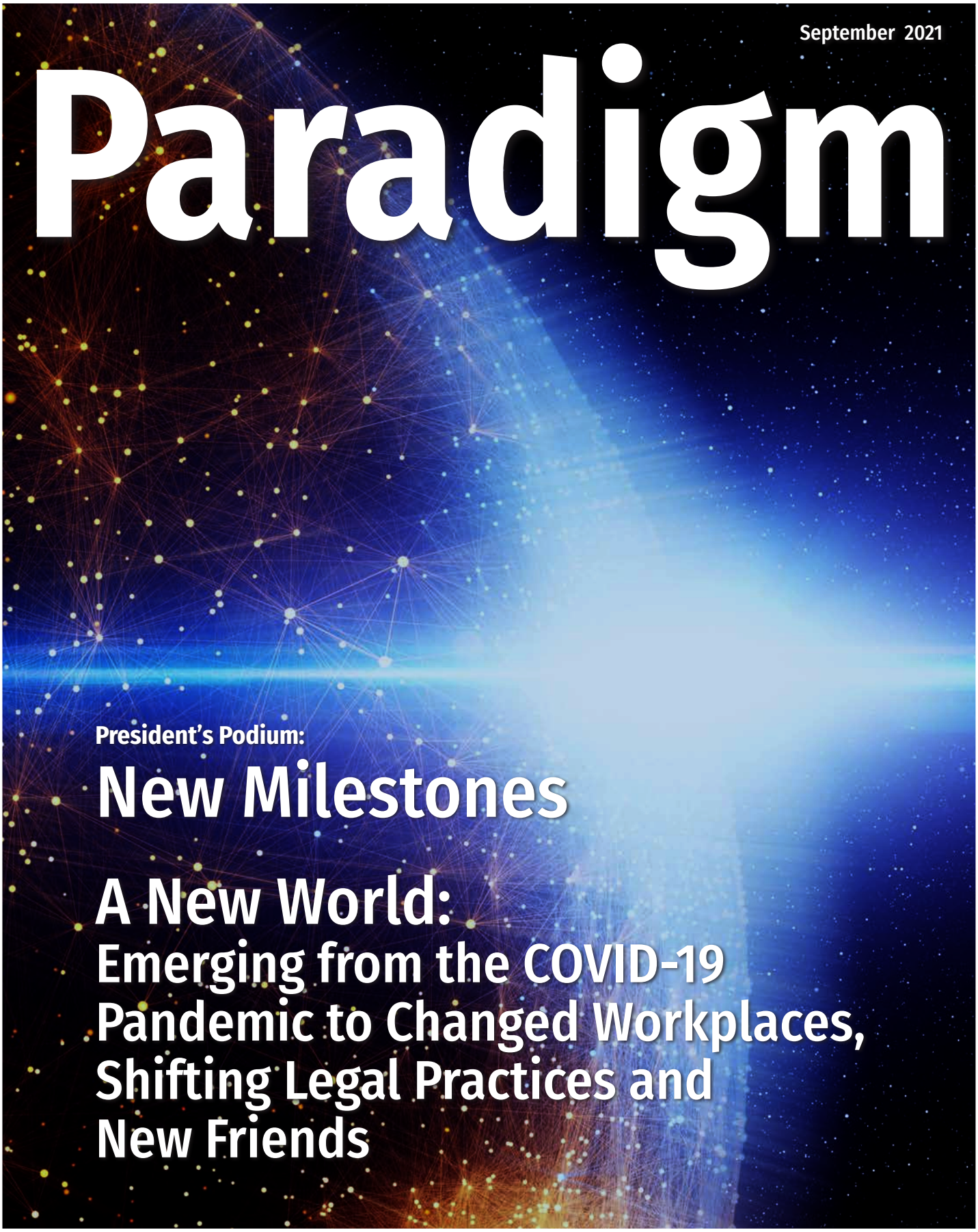
September 2021

# Paradigm



President's Podium:

## New Milestones

## A New World:
## Emerging from the COVID-19 Pandemic to Changed Workplaces, Shifting Legal Practices and New Friends

PRIMERUS

The World's Finest Law Firms

PRIMERUS

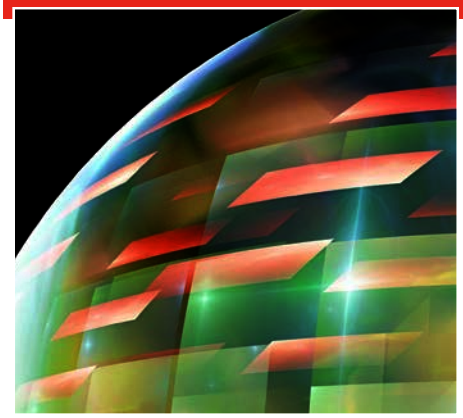
# The Primerus Paradigm

**September 2021**


## About Our Cover

**The COVID-19 pandemic sent shock waves around the globe. As we emerge into a world that has transformed in many ways, together we examine what new ways and viewpoints should continue, and what should be left behind. Within Primerus, global connections have strengthened, equipping us for a bright future.**







Every lawyer in Primerus shares a commitment to a set of common values known as the Six Pillars:

- **Integrity**
- **Excellent Work Product**
- **Reasonable Fees**
- **Continuing Legal Education**
- **Civility**
- **Community Service**

*For a full description of these values, please visit primerus.com.*




Publisher & Editor in Chief: **John C. Buchanan**
Managing Editor: **Chris Dawe**

# IN THIS ISSUE

PRIMERUS

## President's Podium

John C. Buchanan

# New Milestones

Greetings. As we come to you with this issue of *The Primerus Paradigm*, it has been almost 18 months since the Primerus family has gathered in person. I am pleased to announce that very soon, that is going to change.

We have plans to host an in-person Primerus Global Conference October 21-24 at the Lansdowne Resort and Spa in Leesburg, Virginia, near the beautiful Potomac River.

This enables us to continue the long-standing tradition of the global conference, which draws Primerus members from around the world. In November 1994, Primerus hosted this event, then called the Primerus National Conference, for the first time in Scottsdale, Arizona. Some of you may remember it coincided with the coldest November 4 in Arizona history. We went on to hold this event every year until 2020, when the global COVID-19 pandemic forced us to cancel the event, slated to be held in Paris, France.

This is a big development for Primerus, and it marks a hopeful milestone as we emerge from the pandemic. It will be wonderful to be together again, gathering for educational seminars in the morning and then enjoying recreational activities in the afternoon and into the evening. So many wonderful friendships have developed as a result of these gatherings.

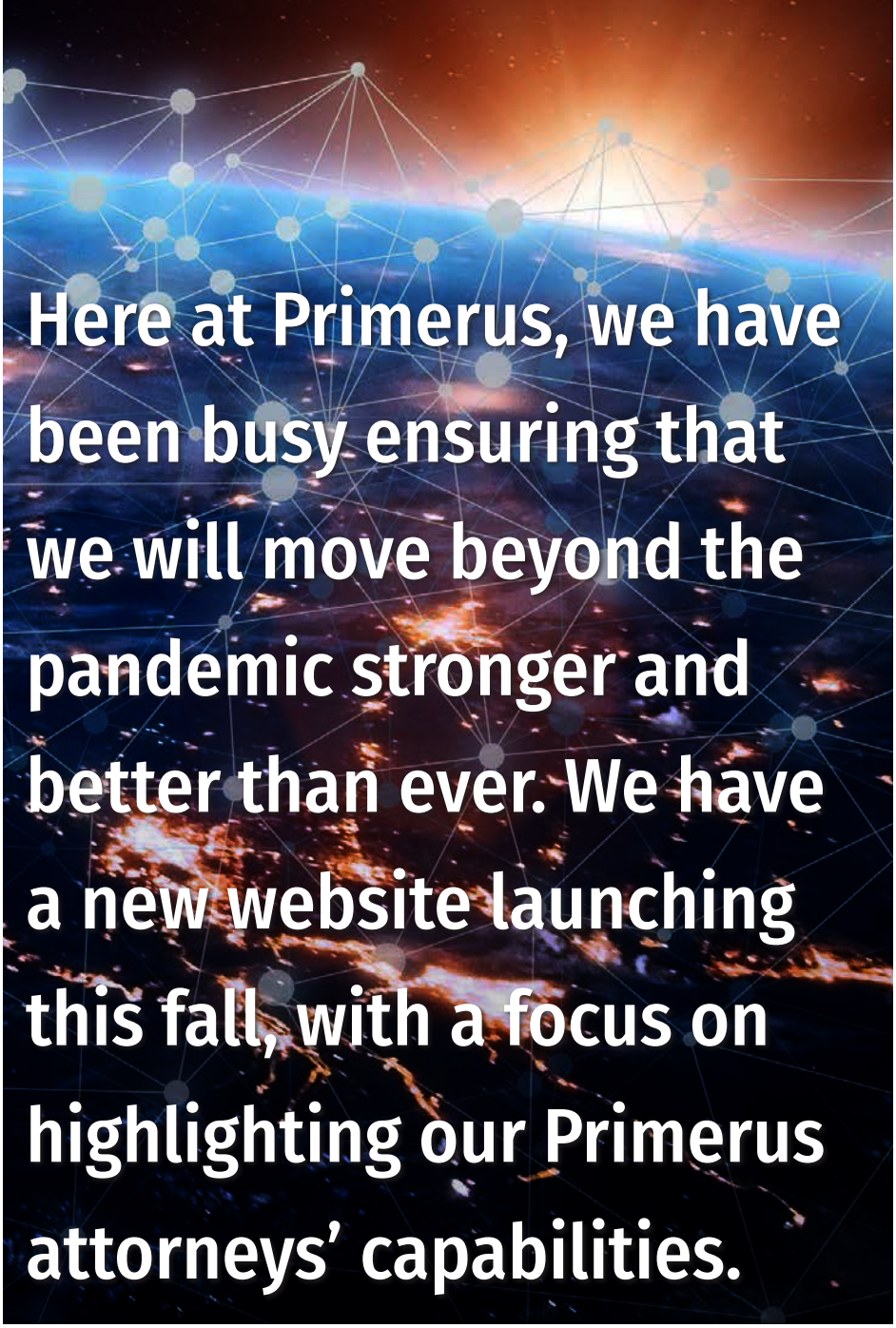
But I am also pleased that as we come together again in person, we have not grown apart or become strangers over the last year and a half. In fact, much the opposite has

happened. The Primerus family came together in many ways over Zoom, whether it was for our Monday morning Coffee and Conversation or other gatherings. We did what we do best — learned together, laughed together and supported one another through one of the most challenging periods in our lifetimes.

Here at Primerus, we have been busy ensuring that we will move beyond the pandemic stronger and better than ever. We have a new website launching this fall, with a focus on highlighting our Primerus attorneys' capabilities in much the same way a talent agent would showcase a movie star celebrity client. We're making it easier than ever for clients to find the highest quality attorneys with the exact expertise they need.

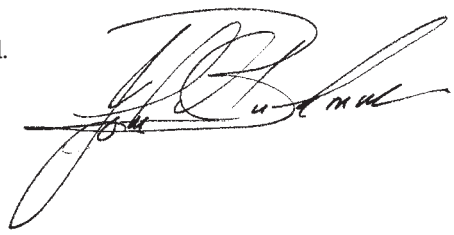
We're also taking steps to continue our commitment to accepting and retaining only the world's finest boutique law firms. This includes our Accreditation Board, which sets the quality standards that all Primerus firms must meet in order to be invited to join the society, and our Quality Assurance Board, which enforces those standards and carries out ongoing annual reviews of all member firms. I believe we have and will continue to have the most stringent quality assurance control system in the entire legal industry. Clients will always be able to rest assured that they're getting the best when they hire a Primerus firm.

In addition, Primerus is making changes to its recruitment of new firms, putting plans in place to further equip incoming firms to successfully become part of the world of Primerus. We want to continue to not only find the best of the best law firms, but very effectively showcase them to the world, making it easier for potential clients to find the attorneys they need.




I know this has been a challenging year for many, if not all, of us. I don't want to minimize the struggles that many have endured on a personal and professional level. But I truly believe the spirit of Primerus is alive and well. We have seen in countless ways that we are, indeed "good people who happen to be good lawyers."

I hope you are making plans to join me in Virginia for the 2021 Primerus Global Conference. While I have enjoyed seeing many of you on a screen, it will be even better to greet you in person once again.



# A New World: Emerging from the COVID-19 Pandemic to Changed Workplaces, Shifting Legal Practices and New Friends

**The arrival of the COVID-19 pandemic in 2020 sent shock waves through businesses around the world.**

There was no industry exempt from change — including transportation.

Emily Chiarizia, general counsel at Armstrong Transport Group, LLC, in Charlotte, North Carolina, said her company immediately jumped into finding new ways to help clients through uncharted territory.

Armstrong is a freight broker or third party-logistics provider, which means they connect shipping customers with trucking companies that have been vetted for quality and safety. They then match trucking carriers with specific loads.

"In the beginning, we were busy ensuring our transportation partners could continue to operate through COVID," Chiarizia said.

That meant keeping everyone updated with changing federal regulations, as well as guidelines specific to individual companies.

"At the beginning, it was really difficult to keep up with the communication to make everyone feel safe," she said.

Yet, even with all the struggles of a global pandemic, truck drivers and others in the transportation industry emerged as cherished "essential workers" who reported to work and kept supply chains running. The public noticed — perhaps more than ever before — and goodwill for truckers soared.

"I feel like the pandemic really clarified how important the transportation and logistics industries are for our country," Chiarizia said. "Truck drivers really had their time to shine. I hope that people's understanding of how transportation is an amazing industry that keeps our country going continues."

It's just one example of the "new world" everyone is navigating as various regions of the world begin to emerge from the pandemic. There will be parts everyone is eager to leave behind, as well as new practices and attitudes some hope will continue.

## Relationships Grow, and New Ones Emerge

The same is true at Primerus, according to President and Founder John C. "Jack" Buchanan. The pandemic brought about very difficult changes, including canceling all in-person gatherings beginning in early 2020 and instead finding ways to come together online.

But now, it's clear that some positive things emerged from those challenges, including new relationships that formed across international borders. Online meetings meant that anyone from a Primerus firm could attend events, without the need for costly and time-consuming travel.

"The interpersonal relationships that Primerus members form among one another and with clients are so important," Buchanan said. "Business comes from friendships. One of our jobs is to facilitate those relationships."

Primerus has worked hard to bring members and clients from around the world together — despite the pandemic. The weekly Monday morning Coffee and Conversation meeting via Zoom still offers a time for Primerus members to learn and laugh together. Each week, a Primerus lawyer brings a topic to the table and leads a discussion about it.

The Primerus International Practice Committee offers various Zoom meetings to allow international Primerus members to get to know one another personally, as well as to build and share legal knowledge. There are also regular seminars, practice group meetings and more.

In addition, because of the success of the Monday morning meeting for Primerus attorneys, Primerus recently started a similar online gathering for clients who are members of the Primerus Client Resource Institute. Held monthly, the Zoom meeting creates a platform for clients to connect with one another and discuss issues important to their day-to-day work.

While virtual meetings have brought the Primerus family together in new ways — and will continue in the future, Primerus is also eager to bring people together face to face. Beginning in October, Primerus has plans to re-engage with in-person events for the first time in two years, hosting the 2021 Primerus Global Conference.

The conference will be held October 21-24 at the Lansdowne Resort and Spa in Leesburg, Virginia, just 20 minutes from the Washington Dulles International Airport.

"This is certainly good news," Buchanan said. "It will be wonderful for everyone to be able to come together in person again. Now, everyone knows one other because they have been attending all these Zoom meetings."

## Personal Connections Help Outside Counsel

Chiarizia was grateful to have a connection with Primerus through all the ups and downs of the pandemic. She first learned about Primerus from the Association of Corporate Counsel in Charlotte, where she met another client who regularly works with Primerus firms.

As a new general counsel, she welcomed Primerus' help finding reputable outside counsel throughout the country when she needed it.

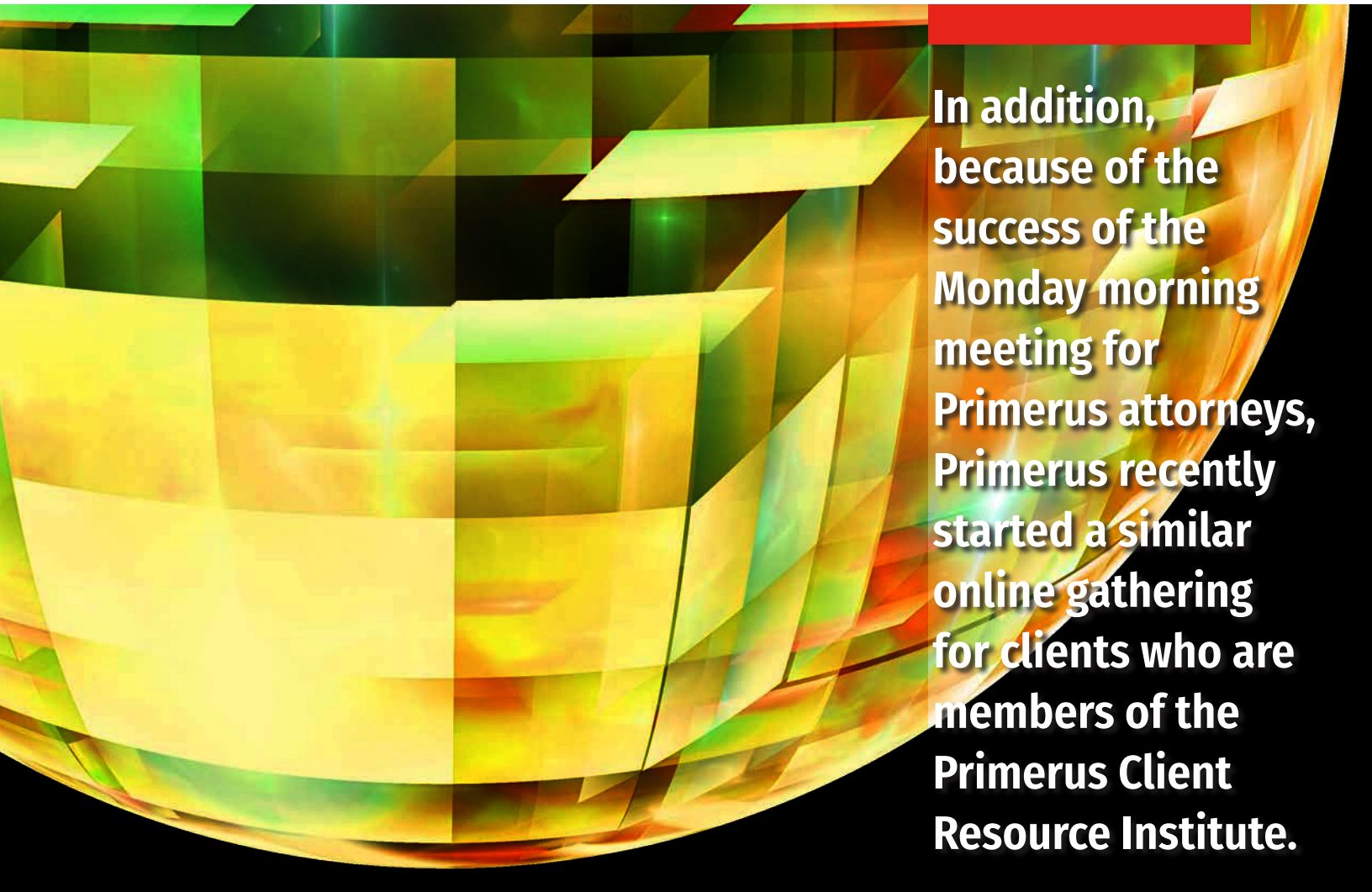
When she left her job as an attorney for a private law firm to become general counsel at Armstrong, all she had was the network she had built from that firm.

"This was the first time I had the opportunity to make my own network," she said. "It's nice to know [Primerus] firms are vetted."

Primerus firms were just right for her: not too big and prestigious for the matters she needed them for. And she had the opportunity to get to know Primerus members before she worked with them.

"It's nice to have a personal connection with the attorneys who you hire," she said. "I like that they are smaller boutique law firms. I don't always want the biggest firms money can buy."

From the first time she attended a Primerus Defense Institute Convocation in 2019, she felt at home with Primerus.



"Everyone I have met there has been really nice, and they're not focused on sales when you meet them," she said. "I didn't feel any pressure."

## New Office Arrangements

The pandemic meant Chiarizia and fellow company leaders also focused on their own employees, working hard early on to make sure everyone was able to work remotely. They purchased laptops for all employees and their IT team even offered to come to people's homes to troubleshoot if needed.

Then, they worked to make sure everyone felt safe coming back to the office when things started opening up again. Her company has now adopted a permanent hybrid model with most employees coming into the office only two days per week.

Of course, they were not alone, as businesses — including Primerus and its law firms around the world — found new work arrangements at the onset of the pandemic and now continue to adapt as things slowly start to reopen around the world.

