



The Voice of the
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The Voice

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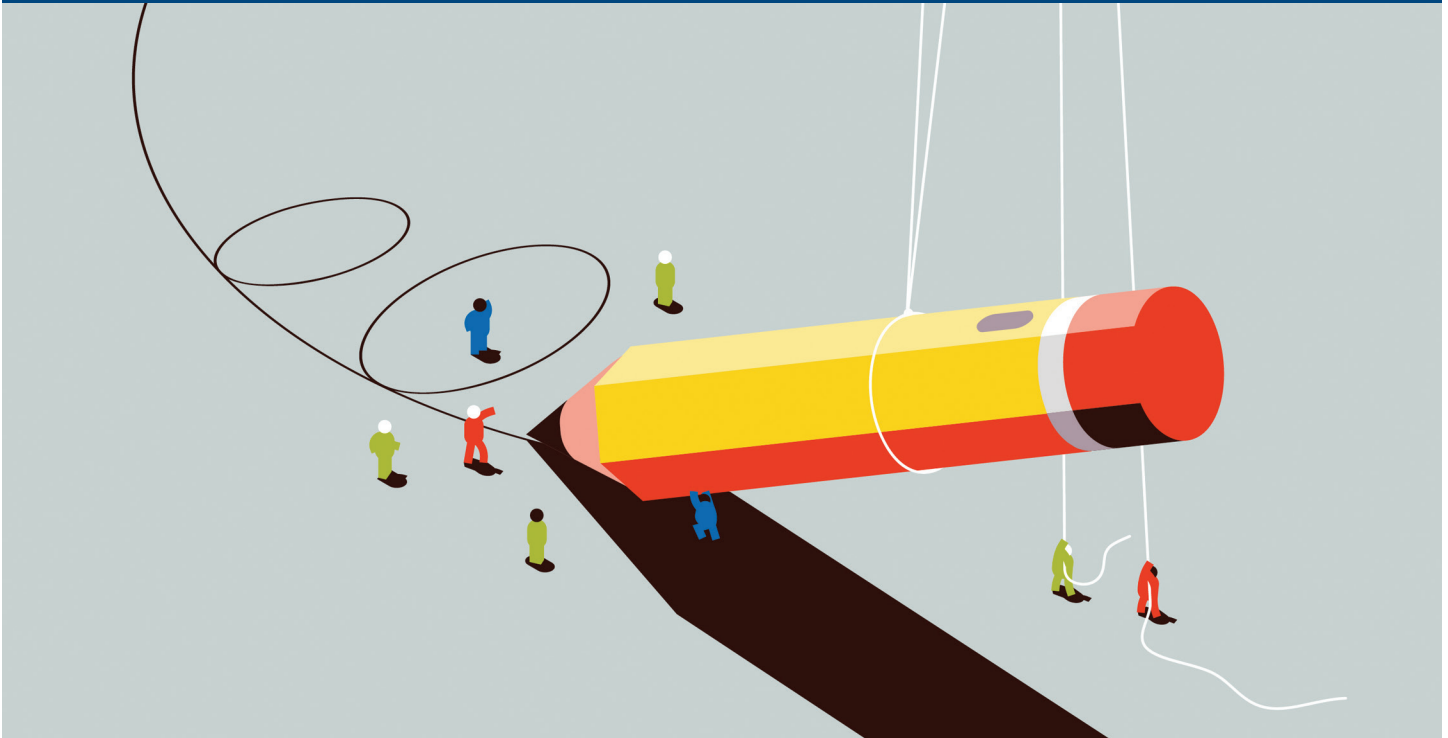
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This Week's Feature



Lessons from a Number 2 Pencil

By Jura Christine Zibas and Sarah Fink

Aspiring patent attorneys often are introduced to the art of claim drafting for utility patents by reference to a number 2 pencil. The pencil is a simple item of manufacture with four parts: the writing tip; the hexagonal body; the ferrule (metal piece that attaches the eraser); and the eraser. This simple and familiar construction makes the pencil an ideal model for learning to draft claims for utility patents, that is, patents for functional items of manufacture.

