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This Week's Feature



Playing a Supporting Role During a COVID-19 Jury Trial

By Michelle Christy

Now that we are over nine months into the COVID-19 pandemic, you likely have heard about the experimental jury trials that have taken place throughout the country. From jury trials held in school auditoriums to fully virtual jury trials, state courts have been exploring a variety of mediums to continue furthering justice while keeping everyone six feet apart. While there are myriad challenges for the first chair during a trial, COVID-19 jury trials also significantly affect the role of the second chair and those in other supporting roles.

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Quote of the Week

“Vanity and pride are different things, though the words are often used synonymously. A person may be proud without being vain. Pride relates more to our opinion of ourselves, vanity to what we would have others think of us.”

— Jane Austen (December 16, 1775–July 18, 1817), *Pride and Prejudice*

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Now that we are over nine months into the COVID-19 pandemic, you likely have heard about the experimental jury trials that have taken place throughout the country. From jury trials held in school auditoriums to fully virtual jury trials, state courts have been exploring a variety of mediums to continue furthering justice while keeping everyone six feet apart. While there are myriad challenges for the first chair during a trial, COVID-19 jury trials also significantly affect the role of the second chair and those in other supporting roles.

I had the opportunity to participate in one of the first civil COVID-19 jury trials in Minneapolis. During trial preparation, I found that while there were articles and webinars out there discussing the logistics of trying a case during a global pandemic, there were also things that I learned along the way in my role supporting the lead attorney. Below are some suggestions to consider in your trial preparations to avoid some of the complications bound to arise during the course of a COVID-19 jury trial.

Make sure you have eyes on everyone in the courtroom. While there is a push to have as few people in the courtroom as possible, it is important to make sure that your trial team is able to see the entire courtroom. A socially distanced trial can create obstacles in the courtroom that block essential views. When planning for trial, consider the following: Are there screens to show exhibits in between the counsel tables and the jury box? Are some members of the jury seated in the gallery behind the lectern? These obstacles make it difficult to see jurors' critical reactions and body language. Seeing every juror is especially important because juries and jury pools are sometimes smaller than average in a COVID-19 trial. In our experience, the jury pool was significantly more educated, less racially diverse, and older than the typical jury pool in our county; this made it even more important to notice small differences between the potential jurors. Courtroom safety modifications can also hinder the lead

attorney's ability to get a read on the judge. Furthermore, it is important that the judge and all members of the jury can see the lead attorney. Look out for obstacles or glare that will obstruct the lead attorney's face from the jury. If you are able to, try to get access to the courtroom prior to trial. Sit in every seat and figure out which lines of sight are obstructed and determine how many trial team members you need to be able to see the whole courtroom and where they will need to sit.

Know your technology. As discussed in previous articles in *The Voice*, COVID-19 trials come with a variety of extra

technological challenges. One of the most important things someone in a supporting role can do is thoroughly understand the technology. There are several ways to learn about technology. Many computer programs have online guides or webinars. In my experience, at least some computer programs designed for trial attorneys also have great support helplines available to assist with any difficulties. If you are using a computer program during the trial, try to make sure that you don't need to use the internet to access your program if at all possible, because internet service in a courthouse can sometimes be unreliable.

Bring extra materials. When preparing for trial, bring extras of everything, from technology, to documents, to office supplies. Your trial team may intend to use many different forms of technology during trial, including laptops, printers, TV screens, projectors, and document cameras. Have extra batteries for any remote controls that you may need. Bring an extra laptop in case you need an additional screen to Zoom in a remote witness. Bring extra cords that connect laptops to screens and projectors. Beyond technology, also consider bringing copies of documents, as some courtroom restrictions can limit the number of people who can touch the same sheet of paper or pen.

Identify a designated support person in the office. Many firms currently have fewer attorneys and staff in the office due to COVID-19 restrictions. Prepare in advance for those

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moments when you are unable to access your file server remotely or need additional logistical help from someone in the office. If you have the capacity, have someone on standby who can help at a moment's notice.

While this list is not exhaustive, it discusses a few things that second chair attorneys, paralegals, and other support staff should consider to ensure that trial goes as smoothly as possible. With proper preparation, you enable the lead attorney to focus on litigating the case. Finally, if you are interested in learning more about the challenges of trying a case during COVID-19, consider reading some of the recent

articles in *The Voice* on this topic, including "[The Virtual Trial: Is it Our New Normal?](#)" written by Ricky A. Raven and Austin K. Yanky or "[Trial in the Age of COVID-19](#)" written by Baxter D. Drennon.

