

# Are we **there**, yet?

Is Cincinnati Business on the Road to Recovery?



# Are we **there**, yet?



## Is Cincinnati Business on the Road to Recovery?

In the midst of conflicting reports about the nation's economic recovery, questions abound among the tri-state's business leaders and entrepreneurs. Are lenders ready to make loans again? When will we see unemployment numbers stabilize? What industries are showing signs of growth? Essentially, are we there yet?

If you ask most pundits, they will tell you "no," while many business owners are hopeful we are turning the corner. And while there seem to be more questions than answers, there is one certainty about this recession--it has been and remains different from any other since the Great Depression. The circumstances are different. The media response is different. And certainly, the effect on business cultures is different. The downturn has impacted every segment of business, and has changed the way many companies operate.

We recently held a roundtable discussion featuring four of our leading attorneys who are experiencing the recession from divergent points of view--that of their clients. Covering areas from commercial lending to merger activity to the increase in bankruptcies and workforce reductions, our panelists shared candid insights on the effects of this recession on local businesses. They also offered opinions on where they see recovery occurring and some best practices to help tri-state businesses prepare for future economic cycles.

We hope this information is helpful to you in managing risks and finding opportunities for growth in years to come. We welcome your comments and questions about this publication and encourage readers to contact us for more information.

**George H. Vincent**  
Managing Partner & Chairman of the Board  
Dinsmore & Shohl LLP



## Inside

Panelist Profiles	p 4D
Roundtable Discussion	p 5D
Labor and Employment Focus	p 9D
About Dinsmore & Shohl	p 11D

# The Panelists



**Kim Martin Lewis**

Partner, Dinsmore & Shohl  
 Cincinnati, OH  
 (513) 977-8259 | Phone  
 kim.lewis@dinslaw.com

Kim Martin Lewis serves as Chair of the firm's Business Restructuring and Reorganization Practice Group. Licensed to practice in Ohio and California, Kim concentrates on corporate reorganization, insolvency, financing, workout, and bankruptcy law. Certified by the American Bankruptcy Board of Certification in business bankruptcy, Kim has counseled clients in the manufacturing, retail and consumer goods industries, guiding them through divestitures, asset sales, commercial loan refinancing, internal reorganizations, corporate restructurings and emergence from bankruptcy.

Kim has been selected to Ohio Super Lawyers® Top 50 Women by Law & Politics and is listed in The Best Lawyers in America® 2010. She is also listed in Chambers USA® Guide to America's Leading Business Lawyers as a top bankruptcy lawyer in Ohio. She is an active member of the American Bankruptcy Institute and serves on the Executive Committee for the Midwest Regional Bankruptcy Seminar. In addition to her work with clients, Kim serves as a member of the firm's Management Council. She earned her J.D. from the Southwestern University School of Law (cum laude) and her undergraduate degree from Ball State University (cum laude).



**Colleen P. Lewis**

Partner, Dinsmore & Shohl  
 Cincinnati, OH  
 (513) 977-8426 | Phone  
 colleen.lewis@dinslaw.com

Colleen Lewis practices in the Labor and Employment Law Department where she defends private and public employers on a wide array of traditional labor and employment issues, including discrimination and civil rights issues, Family and Medical Leave Act compliance, Americans With Disabilities compliance, breach of employment contracts, employment-at-will, wage and hour, and National Labor Relations Act. Her practice is both regional and national in scope, representing clients in state and federal courts and handling labor and employment matters in 13 states. She also handles collective bargaining and arbitrations and has extensive experience reviewing and drafting Affirmative Action plans and representing companies before the OFCCP.

Colleen earned her J.D. from Northern Kentucky University, Chase College of Law (cum laude) and her B.S. from Northern Kentucky University (summa cum laude). She is licensed to practice in Ohio and Kentucky. Apart from her legal practice, she serves on the Steering Committee for both the Women's Initiative and the Labor and Employment Practice Groups at ALFA International. She serves on the Personnel Committee at the Freestore/Foodbank, is a member of the Mentor to New Lawyers Program through the Supreme Court of Ohio and was a member of the Cincinnati USA Regional Chamber's WE Lead Program Class of 2007. Colleen also serves as Chair of Dinsmore & Shohl's Workplace Harassment Committee and is a member of the firm's Professional Development and Diversity Committees.



**Calvin D. Buford**

Partner, Dinsmore & Shohl  
 Cincinnati, OH  
 (513) 977-8228 | Phone  
 calvin.buford@dinslaw.com

Calvin Buford focuses his practice on transactional matters, including mergers, acquisitions and dispositions of publicly and privately held businesses. He is well versed in counseling clients with debt and equity financings including senior, mezzanine and venture capital financing. His work with corporate clients earned him the distinction of 2008 Dealmaker of the Year by the Association for Corporate Growth in the service provider category and he is listed in Chambers USA® Guide to America's Leading Business Lawyers.

