ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

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A Primer on Insurance Coverage for COVID-19 Losses

By Procopio Partner Cecilia O. Miller, Senior Associate Alexandra "Sasha" Selfridge, and Senior Counsel Ryan C. Caplan

The sweeping financial toll resulting from shuttered businesses and cancelled events due to COVID-19—the disease resulting from the virus known as the severe acute respiratory syndrome coronavirus 2—becomes clearer and more concerning with each passing day.

Many businesses have closed for good. Those that survive the COVID-19 pandemic are likely to emerge with financial scars that will, in turn, add to the already devastating human toll, including lost wages and income.

Fortunately, businesses may have in their arsenal a weapon to mitigate the financial havoc caused by COVID-19: insurance. While certain commentators opine that there is no insurance for a pandemic, that assertion is dangerously generalized.

Depending on the particular provisions of the policy and the circumstances of the losses suffered by the business, there very well may be coverage for COVID-19 losses in their insurance portfolio. Below are some steps to help businesses uncover those hidden resources, which might make a difference in ensuring the business survives these challenging times.

Business Interruption Coverage

If a business has a commercial property insurance policy—and they likely do unless they are strictly an online presence—the commercial property insurance package may well include coverage for business interruption and the losses arising from same, including loss of profits. Most business interruption coverages are written to require some form of physical loss or damage to trigger such coverage, which can prove difficult with a contagion such as COVID-19.

However, even if the policy appears to require physical loss or damage there still may be triggers for coverage hidden in the policy. Some courts hold that

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President's Message

By Alan M. Mansfield

The United Kingdom formally withdrew from the European Union. A member of the British royal family stepped away (quoting *Hamilton,* "I wasn't aware that was something a person could do"). A large swath of South Australia burned in uncontrolled wildfires. A passenger jet was shot down in the Middle East. Articles of impeachment were drawn up against the President of the United States. A basketball icon was killed in a helicopter crash. And that was all in January 2020! I guess to say it has been an eventful year so far would be an understatement.

Again, borrowing a phrase from *Hamilton,* in our "world turned upside down" members in all aspects of the legal profession have had to make major adjustments. ABTL has had to do so as well. We have postponed the ABTL Annual Seminar to October 19-24, 2021. Our great networking events such as our dinner programs and the annual judicial mixer have been cancelled. And at our most recent Executive Committee meeting we had to face the reality it is unlikely we will hold any in person events this year.

As one management guru has written, to be plugged in as an organization we need to consider three interwoven components: (1) the knowledge, skills and abilities of the people within our organization; (2) the technology tools available to our organization; and (3) the way we organize our operations. ABTL, both as a chapter and a state-wide professional organization, has quickly adapted to these challenges by drawing on the vast reservoir of talent in our organization, and utilizing technology tools to re-focus the way ABTL is organized in terms of providing substantive educational content and value to our members.

Realizing that our standard program offerings could not go forward as they historically have, and taking advantage of the depth of individual resources within ABTL, we decided to increase our content and offer it to our members via ZOOM conferences. We have been able to offer our members substantive MCLE-approved content on an almost bi-weekly basis. And you all have positively responded — attendance at these events has typically been double what they historically have been for our in-person presentations. If you have not taken advantage of our programs, I encourage you to do so.

In addition, either in presentations to our members or in co-sponsoring events, ABTL has been able to arrange for local executive judicial and administrative officers to provide up-to-date information on the status of our state and federal courts. This has allowed us to advise our clients and assist our court system in getting back to a semblance of normal operations. I particularly want to recognize the work of our Vice President Rebecca Fortune, who along with a team of volunteers lead by David S. Casey, Jr. organized ResolveLaw San Diego. This is a volunteer no cost mediation and resolution resource to help reduce the San Diego Superior Court backlog. ABTL supports the fine work of this group and the numerous volunteers who have offered to lend their time and talent to this project – many of whom are ABTL members. If you haven't checked it out as an option, please visit www.resolvelawsandiego.com.

It goes without saying that as an organization we extend a huge thank you to both our Secretary, Presiding Judge Lorna Alksne, and Board of Governors member Chief Judge Larry Burns, along with Judge Randa Trapp and our other Board members who are navigating these uncharted waters. Their leadership in this time of constantly evolving changes, coming up with solutions while balancing numerous important rights and interests, has been extraordinary. Thank you for your continuing efforts.

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President's Message

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I am most pleased to report on the work we are doing with our sister chapters throughout the State. The presidents of our local chapters are developing a collaborative process to offer our members the ability to participate in some of the programs offered by local chapters to ABTL members state-wide. In June, the Northern California chapter hosted an on-line dinner program with presentations by several local in-house counsel. For the first time, members of other ABTL chapters were able to virtually participate in that program. And while this is still a work in progress with the inevitable fits and starts, it is the presidents' mutual goal to offer more programs to all of our members, expanding the way we organize our operations as a state-wide organization. We hope to develop a further refinement of this new way of collaborating at the upcoming (virtual) ABTL Joint Board Retreat.

There is much more I could share with you all in terms of our plans for programs throughout the second half of the year. I encourage you to visit www.ABTL.org to learn about upcoming programs and events. Suffice to say, to close with my final Hamiltonian reference ABTL is "non-stop"!

I hope you are adjusting and thriving in our hopefully relatively temporary new normal. We welcome your feedback, your ideas, and your participation in ABTL. Be well and be safe.

END NOTE

[1] T.L. Griffith, *The Plugged-In Manager* (2012) at p.4 (with permission).

SINCERELY,

A Primer on Insurance Coverage for COVID-19 Losses

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these policy provisions do not require structural damage and can include airborne contaminants and bacteria. In addition, some policies may be written to include "loss of use" of property that has become uninhabitable or unusable, which may well extend to the COVID-19 related shut downs.

Even if "physical loss" is a predicate to coverage, the circumstances of COVID-19 and the premises may encompass physical loss. For example, to what degree have surfaces at the premises been contaminated by the virus and become a medium for spreading the virus due to heavy customer traffic prior to a shut down? Could the HVAC system have been contaminated? Scientific knowledge regarding transmission of this virus is continuously evolving. A novel virus requires novel arguments to avoid a superficial determination that there can be no coverage without "physical" damage.

Thus, depending on the particular provisions of the policy and the particular circumstance of the interruption of the business, there may be coverage. But, business interruption claims often raise unique questions as well as proof and quantification challenges. For example, a policy's particular waiting period may dictate notice of a claim even though the details of the claim are evolving. The circumstances of COVID-19 introduce an additional complicating factor to an already complicated and discretion-laden process for which prior business interruption claim experience is imperative.

Civil Authority Coverage & Other Specialized Coverages

A business' insurance portfolio may be hiding some other forms of specialized coverage that might apply to these challenging times.

For example, some traditional property insurance policies may also include sub limits for civil authority coverage, which provides coverage for loss of income resulting from restrictions on access to insured premises by a government or civil authority. Similar to business interruption coverage, this coverage may require "physical loss" or damage such that the potential arguments noted above may be useful in disputing any hasty denial of coverage.

Whether—and most importantly ***when***—the successive and increasingly aggressive orders from the federal, state, and local governments meet the requirements of a policy's civil authority coverage remains an open question. Again, this is dependent upon particular policy language and the circumstances of the impacted business.

