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The Voice

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The Return to the Workplace—Another Facet of the New Normal, Explored

By Roberta F. Green

Many of us are cycling between gratitude and relief, and fear and frustration—and that is all before our feet hit the ground in the morning. It has been a year of new experiences, and with them, new duties, new rights, and new questions from our clients about what they can and cannot do to respond to and to maintain the workforce remotely, to respond to employees at risk, and to bring workers back to work, safely and productively.

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- Preventing Nuclear Verdicts in Trucking and Transportation Cases in the COVID-19 Era, June 26, 2020, 11:00–12:30 pm CDT
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- Truck Drivers and the Transportation Industry: The Public's Perception Post COVID-19, July 8, 2020, 12:00–1:00 pm CDT
- Shaping the Law to Meet the Challenges of Advanced Driver Assistance Systems Litigation, July 28, 2020, 12:00–1:30 pm CDT

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Quote of the Week

"Threats to freedom of speech, writing, and action, though often trivial in isolation, are cumulative in their effect, and unless checked, lead to a general disrespect for the rights of the citizen."

—George Orwell (b. June 25, 1903).

This Week's Feature

The Return to the Workplace—Another Facet of the New Normal, Explored

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Many of us are cycling between gratitude and relief, and fear and frustration—and that is all before our feet hit the ground in the morning. It has been a year of new experiences, and with them, new duties, new rights, and new questions from our clients about what they can and cannot do to respond to and to maintain the workforce remotely, to respond to employees at risk, and to bring workers back to work, safely and productively.

As DRI members, we have attended the online conferences addressing these issues. As employment lawyers, we have followed the U.S. Department of Labor's evolving questions and answers. And as employees or employers ourselves, we have tried to follow wisely, lead decisively, and accomplish the work safely and well.

So what issues are we seeing? Members of the workforce who decline the return-to-work notice? Divisions between those willing to maintain protocols, and those who are tired of the regimen or scoff at its effectiveness? As we weigh the fact patterns with which we are faced each day, we also search for the best answer for our clients and ourselves. This brief note will address a few of the potential issues—and resulting opportunities—that may arise in your workplace or in your client's workplace, but it is important to note that the discussion continues, and the law evolves. To start the dialogue, here are a few ideas; however, remember that the guidance and law is evolving. You will want to continue reviewing governmental sites. *See, e.g., What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Opportunity Comm'n (updated June 17, 2020).

While many of our clients are now well versed in responding to requests from at-risk employees (e.g., persons 65 years of age, undergoing chemotherapy), our clients may seek guidance about how they as employers should respond to an employee who is fearful of returning to the office. Does the employer have to accommodate a fear of illness from a person not clearly in an at-risk category? In brief, yes. The U.S. Equal Employment Opportunity Commission (EEOC) recommends an interactive process that will allow an employer to determine whether an employee's fear rises to the level of a disability and whether an accommodation is available. More specifically, the EEOC suggests, "Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic." In furtherance of this determination, the employer may explore accommodations (working from home, increased spacing between work areas in the workplace, additional precautions) and may request medical documentation. While employers will not be eager to psychoanalyze their workers, nonetheless, to ensure a fair, safe return for all workers, management will need to address individual concerns in the backdrop of fairness and safety for the workplace as a whole. Indeed, the EEOC has clarified that employers may request fitness for duty verifications for returning workers, may take employees' temperatures, and may require responses to questionnaires tied to exposures and health. The EEOC is quick to remind employers that the duty to accommodate is not limitless and that "undue hardship" remains available when all reasonable accommodations fail.

The EEOC also has envisioned that pandemic-related harassment may arise in the reopened workplace in the COVID-19 era. Whether due to country of origin, disability, or age, or even just bullying due to frustration or anger, the singling out of the perceived "weak" for ridicule by the perceived "strong," the EEOC envisioned that the pandemic and the return to work could result in mean-spirited, targeted behaviors. Therefore, in preparation, the EEOC urges employers to encourage tolerance and civility expressly and to remind workers that their behavior must not sink below a certain level. In a nutshell, through their actions, employers must "[p]roactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership." *Chart of Risk Factors for Harassment and Responsive Strategies*, U.S. Equal Opportunity Comm'n. The United States Supreme Court has set "standards for judging hostility that are sufficiently demanding to ensure that Title VII does not become a

"general civility code… [but conversely] will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Therefore, we may be called upon by our clients to help them discern when an ordinary tribulation becomes improper or actionable harassment. Once again, the EEOC has considered the rubrics and provides the necessary guidance.

