January / February 2019 Volume 88 Issue 1

Official Publication of the Hennepin County Bar Association

HENNEPIN LAWYER

Stephanie Willing

New Lawyers Section Chair

+ Focus on

Technology

THE 2019 LAW FIRM LEADERSHIP PROGRAM

MAKE THE MOVE FROM SUCCESSFUL LAWYER TO FIRM LEADER

The Hennepin County Bar Association is excited to present this innovative and transformative seven-session training program that will help you achieve the next leadership level in your legal career.

The Law Firm Leadership Program (LFL) is created to be comprehensive and holistic. Over the course of the sessions, you will explore self-leadership and awareness, leading others, and leading the law firm organization. Built specifically for lawyers by lawyers, LFL prepares participants from all levels of their firms to lead during a time of great change within the legal profession.

Ideal for attorneys from any size firm, LFL equips you with the skills, knowledge, and broader context needed to succeed in leading practice groups, heading committees, and serving in other key firm leadership roles.

By participating in this program, you make an invaluable investment in developing your abilities to be an effective and visionary law firm leader today and in the future.

2019 PROGRAM SCHEDULE

The program includes seven sessions, taking place every other Wednesday afternoon, between February 20 and May 15, 2019.

SESSION ONE
Kickoff & Series Concepts
Wednesday, February 20
12:00—3:00 p.m.

SESSION TWO
Personal Leadership I
Wednesday, March 6
12:00—3:00 p.m.

SESSION THREE
Personal Leadership II
Wednesday, March 20
12:00—3:00 p.m.

SESSION FOUR
Team Leadership: Bias & Diversity
Wednesday, April 3
12:00—3:00 p.m.

SESSION FIVE
Team Leadership: Navigating Difficult Situations & Dynamics
Wednesday, April 17
12:00—3:00 p.m.

SESSION SIX
Firm Leadership: Culture & Fundamentals
Wednesday, May 1
12:00—3:00 p.m.

SESSION SEVEN
Firm Leadership: Management & Integration
Wednesday, May 15
2:00—5:00 p.m.
with reception to follow.

Sessions take place at the **Hennepin County Bar Association office:**
Third Floor of City Center • 600 Nicollet Mall, #390, Minneapolis, 55402

Visit www.hcba.org for information on our presenters.

19.25 CLE credits applied for.
(Including 2.5 Elimination of Bias credits)

BE PART OF THIS 7-SESSION CLE PROGRAM THAT DEVELOPS LAWYERS TO BE SUCCESSFUL LAW FIRM LEADERS

Through the Law Firm Leadership Program, You will Learn to:

- Discover the skills, attributes, and abilities necessary for effective law firm leadership
- Build your personal, professional, and leadership development plan
- Navigate the unique challenges and demands of leading lawyers
- Develop emotional and interpersonal intelligence in yourself and others
- Incentivize the behaviors and actions your firm wants through compensation and promotion models
- Attract, cultivate, motivate, and retain talent at every level of your firm
- Understand employment law essentials every leader should know
- Appreciate the power of law firm culture and alignment to the bottom line of the business
- Create an inclusive workplace where everyone's individual contributions are valued and where everyone thrives
- Counteract implicit bias and understand the processes and norms that undermine diversity and inclusion efforts
- Navigate difficult conversations and conflict with others
- Create meaningful short- and long-term strategies that position your firm for future success
- Focus and prioritize your many and competing responsibilities
- Balance your personal law practice with your leadership role (producing vs. managing)
- Lead your law firm through change, such as reorganizations, evolving technology, and thoughtful succession planning
- PLUS, all participants will receive individual assessments on their leadership style

Register: www.hcba.org or 612-752-6600

Sign Up Today to Reserve Your Place. Space is Limited.
HCBA members: $995. Non-members: $1195.

Sessions are only available to series participants and will not be webcast or offered à la carte. Payment does not need to accompany registration.
To be invoiced, call 612-752-6600 to register.

*Speakers and credits may be subject to change. Cancellations must be received 7 days prior to the first session to be eligible for a refund. Cost of materials will be deducted from total amount of refund. Those registering fewer than 7 days prior to the first session will be ineligible for a refund.

Sign up today at www. hcba.org. Contact Micah Fenlason at 612-752-6612 or micah@hcba.org with questions or to register by phone.

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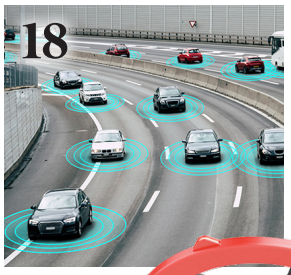

FOCUS ON TECHNOLOGY

Hennepin Lawyer
January/February 2019
Volume 88, Number 1
www.hcba.org

Hennepin Lawyer

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The Hennepin Lawyer is published by the Hennepin County Bar Association to educate and inform lawyers about the current issues and events relating to the law and the profession. It allows for the free expression and exchange of ideas. Articles do not necessarily represent the opinions of any person other than their writers. Copies of the editorial policy statement are available upon request or online at www.hcba.org.

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You can be a part of the Hennepin Lawyer Committee.
If you are interested in writing or editing, email Nick Hansen, Managing Editor at nick@hcba.org

Let's Talk Tech

Within this issue are a number of articles covering what is admittedly a small cross-section of the topics available under the broad category of technology and the law. In a way, the plethora of ideas made my role easier, in that I had a veritable buffet of topics from which to seek authors. This isn't to say that the law and technology are a perfect fit. The breadth of the topic, and the nature of the law, has led a number of courts to comment on the glacial pace of technological change within our profession. While society and industry race forward, the law is often slow to catch up. In some ways I agree with this sentiment, but disagree that it can be broadly applied to all areas of the law. As you will see in this issue, there are areas where the practice and the teaching of law are moving quickly and rapidly evolving to keep pace with ever developing technology.

Nowhere is the practice of law's relatively slow adoption of new technology more apparent than in the places we work. Over the past half-year, my firm has been preparing to move its offices. This move provided an excellent opportunity to reflect on the technology we interact with on a daily basis, and how many technological decisions impact our workspaces. For example, gone are the once-ubiquitous rows of legal reporters and dusty tomes of a firm's law library. Other than providing a backdrop for headshots, those rows of books serve little to no purpose in a modern law office, having been replaced with electronic libraries and search engines. To provide the bandwidth to handle internet and wi-fi usage, the new office is equipped with fiber optic cable. The conference room was specifically designed to facilitate video conferencing, including remote depositions, which will likely continue to increase in frequency. The individual offices themselves have also been redesigned. Each workstation has dual monitors for improved efficiency and desks can quickly convert from a sitting to a standing position. The sum of these technological changes is an office that is substantially different—more streamlined and efficient—than those of the past.

As I alluded to, this issue's articles cover a range of timely and interesting topics. Shawn Webb and Joe Mitchell discuss the ever evolving state of the law on cell phones, digital evidence, and privacy. Kyle Willems and Eric Palmer tackle the emerging issues with self-driving automobiles. Eric Chadwick addresses the *Alice* decision and how it continues to impact intellectual property litigation. Garrett Caffee provides the thirty-thousand foot view of drones and the law. Finally, Michael Robak helps us to understand how the teaching of law has changed since the early 1980s and how technology is shaping the modern law school classroom.

It has been a pleasure working with the great authors whose articles make up this issue. I believe you'll enjoy reading their work as much as I did, and I hope that you have the time and inclination to reflect on the ways technology continues to shape the way we practice law.

"While society and industry race forward, the law is often slow to catch up."

Samuel M. Johnson
January/February Issue Editor
sjohnson@skolnickjoyce.com

Mr. Johnson is an associate with Skolnick & Joyce in Minneapolis. He is a civil litigator in a variety of areas, including business and commercial disputes, contract, and family law. He previously clerked for the Hon. William H. Koch. He is an adjunct professor at the University of St. Thomas School of Law and also serves as a director on its alumni board.

Addressing the Gap:

A Career-Staged Approach to Member Services

This past October, I had the honor of speaking on a panel during the National Association of Women Lawyers' Annual Legal Leadership Summit & Meeting the Challenge Conference. The panel, entitled Ages and Stages of a Law Career, allowed attendees to hear from a diverse group of women attorneys who are in the public sector, private practice, or in-house at different stages of their law practice, including post-retirement.

The panel was asked a variety of questions, including: Given that the legal profession is beginning to talk about well-being and mindfulness as priorities, what do we do for self-care? Were there any pivot points in our careers where we went in a direction we had not expected? What does "work-life balance" mean to us, and what do we do to maintain the right ratio in our own lives? If we have had speed bumps in our careers, how did we navigate them? And what role have professional organizations played in our professional career success or satisfaction? The timing of this panel could not have been better because it aligned with one of my initiatives as president of the HCBA, which is for the HCBA to take a more focused, career-staged approach to member programming.

The HCBA regularly provides programming and opportunities for newer attorneys (i.e., attorneys aged 36 or younger, or who have been practicing six years or less). It also gears programming towards those attorneys now acceptably called "vintage" or "seasoned." But what about those attorneys who fall in the middle? The middle stage of practice is a critical stage for attorneys. That is the stage where attorneys possess the substantive skills and experience that they need in their career, but may also find themselves asking, "What next?"

The HCBA is hard at work trying to address this gap. For example, the HCBA currently offers an assortment of soft skills programming. Soft skills programming refers to programs focused on education related to transferable or professional skills, as opposed to hard skills programming focused on education related to vocation or qualification. The HCBA offers its bi-annual Law Firm Leadership program, tailored for attorneys who have been in practice for 10 or more years and are looking to advance toward broader firm leadership roles. Those who complete the program are then invited to attend alumni roundtable discussion and networking events where they can continue to implement some of the strategies they learned in the program.

The HCBA also has a Mindfulness Meditation Practice Group. While appropriate at all stages of one's career, this program helps attorneys practice being present in the moment and being aware of their bodily sensations, mental and emotional states, and external stimuli. Benefits of mindfulness include stress reduction, expanded working memory, and increased attention span, among others.

Further, the HCBA is encouraging each section to offer more soft skills programming. Topics could include situational communication (e.g., working with foreign-speaking clients, clients with disabilities, victims of trauma, or how to handle difficult conversations, etc.), presentation skills, emotional intelligence, corner office, and other partnership strategies, civic engagement, and other related topics. Several sections have also already considered what we know about those who have been practicing 7 to 15 years, generally, when scheduling CLEs and other section events. For example, some sections have moved their programs to different parts of the day to accommodate the schedules of attorneys who have childcare obligations or other family commitments.

In sum, while the HCBA has regularly focused on newer attorneys, as well as "vintage" or "seasoned," attorneys, we see those of you who fall in the middle. We welcome you back into the fold. And we want to offer you the programs and skills that are appropriate for your career at your stage. Let us know how we can help you. If you have an idea for a CLE or program that you would like a section to organize, or even better if you would like to lead one, feel free to contact one of our section leaders by visiting: *www.hcba.org/page/sections*

Adine S. Momoh
2018-2019
HCBA President
adine.momoh@stinson.com

Ms. Momoh is a partner in the Minneapolis office of Stinson Leonard Street where she represents clients in matters involving banking litigation, estates and trusts litigation and creditors' rights and bankruptcy before state and federal courts across the country. As a trusted advisor, she helps clients navigate the entire lifecycle of a case, from case development and strategy, to discovery, to motion practice, to trial, to appeal.

FELLOWS

MAKING A DIFFERENCE IN HENNEPIN COUNTY

OUR MISSION

"PROMOTING EQUAL ACCESS TO JUSTICE FOR THE PEOPLE OF HENNEPIN COUNTY."

Since 1968, the Hennepin County Bar Foundation has made a positive impact on the community by funding legal projects and agencies that support those in need throughout Hennepin County.

The Hennepin County Bar Foundation provides far-reaching support to a wide range of legal service programs. The HCBF awards grants to organizations that: provide legal services to individuals of limited resources; educate the public about the legal system; and contribute to the improvement of the legal system and the administration of justice.

The foundation's mission is carried out through the generous financial support of the local legal community—members of the Hennepin County Bar Association, local law firms, and businesses. In addition to the Fellows program, support comes through the annual HCBA membership dues check-off, individual donations, support of the Bar Benefit, and participation in the Charity Golf Classic. The foundation combines the support of local lawyers, law firms, and businesses to send a clear message that Hennepin County's legal community cares about access to justice.

WHO ARE THE HCBF FELLOWS?

> The Fellows are licensed attorneys who have been admitted to a bar for at least five years and have shown a strong commitment to increasing access to justice in Hennepin County.

WHAT IS ASKED OF A FELLOW?

> Attorneys are invited to become Fellows by contributing $1,500 to the Hennepin County Bar Foundation over a five year period.

BENEFITS OF BEING A FELLOW:

> Honor & Recognition – Fellows are an esteemed group of local attorneys, recognized by their peers, for dedication and commitment to increasing access to justice

> Making an Impact – Fellows support programs that have significant impact in the community

> Network Building – Fellows are invited to exclusive events

WWW.HCBA.ORG/HCBF

If you are interested in becoming a Fellow, please contact Amanda Idinge at amanda@hcba.org or 612-752-6614

The Hennepin County Bar Foundation is an exempt organization as described in Section 501(c)(3) of the Internal Revenue Code.

Cheryl Dalby Chosen to Lead Combined Staff of Minnesota Bars

The Hennepin County Bar Association, Minnesota State Bar Association and, Ramsey County Bar Association are pleased to announce that Cheryl Dalby has accepted the role of Chief Executive Officer of the three associations. The boards of directors of the associations decided in June 2018 to adopt a shared staff model to better coordinate efforts, increase efficiencies, and improve member value. While each association will maintain its separate identity and legal independence, the single staff, led by the Chief Executive Officer, will provide services to all three.

After completing a nationwide search for the leader of the newly combined staff, a committee composed of members of the MSBA, HCBA, and RCBA recommended Dalby, and the boards of each organization approved the recommendation.

Dalby has served as Executive Director of the Ramsey County Bar Association in St. Paul for the past 18 years. “I am thrilled to lead the bar associations into a collaborative future,” said Dalby. “And I am pleased that Susie Brown, current Executive Director of the Hennepin County Bar Association, has agreed to accept the position of Chief Operating Officer and will work with me in leading the three associations.”

Current MSBA Executive Director Tim Groshens will retire after more than three decades leading the association.

Susie Brown,
Chief Operating Officer

Getting to Know

Stephanie Willing

2018-2019 New Lawyers Section Chair

Stephanie and her husband, Dan, hiking in Northern Minnesota.

Can you share a little bit about your practice?

I am a sixth-year attorney practicing employment law at Maslon. I started out in general business litigation and products liability work, and four years ago shifted to employment. My practice involves preventing issues from arising on the front end by drafting corporate policies, educating employees and HR professionals, and discussing strategy with businesses. When an issue does arise, I represent the client in front of an agency, or in state or federal court. Employment law is a fascinating and rewarding practice area with so many interesting stories, and the law is often evolving, keeping everyone on their toes.

What brought you here from the west coast?

My husband; we met at law school orientation at the University of Oregon, and then were in the same section, so we had every single class together. I grew up in Seattle and planned to stay on the west coast, but he is from the Midwest and he wanted to move back here after we graduated. We have been in Minneapolis for six years now, so I feel like I am getting the hang of it. Minneapolis is a great city to live and work in, and the transition from Seattle was easy once I bought the requisite warm clothes.

What types of programming can New Lawyers Section members look forward to?

The NLS is focusing on collaborating with other HCBA sections, which allows us to offer a wider variety of events. We hope this will lead to an easier transition to other sections once new lawyers age out of the NLS. We are also continuing our Networkout series, which is for those who want to meet people on a run or after a workout class instead of a happy hour. Of course, we'll still have a variety of happy hour networking events.

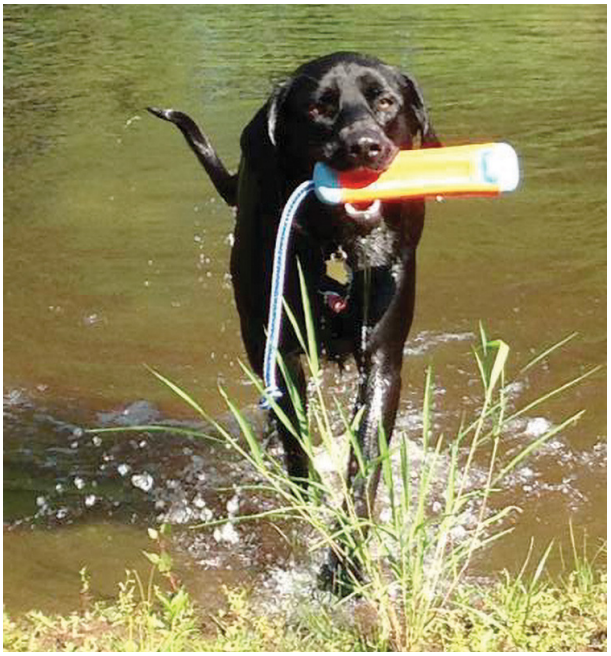
How did you get involved with the section and subsequently, leadership?

