V·B·A
The Virginia Bar Association
YOUNG LAWYERS DIVISION

Volume 8 No. 2 ♦ Summer 2020
www.openingstatement.org
www.vba.org/yld

Opening Statement™

THE OFFICIAL PUBLICATION OF THE VBA YOUNG LAWYERS DIVISION

INSIDE THIS ISSUE

BOUNCING BACK FROM COVID

VBA Adapts to Serve

As all of our readers are acutely aware, the last few months have turned the legal profession upside down. The advent of the COVID-19 pandemic created a new normal almost overnight: social distancing became ubiquitous in the global lexicon, once-busy office buildings became deserted as workers transitioned to working from home, and courthouses shuttered in response to an unprecedented judicial emergency.

Like every other aspect of the legal profession, the *Opening Statement* has not escaped the pandemic unscathed. The YLD Executive Board made the difficult decision to cancel the YLD Spring Meeting entirely, and as a result, the Spring issue was cancelled as well. Despite these setbacks, the VBA has persevered to continue serving its membership and Virginia's legal community. Before the tumultuous month of March was out, VBA President Alison McKee began convening weekly COVID-19 Law Practice Chats for Virginia lawyers to brainstorm how to handle the practice of law in a pandemic. Recognizing the substantial wellness challenges in adapting to socially distanced law practice, the YLD took charge with a lunchtime wellness series, CLE presentations, and other programming designed to promote lawyer wellbeing.

In light of this unprecedented moment in history, we are pleased to present a special, supersized issue of the *Opening Statement* featuring substantive articles reflecting on how the world has changed over these last few months. Carrie Stanton reviews how COVID-19 has affected allocation of risk in merger and acquisition transactions on pages 4-5. Beyond M&As, the pandemic has disrupted all manner of commercial contracts. On pages 14-15, Steven Lippman breaks down considerations for reviewing commercial contracts and force majeure clauses in light of COVID-19. Turning from transactional practice to practicing self-care, Graham Bryant draws on interviews with other young attorneys to discuss strategies for maintaining wellness while coping with COVID-19 on pages 6-8. Finally, on pages 10-12, Nathaniel Shepherd provides a timely overview of qualified immunity, a doctrine that has surged into the limelight following weeks of protests against racism and police brutality.

This edition of the *Opening Statement* will be distributed in print at the 130th VBA Summer Meeting, which—like everything else—will be different this year. Still held from July 23–25, this year's Summer Meeting features programming and fellowship opportunities that have been adjusted for social distancing. Please see the sidebar for more information about this event.

Thank you for reading, and we hope you enjoy this special issue of the *Opening Statement!*

Graham K. Bryant
Editor-in-Chief

Ithi Joshi
Development Editor

Richa Fortuna
Development Editor

Stefanie Felitto
Development Editor

VBA Summer Meeting

The Virginia Bar Association will hold its **130th Summer Meeting** at the Omni Homestead Resort in Hot Springs, Virginia on **July 23–25, 2020**. Due to the COVID-19 pandemic and various government orders, the VBA has had had to make some changes compared to prior years. Nevertheless, the Summer Meeting is taking place in-person, and you are invited to attend. For the most current information on the Summer Meeting, visit the event webpage at: https://www.vba.org/summer20.

Programming and Activities:

An abbreviated course of MCLE programming will be presented on-site and streamed online on Friday, July 24, and Saturday, July 25. Overflow rooms will be used on-site to accommodate social distancing guidelines.

At the time of publication, no receptions or organized athletic events are planned due to social distancing requirements. Should applicable government orders change to allow larger gatherings, the VBA may revisit this decision. The most current information is available on the event webpage.

Friday Banquet Changes

The traditional Friday Banquet will not be held this year. Instead, members and guests in the VBA room block are invited to an outdoor picnic Friday evening.

Registration Information

There is no general registration fee for the Summer Meeting. To register, simply fill out the online form at: https://www.vba.org/summer20. Registration is open until July 21.

Opening Statement™
Vol. 8 No. 2 ♦ Summer 2020
www.openingstatement.org

PUBLISHER
The Virginia Bar Association
Young Lawyers Division

ISSN 2328-1553

MESSAGE FROM THE CHAIR

The Start of 2020 and the Case of the Quarantine

By Madelaine A. Kramer

They say, "When life gives you lemons, make lemonade." Well, the YLD has done just that with 2020—the year of a world-wide pandemic and global shut down. The year kicked off in Williamsburg with a fantastic Annual Meeting. We welcomed more than 70 law school student members (from seven law schools) at our *YLD Luncheon* and *Pints and Pairings* social. In February, the University of Richmond Law School Council held a social gathering at Garden Grove Brewery. The Model Judiciary Program held the first round of their competition—a trial.

Then came the Judicial Emergency and the Governor's Stay-at-Home Order. The many events, projects and activities we had planned and were looking forward to for the Spring were postponed, and some were later cancelled. But we persevered. **We began to offer statewide virtual programming**. We offered live CLEs on unemployment compensation and wellness in the time of COVID-19. Via Zoom, we offered a series of lunch break wellness classes, coffee breaks with VJLAP and the Virginia Bankers Association, and a newly formatted Law School Liaison Round Table, allowing many law firm and law school representatives to attend for the first time. Lastly, in partnership with the VSB Young Lawyers Conference (YLC), our Wills for Heroes program helped active healthcare workers with basic estate planning documents.

While we missed gathering at the Spring Meeting and participating in the Legal Food Frenzy, I am looking forward to seeing my fellow YLD-ers at the Fall Meeting (October 16–18 at the Sanderling) where we will have plenty of room to gather, yet socially distance.

In the meantime, did you know that the legal issues surrounding quarantines and pandemics are not new? Indeed, there is a plethora of caselaw addressing quarantines, employment contracts, force majeure clauses, and vaccinations in the time of a pandemic:

QUARANTINES

The term "quarantine" originates from the Italian term *quaranta* (forty). During the Black Death, port cities in medieval Italy required arriving ships to anchor offshore for 40 days. This practice was known as a *quarantena*.

Remember the landmark decision of *Gibbons v. Ogden*, 22 U.S. 1 (1824)? This case involved the operation of steamboats between New York and New Jersey. *Gibbons* is widely known for its decision on the Commerce Clause of the U.S. Constitution, holding the federal government has the exclusive power to regulate interstate commerce. But did you know that *Gibbons* also discussed quarantines?

Madelaine A. Kramer
Counsel, Sands Anderson PC (McLean)
YLD Chair, 2020-21

Bio: Madelaine is a civil litigation attorney and member of Sands Anderson's Business and Professional Litigation Group. She focuses her practice on professional liability defense and the defense of companies in personal injury, product liability, employment and complex commercial matters throughout state and federal courts in Virginia, DC and Maryland. Madelaine has been involved in the VBA since serving on the VBA YLD Law School Council as a law student at the University of Richmond.

Contact Info: mkramer@sandsanderson.com or 703.663.1705

Citing the Tenth Amendment, the Court noted that the right to impose quarantines was a matter reserved to the states. However, the federal government is also authorized to impose quarantines under the Commerce Clause. *See* Public Health Service Act, 42 U.S.C. § 264.

State quarantine laws are not unconstitutional. *Morgan's S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886), involved a Louisiana law requiring vessels to pass through a quarantine station 75 miles south of New Orleans on the Mississippi River and to pay a fee for an inspection (which could ultimately lead to a quarantine if the vessel or its passengers were diseased). The Supreme Court explained that quarantine laws are a rightful exercise of a state's police power for the protection of health and that requiring an examination of approaching vessels and their passengers to determine their health was important to shield an important commercial city from infectious diseases.

An entire geographic area of a state can be quarantined. Hawaii segregated and quarantined its residents with leprosy in Kalaupapa on the Island of Molokai. *Segregation of Lepers*, 5 Haw. 162 (1884) ("[W]ithout such a law . . . much of our useful population would leave these islands, ships would cease to touch here, our products would fail to find a market abroad, and these fair islands would become a pest-house to be avoided by the whole civilized world."). In 1902, the Supreme Court held that it is indeed constitutional for a state to quarantine a geographical area for "the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases." *Compagnie Francaise De Navigation a Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380 (1902).