Each day in the "new normal" introduces complications and successes along with challenges and opportunities. As we advise our clients and ourselves on being productive employees and good role models, it's good to remember that DRI is here for us all, offering resources and answers. And the EEOC and U.S. Department of Labor have maintained their vigilant guidance. The sources are there, the support is there, even as the challenges continue coming. As officers of the court, we have great opportunities to create a culture of civility and respect. It's the least we can do.

Roberta F. Green is a member of **Shuman, McCuskey & Slicer PLLC** in Charleston, West Virginia. Ms. Green's practice has come to focus on employment law, energy law, state and municipal government liability, personal injury defense, civil rights, professional liability, constitutional law, and appellate practice. She is a member of the DRI Employment and Labor Law Committee.

Article of Note

Life from the Waist Up

By Spencer H. Silverglate

Zoom and other videoconferencing platforms have been a godsend during the COVID-19 pandemic. They've enabled us to conduct business, attend school, and stay connected with colleagues, friends, and loved ones when we couldn't be together in person. Litigators have been able to attend depositions, mediations, and court hearings remotely. Many are ready to pronounce video conferences and remote work as the new normal, even after the pandemic subsides.

Me? I'm not so sure. Yes, the benefits of remote work are significant. Among them are:

- **Health and wellness.** Less time spent commuting and traveling and more time to focus on nutrition, exercise, and sleep. More time for family, friends, and enriching activities. More time with pets. Folks with health conditions are able to stay connected while maintaining social distance and avoiding infection.
- **Childcare.** Greater flexibility for parents to care for their children and for adult children to care for their parents and relatives.
- **Cost savings.** Diminished spending on childcare, commuting, business travel, dry cleaning, eating out, pet care, and personal services. For employers, less rent and office expense.
- **Expanded talent pool.** The ability of employers to hire employees anywhere in the world. The ability of employees to live anywhere in the world.
- **Safety and environment.** Less commuting and travel mean reduced carbon emissions and fewer accidents.

Personally, I've benefited from working at home. I typically commute at least an hour or more to and from my office *each way*. That's over two hours in my daily schedule—as much as 15 hours per week. I've spent much of the extra time with my wife (we're empty nesters), and also doing extra work, reading, and catching up on much-needed sleep. We've eaten out less and cooked in more. Our food and gas expenses have plummeted; our quality time together has soared. Many of my friends have had similar experiences. They've spent more time with their children (including adult children) than they have in years. In some cases, more than ever. And our pets have been in heaven!

My firm has been productive, too. While litigation has slowed, depositions, hearings, and mediations are being handled remotely. Work is getting done. Many lawyers have told me that they're more productive at home. Heck, I'd probably say the same myself.

So what's the rub? If we're happy, healthy, and productive working remotely—why do we need an office at all?

I think the answer boils down to teamwork and culture.

Nothing of significance was ever accomplished by an individual acting alone—even a productive individual. Teamwork lies at the heart of all great achievement. Teams foster a sense of community. They provide greater resources, richer ideas, and higher energy than do any one person. Teams add multiple perspectives on problem solving; individual insight is not as broad or as deep as that of a group.

Teams also motivate us. A couple years ago I joined a group exercise class after decades of working out alone. In class I exert way more effort than I ever did on my own—not because there's an instructor leading the class, but because I don't want to disappoint my ever-encouraging classmates. And, for my own ego, I want to keep up!

Human beings are social creatures. We thrive in teams. Alone, we wither.

If teamwork is the engine that powers an organization, culture is the glue that holds the team together. Culture is how organizations do things. It is the values and behaviors that contribute to the unique social and psychological environment of a group. It is esprit de corps: the feeling of pride, fellowship, and loyalty that team members share. It is sharing a common identity. Culture is what differentiates your organization from every other.

Team culture is forged not online, but in the trenches, working shoulder to shoulder toward a common vision. It is fostered in countless impromptu visits to a colleague's office. In shared meals. Even in the proverbial water cooler chats.

Why can't team culture thrive in a virtual environment? Because, at its core, team culture is really about relationships. It is about knowing and being known. Virtual relationships are just that: virtual. They are socially distanced relationships. They lack the incidental, nonverbal communication that comes with presence. The contagious excitement, the infectious enthusiasm, the shared sadness. All of the unspoken communication that human beings are expert at interpreting in person, but horrible at deciphering over the internet.

It's a bit like the video conference attendee dressed in business attire from the waist up and shorts or sweats or pajamas from the waist down (we've all done it). Virtual relationships have many of the trappings of real relationships, but they're just a bit…inauthentic. They approximate the real thing, but they're not quite the real thing.

Human beings crave connection. And real, authentic human connection is impossible online. The emoji hasn't been created that replaces a face-to-face conversation, a pat on the back, a hand shake, a hug. Real relationships are built by sharing experiences in person, not in cyberspace. Virtual meetings are good, but they will never substitute for one-on-one connection. Great teams are not built by video conference.