Moving here from Seattle I didn't know anyone other than my husband's family. The legal community—the law schools, the firms, other lawyers—was a mystery to me. I first got involved with Minnesota Women Lawyers and shortly after that with the HCBA. I tried a few other groups, but these two groups were the most welcoming. Once I attended a few meetings and events, I started to see familiar faces, which made attending subsequent events easier. I got my first taste of leadership in MWL, serving as a co-chair for the communications committee. I really enjoyed bringing people together and connecting people to MWL. Around the same time, I started taking on a bigger role with the HCBA NLS. Since then, I have served as social director, secretary/treasurer, vice chair, and now this year, chair. I got into NLS leadership both because I wanted to develop my leadership skills, and because the section has done so much for me by improving my networking skills and providing amazing contacts in the legal community. I wanted to help make the group welcoming for others.

What's been your favorite part about being involved with the bar association?

I love meeting so many different people and learning what their practices and career paths have been like. Everyone is different and it is helpful to get to know people who have different stories than your own. Also, in leadership you get to take ownership and plan events and shape the bar. So for those who don't see something that speaks to them, get involved and create something new.

"Once I attended a few meetings and events, I started to see familiar faces, which made attending subsequent events easier."



The Willings' dog Summer, and cat Hops.

"A phrase I heard recently comes to mind: *The best time to dig a well is before you are thirsty.* If you wait until you need a network, it is hard to develop one."

What would you say to a new attorney who says they don't have time to get involved with the HCBA?

New attorneys are pulled in so many different directions, both professionally and personally. It seems daunting to leave your desk at all, even for an hour at lunch, or to leave early to go to an event. Young attorneys especially want to make a good impression and show that they are hard workers. In the short term, bar involvement is a great way to meet amazing people, but there are long-term benefits as well. In order to reap those benefits, you need to start ASAP. A phrase I heard recently comes to mind: *The best time to dig a well is before you are thirsty*. If you wait until you need a network, it is hard to develop one. Whether you are a young lawyer in private practice, in the public sector, or at a nonprofit organization, you never know where your professional (or personal) life is going to take you. Someday you will need someone to talk to about your career. You will be searching for a job, looking to bring in business, raising money for a cause you believe in, wanting to talk to someone about challenges at your current job, or any number of things, and when that time comes —wouldn't it be great to have a contact list full of friends and colleagues you can call? It is difficult to make time, but if you make building a network a priority now, you will reap the benefits later—and you will meet some great people in the meantime.

You're married to a lawyer. What are your dinner table conversations like?

Even though I practice employment law and he practices tax law, we can talk about our day without completely boring the other person, at least most of the time. While I may not always understand the practical implications of the estate-tax law he spent the day wrestling with, and he may not always appreciate the magnitude of a new employment-law decision, we appreciate what the other person is doing. We certainly don't talk about law all of the time, or even much at all after a brief recap of our days. We talk about politics and current events, college football and basketball, and the antics of our cat and dog—Hops and Summer.

What's your favorite thing to do outside of work?

Running. I'm not fast, but I love to zone out and be free from other demands on my time when I am out on a run. There are no emails to answer and no house to clean. Running helps keep me sane. Because we live in Northeast Minneapolis, I can run along the Mississippi River, and on the best mornings watch the sunrises. In the winter I also enjoy putting together puzzles, and in the summer I enjoy working in the garden.

New Lawyers Spotlight:
What is the most vital piece of technology for your practice?

Joshua N. Brekken
Messerli Kramer

I would have to say both the hardware (the computer itself) and the software we use are the best tools of my practice. The hardware is self-explanatory. The software, FinPlan/Divorce Math, is essential as it allows for analysis of tax implications in divorce cases. This is especially important in cases where spousal maintenance is an issue and in other high net worth cases where investment income and significant tax implications come into play.

Dani Peden
Brandt Criminal Defense

Remote access to my server is the greatest technological asset of my practice. My firm uses a virtual private network (VPN) and server login/firewall (SOPHOS) in order to access our files remotely. At previous employment positions, I only worked with paper files and my work hours were limited to the times I had access to them. I may have relished the moment when I was able to disengage completely at times; but, I still spent many hours arriving early, and staying late, in order to ensure some piece of mind when I finally arrived home.

Anthony A. Remick
Arthur Chapman Kettering Smetak & Pikala

My mobile timekeeping app allows me to capture my billable time while working remotely. This increases my timekeeping accuracy. Events, such as depositions, inspections, hearings, and conferences, are crucial for my development as a newer attorney. However, I am only able to attend these events if I continue to manage my other files and projects while I am out of the office. The current technology allows me to make telephone calls, read and send emails, and review and edit documents from anywhere. With so much work being done remotely, the mobile timekeeping app is essential to accurately capturing and billing all of my time.

Scholastica N.S. Baker
Faegre Baker Daniels

I'm a mid-level product liability defense attorney training every day to become a first-chair trial lawyer. I am also a busy mother of three energetic boys and my husband is JAG attorney who works full time in the Minnesota Army National Guard. I rely on the "categorize" color-coding feature in Microsoft Outlook Calendar to manage case deadlines, work/court deadlines, personal commitments, bar activities, and to block off time to complete each activity. Each activity/category has its own color. Because I'm a visual learner, it's easy for me to quickly assess or change my current work load and personal commitments, especially if unexpected events occur.

Tescia Jackson
UnitedHealth Group – Optum

Web-based conferencing is the most essential piece of technology to my practice because it allows me to communicate with clients easily and effectively regardless of time zone, client location or weather. As an organization with employees and clients all over the world, access to a flexible and mobile platform where individuals can interact helps us stay ahead in a fast-paced economy.

Rene T. McNulty
Ballard Spahr

OneNote is a vital tool in my practice. It centralizes all of my notes into one digital notebook and allows me to organize them into sections, pages and subpages. Plus, there is a search function. It has replaced the dozens of notebooks I used to have scattered around my office. Best of all, if I'm feeling nostalgic, I can use the stylus to take handwritten notes on my tablet.

Hon. Sarah West

New to the Bench

by Nick Ryan

To Judge Sarah West, accomplishing the goal of "doing justice" is a puzzle. All parts of the puzzle—those that represent the defendant, those that represent the state, and the bench—need to be strong and need to work together. "We need to all be working for the just outcome," she said.

West knows how she wants the courtroom to function. She wants all parties to feel heard, respected, and be able to walk away feeling like they had a fair process. Gov. Mark Dayton appointed West in September 2018, and she is ready to continue her goal of ensuring that justice is felt by all who enter her courtroom. West also has a big picture mindset in the way she views both the legal profession and her role in the profession.

West's background provides evidence of her goal for justice and her big picture mindset. She was born and raised in Minneapolis. She graduated from Connecticut College. After working in the legal and banking fields for a few years in New York, West moved back home to attend William Mitchell College of Law.

"We need to all be working for the just outcome"

She was attracted to the legal field, and ultimately law school, by the constitutional law classes she took as an undergrad. "These were like real law school classes where discussion and being able to analyze were vital," she said. During law school, West clerked at the Hennepin County Public Defender's Office. After graduating and passing the bar, she worked as an assistant public defender in the same office. In addition to her work as a public defender, she has worked at a number of private firms.

West has practiced in many different areas of the law, including civil, criminal, and juvenile. She has also experienced the joys and challenges of private practice as well as the way a large public defender's office operates. Through it all, West maintained a positive view on the profession and her role in doing justice.

West knows it is easy to be pulled into the adversarial set-up of the legal profession. However, she noted that the most rewarding and encouraging part of her career has been the collegiality and respectfulness among her colleagues in Hennepin County. West said she loved her time working as an assistant public defender in large part due to her coworkers and the prosecutors with whom she worked. "We were able to have good arguments in the courtroom where we fought hard for our positions, and still kept it friendly and professional outside the courtroom," she said.

West currently serves as vice-president of the Hennepin County Bar Foundation (HCBF), and in that capacity, she is also on the board of the Hennepin County Bar Association. "Everyone should be involved in the Hennepin County Bar Foundation," she said. She pointed out that it is important for lawyers to provide resources for others, and the HCBF does an amazing job at making that happen by providing grants to local legal services organizations.

Being involved in the bar association and the legal community has been helpful for West because it prevents her from focusing too much on the adversarial nature of the profession. She also mentioned that practicing law, both in private practice and in a large public defender's office, can become lonely at times. Being involved with the bar association is a fantastic way to ensure that a lawyer feels connected with other members of the community.

The best advice West has for young lawyers is to be invested and engaged in your clients and to respectfully work with the other parts of the system to do right for them.

Not only does West see the bigger picture in the legal world, but she also sees it outside of the courtroom. "Being a great lawyer is not about working a billion hours. A great lawyer is balanced and works effectively to help their clients," she said. West credits her own success to the fact that she makes time for the important things outside of work. The beautiful hand-drawn pictures made by her children that surround West's chambers are a good reminder of the important people at home.

West is excited about her new position and to see the process from a new perspective. "I am excited for the first trial and to see what it looks like from the bench as opposed to from counsel's table."

As someone who has seen so much and has a wide perspective based on her life experiences, West will be able to continue her goal of justice from her new position on the bench.

CAREER TIMELINE

> 2012-2018
Assistant Public Defender, Fourth Judicial District Office of the Public Defender

> 2011-2012
Attorney, Hauble Law

> 2011
Associate, Fafinski, Mark & Johnson

> 2005-2011
Assistant Public Defender, Hennepin County Public Defender's Office

> 2005
Graduated from William Mitchell College of Law

> 2004-2005
Law Clerk, Hennepin County Public Defender's Office

> 2000-2002
Transaction Manager, Barclays Capital

> 1999-2000
Legal Assistant, Skadden, Arps, Slate, Meagher & Flom & Affiliates

> 1999
Graduated from Connecticut College

Nick Ryan

nmr@ethicsmaven.com

Mr. Ryan is an associate attorney at the Law Office of Eric T. Cooperstein where he represents and consults with lawyers facing legal ethics challenges. Previously, he was a law clerk at the Office of Lawyers Professional Responsibility.

2018 Judges Social

OCTOBER 25 – U.S. BANK STADIUM

Fall Member Social

NOVEMER 29 – ATLAS GRILL

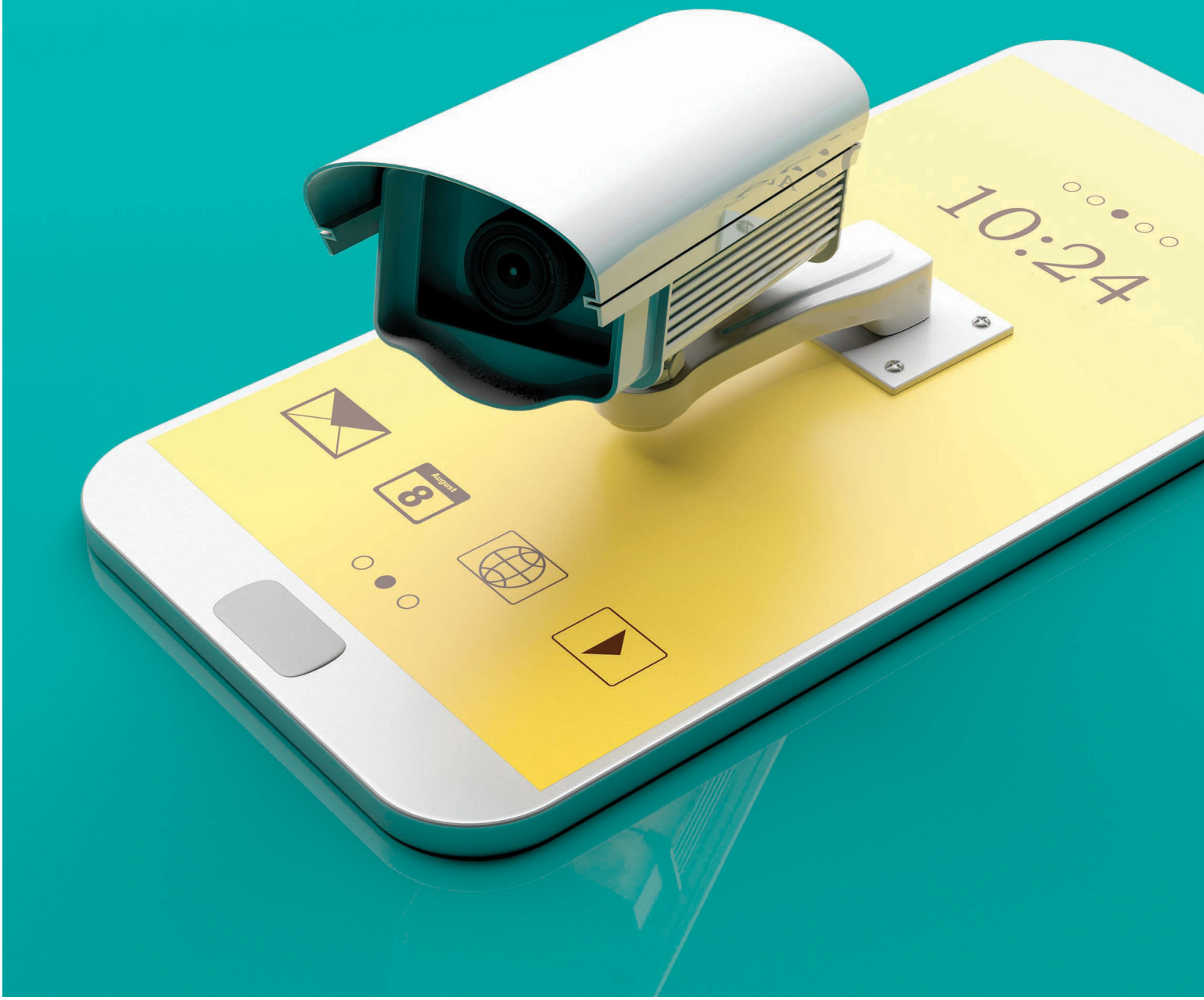
HCBA Fall Socials

Thank you to everyone who attended our fall socials. On October 25, HCBA members and judges from all levels of Minnesota courts gathered at Mystic Lake's Club Purple inside U.S. Bank Stadium for the annual Judges Social. On November 29, members gathered at Atlas Grill for our annual fall member social. We hope to see you at one of our many events this year. Go to *hcba.org/events* for information on all upcoming HCBA events and socials.

Is Big Brother Watching Us?

The Evolving State of the Law on Cell Phones, Digital Evidence, and Privacy

by Joe Mitchell and Shawn Webb



"Cell phones keep a trove of intimate and private data about their owners, which can be disastrous for a person's privacy if the phone's security is compromised."

In the classic dystopian novel *1984*, George Orwell wrote about a world population that had become the victims of an omnipresent government surveillance program (euphemistically referred to as "Big Brother").

While *1984* was written at a time when smartphones weren't even conceptualized in popular culture, the warning given by Orwell 70 years ago is as applicable to us now as it was then. We should be just as wary of the surveillance we willingly submit ourselves to out of convenience and even more cautious about whom we allow to access our personal information. We also need to be vigilant to how we safeguard our privacy in an age when over 90 percent of the country's population has a cell phone and over 75 percent has a smartphone.

Cell phones have the potential to reveal almost everything about their owners' lives. Text message and phone call records can reveal where we are, whom we spend time with, and what we discuss. Phone contents (emails, text messages, social media postings, and internet searches) can contain private communications and sensitive financial or health information. Even without accessing the contents of a phone itself, historical cell site location records can reveal things about the phone's whereabouts and usage. Through connection data, cell tower records can detail a person's location with relative precision. Spread over time, this data can show where that person's phone was, when the person was there, and the approximate path the person traveled to get to those locations. While it is true that these records, at best, can only show where the cell phone was at any given date, who leaves their house without their phone?

