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*(see page 16)*

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*from the editor*



Jennifer Fiore

*To all ACCTLA Members and Supporters,*

The focus of this edition is the elimination and handling of bias, diversity and "belonging," as explained in the first article by Neha Sampat, Esq. At the May 2019 board meeting, Neha provided eye-opening information regarding diversity — or should I say, the ongoing lack of diversity in the legal profession.

Her article is followed by an interesting perspective from a seasoned trial lawyer and mediator, Eric Ivary. He calls out his generation's need to keep learning and doing better, particularly with respect to women.

Don't skip trial lawyer Dan Ambrose's practical tips for voir dire, including dealing with bias and sensitive issues. You get useful tools for voir dire and examples for handling challenging topics — a significant glimpse of what you could learn from him at Trojan Horse.

Next, appellate lawyer Allison Ehlert presents eight recent U.S. Supreme Court cases that every plaintiff's lawyer should know — employment discrimination, arbitration, antitrust law/consumer protection and class action procedure. She also takes a look ahead at the Court's October Term 2019.

Then check out CAOC's update on 25 new judges following years of dedicated lobbying, along with the work that still needs to be done so that the civil justice system can function as intended; and Amanda Greenburg's article with up-to-date information about recent DOJ actions by Medicare and Medicare Set-Asides.

We also hope you enjoy the photos of the Spring Cocktail Reception, honoring Alameda County Trial Judge of the Year Paul Herbert. And in Member News, we feature Anthony Chiosso's recent ghost pepper trial.

If you are interested in writing an article for *The Verdict* or having your verdict featured, please send an email to me (jennifer@theFAfirm.com) and / or Co-Editor, Teresa Li (Teresa@LawOfficesofTeresaLi.com). All ideas and topics are welcome! ◆

*— Jennifer Fiore is a trial attorney with Fiore Achermann where she focuses on catastrophic personal injury, wrongful death, public entity liability, sexual abuse, maritime and other torts.*

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### Design & Production

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*from the president*



Erika Jacobsen White

Mates,

What does it mean to "Belong?" This is the question we have focused on this year, as ACCTLA has made a serious commitment to reconnecting with our membership and redeveloping our programs to create a more diverse and inclusive environment that lifts up all of our members. In the recent months, we have taken this larger view, as we looked back at our history during our Past Presidents' Reception, and as we have engaged in developing more in depth conversations around how to create thoughtful culture change to bring our organization into the future.

At our May board meeting, Neha Sampat, Esq., the CEO of GenLead | Belong Lab guided our board in a discussion on "Belonging." Diving into implicit bias, institutionalized oppression, and how we can co-create ACCTLA as a place of belonging for all of our members. We heard from board members of different races, genders, orientations, generations, abilities, and backgrounds talk about what it means to "belong." It was a process of building understanding and shared vision — and we learned a lot from each other.

Following our meeting, in collaboration with our Diversity Committee and Ms. Sempat, we put together an anonymous survey for our members to complete. All individual responses will remain confidential and will be used only for the purpose of creating a better and stronger organization where everyone feels like they belong. I encourage each of you to take some time to complete this survey, and I invite you to contact me directly with your feedback about how we can do better as an organization. You can find the survey here: https://www.surveymonkey.com/r/ACCTLABelong.

The feedback I have received both personally, and through our survey was significant. Some stories conveyed a deep sense of belonging. In those stories, a theme emerged: belonging in ACCTLA came from mentorship, personal connections, and an invitation to be included in leadership. Others bravely and generously shared stories of exclusion — and a theme emerged there as well: a sense of difference, silencing, microaggressions, and lack of transparency. From these perspectives, we can work together to build a more inclusive organization for all of our members. But how?

This fall, we will be hosting an MCLE designed to address organizational bias inside each of your firms, which will provide both legal background and practical tools for you to use. Ms. Sampat also provides organizational and individual coaching on belonging and bias. You can follow her blog (https://blog.genlead.co/) or get a discounted ACCTLA member rate to attend her series on "Owning Your Value: 10 tactics to bust your self-doubt, step into your true value, and be your best self." This is a five-week online course for lawyers to help them bust their Imposter Syndrome and build their evidence-based confidence. If you are interested, let us know and we can connect you with a special ACCTLA discount code.

ACCTLA has a wealth of knowledge and talent that can be a resource to all of our members — and it was on full display at our Past Presidents' Reception at Trader Vic's last month. With 28 past presidents in the room, we stood together as they signed off on the amendment to our By-Laws passed February to commit to diversity and inclusion in our organization. Building on the pillars of this leadership, we heard from Gary Gwilliam (1974/1975) and Daneen Flynn (1997) about the founding and progress of the organization. We also heard from Shawn Tillis, our President-Elect, about his vision for the future — and the future looks bright. We also presented JoAnn Kingston, Rick Simons, and Bob Gray with the designation of Honorary President in recognition of their decades of commitment and leadership in ACCTLA. In the room were two past presidents who are now leading the state and national bar respectively: Micha Star Liberty (2010), President Elect for CAOC, and Elise Sanguinetti (2008), President of AAJ — and this is not an uncommon path for our leaders. That is what ACCTLA is about — lifting up our members, giving them a voice, and creating mentorship for the future leaders of the trial bar. This all starts with creating a space of belonging.

The future looks bright for ACCTLA, and change is gonna come. ◆

*— Erika Jacobsen White is the principal of Jacobsen White Law, where she represents employees, sexual assault victims and the injured. She has been designated as a Super Lawyers "Rising Star" every year since 2012. She believes in fight hard not only for results, but in empowering her clients through the judicial process.*




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# ~ In Memoriam ~



## BARRY BALAMUTH

Dec. 10, 1945 - May 4, 2019

Barry Balamuth, 73, died Saturday, May 4, 2019 at his home surrounded by loved ones following long-term, cascading illnesses.

He leaves his high school sweetheart and wife of 51 years, Kath (Siefert) Balamuth; his daughter, Kelly Balamuth and her husband, Bryan Kemler; his daughter Brett Anne Balamuth; his sister Barbara Andrews, her husband Lyle, two children Heather and Brian; three grandchildren; and many friends.

Barry grew up in Berkeley, attending Thousand Oaks, Garfield and Berkeley High. He was an alumnus of U.C. Davis & U.C. Berkeley. He earned scholastic honors, including the Order of the Coif and The Thursten Honors Society, during his attendance at U.C. Hastings School of the Law, from which he received his J.D. degree in 1971.

Barry had a passion for justice and practiced trial law as a consumer attorney for 48 years. Over the course of his career, he helped thousands of clients with tenacity, grace and a high level of success. He served on the Board of Directors of the Alameda-Contra Costa Trial Lawyers' Association for 25 years and was a proud member of the Consumer Attorneys of California. He was also a bar member of the U.S. Supreme Court. The latter quarter of his career, he formed a law firm with his daughter, Kelly, which continues under her stewardship.

Barry was a member of the Orinda Country Club for over 20 years, serving on numerous committees, and as chairperson for the Seniors for two years. He was an avid softball player, tennis player, golfer and gambler. Barry loved "the action."

In lieu of flowers, donations may be made to Barry's favorite charity, the Food Bank of Contra Costa and Solano.

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# Belonging

## An Inclusive Approach to Inclusion

*by Neha Sampat*

In 2001, right around the time I was starting my career as an attorney, African-Americans made up 1.28% of partners in law firms. This clearly was a problem. Even way back then, we as a profession decried awful statistics like these and promised to do better. In 2017, 16 years and many, many millions of dollars later, the percentage of African-American partners in law firms was 1.83%. Math may not be my forte, but I know that is a 0.55% increase over 16 years.

That's not a typo. And that *certainly* is not progress.

The legal profession's stagnation with regard to diversity and inclusion is such old news that the stagnation itself has become stagnant.

There are a number of reasons why things haven't changed. As a belonging strategist, consultant, speaker, and trainer, I work a lot in the legal industry, but also in other industries, so I get to see what sets us apart from other industries for both better and worse. On the worse side of the coin, we are very risk-averse: We aren't comfortable with experimenting with bold initiatives, because we fear failure and worry it will define us. We are trained (for many good reasons) to mitigate risk, but it works against us when it keeps us stuck to the status quo.

We as a profession are also very competitive. That means that we want to do whatever it is our competitors are doing. *"Does Firm A have a diversity committee? Oh, then we better create one, too."* We measure our success relative to others in our profession. *"We beat the average by having 1.84% African-American partners. Yes! Success!"*

Okay, I'm being a bit hyperbolic and more than a bit glass-half-empty, which is not my usual view of the world. So here's the glass-half-full part: We don't have to keep doing what we are doing that is not getting to where we really want to be. We are capable of learning, growing, and adjusting. In fact, as lawyers, we are really good at learning, gathering evidence, and reframing.

The big reframe I urge you to consider to earnestly start to move the needle on inclusion in our profession is to shift from a diversity and inclusion framework to a belonging framework. This is going to help you get unstuck from what hasn't been working for decades and start addressing what the real issues are in an inherently inclusive way.