Certain industries such as hospitality, medical services, and retail may have unique coverages or coverage extensions under which COVID-19 would be a covered peril, including, for example, sub-limits for viral outbreaks.

Pollution Legal Liability coverage is a specialized form of coverage, which primarily addresses environmental contamination. According to some policy language, however, this coverage may extend to contamination, including viral contamination.

Making claims under each of these coverages poses traps for the unwary and prior experience with insurance policy interpretation and claims handing is critical.

Beware of Exclusions

Following the SARS outbreak of 2003, the Insurance Services Office ("ISO") developed a virus-specific endorsement for use by the insurance industry, as well as a circular which provided context for the use of the exclusion. That circular specifically noted that disease-causing agents, such as a virus, may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial impurity occurs, potential claims involve the cost of replacement of property, cost of sterilization, and business interruption losses. In short, even the insurance industry contemplates covered property damage which can be caused by disease-causing agents. As such, it developed a virus-specific endorsement designed, and necessary, to exclude such losses. Despite the wide availability of this endorsement, it is certainly not included in every policy.

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A Primer on Insurance Coverage for COVID-19 Losses

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While many commercial policies may exclude mold and/or bacteria, COVID-19 is viral and may not fall within such exclusions, particularly in light of the more specific exclusionary language which is widely available. In addition, standard "pollution" exclusions, which are designed to exclude coverage for environmental cleanups, are generally insufficient to exclude losses caused by virus. As is typical with insurance coverage, the devil is in the details of the particular exclusion language and case-law based arguments to avoid a broad reading of exclusions from coverage.

Insurance Industry Resistance and How to Respond

In the growing wake of COVID-19, the insurance industry is facing a barrage of claims not experienced since the aftermath of September 11, 2001. The California Department of Insurance has received numerous complaints, asserting that certain insurers are attempting to dissuade policyholders from making claims, or refusing to open and investigate these claims upon receipt of notice of a claim. Policyholders are seeing kneejerk, perfunctory denials, even in policies without virus exclusions. Some carriers are demanding that policyholders produce surface or air test results, demonstrating the presence of the virus, tests which do not exist.

Persistence on the part of a policyholder may not be sufficient to get the requisite attention of the assigned claims adjuster. In these situations, it may require the intercession of experienced coverage counsel to demonstrate to the insurer that the policyholder is serious in his or her pursuit of coverage owed. Such counsel can assist with creative means of demonstrating that a covered loss or damage has occurred.

Conclusion

Especially in the COVID-19 claims world, each policy and circumstance is unique. Thus, perfunctory conclusions that a business' losses are not covered should be viewed with skepticism. A review of a business' entire insurance portfolio by an insurance coverage practitioner who can identify these potentially applicable coverages and advise on the nuances of tendering and pursuing a claim could pay significant dividends that allow a business to stay afloat during these tumultuous times.

Cecilia O'Connell Miller is a Partner with Procopio. Her practice focuses on complex commercial litigation and pre-litigation counseling with a focus on insurance coverage recovery. She has extensive experience in representing technology, financial services, life sciences, hospitality, multi-media, healthcare, manufacturing, construction and municipal clients obtaining millions in insurance coverage for first and third party liabilities under a wide range of insurance policies. Ceci's practice encompasses trial and appellate representation of her clients in arbitrations, state courts and federal courts across the country.

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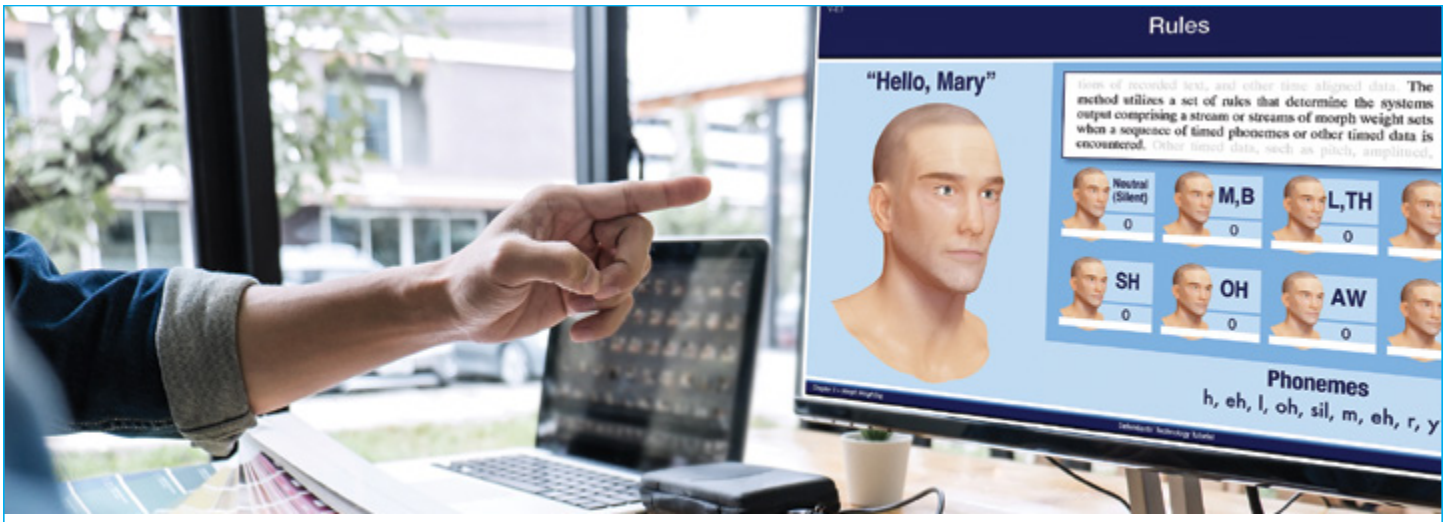

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>
> *Randall E. Kay, Esq., Jones Day*

The Honorable Richard Whitney

Judge Richard Whitney Provides Insight about both Judicial Reaction to the Pandemic and His Department

By Angela M. Hampton

The Honorable Richard S. Whitney, Department 68 Independent Calendar Judge, on April 9, 2020 provided insight on judicial discussions and preparations for the future reopening of the San Diego court during a remote ABTL brown bag lunch about his department. Judge Whitney, having been elected to the San Diego Superior Court in 2002, brings an impressive seventeen years of bench experience to Department 68.

SD Court Remains Partially Open

First and foremost, stay safe and stay at home, if possible. Avoid going to the court. Surprisingly, bailiffs are continuing to turn people away every day who are still reporting for jury duty. Do not go to court unless you are handling a temporary restraining order, unlawful detainer lockout, or gun violence TRO. The court is not taking any civil filings on the court's website at this time.

Future Re-opening

There have been quite a few meetings among the San Diego Superior Court judges. The date of reopening is unknown but the court is evaluating how best to approach the reopening. One concept is to make greater use of Court Call. Video court call capabilities are being explored in order to possibly begin hearings in May. The court is also looking into whether court reporters will need to be physically present at the court or if they can report on a proceeding remotely. The exact number of individuals allowed in the courtroom is not known. However, the first few weeks will likely be video hearings only. Criminal judges may need additional support from civil judges.

These factors will impact the civil courts and how reopening will proceed. When the court reopens, rules from the Governor's office and the Health Department will be followed. Further information will be provided once final determinations are made.