Cell phones keep a trove of intimate and private data about their owners, which can be disastrous for a person's privacy if the phone's security is compromised. This article will discuss the state of the law on two evolving issues relating to cell phone data. First, it will discuss the records that can be accessed without actually going onto a person's phone-connection records kept by the cell phone service providers. These records can show a person's approximate geographic location and pattern of movement. Second, this article will discuss what happens when the government wants to access the content of a seized cell phone to review the contents on the phone itself. Specifically, it will discuss under what circumstances the government may compel persons to unlock/decrypt their devices.

Cell Phone Location Data and Your Privacy

Cell phone connection data provides a picture of where a person goes by showing the geographic location of the cell towers to which his or her mobile devices are connected at a given point in time. This information can be useful for proving a person's location at a given date and time, which can have obvious practical value in investigating criminal cases. This data is created and can be disclosed by cell phone service providers; however, based on the recent *Carpenter v. U.S.* decision, a warrant is now required before disclosure.[1]

Cell phone connection data is generated with every text message, phone call, and internet data exchange between a user's device and a cell tower. Cell towers are ubiquitous and highly visible in both urban and rural areas. Cell phone service providers build and maintain a network of cell towers designed to provide consistent coverage.

To evaluate network use, the companies also keep track of every connection made to their towers. Cell phones are programmed to connect to the strongest data signal that is available. This saves the battery and ensures the fidelity of the connection. Each tower is divided into segments, each with a data receiver. Almost universally, towers have three sides, each receiving data from a 120-degree portion of the service area.[2]

If law enforcement or an interested party requests all connections made by a particular phone, the records show which towers, and which section of those towers, the user's device has connected to. Tower connections are based on signal strength, which is correlated with distance. Hills, buildings, weather, and other factors can also influence signal strength, but those factors are minor compared to distance. Using both the tower and the directional data, the cell phone's location can be roughly estimated at any given time. Cell phones often refresh data automatically, checking for notifications, emails, or other updates, so this data is often comprehensive, even if the user wasn't actively using his or her phone.

This data is also imperfect—it can accurately show only the location of the tower, not the phone itself, although the 120-degree segments can provide some directional hints. These records can be extremely influential evidence in criminal prosecutions. Police and prosecutors can use this data to show that a phone associated with a defendant was in proximity to a crime scene at a particular time. This data is called "Historical Cell Site Location Information" (HCSLI). A vigorous dispute in the legal community about the standard required for the government to obtain HCSLI was recently resolved by the U.S. Supreme Court in its decision in *Carpenter*.[3] The *Carpenter* decision protects an individual's right to privacy in his or her HCSLI and requires the government to get a warrant before obtaining and looking through that sensitive location information.

Arguably, Minnesota law already protected individuals' privacy rights in HCSLI even before *Carpenter*. Minn. Stat. § 626A.42, subdivision 2, established a statutory warrant requirement for the government to access "location information of an electronic device." However, state law did not protect individuals from searches by federal law enforcement agents. Federal agents and law enforcement in other states were still able to obtain HCSLI with only a subpoena. That practice came to an end with the decision in *Carpenter*.

In *Carpenter*, the government argued that the "third-party doctrine" applied. The third-party doctrine holds that when information is voluntarily disclosed to a nongovernment entity, the individual disclosing the information no longer has a right to privacy in that information.[4] In the context of cell phone records, the government argued that users voluntarily disclose their location to the provider by using the service. The data is voluntarily provided to a nongovernmental third party; therefore, the argument went, the user has no right to privacy in the data. This argument, based on *Katz v. U.S.*, had been persuasive in federal courts and in many state courts for decades.[5]

90 percent of the country's population has a cell phone and over 75 percent has a smartphone.

The *Carpenter* Court held that application of the third-party doctrine to HCSLI was inappropriate. The Court noted that cell phones are "almost a feature of human anatomy," and by tracking the location of a phone, the government "achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."[6] The Court considered the disclosure by the user of HCSLI data to third parties, but noted that this data is compiled without "any affirmative act on the part of the user beyond powering up."[7] The Court held that the third-party doctrine should not be extended to HCSLI and required law enforcement nationwide to get a warrant before accessing this data.

Device Security, Encryption, and Biometric Passes

Cell phones and smartphones contain much more information about their owners than just location and connection data. If law enforcement officials can access the contents of a phone itself, they can see text messages, emails, photos, videos, contact history, browsing history, and a plethora of other sensitive personal data. The government's ability to access this information depends, in many cases, on the device's encryption and the user's preferred security settings on the device.

Every mobile device will have some form of data security available. That security will usually include the ability to "lock" the device and some form of data encryption. The most common forms of data encryption are encrypted messaging software and "end-to-end" encryption. Encrypted messaging software works by encrypting data before it is sent from the sender's device and then decrypting it once it arrives at the recipient's device. The data is secure, or encrypted, while it is in transit between the two devices, but it will not be encrypted as stored on either the sender's or the recipient's devices. This encryption is less secure because the unencrypted data can be accessed both before and after it is sent. "End-to-end" encryption is generally accepted as a more secure way to protect a person's digital data. End-to-end encryption works by encrypting the data on the device itself before it is sent and it remains encrypted on any devices that it is on until that user unlocks his or her device and accesses the data. The data is then re-encrypted every time the device is locked. The current versions of Apple's iPhone and Google's Android both use end-to-end encryption on their devices. Most devices will have a variety of options for how to unlock the phone and access its content. Most have numeric password protection to prevent unwanted intrusions into the information stored on the device. For most devices, the default is a four-digit numerical code, though that can be increased up to a 37-digit alpha-numeric code in the current iPhone operating system. Many also feature "swipe pattern" unlocking, where the user must trace his or her finger across a grid of dots in a preselected order. On most current devices, users can also unlock a phone with a fingerprint or facial identification using the phone's biometric reader or camera and specialized software on the device.

The Fifth Amendment to the U.S. Constitution protects individuals from being compelled to provide self-incriminating, testimonial evidence to the government in a criminal prosecution. "The privilege against self-incrimination bars the state from (1) compelling a defendant (2) to make a testimonial communication to the state (3) that is incriminating."[8] However, the courts have held that an act is not testimonial when the act provides "real or physical evidence" that is "used solely to measure physical properties,"[9] or to "exhibit physical characteristics."[10] Historically these rulings have been used to compel defendants to provide nontestimonial evidence to the government that can be used against

them at trial, such as providing fingerprints, submitting to a breath test for alcohol, or providing a DNA sample. The question becomes do these prior rulings apply to today's modern digital evidence and, if they do, how will they be applied?

The U.S. Supreme Court has not directly addressed whether compelling a defendant to provide a fingerprint or a password to unlock a digital device elicits a testimonial communication, so we do not have binding precedent across the country at this time. The issue has been addressed by courts at both the state and federal level with the decisions splitting on this issue. In *United States v. Kirschner*, the U.S. District Court for the Eastern District of Michigan held that compelling a suspect to provide passwords associated with the suspect's computer was testimonial because the act revealed the contents of the suspect's mind.[11] In *Commonwealth v. Gelfgatt*, the Massachusetts Supreme Judicial Court concluded that the act of computer decryption was testimonial because a defendant cannot be compelled to reveal the contents of his or her mind, but held that the testimony was not protected because the testimony was a "foregone conclusion."[12] In *Commonwealth v. Baust*, the Virginia Second Judicial Circuit Court found that providing a passcode was testimonial, but providing a fingerprint was not, because "[u]nlike the production of physical characteristic evidence, such as a fingerprint, the production of a password force[d] the Defendant to disclose the contents of his own mind."[13] The *Baust* Court further observed:

> . . . the password is not a foregone conclusion because it is not known outside of Defendant's mind. Unlike a document or tangible thing, such as an unencrypted copy of the footage itself, if the password was a foregone conclusion, the Commonwealth would not need to compel Defendant to produce it because they would already know it.[14]

The Minnesota Supreme Court partially ruled on the issue of government compelling someone to unlock his or her device in its decision from *State v. Diamond*.[15] In *Diamond*, the Court held that:

> Although the Supreme Court's distinction between the testimonial act of producing documents as evidence and the nontestimonial act of producing the body as evidence is helpful to our analysis, the act here—providing the police a fingerprint to unlock a cellphone—does not fit neatly into either category. Unlike the acts of standing in a lineup or providing a blood, voice, or handwriting sample, providing a fingerprint to unlock a cellphone both exhibits the body (the fingerprint) and produces documents (the contents of the cellphone). Providing a fingerprint gives the government access to the phone's contents that it did not already have, and the act of unlocking the cellphone communicates some degree of possession, control, and authentication of the cellphone's contents. But producing a fingerprint to unlock a phone, unlike the act of producing documents, is a display of the physical characteristics of the body, not of the mind, to the police. Because we conclude that producing a fingerprint is more like exhibiting the body than producing documents, we hold that providing a fingerprint to unlock a cellphone is not a testimonial communication under the Fifth Amendment.[16]

While the Minnesota Supreme Court found that defendants can be compelled to unlock their digital devices with a biometric reading, such as a fingerprint, doing so is not a testimonial communication that is protected under the Fifth Amendment. The Court did not address whether or not that same defendant could be compelled to provide the government with his or her password or whether a password is protected testimonial communication.[17]

Under the current state of the law, if a phone can be unlocked with biometric data, defendants can be compelled by the government to unlock their phones. However, the case law is unclear on if or when a password is considered to be testimonial and would be protected from compulsion under the Fifth Amendment. The practical effect is that using fingerprint, facial recognition, or other biometric reader systems to unlock a person's device can adversely affect his or her privacy rights.

Conclusion

Is an Orwellian "Big Brother" watching our every move and invading our privacy? Possibly. Are we as a society oftentimes freely giving up our privacy for convenience? Definitely. Does this mean people should not use a cell phone? Of course not. As a number of American leaders and thinkers have observed, an educated and informed citizenry is the bedrock of functioning democracy and one of the best defenses against tyranny. To guard against government overreach, people should be aware of the type and amount of information their phones contain about their private lives, how it can be accessed, and what they can do to ensure that their private information is as protected as possible.

Notes

[1] 138 S.Ct. 2206 (2018).
[2] Larry Daniel, *Cell Phone Location Evidence for Legal Professionals: Understanding Cell Phone Location Evidence from the Warrant to the Courtroom* (London: Elsevier, 2017).
[3] *Id.*
[4] U.S. v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979).
[5] 88 S.Ct. 507 (1967).
[6] *Carpenter*, 138 S. Ct. at 2218.
[7] *Id.* at 2220.
[8] Fisher v. United States, 425 U.S. 391, 408 (1976).
[9] United States v. Dionisio, 410 U.S. 1, 7 (1973).
[10] United States v. Wade, 388 U.S. 218, 222 (1967).
[11] 823 F.Supp.2d 665, 668–69 (E.D. Mich. 2010).
[12] 11 N.E.3d 605, 615–16 (Mass. 2014).
[13] 89 Va. Cir. 267, 2014 WL 10355635, at *4 (Va. Cir. Ct. Oct. 28, 2014).
[14] *Id.*
[15] 905 N.W.2d 870 (Minn. 2018).
[16] *Id.* (citations omitted).
[17] *Id.*, n. 5.

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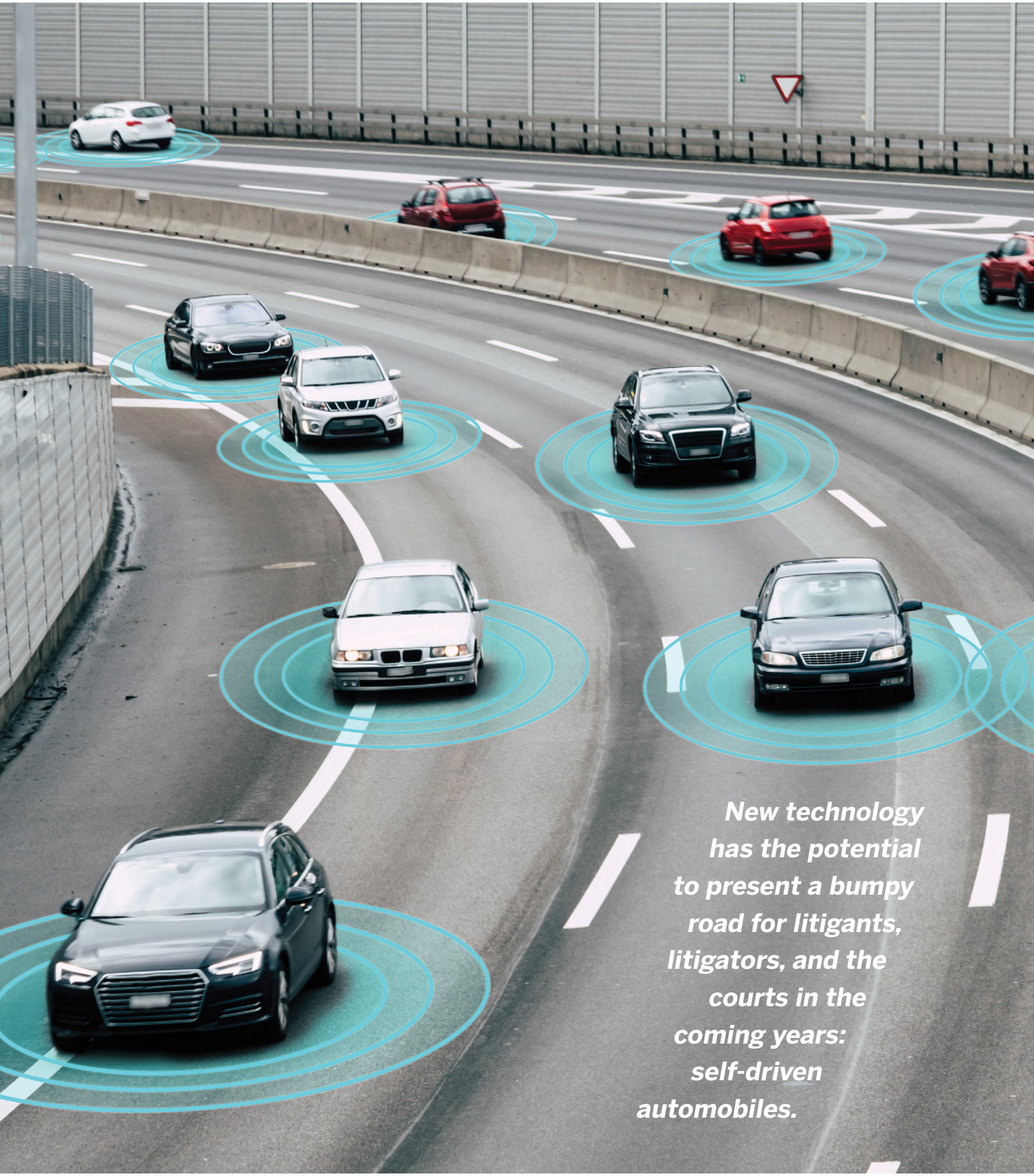


New technology has the potential to present a bumpy road for litigants, litigators, and the courts in the coming years: self-driven automobiles.

Liability in Self-Driving Cars

By Eric Palmer and Kyle Willems

Motor vehicle accident litigation is big business in America. According to the most recent data available, hundreds of thousands of motor vehicle accident (MVA) claims are submitted to insurance companies each year—a substantial portion of which were submitted by personal injury attorneys.[1] In turn, in 2017 America's automobile insurers raked in over $200 billion in insurance premiums to hedge their risk and passed millions of dollars of this income to the attorneys they hire to defend MVA claims.[2] This back and forth between personal injury attorneys and the auto insurance companies has largely remained unchanged since the automobile became the dominant source of transportation nearly one hundred years ago. Like the insurance companies, a number of litigators on both sides of MVA litigation have made a good living off of MVA cases.

New technology has the potential to present a bumpy road for litigants, litigators, and the courts in the coming years: self-driven automobiles. Thanks to rapid advances in connected and automated vehicle technology (CAV), it appears likely the MVA litigation industry is about to go through a major transformation. These changes will force MVA litigators to adapt with the times or get left behind.

The Basics of Our Current MVA Litigation Scheme

MVA disputes focus on the respective fault of the parties to the collision. In virtually every case, at least one of the parties is the driver of a motor vehicle. In the vast majority of cases, the at-fault party is a human. The at-fault human is typically able to satisfy any adverse liability determination because, by statute, the human driver is required to maintain minimum limits of liability insurance.[3] The system of maintaining personal insurance to protect oneself and others injured in MVAs has been the central component of the MVA litigation industry for decades.

