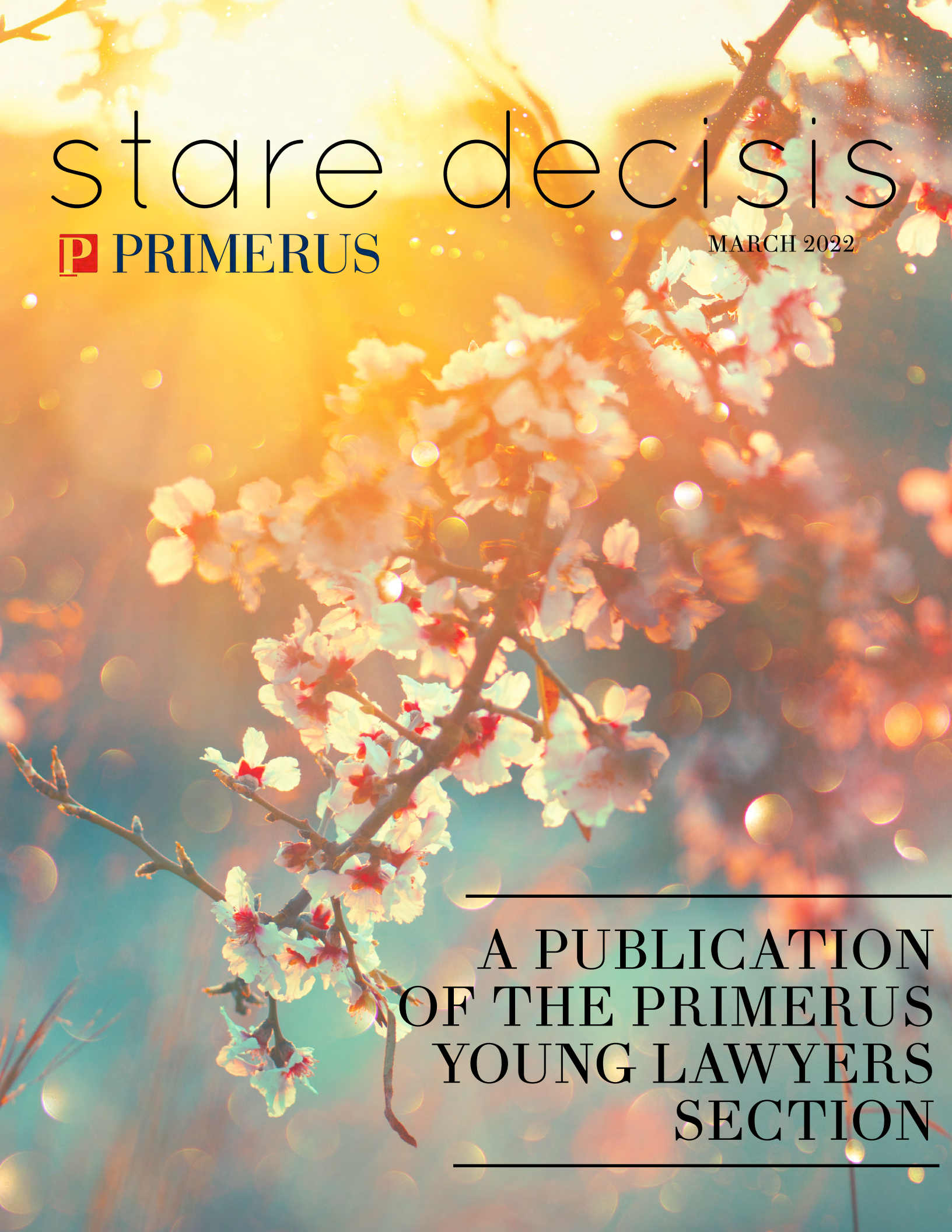

stare decisis

PRIMERUS

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A PUBLICATION OF THE PRIMERUS YOUNG LAWYERS SECTION

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chair column

by daniel pierron

Daniel C. Pierron of Widerman Malek, P.L. 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.

It has been a curious time to be the Primerus Young Lawyers Section chair. After agreeing to another year as chair, I am excited to join my YLS executive committee members and the incredible Primerus staff in preparing for the 2022 YLS conference coming up March 16-18 in Phoenix, AZ. Primerus firm Burch & Cracchiolo has generously agreed to host this terrific group of young attorneys, and I am elated to see my colleagues in person again.

For many of us who attended the 2020 YLS Conference in Coral Gables, that event was the last one we attended in-person before COVID shut the planet down. The YLS has long had remote bi-monthly section calls, but the 2021 YLS Conference not being in-person had a profound effect on me. Being unable to have the kind of relaxed conversation in-person conferences provide took its toll on me. Though the YLS continues to provide great programming and opportunities to connect via web conference, the extent to which the return of the in-person YLS conference brings me joy is difficult to overstate. Speaking only for myself, the rollout of apparently effective vaccines coupled with the emergence of a variant that appears to have comparatively milder symptoms that outcompetes more dangerous variants has given me something more than a glimmer of hope and has provided me with the confidence to resume something approaching full life. The YLS conference provides an unparalleled opportunity for young and new Primerus attorneys to develop professionally from the stellar presentations on topics including marketing, business development, and how to be an effective associate, as well as develop relationships with other Primerus attorneys that serve as the foundation of the kind of collegiality that defines the character of Primerus. This conference is a prime opportunity for new attorneys to engage with Primerus, and I strongly encourage they and their firms' leadership consider attending.

Lastly, as my reputation for being a technophile likely precedes me, I have had the opportunity to test drive MyPrimerus, the new platform for engaging with Primerus and its membership. MyPrimerus is a leap forward in enabling individual interaction with Primerus, making important resources readily available, improving the ability of members to see how other Primerus members are involved, and lowering barriers in communication. Be on the lookout for your invitation to register with MyPrimerus.

I hope you all have a healthy and prosperous 2022. Let us all find opportunities to support each other and those in need and find ways to demonstrate and promote the common values that define Primerus, chief among them integrity, civility, and service.

words to the wise

by jordan loper

For this edition of Words to the Wise, Jordan Loper of Christian & Small LLP in Birmingham, Alabama, combines the words of attorneys in the Primerus network from a variety of firms: Paul Russell of Russell Advocaten B.V. in Amsterdam, Netherlands and Robert Charbonneau of Agentis in Coral Gables, Florida. Below, these attorneys provide practical advice for new attorneys.

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

Paul Russell: The legal profession was instilled in me from the very beginning. In my youth, I helped out at my father's law firm in my spare time and so developed a passion for the profession. I completed my law studies, which normally took six years, in just over three years. In those days, there was no such thing as a specialization and the Bar Association required an all-round training. You were kind of a legal general practitioner. After my studies, I trained as a lawyer in The Hague, where I learned the ins and outs of procedural law. I can advise everyone who works in the legal profession to immerse themselves as much as possible in the litigation practice, so that you know where negotiations go if you cannot work it out together. Later the legal profession became more complex and you could not survive without a specialization any longer.

Robert Charbonneau: Quite by happenstance. I had washed out of the aviation officer candidate program with the Navy on a medical issue and was trying to find my way from a career perspective. I went into sales for a couple of years, found it incredibly unfulfilling, saw that a couple of my best friends from high school were in their first years of practice and seemingly enjoyed it and I thought, "what the heck, I'll become a lawyer too." Greatest decision of my life, and I did not even know it at the time.

Yes and no. I actually despised law school, did not much care for my classmates and thought that if these were the people with whom I was going to spend the rest of my career, I was going to be miserable. Luckily for me, the practice of law bore little resemblance to going to law school, and I really took to it. Every day was a new intellectual adventure. I think the biggest difference between now and then, for me anyway, is how segmented my practice area has become. I practice in the area of restructuring, bankruptcy and creditor's rights, and in my first 5 to 7 years of practice I did it all: I represented bankruptcy trustees, I represented consumer debtors in Chapter 7s and 13s, I represented Chapter 11 debtors, I represented statutory committees, secured lenders and purchasers of assets. That is virtually impossible to do today, at least in my market. You're either a consumer lawyer or business lawyer, and if you are a business lawyer then you are pigeon-holed into a variety of other subspecialties. I am a business lawyer, but I have somewhat resisted over-specialization in any one area, and I am wondering if that is because of the diverse representational background I had as a younger lawyer first coming out of law school. I also believe the world got a lot more complicated in the last 30 years, requiring a much deeper knowledge of narrower subject matter areas.

DESCRIBE YOUR PHILOSOPHY ON CLIENT RELATIONSHIPS AND MANAGEMENT.

