LADY JUSTICE

PRIMERUS

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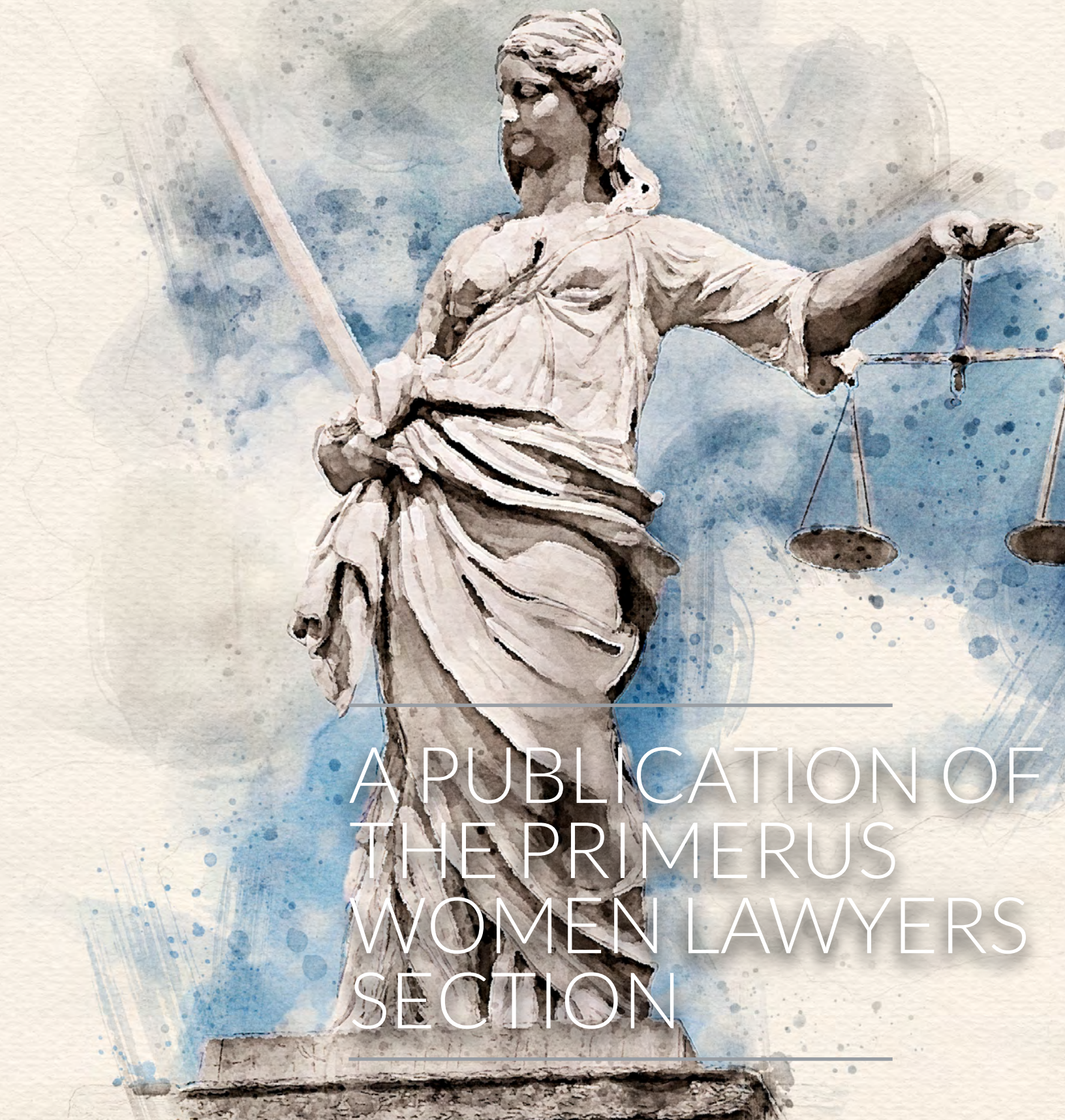

A PUBLICATION OF THE PRIMERUS WOMEN LAWYERS SECTION

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Women Lawyers Section Updates

