The Legal Intelligencer

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# Becoming a Go-To ALSP Follows Common Criteria

**BY VICTORIA HUDGINS AND PHILLIP BANTZ**
*Corporate Counsel*

Selecting an alternative legal service provider (ALSP), which will often deploy technology more broadly than most law firms, can conjure fears straight out of a 1980s sci-fi film.

"You're putting your case in the hands of a machine, where you really don't know how good it is," says Bassi Edlin Huie & Blum partner Noel Edlin. "So that always makes me nervous, maybe I've seen too many 'Terminator' movies."

But seeing no Sarah Connor in sight, more corporate legal departments and law firms are seeking out ALSPs for business consultancy, legal process outsourcing, contract services and tech-powered document analysis, among other services.

*ALSP continues on* **10**

# High Court 'Restores' Role of Prelim Hearings, Pa. Criminal Lawyers Say

**BY MAX MITCHELL**
*Of the Legal Staff*

Over the past several years, muddled case law and court rules have weakened the gatekeeper role of preliminary hearings to the point where they were essentially a rubber stamp for prosecutors, defense attorneys say, but they now express hope the Pennsylvania Supreme Court has changed direction with a recent ruling about the role of hearsay during these threshold proceedings.

On July 21, the high court ruled 4-3 in *Commonwealth v. McClelland* to clarify that prosecutors must use more than hearsay evidence at the preliminary hearing stage if they want their cases to be allowed to move on for trial. The decision, long-awaited by the criminal defense bar, reversed a Superior Court decision that had disregarded a more than 30-year-old Supreme Court ruling that had ended in a jumbled plurality decision.

**DOUGHERTY**

Writing for the majority, Justice Kevin Dougherty determined that, although the high court's 1990 decision in *Commonwealth ex rel. Buchanan v. Verbonitz* had split the previous court's underlying reasoning regarding whether hearsay alone is sufficient at the preliminary hearing stage, the plurality ruling remained good law, and the Superior Court had been in error when it disregarded that ruling's basic holding.

Further, Dougherty determined that a rule of criminal procedure adopted in 2011 and amended in 2013 that says "hearsay evidence shall be sufficient to establish any element of an offense" still required courts to adhere to procedural due process requirements under the law. Allowing cases to pass the preliminary hearing stage on just hearsay alone, he

*Hearings continues on* **10**

# Honeywell, Flex Top Lawyers Talk Hiring, Driving Diversity

**BY PHILLIP BANTZ**
*Corporate Counsel*

Honeywell International Inc. no longer has a single white-shoe Wall Street law firm on its panel of preferred outside firms, which has shrunk from about 100 firms to

*Diversity continues on* **12**

# Indiana, Nevada Postpone Bar Exams, Raising Questions About Online Tests

**BY KAREN SLOAN**
*Law.com*

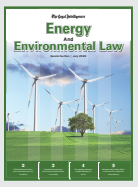
Law graduates taking the bar exam in Nevada and Indiana expected to begin their tests Tuesday from their homes or whatever relatively quiet location that they could find with a strong internet connection.

But they learned July 24—four days before the test was scheduled to take place—that the online exams designed by each of the two states would be delayed due to software problems associated with an outside vendor facilitating both tests. Indiana rescheduled its one-day exam for a week later, Aug. 4. Nevada's two-day test has

*Bar Exams continues on* **11**

## – SPECIAL SECTIONS –

PENNSYLVANIA LawWeekly



**Energy and Environmental Law**
Read about state and federal efforts to limit the PUC's regulation of net metering and the changing landscape of water regulation in the U.S.

## – INSIDE THE LEGAL –



Postal ID on Page 8

# PEOPLE IN THE NEWS

## SPEAKERS

**Lorie Dakessian**, Philadelphia-based vice chair of **Conrad O'Brien**'s Title IX, due process and college discipline practice, is slated to speak on a panel titled "What Schools Need to Know About the New Title IX: Handling Claims of Sexual Harassment and Assault."

The event is co-sponsored by the **New York County Lawyers Association** and the **Westchester County Bar Association**.

The webinar is scheduled to be held from 12:30 to 1:45 p.m. Thursday.

It will cover aspects of the new Title IX regulations and how the regulations impact higher education institutions and students, as viewed from varying perspectives and stakeholders.

The panel will also include **Kimberly C. Lau**, partner and chair of the Title IX/college disciplinary department of **Warshaw Burstein**; **Suzanne Messer**, member of **Bond, Schoeneck & King**; and **Catherine Berryman**, Title IX coordinator of **Hamilton College**.

Dakessian represents clients in several practice areas, including complex commercial litigation, white-collar and internal investigations, student and educator misconduct cases, and data privacy matters.

She is a certified information privacy professional.

Prior to joining **Conrad O'Brien**, Dakessian served for six years in the Philadelphia District Attorney's Office, managing all aspects of large and complex appellate cases.

She is a graduate of **Boston College Law School**.

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**Jennifer Simpson Carr**, director of business development at marketing firm **Furia Rubel Communications Inc.**, is set to present a **Legal Marketing Association** webinar titled "From Business Case to Launch: Creating a Successful Legal Podcast."

The webinar is scheduled to be held at noon Tuesday and will address how to incorporate podcasting into a legal marketing strategy.

Carr, who is the producer of the On Record PR podcast, will join legal marketing and business development professional **Marcie Dickson** to present the webinar.

The webinar is free to LMA members and $20 for nonmembers.

The webinar will discuss how to evaluate whether podcasting is the right fit for a law firm or practice group and where to start.

Additionally, Carr and Dickson will discuss considerations when deciding whether to add podcasting to a firm's integrated marketing strategy, building a business case and achieving buy-in, evaluating and choosing software and equipment, and strategies for producing quality content, including attracting and retaining guests.

At Furia Rubel, Carr leads relationship management with prospective, new and existing clients.

Prior to joining Furia Rubel, Carr spent more than 10 years leading business development and marketing communications strategies in-house at Am Law 200 law firms in New York and mid-market law firms throughout the United States.