Robert Charbonneau: I never intended "friendship" to become a client relationship philosophy, but it just developed

organically. I have to say that some of my best clients I also count among my friends.And it makes sense if you think about it. If you are going to spend a lot of time together in a stressful, high-stakes environment, that relationship is going to be a lot more pleasant, for both you and the client, if you connect at a personal as well as a business level. And if you do, it's difficult to *not* become friends with your clients. In terms of management, I get way, way out ahead of expectations, and try to manage them accordingly. There's some truth in the old adage "under promise, over deliver," but most people want you to shoot straight with them, and that's what I try to do. Also, whenever possible, I try to avoid surprising my client; most clients hate surprises, unless of course it's an unexpected win. Regular communication is key.

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

Robert Charbonneau: I think the word these days is access. Life moves pretty fast, being there, whether it's in an evening or on a weekend, to be able to address a client issue will put you top of mind with the client the next time they need something. Work-life balance is important, absolutely, but sometimes you have to put your life on hold for the needs of the client, and if you don't, the client will find someone who will.

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

Paul Russell: At the beginning of your career, only one thing matters. Becoming a good lawyer. Building up knowledge and skills. Becoming a pure lawyer. And always staying up-to-date in your field of law. Then you have something to "sell". And if you have something to sell, you have to let the world know about it. Publish articles, teach, and continue to develop and profile yourself.

It is essential that you are well-connected in society. You have to maintain your network well and actively seek and maintain contacts, also in times of Covid-19.

Currently, it is called Corporate Social Responsibility, but at Russell Advocaten we have always found it normal to do charity work in addition to our work, or to be politically active, for example, or to play an active role on a school board or on a board of a sports club.

Robert Charbonneau: Our firm does not hire any attorney unless we believe that attorney has what it takes to become a partner someday. What kind of partner is entirely in the hands of the associate lawyer. We foster and encourage immediate business development, understanding that real results do not typically follow for years, but we let them know that the best time to start their development is "right now."

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?

Paul Russell: In the past the adage at the top firms was: up or out. If you do not want to become a partner, it is better to leave the law firm. This statement is no longer tenable these days. Work-life balance has become very important, part-time work is very common and there are excellent employees who do not really want to become partners.

We find it very important that expectations are expressed by the firm and the employees. This prevents misunderstandings.

For example, we had an employee who could write great pleadings of high quality, but did not want to pronounce them in front of a judge. This is strange for a lawyer. But we paired this employee with a lawyer who actually liked to shine in court. A win-win for both of them and for the firm.

Robert Charbonneau: It sounds cliché, but when it comes to producing work product, take pride in what you do. Before sending your work to me to review, make sure you've read your work over at least 3 times. Spelling errors? When I see one, in the age of auto-correct, spell check and even AI, it tells me you don't care, and nothing will get you off my team quicker. Speaking of team, teamwork is really important in partner relationships. Find a partner you'd like to emulate, and get on his or her team. By that I mean let the partner mentor you, but remember the

relationship goes both ways. Community involvement is great and important, but work toward leadership in whatever organization you're in. If you're not putting in the time toward leadership I think you're wasting your time.

FROM YOUR PERSPECTIVE, WHAT MAKES AN ASSOCIATE STAND OUT?

Paul Russell: Knowledge, perseverance, commitment, sense of urgency, being proactive, integrity.

Robert Charbonneau: It's going to sound trite, but for me, and I suspect for most of my partners, it's the young lawyers that go the extra mile that stand out. No one gets in the door unless they are intelligent, articulate, and good writers who are comfortable speaking before large groups of people. But it is the young man or woman who puts in the extra time and work to consistently deliver outstanding product or results that separates themselves from the crowd.

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?

Paul Russell: You must always know exactly who you are working with and what your efforts are serving. Let there be no ambiguity about this.

Transparency between client and lawyer is essential. Do not have a client take advantage of you.

Robert Charbonneau: I love Ted Lasso, so I'm going to paraphrase one of his lines – There's two buttons a young lawyer should never hit: that's the panic and the snooze. It so easy for young lawyers to panic, and kind of understandable when they do, compared to someone with 15 or 20 years of practice. Never panic. All of that great decision-making ability and knowledge that you have goes right out the window when you panic. I can't tell you the number of nights' sleep that I lost as a young lawyer because I panicked. And it never helps anyway so don't do it.

It's also not a good idea to snooze. Of course get a good night's sleep every evening, but when you are at work stay focused and keep pushing forward, I can assure you your competition is.

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

Paul Russell: Be yourselves, remain yourselves. If you perform, perform at your best. Put all your effort in becoming a specialist in your field. It is only fun if you know your business.

However, do not only focus on your profession. There is always time and opportunity to do other things as well, as long as you manage to organize it well.

Robert Charbonneau: Love the process, and the process will love you back. Many times when I was developing either my attorney skill set or client development plan, I made the mistake of looking down the road, and worrying about whether I was doing "it", whatever "it" was, correctly. Making sure that you're getting it right is certainly important, but not at the expense of executing on your plan daily, and as your executing it, really enjoying it. If you're doing something, whether it is the practice of law, selling insurance, or whatever the endeavor is, and you're not truly enjoying it, you should stop immediately and find something else to do, because you will never be happy, and therefore never truly successful. We get to do this once. What a shame it would be for you to do it living someone else's life.

Paul W.L. Russell started studying law at the Free University of Amsterdam in 1973. After his studies he started working at Russell Advocaten, where he is now a senior partner. Russell is active in various fields of law, but within corporate litigation his super-specialty is Art & Law.

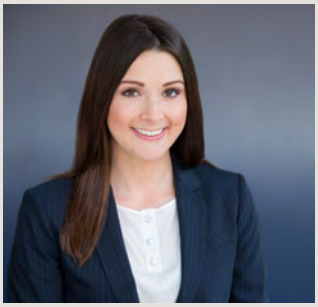
Robert Paul Charbonneau is a founding member and current managing partner of the Firm. He concentrates his practice in troubled loan workouts, business restructuring and dispute resolution and insolvency matters. Bob has particularly broad experience representing statutory committees, including creditors' committees, and funds purchasing distressed debt.

quick tips

five ways to improve your writing right now

by kathryne baldwin

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.



Young lawyers that incorporate solid, persuasive content while maintaining a readable writing style possess a critical skill, no matter the practice area. Concise, effective writing is such a hallmark development point, in fact, it is a favorite harping point for supervising attorneys when performance reviews come up. Get ahead of the curve and write more persuasively, immediately, by putting these simple steps into practice.

1. "**That.**" Once you are done with a draft of your writing, go back to make sure each time you use the word "that," the sentence would suffer if you did not use it. "That" is commonly used as part of a conversation dialogue, but clogs up your message when written down. The more concise your message is, the more likely your reader is to read it.
2. **Keep verbs cozy with nouns**. If you have a sentence that seems long or unwieldy, go back to check how far away your verb is from your noun. The closer those two words are, the better and the easier for your reader to follow.
3. **Beware the comma splice**. A comma splice puts two independent clauses together with a comma and no conjunction. Example: The Plaintiff did not say that at deposition, her attorney said it. Replace that comma with a conjunctive word or a semi-colon to make your writing easier to read. Corrected Example: The Plaintiff did not say that at deposition; her attorney said it.
4. **Watch out for double negatives**. Using a phrase like "not uncommon," in your writing requires your reader to do some mental gymnastics. Keep your writing straightforward and simple by saying exactly what you mean: "common."
5. **Use spell check.** If you are using a word processor, it is certain that program has a spell check feature built-in. Spell check is quick and easy to use, so take advantage of the opportunity. Typos are easy to make and can immediately put a reader off whatever you wrote. 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

RICHIE THAYER
CHRISTIAN & SMLL LLP (BIRMINGHAM, ALABAMA)

Richard "Richie" M. Thayer, Partner, Christian & Small (https://www.csattorneys.com/attorney/richard-m-thayer/)

Richard “Richie” Thayer has been a member of Primerus for over a decade and has made his presence felt throughout the organization in a variety of ways. Richie was originally introduced to Primerus by Duncan Manley. From there Richie helped create the Young Lawyers Section with the goal of connecting similarly situated young attorneys throughout the country to share their experiences and insights with one another. He stuck with YLS as it grew, helping to found *Stare Decisis* and eventually serving as Chairman in 2012 and 2013. After graduating out of YLS, Richie has gone on to serve on the executive committee for CLEs of the Primerus Defense Institute.

In Richie’s experience, the YLS presents younger Primerus members a foot in the door to earn future opportunities in the organization. Early contributors to YLS are often looked to down the road to lead more senior practice groups, events and institutions within Primerus. In turn, these opportunities beget additional networking, new connections, and ultimately develop more business. This dovetails directly with Richie’s advice to younger members: “use the YLS and let the YLS use you.” To Richie, there is no better exposure or advertisement of a younger attorney’s services (and, for that matter, return on a young lawyer’s membership fees) than having Primerus promote that lawyer’s work via publications, presentations and seminars.

While Richie acknowledges the tremendous value in connecting with other lawyers, ultimately the tangible value of staying involved with Primerus comes from the revenue earned on those contacts: “The firms and the lawyers that stay active and stay involved will tell you that Primerus has paid for itself five times over in just business development.”