The Primerus headquarters in Grand Rapids, Michigan, went through an office transformation of its own. They, along with Primerus member Buchanan Firm, downsized from a large, downtown office to a smaller one in suburban Ada, Michigan. The move will allow the Primerus staff to work primarily remotely from home, Buchanan said. The office includes conference rooms and shared work spaces for when employees do need to come into the office.

Mariano Carricart, of Primerus member firm Badeni, Cantilo, Carricart & Bilbao in Buenos Aires, Argentina, said the transition to remote work went very smoothly for his firm, as they had transferred all of the firm's information to the cloud a few years ago.

Carricart said he loves to work remotely on occasion, but not as a norm.

"It means that we all need to work together and trust each other, even though we don't see each other," he said. "That's the tough side that this pandemic brought to the way we work."

The plus side for Carricart: no more useless meetings.

"Those have been good to avoid," he said. "What I miss — or what I need — is to sit here in my office with my associates to discuss things and ask questions which are rich and useful for results."

His firm kept close communication with clients, both those who were essential and non-essential according to the Argentinian government's regulations. When possible, meetings happened in-person, but often took place over Zoom.

"Everything in life has good sides and bad sides," he said.

One positive he hopes carries into the future: Argentina changed its system so attorneys can access court files virtually.

In the past, nearly all of their interaction with the court was in written form, which they then had to physically go to court to submit.

"Now, we can submit all the papers from our office," he said. "This change was coming before the pandemic, but not with the speed we hoped."

Because of the pandemic, it was priority number one and things moved quickly, he said.

"Now we can say it was a good thing," Carricart said. "We save a lot of time. We can get not all but most information from the virtual files."

## Bringing Firm Leaders Together

Darryl Horowitt of Coleman & Horowitt, LLP, in Fresno, California, said the pandemic brought the three owners of his firm together in a very positive way as they focused on helping everyone — the firm and clients — through the challenge before them.

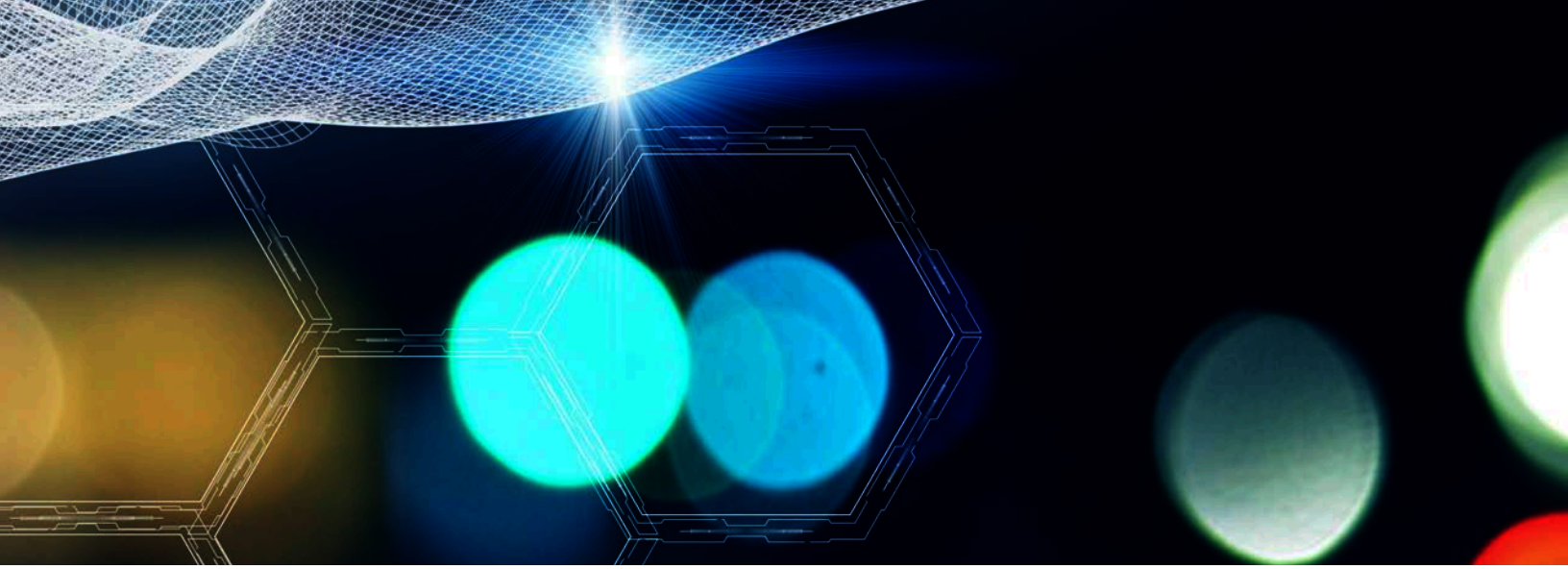
"The pandemic made us focused more on managing the business, in a positive way, than it would have if we had kept on 'business as usual,'" Horowitt said.

"On March 16, we shut down our office, and the first thing we did is focus on what our employees need and make sure we kept them with our firm," he said. "We had no idea what was going to happen."

"We just wanted to make sure we kept our staff employed and that they felt secure, knowing that the firm wasn't going to go anywhere," he said. "Then we wanted to make sure our clients were taken care of as well and provide them with as much information as possible so they could survive."

That included communicating accurate and current information, as well as hosting webinars.

"They reached out to us in a lot of ways, and we made sure that if we didn't have the



answer, we would get it for them," Horowitt said.

In some ways, the pandemic pushed them back to old school communication methods of email and phone.

"Our job is to provide service to our clients, and Zoom helped us do that more easily," he said. "We can now see them, and that's a good thing. For me it was a great thing. It made it even easier to get in touch with them."

That also helped internally.

"We learned that we can work remotely," something they were already doing to an extent in their firm.

"We all found out we could and that was a wonderful thing," he said. "I think that's going to stick around."

Horowitt also kept in touch with fellow Primerus members through virtual events, in lieu of in-person gatherings. That included Coffee and Conversation on Monday mornings, as well as his work with the marketing section.

He's hopeful for the future of his firm.

"I was actually surprised about how we were all very busy through this pandemic and how well we came through it," he said. "We're very optimistic."

## A New World of Technology

Nicole Quintana, of Primerus member firm Ogborn Mihm LLP in Denver, Colorado, said that after her firm had ensured that firm staff could work remotely, they moved on to how they could continue to advance bench trial cases, which were continuing throughout the pandemic in the state of Colorado. So, the trial law firm set up a virtual courtroom — right in their office.

They transformed a conference room. Cameras could zoom in or out on the lawyer or any witnesses who came into the office to testify, and they used an ELMO document camera and television monitor to display exhibits. A remote control allowed attorneys to move around the room and the cameras would capture different angles.

"Basically, we could put on a trial as we would in the courtroom, we were just doing it from our office," she said.

The firm had some equipment previously, but they invested in cameras and a sound system.

The firm used the virtual courtroom for a U.S. District Court case, as well as a two-part arbitration.

"It worked wonderfully," Quintana said. "You have enough to worry about in the trial already. It took that stress off of us, to feel like we had a good system that was hardwired."

It allowed them to feel prepared and focus on the case without worrying about technology.

As courts are opening back up in Colorado, Quintana and her colleagues are anxious to get back into a real courtroom. They will continue to use their virtual set-up for continuing legal education sessions, mock trials and focus groups.

"It remains very useful even if we don't actually put on trials in it," she said.

It stands as a testament to the firm's ability to make the best of the past year.

"It was a constant learning process and re-adjustment of the ways we have historically done things," Quintana said.

There were other good things that came from the pandemic — including the chance it provided for younger attorneys who are very comfortable with technology to work with their firms to find effective solutions.

"I think a lot of younger lawyers did take advantage of that opportunity," Quintana said. "We're always looking for whatever niche we can find, and a lot of folks stepped up to help out with those kinds of things."

She presented during a Coffee and Conversation about helping younger attorneys continue to develop throughout the pandemic, despite remote work and courtroom closures.

## A Bright Future Ahead

Buchanan and others agreed that as painful as the last 18 months have been, the Primerus family of member firms and clients is emerging with a bright future, focused on bringing good clients and quality attorneys together.

"While the pandemic certainly presented challenges, we have learned how strong we as a global community are, and I hope we are emerging into a kinder, more connected world," Buchanan said. "Primerus certainly is, and I know great things are ahead."

Jim Lussier and Mariya Uzunova

# Virtual Mediation: Tales and Tips from Both Sides of the Pond

Business meetings, court proceedings, family reunions, even weddings, are all taking place online these days for reasons we know all too well. The chances are that your next mediation will be conducted virtually. In this article, two Primerus lawyers on opposite sides of the Atlantic Ocean share their recent experiences with online virtual mediations.

**Mariya Uzunova** *works to resolve her clients' disputes from the east side of the Atlantic. Based in London, she participated in a virtual mediation, and has a number of insights to share.*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Our clients had a claim against a company and its directors arising out of the rejection of a settlement agreement compromising a claim for consultancy and other fees due under a consultancy agreement. The settlement agreement was evidenced by email correspondence between the parties and provided for the allocation of additional shares in a newly created holding company.

Although the necessary documentation was executed by our clients according to the terms of the settlement agreement, the additional shares were never allocated. In addition, our opponents claimed they were entitled to acquire the shares, previously allotted to our clients, for a very small sum. Draft details of our clients' claim seeking performance of the settlement agreement, or alternatively damages, were sent to the intended defendants, and following that, the parties attended an unsuccessful mediation.

This was the first time I attended a virtual mediation, as it was at the start of lockdown in April 2020. It was clear, however, that we had a very competent mediator who made sure the process went seamlessly. Our clients were familiar with the use of Zoom for business meetings and were located in separate, private rooms with high-speed internet. The mediator organized a test call the day before the planned Zoom mediation, which both sides attended. This helped immensely to clarify the parties' expectations for the real session.

During the test call, the mediator explained to us that we would initially be held in a virtual waiting room from which he would collect us. He explained that during the mediation, each side would have a private, virtual breakout room where we could discuss matters without the mediator's involvement or the other side listening in.

Eight people joined the Zoom call, excluding the mediator. We were all based in different parts of the country. My supervising partner prepared the opening submission which set out the issues clearly and to the point. Following this, we were separated out in our relevant breakout rooms. The mediator, being the host, jumped in and out of each breakout room, trying to narrow down the issues between the parties.

**Jim Lussier**

**Mariya Uzunova**

**Jim Lussier** practices business law and civil litigation (intellectual property, real estate, contracts and construction). He has handled trials and appeals, and he is an arbitrator with the American Arbitration Association. He was a Navy helicopter pilot before law school and a law clerk for a federal judge in Orlando.

**Mariya Uzunova** is a dispute resolution associate and has experience with both high court and county court litigation. She has advised and represented clients at all stages of the litigation process, including in mediation.

The mediation progressed slowly throughout the day. It eventually transpired that our opponents did not join the mediation with the intention to resolve the dispute and were making proposals which were never going to be acceptable. Our client felt strongly about the way he had been treated, as well as the work he had put into the company and the return he deserved for that work. In such a context, making settlement decisions is never easy. As his solicitors, we were there to carry out a reality check as to what was reasonable and realistic, and what was not.

Even though the mediation was ultimately unsuccessful, the technology worked smoothly, the mediation ran without any technical issues, and the virtual format allowed for all the parties to attend from the comfort and safety of their homes. Further, the mediation assisted with narrowing down the issues and sifting through the emotions to reach logical conclusions. If it were not for this mediation, we would not have been able to open such a line of communication with our opponents and ultimately settle the case.

The aspect which I felt was missing from the entire process was human presence in the same room and the lack of clear body language. Despite us being able to see each other over the screen, we were not able to fully be present for our client the way we would be if we were in the same room. I could say the same in relation to the mediator; the process was efficient yet detached. There is research which suggests that only 7 percent of meaning is communicated verbally, and 55 percent is communicated through body language. The lack of this inevitably affects people's reactions during mediation and the way they feel about the people they speak to.

Nevertheless, technology allowed us to effectively make a step towards resolution of the conflict without having to spend time and costs on travel by simply having a stable internet connection and a computer.

**Jim Lussier** *hails from the west side of the Atlantic, practicing law in Orlando, Florida. In October 2020, he hosted an online Zoom mediation. While the parties did not settle the case that day (it took another two weeks of discussions), it was still an effective attempt. Prior planning and an understanding of the technology made it work.*

Two construction companies were in a dispute over a fire/rescue station project. The general contractor wanted $1.2 million because the project was significantly late being completed. The subcontractor wanted its final payment of $600,000 for a "job well done." Ten people (four of them were attorneys) participated via Zoom from seven different locations in four states. The mediator was at his home in Virginia.

We started with everyone looking at one another on one screen in the main session. After more than one hour of opening statements and general discussion, we separated into breakout rooms — one room for each party. The mediator then electronically "entered and left" each breakout room, engaging in the ping-pong diplomacy known as mediation.

I knew that this was probably my only chance to speak directly to the other client. I also knew that because I went first, I had the opportunity to control the information that the mediator needed to understand our position. I prepared a PowerPoint presentation with 28 slides and a written opening statement that my client pre-approved (mainly for tone). We did not want to throw bombs, but we needed to be clear and firm.

The opening statement made it clear we were there to negotiate and resolve the case. Although that seems obvious — after all, it was a mediation — we did not think the other side was ready to settle. The slide show allowed me to educate the mediator on the relevant physical aspects of a construction project he had never seen. I then presented excerpts from contracts, schedules and correspondence to make major points favoring my client's position. My purpose was to "control the room," and, because of the technology, I was able to do that. Zoom's "share screen" feature worked very well. I had the floor and was essentially uninterrupted. When everyone is looking at the same thing and it is what I want them to see, persuasion opportunities exist.

Rather than describe more about the substance of the negotiations, I want to describe how the technology worked and affected the mediation.

Because my firm had the Zoom professional license, I scheduled the meeting and was the initial host. It was my intention to make the mediator a co-host. Unfortunately, the mediator was unable to use the audio connection through his computer, even though the video connection worked perfectly. Zoom provides a phone-in link as a backup, so the mediator communicated through his cell phone. This was disconcerting for a second, but we soon discovered that there was no sound quality loss, and there was no time lag between the mediator's lips moving and the voice being heard. However, this forced me to remain the host throughout the eight hours of mediation. As host I controlled the mediator's transit from one breakout room to the other instead of letting him do it himself as co-host. He had to call or text me every time he wanted to change rooms. I got faster at it each time, but I kept waiting for his cell phone battery to die.

I suggest practicing with your client beforehand. My clients were not used to Zoom. I coached them on placing the camera close enough so that their faces were not too small to see, and so their voices could be heard. If you want your expression to be observed, your face must be well lit. The background should not be glaring sun through open windows. Zooming from home has special treats: the mediator's dog visited us a couple of times. Try to eliminate distractions and interruptions from outside your video cocoon.

Without the preparation of the PowerPoint and practicing, the other glitches would have been harder to handle. Overall, however, the Zoom mediation seemed just as effective as an in-person mediation. We did not settle the case that day, but we all saved thousands of dollars in travel time and expenses. As professionals, we must expect that the post-COVID world will continue to use virtual technology. I am certain my next mediation experience will be better, just as I am certain that I will have more of them.

# Mateer Harbert, P.A.

Orlando, Florida

Since the firm was founded in 1960, it has built longstanding relationships on the traditional values of diligence, dedication, loyalty and hard work.

Mateer Harbert is a mid-sized law firm with offices in Orlando, Florida. The lawyers at Mateer Harbert are passionate about the law and are relentlessly committed to client service. Since the firm was founded in 1960, it has built longstanding relationships on the traditional values of diligence, dedication, loyalty and hard work. These guiding principles have enabled the firm to grow from a group of four attorneys to a full-service law firm offering counsel on a wide range of legal matters. The firm serves clients across the entire spectrum of law, with a particular focus on litigation, real estate, healthcare, construction and tort law. Because of its size, Mateer Harbert can respond with agility and act decisively to deliver solutions that best meet the clients' needs.

Mateer Harbert received a Tier 1 ranking in *U.S. News-Best Lawyers "Best Law Firms."* It was also recognized by the *Orlando Business Journal* in a list ranking central Florida law firms in the areas of real estate and construction.

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**Brian Wagner** is a shareholder with the Orlando, Florida-based law firm, Mateer Harbert. He is a commercial litigator and has experience in litigating disputes in federal and state courts, as well as arbitrations. He is widely published and speaks nationally and internationally on various legal topics.

Brian Wagner

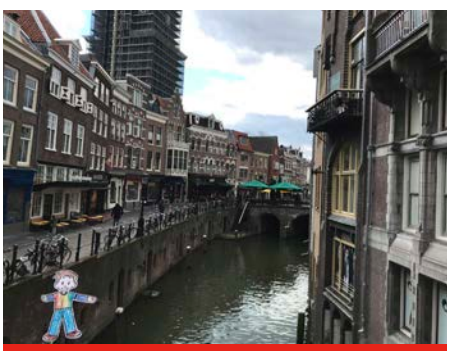
Dominic Wai in Hong Kong

Patricia, Dominic, Caroline, Mauro and Priscilla took time out of their busy schedules to help a little girl who lives in a town that doesn't even appear on most maps. It really doesn't surprise me, though. Experience has taught me to expect such a response from Primerus attorneys.

# Primerus Attorneys: Not Just Good Lawyers, But Good People

I suspect that if, two months ago, someone would have taken a poll of Mrs. Marks' first grade class in Osmond, Nebraska, none of the children would have heard of Primerus or any of its member attorneys. Well, that certainly is not the case anymore.

In April of this year, my niece, Emerson, a first grader at Osmond Community School in Osmond, Nebraska, sent me her Flat Stanley. For those of you who don't know, Flat Stanley is a project that elementary school children use to learn about geography, based on the Flat Stanley book series by author Jeff Brown. A child will send a paper cutout of Flat Stanley to a friend or relative in another city or country. That person's task is then to take photos of Flat Stanley in their city or country and send the photos back with a small description of what Flat Stanley saw on his journey.



Amsterdam

Upon receipt of Emerson's Flat Stanley, I thought of the usual sights in my hometown of Orlando, Florida: theme parks, the beach and similar places a tourist may visit when they come to Central Florida.

Then I had an idea. I decided to email a few of my Primerus friends to see if they would be willing to take some photos with Flat Stanley in their cities. I understood that most Primerus attorneys have busy schedules and that perhaps just one of them would be able to snap a quick photo of Stanley and send it back to me. How wrong I was!

I received a 100 percent positive response from my requests. Emerson's Flat Stanley spent some time in Sao Paulo, Brazil, with Patricia Barcellos (Terciotti Andrade Gomes Donato Advogados) and her daughters. From there, he went to Hong Kong and spent the day touring the island with Dominic Wai (ONC Lawyers). After Hong Kong, he visited Singapore and spent time with Caroline Berube (HJM Asia Law & Co). Flat Stanley traveled to Switzerland and hiked in the mountains with Mauro Loosli (Suter Howald Rechtsanwälte). For his last stop, Flat Stanley spent the weekend getting a wonderful tour of Amsterdam and Utrecht in the Netherlands with Priscilla de Leede (Russell Advocaten B.V.).

I've often heard that Primerus member attorneys are "good people who happen to be good lawyers." I believe that whole-heartedly. Patricia, Dominic, Caroline, Mauro and Priscilla took time out of their busy schedules to help a little girl who lives in a town that doesn't even appear on most maps. It really doesn't surprise me, though. Experience has taught me to expect such a response from Primerus attorneys. Going above and beyond is the norm, not the exception.

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**Houston, Texas**

Recognizing not all cases are suited for trial, the firm strives to put the matters it handles in the best position for alternative resolution.

Donato, Brown, Pool & Moehlmann, PLLC was founded in 1995. It is a mid-sized, Houston-based trial firm that practices in state and federal courts throughout Texas. Its primary areas of focus are premises liability, transportation and oil and gas defense. Donato, Brown, Pool & Moehlmann takes great pride in being a trial firm. Recognizing not all cases are suited for trial, the firm strives to put the matters it handles in the best position for alternative resolution. But through its willingness and reputation for trying cases, it has been able to achieve more fair and equitable settlements for its clients.

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Ian R. Beliveaux

# Liability for Trafficking of Persons: An Introduction

In 2003, the United States Congress enacted the Trafficking Victims Protection Reauthorization Act (TVPRA) and provided civil remedies to victims of human and sex trafficking. In 2008, this legislation was amended to provide expanded civil remedies. Following suit, states began enacting their own legislation to provide civil recourse for trafficking victims. To date, only a handful of states do not have a method of civil recourse for trafficking victims.

Although these laws have been on the books for years, they have largely remained unutilized — at least by victims of sex trafficking. With the increased media focus on sex trafficking over the past few years, the plaintiffs' bar has begun to employ these statutes in an effort to obtain redress for the victims. Their ire has not been focused on the obvious targets — the traffickers and johns. Rather, they have set their site on corporate America, although the legislative intent behind these suits remains hazy at best. The target in the first wave of this litigation has primarily been the hospitality (hotels and motels) industry, and tech (Salesforce.com, Backpage.com, Facebook and Craigslist) to a lesser extent.

