

stare decisis

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chair column

by daniel pierron

Daniel C. Pierron focuses his practice on representing clients in the prosecution of patents and trademarks before the United States Patent and Trademark Office and counseling inventors and businesses on various intellectual property strategies. Dan also focuses his practice on licensing his clients' intellectual property and enforcing the intellectual property rights of his clients in litigation. He is involved in his community and serves on several boards and committees. In 2020, he was a finalist for LEAD Brevard's 4 Under 40.



I follow in the impossible-to-fill footsteps of Nicole Quintana as the Primerus Young Lawyer's Section chair in an uncertain time. As she noted in her October 2020 column, the pandemic has forced the blazing fast acceleration of Primerus firms' adoption of remote work. The previous year has been a trial by fire in figuring out how do we work from home, how do we maintain sanity while working from home, and, for those who dare, imagining what the return to the office will be like.

For some, working from home has demonstrated that, be it the nature of their practice, the nature of their organizational structure, or their own personal natures, remote working does not work. For these people, a return to the office is a welcome return to normalcy. The camaraderie of in-person intra-office interaction is irreplaceable, and the efficiencies of office workflows that could not be replicated remotely will make those people more productive and more satisfied in their life. These will combine to produce the feeling of fulfillment of performing at their best.

For others, if they were not working remotely already, remote work has been a revelation. The ability to juggle domestic responsibilities with work responsibilities is always a challenge, and with proper, reasonable, and honest boundaries in place, working from home opened up new possibilities and improved happiness for many. The flexibility that can come with remote working enables some to find a more effective schedule, particularly factoring in the time saved by the commute changing from the home to the office to just the home office.

Of course, there are many who will find themselves between these two ends of the spectrum. This is the group I find myself in. I miss seeing my coworkers in the easy, convenient way that just does not seem replicable by Teams or Zoom. However, I decidedly do not miss the 50 minute round-trip commute I faced every day (I can hear Primerus members in big metropolitans chuckling from here), and the ability to manage the mundane tasks at home that are much more difficult, if not impossible to manage from the office, have made a significant improvement in simplifying daily existence.

So, as vaccines are disseminated and the prospect of societal normalcy, or something close to it, is on the horizon,

how do we establish a new normal in the office? I have had the good fortune of having my most productive year ever in 2020, so there is not *aprima facie* business case for me returning to the office full time. What are the consequences of me working from home the majority of the time? Firm culture is a big part of why I enjoy working at my firm, and the absence of casual conversation, unplanned interactions, and simple daily proximity has made the maintenance of that culture require concerted effort.

Much as we have been patient and forgiving of ourselves throughout the pandemic, we should also bring the same patience and forgiveness to the transition back into the office. We will all be navigating the process differently and returning with different pandemic experiences. For some, returning to pre-pandemic office routines will be paramount, while others will be unwilling to relinquish all of their remote working freedoms. The interpersonal conflicts that might arise over disagreements about remote vs. in-office work will be thornier to handle than the difficulties addressing the pandemic, as nobody was pro-virus.

Primerus firms are well situated to navigate this process, with their smaller size reducing institutional inertia and having the community of other similarly situated firms to seek guidance and suggestions. I strongly encourage Primerus firm management to engage with their Primerus partners, reach out and share your difficulties, and not struggle with these challenges alone. Much like overcoming the pandemic required a concerted national effort and cooperation, so too does managing its lasting effects, including in the workplace. We are all in this thing called life together, and through connection and group wisdom our journey will be made easier. **P**



words to the wise

by jordan loper

For this edition of Words to the Wise, Jordan Loper of Christian & Small LLP in Birmingham, Alabama, combine the words of attorneys in the Primerus network from a variety of firms: Connie Carrigan of Smith Debnam Narron Drake Saintsing & Myers, LLP, Raleigh, North Carolina, Jerome Weitzel of Kozacky Weitzel McGrath, P.C. and Michael Mihm of Ogborn Mihm LLP in Denver, Colorado. Below, these three attorneys provide practical advice for new attorneys.



HOW DID YOU BECOME A LAWYER?

Connie Carrigan: I did not have a lifetime ambition to be an attorney as I am the only lawyer in my family. During my teenage years my mother worked an administrative professional for the local Bar association, and I spent several summers compiling continuing legal education manuscripts for attorneys. That was my first exposure to the legal world. I literally worked my way up the ladder, starting as a courthouse courier for a local law firm while I was in college. I worked as a paralegal for several years until it became apparent that the next logical step in my career was attending law school.

Jerome Weitzel: Well, I went to law school and then took the bar exam. I thought that was how everyone did it? Oh, what led me to become a lawyer? The real answer is that I was an English major in college, wasn't sure what lied ahead for me after graduation, started thinking about law school, took the LSAT and did well, and then applied and got in. Also, I have an overdeveloped sense of justice, and so the idea of being involved in the system of justice really appealed to me.

Michael Mihm: I was biology/pre-med major for my first year of college, mostly because of parental pressure. However, I grew increasingly bored. I discovered that I wasn't really interested medicine; I was far more interested in law. The courtroom seemed like a far more interesting place than a clinic or a hospital. So, after a big fight with my father, I changed my major and focused on pre-law. I did well on the LSAT, was accepted at the University of Southern California Gould School of law, and never looked back.

During law school, I was a summer associate for a banking law firm based in Beverly Hills, California, and eventually accepted an offer as an associate in the firm's litigation department. However, I noticed that the lawyers in the litigation department rarely went to trial, and when they did, it was always a bench trial. In my final semester of law school, as a lark, I took a class in trial practice. As it turns out, I had natural talent and was the class star. During a mock trial, the criminal defense lawyer serving as a judge took me aside and told me that I should seriously consider becoming trial lawyer. His name was Howard Weitzman. A few weeks later he would go on to fame defending John DeLorean on cocaine trafficking charges. Later, Weitzman would go on to even more fame as lawyer for the stars, and to head a major movie studio. I mulled over Weitzman's advice for a couple of years, and finally made the leap, quit my job at the banking law firm, moved to Denver, and accepted a position at an up-and-coming trial firm, initially and ironically, focusing on defending physicians. But, again, although medical negligence cases got me into the courtroom, I wasn't all that interested in the medicine, so I soon switched to defending lawyers, and developed a substantial legal malpractice defense practice. Eventually, sensing a market opportunity, I switched sides, formed my own firm, and became a plaintiff's lawyer. Since 2003, I have focused my practice on plaintiff-side legal malpractice and business cases.

HAS THE PRACTICE OF LAW MET YOUR EXPECTATIONS? HOW IS IT DIFFERENT THAN WHEN YOU FIRST BEGAN PRACTICING LAW?

Connie Carrigan: As a result of my prior experience, the practice of law is what I expected, although for some reason I did not pick up on all the lawyer jokes until after I became one! I truly enjoy being of service to others and the ability to remain challenged by an evolving legal practice. The most dramatic difference over the years has been advances in technology. I created wills on an IBM Selectric typewriter when I was a paralegal. One typographical error mandated a new draft. It was an arduous process. The ability to conduct title searches, perform legal research, and Shepardize cases online is infinitely more efficient than poring through printed materials.

Jerome Weitzel: Initially it did not meet my expectations. My first five years in practice, the cases were mostly the same and my work on them rarely involved complex legal issues that needed to be researched and analyzed. Since then, i.e., the past twenty-three years, my practice has become varied, representing individuals, small companies and large corporations, involved industries from real estate to telecom to mink farming, and involved varied claims of breach of contract, fraud, patent infringement and whistleblowing.

Michael Mihm: The law is a wonderful way to spend your career if you love what you do. If you don't love what you do, it can be sheer drudgery. Law can be a wonderful and fascinating career because it touches on every facet of our society and how humans behave. As I like to say, the law provides a front-row seat to the human condition.

If I had to say one major difference between now and when I first began practicing is that, as disparities in our society has become even more pronounced, those disparities are increasingly reflected in the law, particularly on the civil side. The well-off can afford the best lawyers; the poor can afford nothing, and middle class can afford next-to-nothing, and so are wildly under-represented. This problem has been exacerbated in civil litigation, which has become prohibitively expensive; it is becoming more and more difficult to take a civil case to trial.

DESCRIBE YOUR PHILOSOPHY ON CLIENT RELATIONSHIPS AND MANAGEMENT.

Connie Carrigan: When folks contact me, it's generally because they're experiencing an issue with a business relationship. Maybe they have a customer or client who failed to pay them for services provided. Maybe it's a business owner or employee who seeks advice regarding the scope and enforceability of a non-compete agreement or the terms of a severance package. Maybe it's a business owner who's in a dispute with a worker over wages, performance issues, or whether the worker is properly classified as an employee or a contractor or as exempt from overtime compensation. Maybe it's a business owner who's been accused of discriminatory employment practices. I enjoy helping my clients navigate through these issues and helping them formulate policies, practices and procedures so they can avoid the legal pitfalls that can arise. Ultimately, I have found that successful businesses cultivate mutually beneficial relationships, not only with customers and clients, but also with employees. My role as a lawyer is to guide those relationships to positive outcomes, either as an advocate in court or before a regulatory agency or in helping my clients put together appropriate practices.

Jerome Weitzel: My philosophy is simple: treat clients the way I would want to be treated. Communicate with them as often as I would want to be communicated with, discuss potential significant costs and fees before incurring them, and talk about the risks and rewards of case strategies before employing them.

Michael Mihm: There are some essential basic of good client relationships, such as actually doing good legal work. However, I've learned that doing good legal work is the bare minimum requirement; good client relationships is mostly about clear communication, and for lawyers, that mostly means listening. The process is the same whether the client is a CEO or a janitor: listen very carefully to hear what the client is really saying. This process is iterative, requires time, patience, and may require some gentle probing, but it always means actively listening to the client, not just perfunctorily pretending to listen while thinking of the next thing that we want to say.

WHAT ARE SOME THINGS ASSOCIATES CAN DO TO HELP MAXIMIZE THE RELATIONSHIP WITH A CLIENT?

Connie Carrigan: One of the most vital skills an attorney should cultivate is the ability to actively listen to a client in order to appropriately ascertain his or her needs and goals. Thereafter, responsiveness and effective follow-up communication are critical. I view my relationship with my clients as a partnership – I serve as a resource to help

them fulfill their business objectives.