Richie’s practice has mirrored this theme of getting involved and staying involved as he worked his way up to the partnership at Christian & Small. Although Richie began as a jack of all trades, his practice evolved swiftly because he was always mindful that the ultimate goal was to develop a personal book of business. In that respect, he imparts two pieces of advice for up-and-coming associates. The first applies to inside the walls of a law firm: be on time, do good work, meet deadlines and communicate honestly with supervising attorneys. The second pertains to the eventual origination of business: never lose sight of the value of networking and making connections. Richie urges young associates to take advantage of slow periods by checking in with current clients and reaching out to colleagues in different industries. Even if those colleagues and clients are not decision makers today, odds are they will be heading in that direction ten years from now. The key is to remain consistent and genuine and the work will follow.

Those looking to vet Richie’s advice need look no further than the practice that he has built. Although he spoke modestly about his success, he is a top partner at his firm and has built an impressive litigation defense practice that includes several large transportation and healthcare regulatory clients as well as work in several other practice areas. Richie remains heavily involved in Primerus and continues to help mentor members of the YLS to this day.

foundations:

advice for young associates

by Duncan Manley

Duncan Manley is the Chair Emeritus of the Defense Institute of Primerus. He served as the Institute Chair from 2004 to 2007. He is a partner at Christian & Small, a leading Alabama law firm. Duncan has more than 40 years of trial experience and is a graduate of the University of the South in Sewanee, Tennessee. After active duty as a U.S. Naval Officer, he received his J.D. degree from Vanderbilt University School of Law.

This is the first of a series of interviews with successful senior lawyers at various Primerus member firms offering advice to young lawyers on how to succeed and thrive.

What's the best advice you could offer associates as to how to work with partners in the firm?

Rarely say no, and then only for a very good reason. When you must say no, ask the partner for a rain check.

Be reliable! Do what you say you are going to do, by the time you said you would do it. Meet deadlines.

Strive to be the "go-to" associate. Be the person who partners want to seek out.

Your work product must be impeccable. No typos, no spelling errors, no formatting mistakes. One of our partners recently told me how much she enjoyed working with a certain associate who had written a motion that could be sent out without a single change. This is what partners want. If I receive a document with errors—that hasn't been proofread—I take it as a reflection on the work ethic of the lawyer.

Exhibit enthusiasm for your work and your career. Don't complain—especially not to other associates who aren't in a position to address your concerns. If you have an issue, take it up with a partner directly.

Ask to "shadow" a partner—accompany him or her to meetings, to court. Clients don't want to pay for double teaming, so you may have to work nights and weekends to stay on track to meet your billable goals, but the non-billable "shadowing" will allow you to gain invaluable insights and experience. Invest in your own career.

Volunteer for work and projects; don't wait to be asked.

Follow these four rules—always:

1. Do what you say you are going to do.

2. Finish what you start.

3. Be on time and meet deadlines.

4. Say please and thank you.

Consider the opposite of the above four rules and you'll see why they are so important to follow.

What makes a star a star at your firm?

Excellent legal work!

Impress clients—when we receive a letter or note or call from a client mentioning they were pleased with an associate's results or service, we circulate it within the firm.

Exceed your billable hour goals or other production goals every year.

Be interested and active with regard to marketing and business development. Client development and business development are keys to success.

Join organizations and be active—take a leadership role.

Stay in touch with classmates—connect and network.

Become knowledgeable in an area of law and share your knowledge by speaking and/or writing—become recognized as an authority.

Develop excellent communication skills. Learn to express yourself articulately, whether on paper, in conversations, or in presentations. Read books, attend seminars, take a Dale Carnegie course, join Toastmasters—do what it takes to become adept and at ease.

What's the kiss of death—in terms of associate behavior—in your opinion?

Unethical conduct—this goes without saying.

Bad conduct or behavior, whether inside or out of the courtroom.

Lying, deceitful behavior, or being untrustworthy—once you develop a reputation for these things, you're done in our industry.

Failure to follow firm rules and administrative procedures can be damaging as well.

How have you developed business over time?

Be interested in developing business and in marketing. In every law firm, there are people who are good at it and people who aren't. The successful lawyers are those who want to do it. Unsuccessful lawyers tend to be shy or uninterested—uninterested in others and uninterested in developing their marketing skills.

Marketing is nothing more than meeting people. Meet them and care about them. Develop a relationship over time—stay in touch. Inspire confidence that you will do a good job.

Seek new business and develop new relationships AND take great care of the clients you have. You must do both.

For more information about Mr. Manley, please visit www.csattorneys.com or the International Society of Primerus Law Firms.

achieving gender equality at work: equal pay, closing the gender pay gap, and gender-neutrality

by priscilla de leede

Priscilla de Leede of Russell Advocaten advises both Dutch and foreign companies on all aspects of employment law. She litigates and negotiates for companies in issues regarding dismissal, restructuring, non-compete disputes, contracts, and the position of directors. Her special focus is on works councils for whom she regularly provides training courses. Priscilla publishes on a wide variety of topics within the field of employment and corporate law, such as employee illness, corporate immigration, and the posting of workers.

Hot topics these days: Why do men and women not receive equal pay for equal work? What are the possibilities to close the gender pay gap? And how do employers ensure inclusion and diversity at the workplace? Can we as law firms promote gender-neutral legal documentation and a gender-neutral work environment within the companies of our clients?

Following my recent participation in the panel of the U.S. Global Equity Organization (GEO) regarding equal pay and (closing) the gender pay gap, I would like to call attention to these topics in this article. Hence, I will discuss the global, European and Dutch legal framework for equal pay of men and women, and how Europe tries to achieve equal pay and to close the gender pay gap. Thereafter, I will discuss ideas for your law firm to stimulate gender neutrality within your clients' companies.

Equal pay and gender pay gap

Equal pay

Equal pay covers all forms of (direct and indirect) pay, including salary, bonuses and stocks. Employers have the legal obligation to pay women and men equally if they perform equal work or work of equal value. Whether employees are paid equally is assessed by means of a reference person from another gender.

Global legal framework

There are several important conventions regarding equal pay at a global level. One of the most important is the UN Convention on the Elimination of all Forms of Discrimination against Women, which addresses gender equality in employment law. States that have ratified this convention have to incorporate the principle of equality of men and women into their legal system and abolish all discriminatory laws. In addition, there are several important conventions regarding equality set by the International Labor Organization (ILO) to which almost all UN Member

States are affiliated. These conventions are particularly concerned with equal pay. One of the most important conventions of the ILO is the Equal Remuneration Convention that addresses equal pay for men and women for work of equal value.

European legal framework

The European framework starts with the general principle of equal pay for equal work or work of equal value. This is one of the European Union's founding principles that allows the EU to create laws, like directives, to ensure equal pay between women and men. The two most important directives are: firstly, the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This Directive refers, among other things, to equal pay for labor of equal value, equality within the context of social security, and equality concerning the hiring and promotion process. And secondly, the Directive on work-life balance for parents and caregivers. This Directive lays down minimum requirements related to paternity, parental and carers' leave and to flexible working arrangements for parents or carers, encouraging men to take up more care-duties towards children. In addition, there is case law, such as judgments of the European Court, which states that 'positive discrimination' to hire women via a preferential policy is allowed under certain circumstances.

In Europe, there is a proposal for a directive and a recommendation of the European Commission to stimulate pay transparency. It gives employees of companies with more than 250 employees the right to request information on how their earnings compare to those of others doing equal work, to be able to claim equal pay. EU Member States need to implement legislation to achieve pay transparency. Several countries have already done so. For example, the Netherlands drafted a legislative proposal to introduce a certificate for companies as proof that women and men receive equal pay for work of equal value. Another initiative in Europe is the European Equal Pay Day, a symbolic day to raise awareness that female workers in Europe on average still earn less than their male colleagues. It might be an option for companies to set a number of fixed dates during the year, for instance on Equal Pay Day and after the yearly appraisals, to assess whether the women and men in their company that perform equal work are paid equally. If it turns out that this is not the case, the companies can correct it.

Dutch legal framework

In the Netherlands, there is a strong framework for equal pay. For example, the Netherlands has a statutory minimum wage that varies per age but is similar for everyone, regardless of a person's gender. This ensures that there is a bottom-line of equality. Furthermore, collective labor agreements often prescribe wage scales that apply to both men and women, such as in the metal industry. Part of ensuring equal pay is to acknowledge the difference between women and men, which under Dutch law can be found in, inter alia, (partly) paid pregnancy and maternity leave, and parental leave to improve the women's unequal position in the labor market.

In addition, a law has just been passed that aims to improve the gender balance among non-executive directors of companies listed on stock exchanges. This law is likely to enter into force per January 2022, and is meant to tackle the lack of women in top positions by, for instance, a binding women quota of 1/3 in supervisory boards. The

appointment of a supervisory board member that does not contribute to a balanced composition of this board will be null and void.