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Quote of the Week

“The fact to which we have got to cling, as to a lifebelt, is that it is possible to be a normal decent person and yet be fully alive.”

—[Allen Ginsberg \(June 3, 1926–Apr. 5, 1997\)](#).

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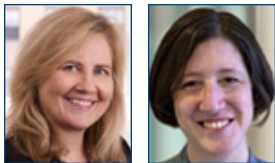
- Tips to Reduce Legal Risks When Bringing Lawyers, Staff, and Clients Back to the Office, By Kirsten Small

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This Week's Feature

Lessons from a Number 2 Pencil

By Jura Christine Zibas and Sarah Fink



Aspiring patent attorneys often are introduced to the art of claim drafting for utility patents by reference to a number 2 pencil. The pencil is a simple item of manu-

facture with four parts: the writing tip; the hexagonal body; the ferrule (metal piece that attaches the eraser); and the eraser. This simple and familiar construction makes the pencil an ideal model for learning to draft claims for utility patents, that is, patents for functional items of manufacture.

As it turns out, reference to the simple number 2 pencil can help shed light on other forms of intellectual property: those that protect nonfunctional designs. A recent federal circuit case considered the modest number 2 pencil in the context of design patents and copyrights. A close look at the holding of the court and the detailed decision of the district court helps to explain the nonfunctional requirement for design patents and copyrights, and the differences between these two types of intellectual property.

In *Lanard v. Dolgencorp LLC*, 2020 U.S. App. Lexis 15422 (Fed. Cir. May 14, 2020), the federal circuit considered, among other issues, design patent and copyright protection for a sidewalk chalk holder designed to look like a number 2 pencil. In 2011, Lanard began selling its chalk holder, which it purported to protect by design patent and copyright. In 2012, Dolgencorp copied the idea of a chalk holder in the image of a pencil and began selling its own version. Lanard's sales fell, and Lanard sued Dolgencorp for, among other things, design patent infringement and copyright infringement. On motion for summary judgment, the U.S. District Court for the Middle District of Florida found no infringement on either count, 2019 U.S. Dist. Lexis 46911 (M.D. Fla. Mar. 21, 2019), and the federal circuit affirmed.

Design Patent

The district court assumed for purposes of its patent infringement analysis that the design patent was valid and protected the ornamental features of the “columnar shape of the eraser, the specific grooved appearance of the ferrule, the smooth surface and straight taper of the conical piece, and the specific proportional size of these

elements in relation to each other.” These aspects were shared by the design patent and the accused product, but their up-close designs were different. For example, the ferrule had different patterns of grooves and the body was stouter on the Dolgencorp model. Any similarities between the patented design and the accused product all stemmed from the functional aspects of the toy: both were chalk holders in the familiar design of a number 2 pencil. Because the accused product was similar to the patented design in only the functional aspects and differed from the patent in the protectable, ornamental features, there was no patent infringement.

The district court did not reach the issue of patent validity, but it did suggest that the patent was likely not valid because the chalk holder differed from the prior art pencils only in function, not in design. Since “the mere transferring of an old design to a new and analogous use is not patentable design invention,” it seemed likely that the examiner had erred in issuing the patent.

Copyright

The copyright infringement claim failed because the design of the toy was functional and therefore could not be the subject of a valid copyright. The district court explained that the Copyright Act allows protection for a pictorial, graphic, or sculptural work incorporated into a useful article, but the copyright extends only to any design features that can be “identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”

The district court found that the copyrighted chalk holder had two purposes: first, the utilitarian purpose of storing and holding chalk to facilitate writing; and second, the artistic purpose of evoking a cartoonish pencil to delight children. But the design aspects of the toy were not separable from the functional aspects of the toy (“the pencil design does not merely encase or disguise the chalk holder, it *is* the chalk holder”), and therefore, the chalk holder was not properly the subject of copyright protection. The federal circuit affirmed this holding.