### The Problem with Diversity

What is diversity? Diversity is most often about demographics and is measured by sheer numbers of people from specific categories of background, experiences, and/or traits. I see diversity as useful in that, by creating a critical mass of previously underrepresented folks, (1) legal employers have a better chance of attracting even more folks of that particular background since people want to work where there are others to whom they can relate; and (2) conceptually, legal employers have a better chance of decreasing implicit bias within the work environment since more folks will have increased exposure to and opportunities to connect and empathize with those who previously were from their out-groups.

But the problem with diversity is that its positive impacts are limited and precarious. If people from marginalized and unique backgrounds do not feel engaged and sincerely welcomed in their workplaces, it doesn't matter how many of them there are; they will leave. And they will leave without having felt comfortable enough to share their authentic lived experiences and unique qualifications, so the bias-busting outcome doesn't really pan out. Also, this approach breeds tokenism, a valuation of people for optics: *"Oh you hired me because I'm brown and a woman. Not because of my merits and because of what makes me uniquely qualified."* This feeds into all sorts of problems that actually decay true equality, such as by nurturing internalized bias and Imposter Syndrome. It doesn't explore how to engage with folks from diverse backgrounds and capitalize on their unique perspectives, which is a tremendous opportunity lost. ▶

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Diversity tends to focus more on recruitment and hiring than on retention, engagement, and development, so it is very short-sighted. And that's where inclusion comes into play.

## The Illusion of Inclusion

What is inclusion? Inclusion is most often initiated and evaluated from the perspective of the organization and/or organizational leaders and implies efforts made to engage folks from diverse categories of background, experience, and/or traits. It focuses more on retention, engagement, and development, which signals an evolution from the diversity framework. However, inclusion commonly is implemented based on assumptions and on sweeping generalizations. It ignores the goldmine of data that is found in the lived experiences and perspectives of every person in the organization. So it is a very top-down approach to inclusion, one that is not very inclusive in how it is implemented, and one that often exacerbates a disconnect between the people in an organization and its leadership.

How do you get to a truer form of inclusion? One that identifies the true strengths of an organization and the true pain points of an organization. How do you address the right challenges in the right way? By shifting to a "belonging" framework.

## The Benefits of Belonging

What is belonging? Whereas "diversity" is "you get me into your org," and "inclusion" is "you make an effort to include me," "belonging" is "you make the *right* efforts such that I feel seen, understood, and valued." Belonging is for everyone; just ask Maslow.

That said, belonging can feel uncomfortable as a concept in that it may appear to be too touchy-feely and subjective. As lawyers, we are trained to discredit the subjective. We always look for objective data and aggregations. But we lose so much in this process. We tell ourselves and our colleagues that our lived experiences and perspectives don't matter, and we don't feel comfortable sharing our authentic selves, which leads to job dissatisfaction, disengagement, disconnection, and stress. To adapt to a belonging framework, we need to expand our definition of data to include the lived experiences and perspectives of each individual in our organizations. We need to remember from our work as attorneys the unrivaled power of a story and make room for our own stories and stories of those in our organizations.

"Diversity tends to focus more on recruitment and hiring than on retention, engagement, and development, so it is very short-sighted.

Belonging *is* subjective. It can mean different things to different people. What it takes for me to feel that I belong in a particular organization may be different than what it takes for you to feel that you belong in that same organization. So a cornerstone in building belonging is to ask and help each individual define for you what belonging means to them and what you can do as an organization for them to belong. Have each member of your organization tell stories of specific times when they experienced belonging and when they did not experience belonging. You then will start to identify the real pain points in your organization instead of assuming what the pain points might be. That will allow to you address your organization's true challenges by leveraging your organization's true strengths. You'll be solving the right problems in the right ways. And you will have sent a message to everyone in your organization that their voice and experience matters from the get-go. This is what makes belonging a truly inclusive approach to inclusion.

## How to Implement a Belonging Framework

A belonging framework requires a particular process that engages each of the individuals in an organization and moves forward from there. I have been working with a number of bold and dedicated law firms and teams on taking a belonging approach by first conducting belonging and engagement assessments for them via anonymous surveys as well as confidential interviews and focus groups. I then analyze the data and share back with them themes and insights. The org/team then has a sense of what is required to create a sense of belonging for all and where they may be falling short. I then help them harness this data into a strategy for true inclusion, and we then implement this strategy.

Along the way, we tend to unearth and address many common hidden barriers to belonging, ones that tend to go under-recognized and under-addressed in the diversity framework, including:

- Unconscious bias *with organizational activation* (many of us have attended unconscious bias workshops with limited to no follow-through, and that has been found to sometimes backfire.)

- Internalized bias and Imposter Syndrome. Along with reducing the bias bouncing around in our organizations, we also must acknowledge the damage already done by the bias our marginalized populations have faced in our workplaces and in their lives. We must empower them to recognize and uproot this internalized bias. One very common hidden barrier to belonging is the feeling of not belonging

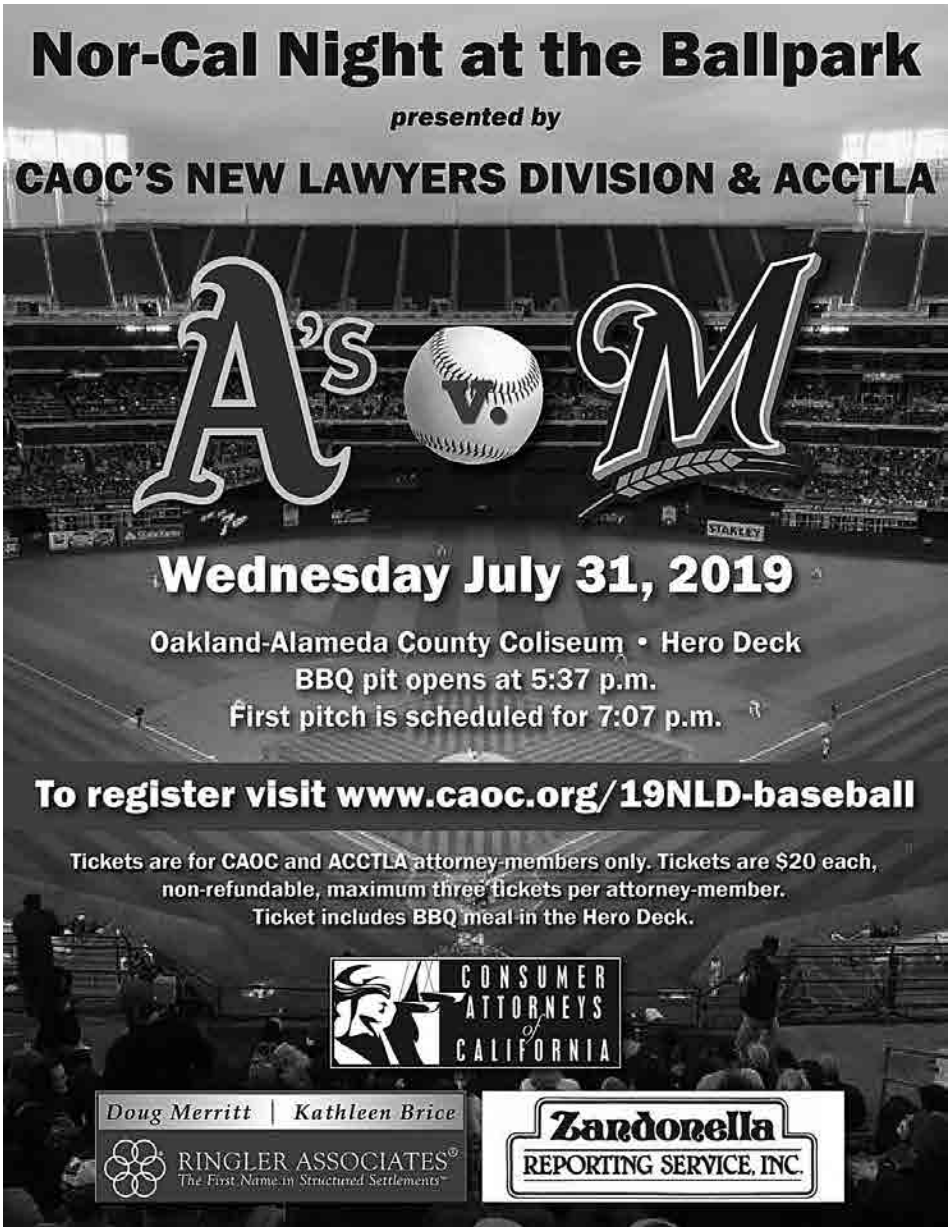
cognitively that, for some, is tied to internalized bias. This can manifest as a particularly destructive form of self-doubt called Imposter Syndrome that is very prevalent among high-achieving lawyers and is also very addressable.

• Generational friction. Many younger attorneys experience a sense of not belonging in the profession due to the profession's traditional hierarchy, and with the leadership retiring out soon, many firms are finding themselves facing a succession crisis, so creating belonging for members of all generations becomes a priority.