She assists attorneys, law firms and other professional service providers in obtaining new business.

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CUMMINS

**Daniel E. Cummins** of **Cummins Law** in Clarks Summit presented, for the second year in a row, a civil litigation update at the **Pennsylvania Defense Institute**'s annual meeting at the Bedford Springs Resort in Bedford Springs.

Cummins provided an update on a variety of cases and trends in the civil litigation context from over the past year and offered practice tips based upon those decisions.

Cummins also provided the audience with tips to improve their appearance on Zoom meetings as well.

Cummins is an insurance defense litigator who focuses his practice in the defense of automobile and trucking accident matters, premises liability cases and products liability matters.

Cummins also provides mediation services through **Cummins Mediation Services**.

## ANNOUNCEMENTS

The Legal and Pennsylvania Law Weekly are looking for verdicts and settlements to report.

If you're a plaintiffs or defense attorney who has obtained a verdict or settlement in Pennsylvania county or federal court recently, email Zack Needles at zneedles@alm.com.

## CORRECTION

The item on transparency in the Tuesday edition of Capitol Report in Pennsylvania Law Weekly should have said Gov. Tom Wolf was evaluating a measure that backers say is aimed at preserving transparency for records during periods where a state disaster has been declared. •

All potential items for People in the News should be addressed to **Aleeza Furman** at The Legal Intelligencer, **afurman@alm.com**

REGIONAL NEWS

# Squire Patton Boggs Bolsters New Jersey Corporate Practice

**BY ERICA SILVERMAN**
*New Jersey Law Journal*

Michael Helmer has left DLA Piper, where he served as co-managing partner in the Short Hills, New Jersey, office, to join Squire Patton Boggs' New Jersey corporate practice.

"We all have to get better, more focused, and more efficient to succeed in a very challenging marketplace," Helmer said.

Helmer focuses his practice on mergers and acquisitions, corporate finance, corporate governance and other commercial transactions, with a concentration of clients in the energy and power, technology, life sciences and transportation sectors. He also acts as outside general counsel for clients.

"Squire presented a unique opportunity to launch an international corporate practice at a top law firm, with a great international reach," Helmer said.

"I have had a long-term relationship with my close friend and former colleague, Mark Sheridan, and a long-standing friendship with global managing partner Steve Mahon," he said.

Helmer decided to make the move after just a few weeks of discussions with Squire.

"I'm confident that all my clients and relationships will work with me at my new firm," said Helmer, including Subaru of America, Ports America, Phibro Animal Health Corp., Transmission Developers, Champlain Hudson Power Express, Lightening Energy and GTherm Energy.

*Helmer said he was drawn to Squire due to its strong practice capabilities, such as its energy, transportation and automotive practice areas.*

Helmer said he was drawn to Squire due to its strong practice capabilities, such as its energy, transportation and automotive practice areas.

"Squire has one of the leading automotive practices in the country. I know that expertise will be important to significant clients, like Subaru," he said.

Helmer has particular experience in intermodal transportation and marine port terminal transactions. His recent transactions include representing Seaspan Corp., the world's largest container ship owner, in its $750 million acquisition of APR Energy earlier this year.

"Ports America is a good example. Over the last few years, I've closed multiple transactions for them up to and over the $100 million-plus [in] size, relating to their acquisitions of equity interests in marine port terminals around the world," Helmer said.

"The ports themselves, working together with terminal operators and union officials, have done a very good job at addressing the COVID-19 challenges, and keep goods flowing into our commerce," Helmer said.

"The biggest challenge is the economic uncertainty and trade policies, which have caused shippers and their customers to have to predict consumer trends in the future," he said.

Until medical solutions are clearer, that uncertainty will persist, he explained.

In terms of how the COVID-19 pandemic has affected his practice, Helmer says that most lawyers and staff are doing a great job of adjusting to the remote work model, although, "You do miss something by not having in-person contact with your colleagues, and while video calls help, at some point you do want to be in the work environment to collaborate and share knowledge," he said.

After 30 years of living and practicing law in New Jersey, Helmer is eager to help Squire grow its New Jersey and New York metro corporate practice.

"Mike is a highly regarded corporate M&A and finance lawyer with deep connections in New Jersey and across the New York Metro business community," said New Jersey managing partner Mark Sheridan.

"He is a great fit for our firm, and will establish our corporate practice in New Jersey, as well as expand our transactional offering across the region and nationally," he said.

*Erica Silverman can be contacted at esilverman@alm.com.* •

# NATIONAL NEWS

## IBM Springs Patent Surprise on Zillow—and the Judge

**BY SCOTT GRAHAM**
*The Recorder*

*Photo by Shutterstock*

International Business Machines Corp. hasn't gotten very far yet in its patent litigation against Zillow Inc. Ten months after Big Blue asserted seven patents covering a variety of technologies, the primary development is that U.S. District Judge Josephine Staton of the Central District of California transferred the case to the Western District of Washington. Though not before U.S. Magistrate Judge John Early scolded IBM for its "'Ready—Fire—Aim' approach to discovery."

In Seattle, Zillow has complained to U.S. District Judge Thomas Zilly of the Western District of Washington that IBM has submitted 25 infringement contention charts, several of them exceeding 200 pages. IBM says that's on Zillow—without more meaningful discovery, it can't be more specific. Zilly has raised the possibility of bifurcating discovery, claim construction, motion practice or trial between Zillow's consumer and business products, or between liability and damages, all with the goal of simplifying the case. Zillow thinks that's a great idea, and has proposed having a "Section 101 day" to get things started.

But IBM, which it should be noted won an $83 million verdict against Groupon Inc. based in part on two of the same patents, has decided it's time for more patent assertion, not less.

On July 22 it filed a brand-new infringement suit against Zillow, asserting five more patents. They cover "a novel iconic GUI," methods for using contextual information to rank search results, and methods for the stacking of portlets in portal pages.