Prioritizing Trials

There are many unknown variables regarding trials. For example, will jurors be permitted to return to court? Although each department is independent the judges are working together to figure this out. The assumption is trials will get pushed out as judges will need to get through ex-partes first. Unlawful detainers will have priority. Preference cases will have next priority. If you have a special or unusual circumstance not addressed in the judicial council rules, it is important you let the court know.

Be Creative and Work it Out

The court is hopeful parties will evaluate their facts and settle cases on their own, where possible. The court is requesting all attorneys put meet and confer efforts into overdrive. The court is aware there will be a tremendous backlog of discovery disputes; however, discovery motions will be put on the back burner.

Judge Whitney implores all to be creative. He reminds us that as officers of the court, everyone needs to get onboard with resolving these issues. It is imperative for attorneys to work out as many discovery disputes as possible. The court is attempting to help facilitate some resolutions.

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Judge Richard Whitney

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Judge Jeffrey Barton has graciously offered to help with discovery disputes and may become a discovery referee. Additionally, there are three Judges who may be working on settlement conferences to alleviate pressing concerns when the court opens up.

When asked whether the holiday rule applies to general discovery, Judge Whitney promptly responded that an attorney's attempt to use a procedural rule to their advantage will not be viewed favorably by the court. Attorneys, now more than ever, need to use exceptional good faith efforts.

Judicial Council Rules

The judicial council recently adopted some rules that impact the civil bench. Rule 9 tolls the SOL for civil causes of action from April 6, 2020 until ninety days after Governor Newsom lifts the pandemic order. Rule eleven extends the 3 and 5 year time to bring a case to trial by 6 months, understanding that it could be extended further. Rule 11 allows deponents to appear remotely at depositions. Rule 11 will also remain in effect until ninety days after Governor Newsom lifts pandemic orders.

Department 68

Amazingly, Department 68 often receives a 12 inch stack of paper for ex parte applications. Ideally, please provide a short, 5 page or less, ex parte application. Make it as brief as possible. Consider that the court only has 5-10 minutes for an ex parte hearing. If it is an unopposed motion to amend a complaint, to withdraw as counsel, or to approve a good faith settlement Judge Whitney will likely grant it. So, let Department 68 know whether there is opposition to your ex parte. If there is good cause, it is not opposed, then for Department 68, there is no need to draft a noticed motion. Judge Whitney will grant it. Additionally, it is rare for Judge Whitney not to sign off on stipulations. If you have a signed, written stipulation, let Department 68 know, you can avoid coming in ex parte.

Judge Whitney is not a huge fan of sanctions. His philosophy is where there is a reasonable excuse he will give the attorney a break, so long as they are not a repeat offender. There should be absolutely no personal attacks between attorneys in writing or during oral argument. While there is nothing wrong with zealous advocacy, remember the decorum owed to all parties and the court. Do not address opposing counsel but instead address Judge Whitney directly. Lack of professionalism makes the court's job much harder.

Judge Whitney's biggest pet peeve: attorneys who snipe at each other in court. Attorneys who get the best results are those who work well together. There is nothing more impressive than seeing an attorney who lost at trial or at a hearing walk over and shake the hand of the opposing party. In fact, Judge Whitney has seen opposing party clients ask for an attorney's card because they were impressed with the level of professionalism. What we need during this grave time is for attorneys to work together. Professionalism goes a long way with the jury and court. From Judge Whitney and Department 68, stay healthy and be well.

Special thanks to Judge Whitney and Department 68 for sharing their knowledge of the ongoing judicial discussions and preparations amid pandemic orders. These are great reminders for our legal community. Stay committed to keeping San Diego classy!

Angela M. Hampton is an associate at Gordon Rees Scully Mansukhani LLP

The Honorable Jill Burkhardt

United States Magistrate Judge Burkhardt's ABTL Lunch and Learn

By Angela M. Hampton

On May 21, 2020, Magistrate Judge Jill L. Burkhardt of the U.S. District Court for the Southern District of California presented a virtual lunch and learn. Judge Burkhardt addressed the federal court's response to the ongoing pandemic. The court's overall goal is to maintain access to justice while protecting the community in a fluid and evolving situation.

Criminal Proceedings

Criminal defendants have constitutional protections which must be protected. Much of the court's attention has been focused on how criminal proceedings can be adjusted to protect health and safety while guarding constitutional rights.

Protecting the health of in-custody individuals is an ongoing priority. The Bureau of Prisons has rolled out a number of protective measures to include screening and quarantine protocols for in-custody individuals. Presently, no outside visitors are being allowed into federal prison facilities in our district.

Criminal defense attorneys have had to use remote methods of communication with their in-custody clients. In-custody defendants cannot currently be safely transported between prisons and the court. Criminal hearings with in-custody individuals are proceeding by video, but only with the consent of the defendant. If video consent is not provided, then the hearing cannot proceed and must be continued. Most in-custody defendants are consenting to video appearances.

The U.S. Attorney's Office has shifted its prosecution policies in order to temporarily reduce the number of defendants in custody. For those arrestees who are approved for criminal prosecution, the Office has opted to give notices to appear to defendants who present a lower risk of flight. Additionally, the court has prioritized sentencing hearings for those defendants who are arguing for time-served sentences so that if a time-served sentence is imposed, those defendants will be released from custody, further reducing the number of defendants in the local federal facilities. For the same reason, the court has prioritized bail review hearings.

Over the last few months, the court has been unable to convene grand juries. Without grand juries, the government cannot obtain indictments against defendants. Thus, the Chief Judge, with authority from the CARES Act and the Ninth Circuit, has issued a series of orders that, among other things, have extended the time in which cases must be presented to the grand jury for indictment. In mid-May, the court began convening grand juries again. This is a big development. While some grand juries have been convened again, the court does not expect to have the usual number of grand jury proceedings for a while.

In-person criminal proceedings for out-of-custody criminal defendants will resume after June 1.

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Magistrate Judge Jill Burkhardt

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Civil Matters

Rest assured, the court's civil business has continued. Many, if not most, court staff and judges are working remotely. Unlike criminal matters, civil remote hearings do not require the consent of the parties. Most civil hearings are being held telephonically or by video. Considering most civil motions in the district are decided on the papers, case progress has not been significantly hampered by the inability to have in-person hearings. Civil jury trials have been suspended. Individual judges are deciding on a case-by-case basis whether to proceed with civil bench trials.

Requesting Extensions

The pandemic has impacted civil case schedules for almost everyone. Initially, when the shelter-at-home orders were first issued, requests for more time were generously granted. Now, there is more of an expectation that the legal community has adapted. Parties may still request extensions of time, but they must be supported by good cause, which is likely to require more than a general reference to the pandemic.

Litigants have learned that depositions can and often should be conducted virtually during the pandemic. If counsel is seeking an extension of the schedule in the case because of a desire to conduct in-person depositions, the court will likely require a fact-specific showing of need. Examples that come to mind might include a witness who is hard of hearing or has other communication challenges. The bottom line is that the pandemic is not a reason for litigation to grind to a halt and the court will be looking to the parties to keep things moving forward.

Communication with the Court

When issues arise, Judge Burkhardt strongly recommends first reviewing the local rules and the chamber rules for the district judge and magistrate judge assigned to the case. This will not only guide you on the appropriate means to communicate with the court, but you can often find the answer to your substantive questions there.

As a friendly reminder, while each judge has an e-file email address, please do not utilize this means of communication unless authorized by the court. Check the judge's chambers rules to determine if email communication is allowed in your particular circumstance.