Individuals can be quarantined. *See, e.g.*, *Ex parte Lewis*, 42 S.W.2d 21 (Mo. 1931) (holding constitutional a law requiring a physical examination for venereal disease of persons arrested for prostitution and subsequent quarantine in a hospital if infected); *see also Little Rock v. Smith*, 163 S.W.2d 705 (Ark. 1942) ("When a cure is effected, the authority to detain her is at an end.").

TEACHER EMPLOYMENT CONTRACTS AND FORCE MAJEURE CLAUSES

There have been numerous cases holding that a general force majeure provision in a teacher's contract does not relieve a school board from paying its teachers during a quarantine. The following cases hold that unless the contract specifically provides for a reduction in pay if schools are closed due to a contagious epidemic, teachers must be paid. *See, e.g.*, *Phelps v. School Dist.*, 134 N.E. 312 (Ill. 1922) (closing of schools for two months by order of the State Board of Health due to influenza epidemic was not an act of God); *Smith v. School Dist.*, 131 P. 557 (Kan. 1913) (teacher owed salary when school board arbitrarily closed school a month early due to prevalence of contagious disease); *Libby v. Douglas*, 55 N.E. 808 (Mass. 1900) (salary due despite three-week school closure due to diphtheria epidemic); *Dewey v. Union School Dist.*, 5 N.W. 646 (Mich. 1880) (schools closed December 10 through March 17 due to prevalence of smallpox; "It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools."). *But see Sandry v. Brooklyn School Dist.*, 182 N.W. 689 (N.D. 1921) (driver contracted by school district to transport teachers and students not entitled to compensation during influenza epidemic that closed schools).

MANDATORY VACCINES

Mandatory vaccination laws are constitutional. The landmark decision of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), involved a man who refused to be vaccinated for smallpox. Interestingly, the law required *either* vaccination *or* the payment of a $5.00 fine (approximately $145.00 in today's dollars). However, Mr. Jacobson did not want to pay the fine. On appeal, the Supreme Court held that communities (and states) have the right to protect themselves against an epidemic of disease. Therefore, laws passed to prevent the spread of contagious diseases, including vaccination laws, are constitutional. The Supreme Court also noted, in dicta, that there may be medical exceptions to mandatory vaccination laws. However, a mandatory vaccination law does not unconstitutionally infringe on an individual's right to the free exercise of religion. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Workman v. Mingo County Bd. of Educ.*, 419 Fed. App'x 348 (4th Cir. 2011) (upholding student immunization requirement over parent's due-process challenge). ■

Material Adverse Change in M&A Agreements

By Carrie Stanton

It is without question that changes to present-day life caused by the spread of COVID-19 are both material and adverse, in the traditional sense of these words. This is true for countries, communities, businesses and individuals, at a macro level, a micro level and all levels in between. However, when these terms—*material*, *adverse*, *change*—are grouped together in the context of merger and acquisition (M&A) transaction documents, their precise meanings, and the practical impact of their application, become less clear.

MAC IN M&A

M&A practitioners are familiar with the concept of Material Adverse Change (MAC) in merger and other acquisition agreements. One of the most important functions of acquisition agreements generally is to allocate risk between buyer and seller: Buyers typically assume systemic risks related to an acquired business and account for these risks in purchase price negotiations, while sellers often assume more target-specific risks that a seller is in a better position to know about and, in some cases, prevent.

Several contractual mechanisms are available to lawyers and their clients in order to allocate pre- and post-closing risks, including representations and warranties, covenants, purchase price adjustment provisions, closing conditions, termination rights and indemnification provisions. In sign-and-delayed-close transactions, buyers often employ MAC to allocate pre-closing adverse change risk to sellers. A MAC provision gives a buyer the right to terminate or refuse to perform if the target business suffers a MAC between signing and closing. MAC is used in other M&A contexts as well, *e.g.*, to qualify seller's representations or in bring-down closing conditions and covenants to operate in the ordinary course of business.

A typical MAC formulation is made up of three parts: (1) a change or development that has had, or reasonably would be expected to have, a materially adverse effect on the business, operating results, financial or other condition, or prospects of the target company and its subsidiaries (if any), taken as a whole, or on the ability of any party to close the contemplated transaction; (2) exclusions of systemic risks such as changes to general business or financial market conditions or changes in the law, or, in some MAC definitions, epidemics, pandemics and/or states of emergency; and (3) exceptions to the enumerated exclusions where there is a disproportionate impact on the target company.

Historically, MAC provisions have been interpreted narrowly, with a significant burden of proof on the buyer to prove that a MAC has occurred. Indeed, there is only one instance in which a Delaware court has found a MAC to permit termination of a signed merger agreement. *See Akorn v. Fresenius*, No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. 2018), *aff'd* 198 A.3d 724 (Del. 2018).

COVID-19 AND MAC

For businesses and their legal counsel who have existing M&A agreements (*i.e.*, signed but not yet closed), a front-of-mind question in light of COVID-19 is whether any party has a right to terminate or refuse to perform based on the virus's outbreak and its far-flung effects. History, here, is not the best teacher. With limited exceptions (*see, e.g.*, *Akorn*), MAC provisions usually are not fully adjudicated; instead, disagreements between parties typically result in the renegotiation of deal terms. Furthermore, what case law does exist fails to provide clear guidance on pandemics such as COVID-19.

As such, it is unclear whether the COVID-19 pandemic is or is not a MAC. This determination will vary case by case, depending on the specific wording of the MAC provision and the effects the pandemic has on the target company. This evaluation, like the ever-evolving effects of the virus, will continue to change over time as the materiality of business impacts comes into sharper focus.

In other words (and spoken like a true lawyer), to the question of whether the COVID-19 pandemic is a MAC, the answer is: It depends. There is no clear-cut rule; however, there are some general concepts to consider in interpreting existing MAC provisions, in each case keeping in mind courts' traditionally narrow interpretation of MACs based on the parties' negotiated language and the particular facts and circumstances:

How has the target company been specifically impacted, as compared to its industry as a whole?

Carrie Stanton
Senior Associate, Williams Mullen
(Charlottesville)

Bio: Carrie Stanton represents businesses in major corporate transactions, including mergers and acquisitions and capital raising as well as complex commercial contracts and regulatory compliance. She represents clients from a broad range of industries, including insurance, retail, manufacturing, technology, transportation, health care, engineering, startups and venture capitalists at various stages of a transaction. Carrie has been named to Virginia Lawyers Weekly's class of "Up & Coming Lawyers" (2019), and she is listed in Virginia Super Lawyers Rising Stars (2013-present) for Business and Corporate Law. She earned her Juris Doctor degree and her Bachelor of Arts degree from the University of Virginia.

Contact Info: cstanton@williamsmullen.com or 434-951-5708

Is this impact quantitatively significant? *E.g.*, how does the target company's performance compare against the same quarter of previous years?

Is this impact "durationally significant" (*Akorn*)?

What is "significant" for this particular target, considered in the context of its industry, from a commercially reasonable standpoint?

Risk allocation considerations, discussed above, might also play a role in a court's interpretation. From this perspective, COVID-19 and associated risks might be considered systemic and, thus, more appropriately allocated to a buyer unless the seller is disproportionately affected. It is important to keep in mind, however, that if even if a target is disproportionately affected, if the company was weak pre-COVID, its further decline may be deemed a predictable or systemic risk (*i.e.*, buyer's risk).

PRACTICAL CONSIDERATIONS

So, what to do?

As a starting point, parties with signed agreements should review them carefully to assess the likelihood that the COVID-19 pandemic will be considered a MAC under the specific language, facts and circumstances. Where MAC is used as a qualifier, are representations, warranties and disclosure still accurate? Where the absence of MAC is used as a closing condition, notice requirements should be carefully reviewed to avoid missed deadlines. If there have been adverse impacts, can they be quantified, and can dollars lost be traced to the COVID-19 pandemic? Buyers might also consider whether they have additional leverage in this environment to add specific closing conditions to address COVID-19 and the related uncertainty, and parties might consider extending termination dates. Furthermore, in addition to MAC considerations, parties should evaluate whether the applicable jurisdiction permits excusal from contractual obligations under common law doctrines of impossibility or frustration of purpose.

