

SEXUAL HARASSMENT, BULLYING, AND HAZING, OH MY! A LEGAL REFRESHER

Jackie Gharapour Wernz
Partner
jwernz@thlaw.com

Rebecca Bailey
Partner
rbailey@thlaw.com

Thompson & Horton LLP

© Thompson & Horton LLP September 2022. Marketing materials. Not legal advice.



**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

1

Lions, Tigers & Bears

2



**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

2

Today's Lions, Tigers & Bears

- ▶ **Lions:** Sexual Harassment
- ▶ **Tigers:** Bullying
- ▶ **Bears:** Hazing

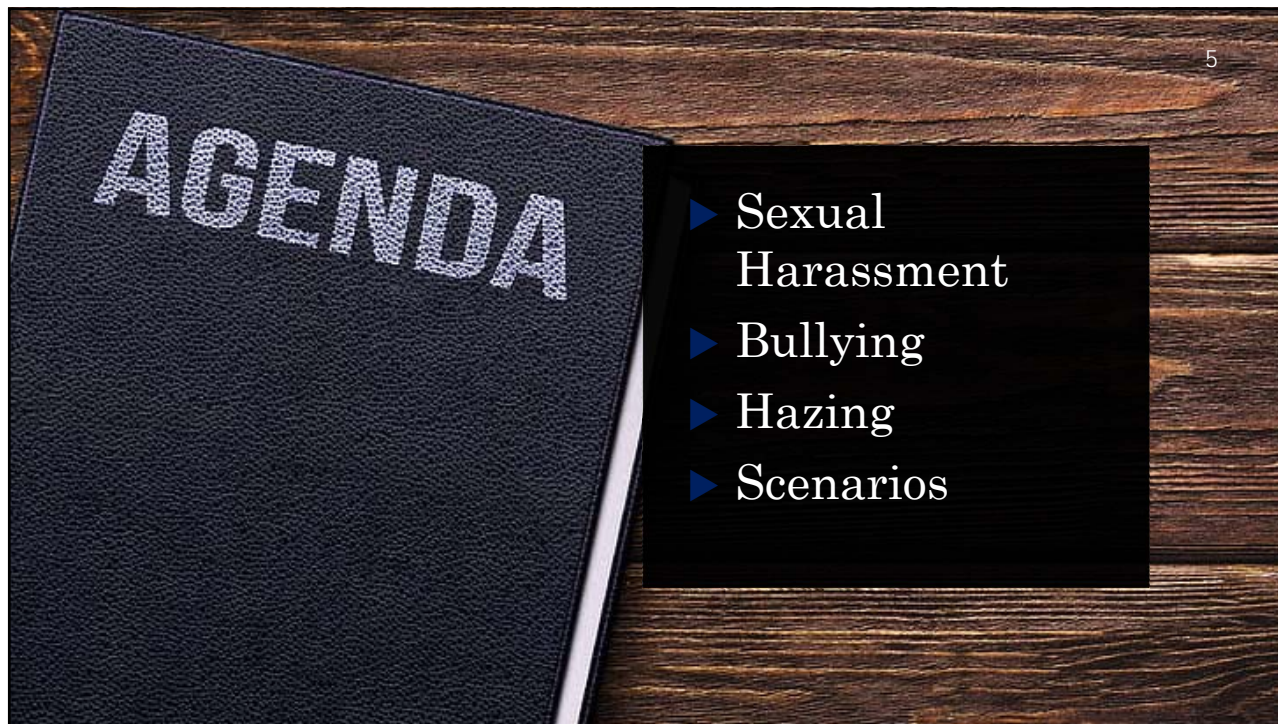


Oh MY!

