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CORPORATE COUNSEL IN THE NEWS

ACC-ST. LOUIS NAMES 2022 LEADERS

The Association of Corporate Counsel-St. Louis Chapter has elected its 2022 officers and board of directors.

The association's president is **Kate Krebel,** vice president and corporate counsel for Leonardo DRS Technologies Inc. Its president-elect is **Jennifer Herner,** assistant vice president and assistant general counsel at MiTek Inc.

Beverly Garner, associate general counsel for Bunge North America Inc., serves as treasurer. **Danielle Langeneckert,** director of pharmaceutical integration for Ascension Health, is its secretary. **Sven Fickeler,** senior corporate counsel for Bunzl Distribution USA, is the association's immediate past president and past president council chair.

The members of the 2022 board of directors are **Jennifer Feldhaus** of Centene Corp. (advocacy); **Tyrus R. Ulmer** of The Boeing Company (Corporate Counsel Institute); Aaron Mutnick of Amazon (communications); **Vikas Sunkari** of SSM Health (diversity); **Erika Schenk** of World Wide Technology Inc. and **Kate Molamphy** of ICL Americas (General Counsel Forum); **Anthony "Jay" Repaso** of Mastercard (annual golf/spa event); **Pam Howlett** of Bayer (law school relations); **Christopher Wittenauer** of Peabody Energy (membership); **Toni Douaihy** of Macy's Inc. and **Brian Parsons** of Centene Corp. (practice area networking); **Patricia Duft** of Medtronics Inc. (pro bono); **Geoffrey Grammar** of Ameren Services (professional development); **John Farmer** of Charter Communications Inc. (programs); **Chrissy Teske** of World Wide Technology (social); **Lisa Savoy** of Experian (social justice task force); **Denise Whitener** of Wells Fargo Law Department (sponsorship).

LOWER STATUTE OF LIMITATIONS GETS SENATE HEARING

By Scott Lauck
slauck@molawyersmedia.com

A Missouri Senate committee is weighing a bill that would reduce Missouri's statute of limitations for personal injury suits to two years from the date of injury..

The Senate Judiciary and Civil and Criminal Jurisprudence heard testimony on the bill on Jan. 11, marking the first bill seeking changes to Missouri's tort laws to get a hearing this session.

Current law gives plaintiffs with claims of personal or bodily injury up to five years to file a lawsuit. The bill's sponsor, Sen. Dan Hegeman, R-Cosby, said most states' statutes of limitations are three years or less.

"It is simply common sense that most injured persons use reasonable due diligence to pursue their claim as soon as practicable," he said. "Most people want justice and then to move on with their lives."

But Ken Barnes, the current president of the Missouri Association of Trial Attorneys, said a two-year limit would prevent justice for more people than the senators realized. Barnes, of the Barnes Law Firm in Kansas City, noted a former client who was in a medically induced coma for two years following a head-on collision.

"To take from them their right to redress, their right to hold those accountable who are responsible for these life-altering injuries by shortening this timeframe, is just to me reprehensible," he said.

Bills seeking a two-year statute of limitations have been introduced in the Missouri legislature each year since at least 2018. Last year's version, which Hegeman also sponsored, was debated in the Senate but was set aside after an all-night debate. Similar legislation is pending this year in the House.

A raft of business groups spoke in favor of the change. Dana Frese, the president of Healthcare Services Group, who testified on behalf of the Missouri Organization of Defense Lawyers and the Missouri Hospital Association, said the bill would make sure that defendants had fresh evidence available for their defense and would not have the threat of litigation hanging over their heads for long periods of time.

"Permitting an individual to file a bodily injury lawsuit five years after an accident is fundamentally unfair to the defendant," Frese said. He said all eight of Missouri's bordering states have shorter time limits, most of which are two years.

The bill preserves a five-year limit for other causes of action, such as contract disputes. Frese defended that distinction, saying both parties have copies of their contracts and are aware of their terms, yet businesses sometimes don't know there was an accident or injury until a lawsuit is filed.

Sen. Steve Roberts, D-St. Louis and an attorney, asked if the shorter limit would prompt attorneys to file more lawsuits lest they miss the deadline. Frese, however, said defendants often will agree to extend the deadline if the parties are in the middle of good-faith negotiations.

But Sen. Karla May, D-St. Louis, said many injured people simply aren't ready to pursue litigation within two years of an injury.

"When you're trying to recover, you're not in the mind frame to fight," she said.

One such person is Kristi Howard, a St. Louis woman who testified against the bill based on her personal experiences. Howard said an imaging center missed signs of her breast cancer, allowing the disease to progress for eight additional months before she began treatment. By the time she was well enough to consider litigation against the center, the statute of limitations had expired. The limit for medical malpractice claims, which appears in a separate statute, has been set at two years for decades and isn't affected by this year's proposal.

"It's too late for me, the law has already changed," she said. "But you don't have to do this to someone one else."

Attorney Ryan Krupp, also of MATA, asked the committee to consider the issues facing victims of sexual assault, who frequently don't disclose or even comprehend their assault until years later. The two-year limit, he said, would "silence their voices."

