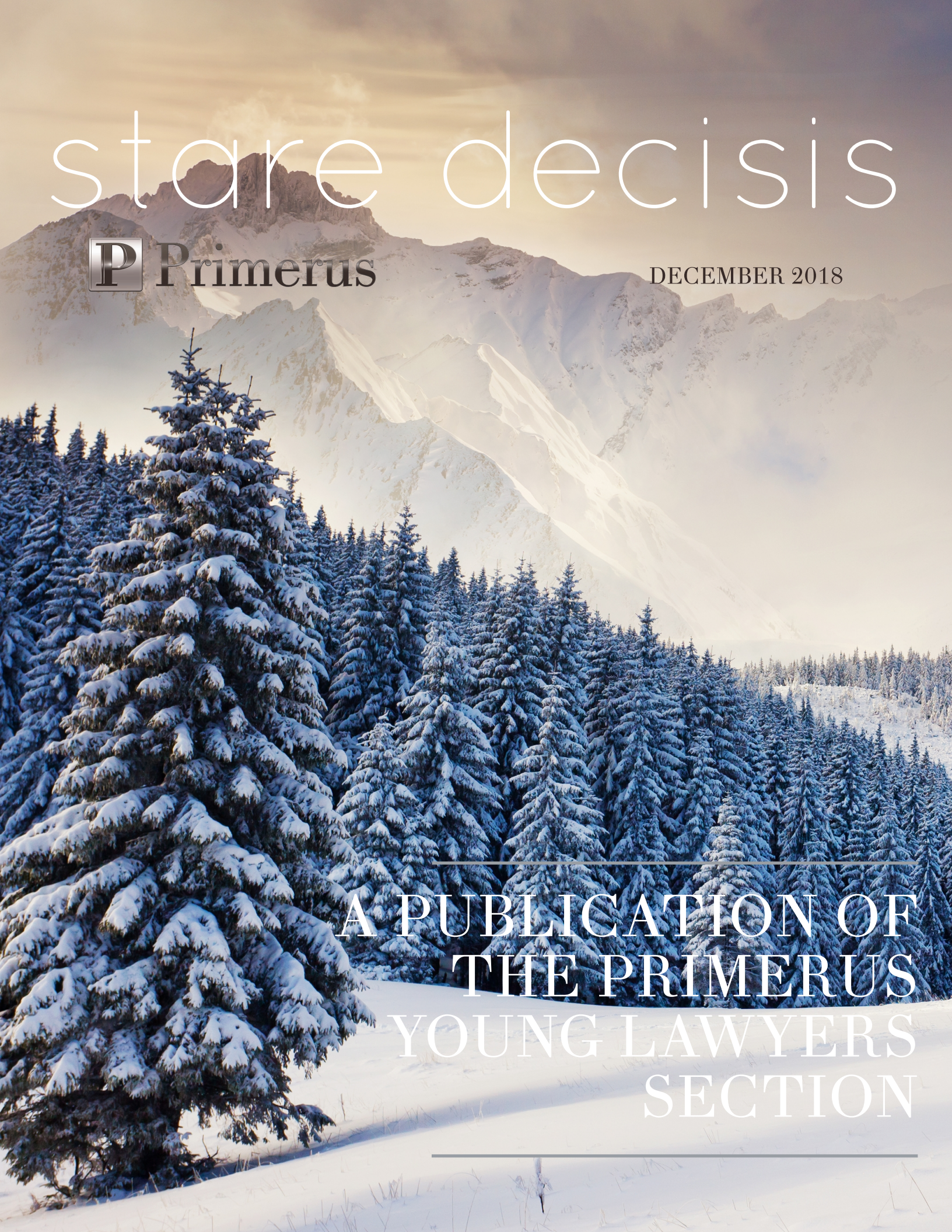

stare decisis

Primerus

DECEMBER 2018

A PUBLICATION OF THE PRIMERUS YOUNG LAWYERS SECTION

chair column

by emily campbell

Emily E. Campbell of Dunlap Codding provides strategic counsel to clients on trademarks, copyrights, internet law, and licensing. She excels in finding creative, practical ways to achieve clients' immediate and long-range business goals by applying her knowledge of intellectual property prosecution, maintenance, licensing, and enforcement strategies.

Her work includes the comprehensive strategic management of international trademark portfolios for several multi-national companies, including prosecution, maintenance, and enforcement. She is a zealous advocate and excels at helping her clients enforce their rights, address third-party claims, and negotiate resolutions in their best interest.

Year-end for some may be a bad word. It can mean long hours, hurried deadlines, book-keeping, and on top of it all, the holidays. Yet as busy as the year-end gets, I hope you take some time (schedule it if you must) to reflect on the year that has so quickly passed us by. Did you accomplish all that you set out to achieve? As I look back on 2018, I am pleased with what the Young Lawyers Section and Primerus have accomplished.

The YLS adopted the theme of "Learn. Connect. Grow." Throughout the year we have aptly applied this theme to our programming, our conferences, and our relationships.

We organized another successful Young Lawyers Section Conference. The event now consistently attracts 30+ young lawyers year over year. We are offering teaching and training for young lawyers to build upon their business development skills necessary to succeed in today's competitive legal landscape. Every other month we are delivering a web-based substantive program on the YLS Membership Call so that young lawyers can continue to grow their knowledge and skills throughout the year. Additionally, YLS committees are giving our young lawyers opportunities to work together on projects, the by-product being close, personal relationships with other members along with leadership training. One of the charges of the YLS was to develop the future leaders of Primerus. This has been evident by the number of former YLS Chairs/Executive Committee Members that have come before me, and that have gone on to other leadership roles within Primerus (*spoiler alert – in future editions we will be featuring those individuals*).

This theme has served us well. With all that being said, I am eager to report that we did not stop there. In the spirit of Community Service, one of the Primerus Six Pillars, I feel it is appropriate to add one more element to our theme – "Learn. Connect. Grow. GIVE BACK!" At this year's YLS Conference in Charleston, SC, we were proud to coordinate the first organized community service activity held during a Primerus event, which is proving to be a

blue print for not only future YLS Conferences, but all Primerus events. Already, the impact was evident at the Global Conference this year in Boston, where a much larger group of Primerus lawyers volunteered their time at the Greater Boston Food Bank. It is wonderful to see groups of Primerus lawyers working together in local communities for a collective greater cause, further demonstrating that we truly are "*Good People Who Happen to be Good Lawyers*". Activities like those organized in Charleston and Boston are already underway for several 2019 Primerus events.