> 'It is unclear whether the COVID-19 pandemic is or is not a MAC. … This evaluation, like the ever-evolving effects of the virus, will continue to change over time as the materiality of business impacts comes into sharper focus'

For parties negotiating M&A agreements during and after the COVID-19 pandemic, it is safe to say that many of these documents will (and should) specifically allocate the risk related to COVID-19 or other similar pandemics going forward. Sellers, for example, may want to shift to buyers the risk related to generalized systemic risks like COVID-19 and other pandemics. Buyers will want to consider including quantitative measurements (revenue, balance sheet, or other industry or target-specific metrics) for determining the existence of a MAC or in lieu of having to rely on a MAC. In any event, careful and intentional negotiation will be key. ■

Note: This article contains general, condensed summaries of legal matters, statutes, and opinions and is intended only for informational purposes. It does not constitute legal advice and does not create an attorney-client relationship.

University of Richmond School of Law Hosts Spring Happy Hour

The University of Richmond School of Law hosted a happy hour at Garden Grove Brewery and Urban Winery on February 7, 2020 to kick off the spring semester. Many students were in attendance and enjoyed a night of networking filled with mentorship opportunities over drinks and appetizers.

Courtesy: Laurel E. Via

Students enjoyed a break from classes and interviewing at the spring happy hour.

Courtesy: Graham K. Bryant

YLD Chair-Elect Frank Cragle chats with students about practicing law in the Richmond area.

Maintaining Young Lawyer Well-Being in a Pandemic[1]

By Graham K. Bryant

Makeshift bedroom offices, endless video conferences, and nary a courtroom, conference room, or colleague in sight. These now-mundane realities of law practice were unthinkable just weeks ago, but the advent of COVID-19 has forced the legal profession to reinvent itself almost overnight. The leaders of law firms and government agencies have had to make rapid decisions on incomplete information to position their organizations for survival during the most sudden economic downturn in living memory.

Along for the ride are young lawyers still in the early stages of their careers. These attorneys often lack advantages enjoyed by their more senior colleagues. Still saddled by significant student debt, many young lawyers are simultaneously trying to establish themselves at work just as they are starting families at home—all without the security provided by seniority. For them, the havoc wrought by COVID-19 is an unwelcome injection of uncertainty into an already distressing time. Without doubt, the pandemic has become the preeminent threat to young lawyer well-being by exacerbating the wellness challenges newer attorneys feel most acutely.

No one can claim to have all the answers for a situation as unprecedented as the one the legal community currently faces. But we can compare notes about how we have overcome our shared challenges. I spoke with several young lawyers at various stages of their careers to find out what they saw as the biggest challenges posed by this new normal and what they've been doing to cope with them. This article shares these strategies in hopes that some of them will help minimize the pandemic's negative effects on young lawyer wellness and perhaps show that opportunities for a more well profession await amid the chaos.

PRACTICING LAW WITHOUT THE LAW OFFICE

The most noticeable effect of COVID-19 has undoubtedly been the mass abandonment of the office resulting from social distancing. Workspaces with efficient multi-monitor setups, accessible law libraries, and ample copying, printing, and mailing resources have been replaced by whatever nook will accommodate a laptop at home. Unsurprisingly, makeshift workspaces tend to reduce productivity and increase frustration.

Patrick Bolling of Woods Rogers reports that for him, the biggest challenge has been "maintaining a positive frame of mind working out of my basement office." Bolling is not alone. I have colleagues attempting to work from their kitchen tables, bedrooms, or even a backyard shed! I'm sure most readers have seen glimpses of their coworkers' similarly improvised workspaces during the countless videoconferences that fill the work days—another consequence of not being in the office. None of these spaces are as conducive to effective work as the actual workplace.

At first, the reason for the lower productivity might seem elusive—after all, lawyers are fortunate their work can, for the most part, be performed remotely. The culprit is what some psychologists call "home office syndrome"—the feelings of stress, loneliness, exhaustion, and being overwhelmed resulting from a blurring of boundaries between work and home life.[2] Many lawyers' at-home workspaces are in locations intimately associated with feelings of being at home. The kitchen table is where family meals, not conference calls, happen. The bedroom is for sleeping, not for billing. By injecting aspects of law practice into these sacred spaces, the lawyers who work in them experience cognitive dissonance that exacerbates the already difficult balance of work and life.

Most strategies for coping with home office syndrome involve establishing boundaries between work life and home life. Perhaps the easiest way to separate the two is to create a designated home office space dedicated solely to business, eliminating the "but-I'm-at-home" mental fog.[3] This approach, however, might not be accessible to many young lawyers who have prudently chosen to live modestly and pay down student debt but lack abundant space as a result. Add in a significant other who must also work from home, a few kids or pets, and building a pure workspace at home becomes all but impossible.

In that case, cultivating psychological resilience is key. Bolling has found that maintaining a healthy mental state is helpful in staving off the downsides of working from home. "Don't get wrapped up in the news cycle—you can only control what's in front of you," he said. "Keep moving. Stay focused on the task at hand and stay physically active, too."

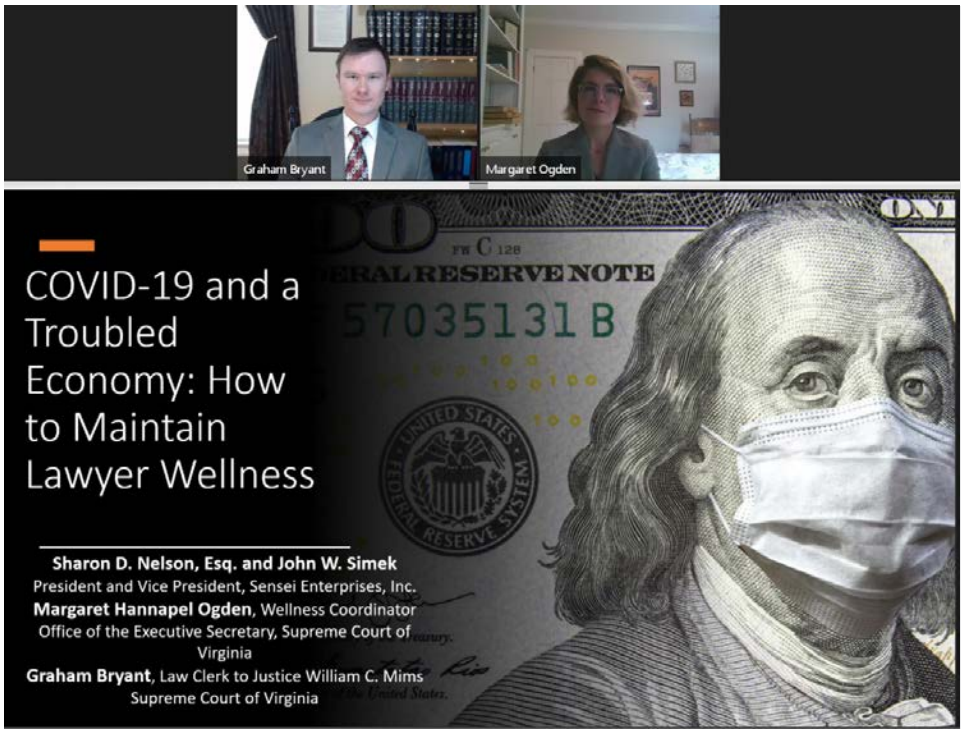
Bolling's recommendations mirror the advice Psychologist Alex Dimitriu offers for combatting home office syndrome.

Graham K. Bryant
Law Clerk, Supreme Court of Virginia

Bio: Graham K. Bryant currently serves as a judicial law clerk to Justice William C. Mims of the Supreme Court of Virginia, in which role he studies developments in state and federal appellate law as well as techniques for effective legal reasoning and writing. An active member of the Virginia Bar Association and Virginia State Bar, he serves as the YLD Liaison to the VBA's Appellate Practice Section Council as well as a member of the VSB Special Committee on Technology and the Future Practice of Law. Graham also writes and presents on the technological, legal, and social trends affecting the legal profession in the twenty-first century. Prior to his current position, Graham served as a law clerk to Judge Glen A. Huff of the Court of Appeals of Virginia.