## The Legislation – 18 U.S.C. §1595(a)

While nearly all states provide for a remedy, most of them have not been interpreted by their state's courts, and this article does not provide sufficient space to discuss them all. But, because the civil remedy provision of the TVPRA has undergone review in connection with 12(b)(6) motions, it will be discussed.

**The provision of the TVPRA that provides a civil remedy states:**

> An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorney fees. 18 U.S.C. §1595(a).

In analyzing the statute, courts have stated the following requirements are necessary for liability under §1595:

(1) the defendant must "knowingly benefit, financially or by receiving something of value; (2) from participating in a venture; (3) that they knew or should have known has engaged in an act in violation of this chapter. *A.C. v. Red Roof Inns, Inc*., 2020 WL 3256261, at *4 (S.D. Ohio June 16, 2020).

Following the lead of *M.A. v. Wyndham Hotels & Resorts, Inc*., 425 F.Supp.3d 959, 965 (S.D. Ohio 2019), federal courts have universally held "the rental of a room constitutes a financial benefit from a relationship with the trafficker sufficient to meet this element of the §1595(a) standard." Thus, even with respect to franchisors, the receipt of royalties from a room rental will satisfy the first element.

Further, the majority of the courts have also followed *M.A.*'s lead with respect to the second element. The *M.A.* court rejected the argument that an "overt act" was necessary to demonstrate participation in a venture. Rather, §1595 only required the defendant "knew or should have known" regarding their participation in the sex trafficking venture. However, two courts, including, *Doe I v. Red Roof Inns, Inc*., 2020 WL 1872335, at *3 (N.D. Georgia April 13, 2020), have held an "overt act" was required to establish participation in a venture.

The final element considered ascertains whether a defendant knew or should have known the venture was engaged in trafficking. "Knew or should have known" is a negligence standard of constructive knowledge. *H.H. v. G6 Hospitality, LLC,* 2019 WL 6682152, at *3 (S.D. Ohio December 6, 2019). Here, the *M.A.* court is in the minority by taking a more liberal view of plaintiff's pleadings to find they were sufficient for purposes of FRCP 12(b)(6). The majority of courts have followed *S.J. v. Choice Hotels International, Inc*., 473 F.Supp.3d 147, 151 (E.D.N.Y. 2020), which concluded, at least as to franchisors, that general awareness of sex trafficking does not satisfy the "knew or should have known" element.

## Statute of Limitations

One area to be especially cognizant of with these claims is the applicable statute of limitations. The expanded limitations period can create a myriad of problems including unavailability of witnesses and coverage issues.

In the past few years, states have begun to expand the statute of limitations applicable to claims involving sexual assault, especially for claims involving minors. In 2019 alone, 15 states expanded the applicable limitations. For example, effective September 1, 2019, the applicable limitations in Texas became five years for adults and 30 years if the victim was a minor. Texas Civil Practice & Remedies Code §16.0045. Additionally, the statutes providing civil remedies for trafficking crimes often contain expanded limitations periods. The TVPRA provides claims can be brought within 10 years of the date of abuse for adults or 10 years after reaching 18 for minors.

## Damages

Just as the applicable limitations period varies from state to state, so do the damages available to victims. The one constant among most states is the allowance for recovery of damages for associated medical treatment and psychological counseling and recovery for mental anguish. Additionally, more than 25 states and the TVPRA provide for the recovery of attorney's fees. From there, the damages available are varied. They range from actual damages to relocation expenses to the gross income generated from the trafficking activity. Given the broad scope of "actual damages," this could potentially allow for the recovery of lost earning capacity. Some states even allow for the recovery of treble damages. What is not as widespread is the allowance for the recovery of punitive damages. Finally, at least one state (Texas) provides for the shareholders of entities to be individually liable where they caused the entity to be used for the purposes of trafficking the plaintiff.

While the range of available damages varies, given the traumatic nature of being trafficked, the potential for large verdicts exists. That said, determining damages in these cases is difficult. First, the claims are unlike any encountered in a regular defense practice. Next, the plaintiffs were often minors when the trafficking started. Additionally, while they may have been trafficking for an extended period of time across multiple cities and states and at several hotels, plaintiffs often only file suit against an individual property or those in a specific city. Thus, assessing the damages, which are primarily psychological in nature, attributable to one property is difficult.

## Coverage Issues

Finally, this sort of litigation brings along a host of coverage issues. The obvious potential exclusions to coverage are criminal conduct, intentional act and knowing violation of the right of another person. Additionally, given the allegations of involvement by the insureds, there could be a claim of prejudice due to failure to notify the carrier of an "occurrence." While this issue has been analyzed by several courts in the context of church abuse cases, there is no uniform rule on how the issue has been decided. The potential for claims from long ago (up to 30 years) also raises the issue of prejudice due to loss of evidence, unavailability of witnesses and increased damages. There is also the undecided issue of whether systematic abuse is one occurrence or multiple.

## Conclusion

Currently these cases are pending in federal courts and some state courts across the country (Texas, California, Georgia, Florida and Alabama to name a few). But given the stated increase in trafficking, the promise of more cases in more states is on the horizon. Furthermore, additional industries could potentially face exposure. Can transportation services (buses and airplanes) be targeted for not identifying individuals being trafficked? Can commercial centers where "massage" parlors are located be sued? What about bars or restaurants where prostitution is known to occur? Given the allegations against the hospitality industry, these could all be potential targets. And while there are many more issues related to this litigation, this has hopefully given you an introduction to the claims and the issues at the forefront.

# The Bennett Law Firm, P.A.

**Portland, Maine**

The Bennett Law Firm was founded over 60 years ago with a boutique practice focused on representing management on issues of labor and employment law. The firm has a sophisticated trial practice and also offers experienced legal guidance in aggressively avoiding unionization. The firm is also at the forefront in developing preventative policies and procedures, conducting workplace investigations, training, avoiding and, if necessary, resolving employment disputes (including alternative dispute resolution), negotiating collective bargaining agreements, and arbitration.

The firm prides itself on long lasting, ongoing relationships with its clients, both large and small. The Bennett Law Firm is dedicated to standing alongside clients in order to meet their challenges successfully, with quality service delivered in a cost-effective manner. And, we are committed to prompt client service because we understand that when a client needs our services, he or she also wants our immediate attention. Our clients appreciate our philosophy and hands on aggressive approach, which has helped build and maintain many long-term relationships. The best evidence of a job well done is a satisfied client, which is the cornerstone of our practice.

The firm's lawyers have depth and experience in labor law, civil litigation and alcohol licensing in front of all forums, including state and federal courts and administrative agencies, such as the National Labor Relations Board, the Equal Employment Opportunity Commission, the Maine Human Rights Commission and the Massachusetts Commission Against Discrimination.

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**Peter Bennett** is a nationally recognized lawyer representing management in the field of labor and employment law, and is president of The Bennett Law Firm. As a leader in his field, he has participated in the American Bar Association (ABA) for over 25 years as a trustee of the Appellate Judges Education Institute, as past chair and member of the ABA's Standing Committee on Judicial Independence, and the immediate past chair of the Judicial College.

Peter Bennett

Employers need to be vigilant to remain in compliance with the new guidance and policies, as changes will likely be swift and cover a wide range of areas.

# Biden's New Mission for the National Labor Relations Board to Revive the Labor Movement

When the United States elected Joe Biden as President, he made it clear that changes at the National Labor Relations Board (NLRB) would be swift and that he would deliberately advance his pro-worker agenda. Soon after promising to be "the strongest labor president you have ever had," Biden fired General Counsel Peter Robb along with Robb's deputy. He announced the nomination of Jennifer Abruzzo to serve as the new General Counsel (GC). With ensuing complications and no set date for her confirmation, he appointed Regional Director Peter Sung Ohr to the position of acting GC.

The acting GC warned that he would not be a "potted plant" during his time in the temporary position and, as promised, during Ohr's first few months he has rescinded 12 memoranda Robb issued during his tenure. In February 2021, Ohr issued his first memoranda rescinding the first 10 issued by Robb. He explained that the policy of the United States is "to encourage the practice and the procedure of collective bargaining and to protect the exercise by workers of their full freedom of association, self-organization, and designation of representatives of their own choosing for the purposes of negotiating the terms and conditions of their employment."

Ohr's memorandum stated that the previous Robb guidance memoranda were either inconsistent with the original mission of the NLRB or were no longer necessary. Closing out the memorandum was a promise that new policies would soon follow.

On March 31, 2021, the acting GC issued his latest memorandum stating that the NLRB intends to "vigorously enforce" the employee protections in Section 7 of the National Labor Relations Act (NLRA). Ohr criticized the Trump-era board's approach to the "mutual aid and protection" doctrine, stating that he believed that the board's previous application was too narrow and restricted employee protections.

In the memorandum, Ohr stated his intention to review and expand the types of conduct considered "inherently concerted" and therefore protected under Section 7. He stressed that the doctrine of inherently concerted activity, being a flexible concept and having no "magic words," would allow the NLRB "to better serve the policies of the United States." This memorandum should be of interest to all employers, union and non-union, because of the expanded scope of what the acting GC considers within the range of what constitutes protected, concerted activity.

The memorandum states that employees' right to engage in "concerted" activities for the purpose of mutual aid and protection is legally protected, not only when the activity involves matters of the workplace but also

when the activity involves the employees' interest as employees. Therefore, activities are protected when they involve efforts to "improve their lot as employees through channels outside the immediate employee-employer relationship, as well as in support of employees of employers other than their own." Based on that view of protected activity, the GC emphasizes that as long as there is a connection to the employees' interests as employees, activities that involve political and social justice advocacy may also be protected.

Although Ohr's memorandum does not have binding legal effect, the memorandum provides a clear indication of the dramatic course correction the NLRB will almost certainly take once the board shifts to a Democratic majority later in 2021. Additionally, we can expect that the NLRB's regional offices will pursue more cases against employers now because by the time those cases reach the board level for decision making, the board will have a Democratic majority.

Even prior to Abruzzo's nomination, Congressional Democrats introduced the Protecting the Right to Organize (PRO) Act. Although some believe it unlikely to pass in the Senate, the PRO Act would impact both union and non-union employers by amending right-to-work laws, giving workers more power during disputes at work, adding penalties for companies that retaliate against workers who organize, and potentially granting collective bargaining rights to many workers who do not currently have them.

Regardless of whether the PRO Act becomes law, the appointment of Abruzzo and the actions of Ohr to date are likely to trigger a dramatic increase in union activity across the country, at least over the next four years.

On April 26, 2021, President Biden announced that Vice President Kamala Harris will chair a new White House Task Force on Worker Organizing and Empowerment. Biden signed an Executive Order creating the task force, which will "be dedicated to mobilizing the federal government's policies, programs, and practices to empower workers to organize and successfully bargain with their employers." The group, under the direction of Vice President Harris, will be expected to provide a list of recommendations within 180 days on how to promote the organization of labor and identify what new policies and regulatory changes are needed to accomplish that goal.

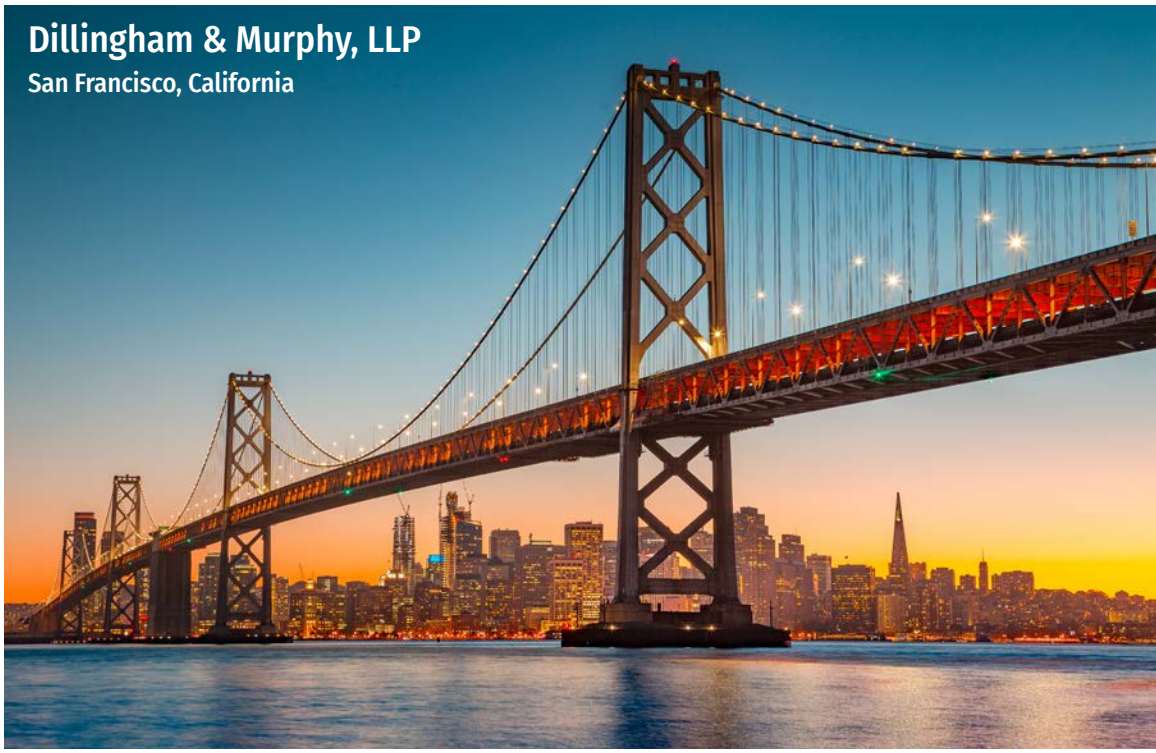
Employers need to be vigilant to remain in compliance with the new guidance and policies, as changes will likely be swift and cover a wide range of areas. Employers need to review policies and procedures that may come under renewed NLRB scrutiny, such as social media policies, confidentiality policies, work rules and investigation procedures. Employers concerned about being organized should engage in strategic planning now to be in the best possible position to defend an organizing campaign. Far too many employers do not do so until it is too late.

With the NLRB's latest guidance from the acting GC and the newly minted pro-union Task Force looking for ways to strengthen the power of the employee, now is the time for employers to start building an effective defense and strategy. Doing so includes more than simply training management and updating policies. P

# Dillingham & Murphy, LLP

**San Francisco, California**

Dillingham & Murphy lawyers are well-versed with litigation in California's federal courts as well as litigation in the California Superior Courts.



Dillingham & Murphy, LLP, in San Francisco, California, is an AV-rated, 11-lawyer law firm founded in 1982. The firm represents a wide range of domestic and international clients, including major publicly owned corporations, private companies, start-ups, non-profits, individuals and governmental entities.

Dillingham & Murphy's practice areas include: product liability, transportation litigation, labor and employment litigation and advice, wage-hour, Telephone Consumer Protection Act (TCPA) and other class action defense, commercial and business litigation and advice (including securities, real estate and intellectual property), intellectual property litigation, including theft of trade secrets and unfair competition litigation involving employers and former employees, representation of senior executives and employers in negotiating employment and severance agreements, ADA access litigation, premises liability litigation, representation of retailers regarding trespassers, including trespassers who claim First Amendment rights to trespass, professional liability advice and defense, and Proposition 65 advice and litigation.

The firm also provides transactional advice and guidance regarding commercial leasing. Although it is based in San Francisco, Dillingham & Murphy handles litigation and arbitration matters throughout the state of California. Its lawyers are well-versed with litigation in California's federal courts, as well as litigation in the California Superior Courts.

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Jack Henning

I retained a forensic mechanic to examine the vehicle. The forensic mechanic determined the transfer case ran out of oil, causing it to overheat and seize.

# A Case Study: The Difference a Forensic Mechanic Can Make in Mechanical Failure Claims

My client operates a motor vehicle auction facility. A vehicle dealership took a used SUV in trade and decided the mileage was too high to sell the SUV as a used vehicle. Therefore, the dealership parked the SUV in an area designated for my client to pick up vehicles and drive them to the auction facility. My client's auction employee arrived at the dealership and performed a visual review of the SUV, checked the engine oil and radiator fluid, and tested the brakes. Finding no safety concerns, the employee drove the SUV onto the highway. The SUV swerved in front of a motorcycle, and the motorcyclist suffered a moderate traumatic brain injury in the resulting accident. The employee claimed that immediately before the accident he heard a "clunk" noise, followed shortly thereafter by the rear wheels seizing, which caused the employee to lose control.

My client immediately purchased the SUV from the dealership, and I retained a forensic mechanic to examine the vehicle. The SUV was all-wheel drive, so it had a transfer case that distributed power to all four wheels. The forensic mechanic determined the transfer case ran out of oil, causing it to overheat and seize. This seizure then moved to the rear driveshaft, the rear differential, the rear axles, and finally the rear wheels, causing them to stop rotating.

The motorcyclist sued the dealership and my client and its employee. We filed a motion for summary judgment, arguing no breach of duty. My separate statement included the following undisputed material facts:

- The vehicle was owned by the dealership at the time of the accident.
- The custom and practice involved the dealership telling my client if the condition of vehicles required they be towed to the auction. In this case, the dealership did not say anything about a tow.
- The dealership did not report any SUV mechanical problems to my client.
- The dealership did not inspect the SUV for roadworthiness before turning it over to my client.
- My client's employee performed a reasonable and customary visual review of the SUV before driving it.
- The SUV transfer case did not have a dipstick or warning light. The only way to check the transfer case oil level was to put the SUV on a lift, unscrew the fill cap and stick a finger into the transfer case.

The dealership, but not the plaintiff, opposed the motion. The dealership argued (1) my client's employee could have crawled under the SUV to check the transfer case oil level; (2) the employee could have brought a mobile lift to the dealership so the transfer case could be inspected; (3) if the employee had been a better driver, he would have had sufficient time to pull to the highway shoulder after hearing the "clunk" noise. The court rejected these arguments and summary judgment was granted.

Defense counsel who handle motor vehicle product liability cases and accident cases need to make sure they have access to a good forensic mechanic to investigate all mechanical failure claims.


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Jessica Klotz

# The PAID Act and Its Impact on Insurers and Personal Injury Suits

The Provide Accurate Information Directly (PAID) Act was signed into law on December 11, 2020, as part of H.R. 8900, and becomes effective December 11, 2021. This Act makes it easier for self-insured entities and liability insurance carriers to ascertain to whom conditional payments have to be repaid following a personal injury settlement, as required by the Medicare Secondary Payer Act of 1981 (MSPA), 42 U.S.C.A. §1395y. The MSPA provides for a private cause of action with a penalty of double damages against an insurer who fails to provide for primary payment or appropriate reimbursement of conditional payments made by Medicare. 42 U.S.C.A. §1395y(b)(3)(A).

There are four types of Medicare defined in the Social Security Act: Part A (hospital services); Part B (medical services); Part C (Medicare Advantage Plans) and Part D (Prescription Drug Plans). Parts A and B are the traditional Medicare programs run by the federal government. Part C Medicare Advantage Plans (MAPs)[1] and Part D Prescription Drug Plans (PDPs) are run by private insurance companies that offer Medicare coverage to beneficiaries with additional benefits in lieu of traditional Medicare coverage.

Currently, when self-insured entities and liability insurance carriers report a claim to the Centers for Medicare and Medicaid Services (CMS) under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), CMS only advises whether the claimant has traditional Medicare Part A and B with conditional payments that have to be repaid at the resolution of an injury claim. Although MAPs and PDPs also have the right to recover conditional payments, CMS does not identify these entities. However, settling parties have the obligation to reimburse these plans under the MSPA. This obligation must be taken seriously, as MAPs and PDPs can commence lawsuits to recover their payments, and are entitled to double damages for nonpayment, just like traditional Medicare.

## Medicare Advantage Plans

Enrollment in MAPs have doubled over the last decade.[2] More than one-third of Medicare beneficiaries have these Part C Plans in lieu of Part B traditional Medicare. In 2020, more than 24 million Medicare beneficiaries were enrolled in a MAP.[3] In total, there are currently 3,550 MAPs available nationwide in 2021.[4] A beneficiary can switch plans or switch between traditional Medicare Part B and MAPs (Part C) once a year. In the last several years, these plans or their assignees have filed lawsuits in federal courts throughout the country seeking to recover their conditional payments and double damages.

The Third and Eleventh Circuit Courts of Appeals are the only Circuit Courts that have addressed cases brought by MAPs under the MSPA. In 2012, the Third Circuit decided the seminal case, In re Avandia, 685 F.3d 353 (3d Cir.2012), recognizing a MAP's right to a private cause of action under the MSPA. In 2016, Eleventh Circuit decided *Humana Medical Plan v. Western Heritage Insurance Company*, 832 F.3d 1229 (11thCir.2016), which involved a slip-and-fall accident that settled for $115,000. Plaintiff represented there was no Medicare lien, but the settling insurance company learned plaintiff had a Humana MAP and included Humana on the settlement check. Plaintiff objected, resulting in a hearing and state court ruling directing the proceeds be turned over to plaintiff's attorney, who was to keep some in escrow. Humana filed suit and the case made its way to the Eleventh Circuit Court of Appeals. The Eleventh Circuit held that the MSPA permitted a MAP's private cause of action against the liability insurer and that placing the money into a trust did not provide for appropriate reimbursement, requiring the insurer to pay Humana double damages. *See also, MSPA Claims 1, LLC v. Tenet Florida, Inc.*, 918 F.3d 1312, 1317 (11th.Cir.2019); *MSPA Claims v. Kingsway Amigo Ins. Co.*, 950 F.3d 764, (11thCir.2020).