WLS Membership Calls – The membership calls take place on a quarterly basis. Here is the call schedule for 2021:

- November 9th at 1:30 pm ET

WLS Listserv

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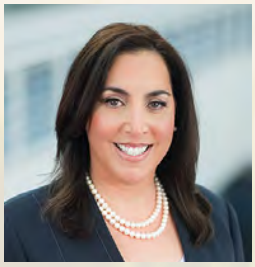
CHAIR COLUMN



Jessica Klotz is the current Chair of the Primerus Women Lawyers Section. She is Senior Counsel with Lewis Johs Avallone Aviles, LLP in New York, New York. Her practice concentrates on the defense of individuals, corporations, professionals and municipalities in areas of civil litigation, including premises liability, personal injury, property damage, employment law and sexual harassment, intentional torts, professional liability, maritime law and civil rights violations in both state and federal courts.

As Chair of the Women Lawyers Section (WLS), I would like to welcome you to the sixth publication of the Women Lawyers Section Newsletter, *Lady Justice*. The Women Lawyers Section is excited about this publication and the articles and content it contains.This publication continues to feature member interviews and articles written by women members of Primerus. This edition focuses on What Work Looks Like Now.

When we first decided on this topic, we thought the severity of the Covid pandemic had reached its peak and was declining. We were enjoying the warmer weather and the lessening of restrictions. Now, we face new concerns related to the Delta variant and some restrictions are being re-imposed. I hope everyone remains safe and healthy.

Currently, the state and federal court in New York, where I practice, are open on a limited basis. Courtrooms and common areas have been re-configured and plexiglass barriers have been installed. The U. S. District Courts of the Southern and Eastern District of New York Courts are open, with limitations. Masks are mandatory and social distancing is required. When you enter the Eastern District, your temperature will be taken and you will be asked screening questions to determine whether you are allowed to enter the building. Seating in public galleries has been reduced.

Similarly, in the New York State Courts, all visitors are required to submit to temperature screening and questioning before being granted entrance. There was a brief respite when those who showed proof of vaccination were given special color-coded passes to wear and not required to wear masks. However, as of August 13, 2021, those Entry Pass Programs have been suspended and all visitors entering a courthouse are required to wear a mask or face covering while inside. Persons without a mask or face covering will not be permitted to enter. While jury trials and pre-trial conferences are in person, discovery and motion conferences are conducted virtually via Microsoft Teams and telephone.

My office underwent some changes too. Our lease was up during the summer, and we moved. Our new office space is 30% smaller. We now occupy approximately 19,000 square feet, when our old space was approximately 28,000 square feet. Attorneys were given the option of being in the office full time, working remotely full time, or working a hybrid schedule of every other day in the office. Hybrid attorneys share an office with those working opposite days. For those working remotely full time, there is "hoteling" space, which provides an office with a computer and phone if they come into the office. All of the new conference rooms are equipped with web-conferencing capabilities. I chose to work on the hybrid schedule.

My daughters have returned to school full time in person – one as a senior in high school, the other as a junior in college in Massachusetts. Both are required to wear masks and be vaccinated, but other restrictions have eased. The plexiglass dividers around the high school desks are gone and school trips are being planned. Some countries are allowing college students to study abroad, but not all.

Things may never return to the pre-Covid version of "normal", but things are normalizing. We are resilient, and we will adapt to our post-Covid lives.

We hope you enjoy the articles in this publication, and that this publication will encourage participation in the WLS. The Women Lawyers Section of Primerus was created in 2016 with the goal of promoting the women lawyers within Primerus, and providing a network for supporting women lawyers, to assist in development and expansion of business and to promote and develop their own personal brand. The section hosts quarterly calls which focus on networking, but also have guest speakers who discuss topics which may be of particular importance to women lawyers. Our next networking call will be on November 9th at 1:30PM, Click Here to Register! Please join us on these calls and introduce yourself. We welcome new voices and perspectives to our discussions.

This is my last letter from the Chair, as my second term concludes in October. It has been my pleasure serving as Chair of this group. As I pass the torch to our Chair-elect, Adina Johnson, I know we are in good hands for the future.