"This lawsuit is the result of Zillow's decision to escalate its behavior by willfully infringing five additional patents," IBM, represented by Desmarais and Harrigan Leyh Farmer & Thomsen, alleges in the suit.

The company says it provided detailed evidence of the infringement to Zillow in writing last fall, but Zillow dismissed it out of hand as a "distraction" from the first lawsuit.

During a virtual status conference July 23, Zilly said he was "quite surprised, even a little shocked," that IBM would file the new suit, without advance notice, while the lawyers were in the midst of trying to make the first case more manageable.

Desmarais partner Karim Oussayef said the new suit is "really meant as a placeholder" to ensure that the additional patents don't expire, and that IBM wouldn't object to staying it while the first case gets hashed out.

"I'm all for staying the new case at some point," Zilly said, "but it seems to me you need to put your cards on the table first" with regard to infringement contentions.

Oussayef said IBM laid out its infringement theories in detail in its 35-page complaint. He stressed that IBM needs Zillow source code or technical documents to narrow its contentions, but that Zillow has unreasonably insisted that IBM first do the narrowing.

Susman Godfrey partner Ian Crosby and associate Katherine Peaslee argued for Zillow that it would have to provide its "entire code base" to meet IBM's production demands. They said Zillow should not have to provide any source code in the first suit until IBM files infringement contentions in the second, a position Zilly said "seems to have some merit."

Zilly said he understands the "chicken and egg" nature of the discovery standoff, but added that the problem seems partly "IBM's doing, because you waited until yesterday to file the new case with five new patents. And presumably IBM has a boatload of patents. We could play this out again in six months or a year with you filing another case against Zillow."

Oussayef assured Zilly that if the parties can deal with the first case expeditiously, "that will drive potential resolution, one way or another."

Zilly ordered each side to file 10-page briefs on discovery and whether IBM should be required to file additional infringement contentions.

*Scott Graham can be contacted at sgraham@alm.com.* •

## Legal Ed's Biggest Annual Event Will Be Virtual in 2021

**BY KAREN SLOAN**
*Law.com*

There won't be any networking in the lobby or gathering for happy hour at the hotel bar for law professors in January.

The Association of American Law Schools on Monday officially announced that its annual meeting, which was to be held Jan. 5 to 9 in San Francisco, will be virtual instead of in person due to the COVID-19 pandemic. The decision was not unexpected—association executive director Judith Areen told law deans as much earlier this month and many legal education entities have moved their events online since March. But the decision means that the single-largest annual law school event will be dramatically different next year. The AALS' annual meeting typically draws about 2,000 attendees to an extensive series of panels, keynotes and networking events.

"Given the risks posed by COVID-19, and considering feedback gathered from faculty and deans across the country, AALS has decided to hold the 2021 AALS Annual Meeting in a virtual format rather than in person," reads a message the association sent to members Monday. "While we are disappointed that we will not be able to meet in San Francisco, we are excited about the opportunities for innovation that a virtual format provides without the need for travel or hotel arrangements."

In addition to not having the cost of travel and hotels, the association is lowering the price to attend the annual meeting and introducing a one-time school registration rate that will allow all faculty and administrators from participating schools to attend the virtual meeting. For those who attend under the traditional individual registration format, the cost for the 2021 meeting is $295, which the association noted is a 40% reduction from last year's price.

***Event*** *continues on* **8**

CYBERLAW

# Combating Insider Threats Posed by Remote Workers in the Time of COVID-19

**BY JEFFREY N. ROSENTHAL AND DAVID J. OBERLY**
*Special to the Legal*

Insider threats—i.e., security risks originating from within an organization—have been on the rise. The average cost of an insider attack has grown by 31% to $11.45 million per incident in the last two years alone. And the current pandemic—and resulting transition to long-term remote work arrangements—has significantly enhanced these already-sizable risks in several ways.

## INCREASED THREATS POSED BY COVID-19 AND REMOTE WORKING

Remote working increases the risk of insider threats arising from employee negligence. Given the state of the world, employees may be prone to distraction and mixing personal online endeavors with their work-related activities. This, in turn, raises the likelihood cyber criminals' targeted phishing campaigns and other attacks will prove successful. Employees may often fail to utilize safe computing practices while working outside the office, leaving remote devices susceptible to cyberattacks. Working from home also brings significant technical vulnerabilities—like insecure network connections—further increasing opportunities for cyber criminals to carry out attacks.

ROSENTHAL

OBERLY

**JEFFREY N. ROSENTHAL** *is a partner at Blank Rome. He concentrates his complex corporate litigation practice on consumer and privacy class action defense, and regularly publishes and presents on class action trends, attorney ethics and social media law. He can be reached at rosenthal-j@blankrome.com.*

**DAVID J. OBERLY** *is an attorney in the Cincinnati office of the firm and is a member of the firm's cybersecurity and data privacy and privacy class action defense groups. Oberly's practice encompasses both counseling and advising sophisticated clients on a wide range of cybersecurity, data privacy and biometric privacy matters, as well as representing clients in the defense of privacy and biometric privacy class action litigation. He can be reached at doberly@blankrome.com.*

At the same time, remote working also enhances the risk of insider threats arising from intentional, malicious actors. The effectiveness of traditional organizational security controls to monitor and flag inappropriate online employee activity may be significantly diminished in remote work environments. This can result in reduced visibility over what employees are doing and the information they access. In addition, many companies that were ill-prepared to make an immediate transition to full-scale remote working have been forced to provide increased privileges and access to maintain productivity levels while employees work from home, greatly boosting the opportunities available for malicious insiders to exploit organizational networks and sensitive data.

Significantly, these heightened insider threat risks will continue apace even after COVID-19 is in our rear-view mirror, especially as many companies implement remote working on a permanent basis. As such, now more than ever companies must take actionable steps to combat the sizable security risks posed by the combination of insider threats and remote working. Fortunately, there are several key best practices that companies can implement as part of a comprehensive, risk-based security strategy to significantly reduce the threat of remote worker insider attacks.