District Courts in New York and Arkansas have held that the MSPA preempts their state statutes. In *Potts v. The Rawlings Company*, 897 F.Supp.2d 185 (S.D.N.Y.2012), the U.S. District Court for the Southern District of New York determined that New York's anti-subrogation statute, Section 5-335 of New York State General Obligations Law, was preempted by the MSPA, pursuant to 42 U.S.C. §§1395w-21–1395w-29, as it applies to Medicare Advantage Plan reimbursement rights. The Court ruled that MAPs have the same reimbursement rights as the U.S. Department of Health & Human Services under the MSPA provisions. *Id.* In *Cupp v. Johns*, 2014 WL 916489 (W.D.Ark.2014), the U.S. District Court for the Western District Court of Arkansas held that no state law could limit a MAP's claim for reimbursement under the MSPA.

U.S. District Courts in California, Connecticut, Illinois, Louisiana, Massachusetts, Ohio, South Carolina,

Tennessee, Texas and Virginia have also recognized a MAP's right to private cause of action under the MSPA. Since most of these lawsuits are against primary insurers, there are two District Court cases which stand out. The court in *Humana v. Paris Blank LLP*, 187 F.Supp.3d 676 (E.D.Va 2016), held that a MAP could maintain an action to recover conditional payments and double damages from a law firm and attorney who represented the settling plaintiff. In one of the more recent cases, *Aetna v. Guerrera*, 2020 WL 4505570 (D.Conn.2020), a self-insured defendant was found liable for "double damages" for its failure to reimburse MAP after settlement of a personal injury lawsuit.

## Medicare Prescription Drug Plans

Medicare Part D is a voluntary outpatient prescription drug benefit for people with Medicare, provided through private plans approved by the federal government.[5] Medicare beneficiaries can enroll in a Part D PDP) which supplements Part B traditional Medicare. According to the June 23, 2021, CMS webinar, 9 out of 10 Medicare beneficiaries have some sort of PDP. In 2020, there were 20.2 million enrollees in PDPs.[6] In 2021, there are 996 PDPs available nationwide.[7]

Medicare PDPs (Part D) also have the right to sue in court and get double damages, although these plans have not been litigious. 42 U.S.C. §1395w-102(4) states that the recovery rights afforded to MAPs "apply in the same manner" to Part D. Also, 42 C.F.R. §423.462 provides that the same "Medicare secondary payer procedures" under §422.108 allowing MAPs to seek reimbursement from insurers and other parties in workers' compensation, liability, and no-fault cases also apply to PDPs. In 2011, CMS released a policy memo positing that PDPs "have the same MSP rights and responsibilities" as MAPs[8].

## Before the PAID Act

Before the PAID Act, it was up to carriers and defense counsel to chase after plaintiffs and their attorneys to obtain information about MAPs and PDPs. Many plaintiffs' attorneys did not provide this information during the regular course of discovery, even though these plans are collateral sources. The PAID Act was prompted in response to multiple lawsuits filed by MAPs or their assignees asserting recovery rights and double damages against insurers under 42 U.S.C. §1395y(b)(3)(A). A major objective of the Act was to provide insurers with the ability to identify whether a claimant is or was a beneficiary with a MAP or PDP and identify said plan.

## What the PAID Act Does

The PAID Act amends 42 U.S.C. §1395y(b)(8)(G) and requires that CMS expand its responses to insurers' Section 111 queries to identify whether a claimant is currently entitled to, or during the preceding 3-year period has been entitled to, Medicare Part C (Medicare Advantage) and/or Medicare Part D (prescription drug) benefits. If so, CMS is then required to provide the names and addresses of any such Medicare plans through the Section 111 Query Process.

The PAID Act is located in Title III, Section 1301 of H.R. 8900, entitled "Transparency of Medicare Secondary Payer Reporting Information." A full copy of H.R. 8900, including the Act, can be found at congress.gov/bill/116th-congress/house-bill/8900/text.

## How the PAID Act Will Affect Personal Injury Litigation Going Forward

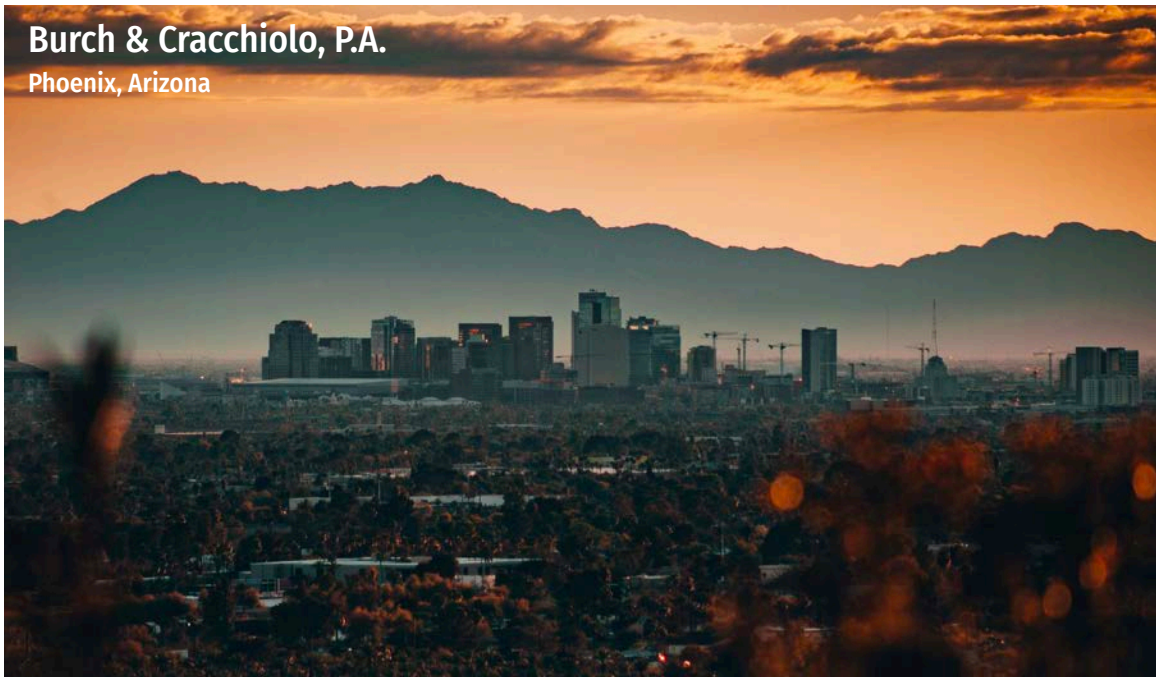
CMS has embraced the changes the PAID Act will bring. On June 8, 2011, CMS issued a Technical Alert regarding implementation of the Act, stating:

> Effective December 11, 2021, this additional information will be provided via new fields in the NGHP Section 111 Query Response File. Information returned will include the Contract Number, Contract Name, Plan Benefit Package Number, Plan address, and effective dates for the previous 3 years (up to 12 instances each for Part C and for Part D). CMS will also be including the most recent Part A and Part B entitlement dates.[9]

On June 23, 2021, CMS hosted a webinar to discuss the PAID Act, details of the NGHP Section 111 Query Response File changes and information on the testing period of September 13 to December 10, 2021. Starting December 11, 2021, in response to a query and Section 111 reporting, CMS will now advise whether a beneficiary has had traditional Medicare (Parts A and B), MAPs (Part C) or PDPs (Part D) for three years prior to the query.

Once the insurance carriers are in possession of this information, they or their defense counsel can use CMS' response to demand authorizations for records of the MAPs and PDPs, similar to the way a printed ISO ClaimSearch is used. Also, insurers or defense counsel can correspond directly with the plans to ascertain whether there are conditional payments to be reimbursed at the time of settlement. Thus, insurance carriers will be able to ensure repayment of all related conditional payments to these plans and limit their liability to MAPs and PDPs, avoiding lawsuits and penalties of double damages going forward.

1 Part C Plans are also known as Medicare Advantage Organizations ("MAOs").
2 A Dozen Facts About Medicare Advantage in 2020 | KFF
3 Medicare Advantage 2021 Spotlight: First Look | KFF
4 *Id.*
5 An Overview of the Medicare Part D Prescription Drug Benefit | KFF
6 Medicare Part D: A First Look at Medicare Prescription Drug Plans in 2021 | KFF
7 *Id.*
8 DEPARTMENT OF HEALTH & HUMAN SERVICES (cms.gov)
9 MMSEA S111 GHP Alert (cms.gov)



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Burch & Cracchiolo is a full-service law firm founded in Phoenix, Arizona, in 1970. Today, the firm boasts 40 attorneys accomplished in a variety of practice areas. Rooted in the Arizona community, Burch & Cracchiolo has a successful history of representing a diverse client base of large corporations, small businesses and individuals in dispute and litigation. The firm's lawyers are leaders in the areas of business and corporate law, commercial litigation, construction, creditors' rights, bankruptcy & reorganization, criminal defense, estate and wealth preservation planning, family law, labor and employment, insurance defense, intellectual property, personal injury litigation, real estate law, zoning and land use and taxation.

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Burch & Cracchiolo is regarded as a very civic-minded and generous firm. We sponsor numerous non-profit fundraising events and financially support economic development organizations, such as local chambers of commerce, commercial development organizations and trade associations. Many of our attorneys sit on local boards of directors for entities that address homelessness, animal welfare, critically disabled children, native American youth and families, LGBTQ issues, civil and constitutional rights, justice reform, single parent families, people with mental disabilities and discrimination. In 2019, Burch & Cracchiolo was named one of the "25 Most Philanthropic Companies in Arizona" by *Arizona Business Magazine*.

**Alicia Bull**

Born and raised in Phoenix, **Alicia Bull** started her professional life teaching in a kindergarten classroom before attending Sandra Day O'Connor College of Law at Arizona State University. Alicia practices in the areas of zoning and land use development, family law and commercial litigation. When she's not in the office, she enjoys spending time with friends and family and practicing martial arts. Alicia also enjoys traveling to new places and visiting historical sites.

Alicia Bull

# The Remote Practice of Law, a Blessing and a Curse: Cybersecurity and Technology During COVID-19

A common topic of conversation over the last year has been COVID-19 and its effects on various industries. The legal profession is no exception. Many networking calls and video chats focused on what was going on in different areas, how various firms were being affected and how firms and courts were responding to the changing world. In many cases, we turned to technology and how it could facilitate the continued practice of law. Technology was a blessing that is likely here to stay because it promotes increased access to the legal system. But we must be mindful of increased use of technology and its potential effects on our clients and our ability to represent them effectively.

Arizona, like many other states, was ordered to shut down via Executive Order. However, certain professions, including legal practice, were deemed "essential" and exempt from the governor's stay-at-home order. Nonetheless, many firms closed their doors for a period of time and ordered all employees to work remotely, while others continued as usual, or at least as close as possible. Our firm took a middle-of-the-road approach — attorneys and staff were encouraged to work remotely but were permitted to remain in the office if that was their preference.

As many firms and attorneys likely experienced, switching to predominantly remote work has its advantages as well as its challenges. The advantages are pretty straightforward — no commute, no need to dress up every day, more freedom, more time with family, etc. The challenges, such as productivity, access to court and technology concerns, may not be as straightforward and are often difficult to address. One of the biggest hurdles, and arguably one of the most important hurdles to working remotely, is technology and cybersecurity.

From a practical standpoint, technology was a challenge because not every staff member was equipped to work remotely. Thanks to the hard work of a few key members of our firm, we quickly ensured everyone had the equipment they needed to work remotely. While technology was initially a practical challenge, the bigger challenge was ensuring cybersecurity.

Arizona's ethical rules require lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." (Arizona Rules of Professional Conduct, ER 6.1(e)). Bolstering cybersecurity and educating staff about safe practices are part of those reasonable efforts to protect client information.

When working remotely, one of the obvious cybersecurity concerns is the prevention of unauthorized access to electronic client files. One of the first steps is to ensure secure access to files. As part of equipping all those working remotely, our firm verified all computers had access to password-protected internet and connected to files through VPNs equipped with multi-layer security. Another important step is working to prevent unauthorized access gained through emails. We've all received the obvious phishing, or scam, email from a supposed potential client or coworker, but we've seen an increase in the number and sophistication of such emails. Consequently, our firm increased the security on our email which now traps most of the questionable emails, identifies all emails received from external sources and provides training on identifying safe attachments. While the added security is a great step, it cannot prevent the receipt of all illicit emails, which means it is up to each recipient to recognize suspicious emails and engage in some investigation. Firms should educate all employees about the dangers of illicit emails, what to look for and what to do if they are unsure about an email or think they may have opened the door to a bad actor.

Another related challenge was access to clients and obtaining client documents. As was the case for many firms, our firm was unable to hold client meetings at our office. We overcame that challenge by utilizing various platforms, like Zoom and Microsoft Teams, to hold video meetings and receive documents electronically. While convenient, such practices require security. Fortunately, the video platforms quickly improved their security features and we were able to create password-protected meetings. As for document submissions, we create secure

links where clients can upload documents to us. This is especially important for sensitive documents or if the client uses an unsecure email platform. While it may not seem likely to many of us that someone would intercept client documents, we must remain diligent in our efforts to protect our clients' confidential information.

We must also remember that confidentiality applies to anyone outside your firm and that we must take steps to ensure no one inadvertently learns confidential information. This was probably an area of ongoing concern for many of us as we adjusted to working remotely, often in the homes we share with family members. Many in our firm found that it was best to have a dedicated and private workspace. When a private space was not possible, it was important to take extra precautions to protect client information. One key piece of technology many in our firm utilized on a daily basis was a good set of headphones. Not only did headphones ensure anyone within hearing distance of the attorney working could not hear the client's side of the conversation, they also prevented interruptions caused by barking dogs or yelling children.

While the last year has been a challenge for many of us, it showed the enduring nature of the legal profession and those who kept practicing. Throughout the year, many of us learned how to use technology we never knew existed, but is likely here to stay. While those technological advances made it possible to continue practicing in a shut-down world, our obligations to our clients remained. We must always stay vigilant in our efforts to protect our clients' information and advance our understanding of technology and how to protect against its potential pitfalls.

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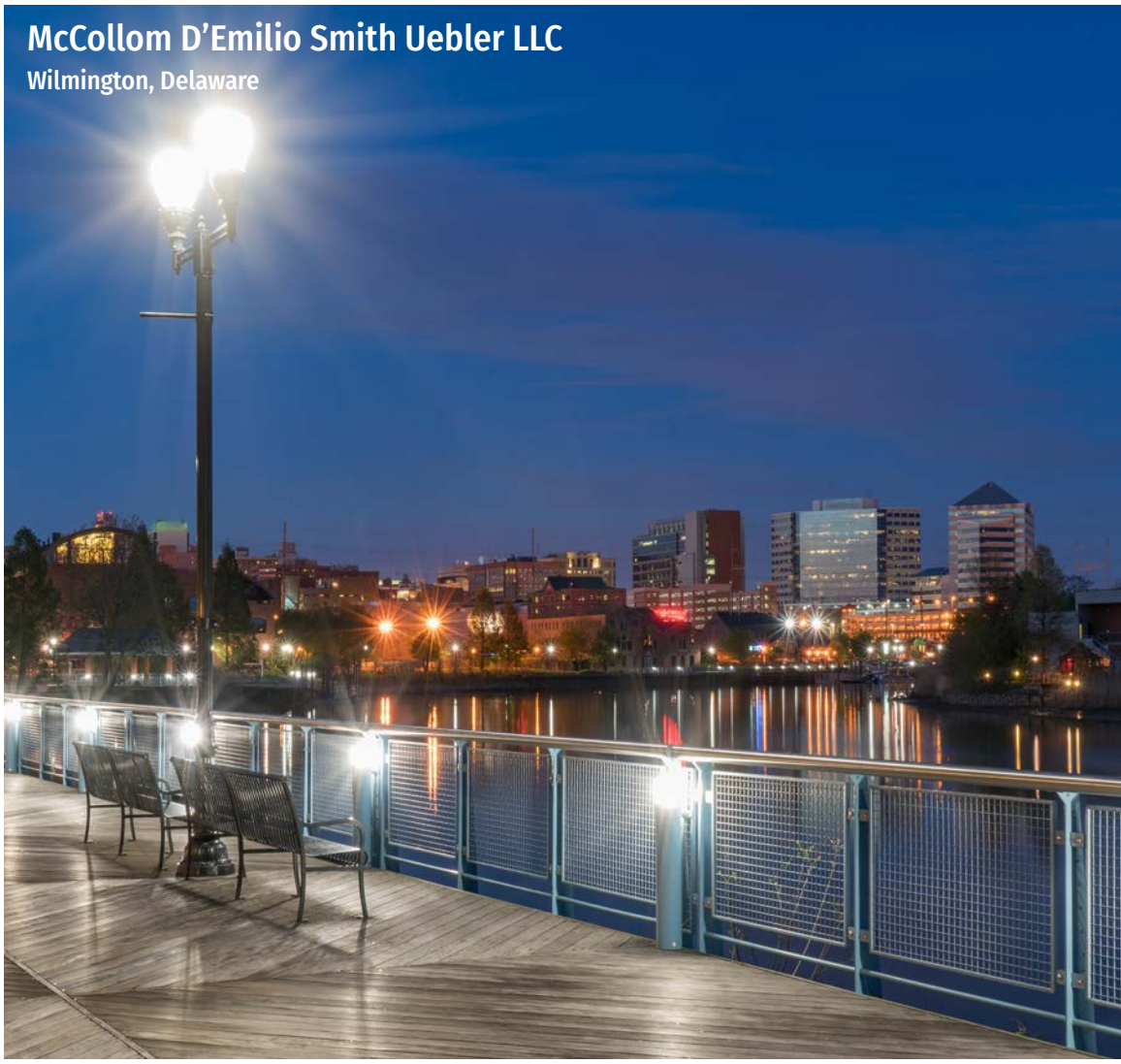
McCollom D'Emilio Smith Uebler LLC represents corporate and individual clients in a range of transactional and litigation matters with a commitment to strategic thinking, responsiveness and efficiency.



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**Allison M. Neff** is an associate at McCollom D'Emilio Smith Uebler LLC. She focuses her practice on trust, estates and tax, as well as corporate and fiduciary litigation. She counsels both individual and corporate trustees in all corporate, business and trust litigation matters. Allison served as a judicial extern to the Honorable Meghan A. Adams of the Delaware Superior Court and as a judicial law clerk for Master Selena E. Molina of the Delaware Court of Chancery.

Allison M. Neff

The Court says it best with a quote from Julia Child, “[a] party without a cake is just a meeting.”

# Mergers and Acquisitions During the COVID-19 Pandemic: Let Them Eat KCAKE

On April 30, 2021, then Vice-Chancellor of the Delaware Court of Chancery, Kathaleen McCormick, issued her decision in *Snow Phipps Group, LLC v. KCake Acquisition, Inc.* – a highly anticipated opinion that determined whether the coronavirus pandemic qualified as a “materially adverse effect” that would prevent a major acquisition deal from going through.

In 2020, Vice-Chancellor Travis Laster issued an instructive opinion in *AB Stable VIII, LLC v. MAPS Hotel and Resorts One, LLC, et al.*, that held the pandemic did not result in a material adverse effect based on the definition in the merger agreement. However, and arguably more important here, the Court held that the merger agreement could be terminated where one party fails to operate in the ordinary course of business.

DecoPac Holdings, Inc. is the largest supplier of cake decorations to grocery stores and professional cake decorators. Snow Phipps, the private equity representative of DecoPac, entered into a stock purchase agreement with Kohlberg & Co., a private equity firm, on March 6, 2020, just as stay-at-home orders were issued. Twelve days later, evidence at trial uncovered Kohlberg’s intention to exit the deal. Kohlberg, the buyer, attempted to terminate the $550 million deal under the material adverse effect clause in the stock purchase agreement and argued that DecoPac’s response to the pandemic resulted in their breach of its covenant to operate in the ordinary course of business.

After an extensive presentation from DecoPac, no shortage of cake designs and decorations, KCake’s presentation focused on the financial analysis surrounding the issue of debt financing and the effect the pandemic had on the business, an obverse strategy by the parties. The Court was suspect of Kohlberg’s actions during the closing stage. In order to justify termination of the deal, KCake must prove that the seller deviated from the ordinary course of business in “all material respects.” The Court distinguished DecoPac’s actions from the *AB Stable* decision, where the seller of luxury hotels had breached its obligations under the ordinary course covenant due to the extensive changes to business as a result of the pandemic. The Court explained that the “in all material respects” standard does not require a showing equivalent to a material adverse effect, only that *de minimis* issues should not derail an acquisition. DecoPac’s revolver draw on financing had occurred on five separate occasions since Snow Phipps acquired the company and the draw was a policy implemented among its portfolio companies to address counterparty risk.