These approaches are not ones that get a lot of attention in our profession because they are not part of what our profession has been doing over the past few decades. But the time has long ago come for change, and if we can let the voices of everyone in our organizations guide us, we can feel confident that we are catalyzing the right kind of change. This type of change keeps attorneys with diverse backgrounds in our organizations and our profession, honors and takes their lead, and eventually leads to even more individuals with unique backgrounds and perspectives wanting to join us, because they know we have created a place where they know they are seen, understood, valued, and championed. Where they belong. ◆



*— Neha Sampat, Esq. is CEO and founder of GenLead|BelongLab, where she focuses on building, belonging and true inclusion. You can read more of Neha's insights at blog.genlead.co, follow her on TW/IG/FB at @belonglab, and reach her directly at neha@genlead.co. (This article builds on a training the author provided to the ACCTLA board in May 2019.)*


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# The Out of Touch Generation

**by Eric Ivary**




What prompts my writing of this piece is the response of my male contemporaries to some recent behavior of Vice President and Presidential Candidate Joe Biden. My demographic is an interesting group. We grew up in the fifties and sixties. We lived through the civil rights movement, the Vietnam War and Watergate. We have lived through a lot of social upheaval which has resulted in social progress. Often the progress has come at a severe cost and often prompted by courts instead of congress.

One of these threads of progress is the Women's Movement. But sometimes I wonder whether we've actually learned anything from the women's movement, especially from the "Me Too" Movement.

The reporting over Joe Biden's behavior with women has brought this question into sharp focus for me. My male contemporaries remind me that his "hands-on" approach with some women isn't exactly sexual harassment, even by the accounts of the recipients. But if not sexual harassment, *what is it?* A lot of men in my generation are dismissive of these allegations as simple over sensitivity. But I think Biden's refusal to apologize was striking.

Most striking is his reason. He explained his refusal by saying *"I didn't intend"* any type of offense. This is an often-used pseudo apology that breaks down to this: *"I'm sorry if you were offended."* Think about this for a moment. Doesn't this really amount to *my* apologizing for *your* behavior. Kind of condescending isn't it? Imagine the nerve! You being offended when I didn't mean anything.

My opinion is that what's missing in this discussion is the fact that it really shouldn't matter what my intent was. But doesn't the true measure of my action lie in how the recipient received it?

But what really surprised me the most has been the reaction of guys in my generation to what I just said. Almost universally the response to what I said has been ridicule. Not public ridicule mind you, just talk among us guys. You know, *"just locker room talk."*

But at the bottom of all this lies a really serious point and this is my main point. At the risk of over generalizing, I've lived long enough to know that women live in a different world than men when it comes to *risk*. Women are at risk just walking home from the bus or trying to exit a parking garage. Most men don't experience that kind of risk. The risk of sexual assault to women is omnipresent. It's a vulnerability most men don't appreciate because it's not part of our world. So, isn't it understandable that women experience a threat from unwanted touch? Or coming too close. A touch that would mean little or nothing to a man can be a reminder of that vulnerability. If we've learned anything from the Me Too Movement, haven't we at least learned that?

In conclusion, I'd argue that Joe Biden isn't really bad or even that insensitive. He, like many of us, just stopped learning. ◆



*— After a 30-year career as a highly successful trial lawyer — culminating in the co-founding of Gwilliam, Ivary, Chiosso, Cavalli & Brewer — Eric Ivary, Esq. now serves as a full-time neutral with ADR Services, Inc. He is known for his ability to grasp complex subject matter and communicate the issues effectively to counsel and their represented parties. He has tried and mediated all types of personal injury cases, employment cases, medical and hospital negligence, as well as insurance bad faith and complex cases involving public entities.*

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# VOIR DIRE

## *The Filing Cabinet of Recipes in Your Mind*

by Daniel Ambrose

For many trial lawyers, voir dire is the most challenging part of the trial. That said, we have a great advantage that they can't take away — we get to go first. This means we get to set up or "frame" every issue. We get to begin the discussion on every topic thereby establishing ourselves as the leaders. The jury has to follow someone; it's either going to be us or the defense lawyer.

### FOUR GOALS OF VOIR DIRE

*Rapport*

The most important thing to do in your first eight minutes of voir dire is to establish rapport. I define rapport as an easy flowing feeling of comfort that both you and your jurors have — sort of like talking with old friends. Lawyers cannot build rapport if they are stuck in their head thinking about what to do next, *"How is this helping me"* or are so nervous that they can't hear. You must be "reflectively listening."

When we are talking with friends, we are not thinking; we patiently wait, take in their thoughts, and respond without worry that they are going to judge us. When we aren't with friends, we do the opposite. We worry about the strangers' opinions, and how they may be taking in what we are saying and thereby editing our overall message. People don't want to say the wrong thing during this type of conversation, so we try to carefully choose our words, and end up manipulating our message as we filter and think. This type of reaction to strangers creates exchanges that are not natural and harmonious, like the ones we have with our friends.

*Persuasion*

The case specific issues that you discuss in voir dire have the natural effect of preloading your jurors' brains with your case issues. If you voir dire on depression, chronic pain and the loss of mobility, your jury knows that your case is about depression, pain and some type of injury that affects the use of one's legs.

*Elimination*

Getting rid of biased jurors is a goal every lawyer has. Getting biased jurors to reveal and recuse themselves is a skill. People are not going to show you who they really are if they don't trust and feel comfortable with you. This takes a lot of practice.

*Preemption*

Many defense attorneys are trained to ask jurors about "personal responsibility," implying that our clients were irresponsible, caused their own injuries and now are here whining about it. They always cry about how they are at such a disadvantage because they have to go last, etc. When we voir dire on these issues, we frame the issue and preempt the defense from talking about it.

On issues like awarding money for psychological harm — PTSD, depression, chronic pain, etc. — we can insulate and protect our potentially favorable jurors who have real-life experience with these issues from being challenged for cause. One way to do this is to make sure that your jurors will decide the case based *only* on the evidence admitted in this courtroom and not allow outside factors, like their life experiences, to influence their verdict.

### REFLECTIVE LISTENING — THE MOST IMPORTANT SKILL TO DEVELOP

Reflective listening means imagining what the other person is saying. This is one of the most difficult skills to master in voir dire. To reflectively listen to a juror means the juror must feel that you are with them. Reflective listening is key to understanding the feelings of others and building rapport with your jury. As soon as a juror begins speaking, the rest of the world should disappear. Focus on them like they are the last person on Earth — that's how important they should feel. Also, don't start formulating your next question, reading your notes or taking notes until they are done.

### PREPARATION — THE KEY TO EVERYTHING

You must prepare! The time to start working on your voir dire is yesterday. When a trial is on the horizon, it is too late to start writing, memorizing and *internalizing* the voir dire. Many people object to rote memorization. They say, *"Oh, it will make me stiff, not spontaneous."* The opposite is actually the truth. I have trained and coached hundreds of lawyers in the past few years, so I'm speaking from experience.

Each time that I am learning a new piece of voir dire, I record it and play it over and over until it is internalized. Then I stand up and practice it. I always do a voir dire focus group before trial to practice and refine my voir dire. Voir dire is really "pattern recognition." The more patterns that you embed in your unconscious mind, the more easily you can have a guided conversation. The phrases from the scripts can be interchanged and resequenced so voir dire appears flowing and natural, because it is. You should also get a transcript of your opponent's voir dire. This way you can preempt all of their best stuff.

### FRAMING

Every question you ask must be framed properly. You can direct the jurors' thinking and avert a lot of wasted conversation by meticulously setting the contextual framework. For example, compare the difference between "biases, what are your thoughts?" and "I want to talk to you about biases. We all have them. Without them, we wouldn't be human. Can you think of a bias you might have?" Sports analogies are always good here. Words matter; they should be used with precision.

### STRUCTURE

Most voir dire has a structure: the introduction, which tells the jury what we're going to talk about (and this way, you are all on the same page); the body, which actually discusses the issue; the conclusion, which tells the jury why we just discussed this issue. When lawyers forget to tell the jury the "why," jurors can become confused and impatient. This is followed by a group formation question like, *"Does this make sense to everybody?"*

### WRITING A NEW VOIR DIRE SCRIPT

Writing a new piece of voir dire is a creative effort. Like most writing, saying it out loud allows you to hear how it sounds, and we call this "writing on your feet." After you have the topic of voir dire, start writing the question and the predictable juror response. It is very beneficial when creating a new voir dire script to have a partner or co-counsel with whom to brainstorm the flow.

Voir dire and human behavior are predictable. When you are creating a new voir dire to handle an issue in trial, you should write it out as follows:

Introduction:
Attorney:
Juror:
Attorney:
Juror:

Imagine what a juror's answer will be to every question. Every time that you get stumped in a focus group, you should celebrate, because you won't get stumped in trial. The more you practice, the more patterns you embed in your mind and the more relaxed you will be in the courtroom, which is when it counts.

There is no reason to reinvent the wheel. I borrow ideas from anyone who has a good voir dire. I think *Don't Eat the Bruises,* written by Keith Mitnik, is the best book on trial. Like anything, take what is useful and adapt it to best help your case.