Lastly, the YLS Newsletter Committee continues to work hard to deliver a timely, engaging publication in that of *Stare Decisis*. They are introducing two new columns in this edition. The first is a spot titled "Foundations", where articles written by senior Primerus members about business development will be featured. The second is a marketing spot, authored by marketing consultant Amber Vincent of Alyn-Weiss & Associates who continues to tirelessly work and give to Primerus young lawyers. The committee expects both spots to be regular features in future editions. Enjoy!

words to the wise

by kathryne baldwin and ashley crank

For this edition of Words to the Wise, Kathryne Baldwin of Wilke, Fleury, Hoffelt, Gould & Birney, LLP in Sacramento, CA and Ashley Crank of Christian & Small LLP in Birmingham, Alabama, combine the words of attorneys in the Primerus network from a variety of firms across the globe: Dr. Pubillones Marín of Dr. Frühbeck Abogados S.L.P. in Havana, Cuba, and Sharon Stuart of Christian & Small LLP in Birmingham, Alabama. Below, these two attorneys provide practical advice for new attorneys.

HOW DID YOU BECOME A LAWYER? HAS THE PRACTICE OF LAW MET YOUR EXPECTATIONS?

Mrs. Stuart: My dad was a lawyer, so I grew up with a strong interest in the law. I was on the debate team early in high school, and by the time I was 16 I felt that I would go to law school, although I originally thought I might want to move to Washington, work on the Hill, and be a lobbyist. The practice has met my expectations in large part. I was fortunate to start practicing when it truly was still viewed as a profession. I have been fortunate to work with great clients and great law partners, to achieve some very good results along the way – the combination of developing relationships and achieving goals for clients in a challenging environment has been the most fulfilling part of practicing law for me.

Dr. Ma. Elena Pubillones Marín: Since I was a child, this profession called my attention, due to the possibility it has to help and guide people facing conflictual situations. As I grew up, this motivation stood stronger and stronger. I consider that the practice of law has fulfilled all my expectations, since I have been able, not only to serve natural persons, but also to companies and trade associations which perform in the business and trade world, and of course, that the scope of my support has increased in a way I could not foresee initially.

HOW HAVE YOU DEVELOPED BUSINESS? WHAT DO YOU LIKE OR EXPECT TO SEE FROM AN ASSOCIATE IN TERMS OF BUSINESS DEVELOPMENT?

Mrs. Stuart: The business I have developed has come from trying to deliver excellent work product, in a timely and efficient manner, and by getting to know my clients and their businesses. But to be fair, it hasn't been all my own doing. I was fortunate to have senior partners who wanted me to succeed, and helped me develop relationships with their clients so that we could have an orderly succession when the senior partners retired. I can't stress enough the importance of having a senior "cheerleader" to help a younger lawyer develop business. This needs to start early and never let up.

Early on, associates should focus on delivering timely work product that they are proud of. That should never change. Then I like to see them focus on becoming involved in one or two organizations in which they can develop relationships and hone their leadership skills. Next, I like to see them pinpoint client contacts or potential clients with whom they can develop relationships and then, if they want my help, I will do whatever needed to help the associate cultivate those relationships.

Dr. Ma. Elena Pubillones Marín: Firstly, I value very much a respectful and humble behavior with bosses, colleagues and clients. This attitude favors a permanent interest in studying, listening to advice and applying knowledge and experiences, which we receive daily in our professional practice. It also favors an atmosphere of solidarity and harmony within the staff, which allows for more efficient work.

WHAT ARE SOME OF THE IMPORTANT THINGS AN ASSOCIATE SHOULD KNOW ABOUT MANAGING AND LIVING UP TO PARTNER EXPECTATIONS?

Mrs. Stuart: This should be as simple as it sounds – partners generally want associates to do high quality work, efficiently and timely. But a lot of ingredients go into that mix. Law practice isn't easy. We deal with problems that are sometimes so tough they make our heads hurt. An associate who tries to think outside the box, be creative, and bring actual solutions to the partner, and ultimately the client, will go far. After all, clients hire us to be problem solvers, and if the associate can solve the problem, it helps the partner and makes both partner and associate look good!

Dr. Ma. Elena Pubillones Marín: First, an associate should know very well what those expectations are, in order to decide if you are in a place to accept and meet them. Once accepted, to proceed with perseverance and patient enough in order to adapt progressively to the rhythm and environment of work, and in that way, to gain the right to “contribute” your suggestions, proposals and elements that will favorably affect the work result.

WHAT MAKES AN ASSOCIATE A STAR IN YOUR MIND?

Mrs. Stuart: A star is the ultimate package – hard worker, quick thinker, problem solver, good writer, good speaker, not timid, interested in business development, and generally, a fun person.

Dr. Ma. Elena Pubillones Marín: A lot of study and professional practice. Mistakes are not something to be afraid of. Only those who work make mistakes. You learn a lot from those mistakes. From each, you must get the positive experience and apply it in the next issue to be solved.

WHAT ARE SOME OF THE THINGS ASSOCIATES SHOULD AVOID DOING?

Mrs. Stuart: Avoid writing off your own time, at least without discussing it with the partner. It only hurts you and doesn't give a fair perspective of the length of time necessary to do a task. Avoid being untimely – it is a poor reflection not only on you, but on the firm. Avoid hiding a problem – everyone makes mistakes, so if something goes wrong, let the partner know. Most issues can be handled if dealt with swiftly. Avoid distracted law practice – in this age of social media and electronic bombardment, it is easy to lose focus and make mistakes. Often, we must immerse ourselves in the law and facts to solve a legal problem. That requires setting aside blocks of time, rather than flitting from one issue to another.

Dr. Ma. Elena Pubillones Marín:

- Break the working principles drawn by the partner.
- Fail to allow the client to express everything he/she wants to, even though it may be irrelevant for the issue.
- Not accepting criticism or suggestions from bosses or other associates.
- Fail to act with solidarity and a cooperative spirit within the staff.

WHAT IS THE ONE PIECE OF ADVICE YOU WOULD GIVE YOUR 26 YEAR-OLD SELF?

Mrs. Stuart: All of the above. :) While that is true, I would also tell myself that a legal career isn't just about the billable hour. I'd advise myself to get involved in Bar work or some legal organization and community leadership early. I would also remind myself to exercise, get more sleep, and take myself a bit less seriously.

Dr. Ma. Elena Pubillones Marín: To continue applying the principles I have mentioned in above answers. My accumulated experience allows me to confirm these principles' utility in the professional practice of the law and in the resulting personal satisfaction due to the fulfilling of our daily work.

Dr. Pubillones Marín hopes to have enough time out of the office to gather information and experience, in order to write texts for use in legal studies.

Dr. Frühbeck Abogados S.L.P.
Havana, Cuba
habana@fruhbeck.com
www.fruhbeck.com

Sharon D. Stuart is a founding partner of Christian & Small, LLP where she handles complex business, insurance, and product liability cases in state and federal courts and arbitrations. Mrs. Stuart is the Chair of the IADC Insurance and Reinsurance Committee, an active member of the Alabama Defense Lawyers Association (Immediate Past President), an active member of Defense Research Institute, and an active member of the American Inns of Court.