Difference Between Design Patent and Copyright

This case aptly illustrates the difference between a design patent and a copyright for the design of a product. While both protect only nonfunctional aspects of a product, the difference is the separability of the design aspects from the functional aspects. A design patent only protects the design aspects of a functional item, but the design aspects need not be separable from the functional aspects. A copyright, on the other hand, also only protects the design aspects of a functional item, but only to the extent that the design aspects exist as a copyrightable work independent of the functional aspects.

For example, the hexagonal body of the chalk holder is functional in that it holds the chalk, but it has a design aspect in that it is hexagonal. This hexagonal shape, were it new, would be entitled to design patent protection. But since the hexagonal body *is* the chalk holder and cannot be separated from the chalk holder, it is not entitled to copyright protection. *See also Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

The concept of a pencil with an eraser on the end opposite the lead tip dates back to at least 1858, when it was

patented by Hymen Lipman as utility patent number 19783. It stands to reason that it would be difficult to protect any new ideas that incorporate this old and ubiquitous design. But, as it turns out, and as discussed above, the modest pencil still has valuable lessons to teach.

[Jura Christine Zibas](#) is co-chair of **Wilson Elser's** intellectual property practice and a member of the firm's Information Governance Leadership Committee. She has an extensive technology background and focuses her legal practice on intellectual property, technology and commercial matters. Ms. Zibas practices from the firm's New York City office. She is a member of the DRI Intellectual Property Litigation Committee.

[Sarah Fink](#) is a senior associate in the Garden City, New York, office of **Wilson Elser**. She has extensive experience litigating all types of intellectual property infringement cases, including patent, trademark, copyright, and trade secret. Ms. Fink is a registered patent attorney, and she has extensive experience prosecuting matters before the United State Patent and Trademark Office and the Patent Trial and Appeal Board.

COVID-19

Connections Continue Despite Interruptions

By R. Jeffrey Lowe, DRI National Director

As I sit on my back porch writing this article and reflecting on my DRI experience as a third-year board member, I keep getting interrupted by my three-year-old golden retriever, Zeb, who incessantly wants me to throw his ball into the backyard so he can retrieve it (think Adam Sandler's dog in the movie *Spanglish*). I type, he pants at my side waiting for me to throw the ball. I throw it, type some more, and he is right back at my side ready for more. Interruption after interruption, but boy does he love to get that ball and I love seeing the joy in his activity.

Interruption is something we deal with daily in the practice of law. We plan our day out to the minute, or tenth of an hour in some cases, to maximize our productivity. However, seldom does the plan hold. A client calls with an emergency, an associate needs help on a project, a colleague calls and wants to talk. And we have to bring that interruption into our schedule. We do and move on, adapting our schedule to get back on track.

The pandemic interrupted our practices as offices closed, courts limited operations and we established remote workspaces. What has not been interrupted, however, is the benefit of being a DRI member. Membership in DRI has always been about more than access to world-class CLE and educational materials. Membership in DRI is also about the personal connection we make with lawyers from across the country and world. Since my first involvement with DRI attending the DRI Civil Rights and Governmental Tort Liability Seminar in New Orleans almost twenty years ago, the people I have met are the best and brightest legal minds. Even more important, however, is those same people are some of the best people I have ever met. They have become friends and people I know I can count on. To me, that is the best benefit of DRI membership—connection with people.

Connection is part of the reason why DRI's seminars are so well-attended. Yes, the content and presenters are outstanding. But the ability to get together and connect with colleagues and friends is just as valuable. I have chaired a seminar planning committee and worked on numerous

seminar planning committees. The bonds created through that process strengthened the connection I initially made attending the seminars. That is why a person you might see one, two, or three times a year can become a lifelong friend. Although the ability to be physically in the same room as that person may be interrupted because of geographical distance, the connection you create through DRI membership allows that connection to grow.