### BLINDED BY THE SUN

I was recently in San Diego getting ready for trial with John Gomez on a TBI case. For this example, assume a truck struck a pedestrian, and the defense has asserted the defense of "it's not my fault because I was temporarily blinded by the sun." Now we all know that this is not a legally recognized defense but, nonetheless, we have all been temporarily blinded by the sun at some point in our lives, so some jurors might forgive or greatly reduce the verdict if this defense flies.

Q: How many of you have ever been instantly but temporarily blinded by the sun while driving?

A: I have.

Q: What was it like, what happened?

A: I took a turn onto a side street and the sun just blinded me.

Q: What did you do?

A: I pulled over.

Q: Why?

A: Because I couldn't see.

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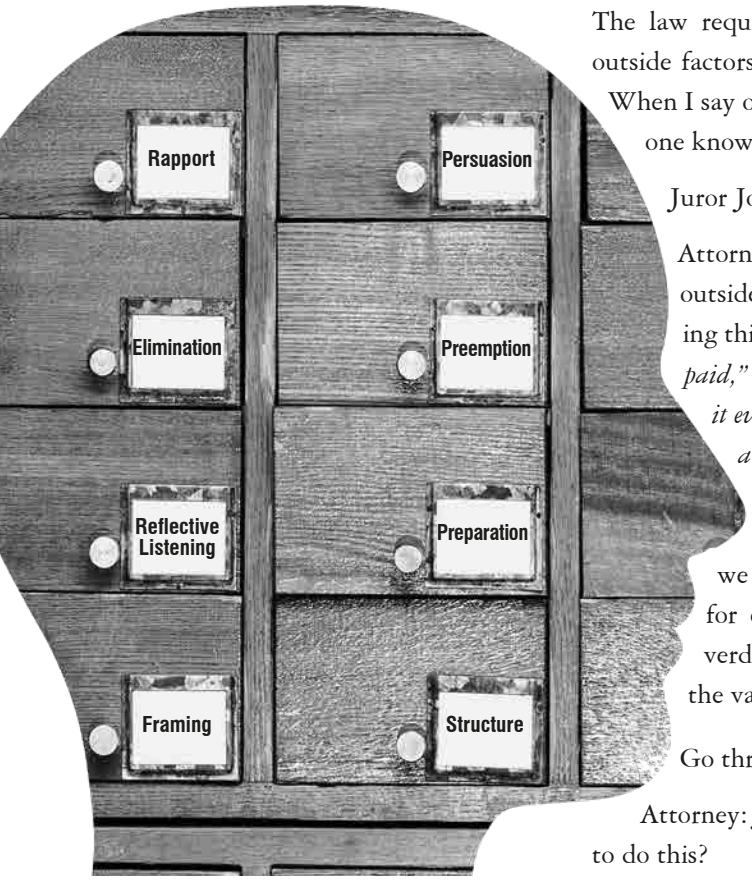
Q: If you chose to continue to drive, even if blinded by the sun and ran a child over who was crossing the street, would you feel responsible?

A: It would depend if I had a chance to stop. If I didn't, then I would not feel at fault; if I did, then I would.

Q: How many of you have been in a similar situation as Juror 1, being temporarily blinded by the sun?

Q: How many of you would agree with juror 1 as to the fault explanation?

Q: The reason I am asking is because one of my concerns is that, hypothetically, if a driver says he's not at fault due to temporary, unexpected blindness from the sun, you may sympathize with him and give him the benefit of the doubt; not on purpose, but just as a matter of being human, in spite of what the rest of the physical evidence and testimony shows.




Ask individual jurors if there was any chance of that unintentionally happening.

## OUTSIDE FACTORS

I was also recently in San Diego helping John Gomez preparing for trial against Marriot for a young girl who was terribly burned by hot coffee. We came up with the following script:

Attorney: Marriot is a defendant in this case and, as you have already heard, I am going to be asking you for a verdict in the tens of millions of dollars. I need to know that if I prove my case with the evidence, and the law supports it, will you be able to deliver a verdict for the appropriate amount? Or will you have some hesitations?

Juror John: I would be concerned. That's a lot of money.

Attorney: I can understand why you might feel that way, and it is a lot of money. Your job will be to sit as appraisers of the human losses that were done to Joe and his life. The law requires us not to allow any outside factors to influence our verdict. When I say outside factors, does everyone know what I mean?

Juror Joan: I am confused.

Attorney: Juror Joan, when I say outside factors, I mean considering things — like *"How will it get paid," "Who will pay it,"* or *"Will it ever get paid at all?"* or *"Will a just and appropriate verdict increase how much hotel rooms cost?"* The law also says that we are not to allow "sympathy for either side" to affect our verdict. We are to only consider the value of Joe's human losses.

Go through jurors one at a time:

Attorney: Juror Joan will you be able to do this?

Juror Jones: Yes.

Attorney: Folks, let me summarize, your job is to evaluate the case, to be the appraisers and to place a dollar value on these human losses, based *only* upon the evidence.

Here's my question — *Can we all do this?*

## OBESITY

I recently tried a case for a client who weighed 290 pounds and had a knee injury. All of the doctors agreed that her weight was a factor in her pain and it would be a good thing if she lost weight. We all know that jurors are prejudiced against very fat people, so here is the voir dire that I wrote:

Me: Folks, I want to talk to you about obesity. How many of us have a family member or close friend who is obese?

Juror: I do.

Me: I know a lot of times when we see a person like this we think, *"They must be lazy"* or *"They must not care about themselves"* or *"They lack self-control."* I know I have these kind of thoughts, do you?

Juror: No, not really. (Most people do have these thoughts but will not openly state them. But by doing so, you force jurors to confront their own bias.)

Me: Does that fact that your friend is obese cause you to feel differently about him?

Juror: No, I don't think it really is a choice.

Me: Why not?

Juror: Because he has tried to lose weight, without success.

Me: Although you don't treat your friend differently, do you think other people discriminate against him because of his weight?

Juror: I think that does happen.

Me: Do you think it's okay to discriminate against a person because of their weight?

Juror: I don't.

Me: Let me ask all of you. Who here thinks it's okay to discriminate against fat people? Obesity really is a preexisting condition that makes a person more susceptible to injury. The worst part is that they hurt our clients who are already overweight, then imply that they are exacerbating their poor health by not losing weight, even though they can barely walk now.

It is very important to know what you want to accomplish when writing and practicing voir dires.

## NON-ENGLISH SPEAKING CLIENT

We all know that jurors discount plaintiffs who do not speak English. A big part of the reason why is that most interpreters translate like computers, with no emotion at all, only words. So a properly trained interpreter is a start. But voir diring on the issue is also important.

**Attorney:** What do you think about people who live here but don't speak English?

Juror: I think they should.

Attorney: Why?

Juror: It will help them be productive members of society.

Attorney: So what I hear you saying is that these folks don't contribute like English speaking folks, is that true?

Juror: A little bit.

You can most likely get this juror off for cause going down this path. But you still need to address this bias with your good, fair-minded jurors.

Attorney: Does anyone think that people who don't speak English suffer less when they are hurt? Does anyone think that a person's pain is worth less if they only speak Spanish?

The above two statements are unlikely to get many hands raised unless you are deep in Trump country, but they do force people to confront their own biases when it comes to our non-English speaking clients.

## NOTES

A large body of research shows that the jurors who take the most detailed notes during trial often become the foreperson. It isn't uncommon that when a person's notes differ from other jurors' recollections, the panel often relies on the notes, not their memory. They do this even though the judge instructs them to do just the opposite. To deal with this situation in voir dire, the following are some questions:

During this trial, you're going to be allowed to take notes, and that's a good thing. But one of my concerns is that sometimes when we take notes, we're not listening, and I know that's true for me. Is that true for anyone else?

During the trial, you might notice that after a witness answers a question, I may jot down a few notes, and this may take a moment or two. Is this going to bother anybody?

And at the end of the trial, you'll be able to take your notes into the jury room with you. In order for you to reach a just verdict, all 12 of you will need to have an equal voice. And some people take a lot of notes, and that helps us remember; some people don't, because we remember better by listening.

So here is my question, regardless of whether you take a lot of notes or none at all. Can we all promise or agree that our voices will be heard in the jury room while deciding this very important case? Can we all do this?

Sometimes our memory may differ with our notes, or other's notes. And if that happens, the judge is going to instruct us that we should rely upon our memory, and not our notes or the notes of others.

For example, if Juror X says my notes say this, but our memory is Y, will you defer to their notes or will you be able to rely upon your memory?

Would you feel comfortable asking the court for a copy of the transcript or to read back the testimony? Even if it took an extra hour to get transcript or read back?

How about if it was Friday afternoon at 4:15 and in order to get the testimony you would need to return on Monday for deliberations. Would you still ask for the testimony?

Of course it would be a good idea to reinforce this in closing argument.

## RECIPES

Voir dire scripts are like a recipe. When you make a recipe, you follow it exactly, and then you adjust it to match your tastes. Memorize the scripts as they were written, then practice with them and change them to suit your personality. Be certain that when you change the words, it doesn't change the meaning — unless, of course, that is your reason for doing so.

