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from the president



Shawn Tillis

I am in a fighting mood. I have been on my own since I was about 16 years old. I had a small apartment across the street from my grandmother's house - I took a place across the street from my grandmother because honestly, although I was on my own, I still needed a loved one close by to feel safe.

I worked at KFC at night. Every night when I got off work, I'd go to my grandmother's house to catch up and watch TV with her until I was sleepy, then I'd walk across the street to my apartment to go to bed. One night, as I stepped out of my grandmother's front door to go to my apartment, I was met with blinding lights trained right at my eyes. I could not see. I heard a voice on the other side of the lights yell "Freeze or we'll blow your head off!" It was the police. Now, I do not know if there is something innate in our brains that tell us instantaneously — and I mean within split seconds — to stand motionless, but that is exactly what I did. I had a whole pie with me from work and stood there, motionless with that pie balanced in my right palm. Then, suddenly, without saying a word to me, the police officers took off. But I still stood there without moving, trying to figure out what had just happened and why. That night, I laid in bed wondering what would have happened if I had dropped that pie. Would I still be alive?

The next day at work one of the police officers who had been at my grandmother's front door the night before came through the KFC drive through. With a bit of a chuckle in his voice he said: "Yeah, sorry about that." It was a case of mistaken identity. Apparently, some guy fitting my description, meaning he was Black, had just shot someone and was on the run — literally. He had jumped through my grandmother's backyard just as I was walking out of her front door, so they thought I was him.

This would not be the last time I would be accosted by the police because of mistaken identity or in general. It also would not be the last time a police officer would point a gun at me and tell me to not move or he would kill me. Where I grew up — in a predominantly Black and Latino inner city — this was typical. Some people who were mistaken for others were not as lucky as I was.

■ ■ ■

Those who are still squeamish when they hear "Black Lives Matter," "Systemic or Structural Racism," or "White Privilege" need to get over it. In the fight for equality, this is the least anyone can do. Contextually, the phrase "All lives Matter" is racist. It is a form of denial which seeks to erase the other's grievance by subsuming it into nothing, into a pious generality, so that it is forgotten. It is an attempt to unsee and to do so without taking responsibility for a willed blindness. It is gaslighting and, moreover, a form of violence in that it is a tacit acceptance of discrimination.

■ ■ ■

I do not qualify the word "protest" with "peaceful," to distinguish it from "rioting" or "looting" because, the last time I checked, these terms are in separate places in the dictionary. To qualify "protest" with "peaceful" (as in "we support the peaceful protests…") is already to equivocate. The phrase "peaceful protests" takes at the same time it purports to give. It is two-faced. It communicates an unsophisticated understanding of the rage and despair that leads people to project their pain through the destruction of property. The phrase "peaceful protests" does not per se evince support for the protester — even the peaceful ones. Rather, it is an attempt to split hairs while all hell is breaking loose. At bottom, it betrays a lack of commitment to the cause and genuine empathy for the aggrieved.

■ ■ ■

This pandemic has exposed and exacerbated the fault lines and inequalities in our system. As Jimmy Kimmel aptly put it recently, White privilege does not mean your life has not been hard or that you did not work hard for everything you have. It just means that the color of your skin is not one of the things that makes it harder. It means that you are less likely to live in an inner city, to be "accidentally" accosted or killed by the police. It means you are more likely to get a job and be paid more for it. It means that you are more likely to get the benefit of the doubt in every facet of life — including in a court of justice. It means that you are more likely to be allowed to go about living your life in peace, without being stopped for no fair reason and having your body violated[1] by the government.

■ ■ ■

There is no question that the economic success of this country was built on slavery and racism. After the Civil War, the system worked to neutralize the common cause of working and middle-class Whites with poor and working-class people of color — to disincentivize any such merger — lest they lose their slightly more privileged status. It is as if someone built a casino with two distinct classes of odds at winning — which, over time, in geometric progressive fashion, adds up to a cushy advantage.

Systemically, one group of people is made to bear more of the brunt of the human condition than others, so that another group can feel less exposed to it. This is unethical and everyone knows it, which is why some people deploy erasures such as "All Lives Matter[2]" and insist on the distinction of "Peaceful Protests."

For all humans, it is hard to give up an unfair advantage, however slight. Truthfully, if the shoe were on the other foot it would be hard for me to do so. But, give it up one must, for to maintain the status quo is, by definition, to perpetuate it. We cannot have our cake and eat it too. No system has ever changed without lots of pain and strife. People of color just want the fair and equal shot everyone else wants. This will inevitably require the structurally privileged class to give up the unfair inheritance.

■ ■ ■

I have said this before, and I'll say it again here: our only hope is to aim towards diversity and reconciliation. South Africa did it in earnest after the dismantlement of apartheid and so can we. We must work towards dismantling our own systems of apartheid and caste. This will require honesty and vulnerability on all sides, not avoidance, equivocation and gaslighting. It will require diversifying our firms as well as our social circles. It will require speaking up when you see something wrong and calling people out even if doing so is uncomfortable. Diversity and love (I know I'm repeating myself here) are the lifeblood of our humanity. With a culture of diversity, love, and inclusion, there is nothing we cannot do or eventually overcome. Without it, "Ashes! Ashes! We all fall down." ◆

—Shawn Tillis is founder and principal attorney at The Tillis Law Firm. His firm specializes in personal injury, employment harassment and discrimination, and sexual abuse cases involving clergy, doctors, mental health care, and healing arts professionals.

---

[1]"Maybe it would help you if... you think about that... unease that you felt watching that Target being looted, try to imagine how it must feel for Black Americans when they watch themselves being looted every single day. That's fundamentally what's happening in America; police in America are looting black bodies." — Trevor Noah to Anderson Cooper on CNN.

[2]Imagine a small business, after having its PPP loan application delayed with no end in sight, protesting the favorable treatment their bank's corporate clients' applications get saying to the bank manager "Small Businesses Matter!" and being told "WHOA — All Businesses Matter!"

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from the editors



Scott J. Lantry



Teresa Li

To all ACCTLA Members and Supporters,

Shawn's message is as timely as it is powerful. It is necessary and proper now, more than ever, to think and act on the trials and tribulations faced by Shawn and all people of color, the disadvantaged, and the underrepresented. But with the air choked by smoke, the threat of deadly infection ever present and seemingly daily reports of police shootings of unarmed Black people, we are all tempted to give in to the despair and resignation that flows from these adversities.

We hope, therefore, that you find a renewal of strength and courage in the words of Theodore Roosevelt. Although the verdict of history on dead white men such as he may be mixed, and his words certainly do not reflect modern gender norms as we embark upon the second century of women's suffrage in the United States, the editors hope you, trial lawyers and litigators all — the "[people] in the arena" — may find in his words renewed vigor and dedication to the vital tasks before you:

> *It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.*
>
> *Theodore Roosevelt, April 23, 1910.*

Cat Cabalo begins our articles with a discussion on how one such group — those protected by the Americans with Disabilities Act — are disproportionally affected by the tribulations of the day — and how we trial lawyers, the "doers of deeds," may bring about positive transformation in that arena.

Dan Horowitz discusses civil rights cases in the wake of the murder of George Floyd and the challenges each civil rights attorney must face when California and federal laws are applied.

Ron Shingler gives us renewed hope that even a SCOTUS that has been remolded by Trump's Supreme Court nominations might interpret decades' old legislative enactments to reflect modern norms and standards — that discrimination based on "sex" goes well beyond the concept of "gender" to include sexual orientation.

And Terry Banks examines the financial realities that disproportionally impact those underserved by our society, and identifies specific financial tools that Terry and other financial coaches can employ with "great devotions" for the betterment of all.

Terry Leoni gives us 10 tips on how to safely reopen our law practice in the middle of the Covid-19 pandemic. This is a must-read for anyone who owns his/her own law practice.

Going hand-in-hand with Terry's article is Jeffrey Wolfert's overview on how the current workers' compensation law is applied to Covid-19 cases with Governor Newsom's Executive Order in mind. His article also examines varies defenses and arguments that an employer may raise in these cases.

We will end the issue with Jayme Walker's article that discusses different ways to manage one's own mental health from the perspective of a busy lawyer and mother of a small child in the middle of the Covid-19 shutdown and protests on racial inequality. ◆

—Scott J. Lantry is a Certified Specialist in the field of Family Law with the law firm Whiting, Ross, Abel & Campbell, LLP and is admitted to practice before all state and federal courts in California. He was selected for inclusion in Northern California Super Lawyers® Rising Stars List. Less than 2.5% of attorneys in Northern California are named to Rising Stars. In his spare time, he rides motorcycles and coaches baseball for his 8 and 10 year old sons.

—Teresa Li is a trial attorney with Law Offices of Teresa Li, PC where she focuses on catastrophic personal injury cases. She has recovered over $13 million for injured parties. She has been repeatedly selected by SuperLawyers Magazine as Super Lawyers Rising Star from 2014-2020. She speaks Mandarin as her first language. On her free time, she enjoys practicing skating (once the arena is open) and of course, teaching her five-year-old daughter about the world.