Jerome Weitzel: Again, communicate! And not just by email. Talk with them on the phone and start the call by talking not about the case but about what is going on in their life and yours. Be interested in them and show that interest, and a relationship should develop.

Michael Mihm: Learn the above faster than I learned it.

WHAT IS YOUR EXPECTATION OF ASSOCIATES WHEN IT COMES TO BUSINESS DEVELOPMENT?

Connie Carrigan: Over the years, I have learned that the most effective way to develop business relationships with potential clients and referral sources is to become actively involved in endeavors and activities that bring me joy and fulfillment. The business relationships often develop organically, and in the meantime, I'm enjoying the experiences that bring us together.

Jerome Weitzel: My expectation is that they likely won't want to do it at first and won't know how. Nevertheless, I want them to show an interest in it as they develop as lawyers, probably by around the three-to-five-year mark. They should figure out where their interests lie and get involved with people and organizations that meet those interests.

Michael Mihm: We expect that associates will focus on learning to be good lawyers in their first two or three years of practice; any business development efforts will be baby steps. However, we are also upfront in telling our associates that anyone who wishes to become an equity partner must eventually learn how to develop business and be able to help grow the firm. How that happens will depend on the individual lawyer, and what business development method best suits her or his personality and interests.

WHAT ARE YOU AND FELLOW PARTNERS LOOKING FOR IN ASSOCIATES AS IT RELATES TO WORK PRODUCT, PARTNER RELATIONSHIPS, AND COMMUNITY INVOLVEMENT? WHAT OTHER THINGS ARE IMPORTANT FOR ASSOCIATES TO REMEMBER ABOUT FIRM EXPECTATIONS?

Connie Carrigan: Maintaining collegiality is a priority for me and my fellow partners. The key to being successful in a law firm environment is often dependent on how quickly an associate acclimates to the demands of partners who have varied work habits and expectations, being flexible and responsive to those demands, effectively managing one's time, and having strong communication skills. Responsiveness is key to satisfying clients and is also key to satisfying partners. With that in mind, treat partners like clients. Make sure you understand the issues and goals being expressed, propose creative solutions, deliver a superior work product, meet deadlines, follow up to ensure you have satisfied the partner's needs, and ask for feedback so that you may continue to improve your skills as a lawyer. Our firm also emphasizes the importance of giving back to our community. Many of our lawyers serve on boards, are actively involved in our children's schools, or participate in activities that serve the needs of our citizens in some concrete way.

Jerome Weitzel: We look for associates who research and write well, and who don't shy away from going into court or taking on responsibility for non-litigation related projects. It is very important to remember to also communicate with partners about their expectations and continue to communicate with them while working on a project, especially if you are not meeting their timeline for completion. It is a pet peeve of mine to have to ask an associate where they are on a project; they should be communicating with me regularly about it and any issues with getting it done well and on time.

Michael Mihm: Excellent work product is a bare minimum requirement. An associate who is not developing into an excellent lawyer will, most likely, eventually leave the firm for one reason or another.

As to the partnership relationships and community involvement, it is helpful for associates to understand, as early in their career as possible, that while the *practice* of law is a profession, a law firm is a *business*. Indeed, business principles apply to law firms just as any other business. Law firms are not immune from the economic conditions, mismanagement, or business risks that affect other businesses. If a law firm is not managed like a business, it has a significant risk of going out of business, regardless of the economic conditions. Thus, it is helpful for an associate to understand that the purpose of a business is to make a profit. Unless a law firm consistently makes a profit, the firm will sooner or later go out of business.

An associate lawyer's principal job as a law firm employee is to generate revenue and make a profit for the business. Training an associate lawyer is a long-term investment for most law firms, particularly firms with highly specialized or technical practices. It may take years and hundreds of thousands of dollars before an associate begins showing a significant profit.

The sooner an associate understands the economic realities of private practice, begins to view the law firm as a business, and begins to act and think like a business owner and to make a profit for the firm, the sooner the associate will become successful as a lawyer and the more likely the associate will be asked to become an equity partner.

Once an associate grasps the business side of the law, the rest will usually fall in place for that person. That associate will likely learn rain-making skills suitable to that lawyer's personality and interests, part of which may be serving on boards, teaching, writing, performing volunteer work, working in politics, or other community involvement.

FROM YOUR PERSPECTIVE, WHAT MAKES AN ASSOCIATE STAND OUT?

Connie Carrigan: Associates who develop a broad base of contacts, both inside and outside the legal community, who cultivate potential client relationships by getting involved in community organizations and networking with their peers, and who gain the confidence of the partners with whom they work by consistently demonstrating the skills outlined above and the ability to think strategically are primed for success. Taking the initiative to pursue work from partners in the firm who will provide effective guidance and allow the associate the opportunity to observe them in action and to get to know their clients goes a long way toward development of the necessary skills to be a top performer.

Jerome Weitzel: One who takes on responsibility without having to be asked. I love it when an associate comes to me to tell me what they have done before I ask them.

Michael Mihm: An associate who stands out will be a person who is developing into an excellent lawyer and who is begins to embrace the economic realities of a law firm, as described in section 6 above.

WHAT LESSONS OR MISTAKES DID YOU MAKE (OR WITNESS OTHERS MAKE) AS AN ASSOCIATE? WHAT ADVICE DO YOU HAVE ON HOW ASSOCIATES CAN AVOID SIMILAR MISTAKES?

Connie Carrigan: Associates who fail to demonstrate professionalism, cooperation, willingness to "go the extra mile" or to deliver the highest standard of work product in conformity with partners' expectations will experience challenges in a law firm environment.

Jerome Weitzel: My advice is to avoid silly mistakes, but to otherwise not focus so heavily on avoiding mistakes, because like in other areas of life, it is from making mistakes that we learn the most. I suppose one "mistake" that associates should avoid is that rather than continuously come to partners with questions, come to them with answers, even if they are wrong. I'd much rather an associate come to me with the problem they faced, how they addressed it and the answer they came up with, than to come to me without having tried to solve it on their own.

Michael Mihm: First, it took me far too long find what I really wanted to do in the law, which is plaintiff-side trial work. Second, it took me far too long to understand the economic and professional realities of practicing law, as described in section 6, above.

WHAT ADVICE WOULD YOU GIVE YOURSELF WHEN YOU WERE NEW TO THE PRACTICE OF LAW?

Connie Carrigan: Over the years I've learned to cultivate an open, kind, and curious mind which has enabled me to be more resilient and less judgmental.

Jerome Weitzel: My advice to myself would be to take the steps to start developing business sooner. In our career, having clients is the key to job security.

Michael Mihm: Follow your bliss, and become really great at what you do; the money will follow.



A desire to serve drives everything Connie Carrigan does. The individual employees and small business representatives that seek her advice know her to be not only remarkably well-versed in the law, but also exceptionally responsive to their needs.

The issues Connie handles for her clients run the gamut. From wage claims and compensation, harassment and discrimination, to termination and severance, restrictive covenants and employment agreements, she advises clients with a shrewdness and prudence that has evolved from almost three decades of experience.

Through active engagement in such industry-oriented groups as the Society for Human Resource Management (SHRM) and the North Carolina and Raleigh-Wake chapters of SHRM, Connie cultivates the ability to advise clients from a “nuts and bolts” standpoint. She sees herself as a facilitator as well as a legal counselor and is quick to connect clients with other resources that can help them in managing their internal HR functions.



Jerome Weitzel is the co-managing partner of KWM. His practice is a unique blend of both trial and transactional representation. He has extensive experience litigating cases in state and federal court in the fields of employment, real estate, construction, manufacturing, telecom, professional liability and probate. He has argued numerous appeals before the First, Fifth, Seventh and Eleventh Federal Circuits. He represents businesses large and small as well as individuals, for whom he drafts and negotiates contracts related to employment and the purchase and sale of goods and services.



Michael Mihm’s unique trial practice focuses on plaintiff-side legal malpractice, business, and catastrophic personal injury litigation. The Best Lawyers in America® has four times named Michael as “Lawyer of the Year” in the field of Legal Malpractice Law–Plaintiff.

Michael has obtained some of the largest plaintiff legal malpractice jury verdicts and settlements in the United States, and many multi-million dollar verdicts and settlements in commercial and personal injury litigation. He is one of the few plaintiffs’ attorneys in the United States to be certified as a specialist in legal malpractice law by The State Bar of California Board of Legal Specialization. Colorado Super Lawyers® magazine names Michael as of one of Colorado’s “Top 100” lawyers.

Michael is a co-founder of Ogborn Mihm, LLP, and practices from both the Denver and Los Angeles offices. Michael represents clients in courtrooms nationwide.

spotlight interview

by charles montgomery



MARK MIKHAEL

SCHNEIDER SMELTZ SPIETH BELL LLP (CLEVELAND, OHIO)

1. What led you to become an attorney?

My first experience with an attorney was watching and listening while my dad and his lawyer negotiated a labor dispute. I thought the attorney lacked any communications skills and I believed that I could become an attorney who not only knew the law but could explain it to others. And since graduating from law school and becoming a litigator, I have found that the client is more satisfied if you, no matter the problem or the outcome, clearly explain the course of action.

2. What type of law do you practice?

I have experience in commercial litigation, routinely handling breach of warranty and contract disputes, and matters involving intellectual property and trademark violations. With my partners, I have gained additional expertise in navigating Ohio's 2007 Trust Code in probate proceedings for small and large entities.

3. What do you like most about your practice?

I love to solve a problem.


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

The best marketing is a referral from a satisfied client, and we are pleased that so many of our clients have come back to us or referred their friends to us. I also keep visible and active by presenting CLEs on topics such as probate litigation and attorney-client privilege issues. And as Courts rule and the law evolves, I send clients updates on legal issues in the news that might be relevant to their business.

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

My wife and I delight in our three-year old son, Luke's, discovery of the world, especially now that his discoveries follow a good night sleep for all. I also enjoy playing tennis and soccer and look forward to a time when league play resumes. Right now, I'm enjoying staying at home and enjoying outdoor activities when we can. And I painted the garage floor!