Calvin earned his J.D. from Harvard Law School, his M.P.P. from Harvard University's Kennedy School of Government and his B.A. from Northwestern University. He is actively involved in Cincinnati's business and cultural communities, currently serving the Cincinnati Art Museum, as a member of their Board of Trustees and Executive Committee. Calvin serves on the Federal Reserve Bank of Cleveland's Cincinnati Business Advisory Council and also on the Board of Trustees and Executive Committee for the Cincinnati Center City Development Corporation (3CDC). Calvin was a member of Class XX of Leadership Cincinnati and serves on the Leadership Council for the Cincinnati USA Regional Chamber Minority Business Accelerator. He is a former chairman of the Board of Trustees for the Urban League of Greater Cincinnati and currently chairs Dinsmore and Shohl's Diversity Committee.



**Joanne M. Schreiner**

Partner, Dinsmore & Shohl  
 Cincinnati, OH  
 (513) 977-8482 | Phone  
 joanne.schreiner@dinslaw.com

Joanne Schreiner counsels clients in commercial and business transactions, including acquisitions and mergers, contract negotiation, real estate financing, leasing, sales, and acquisitions. She has extensive experience in handling complex, multi-state secured lending transactions on behalf of national lending institutions. Her corporate practice includes stock/asset purchases of diverse operating entities, including all related due diligence and negotiation of acquisition and operational agreements. She also provides legal guidance to operating companies in formation, sales/distribution, and regulatory compliance.

Joanne chairs the firm's Commercial Transactions/Real Estate practice. Her accomplishments include being listed in The Best Lawyers in America® and the Ohio Super Lawyers® List. She is also listed in both Chambers USA® as a top real estate lawyer in Ohio and The Legal 500 (2009) for mergers, acquisitions and buyouts. She has also been named a Top 10 Female Lawyer in Cincinnati by Women's Business in Cincinnati.

Joanne earned her J.D. from the University of Chicago Law School and her B.A. from the University of Akron (summa cum laude). She is licensed to practice in Ohio and Arizona.

# Roundtable Discussion

## Is Cincinnati Business on the Road to Recovery?

**This may sound like an odd question, but I'm curious if you are seeing any difference in the way the generations in the current workforce are approaching the current economic climate? Are the generations different in how they're viewing this?**

SCHREINER: I think so. I think it has to do with going through cycles. The prosperity cycle that brought us to where we are today lasted for a time and is equivalent to the career of many people. Those individuals never knew a time when they couldn't get a great deal or when money wasn't readily available. Then, move up just a few years in terms of experience level, you reach a group of people who do remember the last time. Although, you have to go pretty far back to remember as bad as it is now. But I think this has to do with the long memory in the lending industry. Those who have been through this before know that the way you handle it will influence what you're able to do in the future.

I do hear this from lenders I work with. Borrowers are still coming in and saying, "I want money, but I want to run the deal. I want to tell you what the terms and pricing are going to be." The lenders are saying, "It doesn't work that way anymore." I don't know if I'd call it a generational difference, but it's an experiential difference having to do with how long you've been in the industry and how much you've seen.

K. LEWIS: I would agree that it's cyclical. It seems every 10 years, we go into a down cycle. Most Chief Executive Officers that I've talked to have never lived through this severe of a recession. The statistics are shocking. Revenues of many companies have dropped precipitously beginning in the fourth quarter of last year. Management didn't cause that significant of a value reduction. That all had to do with the economy. Nobody really knows how to deal with that. You can't take out enough costs that quickly without decimating the infrastructure of the company.

BUFORD: There has also been a severe devaluation of assets. We talked about real estate, but it's really across a number of asset categories. This general devaluation of assets and collateral impairment severely constrains the ability of borrowers, large and small, to get credit or even maintain existing credit. I know we're seeing some

indications of lenders dipping their toes in the water, but I would say very little. The deals that are being done now are with blue chip borrowers and involve lots of equity. We are not seeing the deal volume of three or four years ago, not even close. It's going to take some time. The biggest factors are credit and confidence. And until we get both credit and confidence back, we won't see a return to a more normal, healthy deal flow.

Of course, bankruptcy has become fertile ground for transactions. Bankruptcy is the new M&A. We've found as a law firm that some of our most sophisticated financings and M&A transactions are arising in the bankruptcy/restructuring context. The most recent example is the successful reorganization of Milacron. Berean Christian Stores is a smaller example.