Michelle Christy is an associate at **Kennedy and Graven** in Minneapolis, Minnesota, a boutique government practice firm primarily representing governmental entities in litigation. She is part of the litigation group and focuses on employment and land use matters.

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A Complicated Case: Key Points of the Concurrent Proximate Cause Rule

By Kenneth Goleaner and Katrina Smeltzer



Complicated insurance coverage questions arise when a loss results from multiple alleged causes, one of which may be covered and the other clearly excluded. Enter the concurrent proximate cause rule, where an injury with two concurrent proximate causes—one covered and another excluded under an insurance policy—is construed to provide coverage. Missouri is among several states adopting this rule, along with Iowa, Minnesota, New Jersey, Tennessee, Texas, Wisconsin, Vermont, and others.

The concurrent proximate cause rule is separate from the efficient proximate cause rule, which is predominantly a first-party insurance doctrine and permits recovery for a loss caused by a combination of a covered cause and an excluded cause if the covered cause sets the other cause(s) in motion. States such as Arkansas, Massachusetts, Nevada, Oklahoma, South Dakota, and Washington have adopted the efficient proximate cause rule. However, the efficient proximate cause doctrine—at least in Missouri—can be contracted around with appropriate policy language.

In contrast, the concurrent proximate cause rule typically involves third-party liability claims with an injury resulting from a cause falling within a policy exclusion, most often the “assault and battery,” “expected or intended,” “abuse or molestation,” or “auto” exclusions. As an end run around the apparent absence of coverage, savvy plaintiffs’ attorneys frame the claim against the insured—or sometimes against a different insured—as one for negligence, such as for a failure to provide adequate security, negligent supervision, or negligent training. One such example in Missouri involved a shooting outside a nightclub into a crowd of teenagers that struck and killed a sixteen-year-old teenager who had been waiting outside the club to attend a party. The claim found to be covered against the insured nightclub, however, was for negligent failure to provide adequate security and crowd control, not assault and

battery. See *Adams v. Certain Underwriters at Lloyd’s of London*, 589 S.W.3d 15 (Mo. App. E.D. 2019).

In cases involving alleged concurrent causes, courts must analyze the relationship between the loss (the shooting death), the excluded cause (the battery and assault), and the potentially covered cause (the negligent failure to provide adequate security). Some of these courts will broadly apply the concurrent cause rule to hold that as long as the covered cause is a direct cause of the loss, it is a covered loss. Others, such as Missouri, have limited application of the rule by requiring that the concurring causes be independent and distinct from each other for the rule to apply.

In Missouri, recent cases have focused on whether the covered cause is dependent on the excluded cause for success.

But even with this guidance, application can be difficult as courts have labored to articulate a precise formulation for a test. Compare *Adams*, 589 S.W.3d at 33–34 (holding that the negligent failure to provide security outside a nightclub before a party was an independent and distinct cause of the claimant’s son’s death from the assault and battery because an injury was foreseeable from the negligent failure to provide security) with *Safeco Ins. Co. of America v. Yount*, 2020 WL 6445840, Case No. 4:19-cv-00890 (E.D. Mo., Nov. 3, 2020) (slip copy) (holding that the claimant could not state independent and distinct causes of gratuitous undertaking or negligent failure to timely contact emergency assistance, which were covered causes, from the excluded possession and distribution of fentanyl, which was an excluded cause, leading to an overdose).

When faced with potentially covered and excluded causes in the same action—no matter how they are titled—the practitioner should be cautious. Under the concurrent proximate cause rule, a claim that at first glance appears to be excluded may quickly pivot into a covered claim. This can be particularly true where pleadings are subsequently amended to add the potentially covered, concurrent cause.

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And while policy language can limit the effect of this doctrine (for example, use of language “in whole or in part” in an exclusion or excluding supervision or entrustment claims “arising out of” the excluded cause), application of this rule has proved to be unpredictable and inconsistent.

[Kenneth Goleaner](#) is a shareholder in the Saint Louis, Missouri, office of **Sandberg Phoenix & von Gontard PC**.

He provides valuable service to his clients at all stages, beginning with claims investigations and continuing all the way through the litigation and appellate process.

[Katrina Smeltzer](#) is a shareholder in the Kansas City, Missouri, office of **Sandberg Phoenix & von Gontard PC**. She is a business litigator, focusing her practice on representing professionals, assisting insurance companies with coverage decisions, and resolving construction disputes.

Thank you to [Sandberg Phoenix](#) for its sponsorship of DRI's 2020 virtual CLE programming!

Use Your Privilege

By **Ebony S. Morris**



Since President-Elect Joe Biden's election, he has promised to select nominees who reflect the image of the United States. Although the selection process is not complete, his cabinet thus far consists of history-making nominees.