When calling chambers, if your call is not immediately answered, please leave a brief but substantive message regarding your issue. Judge Burkhardt's staff is attentive to voice mail messages and calls are returned promptly. The nature of the dispute will impact the kind of response you get, so please be more detailed than simply saying the parties have a discovery dispute. The better informed the court is, the more prepared the court can be to address your issue.

Early Neutral Evaluation Conferences and Mandatory Settlement Conferences

Settlement conferences, both ENEs and MSCs, have continued during the pandemic, albeit remotely. In fact, Judge Burkhardt has settled 6 out of 8 cases since the pandemic started. As a general matter, a successful settlement hearing depends on proper preparation. Lay the necessary groundwork before the hearing. Prepare your client so they understand that a settlement hearing is a court proceeding and the person mediating is one of the judges on the case. Please ensure your client knows what is and is not appropriate court conduct. Endeavor to exchange settlement demands before the hearing. Discuss with your client the need to compromise, be open minded, and listen to other perspectives. Your client should be prepared to re-evaluate his or her settlement position based upon what is learned at the settlement conference. If you have client control or other client issues that are impeding settlement, feel free to let the settlement conference judge know. The settlement judge can sometimes be a good person to communicate messages you cannot or to reinforce messages you need help reinforcing. Please note that if the parties consent to magistrate judge jurisdiction early in the case, the ENE will be conducted by a different magistrate judge.

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Magistrate Judge Jill Burkhardt

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Judge Burkhardt's Pet Peeves

The best motions and briefs are concise, organized and unfailingly true in the legal authority being cited. Resist the urge to cast aspersions on opposing counsel or to characterize opposing counsel in a negative light. Assume opposing counsel's arguments are made in good faith. If a position is not well-founded, set forth the legal analysis and trust the court to draw its own conclusions about the other sides' briefing. Avoid non-legal comments about counsel.

Community Civility

Judge Burkhardt believes our legal community has risen to the occasion in the face of COVID-19. "It has been a pleasure to be on the bench at this time." Our legal community seems to be treating each other more amicably than ever before. Requests received are mostly joint requests. Criminal attorneys have been working hard together to strike the right balance between keeping cases moving forward and keeping everyone safe. Civil attorneys are resolving issues on their own and settling cases where they can. Be patient, adapt, and together we will get through this. Great job San Diego and keep it up!

Angela M. Hampton is an associate at Gordon Rees Scully Mansukhani LLP

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Federal Judges Collaborate on Zoom, Ask Attorneys to Do the Same

By Daniela Peinado Welsh

Videoconference platforms have become an essential tool in the COVID-19 era. In the first quarter of 2020, one videoconference platform peaked at over 300 million daily participants—a *thirtyfold* increase from the previous quarter. Federal courts have risen to the occasion, using such technology to enable motion hearings, settlement conferences, and additional appearances. In other words, to keep their dockets moving and keep the Bar informed.

Eyeing an opportunity, the Litigation Section of the California Lawyers Association hosted a videoconference with judges from different districts. Christian Andreu-von Euw moderated after Jessica Leal introduced the esteemed panel, comprising the Hon. Laurel Beeler (N.D. Cal.), Hon. Jill Burkhardt (S.D. Cal.), Hon. Yvonne Gonzalez Rogers (N.D. Cal.), and Hon. Dana Sabraw (S.D. Cal.).

The conversation was noteworthy for many reasons. It provided a platform for judges from across the state to meet *face to face* without the need for travel. The panel described their practices, identified major changes to their practices, emphasized changes that might outlast COVID-19, and asked attorneys to adjust. We are hopeful that videoconferences like this one will outlast COVID-19, connecting members of the Bench and Bar throughout California.

Exchanging Information

The videoconference served, first and foremost, as a "nice opportunity to get together in a forum like this to talk about our respective practices. It helps us all do our jobs better," Judge Beeler stated.

Judge Sabraw concurred, showing appreciation for his tech-savvy colleagues in the Bay Area. Through a smile, he added, "I've learned so much from my colleagues in the Northern District; I think I'm going to have to change my ways."

In a similar spirit of collaboration, Judge Gonzalez Rogers invited Judge Sabraw's law clerks to observe her upcoming *Markman* (patent claim construction) hearing online, as Judge Sabraw is participating in a pilot program that provides judges with specialized patent law training. The judges, who serve in separate

districts, had previously worked together on paper. She was "glad to finally meet" by video. Clearly, videoconference platforms have created a new avenue for collaboration.

Identifying Changes

The panel laid a foundation, explaining how COVID-19 is affecting their courthouses, their chambers, and their communities. They identified the following fundamental changes: the (1) suspension of jury trials; (2) reduction of prison populations as notices to appear are continued; (3) advent of videoconferencing for criminal defendants (following guidance from the Judicial Conference of the United States, under authority provided by the CARES Act); and (4), as mentioned, the adoption of videoconferencing for external-facing and internal-facing communications like motion hearings and case management conferences.

Since this meeting, the Northern District of California has shared specific guidance with the public regarding videoconferences. While the court will not offer technical support to participants, it will likely use only the audio and video functionality of videoconference platforms; other functions such as text chatting and

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Federal Judges Collaborate on Zoom...

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screen sharing will likely be disabled. Access information for attendees will be available on PACER, the Court's Remote Hearings webpage, the presiding judge's calendar, or by email.

With most of the office teleworking, the Southern District of California is likewise endeavoring to proceed with business as usual. Chief Judge Larry Burns has issued several recent orders related to COVID-19 and has appointed individuals to serve as members of the Court Strategic Committee on Resumption of Regular Court Proceedings.

Making Predictions

The panel indicated that some of these changes might be for the better, promoting sustainability and cost savings. Some, including Judge Gonzalez Rogers, may stop requiring paper courtesy copies. Others may continue using videoconferences (or telephonic conferences, depending on how long videoconference licenses are funded) for law and motion hearings. Members of the panel also suggested that attorneys get comfortable with remote depositions.

But a big challenge, the panel agreed, will be how to resume jury trials. For example, will jurors in high-risk categories be excused from jury service automatically? Will jury selection require more people? Criminal jury boxes and deliberation rooms may not be large enough to accommodate the constitutional minimum, requiring the use of multiple courtrooms for a single criminal trial. Attorneys may need to utilize longer questionnaires, and pro se litigants may need better access to technology. Attorneys were invited to brainstorm solutions to this complicated issue.

Recommending Cooperation

There was one final takeaway: cooperate. Although United States Courts are thoughtfully adapting to the COVID-19 era, now more than ever, the system needs attorneys to work together. Agree on your schedule. Resolve the little things. Submit joint motions. Be kind to each other. In other words, free up federal judges to work together to maintain access to our courts.

Daniela Peinado Welsh is an associate at Morrison Foerster.

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Monthly Charges and Annual Passes During the COVID-19 Pandemic – Do Consumers Get a Refund?

By Chase Stern

The COVID-19 pandemic has resulted in a massive number of unforeseen cancellations of events and the inability to use paid subscriptions, memberships, and season passes. These range from gym and amusement park closings, to postponed sports seasons, concert and vacation travel/ accommodation cancellations, daycare center shutdowns, and ski resort closures. Consumers often pay for these services and activities in advance and frequently in the form of a direct monthly charge to their credit or debit cards, or third-party payment accounts.