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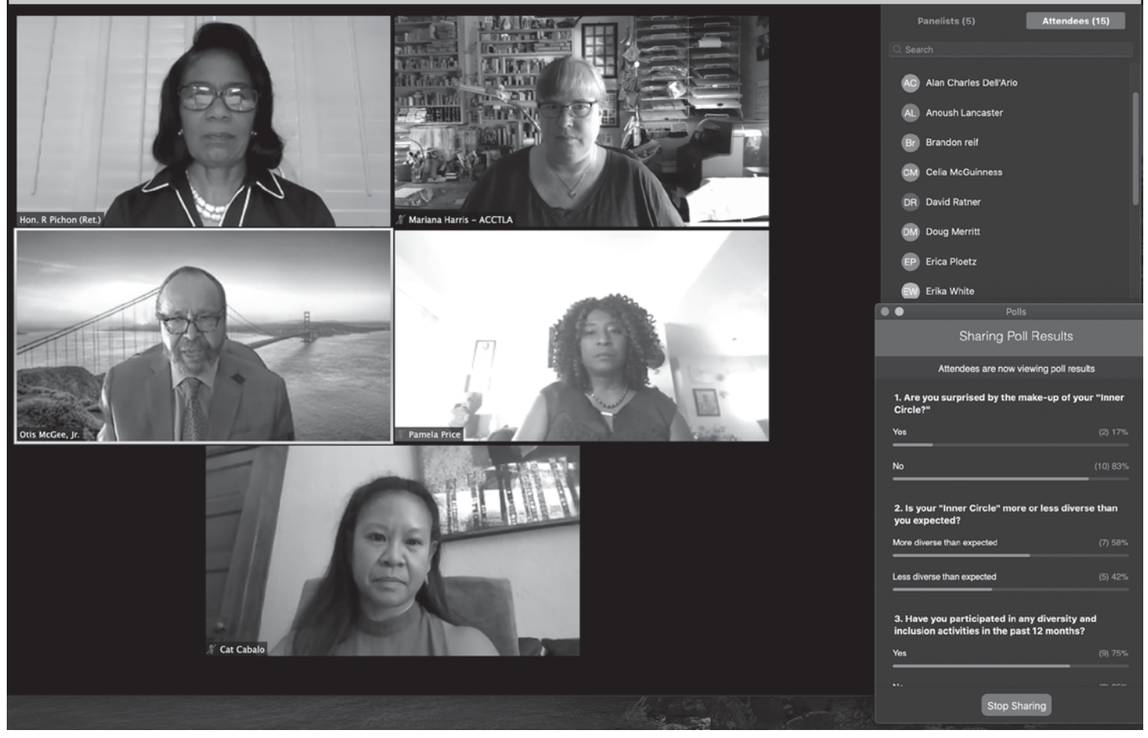
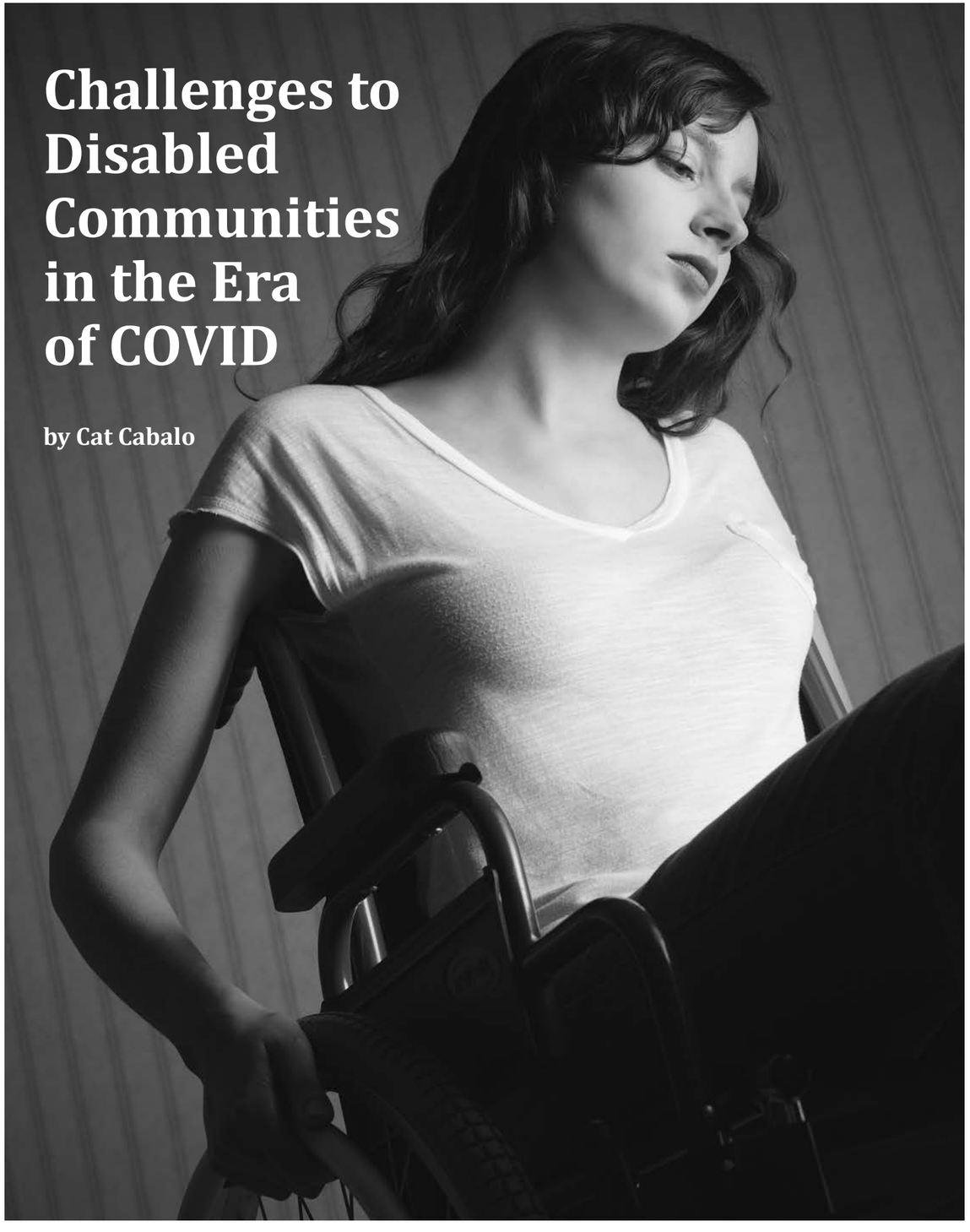


Challenges to Disabled Communities in the Era of COVID



by Cat Cabalo

The "new normal" we live in due to COVID-19 challenges all of us to live our lives without exposing ourselves or others to the deadly virus. We have learned to make sacrifices in our day-to-day operations, but the "Era of COVID" presents particularly harsh challenges for people with disabilities. This article summarizes of some of the issues being discussed in disability rights groups about the application of the Americans with Disabilities Act of 1990 ("ADA") and other access laws since the pandemic first began to take hold of our country.

HOW TO "VALUE" A LIFE: RESOURCE TRIAGING

As COVID cases grew at an exponential rate in many areas of the country, it became evident that medical resources, particularly ventilators, would not be available to all patients in need if we didn't "flatten the curve." Sadly, very troubling policies and screening criteria emerged. For example, for a decade prior to COVID, the state of Alabama's ventilator triage criteria indicated that persons with severe or profound intellectual disability are poor candidates for ventilator support. See https://www.al.com/news/2020/04/alabama-disavows-plan-to-limit-ventilators-for-disabled-during-shortages.html

An op-ed piece published in the New York Times in mid-March addressed rationing of medical resources and allocation of life-saving treatments in low supply: https://www.nytimes.com/2020/03/12/opinion/coronavirus-hospital-shortage.html. This discussion sparked disability rights advocates to speak out against such "Darwinian triaging." See for example:

• https://www.newyorker.com/news/our-columnists/who-is-worthy-deaf-blind-people-fear-that-doctors-wont-save-them-from-the-coronavirus?utm_source=facebook&utm_medium=social&utm_campaign=onsite-share&utm_brand=the-new-yorker&utm_social-type=earned

• https://www.washingtonpost.com/outlook/2020/04/06/coronavirus-ventilators-disabled-people/).

After receiving letters from disability rights organizations from all over the country, the Office of Civil Rights and the U.S. Department of Health and Human Services issued the following statement in a bulletin in late March:

Persons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person's relative "worth" based on the presence or absence of disabilities or age. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient based on the best available objective medical evidence.

https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf.

As COVID cases pick up and surge in various parts of the country, we must be vigilant to oppose any attempts to revisit such discriminatory policies in the future.

COMMUNICATION BARRIERS

People with various disabilities are also losing communication resources because of COVID restrictions. In many areas of the country, service providers and sign-language interpreters were not originally deemed "essential" workers. This left hearing disabled individuals without any assistance or way to communicate.

COVID safety protocols that limit a patient's ability to bring a family member or other helper into the hospital render patients with hearing and/or speech impairments unable to communicate with health care workers. These protocols ultimately deny these patients equal access to medical treatment, effective communication, and the ability to make informed decisions and provide consent. These barriers may mean the difference between life and death, so it is important to educate patients of their rights and what accommodations should be made for them. An excellent resource for patients is the COVID-19 Communication Rights Toolkit by CommunicationFIRST: https://communicationfirst.org/covid-19/. ▶

Ensuring disabled communities receive access to real-time COVID information has also been a struggle. Only after advocacy organizations for the deaf and hard-of-hearing took action did various jurisdictions include sign-language interpreters for televised COVID briefings. But not all jurisdictions have removed these communication barriers. For example, Disability Rights Florida and the National Association of the Deaf recently filed suit in federal court to compel Florida's Governor Ron DeSantis to provide sign-language interpreters immediately so that all residents can receive real-time information and recommendations: https://www.nad.org/2020/07/14/complaint-filed-against-florida-governor-for-violating-ada-laws/. The fight for basic information to keep us all safe continues.

> "Only after advocacy organizations for the deaf and hard-of-hearing took action did various jurisdictions include sign-language interpreters for televised COVID briefings.

INACCESSIBLE TECHNOLOGY

With the transition to remote working and distance learning comes challenges with technology not being accessible. Zoom may not be fully accessible to blind users who rely on screen-reading technology (for example, when Zoom's screen-sharing function is used). Similarly, Zoom attendees who are deaf and hard-of-hearing face barriers when using the platform if communication accommodations, such as closed captioning, are not provided.

Within our own law practices, these technology barriers limit access to justice as we see more courts move to video conferencing for hearings, settlement conferences, and even trials. A few resources to consider:

- https://disabilityin.org/resource/covid-19-response-accessible-tools-and-content/
- https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/zoom-accessibility-tips.pdf
- https://www.nad.org/videoconferencing-platforms-feature-matrix/.