Other than Vice President-Elect Kamala Harris, his cabinet consists of the following:

1. Retired Army Gen. Lloyd Austin, who, if confirmed, will serve as the first African American United States Secretary of Defense;
2. U.S. Representative Marcia Fudge, who, if confirmed, will serve as the first African American woman Secretary of Housing and Urban Development;
3. Alejandro Mayorkas, who, if confirmed, will serve as the first Latino Secretary of the Department of Homeland Security;
4. Avril Haines, who, if confirmed, will serve as the first woman Director of National Intelligence;
5. Neera Tanden, who if confirmed, will serve as the first woman of color to serve as the Director of the Office of Management and Budget; and
6. Pete Buttigieg, who, if confirmed, will serve as the first openly LGBTQ+ Cabinet member as the Secretary of Transportation.

Although his nominations for Cabinet are not complete, he is holding true to a promise made during his campaign—a promise to use his privilege as a bridge to make history. Majority law firms can take a hint from President-Elect Biden's efforts.

The legal profession continues to be one of the least diverse in the nation. According to published statistics from the U.S. Bureau of Labor, more than 86 percent of American lawyers are white, and fewer than six percent identify as Black, Asian, or Latino, respectively. Over one-third of lawyers are women, and African American attorneys make up three percent of associates at major law firms and less than two percent of law firm partners. Women attorneys make up only one-fifth of law firm partners, and only seventeen percent of equity law firm partners. In 2020, these percentages should be higher, but why are the numbers so dismal? The answer is simple. Majority firms are failing to use their privilege, not only to recruit minority attorneys, but also to retain and promote those attorneys.

Several majority law firms have created diversity initiatives within their firms. However, most of the initiatives are unsuccessful in retaining minority attorneys, primarily because the programs are only focused on recruitment of minority attorneys, as opposed to retention of those attorneys. Majority law firms must change the goal of their diversity initiatives to focus on retention of minority attorneys. In changing the focus, firms must realize that retention of minority attorneys requires firms to change their cultures and work environments.

To retain minority attorneys, firms should focus on being inclusive, as well as diverse. Firms can do so by 1) offering constructive feedback; 2) providing minority attorneys with autonomy, empowering decision-making by associates; 3) encouraging client contact; 4) supporting minority attorneys in their professional endeavors outside of the firm, such as participation in professional organizations, speaking engagements, publication opportunities, etc.; and 5) including minority attorneys in firm marketing and business development opportunities with potential clients. Inclusive practices will foster innovation and encourage a broad range of viewpoints and opinions from minority attorneys. Inclusive firm leadership is useful in retaining minority attorneys and sets the standard for creating an environment that fosters minority attorneys' growth and promotion within the firm. Similar to President-Elect Biden, majority law firms must "use their privilege" and be intentional in their diversity and inclusion efforts. These efforts involve more than checking a box. Diversity and inclusion must remain a priority within the legal profession, and law firms must quickly take notice and implement ways to move the needle forward.

Ebony S. Morris is an associate attorney in the New Orleans, Louisiana, office of **Garrison Yount Forte & Mulcahy LLC**. Her practice areas include premises liability, mass tort litigation, automobile liability, and products liability. She was recently selected for inclusion in the 2020 Louisiana Super Lawyers "Rising Stars" List, an independent rating service that selects no more than 2.5 percent of attorneys in the state as Rising Stars and no more than five percent of attorneys in the state as Super Lawyers). Ms. Morris is a member of the DRI Diversity and Inclusion and Young Lawyers Committees.

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And The Defense Wins

Paul Caleo



Congratulations to DRI member [Paul Caleo](#), a partner of **Burnham Brown** in Oakland, California, and his trial team in obtaining a great jury trial result on June 30, 2020, in what they believe was the first civil jury trial concluded in the post-lockdown, COVID-19 era in Alameda County and perhaps in Northern California, if not statewide. Mr. Caleo and his team represented Kirk and Cindy Watkins in *Safi Nairobi v Watkins*, Action # RG17847233, a landlord/tenant and premises liability/breach of warranty of habitability and toxic exposure lawsuit. The plaintiff, a tenant in a studio apartment owned by the defendants, alleged that she was poisoned by toxic mold as a result of a roof leak in a rainstorm, and claimed that she was injured and damaged for the rest of her life, arguing that her compromised immune system made her more susceptible to illness. Whereas the defendants did not dispute that there was a roof leak caused by a rainstorm in October 2014, they immediately responded to fix the roof leak and remediate and clean the studio apartment, arguing that evidence-based medicine confirmed that the plaintiff was not injured by the presence of mold in the studio apartment. The Burnham Brown trial team was able to discredit the plaintiff's medical experts before the jury.