Friendship, however, is not the only positive benefit of connection. Connection with these outstanding people and lawyers has made me a better lawyer and leader. I do not hesitate to pick up the phone and call one of my fellow Governmental Liability Committee colleagues when a practice question arises. I also do not hesitate to reach out to my fellow DRI leaders when a question arises about a challenging leadership issue. The connections have also allowed me to create a book of business in an area that did not previously exist in my firm. The benefits of DRI connections are different for everyone, but they are undoubtedly beneficial.

Despite the inability during the pandemic to conduct seminars as DRI has in the past, DRI continues to offer many opportunities for connection. DRI has various subcommittees holding regular Zoom calls. Planning for upcoming seminars carries on. Publications continue to be published and online programming continues to be recorded. All of these things require planning and lots of hard work. It is the work of DRI's Substantive Law Committees and their connected committee members that create this content. So even during a pandemic, DRI continues to create opportunities for connection.

I currently serve as the board liaison to the Construction Law Committee and it was supposed to hold its seminar the first week in April. Unfortunately, it had to be postponed. The committee led by its chair, David Jones, and its vice chair, Danielle Waltz, immediately formed a task force to address how the committee could provide continued content to its members. From that task force, it created a weekly Zoom conference called "Toolbox Talks" where the

COVID-19

committee presents a substantive topic for approximately 15 minutes and then gives the opportunity for the people on the call to discuss the topic. They have been outstanding presentations and give the committee the opportunity to connect once a week.

DRICares has provided multiple opportunities for connection as well. DRICares provided everyone the opportunity to connect while physically distancing through the “Keep Your Distance 5k.” My whole family participated (including Zeb) in the rain and we all loved seeing the photos on social media of those who ran, walked, biked or hiked. Again, despite the interruption of normal activities, DRI provided its members the opportunity to connect.

President-Elect Emily Coughlin’s weekly coffee talks continue at noon daily and provide an opportunity for any member to join and say “Hi.”



Undoubtedly, the pandemic has interrupted all facets of our lives and practices, as well as normal DRI operations. But, DRI will continue to provide multiple benefits for its members and opportunities to connect, albeit virtually. My DRI connections have certainly been part of what has helped me to strive and succeed during this pandemic. There have been days where a DRI call or Zoom has been exactly what I needed, despite not knowing that I needed it. Interaction does not have to be interrupted and DRI provides the avenue to continue that connection. I look forward to the day in the future when I can see my DRI friends from across the country in person. But I don’t miss them as much when I stay connected to them through DRI.

And by the way, I have now thrown the ball into my backyard 52 times for a golden retriever who is a pleasant interruption.



And The Defense Wins

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and email address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

Matt Malinowski



A Texas district court judge concluded that the plaintiff failed to state a claim under Texas law for innovator liability-styled claims against Novartis Pharmaceuticals Corporation. Novartis was represented by DRI member [Matt](#)

[Malinowski](#), a partner in the Washington, D.C., office of **Hollingworth LLP**.

On May 7, 2020, Chief Judge Orlando L. Garcia, of the U.S. District Court for the Western District of Texas (San Antonio Division), issued an order on Novartis’s Rule 12(b) (6) motion to dismiss all counts of the complaint, including strict liability, negligent manufacturing, negligent failure to warn/fraudulent misrepresentation, breach of express and/or implied warranty, and loss of consortium, concluding that “Texas law rejects [the innovator liability] theory of liability.” *Johnson v. Novartis Pharms. Corp., et al.*, No. 5:19-cv-01087-OLG (W.D. Tex. May 7, 2020).

Judge Garcia’s decision is in accord with the great weight of authority nationwide on the question of innovator liability. See, e.g., *Trower v. Janssen Pharmaceuticals, Inc.*, 2019 WL 1571834 (D. Del. April 11, 2019); *McNair v. Johnson & Johnson*, 241 W. Va. 26, 8181 S.E.2d 852 (2018); *Guarino v. Wyeth, LLC*, 719 F.3d 1245 (11th Cir. 2013).