Contact Info: grahamkbryant@gmail.com

Properly caring for your basic physiological needs—eating nutritious meals, getting sufficient sleep, and exercising—can help establish the boundaries needed to divide the day into work life and home life.[4] The importance of caring for these basic needs cannot be overstated, especially because working from home can exacerbate four of the five physical risks of practicing law identified by the Virginia State Bar's 2019 Wellness Report.[5] In addition, developing a work routine with a fixed starting and ending time, and then sticking to that routine, can help create a psychological barrier between work and home in much the same way as the office commute once did.[6]



Courtesy: Madelaine A. Kramer

A version of this article was included in the written materials for a CLE presentation offered for free to VBA members as part of the YLD's wellness programming during the pandemic.

PHYSICAL—NOT SOCIAL—DISTANCING

The phrase "social distancing" has, perhaps more than any other word, become the definitive concept of the COVID-19 pandemic. Oddsmakers currently place +200 odds on it becoming the 2020 Word of the Year.[7] But the phrase is something of a misnomer—it refers to physically separating human bodies to limit respiratory transmission of the virus, not discouraging social connections. Implementing social distancing measures has, however, had the effect of sharply reducing genuine personal interactions.

The loss of ordinary, day-to-day social interactions has been especially acute for lawyers, for whom personal relationships are an essential part of effective practice. This enforced isolation was, by far, the most commonly reported challenge faced by the young lawyers surveyed. Alicha Grubb of Gentry Locke said that her "biggest challenge has been missing the comradery of the office and the bar. It has been very hard not being with people, going to lunch, etc." Bolling shared her sentiments, noting that "not seeing co-workers, clients, friends, [and] family" has been a major loss under the stay-at-home orders.

Loneliness is a professional risk for lawyers in the best of times. The VSB Wellness Report identified the individual nature of legal work as a leading occupational risk for attorneys, noting that 61 percent of lawyers ranked above average on a loneliness scale.[8] Loneliness can contribute to symptoms of depression, disrupted sleep, impaired cognitive function, and even contribute to premature death.[9] COVID-19 has only exacerbated these negative consequences. Government-issued stay-at-home orders are like nothing we have seen before, and they threaten to usher in a "social recession" with significant physical and mental health implications.[10]

Fortunately, technology has allowed us to mitigate at least some of the worst consequences of stay-at-home orders. By now, everyone has participated in, or at least heard of, virtual happy hours or game nights in which everyone grabs a drink, turns on their webcam, and hangs out remotely in an attempt to replicate the real thing. Grubb noted that associates in her office have been holding virtual happy hours as a coping mechanism. My colleagues have done the same thing—that's how I learned about the backyard shed office. I've even teamed up with old college friends for a virtual pub trivia night. While fun, these virtual socials are a poor substitute for the real thing—something made abundantly clear by my efforts to wrangle the Zoom meeting with the trivia host on one monitor, a Google Hangouts window with my friends on the other, all the while trying to text the host my team's answers as we all talked over one another.

Virtual gatherings cannot fill the social hole left by staying at home, although they are certainly better than nothing. Using the same remote meeting tools for work and play causes the same sort of cognitive dissonance as working from your bedroom, which can contribute to a feeling of fatigue. This is part of the reason why we often feel exhausted after even a for-fun video chat, although the physical and mental strains inherent in video conferencing also play a major role. To get the most out of these virtual hangouts, we have to accept that they are *different* from the real thing and stop comparing the two. And, of course, traditional methods of remote communication remain—you can always call and text people you care about. As Bolling advises: "If you think of a co-worker or a friend for whatever reason, tell them. Keep checking in with people you'd usually see."

Although the personal downsides to social isolation are bad enough, the reduction in social interactions stands to disproportionately affect young lawyers professionally. For attorneys in their first few years of practice, interactions with clients and more senior colleagues are essential for developing the relationships needed to succeed over time. Being forced to stay at home and forego traditional relationship-building interactions can make it feel like career progress has been put in stasis. Those interactions might not be possible, but young lawyers still have steps they can take to position themselves for post-pandemic

success. Following Bolling's advice to stay connected with colleagues will keep you at the forefront of their minds and demonstrate empathy. To the extent possible, check on clients—they are suffering as much, if not more, than the lawyers are. And if work has come to a lull, use the time to polish your marketing materials or draft articles for publication. These steps cannot replace a return to ordinary practice, but they can mitigate the damage.

YOUNG LAWYERS WITH YOUNG FAMILIES

COVID-19 closed schools and daycares across the country, giving parents the joys—and headaches—of more time with their children. Because young lawyers are more likely to have care-dependent children than their more senior colleagues, the loss of the school day has created yet another challenge that disproportionately affects younger attorneys.

Kristen Jurjevich of Pender & Coward is one of the young attorneys trying to balance parenthood with professional obligations. She observes that her biggest challenge has been the sudden lack of daycare facilities for her infant daughter because she and her husband both have full-time jobs. Her strategy for parental success is teamwork and time management: "I tend to wake up quite early, so I try to get in a couple of hours before our little girl gets up and/or work later after she sleeps, as well as working the weekends," Jurjevich said. "My husband and I also take turns watching her for parts of the day."

The combination of children and work at home is rife with potential for pratfalls. Many remember when four-year-old Marion Kelly captured our hearts by toddling into her father's live BBC interview in 2017, embarrassing dad and creating a meme for the ages. Marion and her bright yellow sweater were heralds of the world to come. Who among us has not had a video conference interrupted by a bored child in need of mom or dad's attention since the pandemic began? We should be encouraged that Robert Kelly—now known to the world as "BBC Dad"—seems to be doing just fine.[13]

Working from home with children is a great equalizer, and one that may portend a long-needed culture shift in the legal profession. Children recognize no rank. From the newest associate to the chair of a practice group, everyone's children can be equally embarrassing. That's a good thing. When a toddler waddles into a video conference or prattles away while mom is trying to speak during a conference call, the reaction is almost always amusement rather than displeasure. The world of pandemic practice—in which living rooms form the backdrop for video conferences and messy evidence of family life is everywhere—is distinctly human. Now that we're all outside the office, the things we all hold dearer than anything in the office are readily apparent.

The renewed focus on lawyer well-being over the last few years has led to great strides promoting lawyer wellness and recognizing that attorneys have lives outside the office. For all the damage COVID-19 has wrought, it has sharpened our collective focus on the parts of life that matter most. Enforced working from home—though rife with challenges—has nevertheless demonstrated that the legal profession can successfully operate away from the office on a flexible schedule that accounts for family needs. Once the pandemic ends, the profession's leaders have the opportunity to continue permitting the flexibility demonstrated during the fight against the virus.

Although no one can be sure what law practice will look like on the other side of COVID-19, it certainly will not be identical to practice before the pandemic. The mass experiment in working from home has put great stress on lawyers, and particularly on young lawyers. By applying the lessons learned during this forced experiment, however, the legal field has the opportunity to become a more flexible, efficient, and well profession. ■

Endnotes

1.I am grateful to Patrick Bolling, Alicha Grubb, and Kristen Jurjevich for their contributions to this article.
2.Alex Dimitriu, *Home Office Syndrome*, Psychol. Today, Apr. 13, 2020, https://www.psychologytoday.com/us/blog/psychiatry-and-sleep/202004/home-office-syndrome.
3.Adam Dachis, *How to Craft the Perfect Home Office*, Lifehacker (November 4, 2013), https://lifehacker.com/how-to-craft-the-perfect-home-office-1455516163.
4.Dimitriu, *supra* note 2.
5.The Occupational Risks of the Practice of Law: Report of the Virginia State Bar President's Committee on Lawyer Well-Being 12–20 (May 2019), https://www.vsb.org/docs/VSB_wellness_report.pdf [hereinafter "VSB Wellness Report"] (describing risks associated with sedentary work, managing long and unusual hours, sleep deprivation, and working indoors).
6.Dimitriu, *supra* note 2.
7.David Golokhov, *Don't Worry, You Can Still Bet on the 2020 Word of the Year*, Sports Betting Dime (Apr. 8, 2020), https://www.sportsbettingdime.com/news/2020-word-of-the-year-covid-19-given-best-odds/.
8.VSB Wellness Report, *supra* note 5, at 26.
9.Id.
10.Dimitriu, *supra* note 2.
11.Jeremy Bailenson, *Why Zoom Meetings Can Exhaust Us*, Wall St. J., Apr. 3, 2020, https://www.wsj.com/articles/why-zoom-meetings-can-exhaust-us-11585953336.
12.Ashley Fetters, *We Need to Stop Trying to Replicate the Life We Had*, Atlantic, Apr. 10, 2020, https://www.theatlantic.com/family/archive/2020/04/why-your-zoom-happy-hour-unsatisfying/609823/.
13.Kim Lyons, *BBC Dad, The OG of Interrupted Work-From-Home Calls, is Back With the Kids*, Verge (Mar. 26, 2020), https://www.theverge.com/2020/3/26/21195340/bbc-dad-work-from-home-calls-south-korea.