EQUALITY IN THE WORKPLACE:
TAKING CARE OF FEMALE EMPLOYEES

By Eileen Pluijm and Priscilla de Leede of Russell Advocaten B.V.

Priscilla de Leede advises national and international entrepreneurs and organisations in disputes concerning personnel, employee participation, and social security. She is a member of the employment law and dismissal group at Russell Advocaten.

Eileen Pluijm advises national and international entrepreneurs and organisations on disputes concerning personnel, employee participation and social security. She is a member of the employment law and dismissal group at Russell Advocaten.

Dutch employers must, of course, act in accordance with legislation regarding, for example, equal treatment of men and women. However, when it comes to the workplace, gender difference should be recognized to achieve equality. What must employers keep in mind regarding a work culture where everyone feels comfortable? What are the legal rights of pregnant employees and employees with children? In this article, we will illustrate how Dutch law tries to create a safe and healthy work environment for us as female employees.

Female-friendly work culture

Employers should ensure a safe work environment. A recent judgment shows that this includes the obligation to create and maintain a female-friendly work culture. [1] This judgment was initiated by a female trader of a company that engages in securities trading and, more specifically, 'market making'. In this company, only 75 out of approximately 470 employees are female. At the time of the legal proceedings, the company consisted of 119 male traders and only 2 female traders.

The female trader requested the court to dissolve her employment contract. In this context, she referred to the female-unfriendly and unsafe work environment. As an outlet for the hard and competitive company culture, her employer allowed transgressive behaviour. An example of this is the 'trade sounds' played on the trading floor when a certain trade result was achieved: a short music fragment often including sexual connotations, such as 'Jerk it out', 'Sexy lady' and 'Bitch2'. Furthermore, in morning markets, where traders practice their skills, the traders traded on a fictitious market in, for example, dick pics, the salaries of female porn stars and the most expensive bra. Traders also regularly made sexually intimidating gestures, sounds, comments and jokes. They shared sexually charged expressions and images of scantily dressed women in WhatsApp groups. Company outings often ended in a strip club.

Based on the aforementioned, the court ruled that the employer had acted seriously culpably towards the female trader. The employer had taken insufficient measures to change the company culture. Therefore, the court ordered the employer to pay an additional (so-called 'fair') compensation of €350,000 on top of the statutory severance payment of €64,000 to the female trader for taking inadequate action against an unsafe and female-unfriendly work climate.

Pregnant at work

Under Dutch labour law, employers have to show extra consideration with respect to pregnant employees. In the following, we will go into some legislation applicable to pregnant employees, such a pregnancy and maternity leave and the (im)possibility to dismiss pregnant employees.

Leave arrangements

During and after pregnancy, female employees are entitled to a minimum of 16 weeks pregnancy and maternity leave. At their own discretion, they can start the leave between six and four weeks - or between ten and eight weeks in the event of a

multiple birth - before the estimated delivery date. After childbirth, the employee is entitled to ten weeks maternity leave plus the number of days the pregnancy leave lasted shorter than six weeks (or ten weeks in the event of a multiple birth). During pregnancy and maternity leave, the employee is entitled to a benefit of 100% of the daily wage; however, this benefit may not exceed the maximum daily wage.

Furthermore, female (and male) employees are currently entitled to unpaid parental leave for each child under eight for a maximum period of 26 times the number of weekly working hours. As per 2 August 2022, employees receive a benefit equal to 50% of their daily wage - up to 50% of the maximum daily wage - for the first nine of the 26 weeks of parental leave insofar as this is taken in the first year after the birth.

Dismissal

Under Dutch law there are some prohibitions for an employer to (unilaterally) terminate an employment contract. For example, an employer may not terminate an employee's employment contract during her pregnancy. When starting proceedings to dismiss an employee, there is always an assessment on whether the employee is pregnant. For example, if an employer intends to dismiss an employee due to underperformance, a Dutch court will check whether the underperformance of the employee could be the result of pregnancy of the employee. If this is the case, an employee cannot be dismissed. From a Dutch law perspective, it is difficult to understand a situation like that of Olympic athlete Allyson Felix. After giving birth to her first daughter, her employer wanted to pay her 70% less and offered no guarantees if her performance declined due to her pregnancy. She championed her values and signed a deal with another company. It is encouraging for other female employees that she spoke out against her employer's treatment of women who take breaks in their career to have children.