SCHREINER: It depends on how you define "normal." I was telling the younger attorneys in our group, the last five years have not been normal. If you look back at a span of 15 to 25 years, that gives you a sense of "normal." Personally, I don't think we'll ever see what we had in the last three or four years. I don't think we should. It was bad. But we will see some level of return. But for all of the bad news, there are real opportunities out there, too. For every piece of collateral that's devalued, there is an opportunity for someone else who has cash. And there is a lot of cash out there on the sidelines.

**Joanne, could you talk about the differences between industries? If you're in a particular industry, specifically commercial real estate, you're still out of the water for quite a while in terms of getting funding.**

SCHREINER: Well, commercial real estate as an industry is a very big boat. There are a lot of people in that boat. You're talking about appraisers, contractors, construction companies, title insurance companies, tenants and developers. That boat is so big, I don't think it will stall in the water. I think some of the weaker people will leave and should've left a long time ago. But the core of that industry is still solid and still needs credit. I think the industry will stay steady and will start to come back.

Retail is a problem right now. A lot of spec centers were thrown up without any tenants, with only a hope

and prayer, because the market was so hot. A lot of the lenders call them see-through retail because there's nothing there. Those are not going anywhere.

I won't even talk about residential because that's a whole different problem. But I think underwriting standards are going to tighten. I think credit enhancements are going to become more common as they should be. You'll see more guarantees. You'll see more secondary sources of collateral to back up the loans. You'll see more monitoring and reporting. Banks and lenders are going to go back to doing what they should've always been doing but they haven't been doing as carefully the last few years.

**Do you expect those changes to happen on their own or do you foresee that the restructuring of the banking industry will be forced by the federal government?**

SCHREINER: I think it will be a combination. Major commercial lenders tend to be owned by you and me and every other shareholder who wants to retain the value of our investments. They are run by very smart people. I think they have gotten a little ahead of themselves recently. There is some government regulation that needs to be done, but we're an entrepreneurial society. A company that is well run and competitive is going to do far better at policing itself to maintain its own value than a company that has to account to a whole new layer of regulation. I would put most of the emphasis on the private sector.

**Kim, what do you see in bankruptcies or corporate restructurings that is different during this recession than other previous recessions?**

K. LEWIS: One of the significant differences is that in prior recessions, the lenders were usually banks. In today's deals, most lenders are hedge funds. Their mentalities are very different. So now when you're restructuring a deal, you're not working with your local lender, but with hedge funds, who ultimately are putting in capital to own the business.

Today, there is very little money in the market so you can't get any competing proposals. You can't find others who are willing to invest in the company, so your options are also very limited. You take the existing lenders whoever



### Commercial Lending and Debt Finance

Dinsmore & Shohl has extensive experience representing both commercial lenders and borrowers in financing transactions. Our lending and finance attorneys are known as collaborative negotiators who find options and get deals closed. Meanwhile, our clients can be confident that their individual objectives will be achieved during every stage of the lending process, including advice on structuring credit transactions, preparing and negotiating the appropriate documentation and complete due diligence review. Typical transactions include commercial or working capital financing, asset and/or real property based lending, merger and acquisition financing, mezzanine financing, and equipment leasing.

With attorneys admitted in many states, backed by a proven network of local counsel, we handle complex, multi-state transactions. We represent clients on a regional basis, regardless of the location of the collateral. We maintain an extensive library of state-specific collateral requirements and are able to provide efficient, cost-effective services and our wholly owned subsidiary, Mercantile Title Agency, Inc., provides comprehensive title company services for all types of commercial transactions.

Learn more about our services at [dinslaw.com/lending](http://dinslaw.com/lending).

About Dinsmore & Shohl

September 25, 2009

5D

## Are we there, yet?

they may be, and you're converting a significant amount of debt to equity. Almost all the deals are being done in very short time periods. If you look at Chrysler, at GM, at Milacron, or any large cases, they're all being done through asset sales as opposed to being done through a plan of reorganization.

The cost of going from the beginning of a filing to exiting bankruptcy through a plan of reorganization is significant. One of the largest bankruptcies in Cincinnati was Federated. That was approximately a two year process, and it was considered pretty fast. You couldn't possibly afford a two year case today.

There were also revisions to the bankruptcy code that significantly affected retailers. The new provisions in the code gave a company a maximum of 210 days to decide whether they are going to assume or reject a lease (i.e., stay in a location or exit a particular location). Today, a lender says, "I need three to four months to have a going out of business sale." That lender is only going to give the company three to four months to sell itself as a going concern. If the company doesn't sell itself as a going concern in three months, lenders are going to force a liquidation.

### Is this a permanent change in the way companies will use restructuring or is this a symptom of the banks not being as involved as they were in the past?

K. LEWIS: It's a combination of factors. I think once there are lenders who are willing to lend money -- once you have more than one lender at the table, it's going to be different again. In the old days when you did a financing, you took two lenders to the closing table in hopes you would get the best deal and the best interest rate. That doesn't happen anymore.