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

Primerus is a good reference point when identifying a lawyer for a client that may have an issue in another state. I also enjoyed attending the Young Lawyer's Section conference in Miami in March of 2020 and look forward to attending more conferences in the future. 



quick tips

stressors in the legal workplace

by kathryne balwin

Kathryne Baldwin is an Associate at Wilke Fleury where her practice focuses on corporate and business law with a specific focus on litigation. She obtained her undergraduate degree in Philosophy of Science & Logic at California State University, Sacramento. While in college, Kathryne worked for her family's Sacramento-based business, developing strong ties in the community and gaining a first-hand understanding of the operational issues facing corporations and businesses. Kathryne is a graduate of the University of Pacific, McGeorge School of Law. During law school, Kathryne served as a board member to the McGeorge Women's Caucus organization during all three years of law school, her final year as President. Additionally, Kathryne was a member of the Federal Defender Clinic representing indigent clients charged with misdemeanors in federal court.



With the worldwide COVID-19 vaccination effort well under way, some attorneys are seeing a return to a pre-pandemic normal. Whether you are an attorney returning to in-person work at the office or still commuting to work within your house each day, staying alert to the stressors in your life can be one simple way to combat stress and anxiety in your work life. Understanding the five following workplace stressors and how they impact your day to day work can help manage that stress and reap the associated health benefits.

1. How long you have been practicing may affect work-associated distress. A study published in the American Bar Foundation Research Journal found that law students and new lawyers have a higher incidence of psychological distress.
2. Female attorneys may be more likely to experience misconduct from opposing counsel. A study out of the University of Michigan, Ann Arbor found that female attorneys reported a higher level of misconduct from fellow attorneys and court staff than male attorneys.
3. Having a smaller support base contributes to stress. If you are a solo practitioner, you may be more susceptible to feeling apprehension or anxiety. A study from the City College of the City University of New York attributes this anxiety to a variety of factors ranging from uncertainty about income to unreasonable clients.
4. The type of law you practice may contribute to burnout. Attorneys practicing in emotionally charged areas of law like family law, military law, or pro-bono/indigent client defense may experience "secondary trauma," or the emotional and intellectual fallout from working with anxious clients.
5. Having a (perceived) lack of time contributes to stress. The legal profession is one undoubtedly driven by deadlines and client demands. Whether an attorney indeed has more work load than he, she, or they can handle or simply feels that there is not enough time – will ramp up the anxiety and stress experienced by that attorney.

If you are struggling with coping with any of the above stressors, please reach out to your local bar association, state bar, or lawyer assistance program for resources that may be available to you. For American attorneys, the American Bar Association has a directory of lawyer assistance programs by state that can be found at the following link:

https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/

YLS past leadership

by Emmit Kellar



NICOLE QUINTANA
OGBORN MIHM, LLP (DENVER, COLORADO)

Nicole Quintana served as the Chair of the Primerus Young Lawyers Section (YLS) during 2020 and is a partner at Ogborn Mihm, LLP in Denver, CO. Nicole has been in the legal field for 17 years and has built an impressive career as a trial attorney that serves a variety of practice areas on the plaintiffs’ side. Her interest in trial practice was piqued during her experience on Nicole’s law school trial team. That interest was fostered by her colleagues at Ogborn Mihm, who pushed her to get into the courtroom and challenged her with several early chances to litigate. To that end, Nicole has climbed the ranks by leaping at every opportunity for hands-on experience in the courtroom, at deposition, in the classroom and otherwise.

Nicole’s career development aligns directly with her experience with Primerus. Michael Mihm, a founding partner from Nicole’s firm, introduced her to Primerus by inviting her to a Global Conference. Nicole was immediately impressed at how genuine, kind and proficient the attendees were, which reflected a membership of well-rounded lawyers that were successful in and out of the office. From there, Nicole got her start volunteering with *Stare Decisis* and has since immersed herself at every opportunity and risen through the Primerus ranks. Since ending her term as YLS chair, Nicole now serves on the Primerus Ambassadors Committee and is constantly looking for volunteer, speaking, and committee opportunities.

For our readers, Nicole encourages YLS members to take advantage of the unique perspectives that are available from the wide range of attorneys in the Primerus network. Particularly, she notes that the YLS programming is geared toward “how you cultivate your own identity within your firm; how you become your own lawyer as opposed to just being the associate under the partner.” As a member, Nicole finds that Primerus provides tremendous insight into different types of practice and the business side of the legal field. Her best advice? “Get involved. It doesn’t take much to participate and to volunteer your time and do a little bit more, but it can be invaluable in terms of creating name recognition. Ultimately, the purpose and design [behind Primerus] is to have a really talented referral network. And you don’t get those referrals unless you generate relationships.”

As many can attest, Nicole has been integral in developing the Primerus network due to her selfless devotion of time and willingness to take on projects that benefit the group. In addition to her legal practice, Nicole has spent the past year taking a closer look at how stress and the recent pandemic have affected the day-to-day practice of law with the hopes of raising awareness on how these factors impact attorneys.

foundations

don't call it marketing, call it building 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.



I can hardly open my mail each day without getting a brochure advertising a seminar offering to teach me how to market. Many of the seminars are taught by members of mega law firms, which have marketing directors who make more money than most of us and who have large staffs and enormous marketing budgets. For them, marketing has become part of the business of practicing law. I still like to think of our life's work as a profession. I don't like the word "marketing" in the context of practicing law. It sounds unprofessional. I prefer to use the words "establishing relationships," because that is really what it is. I have been practicing law for many years and some of my best friends are clients. Some were best friends who became clients and some were clients who became best friends. Some were people I met for the first time at a Primerus Defense Institute (PDI) Convocation. We talk and email frequently and I think they know, I sure do, that my interest in them is not dependent on our business relationship. I know and inquire about their family because I am interested in how they are doing. I call their spouse by name, because I know it, and in many instances, know them. They live in distant places ... Georgia, Pennsylvania, Iowa, Texas, Florida, Illinois, etc. If I am in their town on business or pleasure, I call them to go to lunch or dinner if possible, otherwise just a short visit at their office. They know that I care about them, not just their business. In the long run, we are all good lawyers, or we would not be in Primerus. There are a lot of good lawyers in every jurisdiction in the United States. In truth, many of those other lawyers are as good as we are, and their rates may be comparable. That being the case, why do your clients call you rather than them? The answer is all too obvious ... it is the relationship you have established with that client. They know that you are a good lawyer, they have confidence in your ability, they trust you and they know that you are genuinely concerned about them and their company. How can you establish similar relationships with others? One way is to attend the PDI Convocation. This is a wonderful opportunity to present yourself to clients you might otherwise never meet. Clients are always looking for good lawyers, maybe not in

your jurisdiction today, but someday. All of our clients who have attended the PDI Convocation know about the Six Pillars, they know us, and they have had good experiences and successes with our lawyers. They have developed that confidence and trust in us which allows them to entrust their legal matters to us. They believe we are good lawyers, in part, because of the successes of other Primerus lawyers. All of us have different personalities. I like people, clients or not, and I like lawyers. I like to talk to them. I like to find out about what they do, who they know, where they live and whether they like to fly fish, jog, or ride horses. Sometimes my wife gets upset with me because when we are eating out, I talk to our waiter almost as much as I talk to her. One time I had a client who told me I asked more questions than anyone he had ever known. There are probably a lot of others who thought that but did not tell me. I am guilty, but that is the only way to find out about people, and they know I wouldn't be asking those questions if I wasn't interested in them. I think we all want to be liked by others. Recently, I sent a copy of a new case that is relevant to the transportation industry to a list of clients and friends. Some of them are not my clients. That's okay. They know who I am and that I care enough about them to send something that will help them in their job. You would not believe the response I got, and not just from clients. About four years ago, I got a telephone call from a friend, a person I had met 12 years previously. We would see each other at meetings, like Primerus, and I really did look forward to seeing him each year. He used another law firm in Birmingham but that did not interfere with our friendship. One day, out of the blue, he called me and asked if I would assume responsibility for five lawsuits that had been filed in Alabama that were in various stages of discovery. He had lost confidence in the firm he had been using and wanted us to handle those cases. I had earned his trust over the years and as we shared legal experiences, he thought that I was a good lawyer. That man has since retired but I still stay in touch with him. His replacement is now a good friend and comes to Primerus meetings. Our PDI Convocation is our premier event. If you were unable to join us for this year's event, held in April in Scottsdale, Arizona, please plan now to join us next year. The 2011 PDI Convocation will be held April 7-10 at The Ritz-Carlton in Naples, Florida. Many of our clients come to meet lawyers in jurisdictions where they either have no lawyer or are looking to make a change. It is your chance to inspire confidence and trust. It is your opportunity to begin the process of establishing relationships, which, if you uphold the Six Pillars, will last a professional lifetime. **P**



ding dong, it's bacteria: avoiding food safety litigation during the covid-19 pandemic

by l. paige hall

Paige Hall is a Senior Associate at Engles, Ketcham, Olson, and Keith. She is a member of the firm's civil litigation group, with a diversified practice including insurance defense, restaurant and retail industry defense, products liability, insurance coverage and appellate work. She is well-versed in assisting clients with litigated matters from pre-litigation evaluation through the appellate process.

Ms. Hall is admitted to practice in Iowa, Nebraska and Louisiana. She is a member of the Iowa and Nebraska State Bar Associations, the Omaha Bar Association, the Primerus Defense Institute and the Primerus Young Lawyers Division.



During the COVID-19 outbreak, many restaurants and markets have expanded into the forum of food home delivery. Having the option of home delivery accommodates customers who feel more comfortable staying at home and allows restaurants and retailers to continue to obtain income despite mandatory closures in many states. Many restaurants are accomplishing this through the use of a third-party delivery services. However, expansion into the food delivery market is not without its challenges, one of which is ensuring food safety and the integrity of the food is maintained from the time the product leaves the restaurant or retailer and arrives at the home of the consumer.