DRI News

Upcoming DRI Elections

Four **Director Elected Nationally** seats on the DRI Board of Directors, plus the offices of **Second Vice President** and **Secretary-Treasurer**, will be filled at the [2020 DRI Summit](#) in Washington, D.C., October 21–24. To be considered for any position, a DRI member must first file a Declaration of Candidacy form. For more information, please contact

Nancy Parz at DRI headquarters: nparz@dri.org or **312.698.6224**. **Declarations are due by July 1, 2020. This deadline is not being postponed.**

DRI Cares

Carmody MacDonald Salutes Health Care Heroes

The **Carmody MacDonald** law firm in St. Louis delivered 130 decorated boxes of treats April 21 to nurses working during the COVID-19 pandemic at Mercy Hospital St. Louis in Creve Coeur. In past years, the firm has filled and provided treat boxes—containing popcorn, raisins and nuts,

granola bars and cookies—for certified public accountants during tax season in March and April.

But after the pandemic prompted the deadline for filing federal income taxes to be extended until July, the firm instead shared the treats with nurses at Mercy.



Shown, from left, are Chris Ruzicka, Carmody MacDonald director of business development; his wife, Diane Ruzicka; and their daughter, Bridget Ruzicka, who helped to pack and decorate the boxes. The three were part of Carmody MacDonald's effort to deliver 130 boxes of treats to nurses working at Mercy Hospital St. Louis in Creve Coeur. At right is Chris Carter, Mercy executive director of human resources. Photo courtesy of Carmody MacDonald.

Upcoming Webinars

Effects of the COVID-19 Crisis on Jurors' Attitudes and Decision-Making, June 10, 2020, 12:00–1:00 pm CDT



This presentation will explore the likely effects of the COVID-19 crisis on civil jurors' attitudes, beliefs, and decision-making processes from an evidence-based perspective. In addition to examining the psychological effects of COVID-19 on jurors, the presenters will discuss changes in jurors' attitudes toward corporations and corporate defendants and the influence that corporate responses to COVID-19 may have on juror decisions. Attendees also will learn how the COVID-19 crisis may affect jurors' expectations for, and perceptions of, key witnesses. Most importantly, this presentation will discuss strategies for successfully navigating and even capitalizing on this crisis to promote positive case outcomes. [Click here](#) to register.

The Ghost of Treatment Past: Phantom Medical Bills, Medical Litigation Funding, and How to Fight Them (Replay), June 17, 2020, 12:00–1:00 pm CDT



Attendees will hear from two seasoned trucking attorneys and an experienced medical billing professional with an extensive background in analyzing medical billing procedures and determining the reasonable value of medical services regarding the medical funding used in personal injury and trucking litigation.

Specifically, attendees will hear about the different types of medical funding models (doctors who self-finance, factoring, medical funding companies, among others); discovery tactics that can be used by defense lawyers to obtain relevant and critical medical funding information; and a case law overview addressing the relevance of medical funding discovery and the admissibility of medical funding information at trial.

Additionally, attendees will learn examples of questionable billing practices (i.e., overcharging, upcoding, unbundling) and how billing experts can be utilized to help defense attorneys analyze whether the medical expenses incurred by a plaintiff were reasonable. [Click here](#) to register.

The “Protection” of Biometric Data and the Data Cyber Insurance Market: Closing in on a Tipping Point, June 30, 2020, 12:00–1:00 pm CDT



The capture of biometric data creates a delicate balance between privacy and efficiency. Recently, with the advent of COVID-19, it has become increasingly apparent that the use and collection of personal identifiable information is not clearly regulated. This program will discuss the current (and pending) measures in place to address these privacy concerns, as well as recent trends in litigation. In addition, it will offer some “best practices” for reducing potential liability in this new COVID-19 world. Further, this program will discuss the current state of the cyber insurance market and provide an overview of cyber insurance coverage trends, particularly in light of COVID-19. [Click here](#) to register.