Gender pay gap

In addition to equal pay, there is the gender pay gap. It measures the difference between men's and women's average hourly pay in percentage terms. The higher the percentage, the less women earn compared to men.

As regards Europe, the gender pay gap differs significantly within the countries across Europe. Estonia has the highest gender pay gap in Europe (25.6%) and Luxembourg the lowest (1.3%). In the Netherlands women earn approximately 14% less than men. The gender pay gap differs per sector and age. In most of the EU Member States, the gender pay gap is higher in the financial and insurance sector than in the business economy as a whole and is higher in the private sector than in the public sector. This might be because in most countries pay is determined by transparent wage scales that apply equally to men and women. The gender pay gap is generally much lower for new labor market entrants, thus young employees, and tends to widen with age.

Causes of the gender pay gap

In Europe, even employers who pay men and women in the same job equally may still have a large pay gap. How come? There are a few main reasons for this. Firstly, there is an imbalance in work-life balance. On average, women perform more unpaid domestic and care work and less paid work compared to men and also take more time off from work for this; they take more career breaks and are more likely working part-time than men. Secondly, there is sectoral segregation which means that women tend to be overrepresented in certain sectors of the labor market: they have careers as a nurse, teacher, and cleaner. In other sectors, such as science, technology, engineering and mathematics, men are overrepresented. On average, sectors in which women are overrepresented pay less than the sectors in which more men are working, which contributes to the gender pay gap. Thirdly, as you can see there is not only a segregated labor market, but also a division between lower and higher paid positions. Women often do not reach and hold top positions in a company as often as men due to the already mentioned career breaks and part-time work. Of course, higher positions are paid better and also, for example, stocks in Europe are usually only granted to employees in top positions (such as directors), which are mostly held by men.

Closing the gender pay gap

Taking into account the aforementioned and in particular the briefly discussed legal framework at both global and European level, a lot of legislation and initiatives exist for ensuring equal pay and closing the gender pay gap. The general rule that men and women should be paid equally by itself does not lead to pay equality and the absence of a gender gap. On top of that, this rule is hard to enforce. Often, women do not even know that they get paid less than their male colleagues, as salaries across a company are not made public. Pay transparency is therefore the first step. In addition, minimum wages and salary scales may help to tackle the sectoral difference in pay between men and women. They ensure that, despite the sector in which an employee works, they always have a right to a minimum amount of salary which works towards equal pay.

As already mentioned, a reason for the gender pay gap is that women perform more hours of domestic and care work and less hours in paid work. A way to tackle this is by stimulating men to take on more of these domestic and care duties. In Europe, this is tried via the Directive on work-life balance for parents and carers that grants, amongst other things, a minimum of parental leave. In most European countries the law also prescribes additional specific types of leave for women (and men), such as paid pregnancy leave, paternity leave, etc. Lastly, within the EU there are also rules trying to close the gender pay gap by enabling more women to reach higher paid positions within companies. This is mostly done by a target number or a quota of women in (supervisory) boards with far-reaching sanctions if you do not comply with this.

Gender neutrality: What can we do?

In the context of gender equality, we would also like to briefly address the ubiquitous topic of gender neutrality.

After all, it may be the start to achieve gender equality at work. Companies, employees in the workplace, and even we as lawyers (often) do not seem to be consciously aware of gender neutrality. To give an example from our practice: We still see a lot of contracts and other legal documents in which references to the male gender ("he/him/his") are made by default. Even if it concerns a female contractor/employee, many employers are still using standard documents and do not change the references made to the male gender. Should we as lawyers not stimulate our clients to pay attention to all their employees by offering them documents that are drafted inclusively?

Contracts, agreements, policies – it is, of course, important for their language to be accurate and precise. But in view of gender equality in the workplace they should also be inclusive and provide equal respect to all employees. Here, it often takes small changes to make a big difference. How can we act when servicing clients? We might start by avoiding nouns that might appear to assume that a person of a particular gender will do a particular job or role, such as "chairman". Instead, we could use "chairperson". Further, we can, for example, rephrase sentences to avoid the need for a gendered noun or pronoun altogether, or we could use gender-neutral pronouns (such as "they/them/their"). These are all just small things, but they contribute to the big picture of gender equality.[1]

All in all, there are a lot of things to consider to reach equal pay, close the gender pay gap, and promote gender neutrality within your clients' companies. However, awareness is the first step to change. Do you help make a difference to achieve gender equality at work?

If you have any questions regarding this article, please contact Priscilla de Leede, LLM. at priscilla.deleede@russell.nl. She is an employment lawyer at Russell Advocaten in Amsterdam, the Netherlands, advising national and international entrepreneurs and organisations in disputes concerning personnel, employee participation and contracts.

[1]Some governments even offer guides to gender-neutral drafting and demonstrate how easy it is to draft in a way that is legally effective and gender-neutral.

how a little-read law review article became an e-book and series of alerts distributed to thousands on social media

by amber vincent

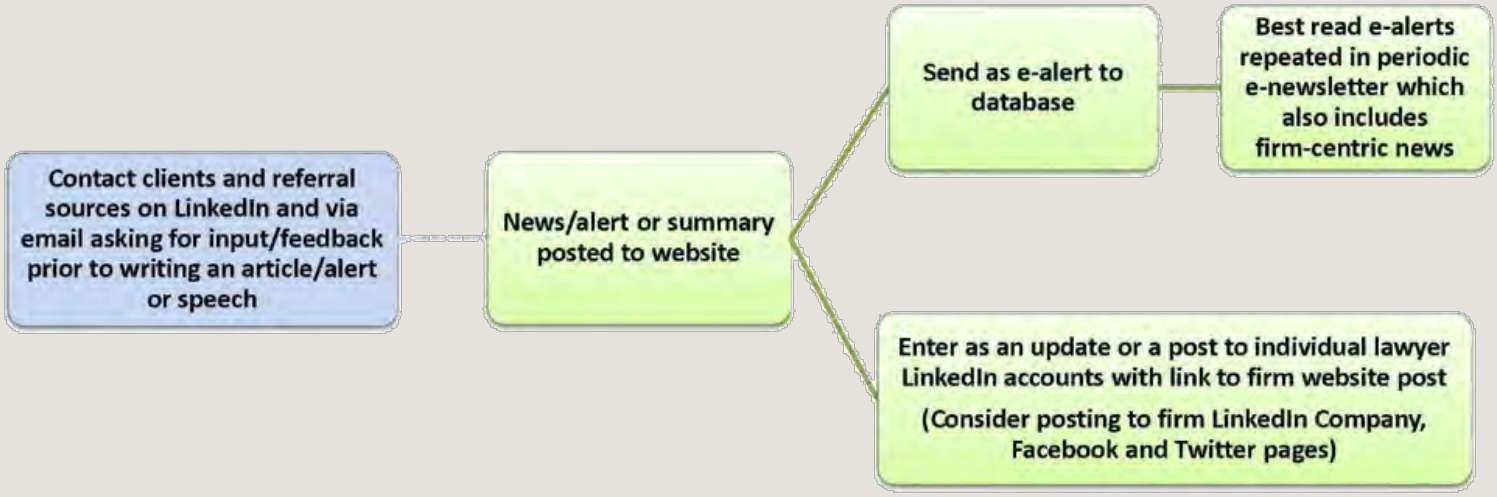
Amber Vincent is president of Alyn-Weiss & Associates, a consulting firm focused on creating strategic plans and differentiating ways to market small-to-midsize law firms across the country. She brings her energetic approach to rather tedious projects inside law firms – website redesigns, database implementation, 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.

We recently re-purposed a law review article written by a client using it as the basis for a series of articles that will reach the authors' clients, prospects and referral sources through direct distribution and social media.

In short, an article that took an extraordinary amount of time to write and was destined for limited readership and impact was restructured into powerful marketing content that will have a long shelf-life.

In general, we recommend firms follow the protocol below when generating articles or alerts:

In this case, our client handed us a copy of a 55-page law review article on non-compete agreements and asked: "Is there anything we can do to get more out of this?" The recommendations we made will work for most any article, not just for those written for a law review. They would hold true for briefs, too. Additionally, if you get a fair amount of work from other lawyers, in private practice or in-house, CLE materials are great for re-purposing.



First, we broke the law review article into a series which was easy. The table of contents gave us the logical breakpoints: an employee's right to compete; employee fiduciary duties; covenant enforceability; litigating covenants and drafting agreements. With an introduction that was a slight rewrite of the article's abstract drafted to appear at the top of each article in the series, we were ready to go.

We advised our client to do the following to get the most out of the new series:

1. The articles should become firm blog posts appearing once every 2-4 weeks.

2. The authors should share the article as an Update on LinkedIn, and post on their individual LinkedIn Publishing platform (click the “Write an Article” button inside LinkedIn to get to this section).