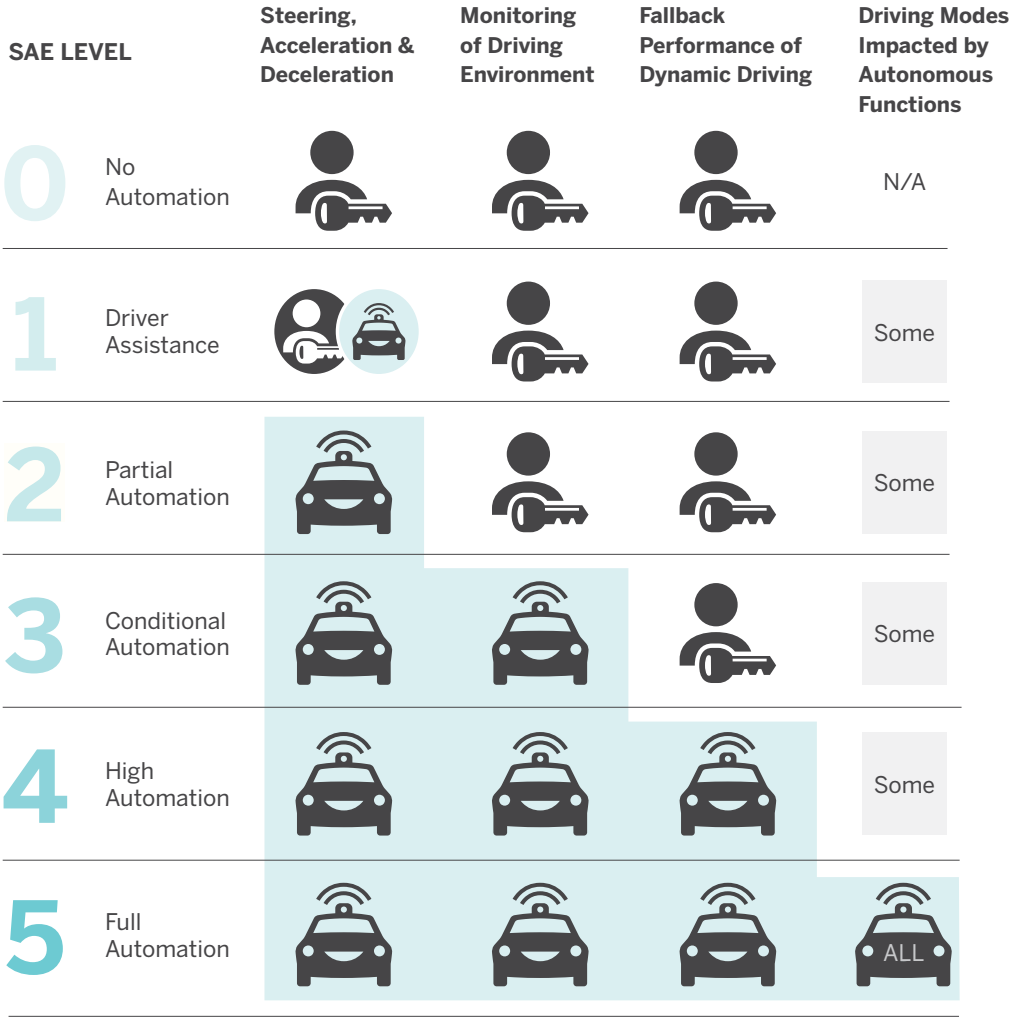
The Current Status of CAV Technology

The current MVA litigation construct is already being tested thanks to recent technological developments in the CAV market. Over the past several years it has become clear CAVs are not only feasible but also are almost certainly going to dominate the personal transportation industry, sooner than many people realize. Presently, there are a number of vehicle manufacturers that offer varying levels of autonomous features on their cars, including the Tesla AutoPilot, Mercedes DrivePilot, Volvo Pilot Assist, and the BMW ConnectedDrive. These industry-leading technologies are being placed into high-end luxury vehicles, but they are becoming more available on more affordable vehicles with every new model year.

These autonomous systems all combine various technologies that include lane-keeping, object and traffic distancing, and speed management that respond to the immediate environment around the vehicle. Most of these features rely upon the combination of multiple onboard cameras and LiDAR sensors. LiDAR, short for light detection and ranging, is a real-time environmental surveying technology that measures distance to an object with pulsating lasers. The overlaying of the images and data obtained from these various technologies allows the vehicle's computer to paint a picture of the environment around it, so it can maneuver within it.

As vehicles progress from level 0 to level 5, additional driving tasks are taken away from the driver and are placed in the control of the onboard computer and its autonomous software systems.

Society of Automotive Engineers (SAE) Working Model of the Varying Levels of Autonomous Vehicles



There are other commonalities among these vehicles and their corresponding autonomous systems: steering wheels, pedals, and, most importantly, click-thru user agreements. All of these systems warn the driver that these systems should not be exclusively relied upon for the safe operation of the vehicle. Most require that an on-screen warning be acknowledged or an agreement be accepted before the autonomous features will engage. The driver's hands must be on or near the steering wheel and the driver's feet must be near the pedals. The driver must be ready to intervene in the event of trouble. At present, the driver remains the responsible party in the event of a collision.

The Society of Automotive Engineers

The Society of Automotive Engineers (SAE) has a working model of the varying levels of autonomous vehicles, ranking the vehicles from a level 0 (no automation) to a level 5 (full automation). As vehicles progress from level 0 to level 5, additional driving tasks are taken away from the driver and are placed in the control of the onboard computer and its autonomous software systems.

The "Fallback Performance of the Dynamic Driving Task" is the most important column to focus on for the purposes of this discussion. In other words, so long as the fallback responsibility rests with the human driver, the landscape of MVA litigation remains relatively unchanged. To boil it down, the varying autonomous features can be viewed as cruise control on steroids. So long as the human driver is the one that has physical control of the steering wheel and pedals, the human driver remains the responsible party in the event of a crash. Once vehicles make the significant leap from Conditional Automation (SAE Level 3) to High Automation (SAE Level 4) or even Full Automation (SAE Level 5), we will see a seismic shift away from human responsibility for the fallback operation of the vehicle.

The Short-term Impact CAV Technology Will Have on MVA Litigation

It is unlikely that we will see a major shift in MVA litigation in the near term because auto manufacturers and insurance companies have done a good job of keeping the fallback responsibility of the driving task in the hands of the human driver. For instance, the liability analysis in recent MVAs involving cars with CAV systems continues to focus on the allocation of fault between the human parties involved in the MVA because there are click-thru agreements that require the driver to maintain control of the vehicle at all times. There is little developed law on the validity of these click-thru agreements at this point and this will likely be a key focus of litigation in the near term.

By having these click-thru user agreements in the current CAV systems, the vehicle manufacturers are able to stake a claim in the rapidly expanding autonomous vehicle market without having to assume financial responsibility for the damages that their systems could cause in the event of a software or sensory failure.

Another issue with the rapid implementation of CAV systems is the public outcry to every CAV-related fatality that has happened so far.[4] With each instance come new moratoriums on public testing, demands for National Traffic and Safety Board (NTSB) investigations, and calls to legislators.

This is all in spite of the fact that in almost every recorded instance human driver error has been an integral component to the cause of the fatality.[5] In fact, a recent study by the California Department of Motor Vehicles found that the human driver was at fault for all but one MVA involving a car in autonomous mode in the state from 2014 to the present.[6]

As long as we continue to see CAV-related fatalities dominate the news, we are probably going to face a slow rollout of the technology. Nevertheless, we are likely to see the first signs of a shift from person-to-person MVA claims to person-to-company products liability claims once we start to see fleets of automobiles with CAV technology.

The next major hurdle for expanding CAVs into the auto market could be the first big CAV-related products liability suit. Auto manufacturers who employ CAV technology and developers of that technology will inevitably put a flawed product into the market on a mass scale. The flaws could come in the form of bad software or bad security—opening the system up to hackers. Because the software and its flaws will presumably be identical in each vehicle's CAV system, any system failure could occur fleet-wide. This will jeopardize the safety of thousands, if not millions, of Americans and will almost certainly result in major, multi-state litigation. The cause and response to this first major suit could determine the long-term fate of CAV implementation.

Legislative Issues

From a legislative standpoint, it is clear that each state will need to adapt some legal constructs for the rollout of autonomous vehicles. In 2018, under the advisement of Gov. Mark Dayton, Minnesota formed a legislative advisory committee focused exclusively on connected and automated vehicles.[7] The title of this subcommittee is intentionally broader than just "Autonomous Vehicles," since it is understood that we will likely see fast-paced and widespread development of technology and products in this sector over the years to come. This committee is presently focusing on the requirements that the State of Minnesota will place upon organizations that want to test autonomous vehicles on Minnesota roadways. While Minnesota presently does not have any formal application process or testing programs in place for autonomous vehicles, we already have vehicles that have autonomous features sharing the roadways with conventional vehicles. As the autonomous vehicle technology continues to become more reliable and less expensive, it is inevitable that we will see more of this technology on Minnesota roadways. This influx of new tech-driven vehicles may change the legal landscape as we know it.

The Impact of Going Fully Autonomous

One truth appears certain, we are moving towards a future where transit is dominated by fully autonomous cars. The *Harvard Business Review* recently cited a joint study by Accenture and the Stevens Institute of Technology that estimates 23 million of the 250 million cars navigating America's roads by 2035 will be fully autonomous.[8] This would require significant legislation that supports the implementation of fully autonomous vehicles, which in turn would mean the floodgates for a fully autonomous market would be open.

Once the floodgates open and as autonomous technology continues to develop and more reliable and accepted fully-autonomous vehicles become marketable, the customary presence of steering wheels and pedals may cease to exist. Rather remarkably, Alphabet Corporation, the overarching technology conglomerate that was born of Google, has deployed some of its Waymo vehicles on the road without a steering wheel or pedals since 2015.[9] The vehicle operates entirely without user engagement and, importantly, without the possibility of user engagement. The fallback operational responsibility to the driver of the vehicle is no longer present. The would-be driver is now a passive passenger.

MVA Litigation Makes the Move Towards Complex Litigation

With the would-be driver as the passive passenger, the current system of a driver-based fault analysis cannot exist as it pertains to that passive passenger because any collision will probably be the result of a product failure that cannot be attributed to the passive passenger. The individuals who are involved in the collision will be evaluated for the purpose of a damages calculation, but any fault determination probably will not include the passive passenger. The fault determination will focus on any alleged product failure and one or more outside factors.

It is estimated that 23 million of the 250 million cars navigating America's roads by 2035 will be fully autonomous.

Depending on the error, these products liability lawsuits will likely be complex, multistate lawsuits that involve hundreds, thousands, or even millions of plaintiffs versus large corporations like the auto manufacturers and software developers. If the error causes common damages claims amongst the claimants, we could see mass tort cases like those that presently exist in the medical device realm. Conversely, while the error that causes MVAs across the country might be identical, the collision specific damages incurred by each potential plaintiff may necessitate smaller suits.

Autonomous Cars Mean Safer Roads

Proponents of fully autonomous vehicles are quick to point out that we need to redefine how we think of transportation in order to fully appreciate the safety benefits autonomous vehicles present. Proponents argue that we should embrace a reality where there are huge fleets of autonomous vehicles that are in constant communication with one another. If there is an accident, the entire fleet learns from it in real time and adjusts accordingly. By being able to communicate with one another in real time, the autonomous vehicles should also be much better than humans at adjusting to last-second dangers. In sum, fleets of autonomous cars should mean safer roads. Safer roads mean a lot less litigation. This is good for society, but not good for the litigator who wants to maintain an MVA-based personal injury practice under the current system.

Legislators Might Not Allow Vehicles That Are Not Autonomous

One frequently discussed topic is whether legislators will ban vehicles that are not autonomous because they will interfere with the system of sensors autonomous vehicles rely on. To even get to this point would require a major attitude shift on the part of the American motorist. But, if autonomous vehicle systems prove to be as safe as their proponents say, then we could see a shift in public opinion that enables autonomous cars to go mainstream. If this were to happen, there are concerns that auto enthusiasts or others who would prefer to operate their own vehicles will disrupt the system. If the law did not preclude them from operating their own vehicles, these individuals may need to purchase insurance policies that have particularly high premiums—assuming they could obtain coverage. These individuals also open themselves up to suit for negligently operating their vehicle, which could seem like a foreign concept in 20 or 30 years.

CAVs and Autonomous Cars' Long-term Impact on MVA Insurance

We cannot talk MVA litigation without talking about insurance. The dawn of autonomous vehicles is already making waves in the insurance forecasting industry. To satisfy an autonomous car industry, insurance companies will need to adjust to the new market. Rather than focus on individual policies, insurers will need to write large policies for auto manufacturers and autonomous systems developers. They will also need to adjust how they approach the individual insurance market because, as previously stated, it may become a niche market. While the insurers may see a dramatic decrease in premiums from traditional auto policies, they are likely to see a dramatic decrease in exposure. If fully autonomous cars prove less likely to be involved in collisions, it would be axiomatic that insurers would have less exposure.

Less exposure for insurance companies means fewer claims for insurance defense attorneys to defend. This means we will likely see an increase in products liability attorneys and a corresponding decrease in the traditional MVA attorneys on both sides.

Conclusion

The big question that looms heavily on personal injury litigators and those within the insurance industry is, just how fast will the MVA litigation and insurance landscape change? If the current trajectory holds, it is extremely likely that personal injury litigation and the corresponding insurance market will be transformed within the next decade. It will be incumbent on attorneys and insurers alike to adjust to this new reality or get left behind. While this is not great for attorneys and insurance representatives who prefer the status quo, the long-term forecast should be good for the public, and there is still going to be a market for attorneys to create value.

Notes

[1] The most recent survey conducted by the National Center for State Courts (NCSC) estimates that in 2005 at least 200,000 motor vehicle accident claims resulted in litigation. While the NCSC has not conducted a study since 2005, there is little reason to believe the statistics have changed in any dramatic fashion. In fact, the National Highway Safety Board's most recent data shows that the number of fatal car accidents have stayed relatively steady over the past several years.

[2] John Cusano & Michael Costonis, *Driverless Cars Will Change Auto Insurance. Here's How Insurers Can Adapt*, Harvard Business Review (Dec. 5, 2017), *https://hbr.org/2017/12/driverless-cars-will-change-auto-insurance-heres-how-insurers-can-adapt.*

[3] *See* Minn. Stat. § 65B.49.

[4] Ashley Halsey III, *As driverless-car crashes mount, fear of riding in them rises, too* (July 26, 2018), *https://www.washingtonpost.com/local/trafficandcommuting/as-driverless-car-crashes-mount-fear-of-riding-in-them-rises-too/2018/07/25/486a8184-8eb5-11e8-bcd5-9d911c784c38_story.html?utm_term=.58a09224ae73.*

[5] State of California Department of Motor Vehicles (October 24, 2018), *Report of Traffic Collision Involving an Autonomous Vehicle (OL 316)*, available at *https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/autonomousveh_ol316+.*

[6] *Id.*

[7] Minn. Exec. Order No. 18-04, Establishing the Governor's Advisory Council on Connected and Automated Vehicles (Mar. 5, 2018), available at *http://www.dot.state.mn.us/automated/docs/execorder.pdf.*

[8] Cusano & Costonis, *supra* note 2.

[9] Waymo, *https://waymo.com/journey/* (last visited Nov. 6, 2018).

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The FAA and Drones: A Modern Day Dr. Frankenstein and His Monster?

by Garrett Caffee

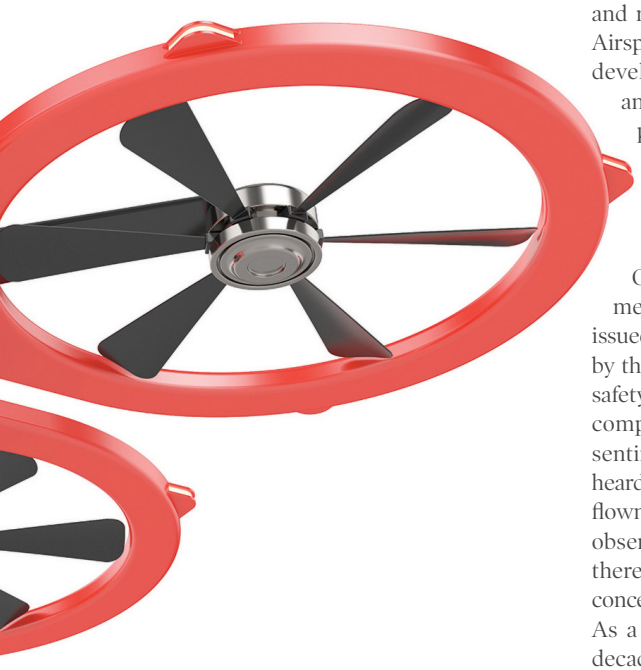
"Hateful day when I received life!" I exclaimed in agony. "Accursed creator! Why did you form a monster so hideous that even you turned from me in disgust?"