Sen. Bob Onder, R-Lake St. Louis, a medical doctor who holds a law degree, noted an incident in the St. Louis area in which numerous people were molested at a laser surgery center.

"It was really only when the first one or two cases came forward that dozens came forward," he said.

The bill is SB 631.

LAW FIRM DIVERSITY IS ONGOING GOAL

By David Baugher

When Amanda Garcia-Williams is asked whether diversity is just a buzzword for some law firms, she quickly mentions three groups.

"Some firms don't even use the buzzword," she said. "Some you can only get the buzzword out of. And then some are really putting their money where their mouth is."

She feels that Husch Blackwell, the organization where she began serving as chief diversity, equity and inclusion officer when the position was created last June, is working hard to fall into that last category. It is a common story as large firms, both in Missouri and nationwide, look for better methods to broaden their personnel in a way that reflects society at large.

Garcia-Williams said "pipelining work" is the first step.

"How do we get young people interested in the legal field and how do we make sure that they have access to law schools and they are getting admitted, getting trained in the right ways and are successfully applying to opportunities at law firms?" she said.

After that, the task becomes creating a culture and work environment where young, diverse lawyers can count on mentoring, training and career development. That last component is proving particularly important for retention which is vital to transition attorneys from associate to partner and, ultimately, to firm leadership.

There is also "lateral recruiting", bringing in lawyers from other firms, in-house positions or non-profits to diversify the ranks.

"I think any good DEI strategy really has to think about all of those different pieces in building their programs," she said.

Christopher Pickett, chief diversity officer at Greensfelder, feels that the pipeline itself isn't the problem. Diverse candidates are coming out of law school but firms may have a focus on traditional metrics that might not always tell the full story of how much potential a graduate could have, especially for a first-generation law school attendee who may not yet be familiar with the intricacies of the field.

Ronald Norwood

"Law firms often make their decisions very early in the game," he said. "It is easy to get pigeonholed as somebody who isn't going to succeed after three or four months of school. Law firms can be rigid as it relates to hiring and oftentimes don't take a sufficient look at context to explain why results might be what they are. As a result, that impacts the ability, at times, to hire students of color."

That problem may be exacerbated as learning has become more virtual which could pose disproportionate obstacles for some students. Pandemic life may also interfere with individuals' chances at success even after they attain a position at a firm.

"It has created challenges because law firms, I think, can't decide where they want to be," Pickett said. "Are we in the office? Are we not in the office? But the reality is if you choose not to be in the office, there might be consequences of that which have become somewhat unwritten and we know that those sorts of unwritten rules can have a significantly greater negative impact on attorneys of color."

Pickett says he believes things have improved and firms are "having conversations now that we may not have been having historically." But he still sees a lot of room for continued advancement.

"It is better," he noted of the overall climate. "It is certainly not where it needs to be as it relates to the depth of those conversations."

Ronald Norwood, who has chaired the Diversity and Inclusion Committee at Lewis Rice since 2014, said law firms often find themselves rushing to recruit the same small group of top candidates in classes.

"Everyone is after them so it makes it challenging to hire individuals everyone is grabbing at the same time," he said.

He sees promise in Missouri Bar mentorship programs that will help candidates to put their best foot forward.

"The hope is that through that effort, individuals would be guided to a path of success in law school which would translate to success when and if they join a large law firm," he said.

Norwood also said other Bar efforts include initiatives that let firms pledge to attract and retain attorneys of color and encourage judges to diversify the ranks of their law clerks.

"That's a program we feel could be important because it gives them access and experience with the internal workings of the court which then translates into being more productive lawyers once

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they leave the court system," he said.

Lesley Wynes, chief legal talent officer of Thompson Coburn, said casting a broad net for recruitment is a priority for professionals at her firm, particularly when it comes to lawyers.

"Diversity is something we've been focusing on across all of our attorney ranks from summer associate hiring to lateral associate and lateral partner hiring," she said, noting that Thompson Coburn has been certified under Diversity Lab's Mansfield Rule for the past three years.

According to Diversity Lab's website, the Mansfield Rule stipulates that an organization has "affirmatively considered at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions."

"Thought leadership is more productive when it is driven by different points of view," Wynes notes. "You are able to solve clients' problems more creatively."

Pickett said there is data to back that up.

"Over and over again, what is clear is that diverse teams just perform better," he noted. "Revenue is higher than industry averages. Innovation is higher than industry average. Efficiency is better than industry average. Diverse teams are more effective teams."

Wynes said the trend toward non-physical office work may have actually had some useful side effects on the firm's diversity efforts by allowing more interchange through interviews outside a given geographic market.

"I think one of the ways that the pandemic has impacted recruiting positively, which has a trickle effect on diversity, is that we can be more inclusive in who we include in the recruitment process because the interviews are generally still happening virtually," she noted.

Despite the dampening effect on in-person campus recruiting events, Garcia-Williams noted a similar phenomenon at Husch where "The Link", a virtual office project has allowed for greater flexibility in outreach and communications.

"The Link, in a lot of ways, has been great for diverse recruiting and diverse hiring," she said. "We just have to be very intentional about making sure the support networks are in place."