THE DOUBLE-EDGED SWORD OF A MASKED POPULACE

We can all agree that wearing masks in public will help stop the spread of COVID. However, requiring masks has unintended consequences for the millions of hearing disabled who depend on lip-reading. People who were once able to get by with lip-reading are now unable to understand others with mandatory masks in public. This barrier poses problems in day-to-day interactions. The implications are much more serious when these individuals attempt to access medical care, as noted above.

Another challenge posed by mandatory masks is the growing number of Americans who have started using the ADA as a shield to argue that they should not be forced to wear a mask in public spaces, often arguing that they have a respiratory condition that prevents them from wearing a mask. This has been a particularly hot topic in the area of disability rights, as the opportunity for abuse of the ADA is high. In response to people without disabilities encouraging others without disabilities to use this ADA "loophole," Snopes.com catalogued many of the claims and included quotes from a number of disability rights organizations in response: https://www.snopes.com/fact-check/able-bodied-ada-mask-loophole/.

> "We can all agree that wearing masks in public will help stop the spread of COVID. However, requiring masks has unintended consequences for the millions of hearing disabled who depend on lip-reading.

OTHER CHALLENGES

Sadly, this article just scratches at the surface of all of the access barriers that are emerging in this era of COVID. A few other COVID-related barriers are as follows (please note that website links are provided as examples for context, not as an endorsement of their content or a representation that the content is all-inclusive):

- Barriers to getting COVID testing and how this affects COVID reporting and statistics: https://www.statnews.com/2020/06/12/dearth-disability-related-covid-19-data-confound-response-efforts/.

The effects of COVID on disabled populations in institutional settings, such as group home/care facilities and prisons: https://rootedinrights.org/the-covid-19-pandemic-makes-it-clear-its-time-to-permanently-close-institutions/.

As restaurants create outdoor dining areas in an essential move to stay alive, jurisdictions that do not ensure appropriate sidewalk widths remain unobstructed by new dining areas may render the public right of way inaccessible to people who use wheelchairs and other mobility aids: https://usa.streetsblog.org/2020/05/21/covid-19-outdoor-dining-already-squeezing-walkers/.

And finally, as we all wait with bated breath for Election Day, we need to question whether absentee voting is accessible to all — for example, in jurisdictions that do not have Braille ballots or trained staff to assist visually disabled voters: https://browngold.com/files-motion-hold-secretary-state-benson-contempt-violating-agreement.

This past July 26, 2020 marked the 30th anniversary of the passage of the ADA. We have made great strides since its enactment to take down barriers that prevent disabled individuals from living independent lives free from discrimination, but our work is far from over, especially as we navigate the era of COVID together. ◆

— Cat Cabalo is Of Counsel with Peiffer Wolf Carr Kane & Conway and her practice is focused on disability rights. She has handled a variety of federal and state cases in California and Washington state through trial and appeal, including in the Ninth Circuit Court of Appeals and the Washington State Supreme Court. Cat and her co-counsel made legal history in Nevarez v. Forty Niners Football Company, a certified class action in the U.S. District Court for the Northern District of California on behalf of approximately 5,000 class members with mobility disabilities who were denied equal access to Levi's Stadium, by securing a settlement that includes a $24 million damages fund, the largest class damages fund ever achieved in a disability access case.

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Civil Rights Cases in the Wake of George Floyd

by Dan Horowitz

As 17-year-old Darnella Frazier bravely filmed the killing of George Floyd, people milled around, expressed outrage but took no direct physical action to save Mr. Floyd's life. If they had, Mr. Floyd would have survived and they would have been arrested and potentially convicted of assaulting a police officer. Under California law, early intervention under the George Floyd facts may not have been legally justified until late in the incident. The jury instruction for self-defense/defense of others to an assault (CACI 1304) instructs that the person intervening must have "reasonably believed" that unlawful harm was going to be caused. The belief is based upon all of the circumstances. (*See J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 976) The connection between excessive force and unlawful harm is murky. They are not necessarily identical.

The Minneapolis police department has approved pressing a knee into the neck of a suspect. The department limited this type of potentially deadly force to life or death situations. (Neil MacFarquhar, "In George Floyd's Death, a Police Technique Results in a Too-Familiar Tragedy," *New York Times,* May 29, 2020.) Watching the Floyd's murder video, it is obvious that Mr. Floyd was not posing a threat to anyone. However, this is not the same as saying that there was imminent harm right at the inception of the knee crush. Somewhere during those painful minutes, the crushing force became harmful and ultimately deadly, but it is a question of fact as to when. The earlier someone intervenes, the better chance of survival for the victim, but the more likely that a criminal charge will be sustained against the intervener.

Consider the case in Denver, Colorado, of a mentally challenged but completely harmless man, Elijah McClain. He was killed when police applied crushing pressure to his neck. The force was excessive given the complete lack of threat from this polite and frightened young man, but to an outside observer the quantum of force was not obviously "imminently" dangerous. An intervention would have saved Mr. McClain's life, but it is not clear that someone intervening would escape criminal prosecution.

> "Somewhere during those painful minutes, the crushing force became harmful and ultimately deadly, but it is a question of fact as to when.

For policy reasons, the common law right to resist an unlawful arrest has been eliminated. Penal Code Section 834a states that a person cannot resist an arrest even if the arrest is unlawful. A person can, however, resist excessive force. There is peril in such resistance, legally and personally. The "reasonable person" standard usually falls against the accused and in favor of law enforcement. The jury instruction for self-defense requires "reasonable belief" and "imminent harm." (See CALCRIM No. 3470.) If accepted, this rule could justify even mistaken interference during an arrest.

But the wiggle room cuts both ways. Under federal law, the officers are not committing a Fourth Amendment violation simply because they use bad judgment or use more force than necessary. As the Ninth Circuit held in S.*B. v. County of San Diego* (9th Cir. 2017) 864 F.3d 1010, 1013–1014, "[W]e must judge the reasonableness of a particular use of force 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight ....'"

This broad language is a great source of frustration to persons suing on an excessive force theory. It is also a risk to attorneys who take civil rights cases on a contingency.

Better charted than the concept of physical intervention is the area of First Amendment protected police criticism. Many times citizens are arrested for "contempt of cop" and invariably the arrest report will add elements of a present threat accompanying the words. Absent a credible present threat conveyed by the words, verbal criticism, even verbal attacks are protected. Recently, in the context of the recent Black Lives Matter protests, a Seattle District Court stated "[T]he First Amendment 'protects a significant amount of verbal criticism and challenge directed at police officers.' (*City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987) [explaining that yelling obscenities and threats at a police officer is still protected under the First Amendment)]" (*Black Lives Matter Seattle-King County v. City of Seattle, Seattle Police Department* (June 12, 2020), W.D. Wash., No. 2:20-CV-00887-RAJ, 2020 WL 3128299, *1.)

California courts and the Ninth Circuit provide strong support for First Amendment expressions of frustration vented toward police. While the police may resent having abusive language "directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." (*Duran v. City of Douglas* (9th Cir.1990) 904 F.2d 1372, 137; *People v. Quiroga* (1993) 16 Cal.App.4th 961, 966).

The U.S. Supreme Court has created a First Amendment exception for "fighting words" (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568.) But in the context of police criticism, challenges to that exception are very likely. The presence of body worn cameras is a major cure for false accusations of fighting words to justify a contempt of cop arrest.

We recently filed civil rights cases on behalf of men arrested in Richmond, California for interfering with law enforcement through strong verbal criticisms. The videos of the arrests can be seen at https://www.youtube.com/watch?v=6Y1jW6f3Hzk and https://www.youtube.com/watch?v=qFfO-K4Jw4s.

In each case, the officers' written reports attempted to justify the contempt of cop arrest upon their claim of imminent threat(s) associated with the statements. District Attorney Becton and senior prosecutors reviewed the videos and disagreed. In dropping the charges against the civilians, Becton stated: "Our decision was made after a careful and thorough review of submitted evidence, including body worn camera video and police reports.... The complete breadth of evidence revealed that we could not in good faith proceed with the criminal prosecution against these men." (Nate Gartrell, Days after Officer Body Cam Video Was Published, Contra Costa DA Drops Charges Against Richmond Men Accused of Resisting Arrest, Mercury News, https://www.mercurynews.com/2020/06/20/days-after-officer-body-cam-video-was-publicized-contra-costa-da-drops-charges-against-richmond-men-accused-of-resisting-arrest/(June 20, 2020).) District Attorney Becton then adopted a policy barring the filing of PC 148 and PC 69 charges until a prosecutor has reviewed the actual body cam footage.

I remember being ten years old and marching with my parents in massive demonstrations for civil rights in the '60s. In that child's brain, it appeared that in a short time, all of these issues would be fixed. Sixty years later, we are just scratching the surface of many of these problems. With the advent of video cell phones and body worn cameras, perhaps the voices of Rev. King, Malcolm X and the people who are our friends, neighbors and colleagues will now be understood in a more personal and more compelling context with a deeper understanding of the pain and anger that systemic injustice creates. ◆



—Dan Horowitz is a trial lawyer who attributes his expertise to the training given to him by the true great attorneys and mentors: Stanley Golde, Al Delucchi, Jackie Taber, Clint White, Joe Moruzumi, Spencer Strells and Dick Bridgman. These great champions for justice paved the way for younger attorneys to take up the mantle. We can never come close to achieving their exceptional standards but we can measure ourselves by them and always strive to achieve more.

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This program is not just for newer attorneys, but also is available for seasoned practitioners who run into problems or simply want to bounce ideas off another seasoned practitioner. The mentors — who are all ACCTLA members — have varied degrees of experience in varied areas of the law, and can address your concerns regarding Motions in Limine, jury selection, problems that arise during trial or issues relating to proposed instructions, or questions involving any of the earlier stages of litigation.