Christian & Small LLP
Birmingham, Alabama
sdstuart@csattorneys.com
www.csattorneys.com

navigating your first jury trial as a young lawyer

by michael o. smith

Michael Smith of Cardelli Landfear Law is a civil defense litigator. His practice focuses primarily on trucking litigation, automobile negligence, contractor liability, and commercial litigation (including contract disputes, unfair competition, and other business torts). Michael's litigation experience provides him with a unique perspective which allows him to provide clients with practical strategies to minimize their potential for future risk in non-litigation matters as well.

As a veteran young lawyer, (or a young, veteran lawyer), I am far enough removed from my first trial to write about it objectively but close enough in time to remember it vividly. While the subject matters, jurisdictions, and procedures may differ for each of our practices, the anxiety associated with taking one's first case to a jury trial is universal. I write to share my story and hopefully some helpful tips I learned from this literal once-in-a-lifetime experience.

Background

The year was 2014. I was defending a trucking company and driver in a negligence case stemming from an accident that Plaintiff alleged was my client's fault. I had the age-old defenses of: 1) It was not the Defendant's fault; and 2) The Plaintiff was not really hurt. That is really all you need to know.

Pretrial Preparation

The most important facet of a jury trial for any lawyer, but *especially* a young lawyer, is preparation. Jurors are taking time away from their jobs and their families to participate in your trial. Some of them are not exactly pleased about it. Jurors expect trial attorneys to be prepared, to know the evidence, and to know the rules of the courtroom. That is the bare minimum. For purposes of this article, we are going to assume that you have worked up the file properly, know the facts and witnesses inside and out, and are comfortable with the rules of evidence. (If not, START THERE). Below are some other tips that helped me prepare for my first trial:

· *Visit the Courtroom Before Your Trial*

Before my trial, I had heard horror stories of attorneys starting trial, having an elaborate multimedia presentation, and realizing their HDMI cable is not long enough to reach the court's monitor just before the opening statement. No thank you. I called the judge's clerk the week before my trial and asked if there was a good time for me to come in and make sure everything hooked up properly. I ended up going in that afternoon. One potential nightmare checked off the list.

· *Study the Rules of Evidence*

This is the area where I was least confident going into the first trial. I had second chaired several trials, taking trial depositions of experts but this was the first time where it was going to be 100% on me to object to improper questions or the admission of exhibits. I studied the Michigan Rules of Evidence like I was preparing for a law school exam. Most of that time was not billable, but it was worth every second.

· *Ask for Help*

I was genuinely surprised how much interest the senior attorneys took in my first trial. In hindsight, as a partner now, *of course* they were interested in my success. My success equals firm success. Genius. There is no resource like someone who has been there before. In my case, someone who has been there over 300 times. Both of the senior partners from my firm took an extensive amount of non-billable time to allow me to practice my opening statement, voir dire questions, and cross-examinations of experts in the week leading up to the trial. One of the partners even came to watch the first day of trial. He sat in the back row, took some notes, and provided some feedback at day's end.

I did not just rely on lawyers for feedback. Once I had my opening statement down, I asked my parents if I could stop by and get their thoughts. My mom, of course, said it was "wonderful" and broke into applause at the end. Not necessarily helpful feedback, but there is nothing wrong with a little confidence boost on the day before trial. My stepdad, on the other hand, candidly told me there was one part of the opening statement that he did not get. I explained it to him in simpler terms and he said "you should say it like that." Done and done.

During the Trial

I am not here to tell you how to try a case. There are a lot of books written by a lot more experienced attorneys than me to tell you that. What I will do is tell you some of the things that happened to me during my trial that I did not expect, despite all of the preparation identified above.

Jury Selection

Everything I read said this is the most important part of the trial. My first chance to speak, my first chance to advocate, my first chance to connect with the jury. I was ready to go for hours, with pages of questions. The judge ended up conducting most of the *voir dire*. Opposing counsel asked about 3 questions, did no advocating, and did not strike any jurors. I was satisfied with all but one juror before I even *started* asking questions. I was left with the choice of going through all of my questions or cutting it short to match the pace set by opposing counsel and the judge. I did something in the middle. Cut about half of my questions out, made sure to do some advocating but not too much, and struck the one questionable juror. In hindsight, I may have asked a couple more questions or dug a little deeper into a couple more of the jurors, but at the time, it felt equally important to let the jurors know I was not there to waste their time.

Opening Statement

I nailed it. Nobody applauded. Sigh…

Examination of Witnesses

I was in front of a notoriously strict judge for my first trial. Things were going well until I attempted to approach one of my witnesses to show them a report they had authored. “COUNSEL! YOU DO NOT APPROACH A WITNESS IN MY COURTROOM WITHOUT MY PERMISSION!”

I stopped dead in my tracks, “Sorry, your honor.” [Pause] “May I… Approach the witness… Now?”

I caught a glance of two of the jurors smiling after this exchange. Every single time I asked to approach a witness after that, I looked at those jurors, and they smiled.

Earlier, I stated that jurors expect you to be prepared and rightfully so. What I learned in this exchange is they do not expect you to be perfect. If you make a mistake, like I did there, you can use that to connect to the jury on a human level. To be clear, I am <u>not</u> suggesting that you make mistakes on purpose but when it inevitably happens, roll with it and move on.

Closing Statement

Again. Nailed it. Again. No applause.

<u>After the Trial</u>

After the trial was completed and the “no cause” judgment was entered (see what I did there?), I wrote hand written thank you notes to the Judge’s staff and to my client who allowed me to try the case. Both notes received nice responses. I recommend doing this. Also, thank your family and friends for putting up with you while you were (probably) a terror to deal with during trial. Enjoy the victory and get a good night’s sleep because, as a young lawyer, you will probably have about 500 unread e-mails on your *other cases* that you need to address.

quick tips

millennials as mentors: what millennials have to teach baby boomers

by nicole m. quintana

Nicole Quintana is a trial lawyer at Ogborn Mihm, LLP in Denver, Colorado. Her practice focuses on business litigation, plaintiff's legal malpractice, and catastrophic personal injury. Nicole represents clients in state and federal court in and outside of Colorado and has tried cases to juries, to judges, and through arbitration. While she works up every case with an eye toward trial, she also strives to reach early resolution where doing so serves the best interests of her clients.

Millennials are now the largest working group in the United States, which leads to inevitable comparisons between the Baby Boomer Generation and those born between 1981 and 1997. Based on studies and statistics, Millennials' confidence is often confused for hubris, and their willingness to change jobs to find more meaningful work is mistaken for a lack of loyalty. The truth is somewhere in between. Like each generation before them, Millennials bring a different perspective and new strengths from which law firm leadership can learn. Law firms should stop seeking to separate Millennials from the rest of the employees and seek to capitalize on the traits they bring to the table.