The Court ultimately utilized the prevention doctrine in order to negate Kohlberg’s absence of debt financing, distinguishing the present case from cases where the failure to achieve a condition was due to some external factor indirectly attributable to the party in breach. The Court was unpersuaded that Kohlberg had acted in good faith with respect to the financing demands and the financial models that were presented, but noted that “scuttling” the debt financing was not necessary to warrant the application of the prevention doctrine. Therefore, the Court ordered specific performance, and supplemental post trial briefing on prejudgment interest, to close the deal. The Court says it best with a quote from Julia Child, “[a] party without a cake is just a meeting.”

## Barton LLP

**New York, New York**


Barton LLP is a mid-sized law firm, offering a full suite of services. At its core, we believe that innovation, agility and a commitment to value set us apart from the mélange of BigLaw firms that offer similar services.

What is the number one concern for clients and in-house counsel today? Security of clients' information handled by outside providers and the firm's overall cybersecurity safeguards have to be at the top of the list. As personal and private data are increasingly created, shared and stored electronically, the threats posed by cybercrime and regulatory investigations into alleged privacy and cybersecurity violations have never been greater.

Barton LLP is a mid-sized law firm, with offices in both New York and Nashville, whose purpose is to provide value, solve problems and foster opportunity. The firm consists primarily of former BigLaw partners who combine their extensive legal experience with Barton's flexible, value-driven service delivery model. Our senior attorneys work directly with clients on matters, taking the time to understand each client's business objectives and long-term goals. We recognize that clients prioritize managing their resources and creating efficiencies — and they want lawyers who are able to do the same.

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**Kenneth N. Rashbaum**

**Kenneth N. Rashbaum** is a partner with Barton LLP in New York City, where he heads the privacy and cybersecurity group. He is also an Adjunct Professor of Law at Fordham Law School in New York. Barton's cyber compliance team is offering Primerus firms a multi-step information security initiative at a discounted flat fee which comprises an evaluation of the firm's compliance with industry standards for cybersecurity; baseline client security requirements for law firms; confidentiality and privacy laws and regulations such as General Data Protection Regulation (GDPR), HIPAA and California Consumer Privacy Act (CCPA); and certain financial services regulations that clients use to determine whether to engage law firms.

Kenneth N. Rashbaum

# Law Firm Cybersecurity: How Firms Can Meet a Top Concern for Clients and Their In-House Counsel, Get New Business and Retain Existing Business

Security and integrity of a client's information shared with and maintained by their law firms, along with the firm's overall cybersecurity safeguards, can make the difference between gaining/retaining business and losing business. Firm compliance with legal and regulatory standards for data protection (privacy plus security) is something that an increasing number of clients rely upon to qualify their law firms, often incorporating company, legal and industry standards into their guidelines for use of outside counsel.

Management of law firm third-party risk occupies a great deal of space in outside counsel guidelines — and for good reason. Cyber-attacks and data breaches in which intruders gained access to clients' confidential and proprietary information are in the news on a regular basis. Several U.S. law firms, as well as academic research institutions, were recently targeted by cyber-criminals who accessed data that was stored with a third party, Accellion. The New York City Transit Authority was attacked in the spring of 2021 through a weakness in the third-party platform that it used to authenticate employees and contractors who needed access to the Transit Authority's database. Going back further, the breaches of Target and Home Depot occurred when hackers infiltrated their systems through weaknesses in the networks of subcontractors, including an HVAC contractor in the case of Target.

Law firms have ethical responsibilities to protect the confidentiality of their clients' communications through, among other things, monitoring their third-party business partners and vendors who have access to the firm's data. This responsibility includes oversight of third-party email and other platforms operated by third parties to assure that they can and do assist the firm in meeting the ethical duty to maintain confidentiality of client information. Client outside counsel guidelines comprise requirements for selection due diligence, supervision and audit (under certain circumstances) of third parties who host client information.

Laws and regulations such as HIPAA, the General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), and the New York SHIELD Act also require that entities covered by these schemes that engage third parties (including law firms) to host or access protected information, exercise and document due diligence into the third party's security safeguards. Law firms, as third-party processors or service providers to entities covered by these schemes, are explicitly within the ambit of third-party requirements. For example, GDPR, CCPA, HIPAA, the New York SHIELD Act of 2019, and the Cyber Security Regulations of the New York State Department of Financial Services (which supervises all organizations authorized to do business in New York pursuant to the Banking and Insurance Laws) require that entities conduct and document due diligence into the cybersecurity safeguards of third parties, including law firms, before engaging them. In addition, these entities must represent and warrant in their engagement agreements that they can and will need explicit information protection safeguards regarding cybersecurity and privacy in third-party service agreements.

Primerus member law firms therefore have legal, ethical and business requirements when it comes to hosting confidential client information, as well as when selecting and retaining third parties who will also have access to this information. Yet, small and mid-sized firms like those in Primerus may find that the resources to meet these emerging client requirements for cyber compliance are daunting. Much larger firms with seemingly unlimited resources have been successfully attacked, with information about and created by their clients disclosed. So what hope is there for firms like ours? The answer lies in working with the right advisors and using the right process. In this way, our firms can successfully meet client, legal and ethical standards without incurring the significant costs of many standard commercial cybersecurity programs.

Law firms are not banks, hospitals or e-commerce platforms. They create and use electronic information differently but are bound by many of the same legal standards


as their clients in regulated industries. The cybersecurity assessment process should be facilitated by advisors who are also lawyers and understand the landscape of law firm data access uses, storage and disclosures. These advisors can work with the law firm to propose a cybersecurity assessment initiative and protocols for protection of law firm information that won't interfere with the firm culture or the work of attorneys. Rather, in addition to meeting client, legal and ethical standards, effective cybersecurity protocols would also have the benefit of creating efficiencies in the uses of information.

The elements of a process that would fit most Primerus law firms are as follows:

- **Preparation of a Data Map**: A firm cannot protect its clients' information if it doesn't know all the places that information resides. This sounds, to paraphrase the great detective Sherlock Holmes, elementary, but let's dig a little deeper. In the COVID era, but also well before it, lawyers worked from the road and their homes. So firm data may be on their phones, laptops, tablets or home computers. How is it secured in each place and in transit from those places to the firm's servers? What third parties have access to that information, including such business partners as email system providers, human resources platforms, and outside IT providers?
- **Third-Party Risk Management**: Do these third parties represent and warrant that they will keep your information at least as confidential and secure as you do? How can you monitor them to assure that they continue to do so? Remember, the firm is responsible for data it entrusts to third parties.
- **Remote Access**: In the COVID work-from-home area, the target environment for hackers became much richer. Your advisors should work with you to assure your safeguards for accessing the network remotely are in place and are standard in the industry.
- **Update the Security Protocols**: When are security patches installed? The 2021 attack that hit on-premises Microsoft Exchange servers obtained law firm data mostly from those firms that had not installed the patch that Microsoft had published well before the attack.
- **Testing the Network**: Your advisors should obtain "white-hat" or "ethical" hackers who will attempt to break into the firm's system and then provide a report (preferably through cybersecurity counsel) as to weaknesses they found and how best to remediate them, making sure they document that remediation.
- **Policies and Procedures**: How will your attorneys and staff know what they should and should not do? What will various clients require of the attorneys and staff for protection of their data? Policies and processes, written in plain English by advisors who are also attorneys and speak your "language," will leave little room for uncertainty concerning firm cybersecurity protocols.
- **Attorney and Staff Training**: Prepared by lawyers for lawyers, these documented interactive sessions can educate the work force on how and why cybersecurity is the concern of the entire firm, not just the information technology department.

In this way, your advisors can provide you with a baseline of cybersecurity compliance benchmarks so that you can meet client expectations, attorney ethical standards, and legal requirements for confidentiality of client information.


Mann Lawyers LLP is a full-service law firm providing legal services to a diverse clientele, both individuals and businesses. Throughout the firm's history, our mission has remained the same — to deliver top-quality legal services for reasonable fees.

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Mann Lawyers LLP is a full-service law firm with offices in Ottawa and Perth, Ontario, Canada, providing a broad range of legal services to a diverse clientele, both individuals and businesses. Areas of specialty include family and business law, commercial and residential real estate, personal injury, litigation, condo development, wills and estate planning, estate litigation, construction law, employment law, bankruptcy, and environmental law. Our lawyers are regarded as leaders across the national capital region due in part to the firm's unwavering commitment to provide top-quality work for every client, and in part to its steadfast efforts to support a range of not-for-profit organizations, arts initiatives and other community activities.

Throughout the firm's history, our mission has remained the same — to deliver top-quality legal services to our clients for reasonable fees. We also work hard to ensure that each and every client coming through our door feels welcome, at-home, heard and understood, so that the results we deliver can be tailor-made to satisfy the unique needs of each of our clients.

The firm has a competitive mix of junior and senior talent with a range of backgrounds and skills, supported by a carefully structured mentorship program. Many of our lawyers have experience assisting foreign law firms domestically, and handling cross border matters originating in either Canada or the United States.

**Scott McLean**

**Scott McLean** is general counsel and director of practice management at Mann Lawyers LLP, a full-service law firm with offices in Ottawa and Perth, Ontario, where he continues to pursue a special interest in the training and mentoring of junior lawyers following 43 years practice as a commercial litigator.

Scott McLean

# The Most Important Asset of Any Law Firm: Its People

*"Did ya hear what happened to the world today? Somebody came an' they took it away."*

— The Turtles (American Rock Band, 1968)

What soon came to be known as COVID-19 was first reported on December 31, 2019, New Year's Eve, by the Wuhan Municipal Health Commission, China, referencing a cluster of cases of pneumonia in Wuhan, Hubei Province, out of which a novel coronavirus was eventually identified. The first cases in North America were reported in the United States in January 2020. In Canada, the first presumptive case was identified on January 25, 2020. By March 11, 2020, the World Health Organization (WHO) was declaring the novel coronavirus outbreak a global pandemic. On October 19, 2020, data from Johns Hopkins University indicated that COVID-19 cases had topped 40 million worldwide. *(WHO Timeline)*.

The world had changed, in many ways irreversibly, and all aspects of our society, including our economies and ways of doing business, were and remain challenged.

## Law Firms

The reaction from North American law firms was immediate. Succeeding pieces in the *American Bar Journal* reported on anticipated consequences of the combination of COVID-19 and an economic downturn. In both Canada and the United States, various austerity measures were adopted by firms of all sizes. The big firms anticipated significant impact, and were early adopters of measures such as lawyer (and staff) lay-offs and wage and draw reductions. Mid-size law firms faced the same effects and had to address the same issues. (*Bloomberg Law, October 14, 2020*). Success in weathering the storm was a factor of firm size, but also of practice sector. Governments on both sides of the border provided support programs to which law firms had access, and many took it.

Newer calls to the bar (new licensees) had increased difficulty in finding jobs and junior lawyers were said to be looking "at a grim future." (*Slaw, May 28, 2020*). Firms of all sizes faced questions, including the need to contemplate the kind of resources and support junior lawyers would require to thrive in a world changed by the coronavirus pandemic.

Not surprisingly, the *2021 Report on the State of the Legal Market* refers to 2020 and 2021 in the grip of COVID-19 as a "tipping point:"

> "It remains to be seen whether the cataclysmic events related to the COVID-19 pandemic will indeed prove to be a tipping point for the legal industry, the time when the redesign of the legal service delivery model (both for law firms and others) firmly takes hold. It seems fairly clear, however, that — whether it is a tipping point or not — the experiences of 2020 and 2021 will accelerate important changes in the way law firms operate and relate to their clients, lawyers, and staffs moving forward. *Firms that take these changes seriously and respond to them proactively will undoubtedly emerge as the market leaders in the "new" post-pandemic normal."*
>
> *(Center on Ethics and the Legal Profession at the Georgetown University Law Center and the Thomson Reuters Institute).*

## What is the New Post-Pandemic Normal?

While there will be many views throughout the Primerus family on the "new" post-pandemic normal, we all must recognize that it will include a healthy dose of apprehension and doubt on the part of our junior colleagues. This is because one of the lasting gifts of COVID-19, apprehension and its many co-morbidities, will not be easily shed. And while they are assuredly not a homogeneous group, our committed and talented junior colleagues are even at high tide not entirely free of self-criticism, self-doubt, performance anxiety and, like Stephen Crane's Henry in *Red Badge of Courage*, a fear of not measuring up. COVID-19, which has fractured everyone's comfort zone, has not helped.

The WHO has presaged the COVID-19 baggage our colleagues carry into the future, and in so doing, shown the way forward:

> "Fear, worry, and stress are normal responses to perceived or real threats, and at times when we are faced with uncertainty or the unknown. So it is normal and understandable that people are experiencing fear in the context of the COVID-19 pandemic.
>
> Added to the fear of contracting the virus in a pandemic such as COVID-19 are the significant changes to our daily lives as our movements are restricted in support of efforts to contain and slow down the spread of the virus. Faced with new

realities of working from home, temporary unemployment, home-schooling of children, and lack of physical contact with other family members, friends and colleagues, *it is important that we look after our mental, as well as our physical, health.*" (WHO – Mental Health and COVID-19).

This then is the challenge for law firms going forward: meeting our junior colleagues' needs as they take their aspirations and developing skills into a post-pandemic world, a world in which, as the 2021 report itself catalogues, many changes have occurred in the way law firms deliver legal services.

*The answer to this challenge requires ongoing flexibility, transparency, understanding and support:*

Junior lawyers will look to our firms for *flexibility* in accommodating their newly acquired taste for working remotely and for the new practices and habits that come with that, albeit with a careful deference to operational communication and firm culture.

They will expect *transparency* in not only the reality of what staying afloat in the pandemic world has meant to our firms, but the operational steps and changes that have been and may continue to be taken to recover – steps and changes that they see and feel the effect of, but may have yet to fully appreciate.

Junior lawyers will also implicitly anticipate an *understanding* of the uncertainties that for them are the product of the destabilization that has been COVID-19's trademark. These uncertainties include, but are not restricted to job (and practice) security, access to the increasingly sophisticated technology required in the post-pandemic world, mentorship and upward mobility. As has been stated, the problem with COVID-19 in these terms is that both it, and the sense of apprehension that comes with it, may never fully fade away.

And, most importantly, they will look for institutionalized *support* for their mental health and well-being. Like the 2021 report, a policy advice paper released by Canada's Centre for Addiction and Mental Health in July 2020 urges that "employers must prioritize the mental health needs of their employees in the wake of COVID-19," highlighting "the importance of creating *a long-term organization-wide mental health strategy*, instituting mandatory mental health training for leadership and developing tailored responses to varying needs." The Centre stresses that mental health training in the new post-pandemic normal should include a "focus on resiliency," and that leaders must support employee mental health through "clear, compassionate and authentic leadership." (CAMH-Toronto).

Out of all of this, it is soothing to know that the 2021 report records that many U.S. law firms have used the pandemic period to focus more attention on issues of wellness, work life balance, and mental health and training. The report describes this as "a most welcome development and a useful reminder of the critical importance of supporting the most important asset of any firm — its people."

And that must be the way of the future and the key to our response.

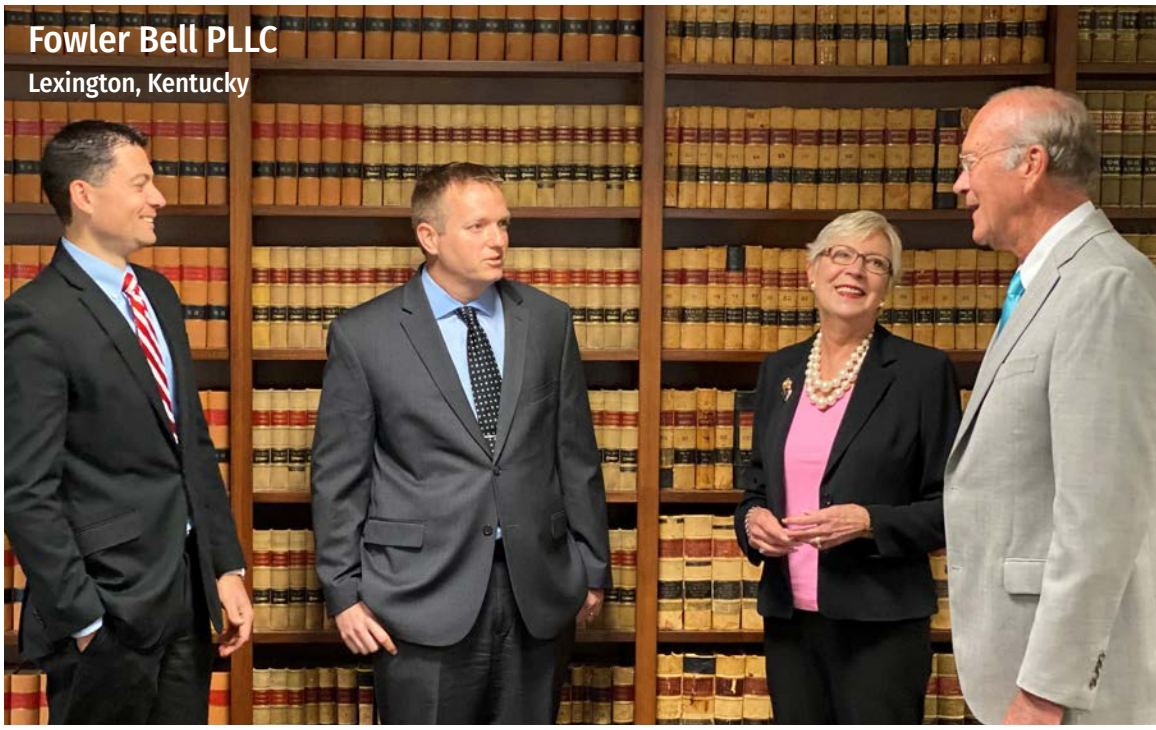
## A Structured and Well-Rounded Mentorship Program

The task of fulfilling these expectations will of course benefit from the development and ongoing enhancement of a structured mentorship program. While there are many models, an optimal program will ensure that junior lawyers receive two kinds of mentorship. The first is practice mentorship, consisting of ongoing file-related skill training from the seniors with whom our junior colleagues work on a daily basis. The second is aspirational and developmental mentorship, which seeks to address individual goals and designs measurable strategies for each lawyer, providing developmental training in support of both.

A balanced mentorship program will support the enlightened communication our junior colleagues require in a post-COVID era.

# Fowler Bell PLLC

**Lexington, Kentucky**



Beyond our industry experience and legal prowess, Fowler Bell attorneys are widely respected for their integrity, responsiveness and no-nonsense style. We take a practical approach to resolving conflicts for clients.

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Fowler Bell is Kentucky's commercial, bankruptcy and litigation law firm known for finding practical solutions to complex matters. Based in Lexington, we serve business clients throughout Kentucky and the United States. We are sought after for our ability to handle complicated matters in an efficient, highly competent manner.

A respected leader in insurance defense and coverage for nearly a century, Fowler Bell has also evolved into a premier law firm in bankruptcy and creditors' rights, civil litigation and defense, and commercial law. Fowler Bell has also built one of the most experienced collections practices in the state, and developed niche practices in real estate, family law, education law, estate planning and intellectual property. In every practice area, the needs of our clients drive our delivery of legal services.

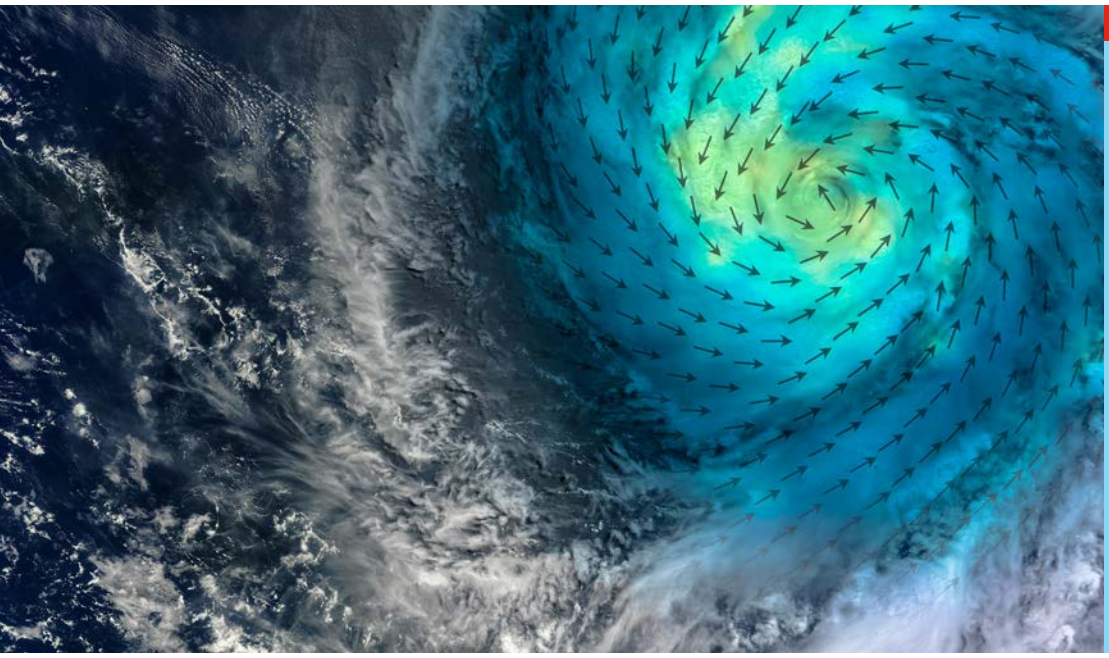
Beyond our industry experience and legal prowess, Fowler Bell attorneys are widely respected for their integrity, responsiveness and no-nonsense style. We take a practical approach to resolving conflicts for clients. We pride ourselves in providing creative alternatives, wise counsel, and high-value results to clients facing tough business or personal challenges.