> *Now more than ever companies must take actionable steps to combat the sizable security risks posed by the combination of insider threats and remote working.*

## TELEWORKING POLICY

As a starting point, companies should implement a strong, comprehensive teleworking policy that directly addresses the security of company networks and data. Creating a robust teleworking policy is a simple yet effective way to combat insider threats, particularly those arising out of carelessness or negligence. In particular, there are several key components that should be included in such policies.

First, teleworking policies should address the issue of remote access. Remote access guidelines should define scope of permissible bring-your-own device (BYOD) practices—involving the use

*Cyberlaw continues on* **8**

LITIGATION

# Seeking Summary Judgment in an Arbitration Proceeding

**ADR**

*Editor's note: This article describes a hypothetical situation.*

**BY CHARLES F. FORER**
*Special to the Legal*

"Arbitration is fast. It is efficient. And it is satisfying." That's what Bob tells all his clients. "Let an experienced arbitrator with a background in your industry decide your disputes!"

The current dispute proved Bob's point. It presented complex real estate issues. It made sense to have an experienced real estate lawyer be the arbitrator.

Plus, Bob's deposition performance was, well, "fantastic." He got the CEO of his client's adversary to admit the underlying contract was unenforceable. In view of this concession, there was no need for an arbitration hearing. Bob's client had a clear path to victory through a pre-hearing summary judgment motion.

Bob wasted no time in submitting his summary judgment motion, carefully labeling it a "dispositive motion" to conform to arbitration lingo. Not surprisingly, Bob's adversary's response was flimsy. It rested on points of law Bob easily could distinguish.

**CHARLES F. FORER**
*of Charles F. Forer Alternative Dispute Resolution Services independently provides arbitration, mediation and all other neutral services. He is the current co-chair of the Philadelphia Bar Association's alternative dispute resolution committee. He is a former chair of the association's fee disputes committee. He is a frequent lecturer and writer on the use of ADR in a variety of settings. You can reach him at 610-999-5764 and cforer@foreradr.com.*

There was one odd part of the response, however. Realizing the weakness of his position, his adversary "threw in" (Bob's term) a procedural argument—that the arbitrator did not have the power even to consider the "dispositive" motion. Bob's response: this argument ignores the undeniable fact that the other side could not respond on the merits to the substance of Bob's argument. "The arbitrator," Bob asserted in his multisyllabic style, "should not countenance such diversionary tactics, which serve only to undermine the promise of arbitration as an expeditious way to resolve disputes."

The arbitrator granted Bob's dispositive motion and entered an arbitration award in Bob's client's favor. Everything was working perfectly. At least so far.

Bob's adversary took the arbitration award to court and there sought to vacate the award. Bob had expected his adversary would fight tooth and nail. Bob had forewarned his client to expect the petition. A lot of money was at stake.

"Just playing out the clock," Bob told his client. In fact, Bob welcomed the petition. It gave him the chance to do something he always had wanted—to recover attorney fees in response to an adversary's frivolous vacatur petition.

*Months and sometimes years before a dispute has arisen, the drafter of an arbitration agreement must consider whether it will be beneficial for his or her client to allow for summary dispositions.*

Bob was not too upset when he did not recover the hoped-for attorney fees. But he was incensed when the court granted the vacatur petition and threw out the award, especially because the court relied on the procedural and "diversionary" tactic Bob had found so peculiar.

In tossing the arbitration award, the court said the arbitrator did not have the power to consider a dispositive motion because the procedural rules governing the arbitration said the arbitrator was supposed to hold a hearing where he or she must consider and determine the parties' contentions. The court's order was based on the Bob-drafted "rules" that summarized, in pithy, clumsy and incomplete fashion, the controlling arbitration procedures.

What an easily avoidable mistake for Bob to make. He could have incorporated American Arbitration Association Commercial Rule R-33, which states, "The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

Or he could have referred to JAMS Comprehensive Arbitration Rule 18, which likewise says, "The arbitrator may permit any party to file a motion for summary

***Litigation** continues on* **8**

# Event

*continued from* **4**

An association spokesman did not immediately respond to a request for comment on what budget implications the move to an online annual meeting will have on the association, of which nearly every American Bar Association-accredited law school is a member.

Areen said in an interview in June that COVID-19 isn't the only factor the organization has been considering when canceling in-person events or moving them online. The association already canceled its annual Faculty Recruitment Conference, which was to take place in Washington in October. Aspiring law professors meet with law school hiring committees for first-round interviews at that yearly event.

"Higher education in general and legal education are facing real economic challenges," Areen said at the time. "Many universities aren't paying for faculty travel. So even if there weren't health issues, schools were saying they would not be able to send a team to interview people."

*Karen Sloan can be contacted at ksloan@alm.com.* •

# Cyberlaw

*continued from* **5**

of employee-owned devices to connect to company networks—while working from home, as well as any technical requirements for connecting remotely to organizational networks, such as mandating virtual private networks (VPN) and multi-factor authentication (MFA) password protocols.

Teleworking policies should also address "acceptable use," which serves a critical role in promoting employees' responsible use of company assets and data by educating them on the types of behaviors permitted when using company technology. Acceptable use guidelines should define what employees can and cannot do with company-owned devices and specify the scope of such activities.

Similarly, mobile security guidelines—which specify the company's security requirements when data is accessed or transmitted via mobile device (both company- and employee-owned)—should also be included in all teleworking policies. In particular, these guidelines should address several key points, including: keeping software updated; always locking devices when they are not in use; reporting lost or stolen devices immediately; and never connecting to public Wi-Fi networks.

## EMPLOYEE EDUCATION AND TRAINING

Employing a workforce that is savvy about lurking cyber-risks and threats is another critical way to minimize the risk of insider threats. As such, a second key ingredient to an insider threat risk mitigation program is employee security awareness education and training.

Employees must be thoroughly educated and trained on how to safely and securely use, transfer and store organizational data in the course of their day-to-day activities while working from home. Employees should also be educated and trained on today's most prominent cyberattack methods—such as phishing, malware and social engineering—and best practices to implement to avoid falling victim to a targeted cyberscam.