Furthermore, under Dutch law employers may not terminate the employment contract of an employee during the period in which she is on maternity leave. Nor can an employment contract be terminated during a period of six weeks after resuming work (i) following maternity leave or (ii) following a period of incapacity for work, that immediately

follows maternity leave, caused by the childbirth or the preceding pregnancy. Even if an employer intends to terminate the employment contracts of employees because of the cessation of the company's activities, it is not possible to dismiss an employee who is on pregnancy or maternity leave. There are only a few exceptions to these termination prohibitions, such as a termination during the probationary period or a dismissal on the spot.

In addition, an employer cannot terminate an employee's employment contract on the grounds that the employee is exercising the right to parental leave, adoption leave, leave for taking care of a foster child, or short-term and long-term care leave.

Safe and healthy work environment

The employer should organize the work of the pregnant employee in such a way that it has no harmful consequences for the pregnancy, the unborn child and the employee herself. This includes the obligation to (temporarily) adjust the workplace, working hours and/or the work if something poses a risk to the health and safety of the employee who is pregnant, recently gave birth or is breastfeeding.

A pregnant employee is entitled to a stable and regular pattern of work and rest. This means no night shifts or overtime, a lower than usual maximum to the hours of work per shift and week, and pregnancy examinations during working hours.

The employer must also make a suitable, lockable area with a bed or couch available to the employee during pregnancy and lactation for resting and breastfeeding or pumping breast milk.

Combining work and motherhood

The Dutch Flexible Work Act [2] entitles employees to request an adjustment of their working time, working hours, or work location. This is a valuable measure, for example, for female employees to combine children and work. Currently, employees can request the employer in writing for a change of place of work under the Flexible Work Act. However, this does not provide a right to work from home. The employer may refuse such a request. A legislative proposal 'Work Where You Want' has been drafted, based on which an employer would only be able to reject such a request if there are compelling business or service interests. If this legislative proposal will be adopted, this will be – in addition to the option to request an adjustment of working time or working hours – a valuable opportunity for female employees to combine childrearing with working from home instead of at the office.

Conclusion and recommendation

As an employer, extra consideration is required regarding female employees. In addition to the (general) equal treatment regulations, Dutch law prescribes several rules on how to create a safe and healthy workplace for female – and in particular pregnant - employees. This is reflected, for example, in leave arrangements, working time and workplace adjustments, and prohibitions of dismissal. Recent case law has also shown that employers are obliged to create a female-friendly work culture to support everyone's wellbeing at work. However, regardless of the country and the legislation, in the 21st century, all companies should foster a culture where female employees feel that they are welcome and truly belong.

[1] Amsterdam District Court, March 24, 2021, ECLI:NL:RBAMS:2021:1776.

[2]In Dutch: Wet Flexibel Werken.

HOW HAS THE PANDEMIC AFFECTED THE TRAJECTORY OF YOUR CAREER?

By Ellen Morrison Townsend of Hackman Hulett LLP

Ellen Morrison Townsend is a partner with Hackman Hulett LLP and practices in the real estate, civil litigation, and general corporate/business services areas. She defends businesses in state and federal courts across Indiana, as well as with the Indiana Attorney General, the Indiana Real Estate Commission, the Department of Insurance, Realtor® boards, and many other state and federal regulatory agencies. Ellen represents small to large business organizations with respect to forming entities, drafting and negotiating contracts, employment matters, buying and selling businesses, litigation, and risk management.

It should come as no surprise to any reader that the global economic disruption brought on by the COVID-19 pandemic resulted in enormous changes and legal challenges to the field of real estate and general business clients. When I was admitted to the practice of law in 1997, the dot-com bubble was having a tremendous impact on the real estate market. We later experienced the financial crisis of 2008, so we became familiar with constant changes to the real estate market. While all have faced challenges due to the pandemic, our clients met each new challenge in a way that will have lasting impacts on the law and the industry.