### So, if I'm an executive of a company that needs to file for bankruptcy, is the shortened process better for me?

K. LEWIS: Being in bankruptcy is awful. Period. So, I guess it's better to the extent that you're in bankruptcy for a shorter period of time. A lot of people think the shortened time frame is good since it cuts down on the very expensive costs of restructuring. But I don't know how it's really beneficial to all constituents. So, if you are an executive of a company, you have fiduciary obligations to that company's constituents. Every company that I've worked with has a primary goal of maximizing value and keeping jobs.



Many people never knew a time when they couldn't get a great deal or when money wasn't readily available.



**Joanne M. Schreiner**  
Partner, Dinsmore & Shohl

I never think it's a good thing if you have limited options, and you're running a bankruptcy case. It's better if you have time to market a company and are able to take advantage of the potential that the economy will get better or the value of the company will increase. But the reality is today you don't have the financing available to give you the time to potentially get a higher value. The lenders are concerned that the longer they finance the business in today's world, the value may decrease even further.

### So, will we see these companies returning to court?

No. The only time you see companies coming back is if you didn't do it right the first time or if the economy gets significantly worse. That can happen if you didn't take enough debt off the balance sheet or if the future projections of the company turn out to be too optimistic.

### Let's shift focus for a moment. Calvin, is Procter & Gamble's sale of its drug unit a sign that merger and acquisition activity is back?

BUFORD: No, I don't think so. There are of course still deals being done, but the volume is anemic compared to what you would see in a healthier economy and with greater access to capital.

We are seeing deals that are a direct function of the distressed economy. The Fifth Third deal in which they sold a large minority stake in Midwest Payment Systems is an example of a transaction that probably would not have been done in better times. But in these times, it made a ton of sense for them because it enabled them to shore up their capital.

### So, how has the current recession affected Dinsmore's M&A practice?

BUFORD: Our bread and butter as a law firm is middle market transactions, transactions under \$200 million. In prior recessions, as credit tightened, the larger deals requiring many hundreds of millions or billions of dollars in debt and equity would grind to a halt. But what's different this time is that it's come all the way down to even the smallest middle market deals. Whether you're trying to raise \$500,000, \$5 million or \$5 billion, it is extremely difficult to access capital. And so even the smaller deals are not getting done.

### We're blaming the credit industry for all these problems. Joanne, what are the trends you're seeing in the lending industry?

SCHREINER: The trend is the reaction to the overabundance of credit for the few years that led up to this. Too much money competing for too few deals. Underwriting standards dropped. Money was being pushed out the door for loans that should have never been made. If you take the broader historical perspective, it's only been recently that those loans were being made. Suddenly, around the early 2000s, the money coming into credit market just got out of control. All of that money was chasing too few deals. Loans to value were way up, 100 percent to 110 percent on some transactions. That could not last. A lot of people saw it coming, but there was too much money and too many people making money on the industry for it to stop on its own.

So, what I've seen in the last couple of years is a lot of that is washing out. It has to wash out. The weaker

## Business Restructuring and Reorganization

Dinsmore & Shohl features a wide range of services to debtors, equity holders, purchasers of assets, and secured and unsecured creditors including lenders, trade creditors, lien creditors, and creditors' committees.

### Options for the Debtor

Our attorneys seek to minimize disruption to business operations and seek solutions to the debtor's financial and/or operational concerns in the most time and cost-efficient manner practicable. In general:

- We represent clients as general counsel in Chapter 11 proceedings
- We help clients through out-of-court workouts – negotiating the terms of an agreed restructuring and eliminating the need for formal bankruptcy process
- In pre-arranged bankruptcy proceedings, we can negotiate with multiple creditors prior to filing for bankruptcy protection to minimize the disruption of Chapter 11 proceedings and preserve the going concern value of the business enterprise and maximize recovery to parties in interest





In prior recessions, the lenders were usually banks. In today's deals, most lenders are hedge funds.



**Kim Martin Lewis**  
 Partner, Dinsmore & Shohl

of alternatives and needs to evaluate their options and be prepared when the borrower approaches the lender. If the lender is going to give the borrower additional time, the lender is going to want something from the borrower. For example, in a closely-held corporation, if currently there are no personal guarantees, the bank is going to want one. If there are non-pledged assets, the lender will want the additional assets as collateral. It doesn't help to become adversarial, but it certainly helps to look at all of your options and be prepared.

BUFORD: And the earlier the better. Borrowers who know, for example, that they have a large payment coming due, one that could exhaust their cash and available credit, should begin planning six to twelve months in advance of having to make the payment. If you want to have an orderly resolution, which could involve a major restructuring of your existing debt, the earlier you communicate with your lender, the better.