1. **Work-life Blend**. Millennials take work-life balance one step further. They seek to integrate their work into their daily lives, which means that they have a willingness to "take their work home." They do not see work and home life as separate endeavors. Rather, they wish to meld the two together. Law firms can learn from and take advantage of Millennials' approach to this concept. Rather than seeing marketing as a chore, encourage lawyers to incorporate it into their activities. Instead of using "working from home" as a euphemism, trust that lawyers are accomplishing more during off hours when others have shut down for the day. Additionally, law firms can instill a greater sense of loyalty and retain the best lawyers by opening up to the idea of a "work family." Feeling connected to colleagues results in happier Millennial workers and lessens the differentiation between work and home.

2. **Technology Embrace**. Millennials, as a whole, are far more knowledgeable and comfortable with technology. Law firm management should take advantage of Millennials' oftentimes superior understanding of technology in order to keep abreast of e-discovery software, case law, and issues, and firms should utilize those individuals to spearhead research and overhauls of case management, document management, and trial management software. They are also prime sources for website content and blogs, which also provides younger lawyers with the opportunity for exposure to potential clients and referral sources. To the extent a firm has no in-house marketing professional, Millennials can assist with management of the firm's online

profiles via Twitter or Instagram, providing the firm an even broader marketing reach. Millennials want to feel involved in the process, and allowing them to lead committees geared toward their strengths benefits both parties.

3. **Preference for Transparency**. Law firms should embrace Millennials' desire for transparency in order to inspire loyalty. Millennials want to understand the whole system, not just the bullet points of the partner track; they want to understand why they are doing something, not just be told to do it. Providing them an education on the business of the law firm and their place in it encourages greater buy in and allows them to contribute in the manner that means the most to the firm's bottom line. Helping Millennials understand the value of their hours (or lack thereof) or how to value a case provides them more informed discretion on delegation of their duties and decision-making when they ultimately begin originating work. Additionally, Millennials value honest feedback. While they may not always like what they hear, they value the opportunity to adjust and address issues in order to improve their performance. Rather than perpetuate the veiled hierarchical structure of Big Law, law firm management should take advantage of the opportunity to integrate Millennials and younger lawyers into the system from the ground up, thereby simplifying the succession plan when such eventuality comes to fruition.

3. **Task Oriented Mindset**. Historically, law firms have focused on lawyers' time as the measure of success. Obviously, billable hours will always be a consideration, but law firms should also embrace Millennials' productivity measure. Millennials monitor their productivity and measure success in terms of completed tasks. As mentioned above, it's not about punching the clock in the office from 8:00 to 5:00; it's about completing the project they have been assigned, whether at 1:00 in the afternoon or 1:00 in the morning. Law firms' ability and willingness to provide flexibility to allow its lawyers to accomplish tasks whenever and wherever will further instill loyalty. It also promotes wellness among the ranks in providing lawyers the time to work, as well as to recharge when their schedules allow. Such approach further ensures law firms are getting the best work possible from their lawyers.

4. **Conscientious Attitude**. Millennials care about social impact, environmental impact, political endeavors, health, and wellness. A majority of Millennials want to feel as though they are making a positive difference in the world. Law firms can and should embrace this passion for giving back and encourage their younger lawyers to provide pro bono services, lead charitable causes in the firm's name, and assist with firm branding that speaks to what is now the largest working class. Additionally, the rise in technology means lawyers are "plugged in" 24/7, and law firms need to be more aware of issues related to health and well-being. Tap Millennials for ideas on benefits, tools, and resources that law firms can provide to promote wellness.

Millennials may challenge the hierarchical structure and appear too opinionated for their age, but the truth is that they simply want more connection with and more communication from the people with whom they spend the most time. Law firm management can learn from and capitalize on Millennials' desire to be involved in the process, their desire for consistent feedback in order to improve their performance, and their desire to positively contribute to the office and the community around them.

spotlight interview

by charles montgomery

JAMES E. FOGG
OGBORN MIHM, LLP (DENVER, COLORADO)

1. What led you to become an attorney?

My parents and their own dedication to service to others. My mother is a speech pathologist at a local hospital, who oftentimes works with people suffering from head injuries and my father is an attorney, who started out as a D.A. in Denver, then worked as a trial lawyer in private practice, and now works in-house. Both of them taught me that focusing your efforts on putting someone else's burden on your own shoulders and helping that person through what is probably one of the most difficult times of their lives leads to a very rewarding career. As someone who excelled at speaking and writing (and not so much at math), those values eventually led me to trial work.

2. What type of law do you practice?

I primarily practice in the areas of commercial litigation, legal malpractice, and trusts and estates litigation. Though our firm, Ogborn Mihm, LLP, represent clients in a wide range of disputes and I also have experience in personal injury, insurance bad faith, and whistleblower retaliation litigation. As a result, I have the pleasure of working with a wide-range of clientele, including business owners and principals, in-house counsel, trustees and beneficiaries, and private citizens.

3. What do you like most about your practice?

The people I work with, both clients and the attorneys and staff at our firm who help me to represent them. Every trial or piece of litigation is about telling a story. But, in order to get that story to the point it is ready for persuasive presentation, you have to understand your client, inside and out. I thoroughly enjoy getting to know my clients, developing an understanding of their business or personal situation, and working with them to attain their goals. Waking up and going to a job where I get to think on my feet, take depositions, and go to trial is just icing on the cake.

4. What do you do to market yourself and your practice?

At an early age, I began to realize that you should be marketing through everything you do because, as a lawyer, you are selling yourself; your personality, your trustworthiness, and your ability to get things done. I approach every conversation, whether it is with a client, opposing counsel, the Court, or just someone in the community with that mindset. But, that approach only works if you get out and get engaged. As a result, I focus on developing relationships through the bar associations; I currently serve on the Colorado Bar Association's Young Lawyers Division Executive Council and am the Immediate Past Chair of the Denver Bar Association's Young Lawyers Division, but I also try to go out of my way to meet other lawyers and join them for something as simple as breakfast, coffee, or a beer.

5. What do you do when you are not working?

I get outside. Growing up in the Rocky Mountains, I've developed a deep passion for fly-fishing and, if I get a day that is above 45 degrees, you'll probably find me on a mountain stream with my dog, Gus. I also enjoy hiking, traveling, and working around the house with my wife, Becca.