—Mary Shelley, *Frankenstein*

In her novel *Frankenstein, or The Modern Prometheus*, 18-year-old Mary Shelley's sometimes strained relationship with her father, William Godwin, can be seen as the motivation for her story of a creator and his creation. While Unmanned Aircraft Systems (UAS or drones) quickly arose as an offshoot of the development of the airplane, and predate the creation of the Federal Aviation Administration (FAA), the historical disconnect between the FAA and drones resembles in many ways the story of Dr. Frankenstein and his monster.

Like any good story, in order to see the relationship in its most pure sense, it is best to go back to where it all started. In 1916, just 13 years after the Wright Brothers first took to the (very low) skies of Kitty Hawk, the U.S. Army developed the first pilotless aircraft while looking for ways to integrate flight-based weapons and surveillance systems into its Great War arsenal.

World War II saw the use of multiple pilotless aircraft and rockets, including, famously, the German V-1 and V-2 rockets, the latter of which would catapult its creator, Wernher von Braun, to the forefront of the Space Age in the decades to come. Even more sophisticated technology



relating to unmanned but piloted aircraft was developed and used in small numbers by the United States during the war. Laden with explosives and TV cameras, the unmanned aircraft was capable of transmitting images back to a trailing piloted aircraft for purposes of steering the unmanned leading aircraft. Already, UAS were being conceived and developed in conjunction with their manned siblings.

Beginning in 1947 and continuing to the present day, the U.S. Air Force has led the efforts to develop and integrate drones into the U.S. military arsenal. Perhaps the most significant advancement was the use of CIA-operated Predator drones in Afghanistan in the hunt for Osama bin Laden and other Taliban prior to and immediately after 9/11. Even before the U.S. Air Force received its own drone fleet, in October 2001, the CIA used Predator tailfin number 3034 (which now hangs in the Smithsonian Air and Space Museum) in an unsuccessful attempt to kill Mullah Omar. As is often the case with developing industries, much of the technology now employed in modern UAS, including those used by hobbyists and commercial operators across the world, was first seen on the drawing boards of corporations vying for military contracts.

The FAA, our figurative Dr. Frankenstein, was created 60 years ago. Currently a part of the Department of Transportation, the FAA became the primary regulatory agency for establishing and maintaining flight safety standards in the U.S., including pilot certification requirements, air traffic control standardization, and researching and developing the National Airspace System (NAS). For decades, the FAA developed and perfected a set of standards and regulations for air travel that focused primarily on its first-born, manned aircraft. This system was so successful, the FAA became known around the globe as one of the premier registries for aircraft.

On June 9, 1981, the FAA and the drones met for the first time. At that time, the FAA issued Advisory Circular 91-57 (AC 91-57), which by the FAA's own admission was an "outline of safety standards for model aircraft operators," compliance with which was voluntary. The sentiment at the time was that the FAA had heard some concerns about model aircraft being flown at distances from airports, which some observers deemed possibly unsafe. However, there was never enough public or legislative concern to lead to any sort of formal rulemaking. As a result, the FAA and drones spent three decades in an informal relationship, with the FAA being reluctant to make anything truly official and instead provided recommendations of use to the Academy of Model Aeronautics (AMA) only via AC 91-57.

In 2007, the FAA attempted to legislate more stringent rules regarding the commercial use of drones by issuing the FAA 2007 Policy Notice[1] (the 2007 Notice), leaving the recreational use of drones covered by the voluntary AC 91-57. It would take only four years for the acts of drone users to force the FAA to revisit the issue.

On October 17, 2011, Raphael Pirker used a four-pound, seven-ounce Ritewing Zephyr-powered Styrofoam glider to capture video and aerial photographs of the University of Virginia campus for which he was compensated by a third-party advertising agency. The Ritewing Zephyr sports a 56-inch wingspan and retails for $130. Video recorded during the flight shows Pirker haphazardly flying the drone near students and through pedestrian tunnels. On April 13, 2012, the FAA issued a Notice of Proposed Assessment, proposing a civil penalty against Pirker in the amount of $10,000. On June 27, 2013, the FAA issued a formal Order of Assessment, which Pirker appealed in an attempt to differentiate drones from manned aircraft, and, as such, not subject to Federal Aviation Regulations (FARs), namely, "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."[2]

On March 6, 2014, administrative law judge Patrick Geraghty issued a decisional order in the *Raphael Pirker*[3] case, striking down the FAA's fine on Pirker. Among other reasons, Judge Geraghty struck down the fine because of his finding that Notice 07-01 was ineffective as it was arguably an attempt at legislative rulemaking and did not adhere to 5 U.S.C. Section 553(d), which requires 30 days' notice prior to an effective date. What's important about the fact that Notice 07-01 was no longer enforceable is that Notice 07-01 was the vehicle through which the FAA had dichotomized commercial UAS activity from hobbyist use of model aircraft, and placed strict restrictions on commercial UAS use. So strict in fact, that up to that date, no commercial UAS use had been approved south of the Arctic. The ruling of the ineffectiveness of Notice 07-01 was not addressed by the FAA in its appeal brief, and therefore was waived, exposing a gaping hole in FAA regulatory authority through which adventurous enterprising UAS flew their drones for commercial purposes pending further clarification on the state of UAS laws.

On November 18, 2014, the National Transportation Safety Board (NTSB) issued the long-awaited and much-anticipated opinion and order in the FAA's appeal of the administrative law judge's decisional order in the *Raphael Pirker* case (Appeal Order). In the Appeal Order, the NTSB explicitly stated that Mr. Pirker's Ritewing Zephyr was in fact an "aircraft" under 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1[4] and therefore was subject to FAA regulations.

Much like a custody order in a sense, the Appeal Order put the public on notice that things such as "unmanned free balloons, kites, rockets, and moored balloons that rise or travel above the surface of the earth,"[5] including UAS are "aircraft." The NTSB stated that "...the plain language of the statutory and regulatory definitions is clear: an 'aircraft' is any device used for flight in the air,"[6] and continued, "[t]his definition includes any aircraft, manned or unmanned, large or small."[7]

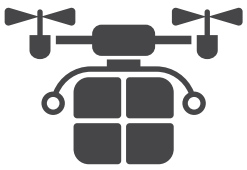
In conjunction with its loss of any enforceability of the 2007 Notice and in an effort to corroborate its argument in the appeal brief in *Pirker*, on June 25, 2014, the FAA caused the publication in the Federal Register of a notice titled "Interpretation of the Special Rule for Model Aircraft"[8] (the 2014 Notice). So why after more than 30 years did the FAA decide to move away from AC 91-57 with regard to its guidance for the use of recreational UAS, which, judging by the relative absence of incidents with model aircraft, had been effective for so long? The FAA stated that it was "issuing this interpretation because we have received many inquiries regarding the scope of the special rule for model aircraft . . . and the FAA's enforcement authority over model aircraft. . ."[9]

In reality, while never directly mentioned, the Notice had everything to do with the FAA's ongoing efforts to maintain its self-professed authority over the commercial use of unmanned aircraft systems by claiming that it never specifically disclaimed jurisdiction over model aircraft, and while AC 91-57 was self-described as voluntary, the FAA really just meant that it could choose whether or not to enforce the FAR regulations on unmanned aircraft at any time, the same way that they could choose whether or not to enforce said regulations on manned aircraft.

During the judicial proceedings accompanying the *Raphael Pirker* case, the FAA continued its floundering and at times confounding treatment of UAS, trying to shoehorn UAS and the regulations surrounding the operation and operators of said half-pound drones into the same FARs that governed the operation of myriad manned aircraft, including behemoths like the Boeing 747 and 777 and Airbus A330 and A380; each commercial airline capable of carrying hundreds of paying passengers, with the A380's maximum take-off weight in excess of 1.2 million pounds.

Impatient UAS operators, both recreational and aspiring commercial enterprises, along with Congress and a supportive President Barack Obama, enacted into law the FAA Modernization and Reform Act of 2012[10] (the 2012 Reform Act), which among other things commanded the FAA to take steps to reign in and take responsibility for its creation, to allow drones to gradually integrate into a shared NAS with manned aircraft, albeit at a literal lower altitude than its manned cousins. The 2012 Reform Act was explicit in allowing for safe commercial operations of drones via Section 333 of the 2012 Reform Act, while also explicitly informing the FAA that it was not to hinder recreational usage of UAS.

Proactive UAS operators around the country seized the opportunity and hurriedly filed Section 333 petitions, essentially an equivalent of adoption papers for their "little monsters," i.e., their drones. Section 333 petitions required the petitioner to detail the exact FARs to which they believed their UAS to be unable or unpractical to adhere. As you can imagine, the FAA's monstrosities acted little and looked even less like their manned counterparts, making the number of FARs from which exemptions were sought well over 20, including by way of illustration 14 C.F.R. § 91.9(b)(2), requiring a copy of the current approved flight manual to be carried aboard the aircraft. Similarly, those operators whose Section 333 exemptions were granted by the FAA were subsequently required to register their UAS with the FAA in the same manner required for a manned aircraft. The FAA had long operated with the carbon-copy-based FAA Form 8050-3 and a $5 check to register aircraft. Imagine the surprise that greeted many commercial UAS operators when after the arduous Section 333 petition drafting and the wait required in order to operate a state of the art unmanned flying commercial aircraft, the reality of the FAA's affairs meant keeping a pink carbon copy of their application and sending in a de minimis application fee before they could finally proceed. In some states, including Minnesota, that also meant registering the drones with the state, along with paying an annual registration fee.



Congress has given the FAA until October 5, 2019, to update the existing regulations to allow for the carriage of property by operators for compensation or hire.

Thousands of Section 333 exemptions were filed with the FAA, causing wait times to increase to a point where new UAS models with increased battery life and more sophisticated cameras eclipsed the older models before the initial Section 333 exemptions were even approved. Section 333 exemption requests required a specific delineation of UAS models for which exemptions were sought, so that, in turn, required commercial operators to file further amendments to their approved Section 333 exemptions just to stay competitive in the market. During all that time, recreational UAS users were inundated by a number of flip-flopping positions by the FAA of registration requirements. At times requiring UAS users to register under a new web-based system along with a $5 registration fee (which was promised to be refunded by the FAA if done within a particular timeframe, and which to date, this author never received), and at others, being advised by the courts and media that such registration was not allowed pursuant to the 2012 Reform Act.

In June 2016, the FAA promulgated the Small Unmanned Aircraft Rule[11] ("Part 107"), which provides specific, tailored rules that detail requirements for operators, the certification they must possess, and the standards and airspace restrictions that UAS operators must abide by. Section 333 continued to be utilized for commercial operation FAR exemptions for UAS over 55 pounds, and for other operations, such as beyond the visual line of sight and nighttime flights.

In October 2018, the Senate, House, and President effected the FAA Reauthorization Act of 2018[12] (the 2018 Bill), providing for five years' worth of appropriations for the FAA. The 2018 Bill represents the longest appropriations time period that the FAA's Airport Improvement Program has had since its 1982 inception and it passed with a 92-6 vote in the Senate, showing near unanimous support.

The 2018 Bill leaves many specific details up to the FAA to determine over the next year, but it does give us a general road map for UAS in the future and benchmarks that Congress has directed the FAA to accomplish. So what does that road map look like?

First, Section 333 is now repealed. As of today, the FAA does not allow drone operators to fly their drones beyond their own line of sight; nor are nighttime flights allowed. With the 2018 Bill, the FAA has specific direction to provide guidance and allow flights that extend beyond the visual line of sight of the operator and for nighttime operations of UAS. Also under the 2018 Bill, all users, even recreational ones, will be required to pass an Aeronautical Knowledge and Safety Test, a provision which is to be implemented by the FAA by April 3, 2019. This test requires an understanding of aeronautical safety and knowledge of FAA regulations and requirements pertaining to the operation of a UAS in the NAS.

Finally, and perhaps most importantly, Congress has given the FAA until October 5, 2019, to update the existing regulations to allow for the carriage of property by operators for compensation or hire. It appears that my ultimate dream of having *Terminator 3: Rise of the Machines* delivered to my doorstep by a drone might actually come true prior to the complete obsolescence of my Blu-Ray player.

One small but very important item to note in the 2018 Bill is that Congress has included an ambiguous proviso that "a violation of a

privacy policy by a person that uses a UAS for compensation or hire, in the NAS shall be an unfair and deceptive practice."[13] Such violation of the privacy act explicitly falls under Federal Trade Commission jurisdiction.[14] Interestingly, this is the first time that we've seen Congress mention an area that remains a highly contentious and discussed arena in UAS operations–that of the privacy rights.

For years, the FAA has had much success dealing with its first-born, manned aircraft. While oft delayed and from time-to-time at odds with previously issued directives, the FAA has begun to integrate and incorporate the life of its second-born, drones, into the NAS. Still to be determined are how privacy, property rights, sharing of and jurisdiction over certain classes of airspace, and the usage of existing rights of way will be managed during the period when the more numerous but less glamorous of the FAA's offspring becomes fully integrated into our lives.

Notes

[1] 72 Fed. Reg. 6689 (Feb. 13, 2007).
[2] 14 C.F.R. § 91.13(a).
[3] *Michael P. Huerta, Administrator, Federal Aviation Administration v. Raphael Pirker*, National Transportation Safety Board Decisions, Docket No. CP-217, March 6, 2014 ("*Raphael Pirker*").
[4] *Michael P. Huerta, Administrator, Federal Aviation Administration v. Raphael Pirker,* NTSB Order No. EA-5730, 12 (Nov. 18, 2014).
[5] *Id.* at 10.
[6] *Id.* at 7.
[7] *Id.* at 12.
[8] 79 Fed. Reg. 36171 (June 25, 2014).
[9] *Id.* at 36172.
[10] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (amending 49 U.S.C.).
[11] 14 C.F.R. Part 107.
[12] H.R. 302, Pub. L. 115-254.
[13] *Id.* at Section 375(a).
[14] 15 U.S.C. § 45(a).

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A New Weapon for Tech Companies to Fend off Trolls

by Eric Chadwick

A common misconception is that inventors receive patents for their ideas. Even the Supreme Court has sometimes fallen into the trap of misstating this fundamental precept of patent law.[1] In a sense the notion is generally true because the genesis for every patent is an idea. But legally, a patent is awarded for an invention. And inventions are ideas that are more fully developed into a new process, machine, manufacture, or composition of matter.[2]

One long-standing implicit exception to this scope of patentable subject matter has been recognized by courts for more than a century and a half. Namely, a patent cannot be granted if it covers laws of nature, natural phenomena, or abstract ideas.[3] And the last exception, the abstract idea, has taken on increased relevance recently as technology companies continue their efforts to fend off litigation from non-practicing entities (NPEs).[4] For more than a decade, patent litigation filings have been on the rise fueled, in large part, by NPEs.[5]

A prohibition on the patenting of abstract ideas makes sense because such patents, if granted, would remove from the public domain all applications of a particular idea. While most everyone would agree on the wisdom of such a rule, identifying an abstract idea in a patent claim is not always an easy task. This difficulty arises, in part, because patent lawyers are paid a lot of money to cleverly draft claims that obtain broad rights for their clients because the underlying technology is complex and patent claims are difficult to decipher. One area at the forefront of this twofold challenge is computer software patents. Of course, this is an area where NPEs flourish as they continue to hound technology companies, sometimes even with patents purchased from another technology company.[6]

Trolls Continue to Extract a Heavy Toll on Technology Companies

NPEs have been around long enough now that those having even a passing familiarity with patent litigation recognize them as companies that derive the majority of their total revenue from patent licensing activities. Likewise, they typically do not utilize their patented technology by marketing any products of their own. For those not so inclined to charitable descriptions, NPEs are often referred to as "trolls" because they unfairly extract a toll from others much like the creatures from folklore who demand money before allowing passage across a bridge. Typically, NPEs sue multiple defendants and, often, they have a sizable patent portfolio, which enables them to sue the same defendants more than once.