3. The Company should share each blog post on its profile and notify employees so they could share the content with their Connections. The power of LinkedIn comes from our individual Connections, which often, includes in-house lawyers, executives, and business owners directly affected by the content shared. We recommended colleagues sharing the post include a message like: "My colleague, INSERT NAME(S) HERE, created a four-part series about non-compete agreements – make sure to read this as a business owner or someone working with owners to help avoid issues before they become issues.”

4. When the series has run, the copy should be formatted into an e-book or whitepaper offered for download on the firm's website. We suggested calls-to-action be inserted into the digital version urging readers to contact the authors. Links to the download should appear on the practice group page of the firm's website, and on the author's bio page(s).

5. When the e-book/whitepaper becomes available, a press release, optimized for search and put on a third-party news site, such as PRWeb or PRNewswire, should be considered to drive traffic.

6. As a leave-behind and to give to select prospects and key clients, we suggested the e-book/whitepaper also be formatted for hard copy. Self-publishing software makes this easy, and you can print on demand; no warehousing needed, easy updating.

This re-purposing and reformatting of an article into blogs, on social media and to hard copy is a best practice scheme we recommend firms follow whenever substantive text is available. Briefs discussing substantive law also can be content fodder. We have recently written blog posts using briefs our clients created which described a state's guardianship and conservatorship laws, what constitutes undue influence, the doctrine of good faith and fair dealing.

Think of what lies in years of briefs on your firm’s document drive!

As we know in the online digital search world, search engines try to assess authority based on relevant and meaningful content when deciding what to show as answers to search inquiries. Using your educational and sourced content to develop frequency and reach, helps to optimization your content while also promoting your thought leadership across various platforms.

Some will say that following our recommendations means people will read or see the same article more than once. That's correct and intended.

Frequency is requisite to your success. As Dale Carnegie said: "tell the audience what you are going to say. Say it; then tell them what you've said."

when pet owners file litigation against veterinarians, it's rarely over money

by peter tanella and melody lins

Melody M. Lins is an associate in Mandelbaum Barrett's Corporate Law Practice Group. Melody focuses her practice on business entity formation, mergers and acquisitions, joint ventures, commercial transactions and corporate governance concerns, frequently for start-ups, family-owned businesses and closely-held businesses. She also advises dental groups, veterinary groups and physicians across the country in the acquisition and sale of professional practices.

Peter Tanella is Chair of the Firm's Business Law Practice Group and its National Veterinary Law Center, as well as a member of the Firm's Executive Committee. He is a nationally experienced business lawyer and trusted advisor to his clients. Peter's practice focuses on representing entrepreneurs, veterinarians, emerging growth companies, privately owned mid-cap enterprises and owner-managed businesses.

As if running a business isn't hard enough, veterinarians often worry about getting sued for malpractice or negligence. One reason to be fearful is obvious – a well-publicized lawsuit can quickly ruin a veterinarian's career and practice. Another reason to be fearful is less obvious – absolutely no one in the world, not even an attorney, can predict the outcome of a lawsuit with perfect certainty. That's because the outcome of litigation depends on many factors, including the facts and circumstances of the case, the personal ideology of judges and juries, and the type of lawsuit brought by a pet owner. To illustrate that point, and uncover a few best practices veterinarians can follow to safeguard against lawsuits, let's dive into a recent appellate case in New Jersey.

The case of Amor the cat

In this case, the plaintiff brought his sick cat, Amor, to a local veterinary hospital. Amor was subsequently diagnosed with saddle thrombus, a heart condition, and needed to be euthanized. During the euthanasia, Amor bit one of the staff members. The veterinarian informed Amor's owner that pursuant to state law, a brain tissue sample was required to determine whether the cat had rabies. The plaintiff explained to the veterinarian that Amor was a vaccinated indoor cat, and was never outdoors. He also provided Amor's vaccination records and suggested that the veterinarian speak to Amor's primary veterinarian.

Before Amor's body was sent to testing, the plaintiff was given the opportunity to say goodbye. At that time, Amor's owner cried, as he held Amor's body, spoke to him, and sang to him before the veterinarian took Amor away. At this time, the plaintiff also advised the veterinarian, not once but twice, that he intended to display Amor's body at the pet cemetery prior to cremation. When the negative rabies test was returned, Amor's body was released to the plaintiff.

When he viewed his pet at the cemetery, the plaintiff discovered that Amor had been decapitated due to the

brain tissue sampling, and his head had been disposed of as medical waste. The veterinarian never explained to plaintiff what a rabies brain tissue sample entailed. Similarly, the veterinarian never provided the plaintiff with other options for sampling, even though other less drastic options existed. Plaintiff was also not informed that his pet's head would not be returned after the testing was completed, even though such a request could be made.

As a result of this incident, the plaintiff went "into a state of shock," in front of the pet cemetery's staff. He also called the police department and requested to be connected to grief counseling services.

An analysis of the plaintiff's lawsuit

Approximately two years after Amor's death, the plaintiff filed a complaint consisting of one count of negligent infliction of emotional distress, six counts of negligence, and one count of bailment (a legal term involving the transfer of personal property for a short time). This article will solely discuss the first count of the plaintiff's complaint, in which the plaintiff alleged that he developed severe mental and physical health problems because of the incident.

The plaintiff's suit was dismissed at the trial court, but on appeal, the appellate court ruled that the veterinary hospital had a duty to return Amor's body in an acceptable condition. It also ruled that the veterinary hospital breached their duty to Amor's owner by disregarding the obvious mental distress he would experience from seeing Amor's decapitated body, and by decapitating Amor without informing him of less drastic alternatives, pursuant to the New Jersey Veterinary Procedures for Handling Rabies Situations. Ultimately, the appellate court reversed the trial court's dismissal and remanded the case for trial.

As of this publication date, the case is in discovery, during which time both parties gather evidence to support their positions. This is often a time when people come to the negotiating table, in order to strike a settlement. Does Amor's owner even want to settle? And if so, what would they want? That is unclear. He did not cite a specific amount of money in the complaint, which instead seeks an award of compensatory damages, lost wages, pain and suffering, and anything else ordered by the court. Since this is somewhat subjective, Amor's owner would have to quantify his losses, and convince the court or a jury that the amount he eventually asks for is warranted, should he win the case.

Key takeaways from the decision

The appellate court clearly outlined the mistakes that led to this lawsuit, and by analyzing those mistakes, a few best practices emerge:

1. **Empathy is a critically important quality**: It is important for veterinarians to know their client and pay attention to social cues. In this case, the veterinarian and staff did not place enough emphasis on the plaintiff's obvious emotional distress. The court emphasized the fact that the plaintiff cried loudly, held Amor's body, spoke to him, and sang to him before the cat's body was taken away. As this case highlights, it is more likely that a court will find "foreseeable damage," if a highly emotional or sensitive client is involved. When these situations arise, it's important to recognize them and handle accordingly.

2. **Learn to communicate effectively**: Spending time with clients and practicing effective communication, oral and written, is one of the best ways to ward off malpractice and legal liability. It is a veterinarian's responsibility to ensure that clients are fully informed about their pet's treatment and their options. In this case, the client knew nothing more than his cat was being tested for rabies. He was not informed how the test was conducted, whether alternate testing was available, and in what state his pet would be returned to him.

3. **Listen, and then listen some more**: We all know the feeling of seeing a doctor that didn't spend enough time with us, or wasn't really listening. Listening to the client could have played a large role in avoiding this lawsuit. The plaintiff clearly explained that Amor was an indoor cat and that his vaccinations were up to date. Even if testing was indeed necessary, the plaintiff also repeatedly put the veterinarian on notice that he would be viewing Amor at the pet cemetery. Nevertheless, the hospital did not take any of the precautionary measures that were available.

4. **Train staff to handle difficult situations**: An emotional intelligence workshop, or even a basic training session that reviews different client scenarios can help prepare staff to handle difficult situations. For example, in this case, when the plaintiff called the hospital to ask why he was not informed that Amor would be decapitated, an employee referred the plaintiff to the Department of Health with Amor's case number – a decision that left an emotionally distraught client angry, and with unanswered questions. Subsequent calls to the veterinary hospital led to similar

outcomes for the plaintiff, and eventually, to litigation. If veterinarians run through situations like this with their staff, and develop a set of best practices, they may be able to prevent difficult matters from escalating.

The big takeaway

Lawsuits are often *not* about money. They frequently arise not because of the initial action, but because people feel that they were ignored, or mistreated, or even lied to by people they trusted. Luckily, lawsuits are not inevitable. If veterinarians hone the skills noted above, they stand a much better chance of avoiding lawsuits, or improving their odds in lawsuits that do arise.

slapp suits in colorado: past, present, and future

by kylie schmidt

Kylie Schmidt is an Associate at Ogborn Mihm, LLP of Denver, Colorado. Kylie has spent her entire career handling complex civil litigation matters. Kylie prides herself on listening to her clients and helping them understand the legal system. She enjoys working with people of all ages who have suffered injuries due to the wrongs of others. Kylie is prepared to take a case through verdict when needed, and is proud to call herself a trial lawyer.