6. What do you like most about the Primerus network membership? What Primerus events have you attended, if any?

Primerus is fantastic because it is made up of highly-skilled, personable people that act as reference points throughout the world. I've had the pleasure of getting involved with the Primerus Young Lawyers' Section, and have attended YLS conferences in Las Vegas and Charleston, and I also attended the Personal Injury Institute Conference in Sedona. I value the connections that I've made through Primerus and I look forward to making more over the years to come.

foundations

making clients happy: the golden rules of maintaining client relationships

by duncan manley

Duncan Y. Manley is the Chair Emeritus of the Primerus Defense Institute. He is a partner with Christian & Small LLP in Birmingham, Alabama, where he practices in the areas of business and commercial litigation, insurance, premises liability, product liability, transportation, and mediation and arbitration.

You may have read the article I wrote about marketing that appeared in the recent Paradigm magazine. There, I wrote about establishing relationships with clients and potential clients. In this article I will address the need to maintain client relations. It goes without saying that clients are the lifeblood of any law firm. You can be the most skillful lawyer in the world, but without clients you will not have the opportunity to prove it.

If your practice is like that of the vast majority of lawyers in the United States, you handle cases that many other lawyers and firms handle. So, why did the client select your firm over the many other lawyers and firms in your jurisdiction who perform similar legal work? I believe, as stated in the Paradigm article, that it is because, at some point, someone in your firm established a relationship with that client.

An important question thus arises: how do you keep the client after that relationship has been established? The answer is easy: swap places with your client. Give your client what you would want if you were the client.

Here are a few examples:

1. Read your clients' websites so you understand their business. Let your clients know that you are familiar with their business.
2. Meet your client in person, if possible, and the sooner, the better. If you are representing an insurance company, also meet the insured early on.
3. Without fail, follow all of your clients litigation guidelines or instructions. Do everything required, when it is required. No excuses.
4. Use a retainer letter to explain what you normally would do to handle the case, unless the client requests a different course of action.
5. Send narrative reports about everything you do on a file. The client needs to know as much about the case as you do, unless he/she tells you otherwise. If your client is an entity, make sure your reports provide sufficient detail that the client contact person can answer questions asked by his/her superiors. Also remember to report on all court hearings.
6. Proofread all writings. Typos and misspellings adversely reflect on your attention to detail.

7. Report to every client every 30 days with a status report. Talk to your clients every 60 days.
8. Keep individual clients, like an insured, advised of everything and then some. Remember, unlike a corporate client, the experience of litigating a lawsuit may be new and foreign to individual clients. They will appreciate the extra effort. Keep in mind that those individuals are potential clients on other matters.
9. On litigated matters, explain how and when the court will select a trial date and report trial dates immediately when notified.
10. On each litigation file, provide information to your client on opposing counsel, the make-up of juries in the county where the case is pending, and other pertinent information that might affect a jury verdict.
11. Provide settlement evaluations as required by litigation guidelines and update evaluations as the case progresses. Explain in detail the reasons for changes in your evaluation and provide exhibits, video depositions, or anything else that supports your changed evaluation.
12. With respect to every file you are handling, constantly ask yourself, Have I done everything this client want(s)(ed) me to do?
13. Do everything you can do to resolve the case at the earliest possible time, as is appropriate and in the best interest of your client. This will save both you and the client valuable time and resources. Make sure your client knows that you are working to handle the case efficiently and effectively.
14. Be honest with your billing. Also, describe the work you do on your time sheet so that the client understands what you did, why you did it, and how the client benefited from the work. (Keep in mind that some items may not warrant a charge and should be designated as no charge.)
15. Regularly send clients articles and cases of interest. This demonstrates that you know the client well and that you are always looking out for the clients' best interests.
16. Diplomatically and tactfully make suggestions about better practices your clients could employ.
17. Enhance your legal knowledge by attending seminars and all social functions sponsored at seminars.
18. Make a point to introduce yourself to judges and bailiffs in the courtrooms where you will be litigating cases. Gather as much information as you can about them so you can report to the client.
19. Get involved in your community. Volunteer for leadership positions in the organizations of which you are a member. Author articles for publication. Be a presenter at a CLE event or conference. These are opportunities for professional development, marketing, and networking. Plus, your client will think well of you.
20. Get involved in your local and state bar associations. Find a way to distinguish yourself from other lawyers who do the same legal work. Consider running for office. Your clients will be impressed.
21. Attend a trial, whether it is your firms' case or not. You will gain insight that you can pass on to your client.
22. Let your clients know that they are important to you and your firm.

If you follow these suggestions, your clients will love you and recommend you to others. If you don't, or if you only follow those that suit you, your clients will soon move on to someone else. As a practical matter, would you rather tell one of your senior partners that you lost a client, or that a client has recommended you to another potential client?

court determines finance companies not liable when sued solely as holder

by darryl j. horowitt and paul m. parvanian

Darryl J. Horowitt is the managing partner of Coleman & Horowitt, LLP. He practices in the litigation department of the firm where he represents clients in complex business, construction, banking and real estate litigation, consumer finance litigation, commercial collections, professional liability defense, insurance coverage, and alternative dispute resolution. He was named one of the Top 100 California litigators by the American Society of Legal Advocates (an invitation-only association of the top lawyers) and a Top 100 Northern California lawyer by Super Lawyers®, where he has been listed as a Northern California Super Lawyer® from 2007 through 2015. He holds an AV®-Preeminent rating from Martindale Hubbell, and is a Premier 100 Trial Lawyer (American Academy of Trial Lawyers) and a Fellow of the Trial Lawyer Honorary Society (Litigation Counsel of America). He is a member of the Fresno County Bar Association, American Bar Association, Association of Business Trial Lawyers, California Creditors Bar Association, and NARCA. If you have any questions regarding the subject of this article, please contact Mr. Horowitt at (559)248-4820 / (800)891-8362, or by e-mail at dhorowitt@ch-law.com.

Paul M. Parvanian is a partner with Coleman & Horowitt, LLP. He practices in the litigation department handling a wide variety of business, construction, consumer finance and real property matters. Paul also assists clients in real property and business transactions. Throughout his time at Coleman & Horowitt, Paul has developed substantial knowledge relating to the consumer laws to be able to help the firm's business and lender clients find the most cost-effective solutions to defending consumer claims, whether that be early resolution or taking a matter to trial or arbitration. If you have any questions regarding the subject of this article, please contact Mr. Parvanian at (559)248-4820/ (800)891-8362, or by e-mail at pparvanian@ch-law.com

As any auto finance company is aware, the FTC "Holder Rule" makes a finance company jointly and severally liable with a seller for any claims that a consumer may have against the seller arising from the sale of a vehicle. Consumer attorneys made a cottage industry in suing finance companies knowing that if the seller could not pay, they could get recovery from the finance company, and recover fees and costs as well.

One issue that was not previously decided by an appellate court in California is whether a consumer could recover attorney's fees in a claim brought against a finance company solely based on its capacity as a holder (assignee) of the consumer finance contract. This question was recently answered in *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 235 Cal.Rptr.3d 842, in which the Court found that a holder is not liable for attorney's fees based on the plain language of the Holder Rule.

