it, and that's it," she said. "They're just letting you know. It's not like you're going to regulate it or monitor it — unless things get crazy. Because crazy creeps in sometimes."

Assuming there's nothing crazy, an employer's concern should be limited to the potential or actual negative affect of the relationship on the employer, she said. For human resources professionals, the dating policy should essentially say, "Look, this is your life, but the workplace is my domain," Mellem said.

A dating policy should discourage workplace romances and consider whether to include vendors, customers and other business associates. It can limit or provide guidance about romances, including whether to allow or limit supervisor/subordinate relationships or intra-department relationships. It can require that everyone behave professionally — no public displays of affection and no fighting — ensure that relationships are consensual, communicate standards of acceptable behavior and include regular training. A policy should be realistic and uniformly applied.

The goal is expressing that the employer is not trying to control employees' personal lives but instead to ensure a fair, equitable and comfortable work environment for everyone, Mellem said.

"You want to limit your involvement, right? You don't want to be in the middle of somebody's love life, and that's the point of doing a company dating policy: You are setting the parameters, you're setting the expectation of what you're going to do [and] the expectation for what they're going to do."

That expectation is founded on the premise that their dating life happens outside the workplace. They may drive to work together or work the same shift, "but they're not lovin' on each other in the breakroom and they're not fighting in front of people, whether it's customers or other employees. Their romantic relationship happens outside the walls of your company," Mellem said.

One possible provision is that employees involved in a relationship sign a "love contract," in which they agree that their relationship is consensual and does not involve any sexual harassment. It limits employer liability when and if the relationship ends.

"It can feel really juvenile, because you're having them acknowledge that they're doing something consensual and voluntary, that they're going to behave professionally in the office and at work events, and that their relationship is not going to interfere with their work performance," Mellen said. "It can feel very juvenile, but the risks of not doing this outweigh the challenges with it."

The contract encourages communication between the two employees and the HR professional and provides a layer of defense for the employer if a harassment lawsuit is filed. Failure of an employee to sign is "a big red flag," she said, "because there is nothing about this that is overly burdensome for the employee. It's literally that they're just going to keep acting the way they're supposed to act in their work environment, but they're in a consensual relationship with someone."

Mellem emphasized that while workplace relationships can be discouraged, limited or subject to company guidance, a complete prohibition makes no sense.

"Honestly, it's just not workable," she said. "All you're going to do is drive everything underground and that's going to cause more problems for you."

Mellem also noted that even very specific policies cannot foresee every possible iteration, twist or element of workplace romance.

"So, nothing about this is black and white," she said. "There are no hard lines. It is very gray. We (attorneys and HR executives) deal in gray. That's what employment law is: just a whole bunch of different shades of it."