In a study completed by US Foods, Inc. in 2019, 21% of customers complained that they suspected their delivery driver had eaten some of the food being delivered to them and a staggering 28% of drivers admitted to previously taking food from an order.^[1] This creates significant concern for potential food contamination, as a driver's physical contact with the food product could cause the product to become contaminated. 17% of customers complained they were consistently irritated with food arriving not warm and/or fresh. Failure to keep food warm and/or fresh during the delivery process can also be a cause for concern for development of bacteria.

Food safety lawsuits may be brought under several different theories of recovery. The majority of jurisdictions have recognized multiple theories of recovery in food safety litigation, including negligence, breach of warranty, breach of contract, and strict liability products liability.^[2] These lawsuits are marked with complicated issues such as securing causation testimony by medical experts as to what food items may have caused a particular illness and analyzing traceback evidence to identify sources of


[1] *New Study Shows What Consumers Crave in a Food Delivery Service*, US Foods, Inc., 2019, <https://www.usfoods.com/our-services/business-trends/2019-food-delivery-statistics.html>.

[2] *Liability for Injury or Death Allegedly Caused by Spoilage, Contamination, or Other Deleterious Condition of Food or Food Product*, 2 A.L.R.5th1 (1992), Jane Massey Draper, B.C.L.

food poisoning and where a product may have become contaminated. Adding third-party food delivery services to the this picture will make these sophisticated cases even more difficult.

With a rapidly expanding need for delivery services, it is important for restaurants and grocers to protect themselves from potential claims that can arise from these circumstances. The following steps can be taken to help avoid food contamination litigation arising from delivery services:

- Test whether food quality standards are maintained during delivery: If you are a restaurant or grocer that is new to food delivery services, test which of your products/recipes hold up to a home delivery. Some products will maintain freshness better than others during the delivery process, and limiting your delivery menu to items you know will survive the trip can help avoid illness. Make sure the food products being delivered can withstand the delivery times of a third-party vendor while maintaining integrity, quality and freshness.
- Packaging and labeling of products: Use of tamper-resistant packaging and labeling can assist you with helping to negate liability when using a third-party vendor. Use of tamper-resistant labels or seals on packaging of foods make it readily apparent when a delivery driver has tampered with the product and alerts the customer that the product has been tampered with.
- Precautions during contact-free delivery: When using contact-free delivery, make sure there are safeguards in place such as photo documentation of the date and time food is left at the front door of the consumer to avoid liability if the customer fails to maintain.
- Separation of hot and cold foods: Keep hot foods with hot foods and cold foods with cold foods to avoid the cooling of hot items and warming of cold items. If possible, request items be delivered in insulated bags to maintain the temperatures of the products.
- Awareness of what services are delivering your products: Some third-party vendors will work with restaurants without a contract, i.e., delivering your products without your permission, sometimes even using restaurant logos or other trademarked materials. In order to limit liability for these deliveries, become aware if any third-party vendors are delivering your products without your permission, and clearly advertise on your website which vendors you are partnered with and disclaimers of liability for unsanctioned services.
- Review and be aware of third-party vendor contracts: When partnering with a third-party vendor for delivery, review the contractual agreement you are executing in detail and be aware of all terms and conditions contained within the merchant contract, including any limitations of liability and indemnification clauses.
- Training of in-house delivery couriers: If you elect to provide delivery through an in-house courier or company employee, training these individuals in food safety, food tampering and food handling can help in the defense of a food safety litigation.
- Implementation of COVID-19 protocols for delivery services: If you already provide training, adding in protocols dealing with COVID-19 safety such as frequent handwashing, use of hand sanitizer, contactless drop-off and pickup and checking delivery drivers for virus symptoms could be helpful in preventing the spread of the virus.

As long as proper precautions are contemplated and taken, expansion into the delivery business can be a beneficial service for both the customer practicing social distancing protocols and the business experiencing lost profits during the COVID-19 outbreak. 

the principle of stare decisis in the context of the open and obvious doctrine

by andrew creal and rachelle glisson

Andrew Creal and Rachelle Glisson are both associates at Cardelli Lanfear located in Royal Oak, Michigan.



Andrew is a defense minded litigator across the board. Andrew is a third-generation attorney whose grandfather practiced estate law for forty years and whose Aunt was a Circuit Court Judge in Washtenaw County. Throughout law school, Andrew worked for a variety of different entities including a city government, a prosecutor's office handling both litigation and writing criminal appeals, as well as a criminal defense firm. His wide range of experience helped him to adapt quickly to civil litigation.



Rachelle Glisson is a civil defense litigator with experience in First and Third-Party No-Fault claims and Premises Liability claims. During law school, Rachelle gained procedural experience while clerking for a federal judge. Additionally, she has had firsthand experience handling claims in Federal District Court through her position at Michigan's first Federal Pro Se Legal Assistance Clinic established in the Eastern District Court of Michigan by University of Detroit Mercy School of Law.

Introduction

There has been recent consternation from both sides of the Michigan Civil Bar regarding what is known as the “open and obvious” doctrine and its viability moving forward under a newly elected Supreme Court. Proponents for change argue that the doctrine is too narrow, thereby precluding potential plaintiffs from sustaining lawsuits which often result from a slip and fall. In contrast, defenders of the doctrine point to the justified responsibility it places on individuals to look out for their own well-being. Which side is correct? This article does not seek to answer this core legal question. Instead, this article intends to analyze the issue under the legal principle of *stare decisis*, the Latin phrase that means “to stand by things decided.” Indeed, it is the principle our entire foundation of American jurisprudence rests upon.

In 2005, President George W. Bush nominated D.C. Circuit Court of Appeals Judge John G. Roberts to be Chief Justice of the U.S. Supreme Court following the passing of Chief Justice William H. Rehnquist. At his confirmation hearing that fall, when asked about the legal principle of stare decisis, the future Chief Justice replied:

The principles of stare decisis look at a number of factors. Settled expectations is one of them...whether or not particular precedents have proved to be unworkable is another consideration on the other side...I do think it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness.[1]

[1] John Roberts, What the Justices Think About Precedent and Stare Decisis, Thirteen (April 8, 2021),

<https://www.thirteen.org/wnet/supremecourt/educators/print/lp4-org1.html>



Stability and evenhandedness are certainly critically important for a society to flourish. Indeed, for everyday citizens whom must live in a country (and state) increasingly crafted by legislators, lawyers and judges, expectations are important. Stare decisis purports to provide a benchmark of expectations with which citizens can alter their personal and professional lives around. Individual and entities can decide their conduct based on the expectation that current “laws” will be the same “laws” if today’s conduct is analyzed by a court in the very near future.

If not for stare decisis, “the law” would drastically change with every judicial appointment or shift in political power. Yesterday's reasonable and lawful conduct might be tomorrow’s negligent and illegal conduct, and vice-versa. Instead, with stare decisis, the law remains as stable as reasonably possible except in those instances of prolonged unworkability and/or grave injustice. And certainly, even with stare decisis, there is room for an overwhelming consensus to change the law. The benefits of the principle, however, are anchored in the stability that comes from having an expectation regarding the law both today and in the very near future.

Stare Decisis and Premises Liability

In Michigan, the issue of stare decisis may soon come into play with respect to the continuing viability “open and obvious” doctrine. Before the 2001 decision in *Lugo v. Ameritech Corporation, Inc.*^[2] the open and obvious doctrine had been applied inconsistently throughout lower courts across the state, often placing the burden on a defendant to establish whether they had—or had not—obliged in their duty to warn the plaintiff of a potentially hazardous situation. This meant that the same landowner engaging in the same conduct in two different counties might have a different litigation outcome. In *Lugo*, the Michigan Supreme Court clarified that a landowner does not owe a duty to warn or protect against dangers that are open and obvious, unless there was a special circumstance that made the condition unreasonably dangerous.^[3] At issue is whether the newly-constituted Michigan Supreme Court will modify *Lugo* to allow for more plaintiff-friendly lawsuits by altering the *Lugo* standard, or adhere to the doctrine of stare decisis and decline to do so.

[2] *Lugo v. Ameritech Corp.*, 629 N.W.2d 384 (2001).

[3] *Id.* at 387.

The undersigned respectfully posit that foundational decisions that increase the workability and everyday practicality of tort laws should remain intact even when a narrow majority swings in the opposite political direction. Leave politics to the legislature—as that is the appropriate forum for concrete changes in the law. The Courts, when adhering to *stare decisis*, are bound by past precedents unless or until there develops an overwhelming consensus that mandates a substantive change.

Lugo and Its Successive Cases

In *Lugo*, the Michigan Supreme Court set forth a standard of liability within premises liability cases that excludes open and obvious hazards.^[4] Invitees, in establishing a duty was owed, were also required to establish that the alleged danger not was open and obvious. ^[5] “[I]f the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger.”^[6] Even so, the open and obvious doctrine always had an exception for unreasonable dangers.

While Michigan’s open and obvious doctrine had long been established, the real limitation on premises liability cases was established when the Michigan Supreme Court determined an objective standard would be used to assess whether the alleged condition was open and obvious.^[7] The defining case for Michigan’s open and obvious doctrine was established in *Lugo v. Ameritech Corporation*.

As it stands, the general rule in Michigan is that a premises owner or possessor “is **not** required to protect an invitee from open and obvious dangers.”^[8] An open and obvious hazard is defined as one that an ordinary person of average intelligence could “discover the danger and the risk presented upon casual inspection.”^[9] The test, which is objective in nature, focuses on whether a reasonable person would have foreseen the danger if in the plaintiff’s position.^[10]

The law of premises liability in Michigan has its foundation in two general precepts. First, land owners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land. Second, and as a corollary, landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land. These principles have been used to establish well-recognized rules governing the rights and responsibilities of both land owners and those who enter their land. Underlying all these principles and rules is the requirement that both the possessors of land and those who come on to it exercise common sense and prudent judgment when confronting hazards on the land. These rules balance a possessor's ability to exercise control over the premises with the invitees' obligation to assume personal responsibility to protect themselves from apparent dangers.^[11]

[4] *Id.*

[5] *Bertrand v. Alan Ford, Inc.*, 537 N.W.2d 185, 187 (1995); *Riddle v. McLouth Steel Products*, 485 N.W.2d 676, 681 (1992).

[6] *Lugo*, *supra*note 2, at 397.