Lesley Wynes

Firms aren't just focused on racial composition either. Thompson Coburn has a "reentry platform" fellowship program that focuses on bringing females back into the office after a hiatus.

"This program gives them a chance to demonstrate their skills and their value in the marketplace while also getting more skills and opportunities and gives mentorship and professional development support to women as they return to the workforce," Wynes said.

Half of Thompson Coburn's management committee is female, and women make up more than 50 percent of managing partners. In 2020, three-quarters of the firm's lateral hires were diverse based on gender, race, ethnicity, LGBTQ, veteran or disability status. That number rose to 86 percent last year.

At Lewis Rice, Norwood said that there is a particular forum geared to helping women with business development or growth in the organization.

"We feel that that forum has been a great success in terms of active participation within the firm and active involvement with outside general counsel that might be women or women business owners," he said.

Garcia-Williams said that firms are likely doing better on promoting female leadership than racial diversity in the boardroom. There is still work to do on making equity partnerships and chairpersons reflect the larger community.

Like Wynes, she feels that diverse groups make better decisions. But she also notes that clients are beginning to feel that way as well.

"Many of them are asking for metrics," she said. "They understand that diverse teams solve complex problems in a better, more efficient, more creative way. They want their law firms to be diverse and to bring diverse perspectives to their complex legal issues."

At Greensfelder, Pickett said the firm is sometimes seeing such questions popping up in RFPs.

"How is leadership organized? How many women and attorneys of color are on the important committees in the law firm?" he said. "There is significant external pressure from larger companies and smaller companies, frankly, to ensure that law firms and the legal industry is living up to what it outwardly says about the importance of diversity within firms."

Unfortunately, while Pickett believes that many firms are genuinely looking to broaden their horizons in terms of personnel, they aren't necessarily the most skilled organizations when it comes to training. Unlike major corporations, which prioritize managing and mentoring, law firms often select practice group leaders for their talent as attorneys, something which doesn't always translate into creating the best managers. Sometimes, that disconnect can leave hiring practices and professional development to suffer which could negatively impact inclusion efforts.

"I think law firms are committed," he said of efforts to diversify and train the next generation of attorneys. "[But] I think law firms are uniquely ill-qualified to try and figure it out."

SUPREME COURT RULINGS ARE FEW BUT MIGHTY

By Scott Lauck

Supreme Court rulings are few but mighty

The Missouri Supreme Court has returned to in-person arguments and cleared some long awaited cases off its docket. But its annual output remains below normal.

The Supreme Court issued just 49 written opinions during calendar year 2021. It's the lowest annual total since at least 2001, according to a database of Supreme Court opinions maintained by Missouri Lawyers Media. The total is nine fewer than the 58 opinions issued in 2020, which was the previous record low.

The pandemic may have exacerbated a long-term trend in the court's output. The yearly average from 2001 to 2010 was 89.5 cases per year, but it was just 70 opinions per year from 2011-2020.

The count may have been small, but the rulings often were mighty. In the last six months, the court upheld the voter-approved expansion of Missouri's Medicaid system, allowed lawmakers to set limits on damages in medical malpractice suits and reined in suits against workers who injury a co-employee on the job.

Missouri Lawyers Media's semiannual Major Opinions section reviews cases from the prior six months from the Missouri Supreme Court, the Missouri Court of Appeals and the 8th U.S. Circuit Court of Appeals that raised significant issues in a variety of practice areas. For reviews of cases earlier in 2021 and before, please see molawyersmedia.com/major-opinions online.

Constitutional

In July, in one of the most-watched cases of the year, the Supreme Court upheld the expansion of MO HealthNet. Voters approved the Medicaid expansion in 2020 as an amendment to the state constitution. The court unanimously said that, because lawmakers still maintain control of the program's funding, the amendment didn't violate a separate constitutional provision that says the initiative petition process can't be used to appropriate money. The case is *Doyle et al. v. Tidball,* SC99185.

In a less weighty constitutional challenge, the Supreme Court said in November that a man could still be tried for assaulting a police officer after a delay in his second trial. Following a mistrial, the defendant's new trial wasn't held during the "same or next term of court," as specified in the state constitution. The court said it was enough that the new trial be scheduled on time, not that it must occur during that term. The case is *State v. Shegog,* SC99103.

The 8th Circuit is considering its own momentous constitutional challenge. In June, a three-judge panel upheld an injunction for a Missouri law that severely limits abortions. But the full 8th Circuit vacated that ruling and heard the case again in September. It's not clear when a ruling will come down, as the U.S. Supreme Court is considering a similar case that could change abortion law at the national level. The case is *Reproductive Health Services of Planned Parenthood of the St. Louis Region Inc. et al. v. Parson,* 19-2882.

In July, the 8th Circuit held that a St. Louis ordinance against obstructing traffic is constitutional. A woman who was arrested for walking in the street while taking part in the Women's March in 2017 challenged the local law and won in district court. The 8th Circuit, however, said the ordinance's primary aim is to regulate conduct, not speech. The case is *Langford v. City of St. Louis,* 20-1488.