Lafferty was the third appellate decision in a long running case. In the action, Lafferty purchased a recreational vehicle from Geweke Auto & RV Group, financed by Wells Fargo Bank. After he experienced mechanical

difficulties with the RV, which were not repaired, he sued Geweke and Wells Fargo. Geweke failed to respond and a default judgment was obtained. Lafferty and Wells Fargo thereafter litigated as to whether or not Lafferty could pursue a claim against Wells Fargo under the Holder Rule and the extent of Wells Fargo's liability.

Wells Fargo demurred to the complaint and the demurrer was sustained. In *Lafferty I* (*Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545), the court reversed the trial court's ruling and allowed the consumer to sue Wells Fargo based on its status as holder under the FTC Holder Rule.

In *Lafferty II* (*Lafferty v. Wells Fargo Bank* (March 25, 2015, C074843) [nonpub. op.]), the appellate court reversed the trial court's award of attorney's fees to Lafferty arising from the first appeal, finding the request premature as judgment had not yet been obtained against Wells Fargo.

After *Lafferty II* was decided, Lafferty and Wells Fargo entered into a stipulated judgment by which Wells Fargo agreed to rescind the finance contract, reimburse all payments made by Lafferty for the RV ($68,000.00), and that Lafferty was the prevailing party. Lafferty then filed a motion for attorney's fees and a memorandum of costs. The motion for attorney's fees was denied by the trial court on the basis that the plain language of the Holder Rule limited Wells Fargo's liability to the amounts the consumer had paid under the contract and no more, as held in *Lafferty I*. (*Lafferty v. Wells Fargo Bank, supra*, 213 Cal.App.4th at 551.) The court did, however, award costs as well as prejudgment interest. Cross-appeals were thereafter filed, with Wells Fargo appealing the granting of costs and prejudgment interest and Lafferty appealing the denial of attorney's fees.

The appellate court affirmed the trial court's decision in all respects. In its opinion, the court conducted a thorough analysis of the statutory language of the Holder Rule and came to the conclusion that the trial court was correct in determining that where a holder is sued solely in its capacity as holder, liability is limited to the amount the consumer paid under the finance contract, and the rule does not permit the recovery of attorney's fees. In doing so, the court analyzed the express language of the Holder Rule, which reads:

> "NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." (16 C.F.R. § 433.2.)

In analyzing the two sentences that comprise the Holder Rule, the court evaluated the rule as interpreted by the FTC, which implemented the rule. In doing so, it determined that the plain language of the statute was unambiguous and that the term "recovery" was qualified by the term "hereunder" to limit liability solely to the amount paid by a consumer and did not include attorney's fees. The court noted statements by the FTC that supported this conclusion and concluded:

> "To sum up, the language of the Holder Rule plainly defines the amount subject to the Rule broadly by using the word 'recovery' to include more than just compensatory damages but narrows the amount that may be recovered to those monies actually paid by the consumer under the contract. And the Holder Rule constraint on recovery does not apply to separate causes of action that might exist independently under state or local law. However, a consumer cannot recover more *under the Holder Rule cause of action* than what has been paid on the debt regardless of what kind of a component of the recovery it might be – whether compensatory damages, punitive damages, or attorney's fees." (*Lafferty v. Wells Fargo Bank, N.A., supra*, 235 Cal.Rptr.3d at 855; emphasis original.)

The court also reminded the parties:

> "It is possible for a consumer to assert uncapped claims against a creditor or seller of goods sold on an installment basis if another state or local cause of action can be found to support such claim . . . However, ***a consumer cannot assert an uncapped claim under the cause of action provided by the Holder Rule***." (*Ibid.*, emphasis added.)

The court did find that costs were recoverable as nothing in the Holder Rule prevented such. The court determined that the award of costs would be governed under Code of Civil Procedure § 1032(b), rather than the Holder Rule and nothing in that section prohibited recovery of costs. Lafferty contended attorney's fees were available under that statute as Wells Fargo was sued under the CLRA and Song-Beverly Consumer Warranty Act, both of which provide for recovery of attorney's fees. The court, however, noted that Wells Fargo was not sued for violations of those acts, but rather on a derivative basis as the holder. In other words, the consumer did not sue Wells Fargo because it violated either the CLRA or Song-Beverly, but because it was the holder. The attorney's fees provisions in those statutes thus did not apply to Wells Fargo.

The court also rejected the recovery of attorney's fees under Code of Civil Procedure § 1021.5 (private attorney general fees), because an award against Wells Fargo did not benefit the public at large, only the consumer.

Lafferty is direct, to the point, and logically concludes why a holder should not be liable for attorney's fees in claims brought solely in its capacity as holder. It thus appears, at least for the foreseeable future, that California finally has a definitive answer to the question of whether a holder can be liable for attorney's fees in consumer cases.

it's your career-do something with it! keys to building and maintaining your contact network

by amber vincent

Amber Vincent is a partner at Alyn-Weiss & Associates which researches and writes marketing communication plans for full-service, contingent fee and family law attorneys and firms.

In addition to helping firms meet their overall marketing goals, Amber coaches young lawyers and develops programs for young lawyers within firms looking to build a next generation. As a business coach and speaker, she offers GenX and Millennial lawyers insight and planning structured to create personal relationships with potential clients. Her goal with every attorney is to generate a book of business that is based on what they want to do rather than what they have to do.

I sit in succession planning meetings in law firms where the conversation quickly turns to a discussion of how the younger attorneys can generate their own work. "We need our next generation to get out and market" is a phrase heard often, but the question from the younger attorneys always circles back to "How?"

It is probably not surprising that most lawyers are averse to networking. After all, walking into a large room, full of strangers waiting to meet you, figuring out what you are going to say to them… sounds dreadful.

But you do not have to walk into a full room to develop desirable work – "getting out there" and creating real relationships can be done in a way that suits your personality.

I am a true believer that everyone has a personal networking style. Some prefer the large room, others may enjoy smaller groups or one-on-one meetings, some like to write articles, and still others enjoy speaking or being on panels. Whatever your style, you must ensure it leads you to enough people that you can actually network with and/or lead to people that would be best for your network.

Aside from getting your bar license, the most valuable and often ignored asset an attorney has is their network of personal contacts. Understanding how business networks function, what makes some relationships stronger than others, and how to evaluate a robust community of influential contacts is key to efficiently achieving your goals.

Here are a few things to think about when creating your professional relationship network.

A professional social network is a group of individuals who are in contact with one another and who serve each other as an unpaid labor source furthering their mutual business interests.

A network is essentially your contact army. These are people you have strong relationships with who will go out and recommend you and your services without you having to ask them to do so. They advocate for you because they know you, like you, and ultimately trust you.