## THE FOLLOW UP

There is always more than one choice to respond to a juror. Here are a few examples:

- Just a nod and a smile.
- You can say, *"Thank you."*
- You can reflect back what they are ▶

saying — *"What I hear you saying is … is that right?"*

• After they have shared, a connecting image may appear in your mind; if so, you can have a conversation about it.

• They may offer some resistance. This is a gift; the only way to reframe an issue/witness is that you must meet them where they are before you can take them where you want to go. For example, if a juror says, *"What good will the money do?"* you can respond by saying, *"You're right, what good will the money do?"* Now you can go on to explain that money justice is all we have in America. If you try to explain to the juror why the juror is wrong, you will only increase the resistance.

None of the follow-ups are better than the other. Instead, when you have internalized all of them, they will be easy to choose from as one will feel more right than the others in the moment.

## PAUSING

The importance of pausing: to allow the jurors' minds to keep up; to add emphasis to whatever word preceded the pause and whatever words follow the pause cannot be understated. So often attorneys speak fast and move from topic to topic. Pausing is important for the jurors to receive all of the important information we present.

## SEQUENCING

The order in which you sequence your topics is very important — voir dire must be sequenced. After gaining rapport, you typically start with biases against your particular kind of case in general, i.e., personal injury cases, money for pain, large verdicts, burden of proof — ending with the "warts."

1. Rapport voir dire(s).
2. Personal responsibility.
3. Apple pie.
4. Economic v. noneconomic.
5. Disfigurement.
6. Beauty v. average noneconomic.
7. Depression.
8. Pain.
9. Memory.
10. Brain injury.
11. Things that we like.
12. Noneconomic damages wrap up.
13. Big money.
14. What good will the money do?
15. Outside factors.
16. Sun was in my eyes.
17. Lying.
18. Rich v. poor noneconomic damages.
19. Conflicting experts.
20. BOP civil.
21. Former civil defendant.
22. Comparative fault.
23. Note taking.
24. The defense goes last.

## ALTERNATES

Part of preparing includes having a strategy for your second round, third round, etc. Doing the same thing over and over will come across as a shtick. Have a plan for the later rounds. Your questions should summarize your most important pieces of your previous voir dire. It is very important to spend at least as much time with your alternates as you did with your first panel because the alternates are a lot more likely to actually sit on the jury, and you want to know who they are.

*"Did we all hear our discussion on saying what we really think and feel?"*

I raise my hand, jurors raise theirs, model from the start.

*"Do we all edit and filter what we say?"*

*"Juror Jones, can you give us an example?"*

## LIMITED TIME

If you have only 20 minutes, I suggest you spend the first five getting rapport, and then getting rid of anti-personal injury, big verdict jurors. Follow these with any case specific voir dire. If people like you and trust you, they will listen to you, hopefully.

## PRACTICE

Again, you must practice. It is imperative that you know all of your voir dire scripts like you know your name. We have all tried learning a foreign language. Until we have submersed ourselves in the culture, we are not having a conversation, we are simply translating and our "conversation" is strained. Practice using boards with people's pictures on them. Practice in front of others. If you don't have a focus group, practice with your colleagues, line up stuffed animals — do whatever it takes. The best is to do focus group practice at least once a month. Take the time to record yourself. Be hard on yourself. Watch the videos of yourself. It helps to have a practice group that meets on a regular basis.

Voir dire, like trial lawyering, is an activity that can only be learned if it is practiced with effort persistently. This is called "deliberate practice." To learn more about deliberate practice you can read *Peak* by Anders Ericsson and Robert Pool. You can read about voir dire until you're blue in the face; this won't make you better. To get better you have to perform, and most importantly, go to trial. The best trial lawyers I know find a reason to go to trial, not an excuse to avoid it. ◆



*— Daniel Ambrose is the co-founder of Trojan Horse Method. Trojan Horse workshops focus on trials skills, and then dive into more technical skills. To learn more, go to trojanhorsemethod.com.*



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# Eight U.S. Supreme Court Cases that Plaintiffs' Lawyers Should Know About

by Allison Ehlert

October Term 2018 has come to an end, and the Justices are no doubt ready for their summer break from the work of the Court. With the exception of two blockbuster cases issued at the end of June, it was a relatively quiet term. That said, there were a slew of decisions that should be of interest to plaintiffs' lawyers, on subjects ranging from arbitration, employment discrimination, antitrust law (consumer protection), and class action procedure.

Most of these were not closely divided, but there were three 5-4 decisions. In two of those, conservative justices joined the four more liberal-leaning justices to make up the five-justice majority. Only one 5-4 decision consisted of the traditional liberal-conservative split.

Below is a synopsis of the key cases that trial lawyers should read.

## EMPLOYMENT DISCRIMINATION

The Court issued unanimous 9-0 decisions on behalf of plaintiffs in two employment-law cases: one concerning when state and local governments may be subject to suit under the Age Discrimination in Employment Act (ADEA); and the other whether Title VII's EEOC charge-filing rule is a jurisdictional requirement or a claim-processing rule.

In *Mount Lemmon Fire District v. Guido*, the fire district discharged its two oldest firefighters when it confronted a budget shortfall. The firefighters sued, arguing that their termination violated the ADEA. The district defended on the ground that it did not constitute an "employer" subject to the Act because it had fewer than 20 employees; and according to its interpretation of the relevant ADEA provision (29 U.S.C. §630(b)), only employers with *20 or more* employees are covered by the Act.

Section 630(b) reads: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." The fire district further argued that the ADEA should be construed consistent with Title VII, which specifies a threshold number of employees that state and local governments must employ to be subject to suit.

In the opinion by Justice Ginsburg, the Court disagreed. It held the plain language of the statute showed that the numerosity requirement does not apply to states and their political subdivisions. For one thing, the Court pointed out that after the numerosity requirement is set forth, the statute provides that "[t]he term [employer] *also* means . . . a State or political subdivision of a State," but the "also means" sentence does not incorporate any numerosity requirement. The Court rejected the fire district's analogy to Title VII, which includes a numerosity requirement. The better comparison, reasoned the Court, is to the Fair Labor Standards Act ("FLSA"), on which the ADEA was substantially modeled and does not impose a numerosity requirement.

*Mount Lemmon* thus leaves plaintiffs free to sue states and their political subdivisions for ADEA violations no matter how few employees they have.

In a second 9-0 decision, also authored by Justice Ginsburg, the Court was confronted with the question of whether Title VII's requirement that litigants file a charge with the EEOC before filing suit is a jurisdictional requirement or a claim-processing rule.

The Court has defined the latter as a rule that "seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." The distinction between jurisdictional requirements and claim-processing rules matters because jurisdictional defects can be raised at any point in a case, no matter how far it has progressed, but objections premised on noncompliance with claim-processing rules are lost if not timely raised.

In *Fort Bend County, Texas v. Davis*, Lois Davis was a county IT employee. She filed a charge with the EEOC complaining that she had been sexually harassed at work and retaliated against for complaining about that harassment. While her charge was pending, her boss instructed her to report to work on a Sunday, to which she objected due to a commitment at her church. She did not report to work as directed and was then fired. Davis brought suit, asserting claims for retaliation and religious discrimination.

The case proceeded through summary judgment, with the Fifth Circuit holding that Davis had adduced sufficient evidence to create a triable issue of fact on her

religious-discrimination claim. When the case was remanded to the District Court, the county moved to dismiss on the grounds that Davis's EEOC charge did not include her religious-discrimination claim. The county argued that the charge-filing requirement was jurisdictional in nature, whereas Davis contended that it was a claim-processing rule.

The Court sided with Davis. It concluded that there was nothing in Title VII suggesting that Congress intended the charge-filing requirement to be jurisdictional in nature. After *Fort Bend County*, then, if a defendant is going to complain that a plaintiff's EEOC charge is defective, it must do so sufficiently early in the litigation to avoid forfeiting its objection.

### ANTITRUST LAW

In a surprising 5-4 decision with Justice Kavanaugh joining the four more liberal justices, the Court ruled in *Apple, Inc. v. Pepper* that iPhone app purchasers could maintain their suit against Apple for allegedly monopolizing the market for app sales (and thereby charging higher-than-competitive prices for them).

App developers contract with Apple to sell their apps in Apple's App Store, which is the only place iPhone owners may lawfully buy apps. Apple requires the sales price of apps to end in $0.99, but otherwise leaves it to the developers to set the price. Apple keeps a 30 percent commission on the sales price for each app, but transfers the rest of the sales proceeds to the app developers. The plaintiffs asserted that in a competitive market, Apple would be forced to lower its 30 percent commission, and that its monopoly behavior forced consumers to pay more for apps than they otherwise would.

The question in the case was whether the plaintiffs could maintain their suit in light of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the Court held that only direct purchasers from an alleged monopolist, not indirect purchasers, can assert antitrust claims.