Regent Students Go for a "JOG"

By Wesley B. Jones

On January 24, 2020, the VBA student chapter of Regent Law School headed to the outstretched beaches of Sandbridge in Virginia Beach for a "JOG." No, they weren't training on the beach like Rocky Balboa—they were partaking in a Journey of Generosity ("JOG").

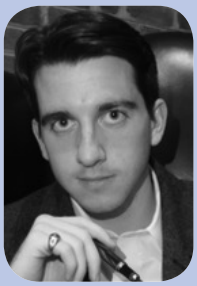
A JOG is a two-day retreat where participants learn about living a more open-handed life and challenge their ideas about how it looks like to live big-heartedly. These retreats, which happen across the country, are organized and facilitated by Generous Giving, a company founded in 2000 by The Maclellan Foundation. Generous Giving "invites people to experience the freedom, purpose, and joy found in a transformed relationship with God and money." The company emphatically promises three things: (1) We will never ask you for money, (2) It's about conversation, and (3) It's worth your time.

But Generous Giving does not only talk about being generous, they walk the walk. Part of the JOG experience is to inspire the participants by showing them generosity. For the VBA student chapter, this meant a weekend say at Neptune II, a nine-bedroom ocean front rental fit for twenty guests. For dinner, the students were treated to an abundance of catered BBQ, and though still full, the next morning they were enticed with a full breakfast spread.

Beyond the literal food, there was also food for thought. The law students engaged in five poignant sessions about money, financial struggles, and wealth. Most of the sessions started with a video on a specific area of generosity. One video showed a dot-com millionaire who gave up everything to live at the medium income level. Another inspiring video followed the rebuilding of a recently decimated village in a developing nation, where the villagers—in the apex of economic loss—amazingly found a way to be generous with their resources and talents. The village didn't just survive—it thrived. An especially relevant video to the soon-to-be lawyers involved a wealthy transactional lawyer who converted his New York mansion into a place for community to gather and encourage one another. Altogether, the videos showed that charity comes in all different shapes and sizes.

After the videos, the students discussed what stood out, what was inspiring, and what, if anything, do they want to change about their lives as a consequence. The group, some of whom hardly knew each other before the retreat, found a unifying bond of mutual vulnerability when sharing about past, present, and future money considerations.

Lawyers we are often viewed as being in a position of financial prowess. There's always a newer car, a bigger house, and a nicer watch. But what if life consisted with more than just an abundance of possessions? What if a higher purpose can be found in generosity? Chew on that idea. Think it over, and maybe, even go on a JOG. ■



Wesley B. Jones
Candidate for Juris Doctorate,
Regent University School of Law
(Virginia Beach)

Bio: Wesley is a third-year law student at Regent. He is interested in plaintiff's civil litigation and criminal defense--along with any other position where he can represent the "small guy punching-up." Along with serving as the Vice President for Regent's VBA chapter, he is the Executive President of the Student Bar Association and has competed in multiple national trial advocacy competitions. Outside of law school, he enjoys working out, classic literature, and poetry, and is currently in the midst of publishing his own poetry collection entitled *A Sunday Afternoon Drive*.

Contact Info: wesljo1@mail.regent.edu or 770-990-9380

Courtesy: Wesley Jones

Regent University Law students bonded during a two-day retreat focused on financial stewardship and how to use their position as soon-to-be lawyers to serve others.

Courtesy: Wesley Jones

Through a series of videos and discussion sessions, the students developed a new way of thinking about generosity and law practice.

Qualified Immunity 101

By Nathaniel S. Shepherd

The doctrine of qualified immunity has entered the political spotlight in recent weeks due to its central role in civil rights litigation against police officers accused of using excessive force.[1] Opponents argue that the doctrine—which provides immunity against civil liability for government officials if they have not violated "clearly established law" [2]—goes too far in protecting officers. The Supreme Court maintains that "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." [3] U.S. Representatives have introduced a bill to abolish qualified immunity,[4] but at least one U.S. Senator has called the idea a "poison pill" to any criminal justice reform legislation.[5]

In the legal community, the debate over qualified immunity is not exactly "breaking news." The Supreme Court has issued at least thirty decisions on the doctrine since 1982 (when the modern standard was first announced),[6] and the supply of academic commentary appears to be limitless.[7] But it is hard to deny the unique weight of the cultural moment in which the country finds itself. The wave of protests in the wake of George Floyd's death,[8] the shift in political opinions regarding police misconduct,[9] and the rapid speed at which corresponding policy reforms have taken shape[10] suggest that qualified immunity may be in line for substantial revision in the near future. Given these developments, it may be worthwhile for lawyers who do not work in civil rights litigation, and who have not cracked open their old law school casebooks in a few years, to refresh their understanding of the doctrine.[11] This article aims, therefore, to provide a basic explanation of a complicated subject so that readers may be better equipped to join the debate.

LEGAL CONTEXT

Note as a preliminary matter that qualified immunity applies not just in cases of excessive force, but in a broad range of civil litigation against government officials. When a state or local official has deprived an individual of a constitutional or statutory right—be it freedom of expression protected by the First Amendment or the freedom from unreasonable searches promised by the Fourth Amendment—the statute 42 U.S.C. § 1983 provides the individual with a private right of action against the official for damages.[12] The Supreme Court recognized a similar cause of action against federal officials in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, in the Fourth Amendment context.[13] An official sued under either cause of action may claim "qualified immunity" as a defense from liability for the alleged violation, and "the qualified immunity analysis is identical under either cause of action."[14] Tens of thousands of lawsuits have been brought under § 1983 and *Bivens* in the last several decades.[15] Qualified immunity thus plays a pivotal role in two important vehicles for the retrospective vindication of individuals' civil rights.[16]

THE STANDARD

The Supreme Court established the modern standard for qualified immunity in *Harlow v. Fitzgerald*, holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[17]

To understand how this defense works, it is helpful to consider that before *Harlow*, the test had involved both an objective and a subjective prong, asking whether the defendant official had a reasonable grounds for believing that his action was lawful, *and* whether the official had actually acted in good faith (*i.e.*, with "permissible intentions").[18] Under that prior standard, a failure on either ground meant a denial of qualified immunity.[19]

The *Harlow* Court, however, eliminated the subjective component.[20] The Court expressed concern that determining officials' subjective good faith—a factual question inextricably bound up in the "experiences, values, and emotions" of the official—involved "substantial costs" in litigation, hampering officials' ability to carry on with their jobs, thereby undermining a key purpose of qualified immunity.[21] By removing the subjective component, the Court created a "single objective standard"[22] (*i.e.*, a purely legal standard) that judges could apply on summary judgment prior to extensive discovery.[23] The Court expressed its hopes openly: "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[24]

Harlow therefore conditions whether an official is entitled to qualified immunity for an alleged unlawful deprivation of a constitutional or statutory right on an "objective standard," intended to be applied early in litigation, with minimal factual development where possible.[25] The inquiry "generally turns on the 'objective legal reasonableness' of the action … assessed in light of the legal rules that were clearly established at the time [the action] was taken."[26] A court should step into the "defendant's shoes"[27] at the moment of the event and "ask whether the [officer] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."[28]

HOW TO APPLY THE STANDARD

Two questions naturally arise: (1) What are viable sources of clearly established law, and (2) just how clear must the law be to count as "clearly established"?