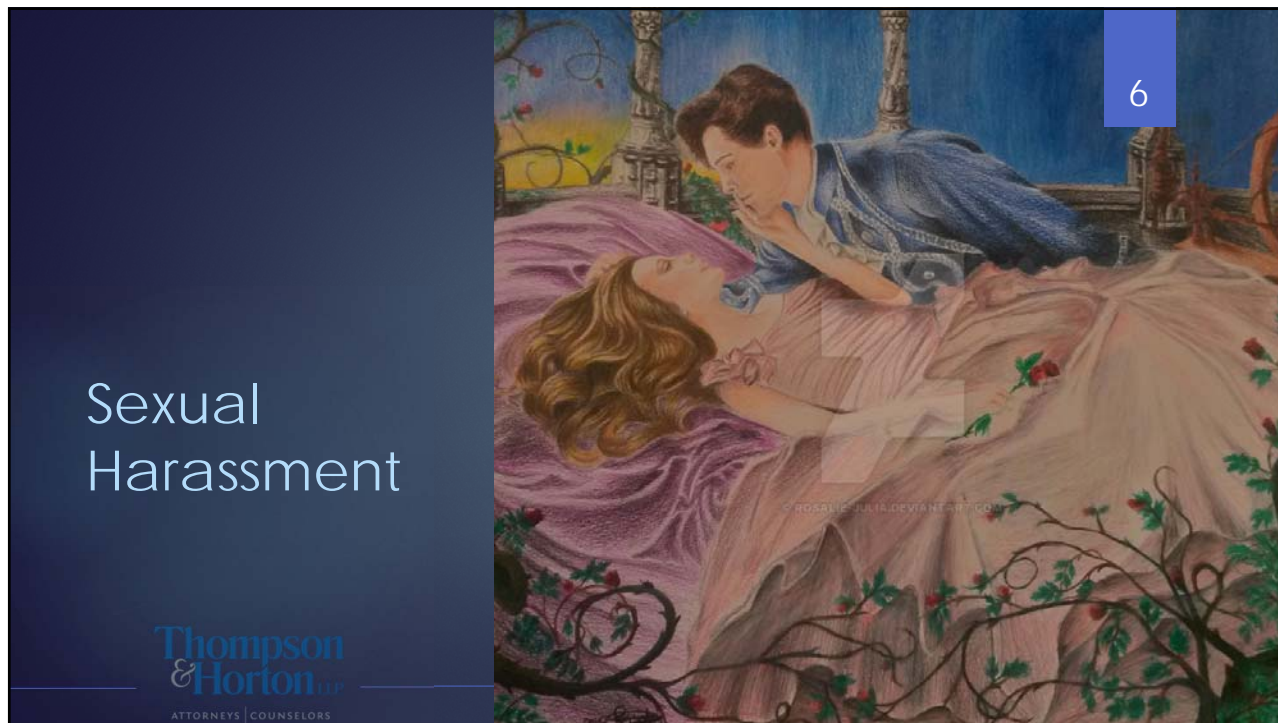
The risks

- ▶ OCR complaints
- ▶ Lawsuits
- ▶ PR nightmares





5



6

Applicable Law

Title IX of the Education Amendments of 1972

Prohibits the most serious types of sexual harassment in schools receiving federal funds



7

Title IX Covered Conduct

Sexual Assault

Domestic Violence

Dating Violence

Stalking

Employee Quid Pro Quo



Unwelcome conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies equal access to the educational program or activity



8

Title IX Covered Conduct

- ▶ Must occur “in an education program or activity”
 - Within a school’s “operations”
 - Where the school has substantial control over **both** the alleged harasser **and** the context of the alleged harassment
- ▶ Must occur against a person “in the United States”

Applicable Policy

- ▶ Policy FFH(LOCAL) Title IX:
“Response to Sexual Harassment—Title IX”
- ▶ **VERY** specific process must be followed

The Biggest Issues

- ▶ Owe a duty of confidentiality to the alleged victim (complainant) unless and until a formal complaint is filed or signed
- ▶ This means you can't tell the alleged perpetrator (respondent) the complainant's name or any information that might identify the complainant