NPE patent assets are also often heavy into computer technology.[7] A common tactic of an NPE is to claim its patent is pioneering in that it covers the most basic of computer-related concepts. This allows the NPE to assert its patent against technology companies across the board, thereby increasing the return on investment. But it also subjects the patents to increased risk of invalidity.

Unfortunately, many of these patents were granted in the 1990s. That time period is one in which the United States Patent & Trademark Office's examination of software and computer technology patent applications was not as vigorous as it perhaps should have been.[8] NPEs have taken note of this weakness and have been using it to their advantage for years.[9]

Over the past 15 years, it is a rare technology company that has not found itself in very expensive patent litigation with one or more NPEs. As one can imagine, after spending millions of dollars in a successful defense, or more typically paying out large sums of money in confidential settlement agreements to avoid the uncertainty of litigation, technology companies have sought cost-effective ways to fight back. That search for an effective defense continues to evolve.

Initially, technology companies relied heavily on the *inter partes* review (IPR) proceeding introduced in 2012.[10] IPRs proved a productive means of combating overstated claims by NPEs. However, IPRs themselves come with a hefty price tag.[11] Moreover, while successful initiation of an IPR often results in a stay of district court litigation, a stay is not guaranteed and typically does not occur until about a year after a lawsuit commences. Thus, defendants are still left with substantial legal fees even if the IPR invalidates the patent. More recently, beleaguered technology defendants have found a new weapon in their arsenals with which to rebuff NPE lawsuits–the abstract idea.

Abstraction Is Not the Model of Clarity

Not surprisingly, in 2014 the Supreme Court in *Alice v. CLS* ruled that applying an abstract idea to a generic computer is no more patentable than a run-of-the-mill abstract idea.[12] Now that the *Alice* opinion is fast-approaching its fifth anniversary, the Court of Appeals for the Federal Circuit has developed a body of case law that provides some guidance for application of abstract ideas to software patents. And while a number of NPE patents have been invalidated under *Alice*, there still remains a fair amount of uncertainty in the determination.

The *Alice* framework utilized by the Federal Circuit is the now familiar, two-step analysis first articulated in 2011 to deny patentability to a patent relating to the laws of nature.[13] In step one, the Court determines whether the claim is directed to an abstract idea.[14] If so, then in step two the Court analyzes the claims to determine if anything additional has been added that transforms the nature of the claim into something patentable, which the Court characterizes as a search for an "inventive concept."[15]

While the two-step *Alice* test appears straightforward, in practice it has proven to be a bit of a challenge. Shortly after the *Alice* opinion, the Federal Circuit acknowledged that "precision has been elusive in defining an all-purpose boundary between the abstract and the concrete."[16] And just last fall, it further admitted that much of the confusion in step one arises from the challenge of properly categorizing what a claim "is directed to."[17]

In 2014 the Supreme Court in *Alice v. CLS* ruled that applying an abstract idea to a generic computer is no more patentable than a run-of-the-mill abstract idea.

For anyone who has ever read the claims of a patent, this difficulty comes as no surprise. By convention, patent claims must be written as a single sentence, which makes them almost incomprehensible to the uninitiated.[18] It is no surprise, then, that district courts have had difficulty distilling what these run-on sentences (*i.e.*, patent claims) are "directed to." As the body of case law has expanded, however, the task has become somewhat more predictable as courts are now able to compare and analogize the claims under consideration with those that have already been passed upon by other courts. Three cases provide a nice flavor of the alleged breadth of these software patents and the issues faced by technology companies targeted by NPEs. One East Texas district court invalidated the patent of eDekka LLC, a troll of particular note because it asserted its patent against 168 separate defendants ranging from Harry & David, Estee Lauder, and the NFL. The court held that eDekka's patent was directed to the abstract idea of storing and labeling information, which are tasks that could be performed by a human.[19] While the patent used seemingly technical terms like "data structure," "data," and "input," the court ultimately found no inventive concept; rather, the patent simply applied an abstract idea to a computer.[20] But an abstract idea performed on a computer is an abstract idea nonetheless. And when the patent was invalidated, eDekka's 168 lawsuits abruptly came to an end.

In another case, NPE-giant Intellectual Ventures asserted its patent relating to dynamic management of eXtensible Markup Language (XML) data against Capital One.[21] XML is a specialized computer language developed (when else?) in the 1990s that finds utility in the flexibility it provides to business partners who exchange data in different formats.[22] The court held that the patent claims were "directed to the abstract idea of collecting, displaying, and manipulating data."[23] The court reasoned that although the claims recited "technical sounding" data types, in reality they were nothing more than coined labels that described already-existing, conventional structures.[24] And the fact that the claims were limited to a particular type of document (XML documents) was an insufficient inventive concept to save the patent. Hence, the Court found them invalid.

Sometimes even the mere threat of an *Alice*-invalidity motion is enough to make an NPE back down. That was the case with AlphaCap Ventures, an NPE with three patents that it asserted covered crowdfunding. In the patents, AlphaCap described its invention for debt and equity financing as involving "data collection templates."[25] AlphaCap asserted its patents against 10 defendants, which comprised every major entity in the industry, and promptly negotiated modest five-figure settlements with nine of them.[26] But one defendant, Gust, Inc., chose to fight rather than pay up.

First, Gust got the case transferred out of patentee-friendly East Texas to the Southern District of New York. It then filed its *Alice* invalidity motion. In response, AlphaCap determined the case was "not worth litigating," and promptly granted Gust a covenant not to sue, effectively ending the lawsuit.[27]

Finally, Gust successfully moved to recover its nearly $500,000 in attorney's fees. In granting Gust's motion, the court noted that crowdfunding is simply a variant of patronage, which is a fundamental economic concept directed toward organizing human activity.[28] In other words, the patented invention was abstract. It's worth noting that while Gust won its fee motion, such an outcome is atypical. The vast majority of technology companies that prevail are left with a substantial legal bill along with the unsatisfying realization that they are free to continue doing what they've been doing all along.

Conclusion

Given the money at stake, there is little doubt that technology companies will continue to be targets for NPEs willing to assert dubious software patents. But, it seems the tide may have shifted some in recent years first through IPR challenges and now with invalidation of abstract patented "ideas." While no one would characterize patent infringement litigation as a walk in the park, the arsenal technology companies now have to combat such lawsuits has expanded and that is a development that should be applauded.

Given the money at stake, there is little doubt that technology companies will continue to be targets for NPEs willing to assert dubious software patents.

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Notes

1 *See, e.g.*, Lear, Inc. v. Adkins, 395 S. Ct. 653, 674 (1969); Brulotte v. Thys Co., 379 U.S. 32, 34-35 (1964) (J. Harlan dissenting).

2 35 U.S.C. § 101.

3 The Supreme Court held that the broad language of Section 101 is subject to an implicit exception for "laws of nature, natural phenomena, and abstract ideas," which are not patentable. *Alice Corp. Pty, Ltd. v. CLS Bank Int'l*, 134 S.Ct. 2347, 2354 (2014).

4 The term "abstract idea" is not easily defined. In *Alice*, the Supreme Court refused to "delimit the precise contours of the 'abstract ideas' category in this case." 134 S.Ct. at 2357. The Federal Circuit Court of Appeals similarly has not provided a firm definition, instead stating that "this court and the Supreme Court have found it sufficient to compare claims at issue to those claims already found to be directed to an abstract idea in previous cases." Enfish, LLC v. Microsoft Corp., 822 F.3d 1327, 1334 (Fed. Cir. 2016).

5 According to one study the number of companies sued by NPEs grew ninefold between 2004 and 2014. James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, Harvard Business Review (Nov. 2014), *available at* https://hbr.org/2014/07/the-evidence-is-in-patent-trolls-do-hurt-innovation.

6 As recently as last year, Uniloc, one of the most prolific trolls, bought a half-dozen patents from IBM. Alex Lee, *IBM Attracts All Types of Patent Buyers*, PatentVue (Sept. 13, 2017), http://patentvue.com/2017/09/13/ibm-attracts-all-types-of-patent-buyers/.

7 By some estimates, software patents represent 62 percent of NPE patent assertions. James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 Cornell L. Rev. 387, 394 (2014).

8 Arti K. Rai, *Improving (Software) Patent Quality Through the Administrative Process*, 51 Houston L. Rev. 503 (2013).

9 Two of the more prolific NPEs are Intellectual Ventures, which owns about 95,000 patents, and Uniloc USA, Inc., which recently had more than 100 active lawsuits.

10 IPRs are an adversarial process conducted in the Patent & Trademark Office, in which the petitioner challenges the decision to grant the patent in the first place. The standard for invalidating claims in an IPR is more favorable for a petitioner than in litigation.

11 On average, IPRs cost in excess of $300,000 from filing through trial. American Intellectual Property Law Association, 2017 Report of the Economic Survey (Aug. 2017).

12 *Alice*, 134 S.Ct. at 2358.

13 Mayo Collaborative Servs. v. Prometheus Labs, Inc., 566 U.S. 66 (2011). *Mayo* involved a different type of patent-ineligible subject matter. Specifically, at issue was the relationship between concentrations of metabolites in a patient's blood and the likelihood that a particular drug dosage would prove ineffective or cause harm.

14 *Alice*, 134 S.Ct. at 2355.

15 *Id.*

16 Internet Patents Corp. v. Active Network, Inc., 790 F.3d 1343, 1345 (Fed. Cir. 2015).

17 Gust, Inc. v. AlphaCap Ventures LLC, No. 2017-2414, slip op. at 13 (Fed. Cir. Sep. 28, 2018).

18 The single-sentence rule is required by the Patent & Trademark Office, which argues that the standardization of how claims are presented fosters efficient processing of patent applications. James McKeown, *Claim Drafting Strategies Revisited–Is the "Single Sentence Rule" Too Inflexible?*, Intellectual Property Today (Aug. 2003).

19 eDekka LLC v. 3Balls.com, Inc., 2:15-cv-00541-JRG, 2015 WL 9225038 (E.D. Tex., Dec. 17, 2015).

20 *Id.* at *3.

21 Intellectual Ventures I LLC v. Capital One Fin. Corp. et al., 850 F.3d 1332, 1338 (Fed. Cir. 2017).

22 U.S. Patent No. 7,984,081, col. 1, lines 45-48.

23 Intellectual Ventures, 850 F.3d at 1340.

24 *Id.* at 1341-42.

25 Gust, Inc. v. AlphaCap Ventures LLC, 226 F.Supp.3d 232, 241 (S.D.N.Y. 2016).

26 *Id.* at 237.

27 *Id.* at 238.

28 *Id.* at 241-42.

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Educational Technology for the Law School Classroom

By Michael Robak

How is educational technology (edtech) impacting the law school environment? How has edtech developed, what features do we see today, and where can we expect it to go in the future? Let's begin our examination by picking a particular inflection point for technology from 35 years ago.

Classes were conducted only in person. Classrooms had, for the most part, fixed seating, chalkboards, and, most likely, a massive overhead projector that used transparencies. Assignments were handwritten or typed on a manual or electric typewriter. Research could only be performed in the library and certainly the only way to "shepardize" a case was to use the print resource Shepard's® Citations Services (no other citator existed) and all its glorious monthly supplements. At the time, legal education depended on books and paper, but then a fundamental technology change began in earnest: the rise of the personal computer.

As the 1980s progressed into the 1990s, the epicenter for law school adoption of edtech was in the law library. While the dean's suite continued to use IBM Selectric typewriters, the law library's publishing vendors began to develop electronic resources to replace print.

Even though personal computers were becoming less expensive, they were far from available to everyone. Computer labs allowed students to access word processing, the library's online catalog materials, and the World Wide Web—which became the next inflection point in technology.

As the web developed, so did the opportunities for enabling new approaches to teaching. Additionally, the rise of computer networking allowed technology to move from the law library and spread to the rest of the law school. And, by the mid-1990s, computers in the law school were becoming ubiquitous.

All of these changes coalesced to provide the foundation for the rise of a more systematic application of technology to education. This, of course, was not confined to law schools. But, not surprisingly, law schools tended to be, for the most part, a little behind the curve in edtech adoption.

And by systematic application of technology to education, two strands of opportunity arose: the use of technology to facilitate the learning process and the use of technology to improve student performance. Often these are seen as intertwined, but by focusing on some specific examples that have developed in the ensuing 20 years, we can begin to see the larger trends unfolding in law school edtech.

CALI

One development specific to law schools can be found in the history of CALI (Center for Computer-Assisted Legal Instruction), which was incorporated in Minnesota in 1982. Most lawyers are probably familiar with the CALI awards, but they might not recall the self-paced, outside-of-class CALI lessons. CALI's work was some of the earliest in edtech, first using CD-ROMs and then the web to deliver instructional assistance. CALI has begun developing other kinds of tools for 21st-century legal instruction. In particular, CALI developed A2J Author software. This software uses a visual coding language to build guided interviews to assist pro se litigants with form creation. The guided interview is developed to capture, by way of question and answer, the elements necessary for the type of pleading to be developed. The A2J Author software works with the document assembly program HotDocs, which takes the information variables created in the guided interview and then marries them with the HotDocs software in order to create the final form or pleading. This tool represents an opportunity for students to learn coding basics and document assembly software. But, most importantly, the programming cannot be properly completed without the student having a complete understanding of the area of law for which the forms are created. This is an example of where edtech has been designed to aid in enhancing student performance. In part this is

also driven by the American Bar Association's requirement that law schools begin finding ways to develop practice-ready attorneys. The focus has been on developing tools that provide an experiential component to the learning as well as a formal assessment of the students' learning.

Flipped Classroom

Another example of the use of edtech to improve learning outcomes is the development of the flipped classroom. The classic description of the law professor in the classroom is as the "sage on the stage," delivering lectures and then using the Socratic method to teach legal reasoning. The current thinking on the subject is to move the instructor from the "sage on the stage" to the "guide on the side." In other words, what has typically been the lecture portion of the class is now recorded by the instructor and then made available to the students to view outside of class. The classroom time is then focused on simulation exercises and collaborative work in which the instructor oversees the student work and can provide a more personalized learning experience. But for this to work, there had to be significant development in two other areas of edtech infrastructure.

Learning Management System (LMS)

The first was the development of the Learning Management System (LMS). The first generation of these systems appeared in the late 1990s. They were also developed in part to assist with development of distance education. Most lawyers will probably remember the Westlaw version of the LMS, called TWEN. Or they may remember the LexisNexis version of the LMS, which used Blackboard. In addition, most law schools would also adopt an LMS outside of these which could have been anything from homegrown to commercial products like Blackboard, Moodle, Sakai, or Canvas. The LMS is now becoming the heart of class instruction. For each course the LMS allows the instructor to post content, interact with the students, provide quizzes and other assessment tools, grades, and other feedback for the students.

Lecture Capture Software

The second development of importance was lecture capture software. The idea of lecture capture software allows for more than just a simple video recording. The presentation materials, such as PowerPoint, can be included in the recording and be available for the student as its own frame that can be presented side by side with the instructor. The software also provides sophisticated editing tools. It includes an analytics component so that the instructor will be able to see which parts of the video students watched, how long they watched the video, when they watched the video, etc. Additional features such as quizzes can be inserted into the video to help assess the student's understanding.

And the lecture capture software isn't just for the flipped classroom. Many law school classrooms have video cameras installed so that the class can be captured for a student's later viewing. This offers the instructor an opportunity to, for example, decide if a student's question represents confusion for just the particular student or the class as a whole. If the instructor concludes that it would not be helpful to stop and explore the question at that point, the instructor can indicate to the student that he or she should note the time and, that evening, call up the lecture and go back to that point in time to review the material. If the student still has a question, then he or she can make an appointment with the professor, using the online scheduling system contained within the LMS.

Of course, the appointment does not have to be in person since the professor has access to video conferencing software that allows online face-to-face discussion.

Distance Education

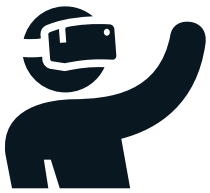
Video conferencing has led to the next evolution in the delivery of legal education: distance education. A distance-education law school class is defined in ABA Accreditation Standard 306 as a class "in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously."[1] Currently the ABA limits the amount of distance learning that can count toward graduation. However, there are a few schools, among them, Mitchell Hamline School of Law, that have asked the ABA for a variance in order to create an online JD program that will meet with ABA approval. Distance education is becoming increasingly important to higher education as more and more schools are grappling with how to offer more classes online.