The DRI Expert Witness Database Gives You an Edge

Well, you didn't see that coming. Maybe you didn't ask the correct question or didn't know that little something that torpedoed your expert witness and your client's case. And your client saw it, too.

You don't need to have that happen more than once before you know that you've got to do better.

It's time to take advantage of your DRI benefit: free, exclusive access to [DRI's Expert Witness Database](#) of 65,000 plaintiff and defense expert witnesses, their contact information, and their documents. Search by defendant, plaintiff, or general research. Or search by case name or number or case description. It's fast and *it's free*.

To fulfill your due diligence, you can order these [Expert Witness Reports](#) for an additional charge:

- DRI Expert Witness Profiler: a comprehensive investigation of an opposing expert witness's professional and personal background, which is an emerging standard procedure for litigators
- DRI Witness Screening Report: a quick look to confirm your instincts and ensure that there are no surprises before trial.
- DRI Witness Challenge Report: an assessment of an expert witness's prior history of being challenged, excluded, and/or critiqued by the court, based on his or her qualifications or methodology.

As Benjamin Franklin said, "By failing to prepare, you are preparing to fail."

State Membership Chair/State Representative Spotlight

Florida

State Membership Chair



John M. Miller, Stockholder, Henderson Franklin Starnes & Holt PA

Areas of Practice: Tort defense.

DRI member since 2009.

John's experience with DRI: "I am currently the state membership chair for the great state of Florida. I inherited this position from Mark Antonelli, so I have big shoes to fill. I have had great experiences with DRI's programming and support throughout my practice."

Fun Fact: "I once ran 54 miles in one day. My wife ran the last 15 miles with me for moral support. I had a frosty beverage and steak waiting for me after the finish."

Georgia

State Representative



Evan C. Holden, Shareholder, Greenberg Traurig LLP

Areas of Practice: Product liability litigation.

DRI member since 2012.

Evan's experience with DRI: My first exposure to DRI came a young associate, when my mentor supported my attendance at the DRI Young Lawyers Seminar. I then became involved in the DRI Young Lawyers Committee, serving as the young lawyers' liaison to the DRI Trial Tactics Committee (now the DRI Litigation Skills Committee) and the DRI Drug and Medical Device Committee, as well as the chair and vice chair of several subcommittees on the DRI Young Lawyers Committee. After aging out of young lawyers, I was looking for ways to remain active and engaged in DRI and have enjoyed serving as the state membership chair for Georgia for the past several months."

Fun fact: "I am originally from the Boston area and a die-hard Patriots fan. A recent highlight was getting to go to Super Bowl LIII in Atlanta, to see the Pats beat the Rams!"

New Member Spotlight

A. Alexander Weisheit, KP Law



[A. Alexander Weisheit](#) is an associate with **KP Law PC** in Boston, Massachusetts, and represents clients in municipal, land use, business, and general civil law. His practice covers a broad range of cases, including zoning and wetlands-permitting appeals, business disputes, and real estate disputes. He also represents municipal clients in enforcement and litigation, including building code, sani-

tary code, wetlands, and zoning enforcement-related matters. His practice also includes corporate and individual clients in all phases of litigation.

Mr. Weisheit is admitted to the Massachusetts Bar and the U.S. District Court for the District of Massachusetts. He is a graduate of Vermont Law School and has a master's degree in environmental law and policy.

Quote of the Week

“The fact to which we have got to cling, as to a lifebelt, is that it is possible to be a normal decent person and yet be fully alive.”

—[Allen Ginsberg](#) ([June 3, 1926–Apr. 5, 1997](#)).

Tips to Reduce Legal Risks When Bringing Lawyers, Staff, and Clients Back to the Office

By Kirsten Small



As lawyers begin returning to corporate legal departments and law firms after months of working remotely, they are not returning to business as usual. Reopening means adopting new measures to ensure the safety of employees and clients. The resulting challenges range from the logistical (such as reduced occupancy limits in conference rooms) to the ethical (maintaining privilege and confidentiality when speaking to a client from six feet away).