Despite the 5-4 split suggesting complexity, Justice Kavanaugh's opinion treated the resolution of the case as almost obvious. He reasoned that because the plaintiffs purchased the apps directly from Apple, and not a go-between, they satisfied *Illinois Brick*'s direct-purchaser test. Justice Kavanaugh distinguished the plaintiffs from those in *Illinois Brick*, explaining that, "In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer." He concluded that, "The absence of an intermediary is dispositive."

The Court also rejected Apple's argument that it could not be sued because it was the app developers, not it, that set the prices. The Court held that the financial arrangement between retailers and manufacturers / suppliers is irrelevant to the central question of whether a retailer has engaged in monopolistic conduct that has caused consumers to pay more for something than they otherwise would have.

### PHARMACEUTICAL TORT LIABILITY

Pharmaceutical manufacturers work with the Food and Drug Administration ("FDA") to develop appropriate warning labels concerning risks associated with taking their drugs. When new information comes to light about possible risks, drug manufacturers typically seek permission from the FDA to revise their labels to account for that new information. In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Court held that state-law failure-to-warn claims brought against drug manufacturers are preempted by federal regulations if the manufacturer can show "clear evidence" that the FDA would not have approved a change to a drug's label concerning its risks. ▶


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Barry P. Gorelick


Jeffrey B. Wolfert

**Gorelick Wolfert, P.C.**

200 Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612

510-272-0300 *phone* • 510-836-3136 *fax*
Barry@bpgcomp.com • Jeff@bpgcomp.com

## A Look Ahead to the Cases of October Term 2019

To date, the Court has granted 50 cases of the approximately 70-75 cases it will decide in the coming term. Unsurprisingly, there are several cases that the plaintiffs' bar will want to keep a watchful eye on, many of which pose questions concerning employment discrimination. The key cases granted so far include:

• *Altitude Express, Inc. v. Zarda* and *Bostock v. Clayton County, Georgia:* Does Title VII's prohibition on employment discrimination "because of sex" cover discrimination based on sexual orientation?

• *R.G. & G.R. Funeral Homes, Inc. v. EEOC:* Does Title VII prohibit discrimination against transgender people?

• *Comcast Corp. v. National Association of African-American-Owned Media:* Are plaintiffs who bring race-discrimination claims under 42 U.S.C. §1981 subject to a "but-for" causation showing?

• *Babb v. Wilkie:* Must federal employees satisfy a "but-for" causation showing to prevail on claims under the Age Discrimination in Employment Act?

• *Espinoza v. Montana Department of Revenue:* Does a religiously neutral and generally available student-aid program violate the religion and Equal Protection clauses if it can be used by students to attend religious schools?

More cases of interest to the plaintiffs' bar will almost certainly be added to the court's docket. The next batch of granted cases will be announced at the end of September 2019, just before the Court's new term opens on the first Monday in October.

In *Merck Sharp & Dohme Corp. v. Albrecht*, the Court answered the follow-up question of who should decide — a judge or jury — the preemption question and explicated the "clear evidence" standard. The plaintiffs were users of the osteoporosis drug Fosamax, who suffered atypical femoral fractures. They brought suit arguing that state law imposed on Merck a duty to warn them and their doctors of the risk of such fractures.

In a six-justice majority opinion authored by Justice Breyer (the remaining three justices — Alito, Kavanaugh and Chief Justice Roberts — concurred in the judgment), the Court held that whether state-law failure-to-warn claims are preempted is a question of law for courts, not juries, to decide. It reasoned that judges "are better equipped to evaluate the nature and scope of an agency's determination," in this case the FDA's.

The Court further explained that the "clear evidence" standard manufacturers have to meet to establish preemption requires them to present "evidence that shows the Court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning." The majority suggested that "ordinarily" drug manufacturers will not be able to show a conflict between state and federal law mandating preemption due to an FDA regulation that permits manufacturers to make changes to their warning labels *without* FDA preapproval "if the change is designed to add or strengthen a warning where there is newly acquired information about the evidence of a causal association between the drug and a risk of harm." (internal quotation marks and ellipsis omitted).

*Albrecht* thus implies that manufacturers face a steep climb in obtaining dismissal of plaintiffs' state-law failure-to-warn claims based on federal preemption.

### ARBITRATION

The Court heard three arbitration cases this term, with two of those decided unanimously, and the third decided by a 5-4 vote with the five more conservative justices (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh) in the majority.

First, *Henry Schein, Inc. v. Archer & White Sales, Inc.* asked whether the federal courts may determine whether a particular dispute is arbitrable even when the parties' arbitration agreement has assigned that question to the arbitrator. The case concerned what has come to be known as the "wholly groundless exception," in which some federal courts have held that even when the parties have agreed that the arbitrator, and not the court, should decide whether a particular dispute is subject to arbitration, the court may override the agreement if it determines that the defendant's argument in favor of arbitration is "wholly groundless."

In his first opinion for the Court, Justice Kavanaugh wrote that the "wholly groundless" exception is inconsistent with the Federal Arbitration Act ("FAA"). If the parties' agreement specifies that the arbitrator should decide whether a dispute is arbitrable, the Court must stay out of it even if it thinks that the arbitrator will certainly conclude that the dispute is not arbitrable and send it back to the Court.

Second, in an 8-0 decision (Justice Kavanaugh did not participate), the Court considered the meaning of the FAA's section 1 exclusion from arbitration of disputes involving the "contracts of employment" of certain transportation workers.

Plaintiff Oliveira was a truck driver for interstate trucking company New Prime, who classified him as an independent contractor. When Oliveira brought a class action suit alleging that New Prime had underpaid its workers by improperly classifying them as independent contractors, rather than employees, New Prime urged the District Court to send the case to arbitration, consistent with the parties' agreement. In an opinion by Justice Gorsuch, the Court held that the dispute was not subject to arbitration, despite the parties' broad arbitration agreement.

New Prime argued that the phrase "contracts of employment" in section 1 refers only to employer-employee relationships, and since Oliveira was an independent contractor (on paper at least), he did not fall within the section 1 exception and the case had to be arbitrated. The Court looked to historical evidence concerning how "contracts of employment" would have been understood in 1925 when the FAA was enacted. Based on that, it concluded that the phrase embraced independent-contractor relationships as well as formal employer-employee relationships. Because Oliveira's independent-contractor agreement was a "contract of employment" within the meaning of section 1, his dispute with New Prime was not subject to arbitration.

Finally, in *Lamps Plus, Inc. v. Varela,* the most significant arbitration decision of the term, a divided 5-4 court held that the FAA precludes *class arbitration* of disputes where the parties' arbitration agreement is ambiguous as to whether the parties intended to allow class arbitration.

The Ninth Circuit had agreed with the District Court that the parties' agreement was ambiguous on the subject of class arbitration. Following the rule that arbitration agreements are to be construed according to ordinary principles of contract interpretation, it applied the "anti-drafter" doctrine, whereby ambiguous contractual provisions are interpreted against the drafter, in this case, defendant Lamps Plus. The Ninth Circuit, therefore, held that the parties' arbitration agreement permitted class arbitration.

In the opinion by Chief Justice Roberts, joined by his fellow conservatives, the Court reversed. The majority emphasized that arbitration is a matter of consent, not coercion. It held that the anti-drafter rule was not a means of divining the parties' intent, but of going around their intent. In other words, the Court reasoned that because construing a contractual ambiguity against a drafter does not actually reveal the drafter's intent, and because arbitration is a matter of consent, not coercion, the anti-drafter doctrine had no role to play. The Court therefore held that where the parties' arbitration agreement is ambiguous as to whether they agreed to class arbitration, the FAA precludes class arbitration.

The Court's opinion is likely to substantially curtail the availability of class arbitration, and also impact under what circumstances parties may resort to ordinary state-law principles of contract interpretation to construe ambiguous arbitration agreements. In a well-reasoned and well-written dissent, Justice Kagan excoriated the majority, arguing that nothing in the FAA authorizes the displacement of state contract rules and neither does the FAA "federalize basic contract law." She suggested that the majority's true motivation was its dislike of class actions and class arbitration.

## CLASS ACTION PROCEDURE

The Court decided two cases posing class-action procedural questions concerning appeals of orders granting or denying class certification and removal of class actions to federal court.

In ***Neutraceutical Corp. v. Lambert***, the Court unanimously held (opinion by Justice Sotomayor) that the 14-day period prescribed by Federal Rule of Civil Procedure 23(f) for petitioning to appeal the grant or denial of certification is *not* subject to equitable tolling. The Court expressly left open questions concerning the effect on the 14-day period on motions for reconsideration, insuperable obstacles to filing, and misinformation by the District Court concerning the deadline to file.

Next, in *Home Depot U.S.A., Inc. v. Jackson*, the Court addressed whether counterclaim defendants may remove putative class actions to federal court. In a 5-4 opinion authored by Justice Thomas (joined by the Court's four more liberal-leaning justices), the Court held the answer is "no."

Citibank filed a debt-collection action against Jackson in North Carolina state court. In response, Jackson filed class-action claims against Home Depot, alleging that it induced homeowners like him to buy water-treatment systems at inflated prices. Home Depot filed a notice of removal.