The Biggest Issues

- ▶ In most cases, the complainant (or a minor complainant's parents/guardians) control whether any investigation occurs

The Biggest Issues

- ▶ Cannot investigate, make a decision, or impose punitive or disciplinary consequences until after the entire grievance process is complete (on average takes about 90-120 days)
- ▶ Cannot interview a party without providing written notice and opportunity to prepare beforehand

Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must

- **Step 1:** Hold a “supportive measures meeting” with the Complainant (alleged victim) and offer right to file a formal complaint
- **Step 2:** Consider if emergency removal/administrative leave warranted

Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

- **Step 3:** Notice of Allegations
- **Step 4:** Consider if dismissal is required or warranted
- **Step 5:** Informal Resolution (in some cases)
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

Not In Kansas Anymore



**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

15

Even if it's not Title IX Sexual Harassment....

Policy FFH(Local) prohibits other sexual harassment that is:

- ▶ So “severe, persistent, or pervasive” that it
 - “affects” the student’s ability to participate in or benefit from an education program or activity, or
 - otherwise adversely affects the student’s educational opportunities or
 - creates an intimidating, threatening, hostile, or abusive educational environment

**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

16

Applicable Policy

- ▶ Policy FFH(LOCAL) Title IX:
“Investigation of Reports Other Than Title IX”
- ▶ Not as prescriptive of a process as Title IX but still requires....

Applicable Policy

- ▶ Oversight by the District’s Title IX Coordinator:
 - Initial Assessment
 - Interim Action
 - District Investigation (by Title IX Coordinator or their designee)
- ▶ 10 day deadline from date of report unless extended
- ▶ Written report of the investigation, including a determination of whether prohibited conduct or bullying occurred

Applicable Policy

- ▶ Report must be filed with the Title IX Coordinator
- ▶ Notification of the outcome must be provided to both parties
- ▶ “To the greatest extent possible,” confidentiality of the complainant, persons against whom a report is filed, and witnesses
- ▶ Appeal must be offered using FNG(Local)



Bullying



Applicable Law

Texas Education Code - EDUC § 37.0832

Requires the board of trustees of each school district to adopt a policy and any necessary procedures concerning bullying



21

Bullying

A single significant act or pattern of acts, student(s) on student(s), that:

- ▶ Exploits an imbalance of power
- ▶ Involves engaging in written or verbal expression, expression through electronic means, or physical conduct that:



22

Bullying

- ▶ Has the effect or will have the effect of physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property
- ▶ Is sufficiently severe, persistent, or pervasive to create an intimidating, threatening, or abusive educational environment for a student
- ▶ Materially and substantially disrupts the educational process or the orderly operation of a classroom or school, or
- ▶ Infringes on the rights of the victim at school

Bullying

Includes cyberbullying, meaning bullying that is done through the use of any electronic communication device, including through the use of a cellular or other type of telephone, a computer, a camera, electronic mail, instant messaging, text messaging, a social media application, an Internet website, or any other Internet-based communication tool.

Covered Conduct

- ▶ Bullying that occurs on or is delivered to school property or to the site of a school-sponsored or school-related activity on or off school property;
- ▶ Bullying that occurs on a publicly or privately owned school bus or vehicle being used for transportation of students to or from school or a school-sponsored or school-related activity; and
- ▶ Cyberbullying that occurs off school property or outside of a school-sponsored or school-related activity if the cyberbullying:
 - Interferes with a student's educational opportunities; or
 - Substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school-related activity.

Applicable Policy

- ▶ Policy FFI
- ▶ Not as prescriptive of a process as Title IX but still requires....

Applicable Policy

- ▶ Policy FFI(LOCAL)
- ▶ Not as prescriptive of a process as Title IX but still requires....