For further information, please contact:

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Making Room at the Table

Bostok v. Clayton County, Georgia

by Ron Shingler

Three employers fired long-time employees for being gay or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R.G. & G.R. Harris Funeral Home fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964 (hereinafter, "Title VII"). In a landmark civil rights decision, the United States Supreme Court held that an employer who fires an individual for being gay or transgender violates Title VII of the Act.[1]

Justice Neal Gorsuch, writing for a 5-4 majority, crafted a liberal and progressive opinion all the while applying a traditional Scalia-like conservative analysis of the law.[2] The entire opinion hinges on the statutory meaning of the word sex as that term is used in Title VII.[3] The Court normally interprets the meaning of a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.[4] So, in 1964, what meaning did Congress ascribe to the word sex?

Employers argued that, in 1964, the word sex meant either female or male as determined by reproductive biology. Employees countered that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation.[5] The Court reasoned that those who adopted Title VII did not likely anticipate that the word sex would come to include not only biologic males and females but also people who are lesbians, gay, transgender, and bisexual.[6] Nor did Congress foresee that the Title VII prohibition against sex discrimination would one day preclude discrimination against mothers or the sexual harassment of males. As Justice Gorsuch noted, the limits of the drafters' imagination supply no reason to ignore what the law demands.[7] The Court concluded that the express terms of a statute give one answer and extratextual considerations suggest another, it's no contest.[8] Only the written word is the law, and all persons are entitled to its benefit.[9]

The Court conceded the written word is sex, and for argument's sake, the Court proceeded on the assumption that, in 1964, sex referred only to biological males and females.[10] The Court noted, however, that this assumption is just a starting point.[11] From the ordinary public meaning of the statute's language at the time of adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on "sex." This rule, when applied to Bostok and its companion cases, compels the conclusion that an individual's sexual orientation or transgender status is not relevant to employment decisions, and firing an employee based on these factors is contrary to law.[12]

Why? Because it is impossible to discriminate against a person for being gay or transgender without discriminating against individuals based on "sex." If a man who is attracted to men is terminated while a woman who is attracted to men is not, then the man who is attracted to men suffers impermissible discrimination based on his sex.[13] Similarly, if a transgender woman who was born as a biologic male is terminated while a woman who was born a biologic female is not, then the transgender woman suffers discrimination based on sex because she was born a biologic male while her counterpart was born a biologic female.[14]

Unlike others in the Nation's Capitol, Judge Gorsuch notes that "[o]us is a society of written laws . . . In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

And with an artful application of Originalist principals to progresseve realities, five Supreme Court Justices made room at the table for our Rainbow Brothers and Sisters. ◆



—Ron Shingler is the founder of Shingler Law, a firm in Walnut Creek comprised of seven professionals who represent people suffering from mesothelioma. Mr. Shingler is the son of an asbestos plant worker. He can be reached at ronshingler@shinglerlaw.com.

[1]Bostock v. Clayton County, Georgia, No. 17-1618 U.S., June 15, 2020, Syllabus, p. 1, ¶¶1&2. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed. Id.

[2]Gorsuch, J., delivered the opinion of the Court, in which Roberts, C.J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed a dissenting opinion, in which Thomas, J., joined. Kavanaugh, J., filed a dissenting opinion.

[3]Title VII outlawed workplace discrimination based on race, color, religion, sex or national origin. Id. at p. 2, ¶1. Sex is the only category examined by the Court in this case.

[4]Bostok v. Clayton County at p. 4, ¶1, paraphrasing Justice Gorsuch.

[5]Id. at p. 5, ¶1.

[6]Id. at p. 2, ¶2.

[7]Id.

[8]Id. at p. 2, ¶2.

[9]Id., paraphrasing Justice Gorsuch.

[10]Id. at p. 5, ¶1.

[11]Id.

[12]Id. at p. 9, ¶¶1-2.

[13]Id. at p. 9, ¶2.

[14]Id. at p. 10,¶1.

The Art of Preparing for the *Unexpected and the Expected*

by Terry Banks

Most of us have seen or heard recent advertisements that use a phrase similar to "in these uncertain times." Yes, 2020 has brought us many seemingly unprecedented events, but history tends to repeat itself.

Covid-19 has its predecessor in the 1918 Spanish Flu. The spread of the virus and the way citizens reacted at the time are eerily similar to what we are experiencing today. History also repeats itself in the context of racial injustice. Our Black Lives Matter movement at its center harkens back to the Civil Rights Movement that spanned much of the late 1950s into the 1960s.

Systemic racism in its many forms is woven into the policies and practices of the U.S. justice system, education, employment, financial services, housing, health care, food security, the media and more. The toll of this double standard has, in effect, created second class citizenship for many Black people for generations. In 2016, the net worth of Black families was just 10% of White families. These inequalities and inequities have exacerbated the impact of Covid-19 on Black Americans.

We now know that the U.S. has been in a recession since February 2020. While recessions are cyclical and therefore should be somewhat expected, the timing of this one has been and will be devastating for many of us. Adding to the financial uncertainty of the recession, the Great Shutdown began affecting some businesses almost immediately with mandatory closures. Many businesses that are deemed essential face increased costs to remain open on one hand, with decreasing patronage on the other. This reduction in profitability affects the number of employees they retain or let go. Unemployed and furloughed employees are part of the population that supports our 66% consumer economy. From 2009 to 2013 household savings rates increased in response to the Great Recession. After 2013, complacency began to settle in and savings rates fell until rising sharply in March of 2020.

As a Financial Coach, I work with my clients to understand and prepare for both predictable and unexpected life events. This is especially important now in the context of Covid-19, the recession and systemic racism. Together we create a sustainable system of efficient money management that fosters being intentional and proactive. With clarity brought by a clear and well-established budget, the spending plan can highlight for them the highest and best use of their money based on their goals. Together we address the best way of balance enjoying the present with future security.

My clients learn how to start, fund, grow and maintain an emergency fund with the intention of using it as a foundation for building wealth. An emergency fund is a basic tool that can be used as protection against less prudent alternatives such as using a credit card or tapping into a 401k. Not being able to pay the credit card in full exacerbates that initial emergency thanks to compound interest. Accessing retirement funds becomes very costly when state and federal taxes and penalties are factored in. There are also opportunity losses from not having those funds in the market. Having an emergency fund in place acts as an insurance policy against relying on usurious consumer debt or liquidating retirement assets.

Covid-19 has illuminated the reality that many essential workers employed in public-facing jobs are Black, Indigenous and People of Color (BIPOC). Often, these are low paying jobs with limited benefits and perks including healthcare. Even if the company offers a 401(k) plan, the compensation is so low that it essentially denies the employee the opportunity to contribute to the plan. This increases the fragility of someone living under sustained financial strain compared to higher compensated employees that use their 401(k) plan to build wealth.

Becoming a homeowner is a goal for many people who want to experience that aspect of the American dream. First-time homebuyers who will also be first-generation homeowners likely don't have the luxury of a support system of family and friends to turn to for sound advice.

For this reason, another facet of my services is to help my clients understand the ins-and-outs of the home buying process because financing a down payment, closing costs, reserves, renovations and furnishings can be daunting. A small misstep in what may be their largest expenditure can have lasting effects on their lives as well as future generations. ▶

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Additionally, clients who own their homes can reduce the life of their mortgage and interest payments by implementing a variety of simple but powerful techniques. One of these techniques is to create your own biweekly mortgage by making half a payment every two weeks and after one year the equivalent of 13 payments has been made. This extra month reduces the length of loan repayment and increases equity which builds stability in a recession or creates opportunity in good times. It's important to note that this only works if the loan does not have prepayment restrictions.

Home equity can be used to build a family legacy. Equity can be used for down-payments for the next generation, college tuition, funds to start a business, or home improvement projects. Depending on the savviness of the homeowner, the equity can be used for other investments like real estate and stock. Unfortunately, the ability to build home equity has been challenging for BIPOC for a variety of reasons including restrictive covenants, eminent domain, redlining and predatory lending. These practices and policies, in addition to blockbusting, white flight and gentrification adversely affect individuals as well as communities.

Working with me can also have a lasting impact for your clients who win settlements. Like winning the lottery, clients who receive a settlement may not have the financial literacy to handle the pressure of managing large sums of money. While this money should represent the end of an arduous journey it can turn out to be just the beginning. Family, friends and strangers will likely contact them with requests for gifts, loans and investments. These funds are an opportunity to change the trajectory of their lives. Without the tools to navigate this new reality, they may not be able to take full advantage of the opportunity to leave a lasting legacy for their family.

Financial literacy is fundamental at every economic level but it is especially important for those who have been excluded from fully participating in the American dream. My focus is guiding professionals who feel frustrated with living paycheck to paycheck so that they can achieve financial security. I meet my clients where they are on their financial journey to support them in bridging the gap. I would appreciate the opportunity to be included on your post-settlement financial team in order to reduce the dissipation risk for your clients. ◆



—Terry Banks is the principal at Bank On It Financial Coaching, where she specializes in guiding professionals, singles and couples who feel frustrated with living paycheck to paycheck so that they can achieve financial security. To learn more about her, visit www.bankonitfc.com.