Tort Law

In July, the Supreme Court affirmed the validity of a 2015 law that reinstated a cap on the noneconomic damages that plaintiffs can recover in medical malpractice lawsuits. The 5-1 decision followed nearly a decade of jurisprudence on the circumstances under which lawmakers can set limits on the kinds of suits that were available when Missouri became a state. The Supreme Court has now made clear that lawmakers can transform common-law causes into statutory ones, allowing legislative limits to take effect. The case is *Ordinola Velazquez v. University Physician Associates et al.,* SC98977.

Also in July, the 8th Circuit agreed that the exclusion of a key expert was fatal to a Missouri man's allegations that he was injured by a defective saw. The plaintiff alleged that the saw's auxiliary handle spontaneously detached from its body, but the court said his expert's testimony didn't back up that story. The case is *McMahon v. Robert Bosch Tool Corp. et al.,* 19-3637.

In August, the 8th Circuit ruled that private medical personnel working for correctional facilities cannot claim qualified immunity in an ongoing wrongful death lawsuit. The ruling puts the 8th Circuit in line with other federal appellate circuits to have considered the issue. The case is *Davis v. Munger et al.,* 20-1842.

Also in August, the 8th Circuit ruled that real estate agents can't rely on a copyright exemption for "pictures" to defend against claims that they reproduced floor plans of an unusual house in their online listings for potential buyers. The case is *Designworks Homes Inc. et al. v. Columbia House of Brokers Realty et al.,*19-3608.

The Western District ruled in August that a fatal flaw in an arbitration agreement allows a class-action lawsuit to proceed in circuit court against a car dealership. The agreement called for any disputes between the dealership and its customers to be resolved through a specific forum, which has since shut down. As a result, the court said an arbitrator with a different group who already had ruled against the plaintiffs had no power to act. The case is *Car Credit Inc. v. Pitts,* WD84054.

The Southern District in September ended a suit against a sporting goods store where a man charged with murder is believed to have obtained the ammunition used in the fatal shooting. Although someone allegedly bought the ammunition for the suspect because he was in the U.S. illegally, such sales aren't prohibited by federal law and do not require a background check. The case is *Elkins v. Academy I LP,* SD36947.

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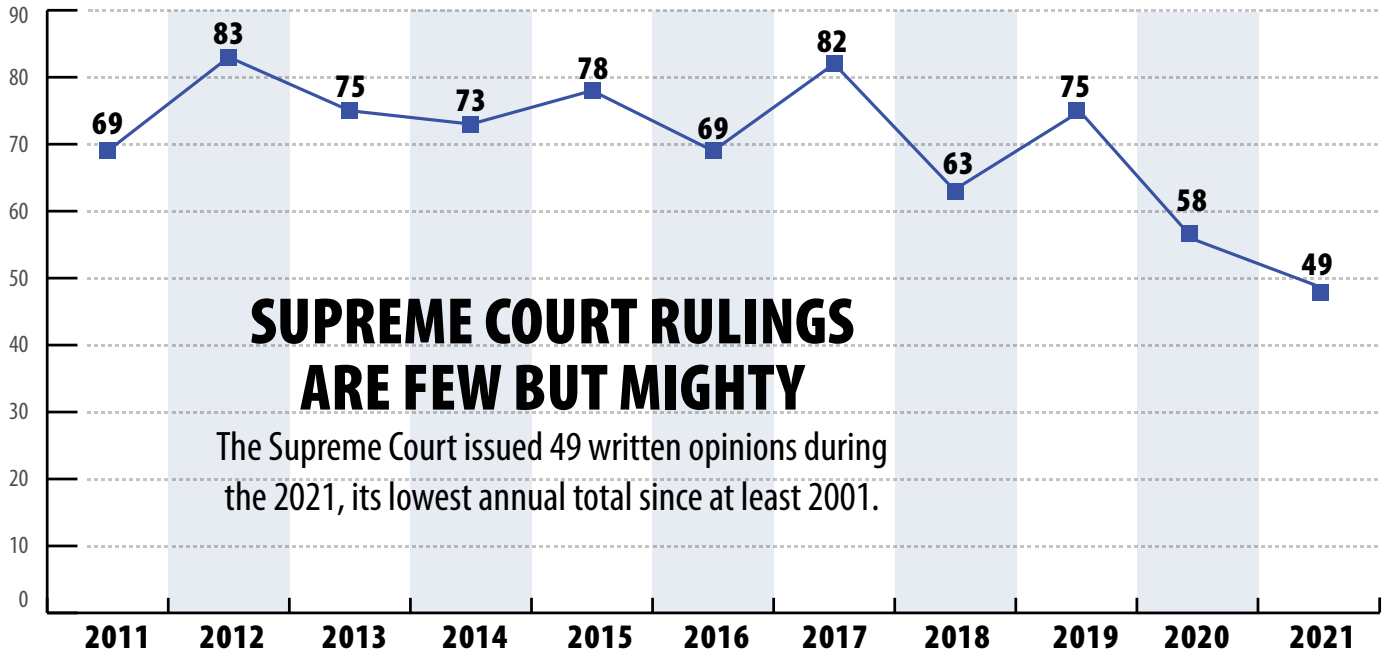

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Also in September, the Western District threw out claims against a state university by the parents of two students who died by apparent suicide. The court said neither Missouri consumer-protection laws nor federal campus safety laws allowed the suit, which alleged that a fellow student had encouraged the suicides. The case is *Bottorf-Arey et al. v. Truman State University et. al.,* WD84006.