Combined, education and training in these areas can help arm a company's workforce with the tools they need to effectively avoid any mishaps while working outside the office that could result in accidental or unintentional data breaches or other security events.

## EMPLOYEE MONITORING

Employee monitoring is a third key component of an effective insider threat risk mitigation program.

Employers should monitor workers' use of electronic data, with an eye toward unusual activity—especially if data is being pulled off the company's network. Data monitoring can not only detect data leaks when they happen, but can discourage employees from taking unnecessary risks when accessing or handling company data.

At the same time, employers should also monitor for "digital" threat indicators, which are represented by different forms of online activity that deviate from employees' normal day-to-day activities. Common examples include downloading large amounts of data to external sources, emailing sensitive data to personal accounts, and accessing sensitive data that is not relevant to an employee's job duties or responsibilities.

## USER ACCESS RESTRICTIONS AND CONTROL

Finally, companies should also include user access restrictions and control as an integral component of their insider threat risk mitigation programs.

Employers should implement the principle of "least privilege" to restrict and limit exposure by granting employees only the minimal level of access or privilege that is necessary for them to carry out their job duties and responsibilities. Similarly, companies should regularly review workers' data access rights and terminate any access to data or accounts that are no longer in use or no longer needed for employees to carry out their job responsibilities.

By ensuring employees only have access to data that is essential to their work-related duties and responsibilities, companies can significantly decrease the likelihood of finding themselves on the receiving end of a successful insider attack.

## CONCLUSION

With no clear ending date for the current COVID-19 pandemic, employers must implement the necessary protocols and technical safeguards to secure their networks and data while employees continue to work remotely. Remote working may very well become the "new normal," as employers seek to capitalize on the significant benefits offered by remote work arrangements. Thus, effective insider threat risk mitigation programs are also critical from a broader, long-term perspective. By adhering to the best practices described above, companies can put themselves in the best position to protect themselves from data compromise events stemming from insider threats and remote working arrangements—both during the COVID-19 pandemic and after.

To fully manage and mitigate the enhanced risk of insider threats tied to remote working, businesses should contact experienced legal counsel to ensure they have the proper policies and protocols in place to effectively defend against these potentially lethal security vulnerabilities. And if a business suffers a successful insider attack or other type of security incident during the COVID-19 pandemic (or thereafter), experienced counsel should be contacted to provide immediate assistance with rapid incident response and crisis management, which is key to minimizing the fallout and impact of a data compromise event. •

# Litigation

*continued from* **7**

disposition of a particular claim or issue, either by agreement of all interested parties or at the request of one party, provided other interested parties have reasonable notice to respond to the request."

So one problem for Bob: his arbitration "rules" did not incorporate the rules of any arbitration provider. Too bad. Courts repeatedly have upheld an arbitrator's authority to grant a dispositive motion when the governing rules, even if incorporated, permit this procedure. Many courts have gone one step further and said an arbitrator always has the power to grant a dispositive motion except when the governing rules specifically prohibit him or her from doing so.

But Bob did not need to refer to or incorporate a provider's rules. His arbitration letter agreement could have specifically allowed for dispositive motions—or, at least, not prohibited them.

But who says the other side will buy into a dispositive-motion procedure? Some arbitration parties may decide they do not like dispositive motions. They may believe their chance of prevailing rests more on what some lawyers refer to as the "equities," rather than on black-letter law. They may seek arbitration to avoid the summary judgment motion they otherwise would face in court.

So another problem for Bob: he missed the boat in drafting the arbitration letter agreement. Not because he did not include a dispositive-motion procedure. But because he failed to consider whether it made sense, in the first place and at the drafting stage, to allow for a dispositive-motion procedure.

What, then, are the lessons for Bob when he next drafts an arbitration agreement? It is not enough only to divine whether it will make sense for the client, months or years later, to seek a dispositive motion. The drafter also must consider at least two other things.

First, the drafter better make sure any incorporated rules provide the preferred procedure. Most providers specifically authorize arbitrators to make summary dispositions. But not all. Only Bob would incorporate a provider's rules on behalf of

***Litigation** continues on* **10**

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# Litigation

*continued from* **8**

a client whose interests are at odds with the incorporated rules.

Second, a drafter who is not incorporating rules must determine what makes the most sense for the client and then draft accordingly. If the drafter does not want dispositive motions, he or she should say so—unambiguously. An arbitrator who considered a dispositive motion in the face of a plain and express ban on such motions would be acting outside the scope of the contractually delegated authority in the parties' agreement. A court then would be hard-pressed to conclude there was a reasonable basis in the parties' agreement for the arbitrator to decide a dispositive motion.

Months and sometimes years before a dispute has arisen, the drafter of an arbitration agreement must consider whether it will be beneficial for his or her client to allow for summary dispositions. The drafter ill serves the client by leaving this issue up in the air, inviting protracted and expensive post-arbitration litigation. Not the best way of avoiding the delay and expense of litigation. And not the best way for Bob to have long-term clients. •

# Hearings

*continued from* **1**

said, did not meet that due process threshold.

"Our precedents make clear the full panoply of trial rights do not apply at a preliminary hearing, but the hearing is nevertheless a critical stage of the proceedings, and is intended under Rule 542 to be more than a mere formality," Dougherty said. "Here, at the hearing afforded appellant, the commonwealth relied exclusively and only on evidence that could not be presented at a trial. This is precisely the circumstance and rationale upon which five justices in *Verbonitz* determined Buchanan's right to due process was violated."

Justices Debra Todd, Christine Donohue and David Wecht joined Dougherty. Chief Justice Thomas Saylor wrote a concurring and dissenting opinion, and Justice Max Baer wrote a dissenting opinion, which Justice Sallie Mundy joined. Wecht also wrote a concurring opinion.