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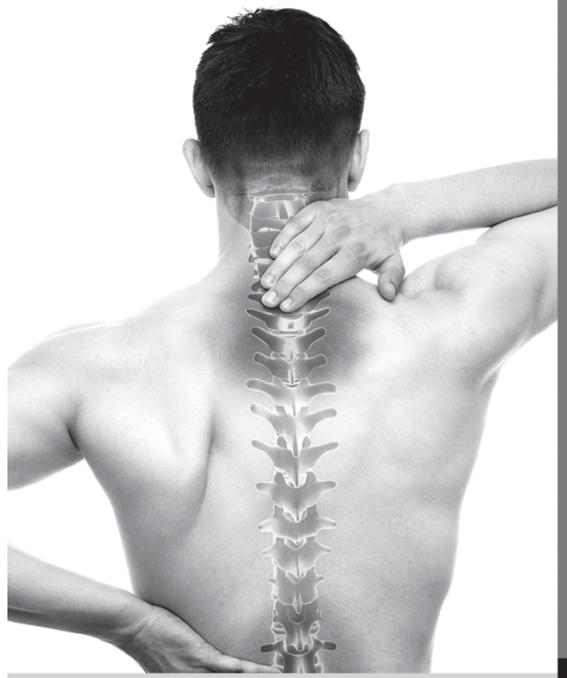

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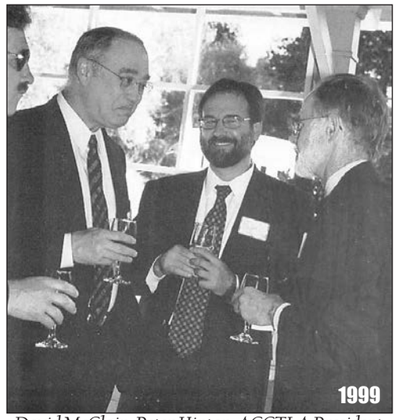
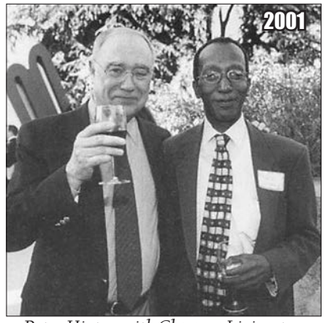
ACCTLA Socials Through the Years



David McClain, Peter Hinton, ACCTLA President Peter Alfert and Contra Costa Judge Richard Patsey



Peter Hinton with Clarence Livingston



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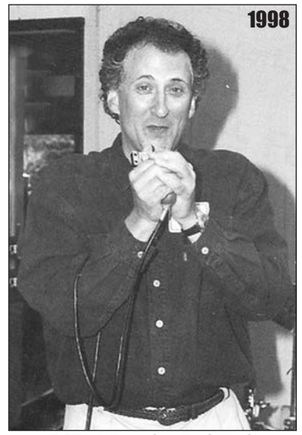

ACCTLA President Rick Baskin on harmonica



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Top 10 Tips for Law Firms Re-Opening During a Pandemic

by Terry R. Leoni

With the relaxing of shelter-in-place orders in Alameda and Contra Costa counties, many lawyers and law firms have, at least partially, re-opened their office and begun employee re-entry. But, are they doing it safely? Because employers have an affirmative duty to maintain the health and safety of their employees, it is crucial that employers understand legal issues associated with COVID-19 (C19) and critical to implement written policies that ensure the health and safety of their employees. Lawyers and law firms are no exception, and must avoid the "do as I say and not as I do" mentality.

As a "full-service" firm that represents employees in a myriad of matters - from discrimination, harassment, and retaliation cases to severance agreements to workplace investigations — and provides advice and counsel to businesses, I am no stranger to C19 issues on both sides of the fence. In fact, I have a long list of what employers should not be doing. But, rather than bore you with horror stories, I thought I would provide my best practices for re-opening a law firm.

Like David Letterman, I am big a fan of "Top 10" lists. So, drum roll please Paul... the following is a list of my "Top 10 Tips for Law Firms Re-Opening During a Pandemic."

Re-Opening "Expert." Federal, state, and local orders and directives change daily and, at times, hourly. California has attempted to create a clearing house of information at www.covid19.ca.gov; however, it does not always encompass updates in county regulations or federal directives from OSHA or EEOC. As such, I suggest creating a firm task-force or assigning an employee to be a "C19 expert" of sorts to stay up-to-date on evolving C19 issues, implementing new policies and protocols when needed, and communicating changes to the team. If nothing else, have an HR advisor or attorney at the ready.

Cleaning & Disinfecting Protocols. Cleaning refers to the removal of dirt, germs, etc. from surfaces, whereas disinfecting uses chemicals to kill germs and bacteria. (Who knew there was a difference?) I advise disinfecting the office prior to re-opening and consider upgrading the air and filtration systems. In addition, implement a written cleaning and disinfecting policy that includes cleaning and disinfecting of high-trafficked and touched areas and frequently used or shared equipment and workspaces. Also, maintain a sufficient stock of supplies, preferably what is on the EPA approved list: www.epa.gov/coronavirus/disinfectant-use-and-coronavirus-covid-19. There is no such thing as being "too clean" these days.

Maintain Social Distancing Protocols. Limit in-person contact, restrict in-person meetings or limit the number of attendees to safe distances apart, reconfigure open workspaces to 6-feet apart where feasible, and consider additional mitigation efforts within the office, including keeping office doors closed and adding Plexiglas to open cubicles. Even in an office environment, safe social distancing is possible and must be enforced.

Close and Limit Shared Spaces. Conference rooms, kitchen, and restrooms should be limited to one-person at a time, and mandate cleaning and/or disinfecting of surfaces touched in all shared spaces. Any non-essential shared space should be closed.

Proper PPE and Employee Hygiene. Require proper PPE within the office, such as masks, shields, or other face coverings. Consider supplying sanitation products, such as hand wipes and sanitizer to all employees, and consider adding sanitization stations at all entrances and exits. Although it may seem silly, remind employees of good hygiene when washing hands, sneezing, and coughing, and permit additional time to maintain proper hygiene.

Modify Employee Schedules and Continue Telecommuting. One of the best ways to minimize contact within the workplace and maintain a safe environment is to limit employees in the office. When feasible, permit employees to continue to work from home part or full-time. I also suggest staggering employee shifts, meal, and rest breaks to allow for proper social distancing and avoid congregating.

Screening and Verification for Employees and Guests. Because C19 is considered a direct health and safety threat, ADA and FEHA requirements are relaxed. Accordingly, employers are permitted to, and should, inquire about C19-related medical issues. I recommend that employers implement a daily screening process that mandates employees and visitors verify that they are not currently experiencing C19 symptoms (and list the symptoms), they have not tested positive for C19, neither they nor a member of their immediate household have been ordered to quarantine by a medical professional, and they have not been in close contact with someone who has tested positive for C19 or been ordered to quarantine by a medical professional. Temperature screening is permissible as part of this daily screening, with a threshold of 100 degrees or higher. It is important to note that all medical information must be maintained confidentiality and kept separate from an employee's personnel file.

Update Wellness and Leave Policies. In addition to screening requirements, employers should require employees to stay at home when sick, immediately report experiencing any C19 symptoms, if they test positive for C19, if they have been exposed to C19, and/or if they have been ordered to quarantine by healthcare professional as a result of C19. Any employee who reports this information while at work should be immediately sent home. Employees should not be permitted to return to work unless and until they are cleared by a medical professional. Likewise, employers should send anyone who experiences C19-related symptoms home and require a return to work clearance. It goes without saying that this policy should be in writing, noticed to employees, and enforced consistently.

Families First Coronavirus Response Act (FFCRA) Compliance. Any employer with fewer than 500 employees must provide emergency sick leave and emergency family leave to any employee, full and part-time and contract, who is unable to attend work due to certain C19 qualifying events. Detailed requirements and specifications can be found on the Department of Labor's website: www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave#:~:text=The%20Families%20First%20Coronavirus%20Response,reasons%20related%20to%20COVID%2D19. Employers must also display the FFCRA poster, which can also be found on the DOL's website. The DOL is now strictly enforcing these mandates, and appears to strongly favor protecting employees.

No Discrimination, Harassment, or Retaliation. All re-opening, return-to-work, health and safety, and leave policies and decisions must be made and implemented free of discrimination, harassment, and retaliation, and enforced in a consistent manner. It also is critical to remind employees that discrimination, harassment, and retaliation of any kind, to include related to C19, will not be tolerated.

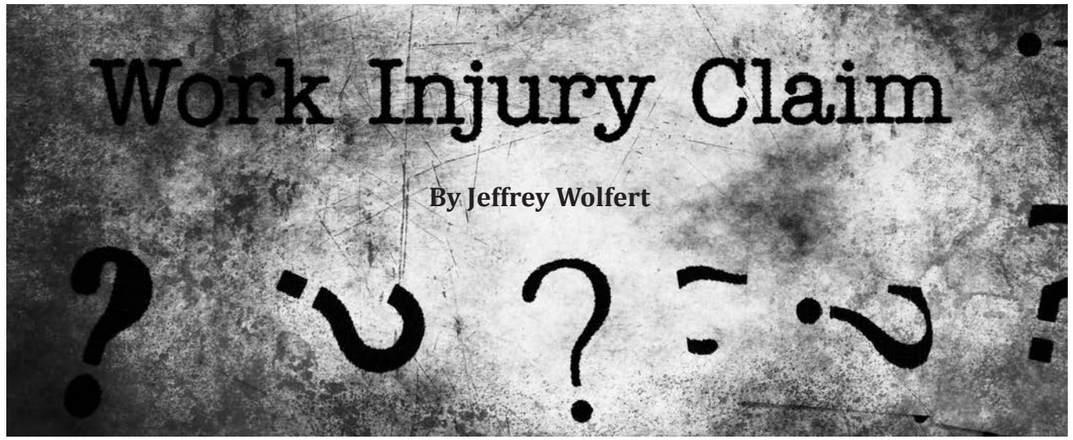
Of course, the list is not exhaustive, so lawyers and law firms are wise to tailor their plans, protocols, and policies for their individual needs. Similarly, be sure to revise and update when local, state, and federal orders change.

While I am clearly no expert in comedy, I can assist with any labor and employment questions, concerns, and guidance. ◆



—Terry R. Leoni is the Founder and Principal of Leoni Law, a full-service labor and employment firm. She handles matters for public and private employees, businesses and entrepreneurs, and professional licensing defense. She also represents victims of crime in both criminal and civil actions. You can find more information at www.leonilawfirm.com, follow her on LinkedIn at www.linkedin.com/in/terryleoni/ for the most up-to-date information, or email her at tleoni@leonilawfirm.com.

COVID-19 Diagnosis
Does Workers' Compensation Law Apply?