[7] *Id.* at 390.

[8] *Id.* at 386.

[9] *Novotney v. Burger King Corp.*, 499 N.W.2d 379, 381 (1993).

[10] *Corey v. Davenport College of Business*, 649 N.W.2d 392, 394 (2002) (quoting *Hughes v. PMG Bldg, Inc.*, 574 N.W.2d 691, 696 (1997)).

[11] *Hoffner v. Lanctoe*, 821 NW2d 88, 93-94 (2012).

The open and obvious doctrine has been expanded in the state of Michigan to include invisible/black ice. [12] The theory of liability when the ice is black ice, is that winter conditions would provide a “reasonable prudent person” with the indicia that ice may be present. The Supreme Court endorsed that “all reasonable Michigan winter residents would conclude that [a] snow-covered parking lot was slippery” and the condition was open and obvious.[13]

Lugo, and its subsequent expansions, began by remedying what was considered to be an unworkable and inconsistent burden placed on defendants in these types of cases. How could a homeowner be liable for failing to maintain their sidewalk while at work during a snowstorm? How could a business owner be liable for a customer slipping on a spilled substance without knowledge that said spill had occurred? By enacting an objective standard with which a reasonable person must be aware, the *Lugo* court correctly struck a balance of allowing Plaintiffs to proceed with premise liability suits, but only when the Defendant had reasonable notice and/or opportunity to correct the alleged hazard.

Criticism of this now two-decade-plus precedent tends to focus on the challenges potential Plaintiffs have in sustaining lawsuits beyond summary disposition motions. Yet these proponents of change offer little in the form of a tangible legal solution to warrant overruling established precedent. In other words, if the Supreme Court were to overrule *Lugo* and be rid of an “objective” analysis through the lens of a “reasonable person,” what would that look like? By default, if a standard is not objective it is subjective. And if a standard is subjective, then it is bound only by the rationale and opinion that carries that particular argument on that particular day. Our legal system is more fundamental than that. Indeed, it must be. For all citizens—business owners and customers, landlords and tenants, homeowners and guests—deserve to know that their behavior falls within a legally acceptable range of outcomes as it has for a number of years. These *expectations* cannot be subject to a recent election or the random assignment of a particular judge. *Stare decisis* commands it. As attorneys, it is our task to uphold these expectations and promote adherence to established precedent. **P**

[12] *Kenny v. Kaatz Funeral Home, Inc.*, 697 N.W.2d 526 (2005).

[13] *Kenny v. Kaatz Funeral Home, Inc.*, 289 N.W.2d 737, 748 (2004), *reversed*, 697 N.W.2d 526 (2005).

vlog or blog - what's the difference and who cares?

by amber vincent

Amber Vincent is president of Alyn-Weiss & Associates, a consulting firm focused on creating strategic plans and differentiating ways to market small-to-midsize law firms across the country. She brings her energetic approach to rather tedious projects inside law firms – website redesigns, database implementation, content generation, developing thought leadership, and meaningful messaging – to help those firms develop ongoing work. She works with full-service, defense, and plaintiffs law firms to pinpoint marketing methods which strengthen referrals lines and generate potential clients.



Video killed the radio star and is on the rampage to fully take over the way we consume content in the future. By now everyone knows what blogging is and most understand its effectiveness. But what in the what is a vlog??

Let's start with a little background...

After two decades of search engine optimization, most law firms have seen how meaningful and relevant content is crucial to ranking high on the search engines and ultimately creates case inquiries through a firm's website. Finally, written content is no longer a negotiable marketing tactic and cannot be ignored.

Now, cue video. For years, I have been encouraging or working with law firms to create meaningful, authentic videos for their attorneys and overall marketing. This tactic has been gaining momentum for more than 15 years since the launch of YouTube and can no longer be ignored in a firm's marketing strategy.

Google may be the number one search browser demanding written content, however, it also owns YouTube which continues to be the second most popular browser and growing especially with Generations Y and Z.

If you plan on attracting the next generations of legal service buyers, then I suggest you create a digital marketing approach with both written and video content included.

So what exactly is a vlog?

In addition to YouTube, you have probably heard of a little thing called TikTok. These are two of the most popular vlogging platforms in the world. Vlogging was born from the availability of smartphones and Internet combined with vlogging platforms like these to give a voice to an entire generation of social media influencers and YouTube stars.

Don't believe that video and vlogging are game changers for the future of marketing? These statistics for online video and vlog consumption are loud and clear.

- The average person spends 100 minutes a day watching videos online which amounts to watching 5 billion YouTube videos per day in total.
- Forrester Research states that one minute of video is worth 1.8 million words.
- According to Forbes, 59% of executives would rather watch video than read text.
- According to Hootsuite, YouTube is the second most preferred platform for watching videos between 18 to 34 year olds.

- According to a HubSpot survey on the use of video, 78% of people watch videos online every week, and 55% view online videos every day.
- As of 2020, 85% of businesses use video as a marketing tool.
- Cisco, a worldwide leader in IT and a multinational technology conglomerate, reports nearly two-thirds of the global population will have Internet access by 2023. There will be 5.3 billion total Internet users (66 percent of global population) by 2023, up from 3.9 billion (51 percent of global population) in 2018.

If these statistics are not convincing enough, I don't know what is.

Blog or vlog – what is more effective?

The answer is here: both.

Content in written form is still crucial for online search engine optimization. The search engine algorithms are built to spider websites and index written content so it can deliver the most recent and relevant information to the searcher.

If you prefer writing, I encourage lawyers to write their content in its traditional form, and then create a quick synopsis of the content in a short video(vlog) using a smartphone or high definition web cam. Video content is easier to share and consume on social media and helps to visually capture your audience while directing viewers to your written blog for more information.


If you prefer to speak or talk over writing, you can record the video blog first and then transcribe it into text for the blog. Efficiency tip - I use an app called Temi to transcribe my videos into text within a matter of minutes. It's amazing.

The key to creating any video is to keep it under two minutes. Research finds viewers will hold steady on a video up until the 2-minute mark, and then drop between 2-3 minutes. That said, for more complicated or detailed videos, viewers will hold steady from about 6 to 10 minutes. The point here is to keep it short, sweet, and to the point.

Also, keep your topic bulleted with helpful tips referenced, and authentic delivering your ideas in a storytelling mode. I recommend staying away from script reading if possible as it may come across rehearsed.

As with most video today, make sure you have good lighting, clear communication, and a clear picture to produce the best vlog experience. I suggest using a ring light or find a well-lit area inside your office or home, invest in a high definition webcam for clarity, and consider a separate microphone depending on your webcam's capabilities. Finally, buy a tripod to give yourself the most favorable angles for your face and stability while shooting your vlog.

Ultimately, vlogging and blogging separately are important and effective marketing tactics every firm should considering implementing. If you'd like to write, then write. If you prefer speaking, consider a video blog. And if you're open to both, combine them to get the most traction from your efforts.

Remember, the best marketing is about re-purposing one good idea into different mediums and sending them down different avenues to get the most traction from your efforts. We look forward to “seeing” you on video soon. 

American agriculture producers address concern as to declining trade with Mexico

by fernando schoeneck

Fernando Schoeneck is an attorney at Cacheaux, Cavazos and Newton, LLP and oversees its office in Guadalajara, Mexico. His practice focuses on commercial, corporate, real estate and foreign investment law in Mexico, specializing in the agricultural sector. Fernando recently completed a Senior Management Program for Companies in the Agrifood Chain with the IPADE Business School at the *Universidad Panamericana*.



On March 22, 2021, 27 of the leading associations of agricultural producers in the United States, including the American Farm Bureau Federation, the American Feed Industry Association and the American Seed Trade Association sent a letter to the U.S. Department of Agriculture Secretary, Thomas Vilsack and the U.S. Trade Representative, Katherine Tai, addressing their concerns as to the declining U.S.-Mexico food and agricultural trade relationship, urgently requesting their attention to this critical issue.


Below is a selection of leading concerns in such trade relationship as highlighted in the letter:

- 1. Glyphosate/GM Corn Ban.** The Mexican Presidential decree published in the Official Journal of the Federation on December 31, 2020 (the “Decree”) states the intent and course of action to be taken by the Mexican government to gradually phase out the use, distribution and importation of glyphosate and genetically modified (GM) corn for human consumption. The Decree establishes a transition period to achieve the total replacement of glyphosate, which period began on January 1, 2021 and will end on January 31, 2024. While the Decree is considered to be unclear and vague in its scope, it has created uncertainty and risk for the U.S.-Mexico trade of corn and corn products with the potential to negatively impact a considerable amount of U.S. agricultural exports bearing in mind that Mexico is the largest importer of corn products from the U.S.
- 2. Front of Pack (FOP) Labeling (NOM-051).** Mexican Official Rule NOM-051-SCFI/SSA1-2010 establishes new general labeling requirements for food and prepackaged non-alcoholic beverages that must warn consumers when calories, total sugar, saturated fat, trans fat and/or sodium amounts exceed intake recommendations. Such warning labels must be in the form of black octagons resembling stop signs. The overarching concern among U.S. agricultural producers is that this labeling requirement

seemingly lacks solid scientific support and appears to be more of a campaign by the Mexican government to attempt to restrict food and agricultural imports from the United States by branding such as potentially prejudicial for the health of Mexican consumers.

3. Biotechnology Approvals. In addition to the Decree referenced above, there is a sense that the Mexican government has created uncertainty regarding the approval of agricultural biotechnology considering that since May 2018, review and approval of applications filed for biotechnology permits in Mexico has stopped. As a result, Mexico has become a barrier for the launching of new biotechnology products in North America, potentially restricting access to new technologies that would help to address critical matters such as sustainability and climate change by farmers in such region.