According to criminal defense lawyers, the decision, which comes nearly two years after the case was argued before the justices, returns some teeth to the preliminary hearing, which is an initial stage where courts are meant to determine whether prosecutors can muster enough evidence for the case to move forward to trial.

"It restores, I think, the important role of the preliminary hearing in determining if there's sufficient evidence," defense attorney and former Lawrence County District Attorney Matthew Mangino said. "A preliminary hearing was never intended to be a rubber stamp and I think this decision makes it clear that it's not just a mere formality. It is critical stage of a criminal prosecution."

Several defense attorneys agreed the ruling returns needed substance to the preliminary hearing.

Troy Wilson of Wilson Law Offices in Philadelphia, who said he was "heartened" by the decision, said the ruling also appeared to be an example of the Supreme Court admonishing the Superior Court for failing to follow precedent.

"Every now and then there's some conflict between the two entities, and it seems as if the Supreme Court is saying, 'remember you have to follow our dictates based on precedential law ... [and reminding you] we run the show here. This is precedent you must follow. If you thought you could wiggle around *Verbonitz*, you can't,'" Wilson said. "The basic holding was almost secondary to the verbal beatdown they wanted to put on Superior Court."

Defense attorneys said that in recent years courts routinely allowed cases to go forward on hearsay alone, typically finding that it was sufficient to have only the arresting officer testify about what the victim or witness said, rather than having the victim or witness actually appear. This, according to defense lawyers, made it so defendants could not confront the victim or witness, or probe their account. With long waits between preliminary hearings and trials, this often resulted in lengthy jail stints based on nothing more than hearsay testimony.

Some attorneys said that, although the recent decision in *McClelland* makes it clear prosecutors need more than just hearsay testimony, the opinion does not give guidance on what that means in a practical sense, and some prosecutors may still seek to rely heavily on hearsay evidence, while providing some direct testimony only from nonessential witness.

"A detective could testify about what a whole bunch of witnesses said, and then they could have an expert witness to testify about what the results of a lab test said," Montgomery County-based criminal defense attorney Steven Fairlie of Fairlie & Lippy said. "So some aggressive prosecutors or courts can push the envelope."

Wilson said his understanding of *McClelland* is that prosecutors will need to provide substantive testimony at all preliminary hearings, but he likewise said he expects prosecutors will test the limits.

"I will definitely be surprised if we don't see [this issue arise]," he said.

Given that, unless a defendant chooses to waive it, preliminary hearings are a part of every criminal case, attorneys said the high court's *McClelland* ruling has the potential to affect a broad swath of cases across the state and could lead to a wave of habeas motions, challenging whether a defendant's case should have been allowed to go forward from that earlier stage.

"People could get out of jail based on having to be bound over by court entirely on hearsay," Fairlie said, adding, however, that this could be delayed since most courts in the state are not hearing habeas motions right now due to restrictions in place as a result of the COVID-19 pandemic.

Mangino said habeas petitions might be less effective for defendants who have already been convicted at trial, but, for those who have yet to be tried, the move could be effective. And defense attorneys may want to check their active case loads.

"Myself, I have cases where I've had a preliminary hearing, where I filed a habeas petition and the habeas was denied based on *Verbonitz* and [*Commonwealth v.*] *Ricker*," he said. "I have to think about, do I go back again. ... I think there'll be a lot of probing and trying to figure out how this decision impacts current cases."

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# ALSP

*continued from* **1**

Historically, ALSPs were viewed as providers of high-volume, low-risk document review work. However, over the past few years they have expanded their services and grown their clientele. While ALSPs were originally leveraged by corporate clients interested in cost-effective alternatives to some of their outside counsel, more recently, some law firms have also begun hiring ALSPs for client matters.

But despite growing their exposure, ALSPs aren't forced to meet wildly different expectations from their various legal clients. Indeed, many firms and corporations use common criteria to evaluate an ALSP when determining whether to leverage their services. Surprisingly, while these companies are often lauded as cost-effective solutions, pricing isn't the top factor in choosing an ALSP, law firms and corporate legal departments reveal.

Instead, it comes second to an ALSP's ability to meet a client's quality expectation, meaning word-of-mouth, exposure to their work and prior experiences go far in the growing ALSP market. If an ALSP can consistently deliver high-quality work, it likely has a long-term advocate that will speak highly of it to peers and send work its way.

While a client's needs and an ALSP's services dictate what other factors are essential during evaluation, technology and scalability are also consistent components reviewed during most vetting processes. However, not included in most sprawling questionnaires sent to ALSPs are questions concerning its diversity and inclusion programs. Despite increasing calls for the retention and inclusion of diverse outside counsel, corporations and law firms aren't holding their ALSPs to the same standard, arguing that an ALSP's hiring practices are out of their hands.

## CASH ISN'T KING

Many law firms and corporate legal departments say if they can't trust the quality of the ALSP's work, hiring them isn't worth their time. The stakes are high when a case can ride on the ALSP's work being leveraged in litigation proceedings, Edlin notes.

But outside the courtroom, law firms also need to trust their ALSP's ability to successfully collaborate with them when creating an end-to-end solution for the corporate client, says former Hogan Lovells innovation and digital head Stephen Allen. (In June, Allen announced he was joining ALSP Elevate as vice president of enterprise solutions.) A lack of understanding regarding quality and a lack of trust can lead to micromanaging by the firm and potential service gaps, he explains, which makes "onboarding projects a nightmare. You have to go over square-by-square each [task] again. You have to agree who will do what and you are retroactively filling that gap."

Based on the service needed, quality is also a key factor when deciding which ALSP is hired in a corporate legal department, says LegalZoom.com Inc. managing corporate counsel Joe Callaghan. "To the extent that what we're looking for is true legal analysis and services, the analysis typically goes: We need a lawyer, what lawyers do we know and trust? And it becomes more of a matter of word of mouth and reputation," Callaghan explains. "What we're looking for is skill sets without having to go through the full hiring process."