For months we have been adjusting our personal and professional lives around the issues related to COVID-19. While we have learned a lot about the virus, there are still many unanswered questions. My firm has been asked by attorneys from different specialties on how the workers' compensation law will treat workers who contract COVID-19. Like many, in March I was quick to produce a video or provide opinions when the effects of the virus were in its infancy. Since then, we have learned a few things.

While workers' compensation laws provide compensation for "occupational diseases" that arise out of and in the course of employment, many state statutes exclude "ordinary diseases of life" (e.g., the common cold or flu). There are occupational groups that arguably would have a higher probability for exposure, such as healthcare workers. However, even in those cases, there may be uncertainty as to whether the disease is compensable.

At the onset of the pandemic, it appeared that it was all or nothing when it came to workers' compensation benefits. As a community, it was thought that if you contracted the virus, you either would be gravely ill or you would not suffer from more than temporary flu-like symptoms.

Before California closed its doors, it appeared that it would be difficult to prove COVID-19 was contracted at work. We were all still moving around during that time. Unless you were working in the emergency room or other health-related location, who could prove the virus was contracted at work? We expected survivors faced an uphill battle. We expected that those infected would be off work for a few weeks, at most, and be back to normal. Maybe it wasn't even worth filing a claim because you could use sick time or get state disability and not bother to go down the difficult path of a workers' compensation case.

How things have changed since early March. A dedicated group of essential workers — whether voluntarily, forced by our federal government or because of economic pressure — was working on the front lines as the risk of serious illness and death increased each day. These essential workers were not just healthcare workers but medical providers of all types: grocery store workers; waste collectors; transit workers; farm workers, etc. Because of the lockdown that kept nonessential workers at home, it was more likely that if someone contracted COVID-19 and was an essential worker, he/she was more likely than not to have been exposed to the virus at their place of employment. We give Governor Newsom credit for acknowledging this fact by establishing a legal presumption for these workers during this period of time.

PRESUMPTION

Governor Newsom issued Executive Order N-62-20 on May 6, 2020. This order creates a rebuttable presumption for any employee who contracts COVID-19 that the injury arose out of and in the course of employment. The presumption applies under limited circumstances and for a limited time period.

All of the following requirements must be satisfied:

The employee tested positive for, or diagnosed with, COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction; the diagnosis occurred between March 19, 2020 and July 5, 2020; the place of employment was not the employee's home or residence; the diagnosis was performed by a physician who holds a physician and surgeon license issued by the California Medical Board; and the diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.

The presumption is rebuttable but must be denied within 30 days, (shortened from 90 days to 30 days) unless rebutted by evidence only discovered subsequent to the 30-day period. When an employee is entitled to paid sick leave benefits, specifically available for COVID-19, those benefits shall be used and exhausted before any temporary total disability (TTD) benefits or benefits under Labor Code section 4850 (specific to law enforcement and firefighters) are due and payable. If such sick leave benefits are not available, the employee must be certified for TTD every 15 days.

PERMANENT DISABILITY (NON DEATH CASES)

The lungs are the main organs affected by COVID-19. However, other organs of the body can be permanently damaged, such as the stomach and intestines, heart, blood vessels, blood clotting that leads to higher risk of stroke or heart attack, liver, kidneys, and brain (dizziness, loss of smell, strokes), among others.

DEFENSES

The defenses are numerous. We know some employers are being advised not to start the workers' compensation process by withholding a claim form (DWC-1 form required when notified of work injury). Their position is that employees are no more at risk than the general population, as with other community-based diseases, and that the employer should not advise employees that they are entitled to workers' compensation benefits. This is not true for "high risk" jobs where the likelihood of contracting COVID-19 is more likely than the general public. Bu, more importantly, the employer is required by law to provide a claim form if a worker asks for a claim form. As we know, workers might be hesitant to do so given the tight job market and risk of retaliation.

Even if causation can be shown, apportionment will remain an issue (reduced liability for permanent disability benefits due). Did the injured worker have pre-existing health issues that made him/her more susceptible to disability from the virus?. Many of those who have had negative outcomes from the virus reportedly had some underlying health problems. While this will not be an issue for a death claim (no apportionment), those who survive and have permanent disability may have reduced awards due to pre-existing health issues, despite the fact that these health issues never affected their ability to work in the past.

EVOLVING LAW

A worker's ability to obtain workers' compensation benefits from a COVID-19 diagnosis will evolve. Now that California is "re-opening," the presumption period will end. While proving AOE/COE will be more difficult without the presumption, it still can be proved.iIn most workers' compensation cases, the specific facts of each COVID case will dictate the likelihood of success. ◆



—Jeffrey Wolfert is a sole practitionr, who has been specializing in workers' compensation law for close to 20 years. He began in the field by representing insurance carriers before beginning to represent injured workers in 2009. He represents his clients in all aspects of workers' compensation law.

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JUST BREATHE!

Attending to Mental Health in the Time of COVID

Jayme L. Walker

This has been the most uncertain, traumatic, economically and emotionally devastating season in collective memory. It is difficult to write an article about tending to our emotional health without feeling overwhelmed by the need to address the disparities that racism and poverty have created in our society. Mental health can seem like one more privilege available only to those who can afford it. Yet hope, gratitude, breath and a sense of well-being can be powerful agents for change and those things don't always have to come with a price tag. They can come from having a strong community, getting involved, and being mindful of our own breath. When I set out to write this article to assist us all in addressing our anxieties and our mental health, my hope was that by tending to our considerable stress as trial lawyers that we can use our invigorated well-being to stand at the forefront of the fight for justice for our clients and be agents for positive change in the community

As the parent of a small child and a working professional, it can seem like each day is a never-ending to-do list where you fall down exhausted each night and never have time to just be present and enjoy the moment. So often I've found myself rushing from one deadline to the next with such a sense of urgency about my cases and my life, that when I am doing one thing all I am thinking about is the next thing that needs to be done. I've been so focused on preparing for a trial, a hearing, or even opposing a motion that I realize I am holding my breath. There have been many times in my life that I have been so stressed that I deteriorate physically with

"As the parent of a small child and a working professional, it can seem like each day is a never-ending to-do list where you fall down exhausted each night and never have time to just be present and enjoy the moment.

body pain, headaches, and fatigue. I must admit a strong feeling of imposter syndrome in writing a stress relief article at all. I vividly recall in law school lamenting to some classmates, that they might think I was calm and mellow but that I was really very anxious and high strung. My girlfriend looked at me and said point blank, "Girl, no one thinks you are calm and mellow." Ever since, I have been working to become calm and mellow, because I truly believe that is essential to being effective.

When we feel out of balance, we can't be effective. We are too exhausted and emotionally drained to take on one more thing or to really be present for a colleague or a client in need. If we all seriously attend to our own well-being, it can have some lasting and positive effects on our profession. Lawyers who aren't overstressed treat each other better. They are happier. They are more available to clients who are struggling. Most importantly, if we aren't so depleted from our stressful jobs and home life, we are more available to challenge systemic and institutionalized injustice in our communities.

I'm not a mental health professional or a mindfulness instructor, but the following techniques have been instrumental for me in reducing stress during this incredibly stressful time.

SET BOUNDARIES

Most of the techniques for reducing stress are common knowledge. We already know that they help. And yet, it is so easy to think to ourselves that we simply don't have time to add these things to our to-do list. That is why the first and most important step in reducing stress is to set boundaries. We live in a world of smartphones and email notifications. The pressure to be available 24/7 to our clients or ▶

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our fellow lawyers can be overwhelming. You need to set the example for your associates and staff that it is okay to take time away from work, to not be available after certain hours and to fully disengage on a vacation. If you are an associate or staff member, you should also set your boundaries and expectations early. You don't want to work for a firm that doesn't respect them. I hear so many lawyers say

> "You need to set the example for your associates and staff that it is okay to take time away from work, to not be available after certain hours and to fully disengage on a vacation.

that they never disengage. That they can't turn off their email on vacation. Yes, you can and you should.

BREATHE

Have you ever noticed while you are scrolling through your email, researching a motion and maybe scanning the news headlines that you catch yourself holding your breath? There is a documented syndrome for this. It's called email apnea. People often hold their breath or breath very shallowly while engaging in computer work like responding to email. In a new book, Breath, the New Science of a Lost Art, a Bay Area journalist James Nestor documents the effects of breathing improperly on our health, our immune systems, inflammation in the body, and mental health disorders like depression and anxiety. Nestor's book suggests breathing can cure ails from anxiety to scoliosis. If breath can cure disease, certainly, it can help the stressed out lawyer. You don't have to have a dedicated meditation practice to start to be more mindful of your breathing. When you are stopped at a red light, taking a shower, washing your dishes, try to focus on your breath. Breathe for a count of five through your nose and then exhale for a count of five through your nose. I've been trying to do this all day long. You just stop what you are doing and take in a few slow deep breaths. Exhaling longer than you inhale engages the parasympathetic nervous system and calms you down. Short shallow breaths or holding your breath triggers the sympathetic nervous system and puts you in fight or flight mode. As lawyers, we are in fight mode enough. We were not built to carry around little devices that constantly trigger our fight or flight responses. Every little ping on your phone alerting you to the news headlines of another tragedy or an email from an equally stressed out opposing counsel can engage a sympathetic fight or flight response. We need to counteract this with consciously engaging a parasympathetic response to ease these anxieties.

EXERCISE IN NATURE

As trial lawyers who live and practice in the Bay Area, we are blessed with access to astounding natural beauty. Leave your phone at your desk or in your car and take a hike. Walk on the beach. Again, don't take your phone with you or at least don't look at your email while you're out in nature. You can get two for one with this one, as both being in nature and at least 20 minutes of cardiovascular exercise have been shown to have dramatic effects on anxiety and well-being.