4. Organic Export Certification Requirement. As of December 28, 2020, Mexico's Health, Safety and Quality Agency (SENASICA for its Spanish acronym) required that all U.S. organic exports be certified in accordance with Mexico's Organic Standards Law. Nevertheless, this requirement was not notified to the World Trade Organization or formally notified to the U.S. government. It is important to note that prior to this, any U.S. organic product certified by the United States Department of Agriculture (USDA) could be exported to Mexico and sold without any additional certification. As a result of efforts by the USDA and U.S. Trade Representative, the deadline to comply with such certification has been extended to June 26, 2021. Nevertheless, it is considered that this is not enough time for its proper implementation and, if enforced, U.S. organic producers are likely to experience significant interruptions to trade given that the certification process might take a year or more under the new organic standard, resulting in an increase in exportation costs to Mexico. Furthermore, SENASICA has not provided any clarity regarding which specific products must be certified and whether such certification process will include all organic products or only a select group.

The challenges faced by farmers, ranchers, producers and workers in the U.S.-Mexico food and agricultural trade relationship require action by both the U.S. and Mexico. If you need any help understanding the legal implications of the gradual glyphosate/GM corn ban, FOP labeling requirements or organic export certification requirements, please contact Fernando Schoeneck at fschoeneck@ccn-law.com.mx. 



managing and proving the brain injury case

by amanda pfeil hood and amy rogers



Amanda Pfeil Hood and Amy N. Rogers both are associates at the law offices of Ogborn Mihm, LLP located in Denver, Colorado.

Amanda has been practicing for over 10 years. She focuses her practice on personal injury and medical malpractice. Amanda primarily works with clients who have sustained catastrophic injuries as a result of the fault of another. The vast majority of her clients have sustained traumatic injuries and/or permanent orthopedic injuries. Amanda is also on the Board of Directors for the Brain Injury Alliance of Colorado.

Amy has been practicing for five years. Her practice focuses on personal injury matters, with a specialty in assisting clients with traumatic brain injuries or other traumatic spinal cord injuries. She has dedicated her career to advocating for and serving the individual.



Brain injury cases are very different from any other type of personal injury case. Unlike a broken bone where you can physically view the injury itself, a brain injury is an invisible injury. Insurance companies do not usually understand the intricacies of a brain injury and how they affect the brain injured plaintiff. Because a person suffering from a brain injury may not look or sound injured, it is important to know how to prove this type of injury to be successful for your client. This article endeavors to educate regarding what a brain injury is and helpful tips and tricks for how to prove it.

What is a Mild Traumatic Brain Injury?

Before deciding to represent a person with an acquired mild brain injury, it is imperative to understand what a mild traumatic brain injury (mTBI) is. The American Congress of Rehabilitation Medicine defines a mild traumatic brain injury as:

- A traumatically induced physiologic disruption of brain function, as manifested by one of the following:
- Any period of loss of consciousness;
- Any loss of memory for events immediately before or after the accident;
- Any alteration in mental state at the time of the accident; or
- Focal neurological deficits, which may or may not be transient.[i]

It is important to note that this definition does not require the physical impact of the head onto another object to meet the definition of a mild traumatic brain injury. Rather, it can be from a flexion extension or rotational forces of the head and neck without any physical contact that can result in a mTBI. The main focus to diagnose a mTBI is on the alteration of the patient's mental state and physical manifestation of symptoms.

The manifestation of certain physical, cognitive, emotional, and sleep-related symptoms can be key to recognize early that a person sustained a brain injury. **Physical** signs and symptoms of a brain injury include headache, nausea, vomiting, balance problems, dizziness, visual problems, fatigue, photophobia (light sensitivity), misophonia (noise sensitivity), numbness/tingling, feeling dazed, or feeling stunned. **Cognitive** signs and symptoms of brain injury include feeling mentally "foggy" or slowed down, difficulty concentrating or remembering, forgetfulness, memory loss, confusion, slow responses to questions, or repeating questions. Common **emotional** signs and symptoms include irritability, sadness, anxiety, depression, increased emotional lability (rapid mood changes), and nervousness. Other **sleep-related** signs and symptoms, such as drowsiness, difficulty falling asleep, or sleeping more or less than usual.[ii]

It is not unusual for certain symptoms to get overlooked or incorrectly attributed to other things rather than realizing they are due to a brain injury, for example, dizziness, headaches, or emotional or personality changes. Thus, it is important for you to understand the constellation of symptoms to best be able to explain what and why your client is having these symptoms and how to correlate that to a mTBI.

Know Who Your Client Is, Both Before and After the Brain Injury.

When proving a brain injury case, it is vitally important to obtain as much information possible to show the clients pre-injury

status. Gather information to show your client's capabilities prior to sustaining a brain injury and objectively quantify their prior level of function.

Medical History and Records: Sit down with your client and work with them to recall as much history as you can get from birth to present. Help your client to create a detailed history of every medical provider that he or she has seen in their lifetime. This includes not only primary care records, but also records from eye doctors, therapists, dentists, etc. Then order your client's medical records for as far back as is possible. Don't forget to ask regarding any prior loss of consciousness or other concussions. The medical literature informs that repeated mild traumatic brain injuries cause cumulative damage to the brain, which can cause memory loss and learning dysfunction. The medical history can additionally help you to prove that your client did not have the symptoms that they are now complaining about post incident. Additionally, gathering the complete medical history provides also ensures that you will not be surprised by anything that unexpected shows up in their records. It is better to know what is in their history than be surprised later down the road in litigation.

Employment and Educational Records: Order your client's education records, including test scores, and for as far back as possible. Order your client's employment records, not only the wage loss but reviews and production documents. Scour these documents to learn out who your client was before suffering a brain injury and if there is any black and white documentation on how well they were doing at school or work before the collision versus any changes after the collision.

Only after you gather objective evidence of your client's pre-brain injury capability and function can you compare that to the level of function after the brain injury and persuasively argue how the brain injury impacted your client's life. Additionally, these documents are important to be able to provide to your medical and vocational experts who will be able to look at this information to be able to provide valid and strong opinions on causation.

Know Your Client's Support System.

In order to effectively prove a brain injury, you should get to know your client's support system, before and after the incident. As stated above, it is critical to know who your client was and how they functioned before the collision versus afterward. In order to learn this information, you must take time to get to know your client and his or her family members, friends, and coworkers who spent significant time with your client before and after the brain injury. It is typical that persons close to your client may have a better understanding than even your client does of the changes the client went through due to the brain injury and how it affected their life, their personality, and their behavior. Friends or family members may report that their loved one is far more irritable after suffering a brain injury and even small noises, such as the ticking sound of a turn signal in a vehicle, can trigger them.

Gather stories from friends and family members regarding specific examples of your client's past and how that has changed afterwards. The more examples and stories that you obtain about your client prior to versus post injury will assist in painting a picture for the jury on who this client was and can invest them in your client's challenges since the brain injury. For example, say your client before the injury was very active in his or her community and regularly gave back in the way of volunteering or would never say no to help out a neighbor, and yet after the injury they were not capable of doing those things any longer. This shows that the brain injury not only affected your client, but affected those in the community to whom he or she would regularly give a helping hand. This endears a jury to your client. The smallest details or examples of how the person changed due to the brain injury may end up being the most convincing facts and testimony to prove that the brain injury occurred.

Not only are friends and family invaluable in telling your client's story, often times with the brain injured client, he or she struggles to communicate or fully understand what you are saying. Friends and family can sometimes help you understand how to better communicate with your client and can help with any communication barriers that may result from a brain injury.

Know the Medicine and the Best Providers.

Failure to develop a rich understanding of the injury itself and the best providers available to assist your client with his or her symptoms does a disservice to the representation of the brain injured client. The types of medical professionals who may be involved in your brain injured client's care include neurologists, neuropsychologists, physical medicine and rehabilitation specialists, otolaryngologists (ENT), neuro-optometrists and neuro-ophthalmologists, cognitive therapists, speech therapists, vision therapists, vestibular therapists, psychologists, and endocrinologists.[iii] It is important to understand each of these specialties and how each one can assist your brain injured client. Not all clients will require every specialty, but you should be armed with knowing not only what kind of specialty may assist your client and who specifically in those communities are fully capable of understanding brain injuries and how best to affectively assist your client in healing.

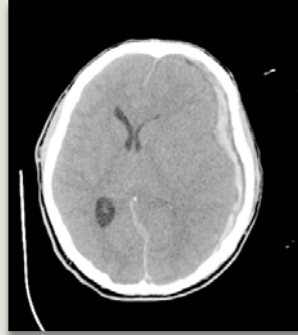
Not only should you understand what these specialties involve, but you should work with your key providers to ensure that they are providing you the necessary opinions on diagnosis, causation, apportionment, and prognosis. The key providers should be given documents outside of their records to assist them in understanding your client and to arm them with the tools

and information to be able to provide expert opinions. For example, make sure that your key providers have a copy of the police report, relevant prior medical records, relevant records post-collision, and other documents specific to their specialty and their opinions.

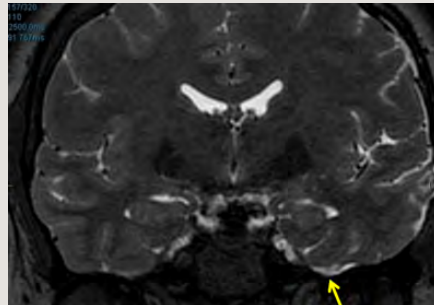
Neuroradiology and Clinical Correlation.

A picture is worth a thousand words. Thus, you should be aware of what different neuroradiology images are available, what they mean, and how/when to use them.[iv]

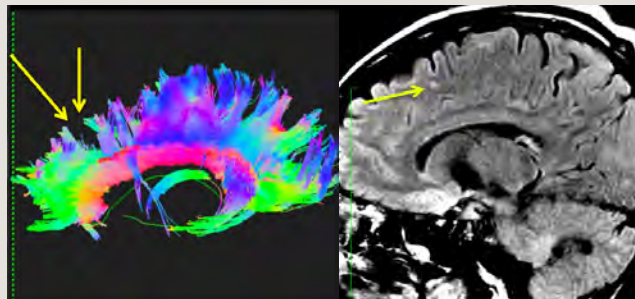
CT Scan: A CT Scan does not show a mTBI or concussion. A CT Scan is useful for more moderate to severe forms of brain injury. It can show bleeds; fractures; ventricle displacement, loss, and enlargement; or midline shift, etc. For example, below is a CT Scan image for a young man who sustained Second Impact Syndrome in a high school football game after being prematurely returned to play. Here you can see a subdural hematoma, a midline shift, and ventricle displacement, loss, and enlargement.