True to the firm's rich legacy of community service, Fowler Bell attorneys strive to be "part of the solution" by serving on countless local boards, donating time to community organizations and providing pro bono services. We also distinguish ourselves at the state and national level by playing pivotal leadership roles in various professional organizations.

**Matthew Ellison**

**Matthew Ellison** is a member at the law firm of Fowler Bell PLLC, where he has practiced law for the past 15 years. The son of a teacher, he believes in the power of education; namely, he aims to be constantly educating his clients about what happened, what is likely to happen, and what the best path forward might be for their specific legal issue.

Matthew Ellison



Attorneys owe their clients a duty of diligence in representation. That means they should investigate every material fact that might be in dispute.

# Give Clients Sunny Skies by Seeking New Sources of Information

Attorneys cannot effectively represent their clients unless they understand which important facts can influence the outcome. That requires us to constantly be learning — and in some cases, the foundation for that learning took place long ago.

When I was young, I used to stay up late to watch the evening news — but only for the weather report. Fast-forward 35 years, and my web browser is bookmarked with the major forecasting models and raw data, so I can interpret it myself and make my own forecast. Truthfully, if I wasn't a lawyer, I'd probably be a meteorologist. But often times in my practice, I get to deal from both sides of the deck.

In certain legal fields where I practice, knowing the basics about something like weather can put you at an advantage. If you know about the essentials of tornado formation and behavior, you can effectively cross-examine the expert who says that a tornado means that a roof five miles away was subjected to tornado-force winds. If you know about the varying density of snowfall based on air temperature profiles, you can conclude whether a roof collapse under 20 inches of snow was an unavoidable "act of God," or an avoidable design flaw in load capability. If you understand the mechanics of relative humidity and air movement, you can understand whether a specific vapor barrier was or was not effective in preventing mold growth.

As a working parent of young children, the COVID-19 pandemic forced me to "work smarter." That required a more precise and disciplined approach to managing and investigating cases. And what I discovered during the pandemic was that there's a lot of valuable weather information and data at my fingertips. With the right search skills, anyone can obtain the following, for example: historical weather observations at certified recording stations over the past 10 years; citizen and governmental reports to the National Weather Service of wind, hail and flood damage; average river flood stages and past recorded events; and animated radar returns on a specific day.

If you're going to hire (or cross-examine) an engineer or forensic meteorologist, you need to be able to understand where their data came from, and whether they're using it properly.

Attorneys owe their clients a duty of diligence in representation. That means they should investigate every material fact that might be in dispute. You wouldn't investigate a major motor vehicle accident without the electronic data recorder information in the involved vehicles — so why wouldn't you do the same if weather may have played a part in the loss or harm? With the growth and availability of weather information on the internet, most of the data I need is only a few clicks away. I can find the historical weather data I need within minutes, to verify the particulars of a loss. I can determine whether a witness is testifying truthfully when they tell me that the rain was blinding, or the skies were darkened by clouds. I can determine whether the loss date given seems to match up with a weather event of damaging proportions. I can look at an opposing expert report, and find the holes that need to be picked apart. Some technology can pinpoint the likelihood of hail or severe-level winds on a given date.

This knowledge benefits my client, because it enables me to advise them, quickly and effectively, whether their case is looking mostly sunny or rather cloudy.


In addition to providing legal advice, we have a strong team of corporate litigators that assist clients both at the national and international level. One of our services is board room counseling.

Russell Advocaten B.V. is an international-oriented, corporate full-service law firm for businesses, providing assistance regarding all legal aspects of day-to-day operations. In addition to Dutch companies and Dutch branches of foreign companies, we also advise Dutch and foreign authorities, expats, works councils and affluent individuals.

We have a diverse team of specialist lawyers. Our lawyers are experts in their field and always your personal advisor. Our main practice areas are corporate law; labor law and dismissal; real estate and rent; litigation, arbitration and mediation; contracts; liability and art law; administrative and environmental law.

In addition to providing legal advice, we have a strong team of corporate litigators that assist clients both at the national and international level. One of our services is board room counseling. Directors, management team members, shareholders, supervisors and works councils turn to Russell Advocaten B.V. when it comes to questions regarding corporate governance, strategic decisions and resolving problems outside of the public eye. In addition to this, Russell Advocaten B.V. advises works councils: representing employee interests is important to works councils, but the survival of the organization is also of importance. Since we assist directors too, we are very familiar with their preferences.

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**Priscilla de Leede**

**Eileen Pluijm**

**Priscilla de Leede** mainly advises and litigates for both Dutch and foreign companies in issues regarding dismissal, contracts, corporate immigration and employee participation. She also assists works councils regarding their legal position on decisions of the entrepreneur, and she regularly provides training courses. She often publishes articles on a wide variety of topics within the field of employment and corporate law.

**Eileen Pluijm** provides advice to mainly employers on all aspects of employment law. She represents companies in cases regarding dismissal, employee participation issues, (changes to terms and conditions of) employment agreements, illness and reintegration, and the position of the director under the articles of association. Furthermore, she litigates on behalf of entrepreneurs in national and international civil disputes.

Priscilla de Leede and Eileen Pluijm

# Questions and Challenges During COVID-19: Dutch Employment Law, Tenancy Law and Contract Law

In this article, we will discuss several questions and challenges in the field of Dutch employment law, tenancy law and contract law during COVID-19.

## Employment Law

### Dismissal Law

Dutch labor law remains the same during COVID-19. This means, as a starting point, there is a distinction between temporary and permanent contracts. An employment contract for a fixed term automatically ends on the final date as mentioned in the contract. The only obligation for the employer is that upon the expiry of a fixed-term employment contract lasting six months or longer, the employer must notify the employee at least one month before the employment contract expires about (1) whether or not the employment contract will be renewed and (2) the conditions under which the employment contract might be continued.

In principle, it is not possible to terminate a temporary employment contract prior to the agreed end date, unless this is explicitly agreed upon in the contract (unilateral amendment clause) or the contract is terminated with mutual consent. Then, the same rules for termination apply as in the event of a termination of an employment contract for an indefinite period of time:

### 1) Mutual Consent

An employment contract for a(n) (in) definite period of time may be terminated with mutual consent. The arrangements concerning the termination must be laid down in writing in a settlement agreement. Please note that when an employee agrees to the termination of the employment contract by signing a termination agreement or by giving his consent in writing, he will be granted a 14-day reflection period. Within this period, the employee is entitled to withdraw, in writing, his consent to the dismissal without giving any reasons.

### 2) UWV (Employee Insurance Agency) Proceedings or Legal Proceedings

What if the employee does not agree to terminate the employment contract with mutual consent? The employer then requires one of the nine statutory reasonable grounds for dismissal. This means, an employer can only dismiss an employee via:

- Submitting an application to the UWV to obtain a dismissal permit, in case of financial/economic reasons or long-term illness, or
- Legal proceedings before the court to set aside the employment contract, for example, in case of an employee that is underperforming or acting culpably.

### Transfer to Suitable Position

The employer will first have to investigate whether the employee can be transferred to a suitable position, before initiating UWV proceedings or legal proceedings before the court in order to terminate the employee's employment contract.

### Notice Period

When terminating an employment contract, a notice period has to be taken into account to determine the termination date. The required notice period for an employee is one month.

The statutory notice period for the employer is based on the length of the employment:

- Less than 5 years = one month's notice
- 5 years or more, but less than 10 years = two months' notice
- 10 years or more, but less than 15 years = three months' notice
- 15 years or more = four months' notice.

### Transition Compensation

Each employee whose employment is being terminated on the initiative of the employer is entitled to so-called transition compensation. The amount of the transition compensation depends on

the length of the employment and is for every employee one-third of the monthly salary per year of service. The accrual of the transition compensation starts immediately from the first day.

#### Fair Compensation

In case of serious culpable acts or negligence of the employer, the court might award a 'fair' compensation on top of the transition compensation. The court is free to determine the level of fair compensation that has to be paid.

#### 3) Termination for Urgent Reasons

Under Dutch law, either party may terminate the employment contract with immediate effect in case of an urgent reason, such as theft, fraud, or crimes involving a breach of trust.

### Unilaterally Changing Employment Conditions

There are three options to change an employee's employment conditions:

#### 1) Agreement with the Employee

First of all, a change of the conditions of employment is possible with the consent of the employee. Hence, the employer can request the employee to agree with a (temporary) change of his conditions of employment. It may well be that the employee is prepared to agree to the (adverse) adjustment if, for instance, he has the choice between a wage sacrifice and bankruptcy or a forced redundancy. If the employee agrees to a change of his conditions of employment, it is important to record properly in writing which conditions will be changed, how, for how long, and why. To avoid discussion afterwards, it is advisable that the employer and the employee sign this record.

#### 2) Unilateral Change of the Conditions of Employment

If a unilateral amendment clause has been agreed upon with the employees, the employer may be able to unilaterally change the conditions of employment on grounds of the coronavirus. A unilateral changes clause has to be agreed in writing (for example, in the employment contract, collective labor agreement or personnel handbook). Please note: The employer can only make use of this clause if he has such a substantial interest in the change that the interest of the employee has to yield to it. Whether the employer can use a unilateral changes clause due to COVID-19 will depend on the consequences of the outbreak of the coronavirus for the company. Has it caused business or organizational circumstances which compel the employer to change the conditions of employment and to which the interest of the employee has to yield (temporarily)? In this case reliance on a unilateral amendment clause could be successful. Unilateral changing of employment conditions is in particular used for collective changes.

#### 3) No Unilateral Changes Clause — Reasonable Proposal to the Employee

The conditions of employment can also be changed without a unilateral changes clause. If the following three conditions are met, the employee must — on grounds of being a good employee — agree to the employer's proposal for change:

1. As a consequence of COVID-19, there are changed circumstances at work that give rise to changes of the conditions of employment,
2. The employer has made a reasonable proposal to the employee to change the conditions of employment, and
3. The acceptance of this proposal can reasonably be required from the employee.

Making a reasonable proposal is in particular used for individual changes.

### Privacy of Employees

#### Vaccination

An obligation to be vaccinated is a violation of the employee's fundamental rights, such as the right to physical integrity. Therefore, a balancing of interests will always have to be made between the employee's fundamental rights and the interests of the employer. If the employer's interests are considered to be more important, the refusal to be vaccinated could have employment consequences for the employee, such as adjustment of the work, an obligation to work from home or even — in extreme cases — dismissal.

#### Temperature Checks of Employees

Starting point is that employers are not allowed to take the temperature of their employees. Employers may not collect medical data of employees. It is only the company doctor who is allowed to do this and who can take temperature of employees, provided that this does not qualify as "processing of personal data" and the General Data Protection Regulation Act (GDPR) does not apply. The company doctor must meet the following three conditions:

1) The temperature taken is not included in a database, such as an Excel list with names and temperatures;

2) The temperature check does not take place automatically, for instance with a thermal camera;

3) The processing may not have an automated consequence. For example, gates that open automatically or a light that automatically turns green if the employee's temperature is considered okay: This constitutes a violation of psychical integrity because based on this, other employees are able to draw a conclusion about the health of the employee.

Even if the employee has given permission to a temperature check, the company doctor is still not allowed to scan the employee's temperature. After all, the GDPR considers the employee's consent

not as freely given permission, since the employment relationship does not qualify as an equal relationship.

Of course, it is possible to give employees, visitors or customers the opportunity to have their temperature taken in a screened-off room, where they can choose what to do with the result.

## Lease Law

### Unforeseen Circumstances: Rent Reduction?

Most judges consider the COVID-19 crisis and the measures taken by the government to be unforeseen circumstances. This means that there may be a ground for adjusting rent, even if changing the rent has been explicitly excluded in the rental agreement. The pandemic and the measures are unforeseen: therefore, these could not have been included in the rental agreement and the general terms and conditions.

### Must the Rent be Adjusted?

The judge is not obliged to adjust rent in the case of unforeseen circumstances. The judge will consider whether retaining the current rent is still acceptable according to the standard of reasonableness and fairness. To prove that the rent has to be reduced, the tenant will have to demonstrate with financial data how much the revenues and turnover have been reduced and that there are no other means available to pay the rent. If the landlord does not want a rent reduction, he will have to prove that the loss of income is not acceptable.

### To What Amount Will the Rent be Reduced?

The judge will usually assume there is reason to adjust the rent if there is a substantial reduction of turnover and revenue. In that situation, professional parties will in principle have to share the pain. If there are no revenues left, this will in practice lead to a rent reduction of 50 percent. Depending on the circumstances, another amount of rent may be set by the judge.

### Turnover Rent

Especially in situations like these, turnover rent can be an option. In that case, parties will share the loss of turnover. Jurisprudence shows that the judge will take account of turnover rent when calculating the amount of rent to be paid. However, using turnover rent as part of the rent will not preclude an adjustment of the fixed rent by the judge.

## Commercial Contracts

During COVID-19, some contracts are put to the test: a supplier is unable to fulfill its obligations as a result of governmental measures, goods or services supplied are of no use to the buyer anymore or a debtor encounters payment problems. May force majeure or unforeseen circumstances be invoked due to the coronavirus?

### Force Majeure

Some events, causing a contracting party to fail to perform, qualify as a force majeure event. Typical force majeure events are (amongst others) natural disasters, earthquakes and war. Force majeure under Dutch law requires that the non-performance is not attributable to the debtor pursuant to the law, a legal act or the relevant standards. Parties can, however, put aside or deviate from the statutory provisions by including a force majeure clause in their contracts.

In case of a successful appeal on force majeure, a claim by the non-breaching party for specific performances or damages will be rejected. The non-breaching party may still dissolve or set aside the contract and/or suspend its obligations.

The threshold for successfully invoking force majeure is high. Whether COVID-19 and its effects qualify as force majeure will always depend on a case-by-case analysis of the facts and the contractual relationship between the parties. However, COVID-19 does present a unique set of circumstances which could justify a force majeure defense due to its unusual nature, the global scale and the unpredictability of the outbreak.

### Unforeseen Circumstances

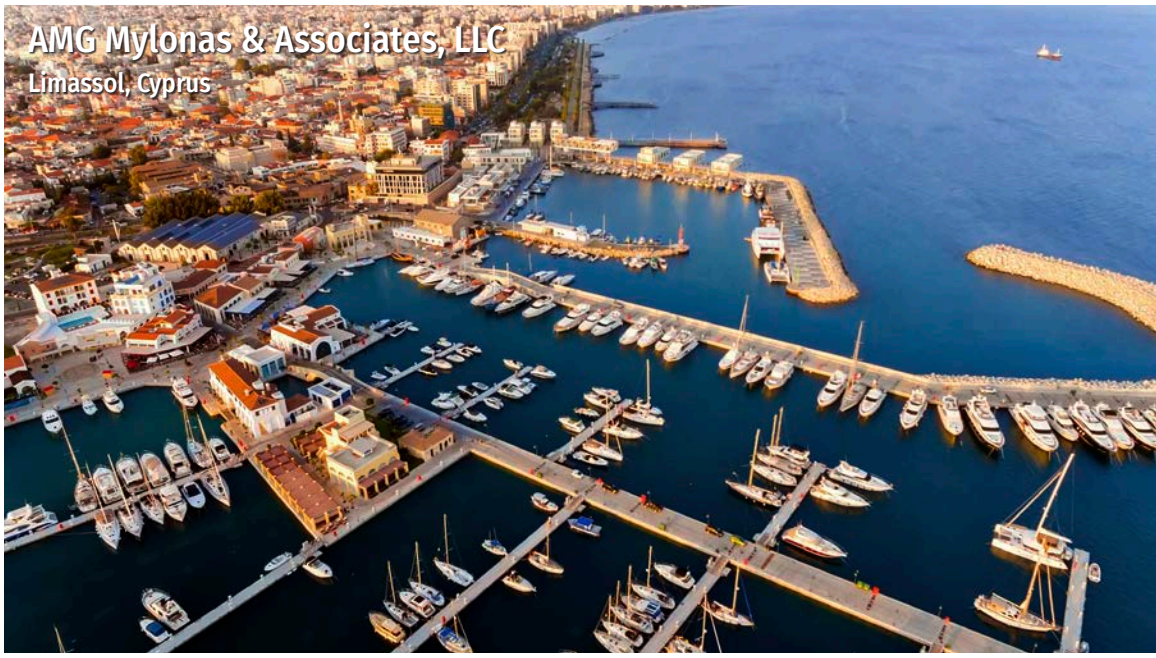
Under Dutch law, the execution of contracts is at all times governed by principles of reasonableness and fairness. According to these principles, it may be unreasonable to expect full performance under the contract in case of unforeseen circumstances. Unforeseen circumstances are circumstances that parties did not take into account in their contract. Even though this is also a very high threshold, COVID-19 may qualify as such a circumstance.

In case of an appeal on unforeseen circumstances the Dutch court is involved. The court may, (retroactively) partly or wholly terminate the contract, modify the effects of a contract, or set these aside, provided that these unforeseen circumstances are of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form.

The question whether the COVID-19 outbreak qualifies as unforeseen circumstance depends, inter alia, on the interpretation of the contract and when the contract was concluded. Key is whether the parties have taken the risk of a pandemic and the effects into account in their contract.

## Conclusion

As can be concluded from the aforementioned, the outbreak of the coronavirus might provide reason to alter employment contracts, rental agreements and commercial contracts. These possibilities are all based on legal provisions and case law that had already been established before the pandemic, but could now enable entrepreneurs to cope with the coronavirus and its serious commercial consequences.



# AMG Mylonas & Associates, LLC

Limassol, Cyprus

"We are more than just a traditional law firm. We think differently, we are innovative problem solvers, but most of all we are great listeners."

Mylonas Law was established in 2013 with the vision to offer its clients customized legal services from a boutique law firm. Mylonas Law primarily deals with business and corporate law, as well as commercial law, international tax law, maritime law, private equity deals, litigation, and trusts and asset protection.

"We are more than just a traditional law firm. We think differently, we are innovative problem solvers, but most of all we are great listeners," managing partner Andreas Mylonas said. "What differentiates us from other firms is that we provide personalized services for high-end clients; lawyers are exclusively the ones who are dealing with customer's requests; and we deliver the services in a short time, under tight deadlines," he said. "Our law firm's culture is based on a 'can-do' attitude, whilst constantly creating value and giving our clients a competitive advantage."

Driven by professionalism and ethics, the firm takes pride in providing the best legal advice and solutions possible. It has been recognized and highly rated by the world's leading legal directories, such as the *Legal 500*, and has received numerous awards, including Renewable Energy Sector Law Firm of the Year 2017 in Cyprus, awarded by Corporate INTL and Corporate Law Firm of the Year in Cyprus, awarded by ACQ5.

The 2019 and 2020 edition of *The Legal 500 Europe, Middle East, and Africa* has recommended and recognized AMG Mylonas Law as a leading law firm in the fields of tax, commercial, corporate and mergers and acquisitions.

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**Andreas Mylonas**

**Andreas Mylonas** is the founder and managing partner of AMG Mylonas & Associates, LLC law firm based in Limassol, Cyprus. His main areas of practice are commercial, corporate, company and tax areas of law, both in legal consultancy and litigation, with special expertise in corporate advisory, real estate, international tax planning, renewable energy and trusts and estate planning.

He was appointed by the President of Cyprus as a member of the board of directors of Cyprus Sports Organization. Andreas is also a member of the board of directors of the Cyprus Employers and Industrialist Federation (OEB) and in December 2020 was elected as member of the executive committee of OEB, the most powerful independent organization in Cyprus comprising 65 of the main professional/sectoral associations.

Andreas Mylonas

# Cyprus Headquartering: Top Attractive Jurisdiction and Relocation Destination for Your Business

Cyprus has a long-established reputation as a highly compliant jurisdiction and attractive location to foreign investors — both European Union (EU) and non-EU nationals — due to its highly competitive advantages as a growing tech hub and business center within the EU.

When it comes to choosing the right location to establish international and regional headquarters, Cyprus is increasingly gaining momentum as a prime contender in the minds of decision makers of tech multinationals by offering numerous complementary services. Strategically located at the crossroads of three continents (Europe, Africa and Asia) Cyprus is a modern EU member-state which tends to become an East Mediterranean economic hub by providing international businesses with the ideal environment to set up, grow and prosper.