Examining the plain language of the general removal statute, 28 U.S.C. §1441(a), as well as the removal statute in the Class Action Fairness Act §1453(b), the Court held the text of neither statute allowed for removal of class claims by third-party counterclaim defendants like Home Depot. Home Depot would simply have to defend against Jackson's class claims in state court. ◆



*— Allison Ehlert is a principal at the appellate firm Ehlert Hicks LLP in Berkeley. She has litigated numerous employment-discrimination, consumer-protection, fraud, and class action appeals on behalf of plaintiffs in the Federal and California Courts of Appeals.*

# 25 JUDGES

*by Nancy Drabble*

# and counting...

It didn't generate big headlines, but the approval of 25 new judges in the 2019-20 state budget was big news for you and your practice of law.

The addition of new judgeships comes after years of lobbying by Consumer Attorneys of California to address the need for the civil courts to keep pace with population growth as well as offset the deep budget cuts spawned by the last recession.

We've been very persistent in our advocacy efforts. Even Gov. Newsom, in announcing he was adding an extra $30 million for the new judges, tipped his hat to Consumer Attorneys. During a press conference, he thanked "trial attorneys and others that have just had enough of the lack of court funding."

CAOC is grateful for the new judgeships, as you should be too. Just where they will be placed will be decided by the Judicial Council in the weeks ahead, but don't be surprised if they focus on regions where the courts have failed miserably to keep up with growth, such as the Inland Empire as well as Kern and Fresno counties.

Newsom's stand on behalf of the courts was a welcome change from the stance taken by his predecessor. Former Gov. Jerry Brown was a tough sell on court funding. In his 2017 budget, for instance, Brown addressed cries for relief in Riverside and San Bernardino counties not by adding judges, but instead by moving two vacant judgeships from Alameda and Santa Clara counties.

It's no secret that California has needed more judges. Back in 2007, the Legislature authorized 50 new judgeships, but funding for those slots was slowed by the recession. In the years that followed, several lawmakers introduced bills to fund the 50 judges and even add 50 more on top, but with little success.

In 2016, the Judicial Council prepared a detailed analysis of the court workload that found the state needs 180 more judges for the system to operate as intended. State judicial leaders say San Bernardino and Riverside counties are operating with 69% of the needed judges, while Kern is at 75% and Fresno is at 86%.

With the 25 new judges this year, we're making headway. But there is no doubt we have more work to do to ensure that our civil courts function at their best and end the case backlog that can slow justice to a crawl.

CAOC will keep the pressure on in the State Capitol. With a new governor and a Legislature that is very aware of the need, we're hopeful this year's court budget boost is just the start.

As always, we appreciate your help in spreading the word about the need to support our courts. Working together, we can ensure that this key cornerstone of our democracy functions as the public demands and you and your clients deserve.

*— Nancy Drabble is CEO and Chief Lobbyist of Consumer Attorneys of California. She can be reached at nancyd@caoc.org.*

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# How to Protect Yourself and Your Loved Ones Now And In the Future: Estate Planning and Elder Abuse

Generally, estate planning is the act of getting your affairs in order so that they will be managed if you become incapacitated or deceased. Some familiar tools in that process are: wills, trusts, powers of attorney, living wills, and advanced health care directives. As people age, they become targets of financial scams or victims of elder abuse. When planned correctly with a legal professional, an estate plan can help prevent elder abuse.
The sad reality is that elder abuse exists, and sometimes people who you trust may make decisions that will benefit them and not you. Awareness and education with your estate plan is your first step to preventing elder abuse.



Jessica Kiely, Esq. is a California family trust, special needs, and elder law attorney at the Meier Law Firm who serves our growing number of families who live and work in the San Francisco Bay Area. She manages the Meier Law Firm's satellite office in Redwood City, California. Jessica enjoys working with families in establishing thoughtful plans that safeguard their unique circumstances. Jessica has been invited to speak to the employees of Uber, Apple, Oracle, and other high-profile Bay Area companies. Before joining the Meier Law Firm, Jessica practiced at a boutique San Francisco law firm where she focused on prosecuting complex cases involving products liability, negligence, catastrophic personal injury, and wrongful death. She gained tremendous trial experience while working to obtain multi-million dollar verdicts and settlements for her clients. She also realized how critical it is for every person to have an estate plan that protects them when life-changing events happen.



Anoush Lancaster, Esq. litigates complex catastrophic injury cases involving negligence, wrongful death, products liability, elder abuse, industrial and exceptions to the workers' compensation exclusive remedy doctrine. She was a finalist for the San Francisco Trial Lawyers Association's 2013 and 2014 Trial Lawyer of the Year and Consumer Attorneys of California's 2015 Trial Lawyer of the Year. She has been named Super Lawyer Northern California Rising Star 2013 and 2014 and a Super Lawyer and one of the Northern California's top women attorneys in 2015. She serves on the Board of Governors for Consumer Attorneys of California and is the vice president of Consumer Attorneys of California's Women's Caucus. Ms. Lancaster's articles appear in various legal publications and she is a frequent lecturer on a variety of topics. She has co-tried cases in Solano, Monterey, Sacramento and Fresno counties to successful plaintiffs' verdicts. Her Fresno verdict was the largest wrongful death verdict in Fresno County in the last decade.

Date and Time
Thursday, August 15, 2019
11:30 check-in; noon to 1:30 pm
Location
Massimo's Ristorante
1604 Locust Street, Walnut Creek
Cost
$40 for ACCTLA Members
$50 non-members
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# Avoiding Problems with Past Reimbursments

# MEDICARE

## and How to Deal with Medicare's Future Interest

by Amanda Greenburg and Clayton Starnes

Medicare is a federal health insurance program for people who are 65 or older, people who are younger than 65 years old and who have been entitled to Social Security Disability Insurance (SSDI) for not less than 24 months, as well as people who may qualify because of end state renal disease or amyotrophic lateral sclerosis (ALS)/Lou Gehrig's' disease. It began in 1966 under the Social Security Administration and is currently administered by the Centers for Medicare and Medicaid Services (CMS). Approximately 15% of the United State's population is currently on Medicare. Accordingly, plaintiff attorneys will encounter plaintiffs on Medicare and must deal with Medicare's interests appropriately when resolving a personal injury case.

Enacted in 1980, 42 U.S.C. §1395y(b)(2)(A)(ii), commonly referred to as the Medicare Secondary Payer (MSP) Statute, states:

Payment under this subchapter may not be made…with respect to any item or service to the extent that…

(ii) payment *has been made*, or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or *under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance*. (emphasis added)

The purpose of the MSP provisions is to protect the Medicare Trust Funds by ensuring that Medicare does not pay for items and services that another plan or entity bears primary responsibility for paying. In other words, if a claimant is compensated for past and/or future medical care in his/her personal injury settlement, Medicare considers its obligation to pay as secondary.

In personal injury cases, we often see severely injured plaintiffs who are eligible for Medicare or will soon be eligible for Medicare because they have applied for SSDI benefits. Persons under age 65 who have been entitled to SSDI for 24 months are automatically eligible for Medicare. In cases where the plaintiff is injured and unable to work, it is likely that they have applied for or are receiving SSDI, and Medicare eligibility may be imminent. Accordingly, Medicare may have an interest in the settlement.

Plaintiff attorneys should be prudent in inquiring about a claimant's Medicare and SSDI status. Even if a plaintiff is not severely injured from the incident giving rise to a claim for personal injuries, it is still recommended that attorneys inquire about a plaintiff's SSDI status as the plaintiff may have applied for or be receiving SSDI for a separate injury unrelated to his/her personal injury claim. Inquiries about a plaintiff's Medicare and SSDI status should be made at the initial intake and continue throughout the litigation to prevent delays in funding.

### REIMBURSING MEDICARE AND RECENT DOJ ACTIONS

Medicare statutes and regulations require that CMS be notified when a Medicare beneficiary resolves an injury claim and Medicare may have paid for care related to the award. This system is well-established, and a portal is set up to assist attorneys in easily reporting of claims. Recently, the Department of Justice (DOJ) identified and settled with a few law firms who did not appropriately address Medicare's interest.