Growing up on a working horse and cattle farm in Attica, Indiana with a small-town, respected lawyer father who raised and trained standardbred racehorses with my mother's constant assistance on our family's half-mile racetrack, taught me many lessons about work ethic and also the practice of law. One of the most important lessons was understanding the value of lawyers doing the *right thing* and minimizing costs, but also why business clients, as well as clients who are real estate brokers, need proper legal support and well-reasoned guidance. A key lesson I learned as a 10-year 4-H member on the farm that I have carried through to my law practice is to remain calm and steady, yet still be adaptive. During the COVID-19 pandemic, this was no exception.

The Fed has kept interest rates relatively low, and the rates are projected to stay that way into the immediate future, which certainly created a favorable environment for strong real estate sales before the onset of the pandemic. The already healthy market coupled with the fact that the real estate industry was already employing tech tools that would become vital during a shutdown set the industry up well to weather the challenges of the pandemic. For instance, over the past few years, even before the coronavirus, real estate brokers have increasingly been integrating the use of technological tools into the sale of homes. Many examples include: (1) Online listings; (2) Virtual presentations for attracting prospective clients, such as for new listings; (3) Remote virtual tours; (4) Direct interaction using 2-way real-time audiovisual technology, such as Zoom, Skype, and FaceTime; and (5) Electronic execution and delivery of legal documents.

While many brokers were able to apply these tools to facilitate transactions after local health restrictions went into effect, real estate brokers

and agents have not been alone in adapting to the ever-changing rules. Real estate title companies found innovative ways to complete transactions, as did our general business clients. One significant development was remote electronic notarization and the e-recording of documents. These new legal requirements made it easier for real estate to change hands in a quick and safe manner.

Notably, many of these changes were already in progress before the pandemic struck. The innovations already tested and tried by brokers and businesses in Indiana are what set us apart and allowed much of the real estate market and other clients to go on with business as usual, with only minor adjustments while we learned to work on a remote basis.

Our real estate and business community came together to address these new challenges in a cooperative fashion. Our Indiana Association of REALTORS® Forms Committee developed innovative contracts and recommendations, in a short time, to address and respond to the unique aspects of a once in a lifetime pandemic.

In many ways, the pandemic only reinforced and enhanced our business industry and real estate market. One reason Indiana is such a lucrative, desirable business and real estate market is because our community, even among business competitors, put aside competition and self-interest and instead operated as a team to preserve our economic stability for the good of all. The end result: remarkable growth in the city of Indianapolis, our larger metropolitan area, and our state. Certainly, big challenges remain, yet we worked together during the early days of the pandemic, the outcome of which is why so many of our clients and local businesses had an exceptional 2020. We did not know what would happen in those early days, but we all chose to cooperate and collaborate, not fight. This is a lesson for us all in how to approach difficult times.

FROM THE WAIST UP:

CHANGING THE RULES OF LITIGATION POST-COVID

By Veronique Evans of Evans & Co.

Ms. Evans was admitted to The Bahamas Bar in December 2002 and joined Evans & Co. as an Associate Attorney. She was made a Partner in 2006. She obtained a Diploma in International Trust Management with Distinction in 2015. Ms. Evans' main areas of practice include, Trusts and Estate Planning, Family Law, Personal Injury Law, Civil Litigation, Commercial Law, and Maritime and Shipping Law. In April 2016 Ms. Evans was awarded the STEP Caribbean Top Student Award.

As I sat in the room with its neutral background and lack of open windows, waiting for the host to let me into her meeting room, it occurred to me just how much COVID has changed the landscape of litigation here in The Bahamas*.

Since our firm is a boutique law firm, our staff numbers are below the 15 member staff threshold which requires employees to work remotely and controls the number of staff that are allowed on-site at any one time. As a result, our day-to-day looks very much like it did pre-COVID with a few notable exceptions, the most glaring of which is the way litigation has changed due to the restrictions imposed to stop the spread of the virus.