An attractive tax system, wide access to markets, strong economic growth, a pro-business environment, tech-savvy talent, low operating costs and a number of incentives, including a competitive intellectual property regime, are only a few of the reasons why Cyprus is one of the top headquartering jurisdictions. A number of global information communication technology companies have established their business in Cyprus while servicing clients in Europe, Middle East and North Africa, and beyond, with success.

## Our Firm's Assistance

Mylonas Law offers a complete package of support and advice during the planning set-up phase and throughout the operation and running of the company.

During the planning set-up phase, we offer advice in order to achieve the best structure from a legal and tax perspective in cooperation with our tax expert affiliates.

Throughout the operation and running of the company, we can assist with:

- the formation and administration of a Cyprus company (providing a complete package of administration and/or nominee services for a Cyprus company, such as director, secretary, nominee shareholder and registered address);
- the administrative procedures in relation to the redomiciliation of companies in Cyprus (handling submissions and filings of all relevant documents with the registrar of companies in Cyprus in order to obtain the temporary and continuance certificate from the registrar of companies);
- the opening of bank accounts, by directly contacting the proposed banking institution and completing all the relevant documentation including, but not limited to, the bank application forms;
- any real estate matters; and
- the accounting and bookkeeping of the company. Moreover, we provide assistance to companies in relation to their tax obligations via our tax experts affiliates.

In addition to helping you establish and grow your business, we also aim to help expats and their families with relocation and living aspects, such as administrative procedures, immigration-related matters (assisting with obtaining permanent and temporary residency permits and work permits), housing, education and job seeking.

## Why Relocate to Cyprus?

Cyprus offers:

- Geostrategic location with market access to 500 million EU consumers and close proximity to Middle East and North Africa.
- Positive economic outlook with robust GDP growth in one of the fastest growing economies.
- Fast track mechanism for licensing and immigration for non-EU nationals.
- Simple and fast establishment of a business.
- Access to a tech-savvy EU talent pool and a well-educated, highly skilled, multilingual workforce.
- Low cost of doing business for high-quality professional services — lower labor costs for technical and professional talents than in other major EU capitals.
- Strong business support services at highly affordable costs.
- Pro-business attitude, excellent regulatory framework and a solid, impartial and credible legal system aligned to the United Kingdom common law.
- High quality of life for expats and their families. Enviable lifestyle in a safe (ranked as the 5th safest country in the world — *Value Penguin 2015*), clean and healthy environment with high living standards. Quality healthcare. Top four best retirement destination globally

(*Knight Frank 2016*). Education facilities, modern housing and a much lower cost of living than many other EU countries.

## Attractive and Transparent EU-Approved Corporate Tax System

The tax system's main features are:

- Taxation is based on residency status.
- 12.5 percent corporate tax on corporate trading profits, which is among the lowest in the EU.
- Capital gains on Cyprus-situated immovable property (and on non-quoted shares directly or indirectly holding such Cyprus-situated immovable property) are taxed separately in Cyprus.
- Profits from disposals of corporate "titles" are unconditionally exempt from corporate income tax. Whereas "titles" are defined as shares, bonds, debentures, founders' shares, and other titles of companies or other legal persons incorporated in Cyprus or abroad and options thereon.
- Favorable and efficient intellectual property (IP) regime for tax optimization and maximum protection and certainty for IP owners. Low tax rate 2.5 percent on income earned from IP assets, 0 percent tax on the gain from disposal of IP assets as a capital nature transaction and up to 20 years amortization period. It applies to a wider range of income compared to other similar European schemes.
- Corporate tax on sale of securities; 100 percent exemption.
- No withholding tax on dividends, interests and royalties paid to non-residents of Cyprus except in the case of royalties earned on rights used within Cyprus. Royalties earned on rights used within Cyprus are subject to withholding tax of 10 percent (5 percent in the case of cinematograph films); however, these may be reduced or eliminated by double taxation treaties entered into by Cyprus or by the EU Interest and Royalty Directive as transposed into the Cyprus tax legislation.
- Attractive and constantly expanding double tax treaty network with more than 65 countries.
- Dividend income generally exempt from tax (subject to relaxed conditions).
- Applicability of all EU directives.
- Special income tax incentives for expat executives and new tax residents of Cyprus.
- Foreign exchange differences are tax neutral for corporate income tax purposes (i.e. forex gains are not taxable and forex losses are not deductible).
- Group relief availability (for 75 percent holdings); companies of the same group to transfer tax losses from loss-making group companies to profitable group companies.
- Tax exempt reorganizations; reorganization relief is available to allow certain transactions to take place in a broadly tax-neutral manner, with exemption from corporate income tax and stamp duty.
- Advanced tax ruling practice offers safety and predictability for investments.
- Attractive personal tax regime for international professionals and non-domiciled individuals (Cyprus Non-Domicile Tax Regime for Individuals).
- Tax deductions for investment into start-ups.
- Competitive tonnage tax for shipping companies and an approved EU open registry.

We look forward to meeting you in person when in Cyprus next! Please get in touch.

# ŠunjkaLaw

**Novi Sad, Vojvodina, Serbia**

ŠunjkaLaw routinely handles complex domestic cases, as well as work across borders. We are well-versed in multi-jurisdiction cases in investigations, litigations and prosecutions, in which we take part in consulting, as well as in representing.

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ŠunjkaLaw is recognized in the local, regional and international market as a first-choice firm for complex legal matters. We routinely handle complex domestic cases, as well as work across borders. We are well-versed in multi-jurisdiction cases in investigations, litigations and prosecutions, in which we take part in consulting, as well as in representing.

ŠunjkaLaw represents clients in business and international business law; mergers and acquistions; corporate; foreign direct investment matters; dispute resolution; complex litigation; arbitration; mediation; enforcement and alternative dispute resolution. We also handle anti-corruption matters; asset tracing and asset recovery matters; criminal responsibility of legal entities and white-collar crime; frauds; Danube shipping; international sports law matters; and more.

In high-risk cases, we act as strategic advisors, project managers and trouble shooters, taking care of everything from prevention, independent monitoring, to conducting investigations, litigation, criminal procedure and negotiations.

Clients hire ŠunjkaLaw because of our specialists, skills, capacity, knowledge, dedication, trust and discretion to resolve the most difficult and most complex legal issues and transactions.

Clients praise us as the leader in the Balkan region. In addition to our efficiency, strategy, innovation and international connections, clients value our independence and our logical business approach.

**Ivan Štrbac**

**Ivan Štrbac** practices business law and complex litigation, especially employment law, where he advises and represents both employees and employers in negotiations, dispute resolution and before competent courts, arbitration and other competent bodies. He is also well-versed in all corporate and litigation matters. His expertise in business law gives him a wider perspective when dealing with white collar and financial crime, as well as corporate and internal investigations. In these areas, he is a respected leader, with his peers and clients noting his world-class work handling financial and corporate crime matters and his in-depth investigation expertise.

Ivan Štrbac

# Law on Determining the Origin of Property and Special Tax

On March 12, 2021, the application of the Law on Determining the Origin of Property and the Special Tax began, which is directed to tax individuals who lead a life and own property that exceeds their officially reported income.

## Key Legal Solutions Foreseen by the Law

This law essentially stipulates that a person, who cannot prove that he has legally acquired the property he owns, is taxed with the tax rate of 75 percent (revalued) of value of that property (i.e., that three-quarters of the value of such property shall be expropriated). Also, if the court finds that the property was acquired by committing a criminal offense, the owner could be deprived of all such illegally acquired property.

According to the solutions foreseen by the law, the control of citizens' property shall be performed by a Special Unit of the Tax Administration, and if it determines that there is property which cannot be justified with officially reported income, it will issue a resolution on determining a special tax of 75 percent on the tax base, which is the sum of revalued value of such property for each calendar year which was subject to control.

The burden of proof in the procedure of determining the origin of property is distributed by law. So, the burden of proof of the increase of property of a natural person is on the side of the Tax Administration, whereas the burden of proof of the origin of that property is on the taxpayer in the part where the increase of his property is not in accordance with officially reported income.

The law specified that during the control, the entire property of the natural person under control is taken into account, especially immovable property, such as an apartment, a house, an office building and premises, a garage, land or other.

It is important to note that the audit procedure is initiated if in the preliminary procedure it seems probable that, in a controlled period of a maximum of three consecutive calendar years, the natural person has an increase in assets, where there is a difference between the increase in assets and reported income of the natural person which exceeds EUR150,000.00. Such a time frame for controlling the revenues against the increase of property is an objectively good solution. It enables the controlled subject to prove the connection between income and acquired property in one period, which is objectively sufficient to justify all possible deviations between income and property (which are realistically possible in practice), whereas deviations exceeding three years are unusual and indicate that deviations are not justified.

In order to create conditions for the practical application of this law, cooperation between state bodies (the Ministry of Interior, National Bank of Serbia, the Administration for the Prevention of Money Laundering, the Agency for the Prevention of Corruption, the Republic Geodetic Authority, the Agency for Business Registers and the Central Securities, Depository and Clearing House) through so-called "liaison officers" is envisaged.

This law does not aim to determine illegally acquired income, although it is quite certain that determining the existence of property for which the source cannot be determined in officially reported income indicates the existence of a criminal offense.

## Potential Problems in the Practical Application of the Law

Without entering in potential political implications in the application of this law, but exclusively from the aspect of its practical application, we point out the following:

1. If the law can cover any three related calendar years and if the application of the provisions on statute of limitations is excluded, whereas keeping in mind the legal deadlines for storing documents are taken into account, a serious question arises as to how the controlled person will be able to prove that the increase in property is based on legally acquired income, if the documentation has been extracted or destroyed in accordance with the law.
2. According to the author of this article, the issue of treatment of money laundering was not sufficiently considered in the drafting of this law. The legislator should have introduced the automatism (obligation) in filing a criminal complaint for the criminal offense of money laundering in the sense that, as soon as the disproportion between the obtained income and the acquired property of the controlled person in the observed period is determined, the Special Unit of Tax Administration must file a criminal complaint against the controlled person, due to suspicion of the criminal offense of money laundering. This is because of

the following — if there is determined disproportion between (legally obtained) income (which can be proven) and the property of the controlled person, it means that the income by which this difference of property was acquired is (most likely) illegal. As such, first of all, it remained untaxed, and then instead of paying the tax on the (illegal) income, that person used that amount of illegal income to obtain that difference in property and thus introduced illegal income into legal channels and thus "legalized" those illegally acquired income, which constitutes a criminal offense of money laundering.

3. A potential source of serious problems in the practical application of the law is the fact that it prescribes that the law on Tax Procedure and Tax Administration is applied in everything that is not regulated differently by this law, except for the provisions on statute of limitations of determining and collection of taxes.

   Here is a justified (practically very important) question — is it possible to make a kind of novation of the taxpayer's obligation, which is already statute-barred?

4. The question of constitutionality and legality of re-taxation of property and income, which have already been taxed once by final decisions of the Tax Administration, is raised. The hypothetical situation is as follows — the taxpayer filed a tax application for property tax; in that tax application he presented the acquired property; the Tax Administration accepted that application, rendered its resolution and made a tax assessment against that tax application. In this way, it is considered that the state, by its official act — resolution (which has already become final), accepted as a valid and lawful the submitted tax application and that it accepted and recognized the property covered by that tax application as legally acquired, and that the taxpayer relied on the decision of the Tax Administration as an official act of the competent state body.

5. The question is: What happens in a situation when in the process of controlling the origin of property (due to disproportion with officially reported income) that property (which was previously taxed with property tax) is re-included? Will that property then be double taxed — the first time through the property tax, and the second time through the tax under this law? The second question (and issue) is that the state has already (formally de iure) audited the property during the audit of the submitted tax application, and it could be argued that the state by its act (resolution of the Tax Administration) recognized the property as legal through a previously conducted audit procedure.

In conclusion, it can be said that there was an unequivocal need for this, that the solutions contained in the law are generally positive and practical, and that this is the first time that the issue of the origin of property is approached in a comprehensive manner. On the other hand, as presented, there are certain problems that can potentially arise in the practical application of the law.

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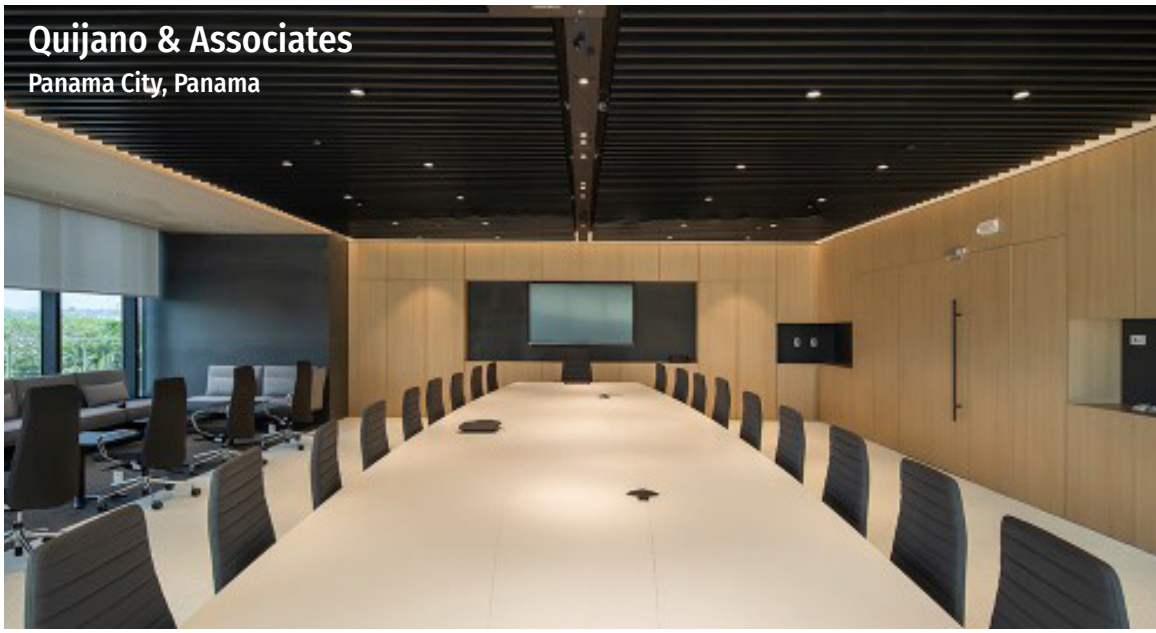

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Valerie Barrios

# Cryptocurrency and Offshore Entities in the British Virgin Islands

Cryptocurrency has revolutionized our monetary system since it was first launched in 2009 as the first decentralized currency. The founding father of the cryptocurrency bitcoin was a man under the pseudonym, Satoshi Nakamoto. Nakamoto published his "proof of concept" whereby he established the mathematical formula that created bitcoin. Cryptocurrency as defined by scholars is a virtual coinage system that functions much like a standard currency, enabling users to provide virtual payment for goods and services free of a central trusted authority. Bitcoin and cryptocurrency, in general, do not require a person to be in charge. One simply downloads the software for free and starts receiving and sending any cryptocurrency. Further, cryptocurrencies rely on the transmission of digital information, utilizing cryptographic methods to ensure legitimate, unique transactions. Today, if you browse around any financial website, entrepreneurial blog or social media platform, you will likely hear the constant buzz about one thing: cryptocurrency.

## Cryptocurrency in the British Virgin Islands

Today, cryptocurrency has become popular in those British Virgin Islands (BVI) structures which use an international business company (IBC) as part of it. The cryptocurrency must have an initial coin offering (ICO) of cryptocurrency to structure itself as a financial vehicle. An ICO is the accessibility to third-party capital. In an ICO, investors exchange cash or money for a new cryptocurrency on a blockchain network. Here, the crypto assets become a credit or token to purchase goods or a service in the application into which the ICO proceeds will be invested. The ICO has an ICO sponsor or founder who creates the business plan or "white paper" to detail the fundraising target goals. The ICO sponsor appoints an ICO issuer that enhances the funds issuing cryptocurrency token on a blockchain network. Typically, the ICO issuer is an incorporated IBC established under the BVI Business Companies Act, 2004.

Currently in the BVI there is no regulatory framework that prohibits cryptocurrency and blockchain business. The government has embraced the idea of a cryptocurrency industry and regulation in the future, nevertheless the current scenario allows you to incorporate your company by simply establishing the below:

1. Filing the incorporation of an IBC at the Registry of the BVI;
2. Appointing a minimum of one director either corporate or natural person;
3. Appointing a minimum of one shareholder either corporate or natural person; and
4. Appointing a registered agent that has a registered office in the BVI, that will maintain corporate documents.

Once the IBC has been established, the entity must consider the below regulations, in case they may apply to the cryptocurrency activity:

- **The Securities and Investment Business Act 2010 (SIBA)** SIBA forbids any individual or company from carrying out investment business activity without holding a license authorized from the BVI Financial Services Commission (FSC). While the act does not point to cryptocurrencies or any virtual token, it is important to consider the definitions provided in this act.
- **Anti-Money Laundering Regulations 2008 (AML)** AML does not interfere with the launching of cryptocurrency as it is not defined within the act or any relevant business activity. However, it must be considered, as speculations indicate the act could be modified in the future to include cryptocurrency. In conclusion, the act must be considered in case it is modified.
- **BVI Electronic Transaction Act 2001 (ET)** ET is relevant when considering a cryptocurrency entity, as this act regulates all electronic contracts and records. All electronic contracts and records shall not be denied legal validity in the BVI simply because they are only maintained in electronic format. In essence, the act is relevant as all crypto related transactions will be done electronically.
- **Beneficial Ownership Secure Search System Act 2017 (Boss Act)** The Boss Act requires that resident agents in the BVI record information as to the beneficial ownership of the company on a central government-controlled database. The Boss Act defines beneficial ownership as the person, juridical or natural, that holds control over the entity (i.e., share ownership, voting rights, the rights to appoint board members and influence and control over a company). As the factor

of disclosure is the control of the entity, token holders in a cryptocurrency would not be recorded as any beneficial owner.

- **BVI Financial Services Commission (FSC)** In 2020, the BVI FSC published Guidance on the Regulation of Virtual Assets in the island. The first step is to determine if a license is applicable for any financial services unless they are excluded. To determine whether licensing is required for virtual assets, the following factors must be assessed:

1. The way the crypto asset is being utilized;
2. The types of business activities being proposed or conducted;
3. Whether the business activities are analogous with those conducted through traditional businesses; and
4. The characteristic and business activities (economic substance).

Once it has been determined that it conducts a regulated activity, a license is required and the entity must comply with the Anti-Money Laundering Regulations (2008), The Regulatory Code and the Financial Services Commission Act (2001).

## Advantages of Cryptocurrency in the BVI

The current lax regulations regarding cryptocurrency has made the jurisdiction attractive, as the government has not announced any future laws.

Some of the advantages are:

- Tax relief if the entity can demonstrate that all activities are carried outside of the country. They are not subject to income tax.

- Annual maintenance is low, as opposed to other jurisdictions in the Caribbean.
- "Transaction fluency" as a pioneer in the offshore business in the region, the BVI continues with a robust professional service community of lawyers, accountants and corporate services providers that allow for transactions to be handled with ease.
- ICO forms are not subject to additional securities for public offering regulation under the BVI law, as current obligations for companies in the BVI are non-onerous.

## Conclusion

The BVI remains a jurisdiction of opportunities, despite the numerous regulations that have been implemented in the last decade. Cryptocurrency is a new, innovative vehicle that no longer requires the in-person exchange of currency, but rather, the wireless communication. The ease of doing business in the BVI remains favorable as the government remains at the forefront of protecting the confidentiality of information and investing resources in the development of platforms that assist the ICOs in a fluent transaction. The government, in addition, seems skeptical in passing regulations that do not permit cryptocurrency, so for the time being, it will remain as a popular jurisdiction to utilize in cryptocurrencies.

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**Selwyn Black** leads the business law group at Carroll & O'Dea. His practice includes advising on a variety of issues for businesses, including acquisitions and disposals, new and joint ventures, contracts and employment arrangements, international supply and distributorship arrangements and associated disputes and regulatory issues.

**Lola Imawan** is a dispute resolution, employment law and tax specialist at Carroll & O'Dea.

Selwyn Black and Lola Imawan

# Remote Working in a Cross-Border World: Key Legal Considerations

The COVID-19 pandemic has demonstrated the opportunities and challenges of remote working. As travel has been limited, we are seeing increased work and collaboration across borders.

According to the latest World Economic Forum's "Future of Jobs"[1] Report, published in October 2020, 80 percent of employers are expanding their use of remote work and 44 percent of employees are able to conduct their work remotely. This article highlights the key legal considerations employers must contemplate when facilitating remote working for their employees across international borders.

It is also important to note that the determination of who is an employee (as opposed to a contractor) will be determined differently in different countries, and may disregard the description in the contract, so the questions for a cross border engagement may not be resolved by describing the relationship as a contracting rather than employment arrangement.

## Labor Laws (including minimum conditions and protections, leave rights, protection from discrimination, dispute process)

Generally, the applicable labor laws for an employee will be the laws in the jurisdiction to which their work is most "sufficiently connected." Where the jurisdiction of the employee's residence and the company's operations are the same (for example, both operate from the same state), there is little contention and the mutual jurisdiction applies. However, the answer is less clear when there are multiple states to consider. For example, an employee residing in Singapore may be providing services to multiple states on a regional or global basis.