The plaintiff's demand for most of the lawsuit was \$2.5 million. The defendants served a CCP 998 statutory offer for \$100,000 in June 2018. After starting trial on February 19 before Judge Evelio Grillo, the parties were sent to a further, all-day, mandatory settlement conference where the plaintiff lowered her demand to \$650,000 and the defendants offered \$235,000.

In closing arguments, the plaintiff's counsel asked the jury to award a total of \$4,885,042 in total damages. After deliberating for a day and a half, the jury returned a verdict awarding damages to plaintiff totaling \$93,290, made up of \$79,290 in past economic damages, \$5,000 in future economic damages, \$9,000 in past general damages, and nothing for future general damages. Further, the jury found that the plaintiff was fifteen percent at fault for her own injuries and damages and that the defendants were neither liable for intentional infliction of emotional distress or concealment, nor for punitive damages.

The defendants filed a cost bill in excess of \$100,000 and are waiting for the court to issue its final rulings on

the several post-trial motions to determine if they will be the prevailing parties in this lawsuit. The trial judge, Evelio Grillo, has already denied the plaintiff's motion for a new trial.

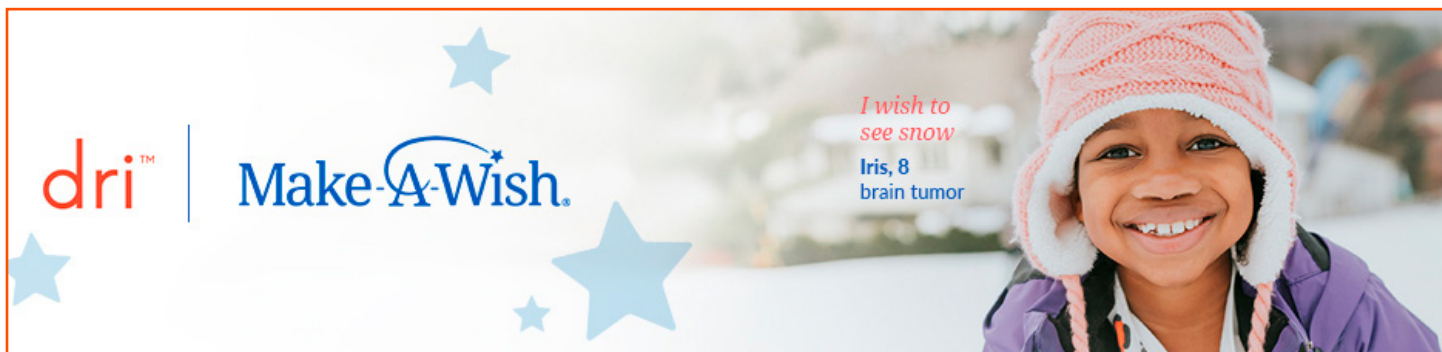
This jury trial was stopped on March 17 with only two to three days to go when California Governor Gavin Newsome handed down the shelter-in-place directive in response to the then-burgeoning COVID-19 pandemic. Both parties requested the trial judge not to order a mistrial, but rather put the trial on hiatus until a later date when the court could consider completing it with guidelines that would ensure the safety and wellbeing of court staff, the litigants, and most importantly, the jurors. Both parties are indebted to the Judge Grillo and the Alameda County Superior Court for their efforts in allowing the jury trial to recommence on June 25 and to complete on June 30 under circumstances that involved all persons wearing face masks at all times and maintaining safe distances, with counsel conducting witness examination and closing arguments surrounded by clear plexiglass on three sides. Mr. Caleo and his trial team sincerely thank the thirteen jurors who agreed to return to finish this trial after a hiatus of more than three months during the pandemic. The jurors in this case demonstrated a commitment to civic duty and their community that should be commended, especially during these difficult times.

Mr. Caleo and his team also want to acknowledge and thank the efforts of their co-counsel at trial, Walter John McMath of Hartsuyker Stratman & Williams-Abrego in Oakland.

Keep The Defense Wins Coming!

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

DRI Trucking Law Committee Supports the Make-A-Wish Foundation



The **DRI Trucking Law Committee** is proud to focus its philanthropy on the **Make-A-Wish Foundation**. The Make-A-Wish Foundation is the largest wish granting organization in the United States and has granted over 330,000 wishes to children throughout the country and its territories since 1980. Every year there are more than 15,800 wishes granted for children; however, there are an estimated 27,000 children diagnosed with a qualifying conditional annually. Granting a child’s wish can have a lifelong impact on the child and his or her family. Research indicates that a wish can improve the child’s quality of life and produce better health outcomes.