To be sure, recommendations are extremely valuable for an ALSP when they're looking to build their reputation and client base, ALSPs say. "Lawyers are skeptical by nature, and a recommendation from a trusted colleague that is aligned with your expectation will carry as much weight as any sales pitch might," says Level 2 Legal client solutions director Daniel Bonner. "Lawyers are there to manage risk—if you enter into an engagement with a client and you solve one of those capacity or capability challenges, it will [serve as] a referral when lawyers are talking to someone you worked with."

Varun Mehta, CEO of fellow ALSP Factor, also notes an ALSP's industry-specific experience is a significant factor considered by clients. "[Clients are] really digging into every detail or metric where they can suss out the actual experience you have in the work, and not just the process of doing the work."

Still, ALSPs are not only evaluated via recommendations. They're also being sized up while working for or against counsel. Hogan Lovells, for instance, prefers to throw its ALSPs into real-life matters and rate their performance simultaneously. "It's only in the heat of that battle that you really see what people are made of," Allen says. "We will work with them live, but we would have a backup." For example, when leveraging a document review team for the first time, he notes the firm would increase quality review before the final product is seen by the client.

However, while quality is important, some note the type of work needed dictates what they look for in an ALSP. Callaghan explains, "In the past, if we needed to do volume work, document review or contract analysis, in those situations speed, volume and efficiency start to creep toward the most important priority, in which case reputation, pedigree and the ability to perform legal analysis become less important. That's when technology starts to creep up on my priority scale."

## TECH'S REVOLVING SEAT AT THE TABLE

An ALSP's technological abilities are important for some, but not for all. Contract staffing, for example, requires less emphasis on technology, while contract and workflow review may require a tech-heavy response, explains Hogan Lovells alternative delivery solutions head Rachel Dabydoyal. She adds that ALSPs that do leverage technology in

***ALSP** continues on* **11**

# ALSP

*continued from* **10**

their infrastructure must meet the firm's information security requirements.

"We need to be able to ensure our clients and regulators that the people we work with operate at the standards we operate at," Hogan Lovells' Allen explains. The law firm's security vetting process includes an ALSP filling out a multipage questionnaire and sitting down with the firm's chief information security officer to confirm its cybersecurity claims.

However, Edlin at Bassi Edlin notes that while understanding an ALSP's technology is important, it can be challenging. "They all have black box technology. It is always proprietary, and they won't tell you how it actually works and the actual mechanics of the algorithms," he says. But the concerns can be pushed aside if the software is accurate, industry-tested and user-friendly, adds Bassi Edlin founding partner Fred Blum. "In my mind, it's not the superiority of the technology but how user-friendly it is."

Big Law's Hogan Lovells and boutique Bassi Edlin exemplify a shared concern across legal to protect client data. However, the two firms' differing technology demands underscore the varying questions ALSPs face when approaching potential clients for work. "Certain buyers ask very specific questions about processes or features that will be key to their workflow. Others may only have a particular platform in mind or are solely focused on results, not the inputs or tools used," Level 2 Legal's Bonner says.

For some companies, technology is more about culture and not a specific workflow or product. "Even when we're looking at pure legal services, legal analysis, counsel, things like that, we're a relatively tech-forward company so we need someone who is willing to work within our system," LegalZoom's Callaghan says. "To the extent someone needs to have a sit-down conversation every day and walk through paper and things like that, that's just incompatible with our company culture and with the direction that our department is heading.

## WHAT CLIENTS AREN'T ASKING FOR

While legal departments and firms' tech culture grows at varying stages, the legal profession has struggled to foster diverse and inclusive work settings. And if their ALSP selection process is any indication, it's unlikely they're making enough progress in that sector either. Despite a push for diverse outside counsel from corporate legal departments, ALSPs aren't required to retain diverse candidates in its ranks. Instead, some corporations and law firms say an ALSP's hiring and inclusion programs are out of their purview.

"It's a factor that we look at when we hire in-house. And then I rely on those people to choose the vendors appropriately. So I wouldn't say it's a criteria [for vendors] I have on a checklist," Callaghan says.

Law firms may also make it a point to hire qualified, diverse candidates in its organization, but their influence in an ALSP's hiring processes is very limited, notes Buchanan Ingersoll & Rooney litigation section director Michael Etkins.

"In terms of reviewers, if we are picking the reviewers we are certainly looking at that [diversity] in the résumés," Etkins says. "In managed review, the vendor is picking the reviewers, we do not have impact on picking the reviewers there."

To be sure, Hogan Lovells for one says it does inquire about an ALSP's staffing of ethnic, female and disabled employees to match the firm's culture initiatives. But overall, diversity and inclusion stats aren't a driving factor in the hiring of ALSPs.

"A lot of clients ask for supplier diversity requirements, [but] not as much as you would imagine," notes Level 2 Legal's Bonner. "The delivery of services should look like the consumer of the services and we take that very seriously."

Still, even when a legal client finds an ALSP that meets all of its diversity, quality, cost or tech requirements, it's not always a guarantee that the service provider will be a good fit. Instead, what's more indicative of if clients picked the right ALSP is whether everyone is on the same page.

"If there's a feeling we're all in alignment, they get it, they understand they are an extension of the team. Often the difference from an average or mediocre ALSP is in that experience—knowing you're all going in the right direction," Bonner says.

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# Bar Exams

*continued from* **1**

been postponed for two weeks, until Aug. 11 and 12.

The last-minute changes have riled and unnerved test-takers and are raising more questions about the feasibility of delivering the bar exam online under rushed conditions. A growing number of states in the last month have abandoned their plans to give the bar exam in person due to the intensifying COVID-19 pandemic. Fifteen states now plan to administer an abbreviated online bar exam being prepared by the National Conference of Bar Examiners on Oct. 5 and 6, including New York, California, Illinois, Pennsylvania, Georgia and Ohio. Another four states plan to give that test in addition to an in-person bar exam.