As to the source of clearly established law, the Supreme Court has not created an exact rule, but it has pointed to the importance of relying on "controlling authority."[29] Courts have interpreted "controlling authority" to mean decisions of the Supreme Court of the United States, decisions from federal courts of appeals as applied to their own circuits, and decisions from "the highest court of the state in which the case arose."[30] But failing to uncover cases of that ilk does

not necessarily end the inquiry. The Court has suggested that "absent controlling authority," the law in some instances may be clearly established by "a robust consensus of cases of persuasive authority."[31] District court opinions may be helpful in some cases, but the Court has noted that "[m]any Courts of Appeals … decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity."[32]

The second question—how clear the law must be to be "clearly established"—goes to the heart of qualified immunity litigation. To understand the Supreme Court's guidance on this issue, keep in mind that the practical contours of constitutional rights are developed over time by courts applying broad legal standards to the unique factual circumstances of the cases they hear. For instance, the Fourth Amendment protects individuals from unreasonable searches. Applying that general principle, the Supreme Court has ruled that warrantless searches by police officers are *per se* unreasonable in the absence of certain exceptions,[33] such as the existence of "exigent circumstances."[34]Applying that narrower rule, the Court has found that "exigent circumstances" justified the warrantless entry of a house where police observed a fistfight occurring inside the house.[35] One might say that it is "clearly established" that searches must be reasonable, or that a warrantless search is reasonable under exigent circumstances, or that police can enter a house if they see a fight happening.

The question of whether the law is "clearly established" thus can be answered at different levels of generality, and the level of generality at which the question is answered has clear implications for the scope of the qualified immunity defense.[36] Viewed at a high level of generality, the range of behavior encompassed by "clearly established" law would be broad, and the defense of qualified immunity correspondingly small.[37] The Supreme Court is averse to this possibility, and regularly pushes lower courts to analyze whether law is "clearly established" at a granular level.[38]

The constitutional right of the plaintiff must be "'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[39] In other words, the law is not "clearly established" simply because there exists an abstract legal standard by which a court could make a reasonable merits decision. The law is "clearly established" when there is a body of authoritative cases in which courts have ruled on sets of facts so similar to those facing an official that a "reasonable official" would know what the law requires (or forbids) them to do.

Applied to the example above, it is insufficient to rely on the "clearly established" rule that people have the right "to be free from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances."[40] That level of generality is too high, according to the Court. Instead, to overcome qualified immunity it must be clearly established that the particular circumstances alleged in a case are not the type of "exigent circumstances" that justify forgoing the warrant requirement.[41]

Under this guidance, one might wonder if the exact behavior at issue must have arisen in a prior case in order for the law concerning the behavior to be "clearly established." The Court has rejected this notion, explaining: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."[42]

Even so, the clear arc of the Court's jurisprudence over the years has been toward an increasingly heightened specificity requirement.[43] The language in the Courts' opinions reflects this attitude. "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[44] In an especially telling turn of phrase, the Court often notes that "properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law."[45] Whether the doctrine provides, as Justice Sotomayor believes, an "absolute shield" for law enforcement officers,[46] or simply "protects law enforcement officers from 'bad guesses in gray areas,'"[47] remains a matter of disagreement.

Finally, note that a court facing a qualified immunity motion must make two decisions: (1) Did the defendant violate the plaintiff's constitutionally protected right, and (2) was the right clearly established?[48] As the law stands today, courts can answer the questions in either order, and they can choose not to answer the former question at all if the answer to the latter question is no.[49] Thus, if the court finds that an alleged right is not clearly established, it can grant immunity to an official without answering the more difficult question of whether the plaintiff's constitutionally protected right was actually violated.

Admittedly, this article only scratches the surface of the qualified immunity topic. Space limitations prohibit notes on the doctrine's procedural and policy implications. Hopefully it at least provides a glimpse into the doctrinal methodology guiding these decisions. The Supreme Court recently denied every petition for the upcoming term involving qualified immunity, so for the time being, the issue of whether to keep, change, or abolish qualified immunity is left up for public and congressional debate. ■

Nathaniel S. Shepherd
Associate, Hunton Andrews Kurth, LLP

Law School: University of Virginia School of Law

Bio: Nate is a litigator focusing on the representation of commercial clients in connection with dispute resolution and complex commercial litigation. Nate is also committed to providing pro bono legal services to those in need, including low-income tenants in housing matters, and is active in the Virginia Bar Association, serving as Co-Chair of the ABA Awards of Achievement Committee for the Young Lawyers Division.

Contact Info: nshepherd@hunton.com or 804-787-8030

Endnotes

1. *See, e.g.*, Daniel Epps, Opinion, *Abolishing Qualified Immunity is Unlikely to Alter Police Behavior*, N.Y. Times (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html; Editorial, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. Times (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html.
2. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
3. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).
4. Nick Sibilla, *New Bill Would Abolish Qualified Immunity, Make It Easier to Sue Cops Who Violate Civil Rights*, Forbes (June 3, 2020), https://www.forbes.com/sites/nicksibilla/2020/06/03/new-bill-would-abolish-qualified-immunity-make-it-easier-to-sue-cops-who-violate-civil-rights/#5bea8f3b6fbc.
5. Melissa Quinn, *Tim Scott Says Ending Qualified Immunity is "Poison Pill" in Police Reform Bill*, CBS News (June 14, 2020), https://www.cbsnews.com/news/tim-scott-police-reform-bill-qualified-immunity-face-the-nation/.
6. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 22 (2017). Schwartz puts the number at twenty-nine, but her article was published before the Court handed down *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).
7. *See* John C. Jeffries, Jr. et al., Civil Rights Actions: Enforcing the Constitution, 121–22 (3d ed. 2013).
8. *Protests Across the Globe after George Floyd's Death*, CNN (June 13, 2020), https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html.
9. *See* Seth Cohen, *As Rayshard Brooks is Buried in Atlanta, Poll Shows Surprising Change in Views on Police Reform*, Forbes (June 23, 2020), https://www.forbes.com/sites/sethcohen/2020/06/23/rayshard-brooks-is-buried-in-atlanta/#a78be025fe8e (citing *Widespread Desire for Policing and Criminal Justice Reform*, AP-NORC (June 2020), http://www.apnorc.org/projects/Pages/Widespread-Desire-for-Policing-and-Criminal-Justice-Reform.aspx).
10. *See* Amelia Thomson-DeVeaux & Maggie Koerth, *Is Police Reform a Fundamentally Flawed Idea?*, FiveThirtyEight (June 22, 2020), https://fivethirtyeight.com/features/is-police-reform-a-fundamentally-flawed-idea/; Sean Collins Walsh, *Philly City Council is Set to Pass Police Reform Measures Before It Goes on Summer Recess*, Phila. Inquirer (June 23, 20200) https://www.inquirer.com/news/philadelphia-city-council-to-pass-police-reform-measures-george-floyd-protests-20200623.html.
11. In fact, that is the basis for this piece. The concepts in this article are in large part distillations of lessons found in John C. Jeffries, Jr. et al., Civil Rights Actions: Enforcing the Constitution, 75–147 (3d ed. 2013). I highly recommend checking out that book for a more in depth look at the topics mentioned here (and more).
12. *Monroe v. Pape*, 365 U.S. 167 (1961).
13. 403 U.S. 388 (1971). The reach of "*Bivens* actions" is not as wide as § 1983, as *Bivens* itself applies only to Fourth Amendment violations, and implied rights of action against federal officials have been recognized in only a few other contexts, such as inadequate medical care provided to a prisoner in violation of the Eighth Amendment. *Carlson v. Green*, 446 U.S. 14 (1980). Even so, it remains an important enforcement tool, accounting for thousands of civil rights actions since 1971. *See* Jeffries, *supra* note 7, at 30.
14. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).
15. *See* Jeffries, *supra* note 7, at 14, 30.
16. At least in theory. For discussions calling into question the empirical impact of qualified immunity on § 1983 and *Bivens* litigation, see Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2 (2017) and Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809 (2010).
17. 457 U.S. 800, 818 (1982).
18. *Id.* at 815.
19. *See Wood v. Strickland*, 420 U.S. 308, 321–22 (1975), *abrogated by Harlow v. Fitzgerald*, 457 U.S. 800, (1982).
20. *See Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) ("Evidence concerning the defendant's subjective intent is simply irrelevant to [the defense of qualified immunity].").
21. *Harlow*, 457 U.S. at 815–18.
22. *Crawford-El*, 523 U.S. at 587–88.
23. *Harlow*, 457 U.S. at 818. ("Until this threshold immunity question is resolved, discovery should not be allowed.").
24. *Id.*
25. *Id.*; *see also Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (reprimanding the Ninth Circuit for treating the immunity decision as a factual question for the jury, noting that, "[i]mmunity ordinarily should be decided by the court long before trial."). *See* Schwartz, *supra* note 16, at 28–33.
26. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).
27. *Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014).
28. *Hunter*, 502 U.S. at 228.
29. *Wilson v. Layne*, 526 U.S. 603, 604 (1999).
30. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017); *see also Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003).
31. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citation omitted). The majority of courts appear to accept this proposition, while some, such as the Eleventh Circuit, only consider decisions within the relevant jurisdiction. *See* Jeffries, *supra* note 7, at 97–98; *Thomas*, 323 F.3d at 955 (noting that "only Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw" could clearly establish the law regarding the constitutionality of "strip searches" conducted in a Georgia school).
32. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).
33. *Katz v. United States*, 389 U.S. 347, 357 (1967).
34. *See Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978).
35. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006).
36. *Anderson*, 483 U.S. 639–40.
37. *Id.* Indeed, at the highest level of generality, the defense would contract so far as to potentially merge with the underlying merits determination and cease to be a separate defense at all. The Ninth Circuit reached this result in *Saucier v. Katz*, finding that the high-generality reasonableness inquiry involved in excessive force claims was "clearly established," so the qualified immunity and merits inquiries were "identical." 533 U.S. 194, 199–200 (2001). The Supreme Court reversed. *Id.* at 209.
38. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ("This Court has 'repeatedly told courts … not to define clearly established law at a high level of generality.'") (citations omitted); *see also White v. Pauly*, 137 S. Ct. 548, 552 (2017).
39. *Anderson*, 483 U.S. at 640.
40. *Id.* at 640–41.
41. *Id.*
42. *Id.* at 640.
43. *See* Schwartz, *supra* note 16, at 6–7 (discussing the "widespread belief" among legal scholars that recent Supreme Court decisions broaden the qualified immunity defense and reduce lawsuits against police).
44. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).
45. *Ashcroft*, 563 U.S. at 743 (citing *Malley v. Briggs*, 475 U.S. 335 341 (1986)); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *White v. Pauly*, 137 S. Ct. 548, 551 (2017); *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774 (2015); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).
46. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).
47. *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005) (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).
48. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).
49. *Id.*; *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Opportunities to Get Involved