In every professional contact network, there are three kinds of contacts:

- Everyone you know
- Everyone you have ever known, and
- Everyone who knows you (but you don't know them)

The first group is where we, as lawyers, tend to focus most of our attention. It is the easily-met people, the people to whom you feel closest, including family, colleagues, neighbors, and friends.

The second group is the one most professionals tend to ignore and is arguably the most important. "Everyone you have ever known" are the contacts that you have allowed to fade over time, people you once knew well but no longer see often, if ever, or feel close to. This group - former neighbors, past clients, someone you "did a deal with last year", classmates, a person who served on a committee or board with you - is a group worth focusing on.

Research shows that professionals often get key information, access to scarce and critical resources, some of their best leads and referrals from this second group. That is because these people are most likely to know about opportunities unknown to you. This makes it fair to say that a large measure of the future success in business lies with those from your past.

The third group of contacts is important in another way. They are a resource you have, but of which you are unaware. You become aware of them by that unexpected phone call or email with the familiar beginning: "I was talking with your friend, Amber Vincent, and she said you would be just the person we need to handle our new joint venture," or "I don't believe we've met, but several people I trust have said that we would be lucky to have you help with our new venture."

One of the goals in designing your network long-term is to emphasize this third kind of interaction, commonly referred to as a "power-referral" or "endorsement-referral". In this case, your network does the work of furthering your interests for you.

How do you accomplish power-referrals? By maintaining regular contact with members of your network, and by clearly communicating who you are and demonstrating to those contacts over time the specific applications of your expertise. Do that, and reciprocate when helped by others, and you will develop a robust flow of market information you can use and regular looks at desirable matters.

Dr. Ronald S. Burt, a sociology professor at the University of Chicago, has studied professionals and how they create effective contact networks. His research shows that meaningful, genuine relationships are key to building the trust in order to refer business.

In order to build these connections, you have to be genuine yourself. Remember, developing any relationship takes a tremendous amount of time and energy. Likely the groundwork you lie now in managing and developing your network can take three to five years (sometimes longer) to produce value of some kind.

The effort it takes to develop a real connection with someone in the professional world is equal to the effort given to doing so in our personal worlds. It is important to see them on a regular basis and care for them in a similar manner to how you care for your personal relationships.

So, be yourself and get out there!

"In today's complex society of comparably skilled, interdependent people, it is more true than ever that success is less a function of what you know than who you know and who knows you." – Dr. Ronald Burt

the dynamex decision: restarting the debate on how to classify workers

by elyssa kulas

Elyssa Kulas joined Ferris & Britton in the summer of 2015 as a law clerk. During law school, she worked with the firm's litigation team, and she currently works with both the transactional and litigation departments.

At the University of San Diego School of Law, Elyssa was a writer on the International Law Journal and a member of the Vis International Commercial Arbitration Moot (VICAM) team, where she had the opportunity to travel to Hong Kong, China, to participate in an international arbitration competition. Elyssa clerked for the United States Attorneys Office in the Civil Division and volunteered for the University of San Diego's Small Claims Clinic. Elyssa took many courses focusing on trial work and was awarded the Civil Litigation Concentration.

On April 30, 2018, the California Supreme Court issued a decision which turned classification of employees and independent contractors in California on its head.[1] Before *Dynamex Operations West, Inc. v. Superior Court*, the California courts applied the multi-factor *Borello* test to classify a worker as an employee under California wage orders by determining whether an employer has the right to control a worker as to the work performed and the manner and means in which it is performed. [2] The California Supreme Court determined that the previous multi-factor tests for employee classification were subject to abuse by permitting the hiring business to evade its fundamental responsibilities under California wage and hour law by dividing its work force into separate categories and varying the working conditions of individual workers to fit the mold of the multi-factor standards.[3]

Traditionally, under the *Borello* test, an employer had the ability to hire independent contractors to perform work within the employer's usual course of business and still appropriately classify the worker as independent contractor if they meet the *Borello* factors. For example, a law firm may hire an attorney as an independent contractor to perform specific case work or a machining company may hire an engineer as an independent contractor to perform work on one particular project. Now, the California Supreme Court has issued a new "ABC test" for classifying workers who are subject to a wage order, which would preclude employers from classifying such workers as independent contractors. Instead, the Court intended the ABC test to apply to "genuine" independent contractors, such as a plumber hired by a restaurant to fix that leaky faucet.

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[1] *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.
[2] *Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341.
[3] *Dynamex, supra*, 4 Cal.5th at pp. 954-55.

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

Under the new "ABC test" from *Dynamex*, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes each of the following three prongs: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; AND (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. The worker must satisfy all three parts to qualify as an independent contractor in California. Thus, when employers are hiring persons to perform work which is part of the regular business of the employer, it will not be possible to satisfy the "B" prong of the three-part "ABC test." The *Borello* factors do not include such a constraint.

Applicability

In California, the wage orders are constitutionally authorized, quasi-legislative regulations that have the force of law.[4] The Industrial Welfare Commission ["IWC"] in California issued 17 wage orders applicable to certain industries or occupations that set wages, hours of work, and working conditions for California employees. However, the IWC did not create a private right of action for violation of a wage order, and no statute creates a private right of action for a violation of an IWC wage order that is not also a violation of the Labor Code.[5] As a result, an aggrieved employee seeking to enforce the applicable wage order is actually enforcing it by suing to recover under the Labor Code.[6]

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[4] *See* Cal. Const., art. XIV, § 1; Cal. Lab. Code, §§ 1173, 1178, 1178.5, 1182, 1185; *Industrial Welfare Com. v. Superior Court (*1980) 27 Cal.3d 690, 700-703.

[5] *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1132; *see* also *Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210;

[6] *Martinez v. Combs* (2010) 49 Cal.4th 35.

The *Dynamex* case involved a class action by delivery drivers alleging wage and hour and other Labor code violations against their employer, Dynamex, who is a nationwide same-day courier and delivery service with operations in California that allegedly was misclassifying delivery drivers as independent contractors since 2005. After determining the proposed class, the trial court then turned to the question of commonality – that is whether common issues of law or fact predominate over individual issues—and applied the wage order definitions of "employ" and "employer" to certify the class. The IWC definition of "employ" under the wage orders means "to exercise control over the wages, hours, or working conditions, to suffer or permit to work, or to engage, thereby creating a common law employment relationship."[7] The California Supreme Court ruled that the "suffer or permit to work" definition of employ contained in a wage order may be relied upon in evaluating whether a worker is an employee or an independent contractor for determining the obligations imposed by the wage order. Ultimately, the Court determined what standard applies under California law for classifying workers "*for purposes of California wage orders*" only.[8] Therefore, if a worker is subject to a wage order pursuant to their industry or occupation, the employer must implement the ABC test in classifying the workers instead of applying the traditional *Borello* standard.