Are consumers entitled to refunds? Common sense suggests the answer is a resounding "Yes," but under the letter of the law and the language in the contracts, this question may be far more difficult and complicated to answer.

Consumer advocates argue that it is unfair, and likely unlawful, for businesses to charge for services they cannot provide and that these businesses are unjustly enriching themselves while not providing the promised services. Yet they are doing it, nonetheless. Businesses argue that parties are free to contract however they choose. Class action lawsuits are being filed across the country addressing these very issues.

It's time to analyze the contract language. Consumer advocates suggest that consumers who have been charged for services that are not being provided should first reach out to the service provider to inquire about a refund. If no refund is forthcoming, then consumers should carefully review their contracts (and request a copy from the service provider if they do not have one). Many consumer contracts contain any number of provisions which can make it difficult, if not impossible, for consumers to obtain refunds, individually and/or on a class wide basis. These include arbitration and class action waiver provisions and force majeure clauses.

Many membership and subscription agreements contain provisions mandating that disputes be resolved solely through arbitration—with individuals waiving their rights to bring an action in a court of law, individually, and on a classwide basis. The costs of an individual arbitration (filing fees, attorneys' fees, and time) will often far exceed any recovery on an individual basis. Consumer contracts may also include unilateral change and force majeure clauses. These clauses, while they may not be as common as arbitration and class action waiver clauses, may enable a company to make and enforce a unilateral change to the contract—such as choosing to extend the customer membership period rather than refunding membership fees. While frustration of purpose or force majeure provisions may allow contract termination, they may also allow delayed or different performance, including membership extensions— without refunds—for facility closures and event postponements/ cancellations. The current and forthcoming class action litigation will likely test the interpretation and enforceability of such force majeure provisions.

If consumers are not getting a refund after paying for services that are not being provided, they should first review their contracts to confirm whether there are arbitration and/ or class action waiver provisions that would prevent the filing of a class action lawsuit, and then contact an experienced law firm that has a track record for success in class actions. Similarly, if businesses are receiving requests for refunds, they should look at their contracts to determine whether they may be required to issue refunds and whether they may have exposure to class actions seeking refunds.

In response to the coronavirus, cities throughout California have issued emergency orders and placed temporary restrictions on certain business, such as restaurants, bars, salons, movie theaters, concert and sporting event venues, golf courses, bowling alleys, gyms, and retail facilities such as department stores and clothing boutiques, to name but a few. If

(Continued on page 18)

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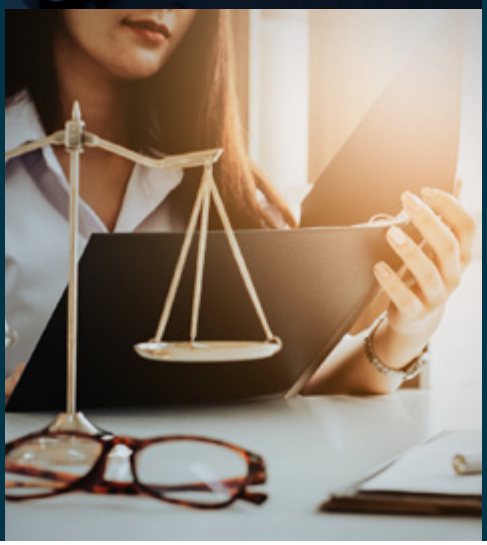

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an employer has temporarily shut down its operations to comply with these orders, several employment issues should be considered:

Paychecks

This issue is one that must be approached carefully. There may not be a need to issue employees a paycheck at the time they are being informed of a temporary shutdown if the employer expects a continuing employment relationship. Employers should make clear that the employment relationship is expected to continue, and should endeavor to provide an expected return date, subject to reconsideration as circumstances develop. The California Labor Code has very specific requirements regarding final pay checks for terminated employees. Employers and employees should consult legal counsel to ensure compliance with the applicable requirements.

Furloughed Work and Entitlement to Compensation

Is an employee who is placed on furlough and who performs work remotely entitled to compensation under California law and/ or the Fair Labor Standards Act (FLSA)? The answer under applicable law would seem to suggest that "yes," the employee must be paid, despite what may or may not be permitted by the employer's policies for furloughed employees. But this is not all cases. Whether an employee is ultimately entitled to pay for furloughed work really must be analyzed under the particular facts and circumstances of each case. Determining whether and how to pay both exempt and nonexempt employees who perform work while on furlough can be complex and employers and employees should consult legal counsel to ensure compliance with the applicable requirements.

Filing for Unemployment Insurance

If an employer reduces hours or shuts down operations due to coronavirus, employees can, and often should, file an Unemployment Insurance (UI) claim. Generally, UI provides partial wage replacement benefit payments to workers who lose their job or have their hours reduced, through no fault of their own. Employees should be notified of their right to apply for unemployment compensation. Certain claimants may also be eligible for increased benefits and the duration of benefits may also increase in light of the pandemic. It is advisable to provide furloughed employees with a link, to the relevant state website, which should be checked regularly. For more information, see: https://edd.ca.gov/Unemployment/ Filing_a_Claim.htm

Paid Sick Leave Under State and Local Laws

Employees may be eligible to use paid sick leave under state and local law. For example, California's Labor Commissioner has issued FAQs on California's paid sick leave law during the COVID-19 period and explains, "Paid sick leave can be used for absences due to illness, the diagnosis, care or treatment of an existing health condition or preventative care for the employee or the employee's family member. Preventative care may include self-quarantine as a result of potential exposure to COVID-19 if quarantine is recommended by civil authorities." Employers and employees should consult legal counsel to ensure compliance with the applicable requirements.

Federal Bill: Families First Coronavirus Response Act

The Family First Coronavirus Response Act (passed March 16, 2020 and effective through December 31, 2020) requires certain employers to provide their employees with two weeks of paid sick leave for reasons related to COVID-19. The Act also expands the Family and Medical Leave Act (FMLA) to provide up to 12 weeks of job-protected leave. After the employee has taken the two weeks of paid leave, the employee will be able to take the additional FMLA leave at two-thirds of the employee's usual pay. The bill requires employers to pay the employees during these leaves, and then provides reimbursement of this cost through a refundable tax credit.

Chase Stern is an associate in the San Diego office of Johnson Fistel.