Are you looking for an opportunity to get involved with the VBA Young Lawyers Division? You can read about the YLD's multiple projects and committees at: **vba.org/yldactivities**. Just reach out to the project or committee chair to learn more. In addition, the YLD always welcomes ideas for new projects. Just reach out to anyone on the YLD Executive Board to share your proposal: **vba.org/yld**.

William & Mary Students Build "Scrabble Wall" for Middle School Library

Members of the William & Mary VBA Law Student Council embodied the citizen-lawyer ideal by volunteering in an unusual community-service project: building a "scrabble wall" at James Blair Middle School in Williamsburg. James Blair's librarian, Patty Lambusta, developed the idea, and the W&M LSC provided the manpower to make it a reality.

"I felt like this was a great project for the Council to take on because I wanted to create something that would have a positive impact on the community and felt like the scrabble board was a creative way to get students in middle school excited about reading," said LSC President Heather Pearson. "As future attorneys, it is important to entrench ourselves in our communities, and I wanted to help in a place that may not have been in our members''hometown.'"

The student VBA members began by painting the letters onto the wooden scrabble squares. They then went to James Blair's library and measured the space on the wall. They laid out the letters to mimic what it would look like on the wall, and then the team got to work. The scrabble wall is now the first thing students and visitors see when they walk into the library, inspiring a love for reading with every visit.

Courtesy: Heather Pearson

The William & Mary VBA Law Student Council stands beside the scrabble wall they created in a collaborative community service project with James Blair Middle School in Williamsburg. Pictured from left to right are YuYao Chen (Secretary); Melanie Dostis (Community Outreach); Heather Pearson (President); Patty Lambusta (James Blair Middle School Librarian); Megan Hughes (Vice President); Alexander Faig (Treasurer).

Lunch Break Wellness Series - Lunchtime Express Workouts

This Spring, in response to the COVID-19 pandemic, the Virginia Governor's stay-at-home order and the Supreme Court of Virginia's judicial emergency, the YLD offered a series of fitness, pilates, yoga, stretching and meditation classes to promote wellness to lawyers quarantined and working from home. In partnership with the Arlington Bar Young Lawyers Section (AYLS), Linda Choe, President of AYLS and founder of The Choe Flow, kicked off our series with an introductory class focused on toning, strength and stretching. The YLD also partnered with the Virginia Association of Defense Attorneys (VADA) to offer *Mindfulness and Meditation for Pandemics and Skeptics*, an introductory meditation class for skeptics with really busy minds and fidgety bodies. Looking for more classes to tame your twitchy mind? Reach out to our instructors Linda Choe (@thechoeflow), Rachel Garmon (@yesandfit) or Kelly List Kemper in Roanoke!

Courtesy: Madelaine Kramer

Linda Choe leads YLD members in stretches during one of the YLD's lunch break wellness presentations.

Force Majeure: Current Applications, Future Negotiations

By Steven W. Lippman

By now the novel coronavirus (COVID-19) pandemic has forced many businesses to review and reassess their current and future commercial transactions. The initial shockwave of events coinciding with the spread of COVID-19, including stay-at-home orders, has been followed by nationwide protests and civil unrest, government-ordered curfews, pending and potential corporate bankruptcies, and the closure of many local businesses due to financial uncertainty. The subsequent supply-chain disruptions are likely to continue well into the future. Such disruptions warrant anyone currently involved in or anticipating near-term commercial transactions to review several boilerplate provisions in their contracts.

Specifically, this article discusses force majeure clauses and other business considerations that attorneys should assess when advising a client on how to proceed with a commercial contract. This analysis necessarily involves reviewing several other provisions in conjunction with the force majeure clause, such as any "Governing Law," "Notice Requirements," "Insurance," and/or "Arbitration" provisions included in the contract. While the following considerations are geared toward contracts being reviewed in light of current events, they may also be helpful for future drafting and negotiations.

WHAT IS THE PURPOSE OF FORCE MAJEURE CLAUSES IN A COMMERCIAL TRANSACTION?

Generally, a force majeure clause is a contractual provision that excuses the performance of one or more parties upon the occurrence of a specified event or circumstance. Similar to the doctrines of impossibility and frustration of purpose under general principles of contract law, force majeure clauses cover events or circumstances that are beyond the parties' control and that make performance of the contract uneconomical, impractical, or impossible. These provisions are included in most contracts to help to mitigate or allocate certain risks for unknown future events that may have a severe, adverse effect on a party's obligations. However, it is important to note that typically a force majeure event simply hits the pause button on performance under the contract unless the contract also allows for termination due to a force majeure event or has the effect of making performance indefinitely impossible.[1]

WHAT SPECIFIC EVENTS OR CIRCUMSTANCES ARE COVERED BY A FORCE MAJEURE CLAUSE?

As legal counsel, you should determine the list of events that may trigger a contract's force majeure clause. Force majeure events are not typically restricted to naturally occurring events, but commonly also include human-initiated events such as civil unrest and any resulting governmental orders (*e.g.*, curfews and social lockdowns). An example of a fairly common list of force majeure events includes natural disasters (*e.g.*, floods and earthquakes), epidemics and pandemics, war, terrorist acts, civil unrest, government action, labor strikes and shortages, and tariffs. A list of events in a force majeure clause is often followed by a catch-all phrase such as, "or other events beyond a party's reasonable control." The list of events included in a force majeure clause can be uniquely tailored to a specific contract and may also vary from industry to industry and by geographical location. You should pay attention to (i) whether a force majeure clause specifically lists pandemics or protests/civil unrest as triggering events that may temporarily or permanently excuse the obligation to perform, and (ii) whether a party is permitted to terminate the contract as a result.