Strategic Lawsuits Against Public Participation ("SLAPP") have become a common tool for intimidating and silencing critics from exercising their First Amendment rights. The goal of a SLAPP suit is not to win on the merits, but rather to discourage a person's right to free speech through the prospect of expensive litigation.

The acronym SLAPP was coined in the 1980s by University of Denver professors Penelope Canan and George W. Pring. [1] The professors originally defined the term as "a lawsuit involving communications made to influence a governmental action or outcome, which resulted in a civil complaint or counterclaim filed against nongovernment individuals or organizations on a substantive issue of some public interest or social significance." [2] This definition morphed as time went on, and includes all suits about speech on any public issue in the most broad interpretations. Colorado's judicial approach to SLAPP lawsuits originated from a zoning dispute in Evergreen, Colorado. [3] The environmental group Protect Our Mountain Environment ("POME") to a real estate developer's approved application to rezone 507 acres of land in Evergreen, CO. [4] The district court ruled against POME on May 9, 1980. [5] Shortly before the ruling was entered, the real estate developer responded to the POME's challenge by filing a lawsuit against the group and its counsel. [6] The suit claimed abuse of the legal process and civil conspiracy with counsel to bring a groundless lawsuit, among other claims, and sought $10,000,000 in compensatory damages and $30,000,000 in exemplary damages.[7]

POME filed a motion to dismiss, arguing that its previous action against the developer was a lawful exercise of its First Amendment right to petition the government for redress of grievances. [8] The case ultimately went to the Colorado Supreme Court which, in an effort to balance constitutional free speech rights with the deterrence of baseless litigation, established an anti-SLAPP framework that made it easier for defendants to obtain

[1]George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out(1996).

[2]*Id.*

[3]*Protect Our Mountain Env't, Inc. v. Dist. Court of Cnty. of Jefferson*, 677 P.2d 1361 (Colo. 1984).

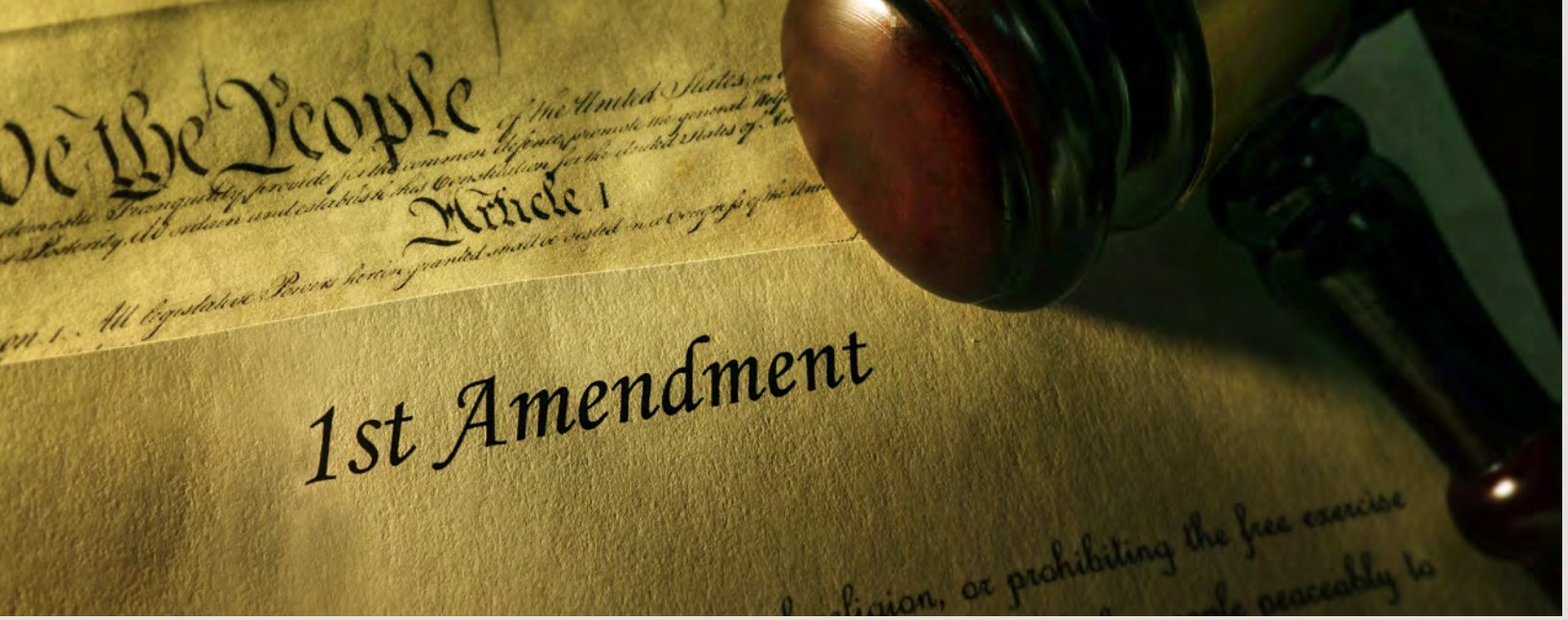
[4]*Id.* at 1362-1363.

[5]*Id.* at 1364.

[6]*Id.*

[7]*Id.*

[8]*Id.* at 1362.



dismissal of SLAPP suits.[9] The *POME* court promulgated a new rule for cases concerning alleged misuse or abuse of the administrative or judicial processes of government:

That standard requires that when, as here, a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.[10]

Notably, the scope of this rule was limited only to circumstances where an administrative or judicial process is abused. A defendant that successfully challenged a SLAPP suit under POME would not be entitled to reasonable attorneys' fees.[11] Although the 1984 opinion didn't use the term SLAPP, it still established the methods by which Colorado courts have addressed SLAPP lawsuits for several decades.

Judicial and legislative responses following POME strongly favored protecting citizens from the harmful effects of SLAPP suits. New York Supreme Court Judge J. Nicholas Colabella said in reference to SLAPPs: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." [12] California became the first state in the country to enact a law protecting individuals and businesses against SLAPPs, which are now known as anti-SLAPP laws. In 2019, Colorado became the 31st state to enact an anti-SLAPP law.

Colorado's Anti-SLAPP Statute

Near the end of the 2018-2019 legislative term, Senator Mike Foote, Representative Lisa Cutter, and Representative Shannon Bird introduced HB 19-1324.[13] HB-1324 ("Anti-SLAPP Statute") passed; it applied to cases filed on or after July 1, 2019.[14] The general assembly determined it was in the public interest to "encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process."[15] The general assembly further found the purpose of the law was to encourage and safeguard a person's constitutional rights to petition, speak freely, and associate freely, while at the same time

[9]*Id*. at 1368-1369.

[10]*Id*.

[11]C.R.S. 13-17-201.

[12]*Gordon v. Morrone*, 590 N.Y. S.2d 649, 656 (N.Y. Sup. Ct. March 31, 1992).

[13]Strategic Lawsuits Against Public Participation, H.R. 1324, 72nd General Assembly (Colo. 2019).

[14]*Id.*

[15]C.R.S. 13-20-1101(1)(a).

protect the right to file meritorious lawsuits for demonstrable injury.[16]

As compared to POME, Colorado's Anti-SLAPP Statute significantly expanded the acts afforded protection that an individual may undertake in furtherance of one's right of petition or free speech.[17] In addition to protecting defendants of SLAPP suits related to written or oral statements made before a legislative, executive, or judicial proceeding, the law covers such statements made in connection with issues under consideration in those same proceedings.[18] Further, written or oral statements and other conduct or communication on issues of public interest are covered by the new statutory scheme.[19] When a suit concerns an act in furtherance of the person's right of petition or free speech in connection with a public issue, it is subject to a special motion to dismiss unless the plaintiff establishes there is a reasonable likelihood the plaintiff will prevail.[20] The special motion must be filed within 63 days after the complaint is served and scheduled for a hearing not more than 28 days after service of the motion.[21] The court has discretion to extend the deadline for the special motion to dismiss, and may also schedule hearings beyond the time frame imposed by the statute due to the court's docket.[22] The court must consider pleadings and affidavits from the parties that state the facts upon which the liability or defense is based.[23] If the court determines the plaintiff has established a reasonable likelihood that the plaintiff will prevail on the claim, neither the ruling or the fact of the determination is admissible in evidence at any later stage; the burden of proof for the original claim remains unaffected.[24]

Discovery is stayed upon filing of a notice of the special motion until entry of the order ruling on the motion, unless the court orders specific discovery take place.[25] Defendants that prevail on the special motion to dismiss are entitled to attorneys' fees and costs unless the court determines such a motion is frivolous or filed only to cause unnecessary delay.[26]

The procedure with the special motion to dismiss does not apply to actions brought by or on behalf of the state enforcing a law or protecting against an imminent threat to health or public safety.[27] Also excluded are actions brought solely in the public interest or on behalf of the general public where certain conditions are met.[28] Suits brought against individuals engaged in the business of leasing goods or services arising from any statement of conduct by that person are not subject to these procedures when particular factors are met.[29] To ensure the protections apply to news and press sources, the statute specifically excludes those employed by newspapers, radio or television stations, or similar entities where information is communicated to the public.[30]

Orders granting or denying a special motion to dismiss can be addressed via an immediate interlocutory appeal.[31] This allows a defendant to pause the lawsuit and directly appeal to a higher state court before discovery in the lawsuit can begin, which helps prevent the costly discovery process.