In October, the Eastern District reinstated a lawsuit by bicyclist who alleges he fell while crossing a bridge in St. Charles. The suit was dismissed because the plaintiff failed to notify the city of his injury within 90 days, but the court said that city ordinance is broader than state law permits and cannot be enforced. The case is *Zang v. City of St. Charles,* ED109422.

The Eastern District in October said a two-year statute of limitations for medical malpractice actions doesn't cover a company that provides at-home health services. The court said the types of health care entities covered by the statute are those that operate under the authority of a license or certificate, and in-home personal care services do not require a license. The case is *Noelke v. Heartland Independent Living Center,* ED109295.

In November, the Eastern District said a law firm that won a substantial medical malpractice verdict can collect its full amount of contingency fees, even though a large part of the award was based on future medical costs that disappeared when the plaintiff died during the appeal. The case is *Lowe v. Mercy Clinic East Communities et al.,* ED108826.

Work Comp and Co-worker Liability

In November, the Supreme Court ended a two-and-a-half-year wait with a ruling that a plaintiff could not hold his former supervisor personally responsible for an injury that crushed his left thumb. The 4-2 ruling, which threw out the plaintiff's $1.05 million verdict and set a record for the delay between oral argument and decision, is expected to severely limit the instances in which a co-employee can be sued for on-the-job negligence. The case is *Brock v. Dunne,* SC97542.

The Western District ruled in September that a school district alleged to have fired an employee for filing a workers' compensation claim cannot claim the protection of sovereign immunity. The ruling held that a series of state statutes waived the district's sovereign immunity for claims of retaliatory discharge. However, the Supreme Court said in December that it would review the case. The case is *Poke v. Independence School District,* WD84198.

The Eastern District in December took a first look at Missouri's Whistleblower's Protection Act, a 2017 law that codified common-law protections for employees who allege misconduct by their employers. The court said that revised law doesn't bar an auto mechanic's claim that he was fired for reporting a co-worker for stealing. The case is *Yount v. Keller Motors Inc.,* ED109503.

In December, the Supreme Court ruled that a cable technician who crashed into a concrete pillar while driving for work cannot recover workers' compensation benefits, as the "risk source" that led to his injury was the breakfast sandwich that caused him to choke while he was driving. The case is *Boothe v. DISH Network Inc.,* SC98948.

Criminal Law

In August, the Supreme Court declined to halt the execution of Ernest Lee Johnson. The court found that he had failed to prove he suffered from an intellectually disability that would prevent him from being put to death for the murders of three people at a convenience store in 1994. Johnson died by lethal injection on Oct. 5. The case is *State ex rel. Johnson v. Blair,* SC99176.

Also in August, the 8th Circuit reinstated the death penalty for a Scott McLaughlin, ruling that his trial counsel wasn't ineffective when they missed a problem in the background of an expert who had been prepared to testify in his favor. The court said McLaughlin's lawyers had sufficiently inquired into the doctor's background, and it was unlikely that a substitute expert

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would have prevented McLaughlin from getting the death penalty for the murder of his former girlfriend in 2003. The case *is McLaughlin v. Precythe*, 18-3510.

In July, the Southern District threw out a lawsuit against a circuit judge who put a woman in jail for violating the terms of her probation. Under a series of recent court rulings, the woman had earned mandatory credits that would have ender her probation already had the judge applied them. The appeals court, however, said the judge didn't act without jurisdiction and was protected by judicial immunity. The case is *Stalnacker v. Dolan,* SD36954.

A split panel of the 8th Circuit in August denied post-conviction relief to a Missouri inmate who was tried simultaneously for two murders that occurred five years apart. The majority said the defendant hadn't had ineffective assistance of counsel, despite his trial lawyer's failure to adequately oppose the joinder of the cases. The dissent said the majority and the state appeals court overstated the similarities between the murders. The case is *Donelson v. Steele,* 20-1094.

The Supreme Court split 4-3 in August on whether to suppress evidence from a defendant's phone because it was obtained at a location that was not listed on a search warrant. The majority said the evidence was properly suppressed because the detective seized the phone directly from the suspect rather than at his home address as detailed in the warrant. The case is *State v. Bales,* 19PU-CR00610.

In September, a split panel of the 8th Circuit affirmed a Missouri district court's sentence for a defendant who had continued to seek out child pornography during treatment. The dissenting judge said that in the context of the defendant's Asperger's Syndrome, his conduct did not warrant the decision. The court declined to rehear the case en banc. The case is *U.S. v. Michael,* 19-1885.

In December, the Eastern District denied a challenge to the practice of setting bond as part of the initial arrest warrant in criminal cases. The defendant argued that because courts have no evidence of the defendant's ability to pay such a bond at that stage of the case, no cash-only bonds should be set. The case is *Nichols v. McCarthy*, ED109897.