However, the question remains open as to whether the ABC test is applicable to classifying employees beyond the wage orders. More specifically, the wage orders impose obligations on employers pertaining to working conditions, wages, and hours, but do not address other facets of employment such as workers compensation or unemployment insurance. Notably, the court in *Dynamex* determined that for causes of actions that are not governed by the applicable wage order, such as non-wage and hour Labor Code violations, the *Borello* test remains the applicable standard for classifying workers. [9] The Court embraced the ABC test with the aim that it would provide greater clarity and consistency and less opportunity for manipulation than a test that weighs a significant number of factors on a case-by-case basis, such as the *Borello* test.[10] Because of this, and because of the fact that all California wage order claims fundamentally are based on Labor Code violations, it is not likely that courts will impose multiple tests when enforcing statutory obligations and resulting penalties derived directly from the wage order regardless of whether a party brings those claims under the Labor Code or under the California Private Attorney General's Act.[11]

As a result, a worker may be classified as an employee for purposes of enforcing the applicable wage order under the ABC test, but as an independent contractor for all protections not covered by the wage orders under the *Borello* test.

Is It Retroactive?

On June 20, 2018, the California Supreme Court refused to decide whether the ABC test will be applied retroactively when it denied a petition for rehearing seeking a ruling on the retroactivity issue. Generally, judicial decisions are given retroactive effect, and the California Supreme Court has the authority to declare an exception to this rule.[12] Notably, a Superior Court in Orange County ordered in a motion in limine that *Dynamex* is to be applied retroactively because of the age of the claims in the *Dynamex* case (by the time the case was decided it had been going on for 13 years), the Court's longstanding acknowledgment of its authority to make a determination on the case's application, and the lack of such a pronouncement on its retroactivity.[13]

Until the California legislature intervenes, *Dynamex* and the ABC test are seemingly here to stay.

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[7] *Id.*

[8] *Dynamex, supra,* 4 Cal.5th at pp. 914-15.

[9] *Id.* at pp. 915-16.

[10] *Id.* at pp. 954-55.

[11] PAGA claims are based on violations of the Labor Code, which in turn requires compliance with the wage orders. *See Thurman, supra,* 203 Cal.App.4th at p. 1132; *see e.g.* Cal. Lab. Code § 1198.

[12] *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978; *Barr v. ADandS, Inc.* (1997) 57 Cal.App.4th 1038, 1053.

[13] (*Johnson v. VCG-IS, LLC* (Super. Ct. Orange County, 2018, No. 802813).)

Why it Matters

While the *Dynamex* case most obviously impacts California employers, the case will ultimately have far reaching implications. The California Supreme Court has found that California wage and hour laws apply to out-of-state employees who perform work within the state.[14] If an out-of-state employer utilizes California workers to perform work that is in the usual course of business of the employer, the employer may be in violation of California wage and hour laws by misclassifying its workers and subject to substantial liability, particularly given the serious risk that *Dynamex* will be applied retroactively.[15]

What to Do About it

Because employers should operate under the assumption that the ABC test will be applied retroactively, employers should seek the advice of counsel as to whether their workers fall within the reach of California wage orders, and what obligations those wage orders impose on the employers. Generally, the wage orders require the employer to pay state minimum wages and overtime and comply with meal and rest-break requirements; as a result employers with California employees should review their policies and procedures as well as their classification of certain workers.

In light of the United States Supreme Court decision blessing the inclusion of class action waivers in an employer's arbitration policy,[16] employers should also consider pros and cons of implementing a class action waiver to wage and hour claims as company policy.

[14] *Sullivan v. Oracle* (2011) 51 Cal.4th 1191.
[15] See Cal. Lab. Code §§ 1194, 1194.2, 1197.1, 203.
[16] *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612.

YLS Stare Decisis Committee

Mayra Artiles – CHAIR
Estrella, LLC
150 Tetuan Street
San Juan, Puerto Rico 00901
martiles@estrellallc.com
www.estrellallc.com

Kathryne Baldwin - VICE CHAIR
Wilke, Fleury, Hoffelt, Gould & Birney, LLP
400 Capitol Mall
Twenty-Second Floor
Sacramento, CA 95814
kbaldwin@wilkefleury.com
www.wilkefleury.com

Nicole Quintana
Ogborn Mihm LLP
1700 Broadway
Suite 1900
Denver, CO 80290
nicole.quintana@omtrial.com
www.omtrial.com

Charles Montgomery
Earp Cohn P.C.
20 Brace Road
4th Floor
Cherry Hill, NJ 08034
cmontgomery@earpcohn.com
www.earpcohn.com

Ashley Crank
Christian & Small LLP
Suite 1800, Financial Center
505 North 20th Street
Birmingham, AL 35203
alcrank@csattorneys.com
www.csattorneys.com

Young Lawyer Section Updates

YLS Membership Call – The membership calls take place the second Tuesday of every other month. Here is the call schedule for 2019:

- Tuesday, February 12th
- Tuesday, April 9th
- Tuesday, June 11th
- Tuesday, August 13th
- Tuesday, October 1st *(moved a week earlier due to the Global Conference)*
- Tuesday, December 10th

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- yls@primerus.com

Primerus Contact for the YLS:

- Chris Dawe - cdawe@primerus.com

Primerus Events Calendar

January

- January 24-25 – Primerus Southern Regional Meeting (Birmingham, AL)
- January 30-31 – Primerus EMEA/ACC Europe Legal Seminar (Brussels, Belgium)

February

- February 19-20 –Primerus Asia Pacific/ACC APAC Client Conference (Singapore)
- February 21-22 –Primerus Defense Institute Transportation Seminar (Austin, TX)
- February 27 – March 3 – Primerus Plaintiff Personal Injury Institute Winter Conference (La Romana, Dominican Republic)

March

- March 13-15 – Primerus Young Lawyers Section Conference (Denver, CO)

April

- April 4-7–Primerus Defense Institute Convocation (Boca Raton, FL)

May

- May 2-4 – Primerus International Convocation (Miami, FL)
- May 12-14 – ACC Europe Annual Meeting (Edinburgh, Scotland)
    - Primerus will be a sponsor

June

- June 20 – Western Regional Meeting (Boise, ID)
- June 27 - Primerus Midwest Regional Meeting (Louisville, KY)
- June (Dates TBD) – Primerus Northeast Regional Meeting (New York, NY)

September

- September (date TBD) – Primerus Europe, Middle East & Africa Event (Milan, Italy)

October

- October 9-12, 2019 – Primerus Global Conference (San Diego, CA)
- October 27-30– ACC Annual Meeting (Phoenix, AZ)
    - Primerus will be a corporate sponsor

November

- November (Dates TBD) – Primerus Defense Institute Fall Seminar (New York, NY)

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