Prediction: California Law will Guide the Interpretation and Use of Colorado's Anti-SLAPP Statute

Colorado's Anti-SLAPP Statute tracks, almost verbatim, Cal. Civ. Code § 425.16 ("California's Anti-SLAPP Act") which was first enacted in 1992.[32] However, Colorado's Anti-SLAPP statute lacks a "SLAPP back" provision. SLAPP back provisions like California's enables the defendant in a SLAPP suit to file one in return after successfully obtaining dismissal of the original SLAPP suit.[33] The SLAPP back behaves similarly to a malicious prosecution lawsuit.

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[16]C.R.S. 13-20-1101(1)(b).

[17]C.R.S. 13-20-1101(2)(a).

[18]C.R.S. 13-20-1101(2)(a)(I)-(II).

[19]C.R.S. 13-20-1101(2)(a)(III)-(IV).

[20]C.R.S. 13-20-1101(3)(a).

[21]C.R.S. 13-20-1101(5).

[22]*Id.*

[23]C.R.S. 13-20-1101(3)(b).

[24]C.R.S. 13-20-1101(3)(c)

[25]C.R.S. 13-20-1101(6).

[26]C.R.S. 13-20-1101(4)(a).

[27]C.R.S. 13-20-1101(8)(a)(I).

[28]C.R.S. 13-20-1101(8)(a)(II).

[29]C.R.S. 13-20-1101(8)(a)(II).

[30]C.R.S. 13-20-1101(8)(a)(III).

[31]C.R.S. 13-20-1101(8)(b)(I)-(II).

[32]C.R.S. 13-4-102.2; C.R.S. 13-20-1101(7).

[33]C.R.S. 13-20-1101; Cal. Civ. Code

The Colorado Anti-SLAPP Statute has rarely been used since its advent. In one case, a judge in Colorado's Federal District Court "primarily look[ed] to California law for persuasive authority as to the interpretation of Colorado's statute" because of the similarity between the statutes. *Stevens v. Mulay*, CV-01675-REB-KLM, 2021 WL 1300503 at *4 (D. Colo. Feb. 16, 2021) (finding the counterclaim at issue in the special motion was not the type of claim contemplated by Colorado's Anti-SLAPP Statute), *report and recommendation adopted*, No. 19-CV-01675-REB-KLM, 2021 WL 1153059 (D. Colo. Mar. 26, 2021). Because Colorado's law remains undeveloped surrounding its Anti-SLAPP Statute, California cases remain helpful in predicting how Colorado Courts will apply the new statutory provisions.

a. Definition of "Public Interest"

The California Supreme Court broadly construes the term "public interest" within its anti-SLAPP statute.[34] A plaintiff can't avoid application of the law by "attempting, through artifices of pleading, to characterize an action as a garden variety breach of contract [or] fraud claim, when in fact the liability claim is based on protected speech or conduct."[35]

b. Use of Anti-SLAPP Motions to Refute an Employee's Claims of Discrimination and Retaliation

In states with strong anti-SLAPP laws, courts have found that certain adverse employment actions that concern constitutional rights fall within the purview of the anti-SLAPP statute. California Courts of Appeal were split for several years on whether California's anti-SLAPP statute applied to an employee's claims of discrimination and retaliation.[36] At the forefront of the debate was whether the employer's alleged motive to discriminate or retaliate eliminates any anti-SLAPP protection that might otherwise attach to the employer's employment practices.[37]

Some panels held that the anti-SLAPP statute does not apply to claims of discrimination or retaliation by an employer, because such claims did not arise out of any protected speech or petitioning activity by the employer, even if the alleged adverse action implicated protected speech or petitioning activity. Rather, such actions arose out of the employer's improper motivation in proceeding with the allegedly improper contact.

Other panels held that the anti-SLAPP statue does apply to discrimination and retaliation claims against employers. For example, in *Symmonds v. Mahoney*, Defendant Edward Mahoney terminated Plaintiff Glenn Symmonds, a drummer who performed with him.[38] Symmonds filed suit and asserted claims of age, disability, and medical condition under state law.[39] Mahoney relied on the California anti-SLAPP statute, arguing that he had the constitutional right to select whomever he wished to perform music with him and that Symmonds' claim arose in connection with an issue of public interest (given the media's and the public's interest in Mahoney and his music).[40] The appellate court emphasized that Mahoney's burden in applying the anti-SLAPP statute "was not an onerous one" and required only a "prima facie showing that the plaintiff's claims arise from the defendant's constitutionally protected free speech or petition rights" in connection with a public issue or an issue of public interest.[41] The court further reasoned that it "must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis."[42] Ultimately, the Court held the decision to terminate Symmonds was considered protected conduct under the California's anti-SLAPP statute.[43]

The division among California Courts of Appeal resolved this year in *Wilson v. Cable News Network, Inc.*[44] The case evolved from television producer Stanley Wilson's allegations of discrimination, retaliation, wrongful termination, and defamation against CNN, his former employer.[45] Wilson was terminated following an audit of his work involving suspected plagiarism.[46] Defendants filed a special motion to strike all causes of action pursuant to California's anti-SLAPP statute.[47] The motion argued all of CNN's staffing decisions were acts in furtherance of

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[34]Cal. Civ. Code § 425.18.

[35]*Equilon Enterprises v. Consumer Cause, Inc.*, 52 P.3d 685, 67 (Cal. 2002).

[36]*Martinez v. Metabolife Internat., Inc.*,113 Cal. App. 4th 181, 187 (Cal. Ct. App. 2003).

[37]*Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 712 (Cal. 2019)..

[38]Symmonds v. Mahoney, 31 Cal. App. 5th 1096, 1100 (Cal. Ct. App. 2019).

[39]*Id.*

[41]*Id.* at 1103.

[42]*Id.*

[43]*Id.* at 1105.

[44]*Wilson v. Cable News Network, Inc.*,444 P.3d 706 (Cal. 2019).

[45]Id. at 711-712.

[46]*Id.* at 711.

[47]*Id.* at 712

its right of free speech and were in connection with the public interest.[48] The trial court granted the motion and dismissed the lawsuit, concluding that Wilson failed to show any of his claims had minimal merit.[49] A divided Court of Appeal reversed, rejecting the characterization of defendants' allegedly discriminatory and retaliatory conduct because it does not qualify as protected activity.[50]

The California Supreme Court reversed in part and affirmed in part the Court of Appeal, holding that "the plaintiff's allegations about the defendant's invidious motives will not shield the claim from the same preliminary [anti-SLAPP] screening for minimal merit that would apply to any other claim arising from protected activity."[51] However, the Supreme Court further held that "CNN has the burden of showing Wilson's role bore such a relationship to its exercise of editorial control as to warrant protection under the anti-SLAPP statute" and that "CNN has failed to make that showing."[52] The Supreme Court remanded the question of whether Wilson's termination claims could be stricken under the anti-SLAPP statute.[53]

As to Wilson's claims of discrimination and retaliation involving CNN's alleged actions that preceded his termination, the Supreme Court held that they would survive regardless because CNN was unaware of any potential plagiarism by Wilson until a few weeks before his termination.[54] Wilson made clear that California's anti-SLAPP statute may be used in employment cases where the employer's alleged discrimination and retaliation implicates protected speech or petitioning activity where there are issues of public concern involved. However, the application is made only where the employment operations implicate issues of public concern.[55]

c. Use of Anti-SLAPP Motions to Combat Defamation Claims

The *Wilson* court undertook a separate analysis in relation to Wilson's defamation claim.[56] The Court determined the defamation claim was based on CNN's speech rather than any tangible action.[57] Although the anti-SLAPP statute refers to "conduct", courts have assumed the term also includes oral or written statements.[58] The Court found that Wilson's defamation claim—arising from statements CNN made about the reasons for Wilson's termination—did not arise from speech on "a public issues or issue of public interest"[59] that contributed to the public discussion of that issue.[60] In summary, a defamation claim based upon alleged privately made statements is not subject to the anti-SLAPP statute where an employee is not a public figure and the statements at issue do not address a public controversy.