SCHREINER: I completely agree with that. Quite often, borrowers never read the loan documents. They really don't know their obligations or their rights. You can actually take it too far by being too willing to let the lender come in and take control. You have to honor the provisions of the document you signed. But borrowers should take advantage of any rights that they have. I'm not suggesting to give any of that up, but there has to be dialogue. It's when the dialogue breaks down that the lines in the sand are drawn and both sides start arming themselves for battle. Lenders respect dialogue and are more willing to work with someone who is willing to communicate their challenges.

**I'll ask you to look into your crystal ball. Business bankruptcies increased about 70 percent over 2008. Are we at the high water mark or are we looking at even higher rates into next year?**

K. LEWIS: I don't think the number will go down. In fact, I actually wish there were more corporate bankruptcies. No one sees the companies that don't file, who really should. And the companies who are in trouble today that don't file, don't survive. If you look at the past year in Cincinnati alone, a significant amount of jobs were lost because companies simply liquidated. The bank took the keys and the jobs went away. That's far worse than filing a bankruptcy and trying to preserve as many jobs and as much value as you can.

banks have to fail. The weaker projects have to be restructured. The stronger lenders will consolidate and survive. There are a lot of lenders other than banks. The more conservative lenders still have money to lend. The weaker lenders who shouldn't have been doing what they were doing will fail. What we're seeing right now is those weaker loans and weaker projects are washing out. We're doing a lot of modifications, restructuring, foreclosures and transfers. I happen to be an optimist. We are well on our way to addressing these issues. The lenders that we work with do have their toes back in the water. They don't have as much money as they had a few years ago. They don't want to talk about the projects that shouldn't have been done in the first place. But if it's a good developer, a good borrower and an income-producing project, those loans are out there. Not at the volume we'd like to see, but it has to start somewhere. It won't come back overnight. I don't think it will come back ever. I don't think it should come back ever. But we'll get back to a level where we were in a slightly more conservative era. We do still have a bubble of bad loans that have to wash through. We'll work on those, as well as the new ones. But I am seeing that we are getting new loans. We're starting to see more interest. Lenders that said to me six months ago, "We are out for the year," are calling me now and saying, "Well, maybe not."

**So, I'm an investor in a company or a borrower whose commercial loan is either in default or is about to be, what should I do?**

SCHREINER: The biggest mistake that borrowers make is to put their heads in the sand and pretend it will all go away if they ignore it. Or even worse, they become adversarial with their lender and begin pointing fingers

or placing blame. I work with lenders who have told me that this is an industry with a very, very long memory. Anybody can have a problem. It's the borrowers, business owners, investors that come to their lender, say they've got a problem, involve the lender in the workout, completely honest and forthright. The lender may end up with a bad loan. They may end up taking the loss on it. But they'll go back to that borrower some day. When that borrower comes in with a new project to be developed, the lender's going to remember that.

We're doing a lot of workouts and delinquencies right now. We have borrowers who will use every tool at their disposal to hinder and delay and run up the cost for the lender. If they are trying get a little extra time to solve their problem, the best way to do that is to go to the lender. Believe me, lenders don't want to shut down a business and take its assets and property. That has a terrible effect on the lender's balance sheet. It's the last thing they want to do. But if a borrower is hiding the facts, locking the lender out, refusing to pick up the phone, you have no choice. The impact of that is that when the industry does come back, that borrower has nowhere to go.

K. LEWIS: Joanne and I are always on the opposite side. If the borrower were to come to me, I usually say go read "A Man in Full" and that will describe the difference between the relationship side of the bank that you've dealt with for 45 years of your life and you will now meet the workout side of the bank. There's a very different personality between the relationship side and the workout side of the bank. I think that Joanne is right that the last thing you should do is put your head in the sand. But I also believe that the borrower has a lot

Continued on page 10D



**Services for the Creditor**

Our attorneys represent various creditor constituents including Fortune 500 clients in regional and national bankruptcy cases, unsecured creditors' committees, secured lenders and other secured creditors, as well as trade and lien creditors.

Our goal is to build consensus and achieve negotiated settlements when possible, seek alternative dispute resolution when practicable, and to aggressively litigate and protect the interest of our clients in court proceedings when necessary. Dinsmore & Shohl has deep experience in:

- Risk management in advance of formal bankruptcy proceedings – limiting potential exposure in the event a financially distressed company is unable to avoid seeking bankruptcy protection
- Representing creditor interests during formal bankruptcy proceedings and out-of-court workouts, focusing on maximizing both short- and long-term recoveries
- Representing defendants in preference and fraudulent conveyance actions

When cases become more complex, we often involve other practices throughout the firm to assure that our clients receive the most knowledgeable, comprehensive restructuring services possible. Learn more about our attorneys and services at [dinslaw.com/businessrestructuring](http://dinslaw.com/businessrestructuring).