Juvenile Law

In a pair of decisions in October, the Supreme Court said two 17-year-olds were properly tried as adults despite a recent change in the law that extends the authority of juvenile courts to offenders who are up to 18. The court said that, while the effective date of the law change was Jan. 1, 2021, the funds that the legislature appropriated for the law change did not kick in until six months later, which was several months after their court dates. The cases are *Missouri v. R.J.G.,* SC99034 and *State ex rel. T.J. v. Cundiff,* SC98951.

The Western District in November held that a defendant's attorney was not ineffective for failing to ask that her young client be held to the standard of a "reasonable juvenile." The result wasn't required under a series of U.S. Supreme Court decisions that have changed how youthful offenders are judged in serious cases. The case is *Shaw v. State of Missouri,* WD83935.

The same month, the 8th Circuit agreed to reconsider a court-ordered reform of Missouri's parole review process for inmates sentenced to life without parole for crimes they committed as juveniles. In September, a panel affirmed a district court ruling that found Missouri's process fell short of constitutional standards. But the court has vacated that ruling and said the court en banc would hear the case in January. The case is *Brown v. Precythe,* 19-2910.

Also in November, the Southern District considered but did not resolve the standard of review to be applied in claims by juveniles that they received ineffective assistance of counsel. Whether it is under the exacting standard that applies to adult criminal proceedings or the "meaningful hearing" standard used termination of parental rights cases, the court said the teen defendant, who allegedly shot another boy, had adequate representation in juvenile court. The case is *In the interest of P.J.T.,* SD36997.

Family Law

In September, the Western District said a woman could renew an order of protection against a man even though he had since moved out of state. The court said Missouri courts had personal jurisdiction to enter the original order and retain it even though he is now a non-resident. The Supreme Court declined to review the ruling. The case is *K.C. v. Chapline,* WD83881.

In November, the Eastern District of Missouri awarded custody to the non-biological mother of a same-sex couple, although the woman had never formally adopted the child, who was conceived via in-vitro fertilization with a sperm donor. Because the daughter was born during the marriage, the court said the non-biological mother was her presumed natural parent. The case is *Schaberg v. Schaberg,* ED109200.

Attorneys and Records

The Eastern District ruled in August that some of a lawyer's files could be disclosed during discovery in a lawsuit that is attempting to recover the proceeds of a jury verdict from an insurance policy. The court said that in the underlying litigation, the attorney served both as counsel to the insurance company and at times as an attorney for the insurer's policyholder, waiving the attorney-client privilege for some materials from that case. The case is *State ex rel. Kilroy Was Here LLC v. Moriarty,* ED109351.

Also in August, the Southern District threw out a sanctions order against a public defender's office after an attorney's vacation to a "hotspot" for COVID-19 caused a judge to postpone a trial set to occur shortly after he got back. The appeals court said there was no evidence that the attorney acted in bad faith. The case is *State ex rel. Area 25 Trial Office v. Clayton,* SD37064.

The Supreme Court ruled in September that a county's presiding judge didn't have the authority to indefinitely suspend the local circuit clerk. Despite a disagreement between the two officials, the court said the suspension had "the practical effect of removing an elected circuit clerk from office." The case is *Allsberry v. Flynn,* SC99257.

The Western District in December gave an opinion that could help doctors and their attorneys know when they can produce records and when they can't. The court said neither privacy laws nor Missouri law bar doctors from turning over patient records sought during investigations by state licensing boards. The case is *State ex rel. Putnam v. State Board of Registration for The Healing Arts,* WD84394.

In July, the Eastern District threw out a default judgment against three pro se litigants whose former law firm had sued them for allegedly failing to pay their bills. The trio appeared at court on the date

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listed in their summons, only to learn that they'd missed their deadline to file a response. The Eastern District said that deadline doesn't apply to associate-level cases. The case is *Zick, Voss, Politte & Richardson v. Puetz,* ED109152.

In November, the Supreme Court ruled that a woman waived her attorney-client privilege of a conversation with her legal counsel by leaving a recording of the meeting for her ex-husband to find. The case is *State ex rel. Garrabrant v. Holden,* SC98875.

SUPREME COURT WEIGHS DENIAL OF ARBITRATION

By Scott Lauck
slauck@molawyersmedia.com

The Missouri Supreme Court is considering whether a group of former car owners are bound by an agreement to arbitrate their claims against a loan servicer that is simultaneously suing them for the amounts they still owe on their cars.

In what was effectively an hour-long argument, the court on Feb. 23 heard a pair of cases involving two cars that were repossessed after the owners allegedly failed to make multiple payments. Kelly Donaldson and Robert Haulcy had bought a 2008 Chevrolet Equinox for $600 down in 2017, and Christopher Jones purchased 2009 Cadillac CTS with a $1,300 initial payment.

Bridgecrest Acceptance Corporation, which was assigned the cars' contracts after the sales, filed claims against the buyers in the associate division of St. Louis County Circuit Court, alleging that more than half of the value of the vehicle remained after they were resold. The defendants filed counterclaims, alleging violations of consumer-protection laws and seeking class-action status.