Active Learning Classroom (ALC)

Even with the increase in online offerings, classrooms on campus are beginning to evolve to both support the flipped classroom as well as provide spaces for active learning. The development of the Active Learning Classroom (ALC)—aka smart classroom or flexible classroom—is relatively new. Unlike traditional classrooms, ALCs do not have a front of the room. Most classrooms have been designed to have the instructor delivering a lecture at the front, and the class arranged to receive the presentation. An ALC contains furniture that can be arranged as necessary for lecture, discussion, or collaborative work. In addition, the room also contains fixed or portable whiteboards. Some schools have chosen to cover the walls with dry erase paint or wallpaper in order to make the entire room a writable surface.

In addition to whiteboards, these smart classrooms are also adding smartboards. The smartboards utilized at the University of St. Thomas School of Law (UST Law) have 75-inch interactive touch screens. They work as electronic whiteboards, which scroll to allow several feet of screen to be utilized for work. This means an instructor can set up a series of screens for instruction that can be scrolled through during class. The screen contains a QR code that students can scan with their smartphones or tablets. The code opens an app that connects the student's smart device to the smartboard. The app allows students to write on the board by using their finger or a stylus to write on their smart device. Whatever they write appears on the screen. Additionally, the instructor or student can save a copy of the lecture notes at any time during the session as a PDF.

Smartboards also allow for browser windows to be opened so websites can be called up during the session. These browser windows can be annotated, and those annotations can also be saved as a PDF. Smartboards also allow for screen sharing. This means that students can take their smartphone, tablet, or computer and wirelessly connect to the smartboard and share on the larger screen. In addition, laptops can be connected to the screen via HDMI cables. This allows for improved collaboration among students on projects.



"With VR, the opportunity exists to create simulations of say a courtroom proceeding that would allow the student to engage with a judge and opposing counsel in the simulation."

Over this past summer, UST Law created an active learning classroom laboratory. A smaller, seminar style classroom was completely renovated as an ALC. This room now contains six 75-inch smartboards, flexible furniture that seats 24 students, and a state-of-the-art digital podium. This podium is effectively a large touch screen tablet that connects to the overhead projector and allows for whatever appears on the screen to be sent to the six smartboards. A single smartboard can be shared with the other smartboards and the digital podium. So, for example, one configuration for the room is to have the tables set up as pods in front of each of the screens with seating for four students. During a legal research class, each of the student groups can be working on different projects. In each of the six groups, one student can be working on Westlaw, one on LexisNexis, one on Bloomberg, and one on Fastcase, all researching the same question. Let's say the group using screen one has the better set of search strategies. The instructor can then share that group's screen with the other five groups and have a discussion for all to easily follow. In addition, the instructor can annotate the screen and save that file.

Virtual Reality

Like all technology, edtech continues to rapidly evolve and change. One particular kind of technology being explored for classroom use is virtual reality (VR), which is now more often referred to as augmented reality. With VR, students can develop simulations based on real situations. For example, a UST undergraduate program had students visit a refugee camp and take highly detailed videos of their visit. The videos included student interactions with those dislocated and living in the camps. The students then used their videos to create a virtual reality tour of the camp. For many viewers, the impact was very emotional as it allowed them to experience the refugee camp firsthand. With VR, the opportunity exists to create simulations of say a courtroom proceeding that would allow the student to engage with a judge and opposing counsel in the simulation. There are no limits on the types of experiential learning opportunities that could be developed.

At UST Law, we are seeking to find innovative ways to ensure our law students are leaving school truly ready to practice law. Edtech offers us this opportunity and we are striving to be a national leader in this effort.

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[1] *Distance Education*, American Bar Association (June 19, 2018), available at *https://www.americanbar.org/groups/legal_education/resources/distance_education/*

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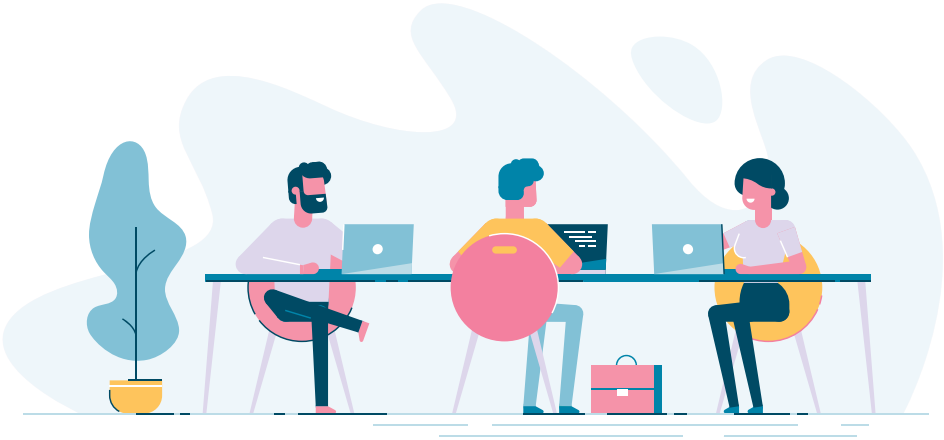
Lawyers in Glass Offices . . .

Ethical Challenges of Coworking Spaces

By Eric T. Cooperstein



Working as a solo or small-firm lawyer can be physically isolating. Whether you are working from home, in an office, or a suite in a building of offices, the opportunities for human contact may be limited to a handful of employees or your family. The typical solo/small office setting offers few opportunities to mingle with others because most of your fellow tenants work behind closed doors. There's no community or opportunity to meet new people, let alone develop relationships that will turn into paying clients.

The cutting edge of office configuration banishes isolation and makes your work environment more reminiscent of your old college library on a Thursday night. "Coworking" spaces literally remove the walls between workspaces or have floor-to-ceiling glass walls. Some feature open workstations where you sit down, plug in your laptop and headphones, and get down to business. At WeWork, a popular chain of co-working offices, the walls are glass, the doors are glass, and the windows are, well, glass, of course. Sections of frosted glass provide some privacy while you're sitting down, but stand up or walk around and you can see everyone.

The offices (which are rather tiny and typically shared by two to four employees) and workspaces are supplemented with large common spaces. Tables for meetings, comfy chairs and couches, coffee and tea, and tap beer (no lie) may all be included with your office or virtual presence rent. Need privacy to make a phone call? There are a couple of phone booths—you bring the phone.

I was quite taken with the arrangement. You don't really need much office space if you're paperless, which most of these businesses were (I know because I could see inside their offices). But there were a couple of ethical deal-breakers for me. There are many blog posts about the ethical challenges of co-working spaces, but they tend to talk in generalities. The problems lie in the details.

One was confidentiality. I'm not so worried about people spying on your computer screen; after all, if they can see you, then you can see them looking at you. Tell them to stop. If you leave your laptop lying around unsecured, that's a problem but it is no different than leaving your laptop anywhere else. But meeting with clients about sensitive matters in a glass-walled room probably doesn't fly. If a lawyer has a business practice, it could be okay, but if your clients' identities need to be kept confidential (as in my practice) or there's a good chance your divorce client is going to break down in tears during a meeting, it seems unworkable.

Unlike the parade of horribles postulated in a couple of rather draconian state ethics opinions,[1] I'm not too concerned about the advertising and solicitation implications of officing in a common space with non-lawyers. Lawyers are permitted to meet and talk with people they do not know in the hope it may eventually lead to business.

But there is a unique potential conflicts problem for a lawyer working in a large communal office space. When your client comes to meet with a lawyer in a co-working setting, even when the client's identity is not an issue, the lawyer has no way of knowing whether an opposing party is also a tenant in the same space. In a traditional shared office setting, there may not be a common reception area at all. Even if there is, a client likely spends only a few minutes in that space before moving to a private conference room or the lawyer's office (one with opaque walls). A lawyer could work around this problem by talking to the client first; it may be best to talk at the client's office.

If your goal is to become known as the "go-to" person for your fellow co-workers to seek out legal advice, be cognizant of when you may be creating an attorney-client relationship and whether you might conflict yourself out of another matter. How you're going to get work done between all the chatting with your new community and drinking free coffee is an entirely different matter.

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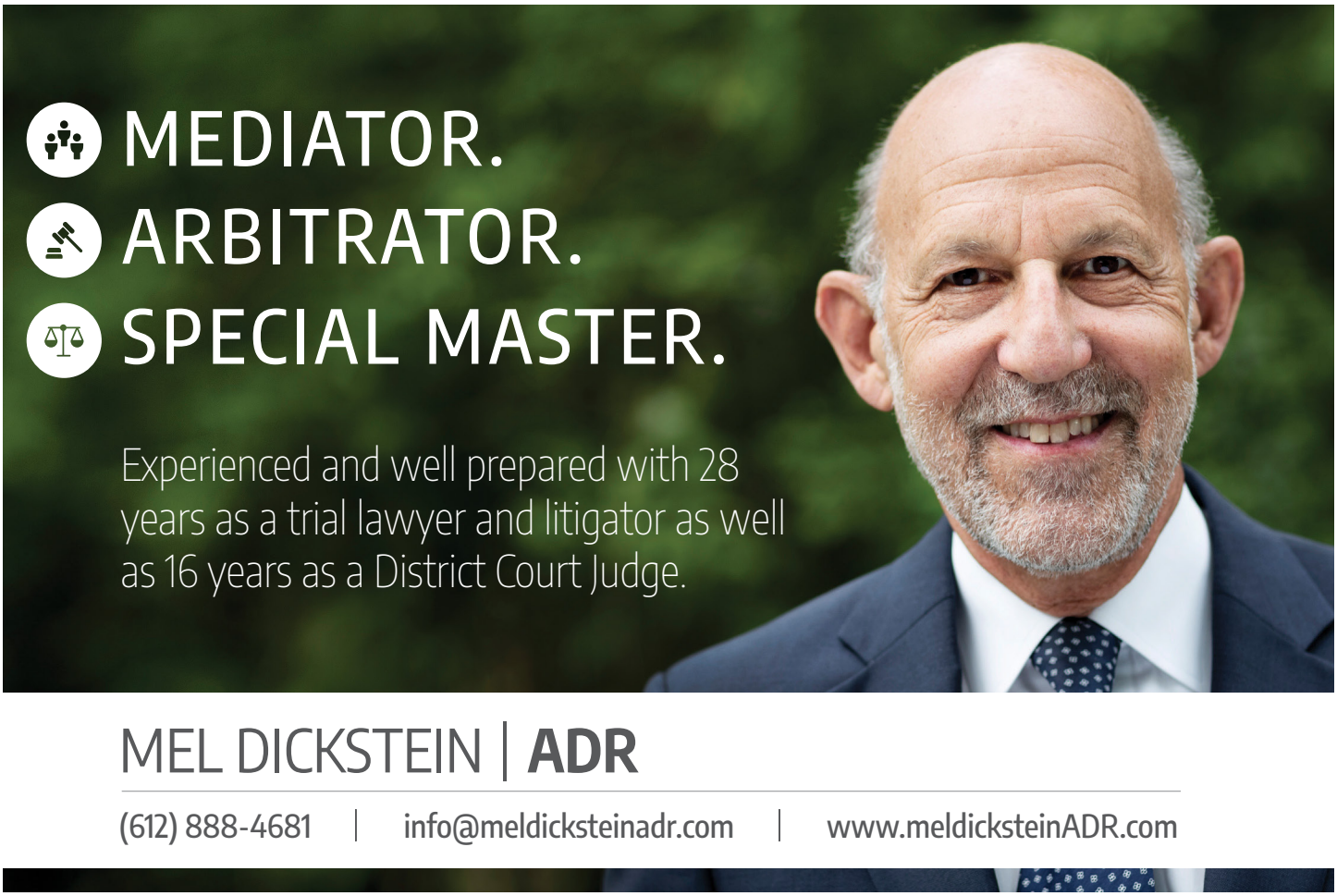
[1] See Kentucky Bar Association Opinion E-417 (Jul. 2001) (*https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)_/kba_e-417.pdf*); Louisiana State Bar Association Public Opinion 08-RPCC-017 (Jun 30, 2008) (*http://files.lsba.org/documents/Ethics/08RPCC017.pdf*).

Eric T. Cooperstein

etc@ethicsmaven.com

Eric T. Cooperstein, the "Ethics Maven," defends lawyers and judges against ethics complaints, provides lawyers with advice and expert opinions, and represents lawyers in fee disputes and law firm break-ups.



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*Hilson, Robert. "Fact Sheet: 15 Alarming Statistics about Law Firm Data Security." Logikcull Blog, Logikcull, blog.logikcull.com/fact-sheet-15-alarming-statistics-law-firm-data-security.

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New Lawyers Section Meeting

Tech Practice Talk: Client Intake Makeover

WEDNESDAY, JANUARY 16
Debtor Creditor CLE: BCFP: New Name, New Direction? Federal Regulatory Updates

THURSDAY, JANUARY 24
Solo & Small Firm Happy Hour

TUESDAY, JANUARY 29
Civil Litigation & New Lawyers Section: Speed Networking Happy Hour

Labor & Employment CLE: Sally Should Smile More – Giving Non-Biased Feedback to Lawyers

FRIDAY, FEBRUARY 8
Law & Literature: Legal Ethics and Elimination of Bias

THURSDAY, FEBRUARY 14
Real Property CLE: Walking through Mortgage Loan Modification and Dual-tracking in Real World Scenarios

TUESDAY, FEBRUARY 19
Business & Securities CLE: Cryptocurrencies, Blockchain, and ICOs: What Securities Litigation Lawyers Need To Know

New Lawyer Section Meeting

WEDNESDAY, FEBRUARY 20
Tech Practice Projects

THURSDAY, FEBRUARY 28
Real Property CLE: Local Regulation of Short-Term and Long-Term Rental Units

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HONORING LAWYERS WHO PASSED AWAY IN 2018

The HCBA's Bar Memorial Committee requests your assistance in its efforts to memorialize Hennepin County lawyers and judges. Please inform us of any colleagues who passed away in 2018 who should be memorialized at the 2019 Bar Memorial.

The 2019 Bar Memorial will take place on Wednesday, May 1, from 9:00–10:00 a.m. at the Thrivent Financial Auditorium in downtown Minneapolis. The Chief Judge of the Fourth Judicial District Court presides over this special session of the court.

Contact Sheila Johnson at sheila@hcba.org, with names of those to be memorialized. If you are interested in serving on the Bar Memorial Committee, we welcome your participation.

Reclaiming Your Calendar

by Jess Birken
@JessBirken

Lawyers tend to glorify busyness. It's true. We hear it *all* the time:

"I've been in back to back meetings since 9 a.m. I didn't even have time to stop for lunch!"

"I'm on my fifth cup of coffee. I was at the office until 1 a.m. last night."

"I hope I can make it home before my kid's bedtime tonight."

We say these things with a mixture of exhaustion and, oddly, pride. Why are we *proud* to work ourselves so hard that we neglect our health and our families? I'll tell you why. Lawyers are competitive and achievement-driven. We get a thrill from seeing our calendars booked solid. But is that thrill worth missing out on our kid's choir concerts and hours and hours of sleep?

I say no.

We've swallowed this myth that the best way to work is to burn the candle at both ends. But how does that leave you at the end of the day? You're exhausted, and your to-do list is still a mile long. Filling the calendar to its bursting point isn't the best way to work for you (or your clients).

That's why I've started incorporating some simple rules to keep my schedule in check. I only allow networking meetings to be scheduled a few times a week. I leave my evenings open for meetings and happy hours when my kids are at their dad's, but I automatically block off the evenings they're with me. I set up all these sorts of limitations in my Outlook calendar and my Acuity Online Scheduling account. (If you don't use online scheduling, check out my previous article in THL. Acuity is AMAZING and will change your lawyer life.)

But one *super* easy way to preserve my sanity is adding prep time and follow up time on either side of all my meetings. No more running from one thing to next because I forgot to block off travel time. No more trying to remember to send follow up emails days later. No more walking into a meeting with no preparation.

This is especially important since I use Acuity for scheduling – any open time on my calendar looks like fair game for someone hoping to book a coffee or a phone call. But even if you (or your assistant) are scheduling meetings the old-fashioned way, it's *way* too easy to fall into the trap of filling up any whitespace on the calendar.

I'm not spending all my time adding these prep and follow up times to my calendar, though. I use Zapier (a super easy automation tool) to automatically add a 30-minute Outlook event on either side of every meeting that gets scheduled.