About Dinsmore & Shohl

## Labor and Employment Focus

### What types of issues do you see in the hiring process which create risk for employers and how can they reduce those risks?

C. LEWIS: Let me start with a positive from the employer's perspective. As a result of the reductions that have occurred, there are a number of very good candidates in the labor pool right now. From a labor standpoint, companies often are able to choose from the stars out there.

Some of the trends I have seen which are creating risks include employers' implementation of selection criteria. Companies that have often thought about selection criteria have now started implementing such without doing any analysis. For example, in a factory setting, the company might implement a math test or might require that all applicants lift 50 pounds. The Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) are scrutinizing selection criteria in a way they never have.

The Uniform Guidelines on Selection Procedures require that any company that has a selection process must analyze it for adverse impact. So, for example, if a company begins using a math test for entry level positions, it should analyze the test to see if it disproportionately excludes people in one particular group by race, gender or other protected category. Once the analysis is complete, if there is no adverse impact, then no further analysis is required. However, if there is adverse impact on a protected group, then the test must be validated. Basically, the employer must show that the test is job related and consistent with business necessity. A good deal of employers do not have their tests validated. This is a really hot area that we are seeing the EEOC and OFCCP focus their attention.

### How can employers get their tests validated quickly?

C. LEWIS: Many vendors of selection criteria such as a personality trait test or a math test have validated their tests. However, it should be noted that it is still the employer's responsibility to make sure that test is specifically job-related and consistent with business necessity within its own work environment. Generally, there are three methods of test validation, content; criterion and construct-based validation. In a nut shell, content validation involves looking at the content of the test and then demonstrating that the content corresponds to the job tasks. For example, if it is an essential job

function of a position to lift 50 pounds, then the testing of the applicant should actually test whether that person can lift 50 pounds.



In a RIF, more communication is better. One of the most important things that I tell companies to do is prepare a question and answer memo that they can physically review with and distribute to employees because it significantly reduces anxiety.



**Colleen P. Lewis**

Partner, Dinsmore & Shohl

### Do tests that companies use to screen sales people or business development people need to be validated to test for standard deviation?

C. LEWIS: The short answer is yes. Any test that is used as selection criteria should be analyzed for adverse impact and, if necessary, validated.

### Can a company raise its standards given the sea of candidates right now? Let's say you have a layoff of a union workforce, and then you brought them back and you need to put them through another drug test. Can you raise your standards from what you use to have to be more selective?

C. LEWIS: There are two possible answers to that because you mentioned unions. If there's a collective bargaining agreement that outlines your standards, the company cannot unilaterally change those standards. Otherwise, it risks having an unfair labor practice charge filed against it with the National Labor Relations Board. You have to follow the criteria set forth in the collective bargaining agreement. Outside the union context, you still have to be careful about criteria for drug testing because every state can have a different level that is considered impairment. Also,

in California, drug testing is considered a medical test and therefore you cannot test until post-offer.

### Are there other employment mistakes that companies are making right now? Are there other things they need to be doing to minimize their risks?

C. LEWIS: More companies are doing background checks. It's just a way to deal with issues before they come in your door. In the employment arena, we have recommended for sometime that companies perform background checks. We currently see companies investing more time and due diligence in the hiring process.

### Do background checks require validation?

C. LEWIS: First of all, there are all kinds of other issues including compliance with the Fair Credit Reporting Act when you conduct a background check. With respect to validation, as I have stated above, any selection criteria that disproportionately excludes a protected group needs to be validated.

### In light of that, what are you telling them about

## Labor and Employment Law

In this economy, jobs, layoffs, regulations and unions are in the headlines daily. Dinsmore & Shohl is helping employers address these challenges with one of the largest labor and employment practices in the region. We represent numerous public and private employers – including Fortune 500 companies – in all phases of labor and employment law, including class action litigation. With more than 60 labor and employment attorneys, we have been selected by numerous companies to handle all labor and employment law matters on a statewide, multi-state and national basis, including international labor and employment law issues as well as counseling international companies with their U.S. operations.



**how to protect themselves from lawsuits?**

C. LEWIS: Workforce reduction is one of the least risky ways to eliminate jobs as far as litigation because you can typically point to objective criteria in making selections. But during the economic times we currently are experiencing, there is more litigation because some employees are not going out the door without a fight, even though they know it's a Reduction in Force (RIF).

The first thing I ask companies when they want to reduce their workforce is, "What is your goal?" Then we recommend writing a plan. The plan should set forth the criteria the company is going to use to select the people for reduction. Initially, we recommend that a company select the positions for elimination, without any consideration of whose filling the position.