MRI Scans: With MRIs there are different weights, such as 1.5T, 2T, and 3T. These weights are the strengths of the magnets and the thinness or thickness of the slices, the higher the weight and the thinner the slice, the more likely it is that findings will appear on the MRI. The 3T MRI is optimal with higher resolution and thinner slices. This allows the neuroradiologist to find contusions and shearing that can be present in an mTBI due to the enhanced detection capabilities. For example, below is a 3T MRI with thinner slices where the neuroradiologist was able to detect a subtle interior temporal contusion.

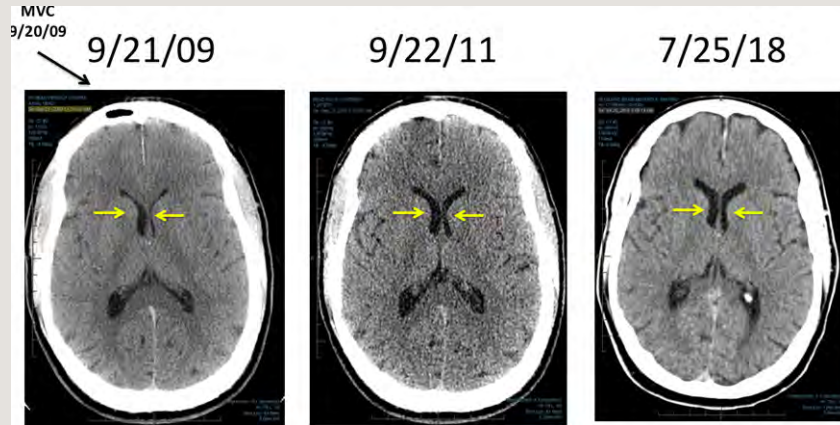


Diffusion Tensor Imaging (DTI): DTI is an MRI based neuro-imaging technique that enables measurement of the restricted diffusion of water flow along axon in the brain tissues and compares the diffusion to the axons in a white matter fiber tract. Axons can be thought of as the “telephone wires” of the brain. DTI provides a unique insight into the brain to measure the neural tract in comparison to a normative database to determine injured areas of your client’s brain. This comparison yields a numerical value regarding the health of the axons. Low values are indicative of axonal injury. In addition, the DTI findings can be matched to the area of injury shown on other imaging, such as MRI. Physical findings that are consistent on more than one type of imaging is objective proof of brain injury. Below is an example where the DTI Imaging matched sheering as seen on an MRI.

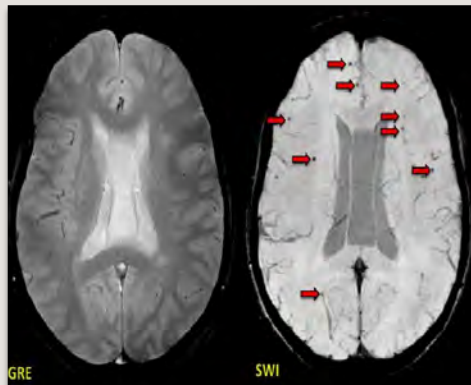


“Despite significant variability in sample characteristics, technical aspects of imaging, and analysis approaches, the consensus is that DTI effectively differentiates patients with TBI and controls, regardless of the severity and timeframe following injury. Furthermore, many have established relationship between DTI measures and TBI outcomes.”[v]

NeuroQuant: NeuroQuant measures the volume of structures of the brain and compares that information to normative databases to assist with diagnosis of neurological conditions, including traumatic brain injury.[vi] This can be done early on after an injury and compared to a later point in time to measure the differences for brain atrophy, *i.e.*, brain damage and death. In particular, NeuroQuant can be a very effective tool to show traumatic brain injury resulting from carbon monoxide exposure. Carbon monoxide exposure causes diffuse brain injury, meaning multiple lobes throughout the brain lose volume (injury) as opposed to a focal injury in a specific location, such as when the front and back portions of the brain are injured during a whiplash-type mechanism of injury. Measured loss of volume in the lobes diffusely throughout the brain can objectively prove that your client suffered a brain injury as a result of carbon monoxide exposure. Below are photographs showing global atrophy in the form of abnormal ventricular volume.



Susceptibility Weighted Imaging (SWI) and Gradient Echo (GRE): SWI and GRE are two additional tools for objectively showing brain injury. These tools allow the neuroradiologist to detect very tiny bleeds in the brain, known as microhemorrhages and calcifications. SWI uses a slightly different sequence and is 4-6 times more likely to find hemorrhages than its GRE counterpart, see the below comparison:



Neuroradiology must be Clinically Correlated: In consideration of all the various types of imaging that can be used to prove a brain injury, the findings that are most likely related to trauma include atrophy of the brain (global, hippocampal, cortical); white matter shearing and hyper intensities; bleeding, sudden swelling, and structural damage; and positive DTI findings. However, these findings mean nothing unless there is clinical correlation. This means that the positive finding on imaging needs to be clinically correlated by a medical professional both to the mechanism of injury as well as the clinical presentation of symptoms. Factors to consider as part of the clinical correlation include age, the mechanism of injury, any history of trauma or clinical suspicion, positive additional findings on imaging scans, exclusion of other risk factors, and the size and number of deviations from normal.

Common Defenses to Brain Injury Cases.

Certain defenses are commonly attempted to argue against the existence of the brain injury itself and whether the client experienced and continues to experience symptoms from the brain injury.

- “The person did not hit his or her head in the collision or incident.” It is well known amongst the medical community that a person does not have to actually hit their head in order to sustain a brain injury. It is the mechanism of injury itself that results in the injury. For example, when a person is in a motor vehicle collision and experiences a whiplash

- type of mechanism of injury, their head can move forward and backward without ever hitting anything. It is this forward and backward motion that can jostle the brain inside the skull, resulting in damage to typically the front and/or back portions of the brain. The movement of the head itself and the rotational forces are sufficient to cause injury.
- “The person did not have a loss of consciousness or post traumatic amnesia.” Just as a person does not need to hit their head to sustain a brain injury, nor do they have to experience a loss of consciousness. Also, there are times that the brain injured client does not realize that they lost consciousness. So you should dig deeper instead of take that information at face value. Walk your client through the accident and everything that they remember. For example, the client will say I remember getting hit and then the next thing I remember is someone knocking at my window. That is a loss of consciousness or post traumatic amnesia.
 - “The CT scan was without abnormal findings and is definitive proof that a person did not suffer a brain injury.” First, CT Scans do not show concussions or mTBIs. Second, not all mTBIs will show up on the other types of imaging above-described. Third, medical providers treat symptoms, not imaging, make sure you get your medical providers to diffuse the lack of findings on imaging.
 - “The ER did not indicate a concussion or head injury.” ER providers are often looking for the acute emergency problem that may need urgent care and treatment and do not always look for concussions or head injuries. Thus, look at the records for the symptoms, was your client complaining of any of the symptoms described above? In addition, it is also possible that symptoms do not immediately develop.
 - Probably the most common theory by the defense to refute a brain injury is the minor impact or light impact collision argument. Defense counsel loves to tout photos of vehicles showing little visible damage as definitive proof that a person could not possibly have sustained a brain injury in a collision. Just because a collision was a “light impact,” meaning the crash occurred at low speeds or did not result in a significant amount of visible damage to the vehicle does not mean that these collisions cannot cause a serious bodily injury or a brain injury. Unfortunately, whether or not the “light impact” argument is true, juries believe it. In this situation, it is critical to search for any facts or evidence to show why the light impact doesn’t matter. For example, it may make sense to have the frame of the vehicle measured to see if there was any damage to it that was missed in the damage estimate or vehicle repair. Was your client a particularly fragile egg? If so, it may not take as much force for he or she to get injured in a collision. Consult with an accident reconstructionist to decide whether it makes sense to hire an expert to opine as to how this collision caused injury to your client. If you take a “light impact” case, you will need to fight twice as hard and search for any little detail to beef up your case to prove how the forces generated in this collision were more than sufficient to cause injury.
 - Finally, the arguments that the worst brain injury symptoms appear first and the argument that all brain injuries get better, so prolonged symptoms must be attributed to something else are commonly raised. It is true that most concussions resolve within six months. Those brain injuries that do not resolve within that amount of time place the individual at risk for suffering with long-term deficits. Symptoms certainly can get better or worse as the individual works through treatment. However, the “worst first” theory has been debunked in the medical literature, so if you are facing that, be aware that there is literature that you can use for cross-examination on that issue.

Inadmissible Defense Comments on the Plaintiff’s Credibility.

Defense counsel commonly attempts, whether directly or indirectly, to argue or submit testimony by medical professionals that a plaintiff is malingering, exaggerating or feigning his symptoms, and that he is motivated to do so as a result of the litigation or secondary gain. Any such argument or attempt to submit evidence regarding same is an improper attempt to admit inadmissible evidence. A medical provider is not appreciably more qualified than a lay juror to form an opinion regarding whether the plaintiff is truthful about his injuries based on the medical evidence. These types of credibility determinations are solely within the province of the jury. Expert opinion testimony on malingering, exaggerating symptoms, and secondary gain is not helpful to a jury. Helpfulness to the jury hinges on whether the testimony is relevant to the case per C.R.E. 401. Defense expert opinions that a plaintiff is malingering or exaggerating is not relevant in that it is not helpful to the jury in determining whether a person suffered an actual brain injury as a result of a collision or other incident. The jury can make its own determination of credibility, and the jury should be permitted to arrive at its own conclusion without a defense medical expert inserting his or her prejudicial opinion. Any probative value of testimony or evidence regarding malingering, exaggerating, feigning symptoms, or motivation as a result of litigation is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Such evidence creates a serious danger of confusion of the issues or misleading the jury, as the jury may substitute the expert’s credibility assessment of the plaintiff for the jury’s own commonsense determination. It is improper to usurp the critical function of the jury with defense medical testimony regarding the plaintiff’s credibility. Any such evidence is inadmissible. Thus, if you are facing this issue in one of your cases, fight the opinion and move to strike it.

Know When to Hold ‘Em and Know When to Fold ‘Em.