What is Zapier?

If you saw my article in the November issue of the *Hennepin Lawyer*, I described how I use Zapier to add contacts to my Outlook automatically – so here's a refresher: Zapier is an application that connects apps you already use. When you create a zap, you're saying, "IF THIS happens in program 1, THEN do THAT in program 2." For example, I have a zap running that sends me a text telling me to close my windows whenever the forecast calls for rain.

Zapier is amazing, and it's based on logic (in other words, you *don't* need to know code). Once you start using zaps, you'll never go back!

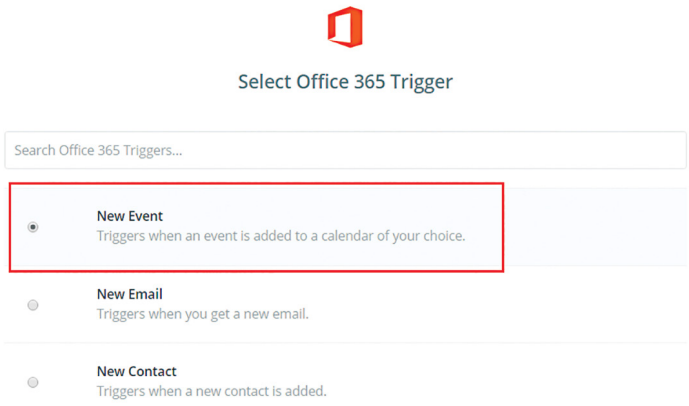
How to add prep time to your calendar using Zapier

For this zap, I'm actually only using one app – Outlook. If you use Gmail or another email service, you can set it up with that program instead. First step is to go sign up for a Zapier account if you don't have one (obviously). You can use up to 5 zaps at a time on a free account - so no excuses!

Here's our zap: When a meeting is added to your calendar, add a 30-minute calendar event starting a half an hour before the meeting. Here's how you set it up in Zapier.

1 Select a trigger

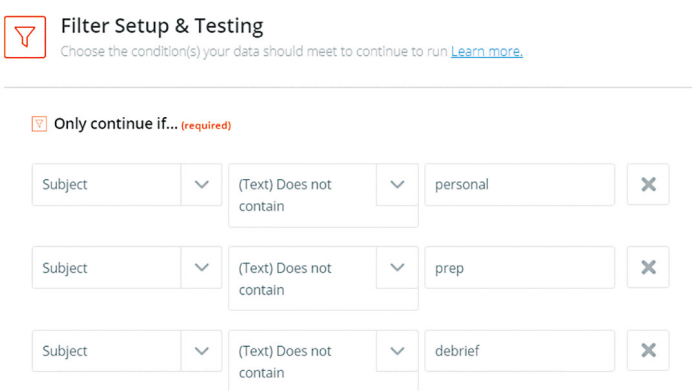
You need to tell Zapier what action will start off the zap. Once you connect your Outlook account and select it for this zap, you'll be presented with some common triggers. We want "New Event."



Zapier will lead you through the process of verifying the connection to your calendar and testing each step.

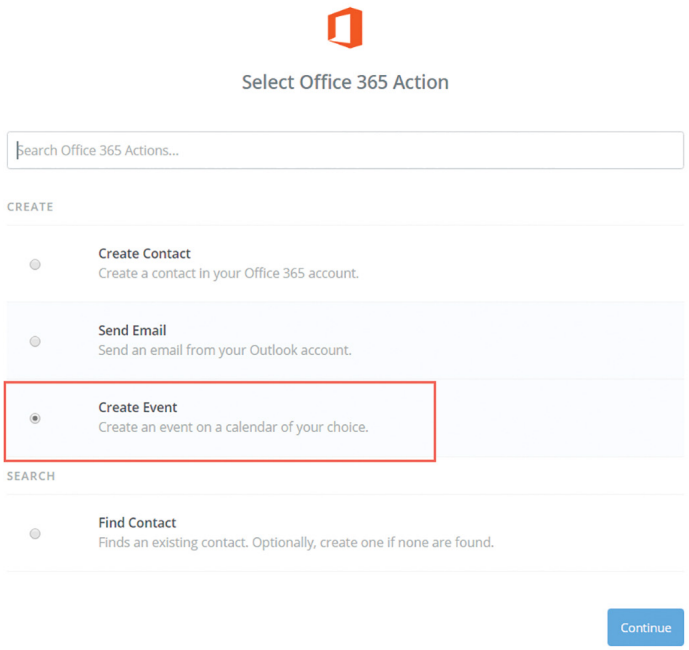
2 Set up a filter

I don't really want prep time tagged on to *all* my calendar items. If an event is all day long (like being out of town), I don't need a prep time for that. I also block off time on my calendar for heads-down lawyer drafting time – I don't need prep time for that either. So, I use certain words (like "personal" or "operations") in my calendaring so Zapier can filter out those events. You see I filter out the words "prep" and "debrief" as well – I don't want prep time for my prep time!



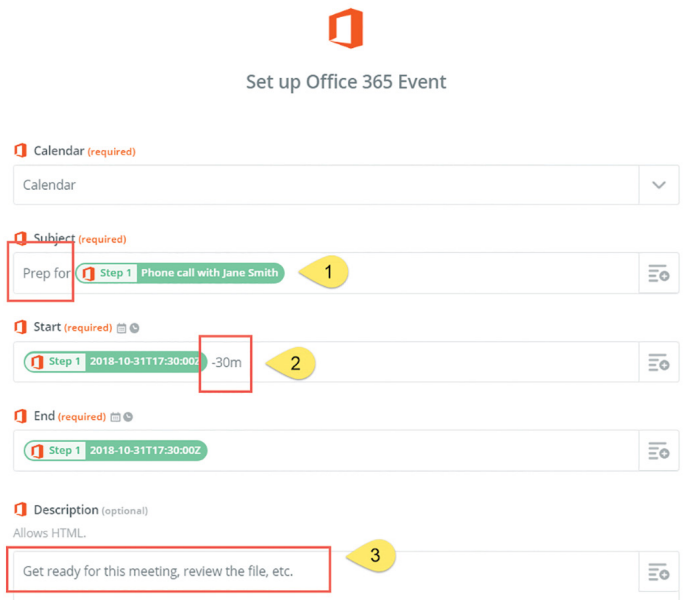
3 Choose an action

Again, Zapier will prompt you with some common ones – it makes this whole process super easy. I want to create a new event.



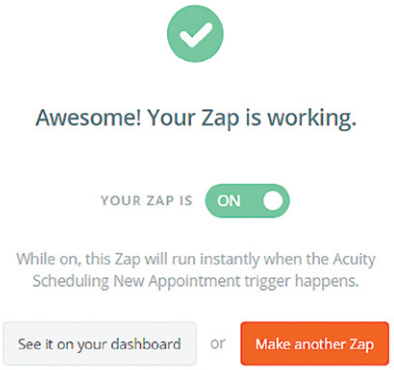
4 Define the action

This is where you can tell Zapier what *kind* of event you want to create. I keep mine pretty basic. 1) I put in my subject line for the event. 2) I set it to start 30 minutes before the event that triggered the zap. I name it Prep for [meeting]. 3) I also add a basic agenda in the description. Since this is just for me, I don't need to worry about attendees or location or anything else here.

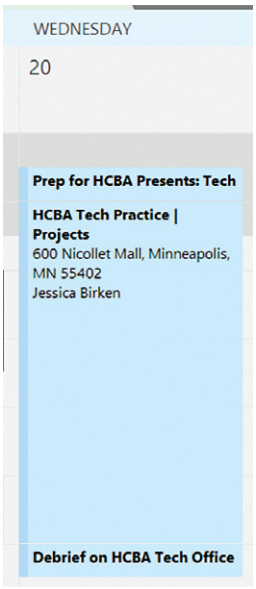


5 Test!

Zapier will test your logic to make sure everything works as it should. If everything looks right, you're done! If there's a problem it will let you know there's a bug in the logic.



Ta da! Now, whenever I book a new meeting, prep time is automatically blocked off. Now Zapier will look at my calendar automatically every 15 minutes looking for new calendar events and blocking off time for me. I have a similar zap that adds time after every meeting too. Once it's done it looks like this on my calendar:



It's little things like this that will change your lawyer life for the better. With tech tools like Zapier, you can set up your practice so that you work smarter. Sure, I still have plenty of days where I accidentally overbook myself or work through dinner time. But setting up parameters like these helps me to make those days the exception rather than the norm. Join me in reclaiming your calendar!

Want to see Zapier in action? I made you a video tour, check it out at *https://tinyurl.com/tryzapier*

Jess Birken
jess@birkenlaw.com

When she's not helping lawyers use tech tools, Jess Birken is the owner of Birken Law Office—a firm that helps nonprofits solve problems so they can get back to their mission.

Grantee Spotlight:

domestic abuse project
DAP

In the 1970s, people began to call attention to victims of domestic abuse. Communities began providing shelter for women in need. However, advocates recognized that victims need more than just a safe place to stay. They needed advocacy, resources, and access to the legal system. The Domestic Abuse Project (DAP) was created to address these concerns here in the Twin Cities. Today, DAP is located in northeast Minneapolis, and has satellite offices in the downtown Minneapolis Public Service Center, the Little Earth community in the Philips neighborhood, and North Point Health and Wellness in the Willard-Hay neighborhood. In 2018, the Hennepin County Bar Foundation supported DAP's critical work in the community.

DAP was founded on the philosophy that abusive behavior can be unlearned. It is one of the few agencies that works with the whole family, even the individual using abuse in their relationship. Many abusers are court-ordered to attend DAP's program. DAP believes in looking at the root cause of the abuse from a holistic standpoint and attempting to end the abuse directly through the abuser. "Once you've used abuse, you're not forever an abuser," says Aaron Zimmerman, Director of Development and Communications at DAP.

Initially, DAP offered two main services: advocacy and therapy. Advocacy services work with victims to attain stability and safety. Therapy services help with longer-term healing. Today, DAP also offers case management to help victims of abuse gain stability in other areas such as child care, healthcare, housing, veterans benefits, and other critical supports.

DAP was founded on the philosophy that abusive behavior can be unlearned. It is one of the few agencies that works with the whole family, even the individual using abuse in their relationship.

DAP has five advocates who work directly with victims in Hennepin County, helping them gain access to various services, including changing the locks on their doors and setting up anonymous P.O. boxes. These advocates also monitor courts and provide additional legal advocacies in order to help victims navigate the legal system, write orders for protection, and secure restraining orders. These advocates are like guides to the victims, helping them get on track to a healthier and safer life every step of the way.

In 2018, the Hennepin County Bar Foundation provided DAP with a grant to purchase portable touchscreen laptops for its advocates. Advocates need to be able to work remotely and have access to technology from anywhere. The laptops are especially helpful when taking notes and collecting data in court. "This grant provided us technology that doesn't fail," says Zimmerman. Over 50 percent of victims served by DAP are below the poverty line, making it very difficult to hire consistent and skilled attorneys. DAP holds clinics that victims of abuse can attend to receive advice on legal matters. Volunteer and pro bono attorneys provide advice and assist through the legal process, including the trial process.

DAP is experiencing a shortage of pro bono attorneys. They welcome volunteer attorneys with a variety of backgrounds and skills. "Just providing sound legal advice, even if it's basic, would be helpful," says Zimmerman. Attorneys are needed to address direct or collateral issues related to domestic abuse.

Volunteers can help in a non-legal capacity as well. Frequently those fleeing domestic abuse do not take the time to bring small but critical items when they flee. DAP volunteers collect toiletries, warm clothing, school supplies and more that victims may need as they seek safety and support.

If you would like to take part in the important work done at DAP, please contact Siri Lokensgard, Supervisor of Advocacy, at *slokensgard@mndap.org* or 612-874-7063 ext. 229.

Member News

Submit your HCBA member news to thl@hcba.org for consideration.

Joel D. Van Nurden of Van Nurden Law was named the 2018 Safety Project Attorney of the Year by Tubman Pro Bono Safety Project.

Bernick Lifson announces the addition of two associate attorneys, **Elizabeth Halet** and **Macey Muller.**

JAMS welcomes **Lawrence Zelle** to its panel in Minneapolis.

Fredrikson & Byron announces the addition of six associates to the firm's Minneapolis office: **Samuel M. Andre, Mary G. Hyland, Chelsey E. Jonason, Jessica R. Sharpe, Jeffrey C. Story,** and **Ashley W. Wilson.**

Attorney **Jennifer Bouta Mojica** has joined Fredrikson & Byron.

Fredrikson & Byron elected **Leigh-Erin Irons** and **Todd A. Wind** to the firm's board of directors and re-elected **John J. Erhart, John M. Koneck** and **Steven J. Quam.**

Hoff Barry is pleased to announce that **Scott B. Landsman, Justin L. Templin, Shelley M. Ryan, and Jared D. Shepherd** assumed partnership roles and management of the firm, effective January 1. **George C. Hoff** and **Thomas G. Barry, Jr.** will continue to practice with the firm as Of Counsel. **Sarah E. Schwarzhoff** remains of counsel with the firm.

Lockridge Grindal Nauen welcomes **Stephanie Chen** and **Jennifer Jacobs** as the firm's newest attorneys.

Gregerson, Rosow, Johnson & Nilan announces that **Julie L. Matucheski** has joined the firm as an associate.

Elizabeth G. Bentley has joined Jones Day's Minneapolis office after serving as a clerk for U.S. Supreme Court Justice Sonia Sotomayor.

Cozen O'Connor announces the addition of **Vadim Braginsky** to their Minneapolis office.

Brent R. Eichten has joined Fredrikson & Byron as the firm's Chief Information Officer.

Neutrals Like No Others

JAMS welcomes **Lawrence Zelle, Esq.**

More than 50 years of experience as a lawyer, arbitrator, mediator, negotiator and settlement broker; lead or co-lead counsel in 300+ cases that were tried, arbitrated or settled

National and international reputation for resolution of a wide array of disputes involving questions of insurance or reinsurance; served as consultant to risk managers, underwriters and brokers

Available to resolve disputes **involving business/commercial, environmental, health care, insurance, intellectual property, personal injury/torts and professional liability** matters

jamsadr.com/zelle
Case Manager
Deb Lewis
612.332.8225
or dlewis@jamsadr.com

JAMS

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10 THINGS

I Love about Being an Attorney

by Amran Farah

"By being a mentor myself, I love that I can contribute to future generations of attorneys and legal practitioners."

1 Being a storyteller. Everyone has a story; and as an attorney, I get to help my clients tell their own stories honestly and zealously. Attorneys should not be the main characters of their clients' stories, but they should serve as narrators, and help juries and judges digest the facts and the law.

2 Being creative. From the simplest discovery issue, to the most complex legal matter, I get to be creative and think about new and innovative ways to serve my clients.

3 Problem Solving. In my practice, clients usually call me because they have a problem. I am tasked with finding a solution for them. To that end, I like to think of the practice of law as a giant puzzle, where you must find all the pieces that fit together. And because not all puzzle pieces fit together, sometimes not all legal problems have a legal solution.

4 Being a part of a team. At Greene Espel, our practice is built on teamwork and collaboration. We encourage participation and contribution at every level, everyone from administrative assistants and paralegals, to our most junior and most senior attorneys work side-by-side to achieve extraordinary results for our clients.

5 Being an advocate. I love serving others by advocating for those who would benefit most from my skills and talents. I believe, as an attorney, I have an obligation to ensure that the benefits of our legal system reach the least fortunate and the most deserving.

6 Being part of a community. As president of the Minnesota Association of Black Lawyers, I love that I am a part of a community of black attorneys. As a member of Greene Espel, I am part of a smaller community of smart, talented, and caring attorneys. As an attorney, I am part of a community of legal professionals promoting justice and respect for the law.

7 Being a mentor and receiving mentorship. My legal career has benefited from great mentors and sponsors. By being a mentor myself, I love that I can contribute to future generations of attorneys and legal practitioners.

8 Being a force for change. I love that I have a hand in making our profession more diverse and inclusive. So, I love that my presence as a Black-Muslim-Somali-Immigrant woman attorney makes a difference.

9 The sense of duty. I love that as attorneys, we are officers of the court. My sense of duty as an officer of the court makes me proud.

10 The impact of the law. The practice of law touches almost every aspect of our world. From politics to the arts, from healthcare to education, as a lawyer, you can contribute to society in countless, meaningful ways.

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