While expressing a clear governing jurisdiction clause is highly recommended (even for the purpose of assisting any future discussions or dispute resolution), it does not necessarily fix the employee to that jurisdiction for all purposes. For example, in Australia, if an employment relationship is deemed as having "sufficient connection" with Australia, the federal labor legislation (*Fair Work Act 2009* (Cth))[2] is deemed to apply irrespective of what may have been stated in contract. This "sufficient connection" test can be applicable to employees that are non-resident to Australia.

This question was explored in *Fair Work Ombudsman v Valuair Limited (No 2)* [2014] FCA 759[3] in the Federal Court of Australia. In this case, there was a dispute on whether the employment of Thai and Singaporean aircraft crew, who spent substantial time working and traveling on Australian aircraft within Australia, was sufficiently connected to Australia.

The Court held that there was no sufficient connection and cited a number of factors, including the fact that the employers of the aircraft were foreign corporations, the cabin crew was not resident in Australia and that the employment contracts were made outside of Australia and were regulated by the laws of Thailand or Singapore respectively. Further, the cabin crew were paid wages and assessed on taxes outside of Australia.

In another case in the Federal Circuit Court of Australia, *Holmes v Balance Water Inc. & Ors* (No 2) [2015] FCCA 1093, the Court held that the place in which work was performed was not critical in determining a sufficient connection.[4] The Court also stressed that the employment relationship must be linked sufficiently with Australia, not just the employee or employer.[5]

Even though the mentioned cases are from Australia, the key principles of "sufficient connection" should still be carefully considered for any employment arrangement where there is a cross-border element involved. From these cases, it is clear there is no sweeping criteria that can be used and a multitude of factors must be considered.

Once the applicable country has been identified, it is also appropriate to check which International Labor Organization (ILO) conventions it is a party to. Those conventions include topics such as freedom of association, right to organize, collective bargaining, forced labor, protection of children and young persons, discrimination and equal remuneration.

## Workers' Health and Safety and Workers' Compensation

Another key area to consider is employee wellbeing and safety. Employers have an obligation (or in some jurisdictions, a duty of care) to ensure that their employees have a safe working environment. In Australia, this obligation extends to the environments of employees working remotely. Through consultation with employees, companies should provide guidance on what is a safe work environment or provide workplace assessments of the employee's remote situation. Companies should still require their employees to learn and comply with good ergonomic practices, mental health resources and proper hazard assessment.[6]


While taking these reasonable steps, companies must also consider what their obligations are to employees in the event that their employee has a work-related incident remotely. In Australia all companies are required to take out workers' compensation insurance to cover themselves and their workers.

Companies should check whether their employer's liability insurance includes coverage for remote and cross border workers.

## Taxation Laws

Even before the pandemic, the taxation of globally mobile employees was complex. Companies need to first consider the tax residency status of the employee. While this will be subject to various considerations (in Australia, there are four key statutory tests used)[7], often, the state from which an employee sources its income will be the state where they are assessed for personal tax on that income.

In most jurisdictions, employers will also have the responsibility for withholding the personal income tax of the employee directly from their salary.

It is important to check whether there are any applicable international Double Tax Agreements (DTAs)[8]. Where applicable, DTAs may ensure that an employee is not taxed in both the state of their residence and the state in which their employment is sufficiently connected. As the conditions and wording may vary between each DTA, it is important that it is reviewed carefully in the particular context.

Beyond the personal income tax of the employees, companies must consider other taxes it may need to pay by virtue of employing employees. These may include payroll taxes, taxes for non-cash benefits and social security contributions.[9] For example, in Australia, there is a Superannuation Guarantee requirement for employers to pay a percentage of an employee's wages into a specified retirement fund.

## Conclusion

Remote working, while of great benefit in gaining access to the best talent and opportunities, does not come without its issues. Beyond tackling logistic and administrative concerns, companies must consider the various legal, compliance and tax implications which may occur.

As a general rule of thumb, the law of the country that the employment is deemed most connected to, should be the starting point for all discussions. However, as discussed above, the interplay of other national laws and international treaties should also be considered.

It is pivotal that both parties undertake careful consideration and obtain appropriate legal and taxation advice prior to formalising any international remote working arrangements for their employees.

1 WEF economic report
2 FWA Act
3 jade.io/j/?a=outline&id=339032
4 jade.io/article/406376, 132
5 jade.io/article/406376 , 131
6 safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/working-home "What must I do when workers are working from home?"
7 ato.gov.au/Individuals/coming-to-australia-or-going-overseas/Your-tax-residency/#Residencytests
8 ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/#Effectofadoubletaxagreementsonemployment
9 Labour and employment 2021, Getting the Deal Through (Taxation of Employees) section for each country

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Eckart Brödermann

# Truth Versus Facts: Different Concepts in Common and Civil Law Jurisdictions

We all know to distinguish between different kinds of facts: objective reality, the facts which the client knows, the facts which the lawyer knows, the facts which are documented, the facts which the other party knows and the facts which a jury or a court determines to be true.

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In an owl meeting organized as the opening session for Primerus University, the Primerus International Practice Committee (IPC) concentrated on the role of truth in a fascinating discussion including perspectives from Primerus members in Africa, Europe, India, Japan and the United States. This article gives a summary of the discussion.

We all know to distinguish between different kinds of facts: (i) objective reality, (ii) the facts which the client knows, (iii) the facts which the lawyer knows, (iv) the facts which are documented, (v) the facts which the other party knows and (vi) the facts which a jury or a court determines to be true. In an ideal world, all these kinds of facts correlate.

In the American approach, the underlying concept is that each party should put all cards on the table and disclose relevant facts if so requested. In an effort to win its case, the claimant may file its case based on vague facts before it seeks to discover

the real facts in a pre-trial discovery with interrogatories of witnesses and requests for production of documents. Monumental amounts of work are performed at the beginning of a litigation or arbitration in order to discover the truth already in a pre-trial discovery phase. While each party

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## Development of the International Practice Committee

**This brief summary gives an impression of the variety of perspectives regularly discussed in the different Owl, Giraffe, Panda, Kangaroo and Elephant Meetings of the IPC (whereby each animal stands for a different format, as described on pages 50-51 of the March 2021 issue of Paradigm). These weekly meetings of the International Practice Committee (IPC) have developed to become a great basis for knowledge transfer and interaction, as well as relationship building between the lawyers of the Primerus family. Meanwhile, the IPC includes 24 practice groups with a leadership of 35 lawyers from 22 jurisdictions. To read another reflection on the role of truth from K. Rosemary Wanjiku and Njoroge Regeru of Njoroge Regeru & Company in Nairobi, Kenya, please see pages 60-61.**

strives to win its case and the truth is not always discovered, the search for the real truth determines the mind-set. Many cases settle once the truth is discovered and lawyers from both sides can assess the law based on the true facts. The advantage of this system lies in the undeniable fact that every honest lawyer feels more comfortable if a case can be decided on the basis of objective truth. The downside of the system are costs and a lengthy process. Full pre-trial discoveries can cost a fortune, as discovery is not always kept to reasonable boundaries. If it comes to trial, the evidence will be presented to a jury, composed of laypeople without legal training, who will decide jointly on the true facts.

In continental European systems, with their roots in Roman law, it is for the plaintiff to prove its case. Pre-trial discovery is perceived as a "fishing expedition" and — to take the German example — as unconstitutional. A German judge will read the facts as presented by plaintiff along with offers of evidence. Early on, the judge will compare the plaintiff's case against the case as presented by defendant, also along with its evidence. To the extent that a defendant does not contest a presentation of the plaintiff, such presentation will be deemed as true even if, for example, this is objectively not the truth and, for example, a grey elephant is described as red. The judge will analyze the case, along with submitted documents, and then determine which other evidence offered by either party the court needs to take, in order to decide the case. In the example of the elephant, if it is not relevant for the decision of the case whether the elephant was grey or red, the court will decide not to even listen to such evidence, even if the defendant contests that the elephant was red and offers a witness who saw the elephant. If, from a legal perspective, the only relevant question is whether the elephant was alive, the color will not be considered, especially if there is agreement on that question. If a German judge wishes to hear evidence, he or she will communicate this decision in writing and thereby set borders for the taking of evidence at trial. Evidence taking at trial will thus often be restricted to a few hours or a maximum of one day. Pre-trial discovery is not necessary. In very limited scenarios, the claimant may offer as evidence a specific document to be produced by the defendant.

In international arbitration, a limitation of document production to "relevant and material" documents is emerging as a middle ground. It can be found both in the arbitration rules of the International Centre for Dispute Resolution of the American Arbitration Association (Art. 21.4), and in the IBA Rules on the Taking of Evidence 2020 of the International Bar Association (article 3.1(2)). For cross-border litigation, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 can play a role, but national reservations can obstruct service of rogatory letters or of requests for production issued in the context of pre-trial discovery.

Filtering the truth implies many parameters. In jurisdictions like in America, with a broad discovery concept, there are shields to protect other interests. For example, an attorney-client privilege may prevent that privileged communication of outside or in-house counsel be presented to the other side or in court. In contrast, in jurisdictions without a discovery concept, such shields do not exist. Instead, due process and third-party interests are protected by other means, for example, in some jurisdictions (Germany and Switzerland) by an attorney secrecy concept which is protected by criminal sanctions. It starts with an obligation of an attorney to secrecy as compared to a privilege of a party. The European Union has restricted it to outside counsel and not extended it to inside counsel. When parties from different jurisdictions are trading, there is simply no equal level playing field in this respect when it comes to a dispute.

To overcome such differences in international arbitration — often the best medium for international dispute resolution — the Inter-Pacific Bar Association (IPBA) in November 2019 released the IPBA Guidelines on Privilege and Attorney Secrecy.[1] In very few rules, they strive to overcome the difference, creating a level playing field for parties from different legal systems. It has proven helpful in practice to integrate a reference to these guidelines into arbitration clauses.

1 /ipba.org/sites/main/media/fck/files/2020/IPBA%20Guidelines.pdf.

K. Rosemary Wanjiku and Njoroge Regeru

# Truth Versus Facts: The Role of Truth in Dispute Resolution

Truth fights a heavy battle with the quest for justice based on the principle of proven and unproven facts, contested versus uncontested facts.

The pursuit of truth in the conduct of hearings before a judge or an arbitral tribunal is an elusive endeavor, particularly against the backdrop of evidentiary rules, constitutional rights and freedoms and in the conquest for justice. Truth fights a heavy battle with the quest for justice based on the principle of proven and unproven facts, contested versus uncontested facts. Accordingly, truth becomes replaced with the notion of proven facts.

As with any trial, the dispute resolution process commences with the filing of the various pleadings such as a statement of claim and may be rebutted with a statement of defense. To these pleadings, the different parties support their case with either documentary and/or oral evidence. However, relying on the best evidence rule, it is expected that at a minimum a witness statement shall be provided for purposes of introducing and submitting documentary evidence as exhibits before a court or arbitral tribunal. This allows the umpire, as the case may be, to test the veracity of the averments in the witness statement against the documentary evidence produced.

It is not in question that examination-in-chief sets the pace for the prosecution witness, in terms of tempo, pace and persuasion. However, in light of the court's or arbitral tribunal's value of time, procedure dictates that examination-in-chief is kept to a minimum to the extent of the introduction of the witness, the adoption of the witness statement and the submission of the documentary evidence relied upon as exhibits for purposes of interrogation of its veracity and corroboration of the averments in the witness statements. It is at the point of cross-examination, that "truth" may be ascertained though with the overriding interest being in favor of fact. Thus, the

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idea of interrogating a witness's testimony for truth is not always a successful pursuit noting that the more persuasive speech takes the day.

It has long been a settled rule of common law that all evidence which is relevant to the fact at issue is admissible, regardless of how the same was obtained. Thus, for a long time, this rule found application in the admissibility of illegally obtained evidence in Kenya under the Mandatory Inclusion Approach. Accordingly, the pursuit of truth through the principle of Mandatory Inclusion seeks to have the means justify the end-truth. However, in the pursuit of justice, the focus shifts to proven facts within the confines of the law. The end is never justified by the means explored. Constitutional rights and freedoms, such as the right to privacy and the right of an accused person to remain silent and not self-incriminate, shifts the role played by truth in the quest for justice to that of fairness and legality.

Since the promulgation of the Kenyan Constitution in 2010, a shift towards mandatory exclusion of involuntarily obtained evidence continues to take shape. The Supreme Court of Kenya in *Njonjo Mue & another –vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] e*KLR, held that:
"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

This therefore impacts the conduct of arbitral proceedings, despite the flexibility of the rules of evidence adopted and the parties' choice of law and procedure for the conduct of arbitral proceedings. Noting that every arbitral award is subject to the public policy of the state where the recognition and enforcement of the arbitral award is sought, the exception to the Mandatory Inclusion Approach in Kenya, that is, "evidence obtained in a manner that violates any fundamental right or freedom and leads to a miscarriage of justice, must be excluded," firmly forms part of Kenya's public policy and tilts the scales of justice towards proven facts rather than truth. Truth therefore struggles to fight for its place where the primary duty of the umpire, as it were, is to do justice.

# Widerman Malek's Celebration Exotic Car Festival

## How one Primerus firm uses exotic cars to rev up their community service efforts

### Ferrari. Maserati. Lotus. Lamborghini. Aston Martin. Bugatti. McLaren. Pantera. DeLorean. Pagani.

You name the exotic car, and it's probably at the Celebration Exotic Car Festival (CECF) in Celebration, Florida.

With more than 300 of the world's rarest exotic cars, race cars and Hollywood movie cars — not to mention sports and movie celebrities and world-class entertainment — the popular event is known for glitz, speed and fun.

But for the Florida-based Primerus firm that created the event, Widerman Malek, P.L., there's a much deeper meaning behind it all.

Charity. This year, the festival donated over $400,000 to children's charities including Make-A-Wish, Give Kids the World and the Moffitt Cancer Center. Since it was founded in 2004, the 100 percent volunteer-run event has donated approximately $3.5 million.

"We're a very community-centered law firm. We really feel that the success of our firm is wholly dependent on the community we serve," said Mark Warzecha, director of the firm's intellectual property litigation department. "We wanted to give back to the community."

In 2004, firm partners, and brothers, Jeff and Jim Ippoliti founded the event in honor of Jeff's late wife, Laura Ippoliti, who died in a car accident in 2001 at 32 years old. Laura was a Ferrari and Formula One enthusiast, who also had a deep love of children. When he's not working as an attorney, Jeff enjoys race car driving, including competing in the Ferrari Challenge Club race series.

When the Ippoliti brothers' law firm in Celebration, Florida, merged with Widerman Malek in 2017, the firm wholeheartedly embraced the event.

CECF includes two days of private racing at Daytona International Speedway — making it the only private event the Speedway allows on its grounds. There are also two VIP evening events — one at Universal Studios Hard Rock Live where celebrity entertainers perform with all proceeds being donated to the festival's causes. Past performers include Steve Martin & Martin Short, The Beach Boys, Jay Leno, REO Speedwagon and STYX. The second VIP event features a world class food and wine pairing gala with silent and live auctions at the Four Seasons Resort in Orlando.

In the event's first year, CECF featured about 50 cars and raised $20,000. Over the years, the festival has grown into the nation's largest charity exotic car event, drawing 40,000 spectators over four days every April.

At one point during the festival, the cars make their way from Celebration, Florida, to Universal Studios. It's a route known for bumper-to-bumper traffic.

"The local sheriff shuts down I-4 for us. We literally have a motorcycle escort from Celebration to Universal to enable our guests to arrive on time for the night of entertainment," Warzecha said.

Most of the proceeds go to Make-A-Wish Foundation, but other non-profits benefit as well.

The event is run completely by volunteers, including board members who are not from Widerman Malek.

"It's a lot of work, of course, but once you get it tuned in, it just kind of runs itself. We just tweak it every year," Warzecha said.

Warzecha said the event was canceled in 2020 because of the COVID-19 pandemic, but it returned this year.

"It is a great, great time," Warzecha said. "This year was one of the best."

In fact, donors must have been motivated to make up for last year's loss because they raised two years' worth of money in the live auction.

"The bidding on the live auction items was out of control," Warzecha said.

The live auction is one of Warzecha's favorite parts of the event. For the auction, various people offer experiences to auction off. Over the years, they have included a private tour of Jay Leno's garage, private air travel and accommodations in the Bahamas, meet-

CECF includes two days of private racing at Daytona International Speedway — making it the only private event the Speedway allows on its grounds.

and-greet backstage passes with members of STYX and REO Speedwagon, finale tickets for American Idol and Dancing with the Stars, numerous celebrity experiences and amazing vacation getaways.

The live auction is where Warzecha is hoping to get fellow Primerus firms involved in the event, by inviting them to donate a VIP experience to be auctioned off at future CECFs.

"Everyone has one, they just probably don't know it," Warzecha said. "This is a one-of-a-kind, can't-buy-it-off-the-street experience."

Possible auction item donations could be tickets or a suite at a top sporting event or concert, access to a vacation home, use of a private jet, private dining experience at a top-rated restaurant, dinner with a celebrity, golf outing at a private exclusive club, or anything else firms can imagine and have access to.

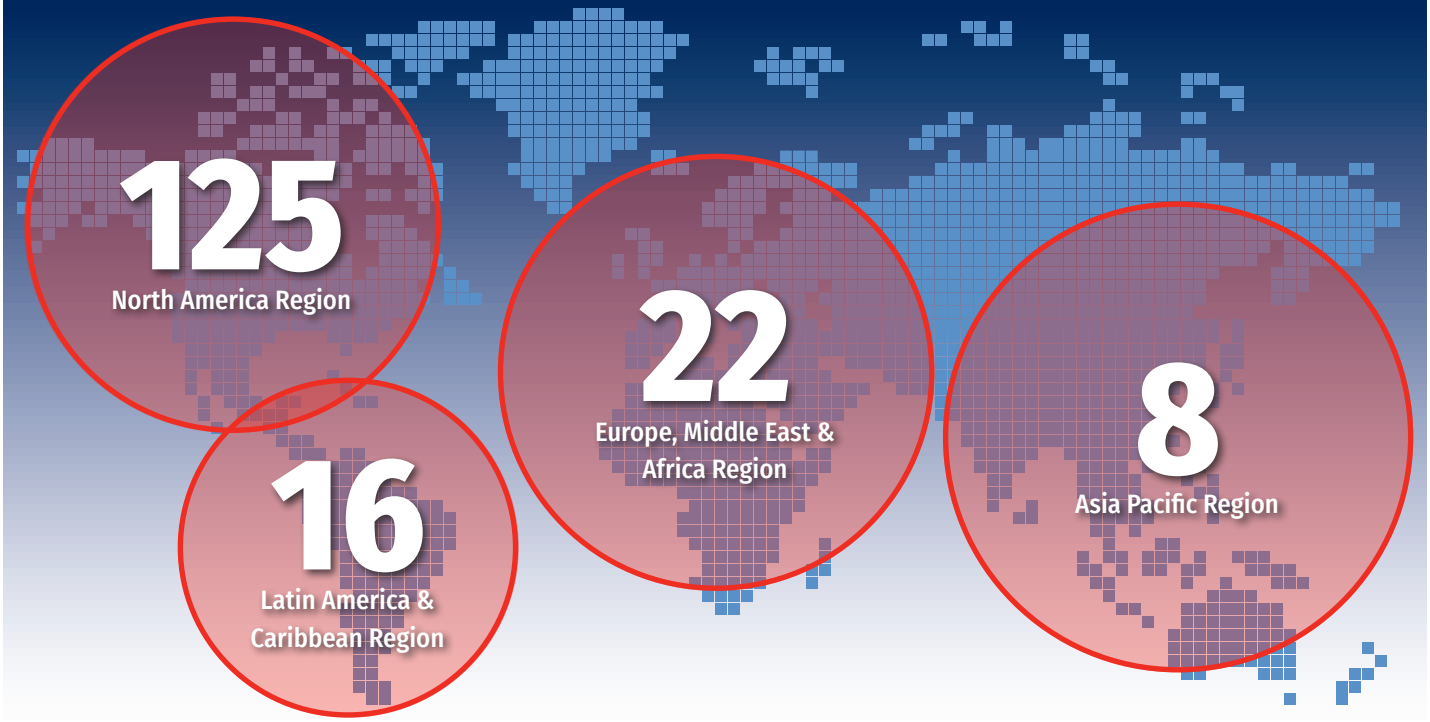
"You don't have to spend more than a minute to raise this money," he said. "If you find an incredible item or experience to donate, we'll promote it and then auction it off at our live event at the Four Seasons in Orlando."

CECF sees it as a great way for Primerus firms to join in the excitement of the event and support important work for sick children.

"We want to encourage everyone to do that," Warzecha said.

For more information, contact Mark Warzecha at mfw@uslegalteam.com or CECF co-founder Jim Ippoliti at jim@uslegalteam.com.

## Primerus Member Firms Globally

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