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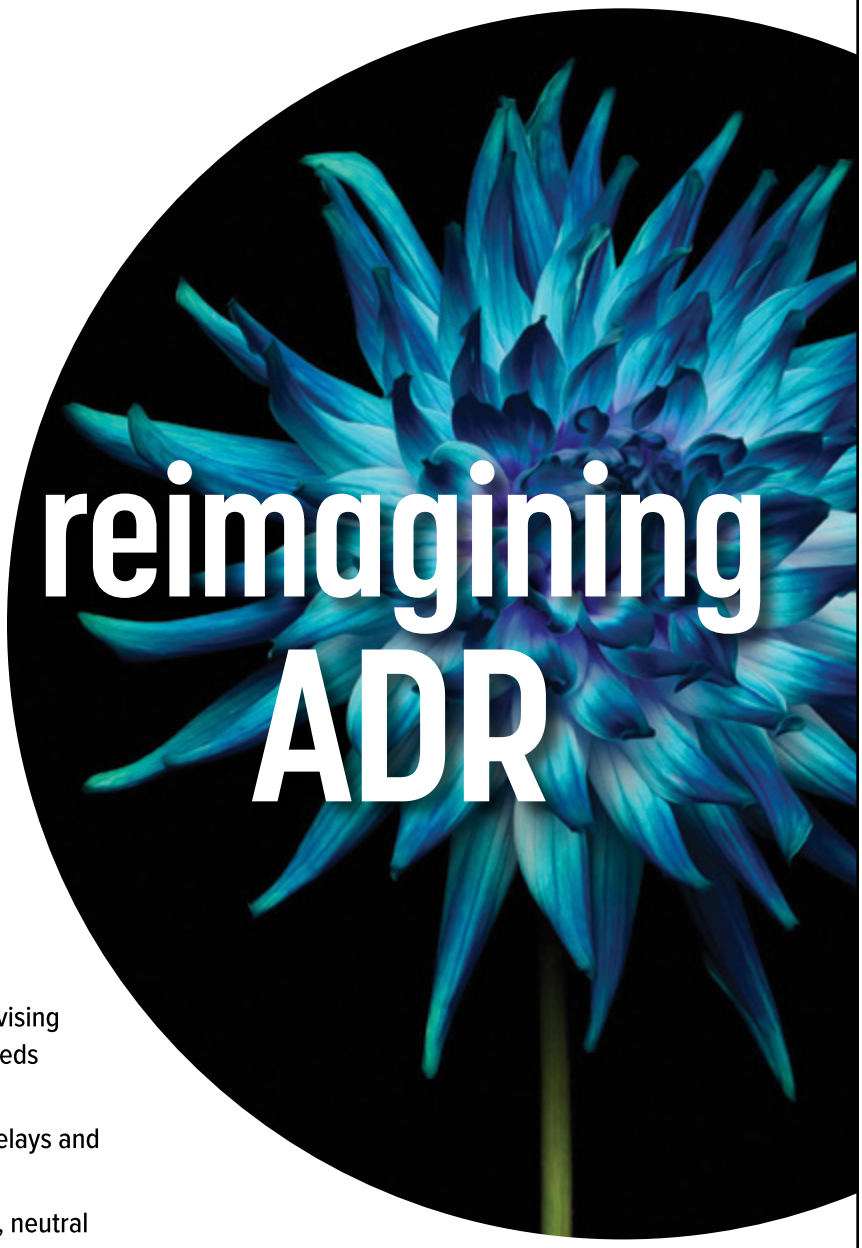

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June 2020

By Monty A. McIntyre, ADR Services, Inc.

CALIFORNIA SUPREME COURT

Business & Professions Code

*Abbott Laboratories v. Super. Ct. of Orange County (*2020) _ Cal.5th _ , 2020 WL 3525181: The California Supreme Court reversed the Court of Appeal's order directing the trial court to grant defendants' motion to strike the word "California" from the Orange County District Attorney's (District Attorney) complaint alleging that defendants had violated the unfair competition law (UCL; Business & Professions Code, section 17200 et seq.) by entering into agreements to delay the market debut of generic versions of Niaspan, a prescription drug used to treat high cholesterol, causing users of Niaspan, their insurers, public health care providers, and other government entities to pay substantially higher prices for Niaspan than they would have if the generic version had been available without improper delay. The Court of Appeal found the District Attorney could only bring the UCL action on behalf of residents of Orange County. The California Supreme Court disagreed, ruling that the UCL does not preclude a district attorney, in a properly pleaded case, from including allegations of violations occurring outside as well as within the borders of his or her county. (June 25, 2020.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Cal. Union Square L.P. v. Saks & Co. LLC (2020) _ Cal.App.5th _ , 2020 WL 3097391: The Court of Appeal affirmed the trial court's order vacating the first arbitration award in favor of claimant. After the trial court vacated the first arbitration award, the parties attended a second arbitration with a new arbitrator who issued an award favoring respondent. The trial court confirmed the second arbitration award, but that order was not appealed by claimant. Because the first arbitrator's visit to New York properties discussed in testimony in terms of sales volumes was arguably within the scope of his powers as arbitrator, the Court of Appeal ruled he did not exceed his powers by visiting those specified properties. However, regarding respondent's flagship store on Fifth Avenue in New York (Saks New York), the Court of Appeal held the first arbitrator exceeded the powers granted him by the agreement when he conducted his own investigation and inspection of a property that was not even mentioned at the hearing. Because the arbitrator's inspection of Saks New York and his evaluation of what Saks did with another one of its own properties, at the very least, potentially affected his rent determination, the trial court properly granted the motion to vacate the first arbitration award. (C.A. 1st, June 11, 2020.)

Attorney Fees

MSY Trading Inc. v. Saleen Automotive, Inc. (2020) _ Cal.App.5th _ , 2020 WL 3481424: The Court of Appeal affirmed the trial court's order granting defendant's motion for attorney fees after it prevailed in plaintiff's post-judgment action alleging that defendant should be liable, as an alter ego, on a judgment for breach of contract. Ruling on a matter of first impression, the Court of Appeal held that, when a judgment creditor attempts to add a party to a breach of contract judgment that includes a contractual fee award, the suit is on the contract for purposes of Civil Code section 1717. (C.A. 4th, June 26, 2020.)

Civil Procedure

Roche v. Hyde (2020) _ Cal.App. 5th _ , 2020 WL 3563410: The Court of Appeal affirmed the trial court's order denying defendants' anti-SLAPP motion to strike (Code of Civil Procedure, section 425.16) plaintiff's complaint for malicious prosecution. Plaintiff sued for malicious prosecution after defendants dismissed an earlier lawsuit against plaintiff[1] and agreed to pay $600,000 of plaintiff's attorney fees in that action. The dismissal of the earlier lawsuit occurred shortly before a terminating sanctions motion was to be heard regarding the continuous withholding of documents by the plaintiff in that action. The dismissal was shortly after plaintiff in the earlier action finally produced documents from its transactional attorney showing that it had in its possession, before the winery escrow closed, an expert report providing the seismic information the plaintiff in that action alleged had been withheld. The basic issue for this anti-SLAPP motion appeal was whether plaintiff had made a sufficient showing that he was likely to succeed on the merits, and the Court of Appeal concluded that he had. Plaintiff met his prima facie burden of proving the underlying action was terminated in his favor. The Court of Appeal found, under the circumstances of the earlier case, that the unilateral dismissal of the earlier action was a favorable termination. Plaintiff also met his prima facie burden of proving defendants lacked probable cause to bring or maintain the

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California Civil Case Summaries

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underlying action against him, primarily because the plaintiff in the earlier action was constructively charged with expert seismic information in the hands of its transactional counsel. As a matter of first impression, the Court of Appeal held that egregious discovery misconduct—the withholding of a critical piece of evidence in willful violation of multiple court orders, including a sanctions order, where the suppressed evidence likely would have resulted in a summary judgment victory for defendant in the underlying action—can provide a basis for applying the fraud or perjury exception under *Carpenter v. Sibley* (1908) 153 Cal. 215 to the interim adverse judgment rule enunciated in *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767. The Court of Appeal concluded the evidence supplied a prima facie basis for applying the exception in this case. (C.A. 1st, June 30, 2020.)

ENDNOTES

[1] That action against plaintiff was for breach of contract, fraud and negligent disclosure arising from the sale of a Sonoma County winery based upon claims that plaintiff had withheld seismic information about the property and made misstatements concerning the ability to build on an existing building pad.