Applicable Policy

- ▶ The Principal or designee must notify the parent of the alleged victim of bullying on or before the third business day of the report
- ▶ The Principal or designee must notify the alleged perpetrator within a reasonable amount of time after the report

Applicable Policy

Requires:

- ▶ Interim Action
- ▶ Investigation of the Report
 - Within 10 District business days of the report unless extended
- ▶ A final, written report of the investigation
 - Must include a determination as to whether bullying occurred and if so whether the victim used reasonable self defense
 - A copy of the report must be sent to the Superintendent or designee



29

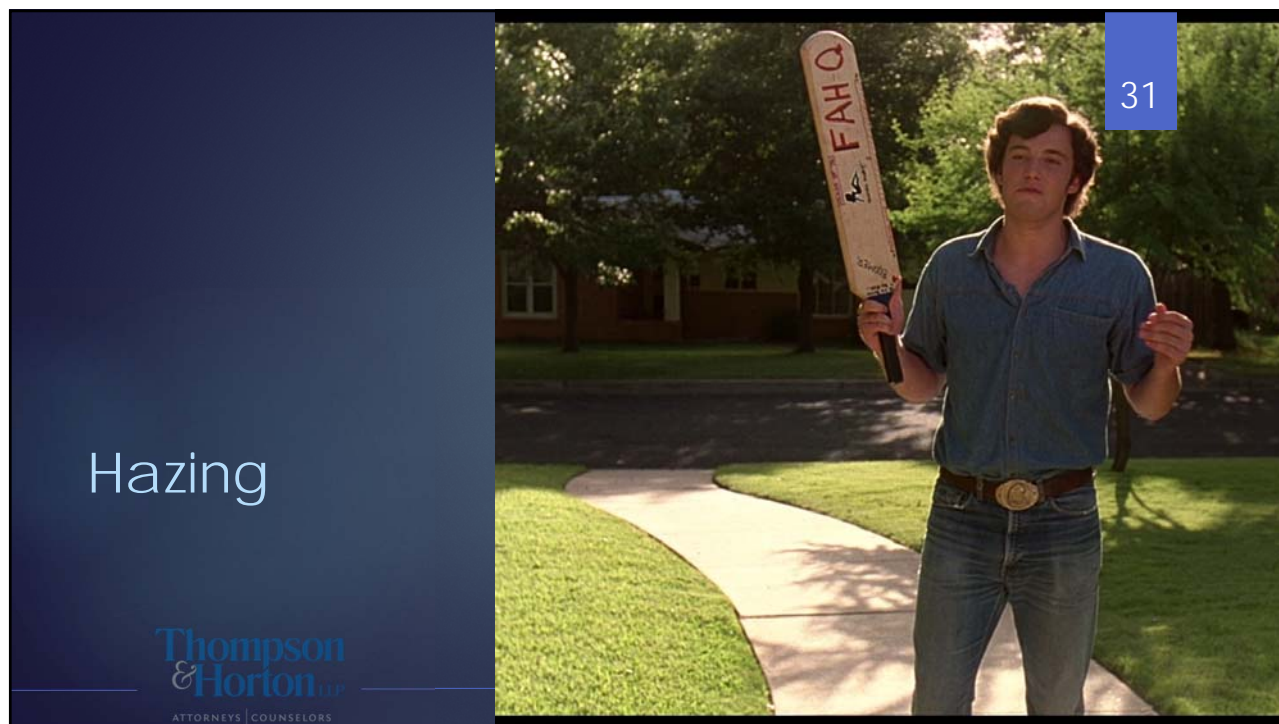
Applicable Policy

If bullying is confirmed:

- ▶ The Principal or designee must promptly notify the parents of the victim and perpetrator
- ▶ The Principal or designee must notify the victim, the perpetrator, and any witnesses of available counseling options



30



31

Applicable Law

Texas Education Code - EDUC § 37.151
Prohibits hazing in public and private high schools; also applied to higher education institutions