In a drive organized by committee chair [Steve Pesarchick](#), the Trucking Law Committee raised over \$1,000 for the Make-A-Wish Foundation in one short day during the November virtual seminar. Imagine what we could do in a year. It is the Trucking Law Committee’s plan to continue our relationship with Make-A-Wish through the holidays and into next year.



We encourage you to take a moment to watch the video “[This Is Make-A-Wish](#).” Please find it in your heart to help make the wishes of critically ill children come true. Donations can be made [here](#). The Trucking Law Committee greatly appreciates your support.

The Trucking Law Committee wishes you all a safe, healthy, and happy holiday season.

“DRI Cares” content is coordinated by [James Craven](#) of Wiggin and Dana LLP and [Rebecca Nickelson](#) of Sinars Slowikowski Tomaska LLC. To submit items for upcoming issues, please contact them at jcraven@wiggin.com and rnickelson@sinarslaw.com.

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Olivia Pruitt

Why is it important to help other people who need our help?

We have to think about if we were in their shoes would we want help.

If you could design a charity to help the world be a better place, what would it be?

Raise money to help research cures for sick kids.

What's the thing you are the most proud of that you have done to help other people?

Holding the door open for people.

What do you like daydreaming about?

Food.

Tell me something about you that you think I might not know.

I can dance (on water!).

What's a memory that makes you happy?

The last time I got to see Mamaw and Papaw.

If you could make one rule that everyone in the world had to follow, what rule would you make?

Everyone be kind to everyone.

Olivia Pruitt is the eleven-year-old niece of Diane and Mike Pumphrey. Diane is a partner at Wilkins Patterson, P.A., in Jackson, Mississippi, and the DRI Southern Region Director.

“DRIKids” content is coordinated by **Diane Pumphrey** of Wilkins Patterson Smith Pumphrey & Stephenson PA and **Laura Emmett** of Strigberger Brown Armstrong LLP. To submit items for upcoming issues, please contact them at dpumphrey@wilkinspatterson.com and lemmett@sbalawyers.ca.



Mindfulness Meditations

By Courtney B. Schulnick



I was recently reflecting on my experience this time last year (seems like forever ago at this point!) with LaToyia Pierce and Penny Diehl, who were my co-presenters during the DRI Professional Liability Seminar in New York City.

I really enjoyed our time together and collaborating with two great people. As a token of appreciation, I wanted to share with all of you a guided mindfulness meditation that I recently posted on YouTube. I've been posting some lately to help support us through these unsettling times, especially as we approach the holiday season and another few months of what feels like a whole lot of isolation at times. This most recent one is a shorter practice (just about ten minutes). Please feel free to share this practice with your colleagues if you think it would be of value to them. I wish that we could be in person, practicing these together like we did last year. In due time. In the meantime, [here's the link](#) to my most recent guided practice on YouTube. I have a couple of others under "Courtney Schulnick Mindfulness."

Also, I also wanted to let you know about a virtual mindfulness retreat via Zoom that I am offering on January 3, 2021, from 10:00 a.m. to 1:30 p.m. It's an online, half-day



retreat that invites you to disconnect from your phones, computers, news, to-do lists, and other obligations, and simply connect more deeply with yourself. In our time together, I will guide you in a variety of mindfulness meditations, and we will also practice mindful eating and movement. This is a nice way to practice being kind to yourself and give yourself the gift to rest, refresh, and let

go as we begin a new year. If you are interested or know of others who might be, please contact me for additional retreat details.

Courtney B. Schulnick, special counsel in **Marshall Dennehey Warner Coleman & Goggin PC's Casualty Department**, litigates cases in both state and federal courts. In

an effort to better manage her anxiety and the stressors associated with litigation and life in general, she enrolled in the MBSR Program at the Mindfulness Institute at Jefferson University. She completed both the Teaching Practicum and Internship at Jefferson. She now pursues her passion of helping others by teaching Mindfulness so that they, too, can live more fully in the present moment and achieve greater balance, vitality, and health.

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Quote of the Week

“Vanity and pride are different things, though the words are often used synonymously. A person may be proud without being vain. Pride relates more to our opinion of ourselves, vanity to what we would have others think of us.”

— Jane Austen (December 16, 1775–July 18, 1817), *Pride and Prejudice*

DRI sends you all best wishes for a wonderful holiday season and a Happy New Year!
The Voice will return on January 13, 2021.