"Bar regulators should put themselves in the shoes of bar takers when considering next steps," said Aaron Taylor, the executive director of the AccessLex Center for Legal Education Excellence. "The mental and financial impact of the delays and the lack of clarity regarding the exam cannot be overstated, particularly in the context of the ongoing pandemic. If both in-person and online exams are infeasible, then other alternatives, such as diploma privilege, should be given serious consideration."

Indiana and Nevada fall into a different category than the many states planning for the October online exam. Like Florida and Michigan, they designed their own tests and are not using material developed by the National Conference of Bar Examiners. (Michigan's online exam, which consists only of essay questions, was still scheduled to be given Tuesday as of Monday morning. Florida's one-day online exam is scheduled for Aug. 19.) Taylor said Nevada and Indiana deserve credit for making early decisions to move their exams online, but added that "in chaotic situations, the best-laid plans often fall flat." Indiana was the first state to announce it would give the bar exam online. Nevada followed three weeks later.

In an announcement July 24, the Indiana Supreme Court said that "unforeseen complications" arose when vendor ILG Technology ran an update on the software used to deliver the exam. The problem became apparent last week during practice exams, and the additional week will provide time to update the software the court said.

"Earlier this week applicants started to experience delays when typing during practice tests," said Brad Skolnik, executive director of the court's office of admissions. "We know this added unnecessary anxiety to the applicants and impacted their ability to study in this critical week."

Nevada is also using ILG to deliver its open-book online exam, and delayed the test for two weeks at the requests of the Nevada Board of Bar Examiners mere hours after Indiana took similar action.

"We have been pre-testing the software used to administer the bar exam remotely. The pre-testing revealed a problem the vendor is correcting this weekend," said Brian Kunzi, director of admissions for the State Bar of Nevada in an announcement of the change. "With the exam scheduled to start Tuesday, this does not leave time for a final pre-test of the software. Rather than risk problems during the exam, the decision was made to postpone the exam."

Law graduates in both states are harnessing the last-minute delays to renew their pushes for an emergency diploma privilege that would allow them to skip the bar exam altogether. Graduates of the William S. Boyd School of Law at the University of Nevada, Las Vegas began circulating a petition asking for a diploma privilege soon after the court's decision to delay the exam.

"The most important thing is NOT to take the bar exam: the most important thing is the physical and mental health of the dedicated graduates of Boyd Law who have gone above and beyond to prepare to enter our careers," their petition reads. "The most important thing is to trust in the education created for this state's law school to produce amazing future lawyers who need the opportunity to help people and work sooner rather than later."

Similarly, law graduates slated to take the Indiana test are also requesting a diploma privilege, arguing that this latest change leaves examinees scrambling to make new arrangements for child care and a suitable testing space. They also are skeptical that a week is enough time to remedy the flaws in the testing software

"The exam is no longer going forward as planned, and there is no evidence to suggest that the ILG Exam360 software will ever be capable of successfully supporting an online bar exam administration for hundreds of applicants," reads a Monday letter to the Indiana Supreme Court. "The postponement is wreaking havoc on the lives of the bar applicants."

Some legal academics agree that the Indiana and Nevada delays should serve as a warning sign to other jurisdictions that are planning to hold online bar exams.

"I don't begrudge those state bars which decided on online bar exam to replace in-person debacle," Tweeted Dan Rodriguez, a professor and former dean of Northwestern University Pritzker School of Law. "Many were working to do something meaningful for grads. Now we know this is a mess, and the courageous thing is to reconsider."

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# Diversity

*continued from* **1**

13 as part of an effort that began about a year ago.

The project, which is part of a collaboration with general counsel collective AdvanceLaw, has helped Honeywell increase diversity among its outside counsel. The effort also has allowed the Charlotte, North Carolina-based company to better manage outside counsel spending, according to general counsel and senior vice president Anne Madden.

Madden and Scott Offer, chief lawyer for Flex, a global electronics manufacturer headquartered in Singapore with a U.S. base in Silicon Valley, spoke July 14 during an AdvanceLaw webinar about creating results-based outside counsel panels through data analytics.

"They're the right kind of firms and we know this because we put the firms through their paces," Madden said. "We have to have the courage to be able to move away from that comfort blanket and move to firms that give us just as much quality but at a lower price point and really being thoughtful about who we go to for what sort of matter."

Offer noted during the talk that his company also had too many outside law firms on its roster and initially began working to shorten the list to "increase understanding, commitment and investment" from Flex's outside firms. Later, cutting costs entered the equation. The effort resulted in Flex going from about 100 firms to 12, according to Offer.

As part of its firm selection process, Honeywell looks to a scorecard that AdvanceLaw designed and which rates firms based on diversity, innovation, size, billing rates and expertise. The approach pairs Honeywell and Flex with the best firms for their needs on a particular matter. Meanwhile, firms with high scores "will be rewarded with more work," Madden said. And not just from Honeywell and Flex but the nearly 300 general counsel that are part of the AdvanceLaw collective.

Most of the firms on the panels are still relatively large, about 500 lawyers on average, but are not so-called white-shoe Wall Street firms and therefore tend to charge relatively lower billing rates.

Madden noted that she serves as the gatekeeper for outside counsel hiring. And so any request to work with a firm that's not on Honeywell's new, smaller panel must go through Madden, who said she only grants exceptions when there is a "special reason."

"If you set up a control process like this and you don't wrap the right controls around it, it's not going to work," Madden said.

As for diversity, Madden said that Honeywell encourages diverse teams for all of its outside counsel hiring. She stressed that the company has a "very clear expectation for all of our law firms that that's what we want," adding that the expectation also applies to Honeywell.

"If we're going to hold our feet to the fire and say, 'Each interview slate has to have at least two diverse candidates,' we want our partners to make those same commitments in their hiring practices and in the assembly of the teams that we use on our matters," she said.

Offer, meanwhile, asserted that more progress has been made on gender diversity than ethnic diversity within the legal profession, though work remains to be done on the former as well. He advocated for mentorship programs as one way to increase diversity in the profession.

"I think on ethnic diversity we just haven't done enough," he said. "Now, I think, is the time to act."

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