Anti-SLAPP Statutes in Federal Court

It is well established that a federal court sitting in diversity applies state substantive law and federal procedural rules.[61] Courts continue to struggle with whether state anti-SLAPP statutes can be applied in federal court. The answer, in dealing with the *Erie* doctrine, depends on whether the statute is construed as procedural or substantive. For many years federal courts routinely held state anti-SLAPP statutes could be used in federal court cases.[62]

Part of the reason why federal courts apply state anti-SLAPP statutes in federal court is to avoid forum shopping. These courts reasoned the state statutes provided substantive legal defenses, and applying them in federal court furthered important, substantive state interests.[63] As the *Godin* court explained, refusing to apply a state anti-SLAPP statute in federal court "would thus result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court. . .. [T]he incentives for forum shopping would be strong: electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to avoid [the

[48]*Id.*

[49]*Id.*

[50]*Id.*

[51]Id. at 710.

[52]*Id.* at 721.

[53]*Id.* at 723.

[54]*Id.*

[55]*Id.* at 722.

[56]*Id.* at 723.

[57]*Id.*

[58]*Id.*

[59]Cal. Civ. Code § 425.16(e)(4).

[60]*Wilson*, 444 P.3d 706, 724;*see also Jef-fra v. California State Lottery*, 39 Cal. App. 5th 471 (Cal. Ct. App. 2019) (although employer's investigation of possible misconduct by employee wasprotected activity within the meaning of the anti-SLAPP statute, plaintiff established a probability of prevailing on the merits of his claim, so employer's motion was properly denied).

[61]*Erie Railroad Co. v. Tompkins*, 304 U.S.64 (1938).

[62]*See, e.g., Godin v. Schencks*, 629 F.3d79 (1st Cir. 2010); *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

[63]*Godin*, 629 F.3d 79; *Newsham*, 190F.3d 963.

anti-SLAPP statute's] burden-shifting framework, rely upon the common law's per se damages rule, and circumvent any liability for a defendant's attorney's fees or costs."[64] This reasoning echoed the earlier *Newsham* court which reasoned that, "if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding."[65]

A significant circuit split on application of state anti-SLAPP law in federal court existed about a year ago, but recent opinions have revealed a change in the landscape. More circuits now disfavor application of state anti-SLAPP laws due to the conflict with the Federal Rules of Civil Procedure 12 and 56. Four circuits (District of Columbia, Fifth, Tenth, and Eleventh) have refused to apply state anti-SLAPP laws in federal court.[66] Another has held that the denial of an anti-SLAPP motion is not immediately appealable.[67]

Although the Ninth Circuit has upheld the application of state anti-SLAPP laws in federal court, judges began to question whether state anti-SLAPP statutes could apply in a federal court diversity case years ago.[68] Most recently, the Ninth Circuit clarified the standards applicable to anti-SLAPP motions in federal in *Planned Parenthood Federation of America v. Center for Medical Progress*.[69] In *Planned Parenthood*, the plaintiff alleged that the defendants fraudulently entered the plaintiff's conferences and obtained meetings with the organization's staff to create false and misleading videos.[70] The defendants filed two motions to dismiss the claims: one under Federal Rule of Civil Procedure 12(b)(6) and one under California's Anti-SLAPP Statute.[71] The district court denied both motions.[72]

Because the defendants' arguments under Rule 12 were identical to those in the anti-SLAPP motion, the district court concluded that it need only assess the sufficiency of the plaintiff's complaint.[73] When the defendants raised factual defenses, the district court held questions of fact precluded dismissal.[74]

The Ninth Circuit affirmed the district court's decision, and clarified the standards applicable to anti-SLAPP motions in federal courts.[75] Adopting the holding from a previously unpublished decision, the court held that if the anti-SLAPP motion attacks the legal sufficiency of the plaintiff's complaint, a court evaluates the motion using the standard under Rule 12 and Rule 8.[76] If, on the other hand, a defendant's motion attacks the factual sufficiency of the claim, "then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted."[77]

The panel emphasized the apparent inconsistencies between California's Anti-SLAPP Statute and the Federal Rules of Civil Procedure, holding that a contrary reading "would lead to the stark collision of the state rules of procedure with the governing Federal Rules…."[78] It also rejected the defendants' argument that a plaintiff is required to present evidence, holding that "if the defendants have urged only insufficiency of pleadings, then the plaintiff can properly respond merely by showing sufficiency of pleadings, and there's no requirement for a plaintiff to submit evidence to oppose contrary evidence that was never presented by the defendants."[79]

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[64]*Godin*, 629 F.3d 79 at 92.

[65] *Newsham*, 190 F.3d 963 at 973.

[66]*Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015); *Los Lobos Renewable Power, LLC v. Ameri-culture, Inc.*, 885 F.3d 659 (10thCir.2018); *Carbone v. CNN, Inc.*, 910 F.3d1345 (11thCir. 2018); *Klocke v. Watson*,936 F.3d 240 (5th Cir. 2019).

[67]*Ernst v. Carrigan*, 814 F.3d 116, 119 (2dCir. 2016).

[68]*See, e.g., Makaeff v. Trump Univ., LLC*,715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring) ("Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules"); *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180,1188 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing *en banc*) (Rules 12 and 56 "establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court.").

[69]*Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*,890 F.3d 828 (9th Cir. 2018).

[70]*Id*. at 831.

[71]*Id*.

[72]*Id*.

[73]*Id*. at 832.

[74]*Id*.

[75]*Id*. at 833-834.

[76]*Id*.

[77]*Id*.at 833

[78]*Id*.at 834.

[79]*Id*..

Judge Gould, joined by Judge Marguia, issued a concurrence inviting the court to revisit its decision to hear anti-SLAPP appeals immediately.[80] The concurring opinion urged the Ninth Circuit to revisit its practice of immediately reviewing the denial of anti-SLAPP motions under the collateral order doctrine.[81] In their view, denial of an anti-SLAPP motion does not qualify as a collateral order because "it requires the court to directly assess the merits of Plaintiffs' complaint" instead of resolving claims separate from the merits.[82] The judges stopped short of encouraging the Ninth Circuit to reconsider its decision to apply anti-SLAPP statutes in federal court, but noted that "one of the primary drivers for allowing this practice to continue—prevention of a circuit split—has occurred despite our best efforts."[83]

The Tenth Circuit has already declined to apply specific anti-SLAPP statutes in federal court in *Los Lobos Renewable Power, LLC v. Americulture, Inc.*[84] In *Lobos*, a dispute arose over contractual rights and obligation of two businesses related to 2,500 acres of land leased by the United States Bureau of Land Management.[85] The complaint included paragraphs alleging the Defendants made material misrepresentations concerning the Plaintiffs to numerous state agencies and other public bodies.[86] Defendants responded to these allegations by filing a "special motion to dismiss" authorized by New Mexico's anti-SLAPP statute[87], claiming the state law's protections were substantive in nature.[88] The district court determined that New Mexico's anti-SLAPP statute is a "procedural provision" that does not apply in federal court.[89] The *Lobos* panel affirmed the district court's decision, concluding that the plain language of the New Mexico anti-SLAPP statute reveals the law is a procedural mechanism not designed in impact the outcome of the case but only the timing of the outcome.[90] The court noted, though, that the statute was unlike many other states' anti-SLAPP statutes[91], which shift substantive burdens of proof or alter substantive standards.[92]

Conclusion

Colorado's early case law protecting the first amendment rights of its citizens has greatly expanded with the passing of the anti-SLAPP statute. Given the nearly identical language in Colorado's Anti-SLAPP Statute as compared to California's, it is likely Colorado courts will use rulings in California as persuasive authority to assist in creating a new body of law in our state. Employment attorneys may begin to see special motions to dismiss filed as tactics to defeat claims of discrimination and retaliation in state court. Because specific language used in Colorado's Anti-SLAPP Statute implicates substantive measures, federal courts in Colorado have room to distinguish from the Tenth Circuit's decision in *Lobos* and permit special motions to dismiss in diversity cases.

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[80]*Id.* at 835-838.

[81]*Id.* at 835-837.

[82]*Id.*at 836.

[83]*Id.*at 836.

[84]*Los Lobos Renewable Power, LLC v. Americulture, Inc.*,885 F.3d 659, 673 (10th Cir. 2018).

[85]*Id.*at 661.

[86]*Id.*at 662.

[87]N.M. Stat. Ann. §§ 38-2-9.1 & 38-2-9.2.

[88]*Lobos*, 885 F.3d 659 at 662.

[89]*Id.*

[90]*Id.* at 668.

[91]*Cf., e.g., Makaeff v. Trump Univ., LLC*,715 F.3d 254 (9th Cir. 2013) (addressing a California anti-SLAPP statute that shifted substantive burdens and altered substantive standards).

[92]*Lobos*, 885 F.3d 659 at 666.

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