SHOW UP

I must tell you there are days that I believe I am constitutionally not cut out for this work. There are days when I feel the grind and toll of the stress starts to overshadow the triumphs of justice. What always gets

> "Every little ping on your phone alerting you to the news headlines of another tragedy or an email from an equally stressed out opposing counsel can engage a sympathetic fight or flight response.

me out of these funks is showing up and being inspired. Whenever I go to conferences with CAOC or CELA and listen to our colleagues tell stories about incredible results for deserving people, I feel inspired to keep showing up for my clients. When I meet with some of our members and talk about stress relief on zoom calls, I feel inspired and engaged by our members and their dedication to justice. Even when life feels too full to add one more thing to your calendar, sometimes you just have to show up. (But see #1, set boundaries because sometimes you also need to just go home and play with your kid.)

I'm sure most of you knew all these things would help relieve your stress. Sometimes, even the most common-sense things, things we already know, can seem profound when we put them in practice and stick with it. I can't tell you how much paying attention to my breath has changed my life. If something as simple as breathing has been shown to alleviate anxiety better than any drug, it's good to publish a reminder during such stressful and uncertain times. So here it is…BREATHE. ◆



—Jayme L. Walker is the ACCTLA President Elect and a partner at Gwilliam, Ivary, Chiosso, Cavalli & Brewer where she practices employment, catastrophic injury, sexual abuse/assault and police misconduct/ civil rights cases.

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Verdict: $932,293.09
November 26, 2019
Jeanette Gaub v. Safeway Stores, Inc.,
Alameda County Superior Court
Case No. RG16825586

Jeanette Gaub slipped and fell in a large puddle of water that was leaking from the ceiling in front of the checkstands at the Safeway store in San Leandro. The leak had been a persistent, unresolved problem at Safeway for several weeks before Ms. Gaub's accident, yet Safeway had placed no signs or barriers in the area to warn Ms. Gaub or prevent her fall. Her ankle was seriously injured and required three surgeries to repair. Her injuries and recovery prevented her from working at her job as a store clerk at Trader Joe's for nearly four years.

At the trial, the jury rejected Safeway's arguments that Ms. Gaub was partially responsible for her slip and fall, that the water did not amount to a dangerous condition, and that Safeway had taken adequate remedial steps to resolve the issue. The jury found Safeway 100% at fault and awarded Ms. Gaub $932,293.09, including prejudgment interest on her past lost earnings. Included in that jury verdict was an award of $665,511 in past and future pain and suffering.

Ms. Gaub was represented by Emily Dahm and Megan Burns of Bonjour, Thorman, Burns & Dahm.

Settlement/Award: $24,000,000 in Damages, $12,258,003.53 in attorneys' fees, and $1,199,148.87 in Costs
July 23, 2020
***Nevarez v. Forty Niners Football Company, LLC, et al.,* 2020 WL 4226517, 2020 U.S. Dist. LEXIS 131491, ---F. Supp. 3d --- (N.D. Cal. 2020)**

On July 23, 2020, just three days before the 30th anniversary of the passage of the Americans with Disabilities Act, Federal District Court Judge Lucy H. Koh granted final approval of the settlement agreement reached by the parties. That agreement provides for virtually all of the relief plaintiffs sought on behalf of the classes of persons with mobility disabilities and their companions who attended or will attend events at Levi's Stadium. This includes, most importantly, the remediation of over 2,600 access barriers at the stadium, its parking lots and pedestrian rights of way serving the stadium, as well as a $24 million damages fund for disabled class members that is one of the largest ever obtained in a case of this kind. The Court also awarded service awards to the three class representatives and awarded class counsel $1,199,148.87 in costs and expenses and $12,258,003.53 in attorneys' fees, which included a 1.125 multiplier. The Court approved requested hourly rates for most of Class Counsel, including a rate of $785/hour for Cat Cabalo.

Plaintiffs and the class are represented by Peiffer Wolf Carr Kane & Conway in San Francisco; Schneider Wallace Cottrell Konecky in Emeryville; and Goldstein Borgen Dardarian & Ho in Oakland.

Settlement: $13,330,000
October 11, 2019
Trevor Stotka v. Rosevelt Truck Lines, LLC, Farwest Safety, Inc., Bay Cities Paving & Grading, Inc., C.C. Myers, Inc., Bay Cities Paving & Grading, Inc., and C.C. Myers, Inc., a Joint Venture, Caltrans, et al.
Yolo County Superior Court
Case No. PM16-1098

This case arose out of a rear-end accident that occurred on eastbound Highway 80 ▶

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J. Gary Gwilliam and Randall E. Strauss

Colombo, et al. vs. BNC Mortgage, Inc., et al.

14 Years of Litigation Finally Lead to Justice and a $5,000,000 Settlement for Subprime Mortgage Predatory Lender Whistleblowers

J. Gary Gwilliam and Randall E. Strauss were proud to represent six women who worked for the Sacramento branch of BNC Mortgage, Inc. – a Lehman Brothers subsidiary. They worked as underwriters for the subprime mortgage lender. When they began to notice fraudulent lending practices in 2005, they alerted their supervisors. Rather than being rewarded for doing their jobs, they were told to ignore these illegal practices. Lehman Brothers was intentionally making home loans to borrowers who could not qualify for their mortgage loans by creating fraudulent loan files that overstated income.

The plaintiffs refused to "look the other way" and persisted in complaining to management that this activity was illegal and would lead to the borrowers losing their homes through foreclosure. Lehman Brothers did not want to hear it. They continued to make fraudulent loans and reap in profits – practices that eventually led to the Great Recession in 2008. The plaintiffs were retaliated against, subjected to sexual harassment and other abuses designed to force them to quit. The sexual harassment was inflicted by a supervior as a direct response to the women's whistleblowing. Eventually they could not take this abuse any longer, and each of the plaintiffs resigned in protest.

These heroic women sounded an alarm that went unheeded.These fraudulent lending packages led to the collapse of the subprime mortgage market, helping to cause the downfall of Lehman Brothers and with it the worldwide economy. The six women filed suit for wrongful termination and sexual harassment in November 2005. Lehman tried to force their claims into Arbitration, but failed. Then, just as discovery was heating up, Lehman Brothers declared bankruptcy, stopping the lawsuit dead in its tracks.

GICCB and partners Gwilliam and Strauss would not give up. They doggedly pursued the women's claims in the bankruptcy court in New York for over a decade. Many times during this struggle, Lehman Brothers claimed that the cases would be entirely defensed or the claims would be extinguished in the bankruptcy and refused to settle.

After nearly 14 years of litigation and advancing over $500,000 in costs, GICCB achieved a significant financial settlement on behalf of their clients. This result was the outcome of never ending determination and doggedness that exemplifies the values of the attorney-members of Consumer Attorneys of California. Gwilliam and Strauss battled this corporate behemoth for so many years on behalf of their heroic clients because of the harm caused to the public by Lehman Brothers' actions, vindicating the rights of whistleblowers who were forced to resign after shedding light on corporate greed and wrongdoing, upholding the rights of sexual harassment victims in the workplace, and blowing the whistle on the fradulant lending practices of one of the largest finanical institutions in the world.

The CAOC is slated to select the winners during their board meeting on September 25, 2020.

just west of the Sacramento Bridge. Plaintiff was a "single" 24-year-old with no dependents. He worked as a construction project foreman and was operating a company truck when he was violently rear-ended by an empty tank truck resulting in a significant traumatic brain injury.

Because the at-fault driver had limited insurance coverage, plaintiff named Caltrans and the construction companies who were involved with widening I-80 and reinforcing portions of the bridge over the Sacramento River at the time of the accident. Plaintiff contended that improper construction signage created confusion for drivers going eastbound, causing them to abruptly slow down due to a lane closure on the bridge, causing a bottleneck and trap for unwary motorists.

Caltrans tendered its defense to the construction companies and Farwest Safety, Inc., which had erected the construction signage.

The litigation was complicated due to C.C. Myers, Inc.'s bankruptcy and the relationship of the joint ventures' insurance coverage versus their separate corporations' liability coverage. An animation was created regarding how the accident occurred, why it occurred, and the nature and extent of plaintiff's injuries.

Mediation was held shortly prior to trial with John Bates at JAMS, resulting in a settlement of $13.33 million. Additionally, at the mediation, plaintiff also settled his workers' compensation case via a third-party compromise and release that paid plaintiff $1.5 million "new money" in cash, funded a Medicare Set Aside in the amount of $813,056, and paid $124,000 for ADA improvements to plaintiff's home. Fortunately, through hard work and diligence, the plaintiff is now living independently.

Plaintiff was represented by Rick Bennett of Bennett & Johnson, LLP

Settlement: $8,000,000
July 16, 2020
Jonathan Munguia and Kristina Salas vs. County of Merced
Merced Superior Court
Case No. 17CV00792

This action involved an intersection collision between a police car speeding to a crime scene with a claim of activation of overhead lights but admittedly no siren. The defendant alleged comparative negligence by plaintiff for entering the intersection on a yellow light. Both plaintiffs suffered significant head trauma.

The core issue and disputed fact for settlement was the extent of the claimed permanent head injuries. An animation depicting the accident and related injuries was prepared. Mediation was held on July 16, 2020 before Dan Quinn, Esq. resulting in a settlement of $8,000,000 for both plaintiffs.

Plaintiffs were represented by Steve Brady of the Brady Law Group.

Settlement: $6,000,000
June 17, 2020
Joseph Tehada vs. Sabor Farms
Monterey Superior Court
Case No. 17 CV004614

This action involved a motorcycle versus a pickup truck collision. Liability of the defendant was clear but defendant argued comparative negligence. Plaintiff suffered severe injury to his right leg, which required multiple surgeries. Future surgeries were opined by the treating doctors.

The core issue and dispute for settlement evaluation was the need and extent of future surgery. An animation depicting the accident and related injuries was prepared. Mediation was held on June 17, 2020 before John Drath, Esq., resulting in a settlement of $6,000,000.

Plaintiff was represented by Steve Brady of the Brady Law Group.