ARE THERE ANY EVENTS OR CIRCUMSTANCES THAT SHOULD BE EXCLUDED FROM FORCE MAJEURE CLAUSES?

Just as important as enumerated events, you should also determine whether a contract's force majeure clause excludes or should exclude any events or circumstances that allocate the risk of occurrence between the parties, such as changes in economic circumstances or third-party/subcontractor failures. Economic circumstances are situations that are directly tied to a party's bank account or cost of goods and are usually excluded because such circumstances would have presumably been covered in other parts of the contract. For example, a transportation company might include the early termination of a transportation contract if the cost of fuel rises after the contract is executed or if costs increase due to regulatory requirements, higher material prices, equipment failure, or labor shortages. The issues are whether the allocation of risk for that specific circumstance is acceptable to the parties and whether that allocation should be handled through a force majeure clause or a price adjustment. The above situation is fairly common in service provider contracts. When negotiating these provisions, you can limit the scope by including threshold requirements; for example, "if cost of fuel increases by at least X% compared to the average cost of fuel over the past six (6) months."

HOW SHOULD A PARTY'S DEGREE OF CONTROL OVER AN EVENT AFFECT THE CONTRACT LANGUAGE?

In addition to enumerated exclusions to force majeure events or circumstances, you should assess whether the parties have some degree of control over any of the force majeure events and whether this degree of control is commercially reasonable and acceptable to your client. For example, if force majeure events include broad language such as "shortages of materials and changes in laws governing international trade," the parties should consider narrowing the scope to something that can be more clearly determined; such as:

> Shortages of materials and changes in laws governing international trade shall only qualify as a force

majeure event if the shortage of materials or change in international trade law affects (a) an essential portion of XYZ's obligations under this Agreement, and (b) the shortage of materials or change in international trade law also affects XYZ's other projects that were substantially similar to [description of project/transaction at issue].

HOW SHOULD A PARTY AVAIL ITSELF OF FORCE MAJEURE PROTECTION?

A well-drafted force majeure clause should specify how a party is to invoke the clause. Notice provisions included in a force majeure clause may differ from the standard notice provisions of the contract and can include requirements such as prompt or immediate notice or that the affected party must first take specific mitigation efforts. Force majeure clauses may also include provisions concerning available or additional remedies, such as the ability to file suit or seek arbitration.

WHAT GENERAL PRINCIPLES OF CONTRACT CONSTRUCTION SHOULD BE APPLIED TO A FORCE MAJEURE CLAUSE?

If the plain language of the force majeure clause does not provide clear answers, the following general principles should be considered in construing the clause:

Catch-All Phrases: In Virginia, courts follow the rule of *ejusdem generis*, meaning that the catch-all phrase includes only items of the same type of those listed.[2] For example, if the force majeure clause names "floods, hurricanes, and snowstorms," then the catch-all phrase could be interpreted as only including naturally occurring weather-related events.

Foreseeability: An argument can be made that if the specified list of events is considered unforeseeable, then any non-listed event should be deemed to be foreseeable to the contracting parties, particularly if other provisions of the contract touch the subject matter (*e.g.*, penalty for shipping delays in a warehouse distribution agreement, where shipping delays are a more frequent occurrence). However, when interpreting catch-all phrases, even if the word "foreseeable" is not explicitly used to limit the scope of force majeure events, foreseeability may be implied by "best efforts" language as it relates to any mitigation obligations.[3] Notably, contracts formed *after* a significant event that has gained regional or national coverage that may have otherwise triggered a force majeure clause, such as COVID-19, might be deemed foreseeable.

Proximate Cause: Consider whether the force majeure event caused performance under the contract to be impossible rather than merely difficult or unprofitable.[4]

BEFORE YOUR CLIENT INVOKES A FORCE MAJEURE CLAUSE, IS YOUR CLIENT REQUIRED TO PURSUE AVAILABLE INSURANCE COVERAGE?

Before your client invokes a force majeure clause, you should assess whether the force majeure clause requires your client to seek recovery from an insurance policy. You should start with an analysis of the major gating issues such as any applicable notice periods, deadlines, and/or exclusions. Specifically, you will need to determine whether the relevant force majeure event is covered or excluded under any applicable insurance policies, including business interruption insurance, commercial general liability insurance, and/or other related policies.

KEY CONSIDERATIONS FOR CURRENT REVIEW AND CLARIFICATION GOING FORWARD

Clients seeking your advice on the applicability of the force majeure clauses will undoubtedly be under considerable stress, and hopefully a clear analysis of any applicable force majeure clause provides a guiding light moving forward. For the client that has a potential force majeure event now, the analysis should focus on whether COVID-19, civil unrest, or other recent events are specifically enumerated, covered under a catch-all phrase or specifically excluded from the force majeure clause. Furthermore, you should consider whether there is any limiting language regarding a party's degree of control of the triggering event and how such control may impact the party's ability to invoke the force majeure clause. Finally, you will want to ensure proper compliance with other contractual provisions, such as any notice requirements. For clients that have existing contracts that will likely be adversely affected by a pandemic and/or civil unrest, force majeure clauses should be revisited and renegotiated as necessary to clarify the risk allocation between the parties.

Steven W. Lippman
Associate, Christian & Barton, LLP (Richmond)

Bio: Steven W. Lippman is an associate at Christian & Barton, LLP in Richmond where he is a member of the business law, health care and municipal governance departments. In his practice, he represents public and private entities on general business and corporate matters such as governance, entity formation, mergers and acquisitions, joint ventures, and contract drafting and negotiation. In addition, Mr. Lippman has significant experience with regulatory compliance and transactional matters particular to health care clients, and he assists firm clients by translating emerging trends into business operation best practices. He earned degrees from the University of Richmond School of Law and James Madison University.

Contact Info: slippman@cblaw.com or 804.697.4107

Endnotes

1. *See* Smokeless Fuel Co. v. Seaton & Sons, 105 Va. 170 (1906); *see also* Wheeling Valley Coal Corp. v. Mead, 186 F.2d 219 (4th Cir. 1960); Acme Mfg. Co. v. Arminius Chemical Co., 264 F. 27 (4th Cir. 1920).
2. *See* SunTrust Mortg., Inc. v. Am. Pac. Home Funding, LLC, 2012 WL 6561728 (E.D.Va. Dec. 14, 2012).
3. *See, e.g.*, United States v. Hampton Roads Sanitation Department, 2012 WL 1109030 (E.D. Va. Apr. 2, 2012); Washington & Old Dominion Ry. Co. v. Westinghouse Electric & Mfg. Co., 120 Va. 620 (1917).
4. Middle E. Broad. Networks, Inc. v. MBI Glob., 2015 WL 4571178 (E.D. Va. July 28, 2015).

A WILLIAMSBURG REUNION

VBA Annual Meeting Highlights

Courtesy: Graham K. Bryant

Incoming YLD Chair Madelaine A. Kramer presents outgoing YLD Chair Jennifer L. Ligon with a framed copy of the Principles of Professionalism for Virginia Lawyers in recognition of her service as Chair during the YLD luncheon and business meeting.

Courtesy: VBA Staff

YLD Chair Jennifer L. Ligon presents past YLD Chair and *Opening Statement* founder Andrew B. Stockment with the 2019 VBA YLD Sandra P. Thompson Award in recognition of his outstanding work and long-term service to the YLD.

Courtesy: VBA Staff

In a memory from the days before COVID-19, the annual YLD *Pints and Pairings* social was packed with attendees—including a record number of law students—who took advantage of the opportunity to network with members of the judiciary.

Courtesy: VBA Staff

It wouldn't be the VBA Annual Meeting Banquet without a kick-off performance by a Colonial Williamsburg fife and drum corps.

Courtesy: VBA Staff

YLD Executive Board member Craig A. Hoovler received the 2019 VBA YLD Emerson G. Spies Award from YLD Chair Jennifer L. Ligon during the banquet in recognition of his enthusiasm, loyalty and dedication over the year.

Courtesy: VBA Staff

Attendees gather to rekindle old friendships and forge new ones during the black-tie-optional reception before the banquet.