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Words Matter. Perhaps Especially Ours as Lawyers.

By Rupa G. Singh

Words matter, and the right words matter most of all.
In the end, they're all that remain of us. – John Birmingham

My grandfather was a well-respected, reasonably successful lawyer in post-colonial India. Lawyers also seem disproportionately likely to lead nation-states, institutional reforms, and social revolutions, and transition seamlessly to politics and government. But I didn't become a lawyer to pay homage to family tradition. Nor did I aspire to lead a movement or rise through the ranks in the public sector.

Rather, I gravitated towards the law because of how it quietly empowers words over weapons. Whether it's determining who owns a parcel of land, what criminal act warrants life in prison, or how to award custody of children after a contentious divorce, the law represents our agreement to forsake fists, swords, and guns in favor of words to resolve the most intractable of human disputes.

Recently, though, I have been forced to think more deeply about the power of our pen as lawyers. In her thought-provoking presentation, Professor Leslie P. Culver used anthropological, legal, and academic research to explain persuasively that our implicit biases affect the words we choose in our legal advocacy, allowing us to either unconsciously reinforce or consciously exploit prevalent stereotypes.

Wait, what? The implicit biases that decades of research shows we all harbor are somehow reflected in our oral and written advocacy? Yes, and just let me count the ways. Confirmation bias causes us to pay more attention to information that confirms our existing belief system and to disregard information that is contradictory, for example, discounting the possibility of women perpetrating sexual harassment. Attribution bias causes us to make more favorable assessments of behaviors by those in our "in groups" while judging those in our "out groups" by less favorable group stereotypes, for example excusing analytical errors by white males as mistakes while believing the same mistakes by his black counterpart as intellectual inferiority. Availability bias causes us to default to "top of mind" information, such as automatically picturing a man when describing a "leader" and a woman when describing a "support person." Affinity bias—the tendency to gravitate toward people who are more like ourselves in interest and background—leads us to invest more energy and resources in those in our affinity group while unintentionally leaving others out. Narrative bias—the "pervasive bias of stories, manners, sensitivities, and paradigms"—allows us to discuss as "neutral" information that dredges conflict for others, for example, arguing based on the premise that women's entry into the workforce is harmful to children or that the Obama presidency established that we live in a post-racial world.

As one researcher puts it, "We are mistaken if we treat law as an objective and neutral body of rules and values, and fail to recognize how white, male, middle-class experience and values dominate the legal system." And it's not just in the much-studied arena of criminal justice, but at every level and in every practice area of the law. In my field of civil litigation and appeals, for example, consider the motion to recuse an African-American district court judge to whom a case by black plaintiffs alleging racial discrimination was assigned; according to defendants, the judge was biased because he had given a speech to black historians and had an "intimate tie with and emotional attachment to the advancement of black civil rights." In denying defendant's motion, the court called out its racist premise—that black judges, unlike their white colleagues, could not be impartial in deciding a case involving parties of their own ethnic background.

Notably, scholars argue that we cannot be, and should not strive to be, blind to issues of race, gender, age, sexual orientation, socio-economic class, physical disability, or mental health; these issues and our unconscious reaction to them are always present. But, in addition to becoming aware of our biases and how they might make us act, we are also urged do the same in our words. Reflection on this advice leads to my next revelation: We are obligated as lawyers to choose our words in briefs and arguments based on concerns beyond our duty to credibly yet zealously advocate for our clients. In fact, being

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Words Matter...

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an officer of the court requires us to be more than just truthful; we must also try to dispel bias, and, if possible, plant counter-stereotypes while pursuing our client's interests. How do we do this?

First, we can strive to use gender-neutral language, which rules suggest some courts to aspire to already—for example, calling a party a firefighter, not a fireman; a police officer, not a policeman; a chair, not a chairman; a flight attendant, not a stewardess. Second, we can be precise in using terms of cultural or ethnic identity, assuming they are relevant to the discussion—for example, the terms "Hispanic," "Spanish," "Latino/Latina," and "Chicano/Chicana" are not interchangeable, but mean different things. Third, we can examine vocabulary specific to our area of practice for terms that seem ubiquitous but carry cultural baggage we may not mean to employ—for example, we attach different cultural meaning to "fathering" a child verses "mothering" a child, and also exclude same-sex parents when using these terms, so family law practitioners might describe "parenting" efforts when advocating for custody or visitation in a child's best interests.

Fourth, we can examine how to frame the issues to a tribunal. Take a defamation case. We can choose to frame the issue around the erroneous determination that a female plaintiff is only damaged because of her heightened sensitivity or lack of thick skin, subtly naming and reinforcing the stereotype that women lack the ability to loosen up or laugh at themselves. Or take a personal injury case. We could plausibly note, during our discussion of the facts, that plaintiff is a female construction worker or a male receptionist; even though these facts are not necessary the issue of liability or damages, we can put a name to, and challenge, cultural stereotypes about "male" and "female" professions. As USCD cognitive scientist Lera Boroditsky has explained, "Things that are named are the ones most likely to be thought about and to be visible in our consciousness" but "what isn't named can't be counted . . . [or] be acted upon."

This brings up the question, of course, of how to balance such efforts with our duty to only include "legally significant facts," that is, facts "a court would consider significant either in deciding that a statute or rule is applicable or in applying that statute or rule." Take the debate over whether to mention a black defendant's race in a statement of facts when it is not relevant to applying any criminal statute or rule. Because its only relevance is to evoke the decision-maker's unconscious bias, this fact seems best left out even under the rule of "legally significant" facts. Plus, zealous advocacy does not mean unprincipled advocacy; we just need to decide which principles are important enough to uphold even as zealous advocates. Navigating this issue is a complicated question, with a disfavored yet predictable answer—it depends (on the advocate and the case).

That brings me to a final question—does this excruciating exercise in self-examination, thoughtful research, and careful advocacy really matter? Can we as individuals really battle sexism, racism, agism, xenophobia, or homophobia with a few word choices in legal advocacy? This time the answer is not a dissatisfying "it depends," but a resounding yes.

"Implicit biases are malleable; therefore, the implicit associations that we have formed can be gradually unlearned and replaced with new mental associations." Reading about successful female leaders or merely viewing photographs of women leaders has been shown to reduce implicit gender bias. Biologist Dr. Mark Pagel has suggested that language is "the most powerful, dangerous and subversive trait that natural selection has ever devised" because it allows us to "implant" our ideas other people's minds, "rewiring" them.

And so, I come full circle, recognizing the power of words, especially in the law. I may not have become a lawyer because of my grandfather, but I hope at least one of my children or grandchildren will also choose the law, and make striving for meaningful advocacy a family tradition, perhaps the only thing that remains of me.

Rupa G. Singh handles complex civil appeals and critical motions in state and federal court at Niddrie Addams Fuller Singh LLP, an appellate boutique. She is founding president of the San Diego Appellate Inn of Court, former chair of the County Bar's Appellate Practice Section, and a self-proclaimed word enthusiast.

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Words Matter...

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ENDNOTES

[1] www.azquotes.com/author/30766-John_Birmingham; Birmingham is a British-born Australian author of, among others, "Axis of Time" trilogy.