Settlement: $1,600,000
September 24, 2019
Belcher, et. al. v. AC Transit
Alameda Superior Court

On September 20, 2016, an AC Transit bus struck and killed two-year-old Jeremiah Esera in the middle of 35th Avenue near Penniman in Oakland. Jeremiah had darted out into the street from behind a large van parked along the curb. Bus camera demonstrated Jeremiah had been chasing a ball, which appeared in the street 2.0 seconds before impact, when the bus was going approximately 9.3 miles per hour. Jeremiah appeared in the street 1.8 seconds before impact. The bus driver never saw Jeremiah and did not hit his brakes until hearing or sensing Jeremiah hit into the undercarriage of the bus.

Jeremiah had been playing in the front yard of an apartment complex with two of his siblings and two other young children. Jeremiah's mother was responsible for watching the children. She testified she saw the bus hit and kill Jeremiah but had not seen him for five minutes before that.

AC Transit denied liability and claimed this was a classic dart out with insufficient time for the driver to see Jeremiah or avoid impact. AC Transit maintained that the mother was entirely responsible for failing to supervise her child and to be aware of the fact that he was running towards, and then into, a busy street. ▶

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Jeremiah's brain was traumatically ejected from his skull. His mother picked him up and held him until first responders arrived. Plaintiffs argued Jeremiah's mother and two siblings outside had NIED claims for witnessing the incident. Thus, the graphic photos of Jeremiah's injuries would be admissible.

Plaintiffs created a simulation of the incident and converted the bus camera to the location of the driver's pupils. Plaintiffs argued this vantage point gave the driver the opportunity to see Jeremiah for .9 seconds (from 4.0 to 3.1 seconds) before impact. Plaintiffs also claimed aggressive barking and proper response when the ball and then Jeremiah first appeared in the road would have resulted in impact but not death.

Plaintiffs were represented by Michael E. Gatto of Van Blois & Associates.

Settlement: $1,400,000
May 13, 2020
Hatzfield vs. Wood
Placer County Superior Court
Case No. SCV0041419

This action involved a left turn by the defendant in front of an oncoming motorcycle. Liability was highly disputed with independent witnesses describing fault on the part of the plaintiff. Detailed accident reconstruction disputed the witnesses' observations and an animation depicting the accident from the plaintiff's point of view was very effective. The plaintiff suffered a severe leg fracture and required an emergency splenectomy.

Mediation was held on May 13, 2020 before Dan Quinn, Esq. resulting in a settlement of $1,400,000.

Plaintiff was represented by Steve Brady of the Brady Law Group.

Settlement: $1,250,000
March 26, 2020
M. Smith v. Deborah Fink
Pre-Litigation

Mr. Smith was a 76-year-old retired carpenter, artist and musician whose primary passion was attending open mic jam sessions at folk clubs throughout the Bay Area. One night, after playing flute at a club in Berkeley, he exited and proceeded across the street in a marked crosswalk. Suddenly and without warning, he was struck on his left side by a vehicle driven by Ms. Fink. Mr. Smith was taken from the scene to Highland Hospital and later spent time at a skilled nursing facility recovering from his injuries, which included multiple fractures and contusions. Ms. Fink had policies of coverage with Allstate.

After putting to rest any argument of comparative fault, Heinrich Law submitted a comprehensive settlement demand and demand for asset declaration. The matter was settled pre-litigation for $1,250,000. No mediator was involved.

Mr. Smith was represented by Marjorie Heinrich and Ethan Wimert of Heinrich Law, PC

Award: $124,278.75 in attorneys' fees
June 19, 2020
Shaikh v. Aetna Life Ins. Co.
2020 WL 1430496, ---F. Supp. 3d --- (N.D. Cal. 2020)

On March 24, 2020, Federal District Court Judge Maxine M. Chesney determined that Hartford's prior decision to terminate ERISA-governed long-term disability benefits under the "own occupation" standard was incorrect. Specifically, "The Court finds Aetna has focused overly on the objective evidence" when subjective complaints of pain must be taken into account. The Court also determined that "of particular importance, Aetna has ▶

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- Learn about radiologic imaging techniques that will document intracranial hemorrhage and brain injury.
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Murray A. Solomon, M.D. graduated from UCSF School of Medicine. He was a resident in diagnostic radiology at Mallinckrodt Institute of radiology in St. Louis which is part of the Washington University Hospital complex. Dr. Solomon returned to UCSF for a fellowship in Neuroradiology and MRI. In 1984, he helped open the first MRI center between San Francisco and Los Angeles in San Jose and was scanning Stanford patients before Stanford had a magnet. In 2004, Dr. Solomon helped site the first outpatient 3T MRI scanner in Northern California. Dr. Solomon currently works at Insight Los Gatos MRI in Los Gatos which houses both a standard bore and a wide bore 3T designed for obese, claustrophobic and anxious patients.

WHEN – Sept 17, 2020 – Noon to 1:30 pm
WHERE – Zoom
Details provided following registration
Cost
$10 for ACCTLA Members
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Moderated by:



Teresa Li is a trial attorney with Law Offices of Teresa Li, PC where she focuses on catastrophic personal injury cases. She has recovered over $15 million for injured parties. She has been repeatedly selected by SuperLawyers Magazine as Super Lawyers Rising Star from 2014-2020.

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essentially disregarded Shaikh's complaints of severe pain, which, as set forth below, have persisted over an extended period of time." The Court awarded plaintiff's "own occupation" benefits rather than remanding for further analysis because it found Aetna should not have "a second bite at the apple when its first decision was simply contrary to the facts" (internal citation omitted).

In a subsequent order, the Court awarded $124,278.75 in attorneys' fees, at the rate of $750/hour for Cassie Springer Ayeni, $500/hour for Rachel Coen, and $450/hour for Jeena Jiampetti. 2020 WL 3402247 (N.D. Cal. June 19, 2020).

Plaintiff was represented by Springer Ayeni in Oakland.

Appellate Victory
Trial Court's Order of Dismissal Reversed
Filed June 29, 2020
Eghtesad v. State Farm General Insurance Company
(2020)____ Cal.App.5th ____
2020 WL 3496797, 2020 DJDAR 6623
First District Court of Appeal, Div. 2

The First District reversed the dismissal of plaintiff's complaint without leave to amend following State Farm's demurrer to the complaint.

The plaintiff, who initially was pro per, tried suing his insurance company for not covering a claim he made on a building he owned. He leased a portion of the building to someone and, as a condition of leasing, required that he be named as an additional insured for fire and liability insurance, only for the carrier, State Farm, to deny coverage when he subsequently made a claim.

State Farm demurred. The trial judge gave him a continuance to get counsel. Before he could, he was involved in a car accident for which he was hospitalized and for which the client sought additional time. He provided documentation. The trial court gave one more continuance but then refused any further continuances and sustained the demurrer without leave to amend. He appealed.

Reversed. Even though the appellant did not seek amendment in the trial court, CCP section 472c(a) leaves the issue open on appeal. State Farm argued that grounds for amendment could only be shown from the record, but this was an original complaint and the standard for leave to amend for original complaints is that it is an abuse of discretion to deny leave to amend an original complaint unless it shows on its face that it is incapable of amendment. The Court also held that appellant's brief could state the basis for amendment, in lieu of the record.

The appellant was represented by John T. Schreiber of Law Offices of John T. Schreiber.

Got News?

If you have any member news that you'd like to share, please email it to one of the following:

Teresa Li	Scott Lantry	Mariana Harris
teresa@lawofficesofteresali.com	slantry@disso.com	acctriallawyers@gmail.com

Affirming Trial Court's Order Vacating the Default Judgment
April 29, 2020
Olivia Lay v. Siamak Shemirani
First District Court of Appeal, Div. 2
Case No. A156961

The appellant court affirmed a trial court order vacating $275,000 default judgment against a defendant, based on equitable grounds. The respondent's counsel had strung the appellant along at a time when he was unrepresented, persuading him to provide information that the appellant thought exonerated him, but which counsel used to obtain a $275,000 default judgment against the appellant. The opinion is unpublished.

The appellant was represented by John T. Schreiber of Law Offices of John T. Schreiber.

Other Trial Court Victory
Hasten v. Prudential
2020 WL 3786229, ---F. Supp. 3d ---
(N.D. Cal. 2020)

On July 6, 2020 in Federal District Court, Judge Jeffrey S. White issued one of the first decisions in the country interpreting the 2018 ERISA Regulation promulgated by the Department of Labor. In denying the defendant's Motion to Dismiss, Judge White held that the ERISA regulations require strict compliance by ERISA plan administrators, and Prudential's failure to evaluate and decide Ms. Hasten's claim for long-term disability benefits before the expiration of the ERISA deadlines gave Ms. Hasten the right to proceed to litigation. The Court further held that Prudential was unable to demonstrate good cause to justify its delay.

Plaintiff was represented by Springer Ayeni in Oakland. ◆

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Cassie Springer Ayeni has handled plaintiff-side ERISA litigation, claims, and appeals since 2002, with a focus on disability employee benefits. She has been recognized on the *Northern California Super Lawyers* Top 100 and Top 50 Women lists. She was named a "Top 40 under 40" *Daily Journal* attorney in 2014, and a *Recorder* Top 50 Attorney "On The Fast Track" in 2012. She is proud to serve on the ACCTLA Board.



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Alan Charles Dell'Ario
Certified Specialist, Appellate Law
State Bar of California, Board of Legal Specialization



Charles Dell'Ario has been representing individuals and small businesses in the California and federal courts since 1974. Beginning in 1997, Mr. Dell'Ario has specialized in appellate matters and has participated in over 250 appeals in the California Courts of Appeal, Supreme Court of California, Ninth U.S. Circuit Court of Appeals and the United States Supreme Court.

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The Daily Journal selected my work in Regents of U.C. v. Superior Court (Rosen) 4 Cal.5th 607 and 29 Cal.App.5th 890 which established the duty of all California colleges and universities to use reasonable care to protect students from foreseeable violence in curricular activities. These decisions affect all 3.5 million college students and their families.


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