It takes careful planning. Many times companies call me and tell me they want to be able to announce a reduction within two weeks. Long story short, I assist companies with coming up with a plan that identifies factors that the company is going to consider, for example, job functions. Each manager is told to look at their department to decide which job functions are essential and which functions they can do without.

The next step is to look at the people who are in those job functions. For example, if a company has five billing clerks in an accounting department, and the company believes it can do without one billing clerk, then the company identifies that function as one it can do without. The next step is to identify which one of the billing clerks will be eliminated. The manager of that department can rank the employees using objective criteria, like years of experience or computer skills.

**Can performance reviews go in the ranking?**

C. LEWIS: Yes they can. The company needs to decide whether it is going to consider performance reviews in its plan. The first thing I ask a company in this context is, "Does the company do a good job with providing performance reviews or are performance reviews a hit-or-miss?" This is important because if the company is going to consider performance reviews, there needs to be consistency for comparison sake.

**The RIF process can be implemented in any kind of economic environment. Is there a higher risk when the GDP is positive or negative?**

C. LEWIS: A RIF process can be implemented in any kind of economic environment. But what we're seeing today, which is different, is that more people are not accepting severance packages and are choosing instead to sue the company.

**I've never had an employee refuse their severance. If they did, should I not lay them off?**

C. LEWIS: Oh no. I tell companies if they have done a good job in drafting a plan that includes objective criteria for the selection of employees for a reduction in force, then we will be able to defend the company in litigation.

**Colleen, do you have other tips for reducing risks entering a RIF?**

C. LEWIS: In a RIF, more communication is better. One of the most important things that I tell companies to do is prepare a question and answer memo that they can physically review with and distribute to employees because it significantly reduces anxiety. When employees don't feel suspicious, then the risk is mitigated. Typically, what is helpful to prepare is a frequently asked questions type format like "What happens to my 401(k)?" Or, "Am I eligible for unemployment?" Typically, it's four or five pages long and includes contact information for people they can call about lost wages or benefits.

**Do you suggest distributing the Q&A to everyone or only the people being offered the package?**

C. LEWIS: It depends. If you're going to implement a voluntary severance plan offered to the entire workforce, then obviously the Q&A would be offered to everyone. But if you're offering it to one segment, the Q&A should only go to that segment. But separately, I would create a script for the entire workforce so they understand what's going on so the rumors aren't flying. It really helps reduce risk. The more knowledge they have, the less suspicious they are.

**What guidance are you giving companies who are implementing forced salary reductions?**

C. LEWIS: Again, you have to be careful. There are all kinds of ways you can creatively use to help reduce salaries. For example, many of our clients are implementing furloughs where they are giving employees one week off

every month, or one week off every two months. Counsel needs to be involved in this process because of wage and hour implications.

**With those kinds of cautions, is there one particular concern?**

C. LEWIS: Unfortunately, with wage hour questions, there's never an easy answer. When we get a wage hour question, every lawyer I know who practices in labor and employment reviews the regulations. Every situation is different. You start with the general rules, then you get into the nuances.

**Have you seen any lawsuits from people who have had their salaries reduced involuntary?**

C. LEWIS: No, because right now people are happy to have their job, so they're willing to reduce their work week and their salary.

**Has the wave of layoffs slowed down? Have fewer companies been calling your office saying "Hey, I need to lay off 100 people?"**

C. LEWIS: It has slowed down in the number of people they need to lay off. Some of the clients I've been dealing with for the past eight months have been working through plans for labor reduction. Some are calling me and saying, "We thought we cut enough, but we think we need five more jobs eliminated." That's where I'm seeing a downturn now. I feel like I'm getting the same amount of calls, but thankfully, they are for fewer people. And I've actually gotten a few calls where people are saying they're ready to hire again.

**You mentioned that some companies ready to rehire? Do they need to be careful about rehiring after they've just gone through a workforce reduction?**

C. LEWIS: Yes. What you have to be careful of is the timing.

Sometimes companies will say, "We want to get rid of five people. They've been horrible performers and I'm tired of dealing with them, I'm just going to RIF them." And then the next week, the company puts an ad in the paper for those same five positions — that's not a RIF. So, you have to be careful timing-wise.



Our clients can think of our Labor and Employment attorneys as an extension of their own human resources function, providing insightful counsel and preventative risk management audits and programs for all sizes of business organizations. We counsel management teams on effective personnel management strategies in union and non-union environments and provide training to help avoid costly litigation.

When it comes to class actions or employment discrimination and controversies, we have proven litigators who have successfully counseled and defended companies in state and federal claims across the nation.

Find out more about our labor services at [dinslaw.com/labor](http://dinslaw.com/labor) and our employment services at [dinslaw.com/employment](http://dinslaw.com/employment).