Bridgecrest then sought to force the consumer's claims into arbitration, citing an agreement they allegedly signed at the same time they entered into the sales contracts for their vehicles. Associate Circuit Judge Mondonna Ghasedi declined to enforce the agreements. Last June, the Court of Appeals Eastern District affirmed those rulings.

Although the Eastern District's opinions were unpublished, they jolted business and lending groups and prompted a flurry of amicus briefs in the Supreme Court. Declining Bridgecrest's invitation to read the sales and arbitration agreements as a single contract, the Eastern District found that the arbitration agreement was "illusory," as Bridgecrest could repossess the cars and seek to recover the deficiency without waiving its right to compel arbitration of claims against it.

"The arbitration agreement functionally does not require Bridgecrest to arbitrate its primary claims while maintaining the ability to force [the car buyer] to arbitrate any meaningful claims he may have," the appeals court wrote.

David Helms of GM Law, an attorney for Bridgecrest, told the Supreme Court that the ruling "has created great uncertainty and concern on a local and even a national level for not only lenders but all parties relying on the enforceability of arbitration agreements in their business dealings in Missouri."

Technically, the concerns with the Eastern District opinions already have been addressed, as they were automatically vacated as soon as the cases were transferred to the Supreme Court. But in oral arguments, the high court didn't give a clear indication of how the law ultimately will be settled.

Jesse Rochman of OnderLaw, an attorney for the consumers, argued that the sales contracts were separate from the arbitration agreements, and that the benefits of the former couldn't be used to justify the terms of the latter. In other words, he urged the court to find that the arbitration agreements were standalone contracts that had to meet the normal requirements for a valid contract — including that they offer "consideration" by binding both parties to the requirement to arbitrate.

Rochman noted that Bridgecrest's deficiency suit initially included only the sales contract. The arbitration agreement wasn't provided to the trial court until the company sought to force the counterclaims into arbitration, and he argued that the company never complied with court rules to properly put the document into the record.

"Perhaps they didn't attach it because it would be inconsistent with the right to arbitration to be suing for a deficiency judgment," he said.

Helms said the arbitration agreements should not be read in isolation from the consumers' overall agreement to buy the cars. But, with a reference to the 2000 movie "Castaway," he also argued it could stand on its own.

"If you shipwreck this thing, rip it from the contract and toss it on an island — like Tom Hanks looking for his volleyball, Wilson — even then the agreement still is valid," he said.

Supporting Bridgecrest were the U.S. and Missouri Chambers of Commerce, the American Financial Services Association, the Missouri Bankers Association, the Missouri Installment Lenders Association and Heartland Credit Union Association. In amicus briefs, the groups urged the court to settle the "significant uncertainty" the underlying case had created.

But the Missouri Association of Trial Attorneys and the American Association for Justice submitted a brief in support of the car buyers, arguing that loan servicer wanted to "unilaterally declare a buyer is in default; repossess and sell the vehicle; file a lawsuit seeking a deficiency judgment; but force arbitration if the buyer has the temerity to fight back."

The cases are *Bridgecrest Acceptance Corporation v. Donaldson,* SC99269, and *Bridgecrest Acceptance Corporation v. Jones,* SC99270.

WHEN DOES ALTERNATIVE DISPUTE RESOLUTION MAKE SENSE?

By Michael Brier
BridgeTower Media Newswires

BOSTON, MA -- Not infrequently, businesses find themselves enmeshed in disputes that cannot be resolved through informal negotiation. Those disputes can always be litigated in the courts, but the path to resolution is often time-consuming and expensive.

In recent decades, the burdensome nature of litigation has led many businesses and their in-house counsel to consider alternative dispute resolution as a way to avoid the court system.

But what exactly is ADR? Many business owners (and maybe even some in-house counsel who come from a transactional background) do not have a clear answer to that question. Far more will wonder if ADR makes sense for them in a given situation.

Types of ADR

ADR is a general term that encompasses any means of settling a dispute through the assistance of an outside neutral. Of these, by far the most important are mediation and arbitration. (Other types of ADR, like engaging a panel to issue a non-binding verdict following a "mini trial," are much less common).

In mediation, the parties engage a mediator to help broker a settlement at some point in the litigation process. In arbitration, the parties engage an arbitrator who hears the evidence and then acts as judge and jury, eventually issuing a binding judgment.

Thus, while mediation and arbitration both involve the assistance of a third-party neutral, they are fundamentally different from one another. So the question of why use ADR is really the two distinct questions of why mediate and why arbitrate.

Why mediate?

Every litigant sees a case from his or her own perspective. Good counsel aim to be more objective, but they are not immune from the natural human inclination to see the case from the prospective of their clients. Nor are lawyers as a rule especially effective at communicating the weakness of a case to their clients: after all, clients like to hear good news, and the lawyers work for them.

Mediation seeks to ameliorate these problems by having a neutral lawyer read a summary of the evidence from both sides and sometimes hear oral statements from the parties. Then the two sides move to separate breakout rooms, and the mediator shuttles between them in an effort to broker the settlement.