In a Practice Direction promulgated by the Chief Justice of The Bahamas, Brian Moree, in July 2020, for the first time in our history there were directions as to remote hearings. Before this, the technology was only used to take evidence from non-resident witnesses and to facilitate the continuation of the incarceration of persons held on remand at the Bahamas Department of Corrections. Otherwise, all matters, no matter how small or brief, were held in person in either a courtroom or a judge's chambers.

These new rules charted a course that managed to be modern in terms of the use of technology but maintains the decorum and formality that Bahamian lawyers have come to know and (to varying degrees) love. To quote directly from the Practice Direction: "Procedural propriety must be observed at all times and the normal ways of addressing judicial officers and counsel in court proceedings shall apply".

If you've ever had the opportunity to sit in a courtroom in any jurisdiction that follows the United Kingdom tradition as The Bahamas does, you know that formality is the name of the game. From the manner of dress to the almost courtly manners required, there is a lot to work through. The means of address alone are complex. For example in a lower court, the Magistrate is referred to as "Your Worship", in the Supreme Court the Judge is referred to as "My Lady" or "My Lord" as appropriate, in the Court of Appeal the court is referred to as "My Lords" regardless of whether any of the judges are female, and other Counsel in the matter at any court level are either "My Learned Friend" or "My Learned Senior" as appropriate.

In terms of dress, Counsel are still required to wear court dress for matters heard in open court. For women that includes a collarette (a dickie with the bands on the front and a nice lace collar if you feel fancy) with a jacket in a sober colour, and by 'sober' please interpret as anything that you would wear to a funeral. The one concession is that for remote hearings the court gown is not required and as the wig has been relegated to special occasions, the day-to-day uniform doesn't include it. For matters in chambers, no collarette is needed but your jacket and blouse (if visible) must be in the same sober colours. What is worn on parts of the body out of the view of the camera on your device is entirely up to you, hence the title of this article.

The new directions also condescend to things such as background (neutral and away

from open windows) and when to mute your microphone (whenever you aren't speaking). There is even guidance on the use of the 'raise your hand' feature for the less technically savvy.

For a practitioner in Civil and Commercial Litigation for nearly twenty years I have to say this was a major adjustment. The court dress to me has been akin to an actor putting on a costume to get into character. Something about donning my court gown; which, due to the wholly unnecessary thick panel in the back, always manages to slip off my shoulders, gets me ready for battle. Also, returning the judge's bow as he or she takes their seat is the same as a director calling "Action!" These things are non-existent in a remote hearing and it has been an adjustment, albeit a welcome one for many reasons.

For me, the most important change is the reduced need to travel. The Bahamas is an archipelago of over 700 islands and cays with Magistrate's Courts on most significantly populated islands, and Supreme Courts in both New Providence and Grand Bahama, so a litigation practitioner's life involves a fair amount of inter-island travel. The new use of technology is a God-send because I can now have a hearing in Grand Bahama and go right back to my desk, whereas before I would have had to take a morning flight to Grand Bahama and hope that my hearing is done before the flight at midday, otherwise my next opportunity to get home is the evening flight thus losing an entire day. The savings in time and client costs have been extensive because there are no transportation costs and the time spent is far less which reduces the overall cost of litigation and makes the benefits of the judicial process available to more people who would have shied away from it because of financial concerns.

Unfortunately, some older practitioners have taken the new rules as their cue to enter retirement, which is understandable because there is an unprecedented reliance on technology which is not at all comfortable for practitioners who came of age in a different era. When he took office, the Chief Justice vowed to increase the use of technology thus increasing the efficiency of the Judicial Process, and gave himself three years to do so. Covid-19 was the perfect opportunity to move that timeline forward and overall the pros have outweighed the cons but the landscape is now very different.

Now my reflections are interrupted by the screen coming to life and I feel the familiar rush of anticipation as the Clerk calls the matter.

"Yes, Ms. Evans."

"May it please you, my Lord...."

Some things never change.

*As of the writing of this article, in-person hearings have been resumed for criminal matters with appropriate social distancing however civil matters are still heard remotely.