About Dinsmore & Shohl

September 25, 2009



**Roundtable Discussion (continued from 7D)**

BUFORD: In many cases, those are companies that may have been viable in the past. If credit had been available or their lenders had been willing to work with them, they may have had an opportunity to survive. But in the fourth quarter of last year, many banks were moving quickly to clean up their balance sheets and were simply shutting these businesses down.

**Again, that sounds like a difference between this recession and previous recessions. The lack of liquidity, lack of credit has made this one worse.**

BUFORD: I think that's right. The shock to the financial system last fall was sudden and severe. The distrust among banks themselves was so deep and widespread that they were afraid to lend to each other, and if the world's largest banks won't lend to each other,

BUFORD: I think the direct hit to the banking and financial system, as distinguished from the so-called "real economy," is a big part of what makes this recession different. Of course, extensive damage to the economy followed the financial crisis. The fear was so widespread. It's going to take longer this time around for confidence to be fully restored.

**Are their geographical differences?**

BUFORD: No. The impact has been the same everywhere.

**Let's talk about the topic of confidence. Do you find that you have to be more of a cheerleader with your clients these days? Are you concerned with how you communicate with your clients?**

has taken my job away. You spend a career learning how to do something very well, and building a practice and reputation, and then suddenly somebody flipped the switch and it disappears overnight.

Internally, I have to be the cheerleader for the group of attorneys that I head, who have never seen this kind of climate before. Externally, it's been a tough year and there's no point in denying it. But, as I said before, this industry is a big boat with a lot of very committed people in it. And while I'm not going to pick up the phone to call my lenders and say, "Isn't it a great world we live in?" I do call them and say, "I realize how hard it is. What can we do to help you?" Our job is to be their resource to succeed and I take that very seriously.

**Finally, based on what you're hearing and seeing in the marketplace, what will the next 12 months hold for your area?**

C. LEWIS: On the labor front, companies will continue to look for creative ways to hit a target number of savings, including RIFS, reduced work weeks and salaries, and reducing benefits. Due to the loss of jobs, we will continue to see litigation rise in the employment arena. In addition, as a result of the push of traditional labor issues in the previous several months, we will see an increase in the number of unfair labor practice charges filed before the National Labor Relations Board.

SCHREINER: I expect the credit market to remain tight, but with gradual improvement. Underwriting will remain conservative, but strong developers and projects will have options. The lending industry will continue to work through commercial delinquencies, and as troubled loans are managed, assets will be freed up for new investment.

BUFORD: Like Joanne, I expect some gradual improvement in the credit markets and some up-tick in M&A activity. Blue Chip and cash-rich buyers will continue to be opportunistic and we'll continue to see transactions arising in the bankruptcy and restructuring context, but a return to the volume of M&A deals we saw before the recession is not likely to occur in the next 12 months.



The deals that are being done now are with blue chip borrowers and involve lots of equity. We are not seeing the deal volume of three or four years ago, not even close.



**Calvin D. Buford**  
Partner, Dinsmore & Shohl

there's not much hope for the rest of us. Large corporate customers--household names--couldn't sell their commercial paper. The disruption in the credit markets was unprecedented in our lifetimes. I don't think any of us ever expected to see the global financial system teetering on the brink of collapse as it did last fall.

**Are there any other ways this recession is different?**

K. LEWIS: In my practice, my job is not to be the optimist. I have to be the realist and make sure that when a company comes out of a financial restructuring, they'll be able to survive. Sometimes, the company may not like what I have to say, but that's my job.

SCHREINER: As someone whose career has grown with the credit industry, absolutely. There have been days in the past 12 months when I have felt like someone

About Dinsmore & Shohl

**Mergers and Acquisitions**

Dinsmore & Shohl completes numerous mergers and acquisition transactions each year and our M&A practice is top-rated in Ohio as listed in the 2010 edition of *The Best Lawyers in America*®.

Whether it is a large, diversified, multi-national corporation that needs to rebalance its portfolio of businesses through a strategic sale or acquisition, or a family business with a succession or estate tax challenge, we have experienced deal makers armed with up-to-date technical knowledge to guide clients through even the most difficult merger and acquisition transactions, including stock, asset, and mergers.

In some cases, industry-specific experience can be invaluable in properly structuring, negotiating, and closing an acquisition. Many of our attorneys have specialized knowledge in particular industry categories and counsel, including:

- Manufacturing businesses
- Consumer products businesses
- Software and other computer-related businesses
- Banking and financial institutions
- Broadcasting
- Hospitals and healthcare businesses

Find out more about our attorneys and services at [dinslaw.com/mergersandacquisitions](http://dinslaw.com/mergersandacquisitions).