In any brain injury case, it is critically important to know when to push and know when to fold. Because of the difficulty in proving an invisible disability such as a brain injury, the right time to push for the full value of the case is when all the facts and

evidence you gathered support doing so: demonstrated high prior level of function; good documentation of medical providers showing no prior history of the same or similar symptoms; strong evidence of liability and damages; and good support network of the injured person to build the story of who your client was before the brain injury and how the brain injury affected his or her life that ability to function.

Of course, when the facts and evidence do not add up, you may be taking a risk if you are pushing for too much for a brain injured client. It is also important to know when to fold. Be aware of this risk when liability is in question. Defense counsel will fight like hell against a brain injury case when the collision itself is a “light impact.” Be vigilant when there are questions surrounding client telling the truth as client credibility is essential to proving a brain injury. Having clean, clear medical history is critical, so if there are issues with the medical history, this may create an issue with proving the brain injury. For example, the lack of symptoms or diagnosis in the ER or at the first medical visit may create issues for proving when the brain injury occurred. The more of these trouble areas that exist, the more difficult it will be to prove your brain injury case. Be aware of the costs financially and emotionally, as there can be a significant psychological component for your clients to put them through litigation and ultimately not be successful.

Every Brain Injury is Different Because Every Brain is Uniquely Different.

Remember that because every brain is unique, the recovery for each person will be different.[vii] Struggling with the brain injury is particularly difficult for very high functioning individuals, as he or she is used to operating at a certain level. When a brain injury diminishes his or her ability to live and work as they did before, this creates intense frustrations due to the inability to function. Because each brain injured client is different, their specific needs will differ, which will alter how you should interact with them and assist them through their case. It is important to remind yourself as well as the client to be patient with their progress.

Know Your Available Resources.

Failing to take the time necessary to truly understand the medicine, the available treatments, the types of brain injury, and the client and their support system does a disservice to your client’s case. If you feel that you are in over your head handling a brain injury case, consult with a knowledgeable attorney and consider a co-counsel agreement. It is better to ask for help and be successful than to leave a struggling client in an unwinnable situation. Moreover, there are many available resources available through the Brain Injury Association or Alliance of your state which can be extremely beneficial to your client. Reach out to your local Brain Injury Association or Alliance to find out what resources your client may qualify for, it could make a world of difference. **P**

[i]https://acrm.org/wp-content/uploads/pdf/TBIDef_English_10-10.pdf.

[ii]<https://www.nichd.nih.gov/health/topics/tbi/conditioninfo/symptoms>.

[iii]<http://www.tbiguide.com/whoprofessionals.html>.

[iv]Christopher A. Mutch, et al.,*Imaging Evaluation of Acute Traumatic Brain Injury*, 27 NEUROSURG. CLIN.OFN. AM.409-39 (2016), available at<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5027071/>.

[v]Hulkower, M.B., et al. (2013) “A decade of DTI in traumatic brain injury: 10 years and 100 articles later.”AJNR Am J Neuroradiol 34(11): 2064-2074,available at<http://www.ajnr.org/content/34/11/206>.

[vi]Eric R. Braverman, et al.,*Evoked Potentials and Memory/Cognition Tests Validate Brain Atrophy as Measured by3T MRI (NeuroQuant) in Cognitively Impaired Patients*, 10 PLOS ONE80133609 (Aug. 5, 2015).

[vii]<https://biau.org/types-and-levels-of-brain-injury/>.

three important topics to include in your employment contract under Dutch, US and UK law

by priscilla de leede, mary edenfield and ed belam

You have a company with which you are doing business in the Netherlands, the United States and/or the United Kingdom. What are the three most important topics to include in your employment contracts under Dutch, American and English law regarding the termination of the contract?

From Dutch law perspective

1. Duration and termination of the employment contract

An employment contract may be entered into for a fixed term or for an indefinite period. If no fixed duration is agreed upon, the contract is considered to be for an indefinite period.

Please note that multiple consecutive fixed-term contracts may automatically turn into a permanent contract (“chain of employment contracts”) after a certain period of time and/or a certain number of contracts.

The fixed term employment contract ends automatically on the final date as mentioned in this contract. In principle, it is not possible to terminate such a contract prior to the agreed time, unless (1) this is explicitly agreed upon in the contract or (2) the contract is terminated with mutual consent. Therefore, we advise to also - alongside the final date of the contract - include a so-called premature termination clause. If you include a such a clause, the same rules for termination apply as in the event of a termination of a permanent employment contract. This means that a reasonable dismissal ground and prior approval from the court (in case of personal reasons, such as underperformance) or the Employment Insurance Agency (in case of financial/economic reasons or long-term illness) is required.

2. Notice period

When terminating an employment contract, a notice period needs to be taken into account to determine the termination date. Under Dutch law, the 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.

The statutory notice period for an employee is one month. However, under certain conditions parties may also agree upon a different notice period in the employment contract.

3. Post-termination restrictions

The employee may be restricted to work or operate for business competitors and to take over clients after termination of the employment contract. For this reason, a non-competition and non-solicitation clause can be

included in the employment contract, in addition to a confidentiality clause). In order to be valid, the non-competition and business relations clause has to meet the following requirements:

- must be in writing; and
- must be agreed upon with an adult.

It is not allowed to include a non-competition and non-solicitation clause in a fixed-term employment contract, unless (a) this clause stipulates your well-founded substantial business interests requiring such a clause to protect these interests and (b) why this specifically applies to the position of the employee involved. Furthermore, a court may assess whether the clause is reasonable, thus whether the duration, territory and activities to which the clause applies are sufficiently specified.

Last but not least: Do not forget to include a penalty clause linked to the violation of these post-termination restrictions!

From US law perspective

1. Termination

The contract should give the employer the ability to terminate employment immediately or on an expedited basis for cause. The contract should specify the conduct or other issues that will permit the employer to terminate for cause, as well as any notice requirements and whether the employee will have an opportunity to cure the issue before termination becomes final.

The contract should specify how an employer may terminate employment without cause. This is needed in case there are concerns with the employee's performance or conduct that do not meet the requirements for termination for cause, and to give the employer flexibility to respond to changing business needs. The contract should specify the amount of notice required (typically sixty or ninety days), and whether the employer has the option of providing pay in lieu of all or part of the notice period.

The contract should also address any requirements that apply if the employee wishes to resign, such as the amount of notice that is required and whether and under what circumstances the employer may terminate the employment before the end of the notice period.

2. Post-termination restrictions

Employers may wish to restrict an employee from starting a competing business or working for a competitor, and from soliciting customers or employees, during employment and for a period of time after employment ends. Applicable law varies from state to state, and state law should always be consulted. Generally such restrictions must be reasonable with respect to the length of time they remain in effect and the geographical area that is included. If the employee will have access to confidential information, the contract should include confidentiality and non-disclosure requirements that survive the termination of the contract. The contract should specify that the employer is entitled to injunctive relief for violations of these requirements, in addition to damages and all other available remedies.

3. Dispute Resolution

Employers may wish to require use of alternative dispute resolution (such as arbitration or mediation) in the event of a dispute, in lieu of litigation. Such provisions should specify how the arbitrator or mediator will be selected, the rules and procedures that will be followed (for example, the rules and procedures of a particular alternative dispute resolution organization), how the costs will be allocated, and whether the outcome will be binding. The contract should specify which state's laws will apply to the interpretation and enforcement of the contract. In addition, the contract should specify the venue for any proceedings.



Important to keep in mind: Since in the U.S., many aspects of the employment relationship are regulated at the state level, there may be different considerations depending on the state or states involved, and state law should always be taken into consideration.

From UK law perspective

All employers are required to give all employees certain key information (name of the employer, salary, job title, place of work, etc) in writing at the start of their employment. Typically however, employees will be asked to sign employment contracts which go much further than the minimum statutory requirements.

1. Termination

A well drafted employment contract should contain each of the following provisions relating to termination:

- a basic contractual notice period depending on the length of the employment:
 - between one month and 2 years: at least one week's notice;
 - between 2 and 12 years: one week's notice for each year of service;
 - 12 years or more: 12 weeks' notice.
- a pay-in-lieu-of-notice provision;
- an express garden leave provision; and
- a summary dismissal / termination for 'cause' provision.

2. Post-termination restrictions

Post-termination restrictions are a key business protection provision in all well drafted employment contracts for senior employees and directors. The law which governs them, however, is complex. Post-termination restrictions will be enforceable as long as they go no further (in scope of duration) than is reasonably necessary to protect the legitimate business interests of the employer. If any clause is deemed to go further than that, then a court will not re-write it and will not enforce it. To stand the best chance of being enforceable they need to be

well drafted and tailored to the individual's role and seniority, as well as to the nature of the employer's business and the industry they work in.

Typically they are stated to last between 3 and 12 months for a senior employee or director and typically they tend to cover:

- competition;
- soliciting and working with customers and prospective customers;
- poaching and employing key employees; and
- forbidding any interference with the employer's key suppliers.


If the restrictions are enforceable, employees do not have to be paid a salary whilst they are in force.

3. Confidential Information and Return of Property

A well drafted employment contract for any level of employee will contain a clause dealing with confidential information. This would principally cover what an employee can (and cannot) do with an employer's confidential information, but should also cover the return of any such confidential information on termination of employment.

Conclusion and advice

When doing business abroad in the Netherlands, the United States and/or the United Kingdom, it might be advisable to include clauses in your employment contract regarding the termination of the contract such as a (premature) termination clause, a notice period, post-termination restrictions and a clause regarding (alternative) dispute resolution.

If you need any help with drafting employment contracts under Dutch, American or English law or if you have any questions related to (the clauses to include in) employment contracts, please contact Priscilla de Leede (NL), Mary Edenfield (US) or Ed Belam (UK). 



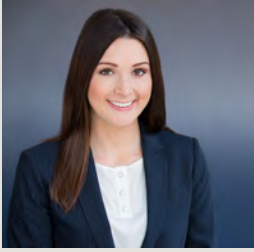
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YLS Membership Call – The membership calls take place the second Tuesday of every other month. Here is the call schedule for 2021:

- Tuesday, August 10th
- Tuesday, October 12th
- Tuesday, December 14th

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