Thompson & Horton LLP
ATTORNEYS | COUNSELORS

32

Hazing

Any intentional, knowing, or reckless act, occurring on or off the campus of an educational institution, by one person alone or acting with others, directed against a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in an organization **if the act involves:**



33

Hazing

- ▶ Physical brutality (whipping, beating, striking, branding, electronic shocking, placing of a harmful substance on the body, etc.)
- ▶ Sleep deprivation, exposure to the elements, confinement in a small space, calisthenics, or similar activity that subjects the student to an unreasonable risk of harm or that severely affects their mental or physical health or safety



34

Hazing

- ▶ Involves consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student;
- ▶ Is any activity that induces, causes, or requires the student to perform a duty or task that involves a violation of the Penal Code;

Hazing

- ▶ involves coercing the student to consume:
 - a drug; or
 - an alcoholic beverage or liquor in an amount that would lead a reasonable person to believe that the student is intoxicated

Hazing Can Also Be...

- ▶ Title IX sexual harassment
- ▶ Other sexual harassment
- ▶ Bullying

Scenarios



Polling Access



Option One

Use this QR code

Option Two

- ▶ Go to Pollev.com on any browser
- ▶ Accept or dismiss cookies
- ▶ Enter THLAW411 as the Username
- ▶ Skip when asked to enter your name

Scenario #1

Student A reports that Student B makes fun of Student A for being overweight, calls Student A names like “idiot” and “freak,” and spreads rumors about Student B’s family being “poor trash.”

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

What is the alleged conduct, if proved?

- Title IX Sexual Harassment
- Other Sexual Harassment
- Bullying
- Hazing
- Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

41

42

Scenario #2

Student A reports that Student B constantly asks Student A out for dates, calls Student A a “whore,” says they want to “break your back” to Student A while making thrusting motions, and got under a table and simulated performing oral sex on Student A (without touching Student A).

Thompson & Horton LLP
ATTORNEYS | COUNSELORS

42

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

What is the alleged conduct, if proved?

- Title IX Sexual Harassment
- Other Sexual Harassment
- Bullying
- Hazing
- Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

43

44

Scenario #3

Members of the basketball team regularly slap each other on the butt during games. One student reports that although they know it's not done for sexual purposes, it makes them uncomfortable to have others touching their private body party.

Thompson & Horton LLP
ATTORNEYS | COUNSELORS

44

When poll is active, respond at pollev.com/thlaw411
 Text **THLAW411** to **22333** once to join

What is the alleged conduct, if proved?

- Title IX Sexual Harassment
- Other Sexual Harassment
- Bullying
- Hazing
- Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

45

46

Scenario #4

Two best friends are poking each other with a pencil and wrestling. One of them inadvertently penetrates the other's anus with the pencil eraser. A teacher sees it and reports the conduct to you.

Thompson & Horton LLP
 ATTORNEYS | COUNSELORS

46

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

What is the alleged conduct, if proved?

- Title IX Sexual Harassment
- Other Sexual Harassment
- Bullying
- Hazing
- Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

47

48

Scenario #5

Students on a sports team pin down a student as an initiation ritual, pull down the student's pants, and poke the student in the anus with a stick.

Thompson & Horton LLP
ATTORNEYS | COUNSELORS

48

What is the alleged conduct, if proved?

Title IX Sexual Harassment

Other Sexual Harassment

Bullying

Hazing

Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

49

50

Scenario #6

A student reports that their significant other tells them who they can and cannot hang out with, constantly is checking in on them, gets made if they get a text from someone else or does not respond right away, and makes them feel guilty about any time spent with family

**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

50

What is the alleged conduct, if proved?

Title IX Sexual Harassment

Other Sexual Harassment

Bullying

Hazing

Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

51

52

Scenario #6

Student A reports that Student B sexually assaulted them off campus at a party on the weekend. Since then, Student B's friends have been making fun of Student A at school and calling them names for being "easy" and "fast."

**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

52

What is the alleged conduct, if proved?