Good mediators don't just convey settlement offers — anyone can do that. Rather, they help to encourage settlement by speaking frankly to each side about the strengths and weaknesses of the case, the amount of a possible recovery, and the costs of further litigation. At the end of the process, both parties hopefully walk out of the mediation with a signed settlement that they may not be happy about but can live with.

At its best, mediation can help parties reach a settlement that they would have trouble negotiating on their own. Why then shouldn't parties mediate every case as soon as a dispute arises? After all, whether you are the plaintiff or the defendant, you can save a lot of time and money by settling right away instead of on the courthouse steps (or while the jury is out)! Sometimes courts even compel mediation in an effort to get the parties to settle.

The first reason is lack of information. When a dispute comes up, each party typically doesn't know much about the other party's case. (Sometimes, they don't even know much about their own case). The strengths and weaknesses of each will become apparent only through the discovery process of document productions, interrogatory answers and depositions.

By the same token, lawyers will often not have a full picture of the other side's legal arguments until summary judgment.

In many instances, in-house counsel would be wise to skip the arbitration provision in their contracts or put off mediation, at least for the time being.

This can make it hard to mediate early, despite the obvious advantages of settlement before costs begin to pile up. Parties are essentially being asked to settle "blind," which can be quite risky as either a plaintiff or a defendant.

Moreover, the mediator has less ammunition to try to move parties away from their entrenched positions, making the mediation more likely to fail (and potentially making settlement harder later on).

Mediations after significant discovery (or the denial of a motion for summary judgment) tend to have a better shot at success.

The second reason mediation may not make sense is that — even after discovery — the sides are just too far apart to reasonably expect mediation to be successful. Sometimes it is entirely rational for the parties to be far apart. For example, the case may turn on a novel legal issue the courts haven't addressed before. Or the evidence may be too finely balanced to predict how a jury is going to view it. In such instances, it can be a hard sell to convince either party to settle for half a loaf and call it a day.

Arguably just as common is a situation in which one party is so convinced that it is right that it is not willing to compromise, regardless of the evidence. There's not much the other party can do in such an instance besides go to trial. A mediator isn't going to be able to bridge the gap where a plain-

tiff's demand is for $10 million and the defendant's offer is for $5,000.

Why arbitrate?

Arbitration generally begins long before a dispute arises, when the parties to a contract agree to a provision by which they agree to submit any conflicts they might have to an arbitrator rather than go to court.

Parties are free to agree to arbitrate after a dispute arises as well, but this is much less common, since once the contours of a dispute become apparent, one party will usually conclude that it is more advantageous to proceed in court. (This is why it is highly unusual for tort litigation to be resolved by arbitrators.)

In either case, arbitration has several possible advantages over traditional litigation.

First, arbitration is confidential: The case documents and trial are not open to the public, as court proceedings are. This is often the biggest attraction of arbitration for businesses that do not want their confidential documents or ex-employees' allegations of wrongdoing appearing in court documents.

Second, arbitration can be cheaper than litigation, primarily because it usually involves less discovery. Whereas in court parties can generally seek production of documents about any matter relevant to the claims at issue, in arbitration the scope of document productions tends to be narrower. Interrogatories are uncommon, and depositions tend to be confined to the parties themselves, rather than to anyone who might know relevant information.

On the other hand, arbitration isn't guaranteed to be cheaper than traditional litigation: The parties need to pay the arbitrator, which isn't the case in court, and the summary judgment procedure — which can eliminate or narrow many disputes prior to trial — is disfavored.

Third, arbitrations are decided by a trained lawyer, rather than a jury (although a waiver of jury trial provision in a contract can achieve a similar affect).

Finally, arbitration is usually faster than traditional litigation, often being completed in a year or less rather than the two or three common in court.

What then are the drawbacks that in-house counsel should consider as they are negotiating contracts with business partners and employees?

Arguably, the biggest drawback is that there generally is no appeal from the decision of the arbitrator. Of course, the winning party loves the lack of appellate rights. But the losing party is out of luck, even if the arbitrator got the law entirely wrong.

This allows the arbitrator to decide cases based on what he or she believes is the "right" result as opposed to what the law says. This makes arbitration less predictable than traditional litigation.

Also, in-house counsel will need to consider a few drawbacks particular to arbitration agreements with employees and consumers. Under the terms of the Federal Arbitration Act and many state analogues, these agreements are usually enforceable and, as an added bonus, can prohibit class action lawsuits.

However, the law does permit courts to refuse to enforce arbitration agreements that are unconscionable, for example because they require plaintiffs to foot too much of an arbitration bill. As a result, companies often end up being required to pay for the whole cost of arbitrations in which they are the defendant. They also can be drawn into costly and time-consuming side litigation about whether the arbitration provision they crafted is enforceable in the first place.

Conclusion

In sum, ADR can be a useful tool in a variety of situations. But it is not a panacea. In many instances, in-house counsel would be wise to skip the arbitration provision in their contracts or put off mediation, at least for the time being.

The key in any instance is having good advice to determine what the best choice is for the business.

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