In 2018, the DOJ settled a case with a Pennsylvania law firm when the law firm allegedly failed to reimburse Medicare for conditional payments made to their clients. Between May 2011 and March 2017, the law firm allegedly did not reimburse Medicare for nine of the firm's clients. U.S. Attorney William M. McSwain stated "When an attorney fails to reimburse Medicare, the United States can recover from the attorney — even if the attorney already transmitted the proceeds to the client."[1] As part of the settlement for failing to comply with the Medicare Secondary Payer Act, the law firm agreed to:

- Pay a lump sum of $28,000;
- Designate a person at the firm responsible for paying Medicare secondary payer debts;
- Train the designated employee to ensure that the firm pays these debts on a timely basis; and ▶

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# CALENDAR OF EVENTS

**Sunday, July 21, 2019**
Fourth Annual BBQ & Potluck
Roberts Regional Park, Oakland

**Tuesday, July 23, 2019**
Finding Hidden Property Damage (MCLE)
11:30am · Massimo's, Walnut Creek

**Wednesday, July 31, 2019**
Oakland A's v. Milwaukee Brewers
Oakland Coliseum

**Thursday, August 15, 2019**
How to Protect Yourself and Your Loved Ones Now and in the Future:
Estate Planning and Elder Abuse
11:30am · Massimo's Walnut Creek

**Thursday, August 29, 2019**
Diversity Mixer
5:00pm · Somar Bar & Lounge, Oakland

**Wednesday, September 25, 2019**
Diversity MCLE
11:30am check in · 1999 Harrison Street, Oakland

**Thursday, October 3, 2019**
Fall Cocktail Reception
5:30 - 7:30pm · Lafayette Park Hotel

**Wednesday, October 30, 2019**
Practical Trial Tips
11:30am · Scott's, Walnut Creek

**Thursday, December 5, 2019**
Finish Up Your MCLE with ACCTLA
5:30pm · Scott's, Oakland

**Thursday, January 16, 2020**
Judges' Night
Rotunda, Oakland

• Review any outstanding debts with the designated employee at least every six months to ensure compliance.

Given the size of the fine/payment and the number of cases, it appears the DOJ used this case to make a point that they are reviewing all cases, including lower value cases.

On March 18, 2019, the DOJ settled another case with a law firm in Maryland for allegedly failing to reimburse Medicare for payments made to medical providers on plaintiff's behalf. In this case, the client received a $1,150,000 settlement in a medical malpractice case. Medicare became aware of the settlement and requested payment. In the settlement with the DOJ, the firm agreed to pay a $250,000 fine and institute the same employee oversights listed above.

The DOJ reiterated that it was the law firm's responsibility to ensure Medicare is appropriately reimbursed. "Attorneys typically receive settlement proceeds for and disburse settlement proceeds to their clients, so they are often in the best position to ensure that Medicare's conditional payments are repaid," said U.S. Attorney Robert K. Hur. "We intend to hold attorneys accountable for failing to make good on their obligations to repay Medicare for its conditional payments."[2]

In order to avoid any potential problems, law firms must ensure that they properly notify Medicare when Medicare may have an interest even if they believe that Medicare hasn't made any payments.

## USING A MEDICARE SET-ASIDE TO PROTECT MEDICARE'S FUTURE INTEREST IN A LIABILITY CASE

The CMS's interpretation of the MSP Act is that Medicare's future interest must be considered when there is a recovery for future medical care that would otherwise be payable by Medicare. The purpose of a Medicare Set-Aside is to carve out that portion of a settlement that represents compensation for future medicals. Plaintiff attorneys put themselves and their clients in the best position when they consider Medicare's future interest and document their file.

In workers' compensation cases, CMS has established a pretty sound system and there are a number of published memoranda over the past couple of decades answering questions on how to protect Medicare's future interest. However, CMS has done very little in issuing guidance on how to consider and protect Medicare's future interest in liability cases.

In 2017, CMS issued Change Request 9893 which was a directive to the billing operators to deny payment when a Liability Medicare Set-Aside (LMSA) should be in place which went into effect on October 1, 2017. The Change Request was designed to:

• Addresses the policies, procedures and system updates required create an LMSA and NFMSA record, similar to a Workers' Compensation Medicare Set-Aside; and

• Instructs … to deny payment for items or services that should be paid from an LMSA or NFMSA fund.

When CMS issued Change Request, there was a lot of speculation about whether CMS would take a more formal approach to MSAs in liability cases and issue guidelines on how to remain compliant like it did in workers' compensation. To date, no such guidance has been issued and plaintiffs must figure out how to adequately protect Medicare's future interest on their own.

While an LMSA may not be required at this time, the CMS has made it clear that they still expect the Medicare Trust Funds be protected from payment for future services. In some CMS regional offices, when an LMSA is submitted for review and approval, CMS will send a response letter that says:

Due to resource constraints, CMS is not providing a review of this proposed LMSA amount. Please be advised that this does not constitute a release or a safe harbor from any obligations under any Federal law, including the MSP statute. All parties must ensure that Medicare is secondary to any other entity responsible for payment of medical items and services related to the liability settlement, judgment or award.

Since the Workers' Compensation MSA process is much more defined, plaintiffs can look to the workers' compensation rules for guidance. The attached flowchart lays out the Workers' Compensation MSA recommendations and can be used to evaluate when Medicare may have a future interest. From there, plaintiffs can figure out the best approach to considering Medicare's future interest and appropriately documenting their file. Documentation is key to avoid any problems with Medicare and ensuring that your consideration is defensible.

## CONCLUSION

Medicare's interest should always be evaluated and considered when resolving a personal injury claim in order to avoid delays and disruption of benefits. ◆

*— Amanda Greenburg is the Director of Medicare Compliance and Clayton Starnes is the Executive Vice President at Archer Systems, LLC. Archer is a leading provider of comprehensive settlement services including Claims Administration, Lien Resolution, QSF Administration, Medical Record Review and Plaintiff Fact Sheet Services, Bankruptcy and Probate Coordination, MSP Compliance and other settlement services. (This article was eprinted with permission from the Pennsylvania Trial Lawyers Association.)*

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[1]https://www.justice.gov/usao-edpa/pr/philadelphia-personal-injury-law-firm-agrees-start-compliance-program-and-reimburse

[2]https://www.justice.gov/usao-md/pr/maryland-law-firm-meyers-rodbell-rosenbaum-pa-agrees-pay-united-states-250000-settle

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# MEMBER news

**The Ghost Pepper Trial**

Anthony Chiosso, member of ACCTLA's Board of Directors, was on the winning team in *Stout, et al. v. The Swinging Door, et al.* (San Mateo County Superior Court, Case No. 17CIV01123, Judge Joseph C. Scott presiding). On May 2, 2019, the jury rendered its $1,050,000 verdict for Sean Stout and his spouse.

Anthony tried this personal injury, gross negligence case with Miles Cooper of Emison Cooper & Cooper, and Albert Thuesen and James O'Brien of Coit Law Group against Harlan Watkins of Murphy Pearson Bradley & Feeney.

Sean received catastrophic injuries after consuming what was deemed the "spiciest hamburger in the nation." In March 2015, while at "The Swingin' Door" in San Mateo, Sean was up-sold into ordering the pub's "XXX Habanero Hamburger." Thinking it all a big gag and knowing little about the entrée other than it had something (not known to him at the time) identified as "ghost peppers" in the sauce, he gave it a try. Beforehand, he was provided a waiver to eat this "extreme" spicy hamburger.

Along with the burger (which happened to be dosed with three to four times the standard amount of sauce), Sean was provided two pitchers of water to wash it all down. This was contrary to the pub's standard practice of providing an ice-cream sandwich to calm the mouth flames (available on request only and not on the menu). The combination of the spicy burger and two pitchers of water created insurmountable pressure in Sean's stomach.

Sean had an episode of projectile vomiting which blew a hole in his esophagus (Boerhaave's syndrome), filled his chest cavity with toxic vomit and consequently caused a pneumothorax. After transport to the ER and last rights being read, he underwent emergency life-saving surgery. He was subsequently put into a two-week coma to allow his esophagus to heal. After waking, he suffered from extreme E.R./intubation psychosis and relied on a feeding tube for much of the next two years. He has since undergone approximately nine additional surgical procedures. With some improvement, he remains with limited capacity in his consumption of food.

Plaintiff's team defeated the motion for summary judgment on the waiver and the primary assumption of risk doctrine, but lost on strict liability — the "Mexicali Rose" doctrine (that naturally occurring foods cannot be subject to strict liability).

Two entire prospective jury panels (150 people) were exhausted, mostly due to cause challenges related to the waiver and sadly, gay marriage.

The verdict form had 39 total questions, which was necessary due to the affirmative defenses, two defendants and two plaintiffs. The largest issues to overcome were: (1) the signed "waiver" (which, if found to be applicable, can only be beaten by a showing of gross negligence) and (2) the primary assumption of risk defense for participating in a food eating challenge (which must be beaten by demonstrating the host increased the risks otherwise normally inherent in the activity). A highlight of the trial included Miles standing before the jury with a gas mask, the kind the chef would use in preparing the sauce.

Plaintiffs' counsel argued for future medicals, general damages, NIED and consortium damages only. After 16 days of trial, the jury awarded the $1,050,000 to plaintiffs, and also attempted to award an extra $100,000 in bystander NIED damages, but seemed confused on the elements. Sean was found 49% comparatively at fault for his participation in the event.

The result was five times greater than defendants' best and only settlement offer and plaintiffs beat their 998s. ◆



*The winning team:*
*Anthony Chiosso, Miles Cooper and Albert Thuesen*

# 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.

## 2019 California Lawyer "Attorney of the Year"

"The 2019 California Lawyer Attorneys of the Year honor attorneys who used their considerable talents to protect, preserve and defend not only their clients but some of the world's most precious resources and ideals." In every instance, these lawyers exemplify the impacts that result from superior legal skills. • These matters and all of the others featured in this issue had far-reaching impacts in law, business and society. We highlight and salute the winners' work."

*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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