THE GENESIS OF ANTI-INDEMNITY STATUTES AS A MATTER OF LAW

By Emma Dedman of Degan, Blanchard & Nash, PLC

Emma Dedman is an associate at Degan, Blanchard & Nash. She graduated cum laude from Tulane University with a Bachelor of Science in Management in 2016. She received her Juris Doctorate from Tulane University School of Law in 2019. While in law school, she was a member of the Tulane Journal of International and Comparative Law and served as the Senior Business Editor. Emma was published in Volume 26 No. 2 of the Tulane Journal of International and Comparative Law. While on the Journal, Emma led the creation of a panel presentation at Tulane Law School addressing issues of international law, trade, and risk mitigation including lawyers from Texas, Tennessee, Louisiana, Germany, and China, as well as business and government leaders from New Orleans. Emma is common law educated but civil law licensed, giving her the ability to discuss both legal systems. Emma is admitted to practice in Louisiana.

In practice areas such as insurance coverage, contract drafting, and construction, among others, it is becoming increasingly important to understand and evaluate applicable state law regarding indemnification and additional insured status. As states have enacted anti-indemnity statutes in the past couple of decades, case law is developing on how courts interpret these laws.

Indemnity and Additional Insured Status In General

Indemnity provisions are contractual risk-shifting mechanisms by which the risk of monetary liability is transferred from one party to another. These provisions are often found in construction contracts. Typically, the risk is shifted from a contractor with more power to a subcontractor with less power. Indemnity provisions are different from being named as an additional insured, in which an indemnitor names an indemnitee as an additional insured in the indemnitor's policy. While both indemnity and additional insured status are risk-shifting mechanisms, an indemnity provision does not by itself provide insurance coverage for an indemnitee. It is an agreement for an indemnitor to indemnify, defend, or hold harmless an indemnitee, often called an "insured contract". However, commercial general liability policies often provide coverage for insured contracts.

Louisiana Law

A good example of an anti-indemnity statute can be found in Louisiana law: La. R.S. 9:2780.1, or the Louisiana Anti-Indemnity Act (LAIA). This act went into effect on January 1, 2011. In enacting the statute, the Louisiana Legislature determined that indemnity provisions over which an indemnitor has no control are contrary to the public policy of the state of Louisiana and are null, void, and unenforceable. [1]

Specifically, the LAIA limits contractual liability and additional insured agreements in construction contracts and motor carrier transportation contracts. The statute declares null, void, and unenforceable a contract that purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control. In addition, LAIA declares null, void, and unenforceable a contract which purports to require an indemnitor to procure liability insurance covering the acts or

omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control.

While indemnification agreements that require defense and indemnity by an indemnitor for the acts or negligence of an indemnitee are against public policy, there is an exception for additional insured agreements in construction contracts. If an indemnitor recovers the cost of the required insurance in the contract price, then the additional insured agreement is valid.

The Louisiana legislature enacted the LAIA to prevent agreements that go against public policy. Thus, the statute stops a contractor or subcontractor from being obligated to indemnify an indemnitee for the indemnitee's own wrongdoing. Public policy is that a party should not be able to contract away financial responsibility arising from its own tortious conduct. If a party could contract this responsibility away, there would be no incentive for the indemnitee to take necessary precautions to avoid injury or damage.

Currently, there is little jurisprudence on this statute.

Conclusion

The LAIA is significant in coverage considerations in construction matters. As most states have enacted similar laws, it is necessary to understand the limitations imposed by law on indemnity and additional insured agreements.

When evaluating coverage pursuant to a construction contract that includes an indemnity or additional insured provision, it is very important to compare the provision to the applicable state's laws. State law may prohibit or limit these provisions.

Understanding and being aware of anti-indemnity laws is also important when drafting construction agreements. Agreements should spell out the extent of indemnification for concurrent liability, making sure it is in line with the relevant state law.

Finally, as case law develops, it will be important to keep up with new decisions and how they may affect evaluations and strategy in coverage, construction, and other relevant matters. P

[1] *See* La. R.S. 9:2780.1;*Gaulden v. Buzzi Unicem USA, Inc.*, No.CV 16-13875, 2017 WL 2870065, at *3 (E.D. La.June 29, 2017).