[2] Professor Leslie P. Culver, *White Doors, Black Footsteps: Implicit Bias & Cultural Consciousness In Legal Writing,* SDCBA Appellate Practice Section Presentation (June 24, 2020); see also https://www.law.uci.edu/faculty/visiting/culver/.

[3] Kathleen Nalty, Strategies for Confronting Unconscious Bias, THE FEDERAL LAWYER 26, 28 (2017).

[4] *Ibid.*

[5] For example, a 2014 study found that law firm partners who reviewed a legal memorandum with identical typographical, grammatical, and substantive errors were more likely to rate it as analytically superior when told that its author was a white male associate than a black one. (www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases).

[6] Nalty, *supra* note 3, at 27.

[7] *Id.* at 28 (positing that, due to the prevalence of affinity bias, the legal profession is more of a "mirrortocracy" than a meritocracy).

[8] Leslie Espinoza, *The LSAT: Narratives and Bias,* 1 AM. U. J. GENDER & L. 121, 131-35 (1993)

[9] Paula Lustbader, *Teach in Context: Responding to Diverse Students Helps All Students Learn,* 48 J. LEGAL EDUC. 402, 408 (1998).

[10] Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law,* 73 CORNELL L. REV. 1016, 1018 (1988).

[11] Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 CAL. L. REV. 733, 743 & fn. 42 (1995) (discussing legal decisionmakers' ingrained stereotypes); Thomas W. Joo, Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11, 34 COLUM HUM. RTS. L. REV. 1, 4 (2002) ("negative racial stereotypes are deeply ingrained in our culture and history, and thus reflected in the law and government conduct").

[12] *Penn. v. Local Union 542, Int'l Union of Operating Engr's,* 388 F. Supp. 155 (E.D. Pa. 1974)

[13] *Id.* at 157, 163-65.

[14] Stephanie M. Wildman, *et al.,* PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996) ("Race, gender, and sexual orientation are in the room whether we make them explicit or not, but everyone pretends that they are not noticing.").

[15] Leslie P. Culver, *White Doors, Black Footsteps: Leveraging 'White Privilege' to Benefit Law Students of Color,* 21 J. GENDER, RACE & JUSTICE 37 (2017).

[16] *E.g.,* Cal. R. Ct., Rule § 10.612.

[17] Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship,* 34 J. MARSHALL L. REV. 281, 282 (2000).

[18] Marilyn Schwartz, Guidelines For Bias-Free Writing 1 (1995); Casey Miller and Kate Swift, THE HANDBOOK OF NONSEXIST WRITING: FOR WRITERS, EDITORS AND SPEAKERS (2d Ed. 1988); Rosalie Maggio, The Bias-Free Word Finder: A Dictionary of Nondiscriminatory Language 7-10 (1991).

[19] Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language,* 27:1 SEATTLE U. L. REV. 15¬-18 & fn. 60-68 (2003) (explaining differences in meaning and connotation of these terms, as well terms like "Arab" and "Middle Eastern" or "Native American" and "American Indian").

[20] *Id.* at 11-13 ("fathering" vs. "mothering" connote different involvement in child's life).

[21] Dian Fine Maron, "Why Words Matter: What Cognitive Science Says about Prohibiting Certain Terms," SCIENTIFIC AMERICAN (Dec. 19, 2017).

[22] Laurel Currie Oates, *et al.,* The Legal Writing Handbook 708-13.910 (3rd Ed. Aspen L. & Bus. 2002) (1993).

[23] See Oates, *supra* note 15, at 4-5 (describing class discussion about whether black defendant's race should be discussed); *see also* THE REDBOOK: A MANUAL ON LEGAL STYLE 272-73 (Bryan A. Garner Ed., 2002) ("needless reference to a criminal defendant's race may suggest that race is somehow related to and predictive of behavior" and "pointless mention of a witness's physical disability (e.g., blindness) may invoke a reader's biases (e.g., a presumption of diminished mental capacity)").

[24] Cheryl Staats *et al.,* STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW, at 63 (Kirwan Institute, 2015).

[25] See *supra* note 13.

[26] *See* www.ted.com/talks/mark_pagel_how_language_transformed_humanity/transcript#t-153638; *see also* https://www.youtube.com/watch?v=joj7_brYWt8 (hypnotherapist Kristin Rivas analogizing words and the ideas they convey as "one of the most resilient parasites"); Sharon Begley, TRAIN YOUR MIND, CHANGE YOUR BRAIN: HOW A NEW SCIENCE REVEALS OUR EXTRAORDINARY POTENTIAL TO TRANSFORM OURSELVES (2007) (findings in "neuroplasticity"—the ability of the brain to change in response to experience—suggest that our thoughts can force our brains to alter their structure and function, and even generate new neurons to adapt, heal, and renew after trauma or disability); https://viewpoint.pointloma.edu/how-much-do-our-words-matter (quoting Point Loma Nazarine University Associate Professor, Dr. Kara Lyons-Pardue, as saying "Our words have the potential to create imaginative spaces.").

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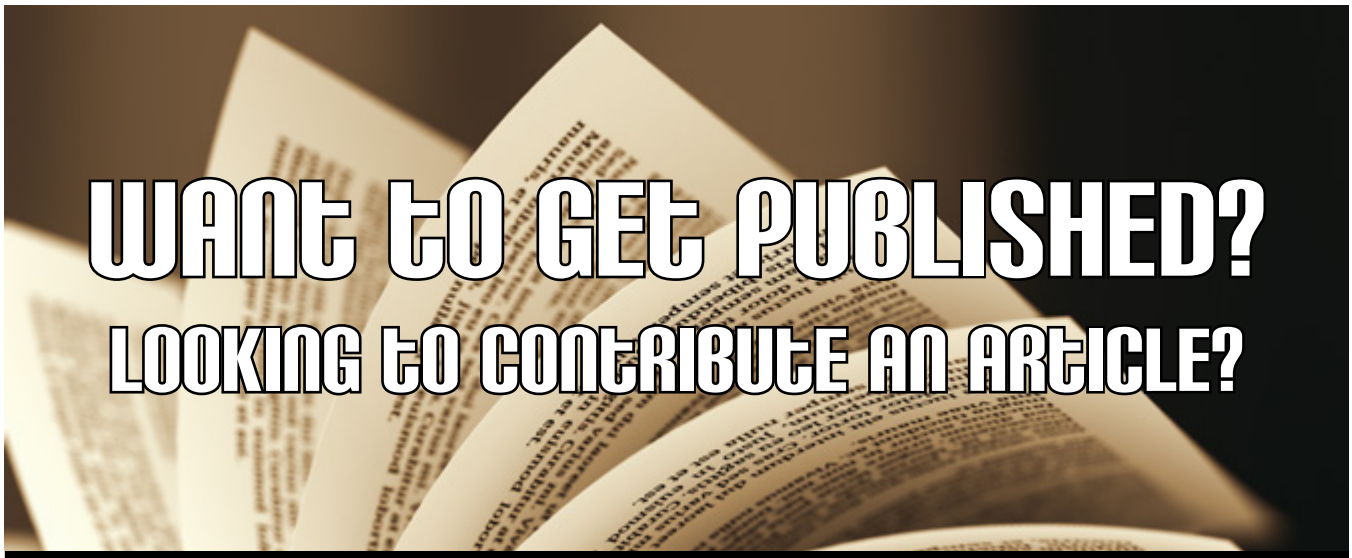

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