Title IX Sexual Harassment

Other Sexual Harassment

Bullying

Hazing

Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

53

54

Scenario #7

Football players restrain teammates and use a muscle therapy gun to poke the buttocks of the students on the ground. The students are fully clothed and there is no penetration.

**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

54

What is the alleged conduct, if proved?

Title IX Sexual Harassment

Other Sexual Harassment

Bullying

Hazing

Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

55

56

Scenario #8

A student video records another student using the bathroom in the next bathroom stall and shares the video with other students via snapchat. The students genitals are visible in the video.

**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

56

What is the alleged conduct, if proved?

- Title IX Sexual Harassment
- Other Sexual Harassment
- Bullying
- Hazing
- Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

57

Scenario #9

There are some rumors and gossip that a teacher and a student are dating, but there is no concrete basis for any report of misconduct other than mere gossip.

Thompson & Horton LLP
ATTORNEYS | COUNSELORS

58

58

What is the alleged conduct, if proved?

- Title IX Sexual Harassment
- Other Sexual Harassment
- Bullying
- Hazing
- Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

59

Scenario #10

A student reports that another student grabbed their butt and whistled at them calling them “sexy baby.”

Thompson & Horton LLP
ATTORNEYS | COUNSELORS

60

60

What is the alleged conduct, if proved?

- Title IX Sexual Harassment
- Other Sexual Harassment
- Bullying
- Hazing
- Code of Conduct Violation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

61

SEXUAL HARASSMENT, BULLYING, AND HAZING, OH MY! A LEGAL REFRESHER

Jackie Gharapour Wernz
Partner
jwernz@thlaw.com

Rebecca Bailey
Partner
rbailey@thlaw.com

Thompson & Horton LLP
© Thompson & Horton LLP September 2022. Marketing materials. Not legal advice.



Thompson & Horton LLP
ATTORNEYS | COUNSELORS

62

© Thompson & Horton LLP 2022. These materials are not legal advice. These materials are subject to a LIMITED LICENSE AND COPYRIGHT. These materials are proprietary and are owned and copyrighted by Thompson & Horton LLP. As training materials used to train Title IX personnel, these materials must be posted publicly by any organization or entity that purchased training for its Title IX personnel using these materials on that organization or entity's website or, if it has no website, must be made available by any such organization or entity for inspection and review at its offices. Accordingly, Thompson & Horton LLP has granted a LIMITED LICENSE to the organization or entity that lawfully purchased training using these materials (the "LICENSEE") to post these materials on its website or otherwise make them available as required by 34 C.F.R. 106.45(B)(10). The LICENSEE and any party who in any way receives and/or uses these materials agree to accept all terms and conditions and to abide by all provisions of this LIMITED LICENSE. Only the LICENSEE may post these materials on its website, and the materials may be posted only for purposes of review/inspection by the public; they may not be displayed, posted, shared, published, or used for any other purpose. Thompson & Horton LLP does not authorize any other public display, sharing, posting, or publication of these materials by the LICENSEE or any other party and does not authorize any use whatsoever by any party other than the LICENSEE. No party, including the LICENSEE, is authorized to copy, adapt, or otherwise use these materials without explicit written permission from Thompson & Horton LLP. No party, including the LICENSEE, is authorized to remove this LIMITED LICENSE AND COPYRIGHT language from any version of these materials or any copy thereof. Should any party, including the LICENSEE, display, post, share, publish, or otherwise use these materials in any manner other than that authorized by this LIMITED LICENSE, Thompson & Horton LLP will exercise all available legal rights and seek all available legal remedies including, but not limited to, directing the party to immediately remove any improperly posted content, cease and desist any unauthorized use, and compensate Thompson & Horton LLP for any unauthorized use to the extent authorized by copyright and other law. These materials may not be used by any party, including the LICENSEE, for any commercial purpose unless expressly authorized in writing by Thompson & Horton LLP. No other rights are provided, and all other rights are reserved.