We are providing a [checklist](#) to assist DRI members in navigating a wide variety of legal risks as they reopen their offices. DRI's [Coronavirus Information Center](#) contains additional resources to help lawyers navigate the COVID-19 crisis. In addition, the [Canadian Bar Association](#) and the [American Bar Association](#) are providing resources to help firms navigate the crisis and determine when, and how, to reopen their physical locations. Other resources include [a helpful checklist and graphics](#) from the Ontario Bar Association. Lawyers in the U.S. can find additional guidance from state and local bar associations. See *also* [Nexsen Pruet webinar on COVID-19 litigation](#), including segment from the Electronic Privacy Working Group's Kirsten Small on privacy law issues with returning to work.

Often missing from such guidance is information about privacy and cybersecurity aspects of returning to work. These are important considerations for any business, but law firms must account for the additional dimension of ethical obligations of technology competence and client confidentiality. Here are some of the top issues that law firms should consider in the months ahead.

1. Plan for the future by considering the past. Like many other businesses, law firms found themselves making an abrupt transition from working at the office and meeting clients face-to-face, to working remotely and meeting clients via Zoom or other video communications apps.

The COVID-19 crisis, with its sudden shift to remote working environments, has spawned increased cybersecurity risks. Individual lawyers must be on guard against “phishing” emails and other cyber-attacks that may lead to compromise of systems and exposure of sensitive client information. At the firm level, adapting to the new normal means reviewing security processes and procedures

related to remote access to confidential client information. Lawyers have, in general, been slow to adopt security measures like virtual private networks (VPN), end-to-end encryption, and two-factor authentication that are standard in other industries. Now is the time to adopt these technologies and to adopt policies requiring their use.

2. Manage liability risks. No less than other businesses, law firms must be concerned with the potential for liability arising from the spread of COVID-19 due to workplace contact. In the face of numerous wrongful death lawsuits that have already been filed on behalf of employees who purportedly contracted the virus at work, initiatives are underway at the state and federal level to consider limiting COVID-19-related business liability.

In most U.S. jurisdictions, workers' compensation is the sole remedy for on-the-job injuries. Because COVID-19 does not fit neatly into the categories of “workplace injury” or “occupational disease” traditionally covered by workers' compensation laws, some carriers may deny coverage, thereby placing the burden on employers through secondary liability. To avoid this, some states are considering legislation establishing a legal presumption that COVID-19 is a workplace injury, while others, such as California, are accomplishing the same result through executive orders. The National Conference of State Legislatures is [tracking this rapidly evolving landscape](#).

3. Consider your surroundings. It appears likely that social distancing will continue to be the norm, even as courthouses reopen and begin to conduct in-person proceedings again. When discussing privileged matters in court or other public spaces, lawyers should be mindful that conversations between people who are six feet apart are more susceptible to being overheard.

4. One size does not fit all. Law firms and legal departments come in all shapes, sizes, locations, and practice areas. The considerations affecting when and how to reopen a physical office are equally varied and unique. Not only that, but current recommendations or guidelines may change as public health experts gain more knowledge about COVID-19. For these reasons, any reopening plan must account for each firm's or company's unique circumstances and legal obligations.

[Kirsten Small](#) is a member in **Nexsen Pruet**'s Greenville, South Carolina, office. A member of the International Association of Privacy Professionals (IAPP), Kirsten came to the field of privacy law through her work as a litigator and appellate lawyer, a background that gives her a unique insight on how a company's policies and actions before a data breach can help mitigate—or avoid—liability if a

breach occurs. She is a member of the DRI Center for Law and Public Policy's Electronic Privacy Working Group. Fellow group members Susan Gunter, Brandon Hull, and Laura Clark Fey contributed to this article.