After spending three years of blood, sweat, and tears (and money) attending law school, the newly minted grad does not aspire to suit up in his or her pajamas and commute to the kitchen table. Just as no child would opt to be raised by virtual parents, no young lawyer would prefer to be mentored from afar by some wizard hidden behind a curtain of technology.

I've spent my entire 32-year legal career sitting 20 feet away from my mentor, Bud Clarke. During that time, I've worn out the carpet between our two offices—brainstorming cases, asking advice, getting much-needed perspective. I always leave his office better than when I entered. You can't get that on a video conference. And, working remotely, you can't observe what happens between video conferences. Mario Cuomo said, "I talk and talk, and I haven't taught people what my father taught me by example in one week." When we are not at our mentors' elbow day in and day out, we miss their example. Information can be imparted through a screen, but character is molded side by side.

To be clear, I am not suggesting that video technology is a bad thing. It's a tool, and like any tool, it can be extremely effective. For those with health conditions or family care issues, it can be a game changer. It's all in how you use the technology. It's about balance.

For my part, once the pandemic subsides, I will likely commute a bit less and Zoom a bit more—yes, in business attire from the waist up and jammy-jams from the waist down. It's so darn convenient. But as I leverage the benefits of the technology, I will bear in mind that it's an adjunct to, not a substitute for, personal connection. Virtual relationships can never replace real relationships.

Spencer H. Silverglate is president of **Clarke Silverglate PA** in Miami, Florida. His practice focuses on high-stakes commercial litigation and the defense of catastrophic personal injury and product liability claims and class and mass actions. Mr. Silverglate is an IADC board member; 2015 director of the IADC Trial Academy; an active DRI member and the 2015–2016 chair of the DRI Employment and Labor Law Committee; the 2011–2012 chair of the DRI Jury Preservation Task Force; and a past president of the Florida Defense Lawyers Association. He has been recognized as one of the top attorneys in the United States.

A View from the Sidelines

By Theodore Freeman, DRI Southeast Region Director

For over three months now, a new COVID-19 article has appeared in each of the weekly editions of *The Voice*. Hopefully, you have read and enjoyed them, finding some semblance of comfort in our shared experience. We have heard from each of the members of the DRI Executive Committee, our former executive director, and each of the fourth-year DRI Board members. In each case, our assignment was to provide our take on something related to the pandemic and how it has affected each of us. I am the latest (and, quite possibly, the least) of this group. I say this because unlike those before me, after nearly 45 years of being in the trenches of legal warfare, I retired from the practice at the end of 2019. I say this also recognizing full well the unprecedented time in which we now find ourselves as members of the bar, as officers of the court, but—most importantly—as human beings.

Enzo and River on one of our daily walks.

My COVID-19 challenges and experiences have not included how to manage a busy litigation practice from home. They have not included dealing with client videoconferences, Zoom depositions, or virtual mediations. They definitely have not included trying to do all of this while also trying to be educator and entertainer to school-age children. I continue to marvel at those who have successfully handled all this while at the same time retaining a modicum of sanity.

No, my "challenges" have been more about deciding which closet to clean out and organize next, which room to paint (and what color!), and what project that's been on the "To Do" list for years to finally tackle. Even during the weeks of the shutdown and quarantine, my life seemed largely unaffected. I could still walk the dogs in the national forest behind my home, and I could still go to the mountains and enjoy taking the boat out on the lake.

To be sure, I have sorely missed the face-to-face interactions with my friends at board meetings, SLDO meetings, regional meetings, and seminars, where we tend to stay up too late telling stories and are occasionally over-served. But overall, I have had the luxury of viewing much of the pandemic from the sidelines. This assignment, however, brought home anew the truth that it is our shared experiences that bring us closer together. I have watched in awe as my fellow lawyers have worked to find solutions to the problems the pandemic has created.

Viewing it from the sidelines, I am so impressed with the leadership DRI has taken to help its members navigate through these troubled times. Nowhere has this been more evident than the incredible DRI Coronavirus Information Center webpage and all of the timely and informative webinars. What great resources these are!

I recently told Nancy Parz, DRI Vice President, that I wish I had known 40 years ago the things I now know about DRI, because I would have become more active long ago. It truly is a special organization with warm, welcoming, and caring people. The friends I have made these last three years on the board will be with me for the rest of my life; I only wish I had gotten to know them sooner.

Addendum: When I wrote this piece, I thought "A View from the Sidelines" would be an appropriate title. After all, I personally knew of no one whose health had been adversely affected by the coronavirus, and it certainly had not seemed to affect my life in any real respect. All that changed recently. Just over a week ago, I learned that

someone who I have known for over 50 years and whose business was forced to shut down during the pandemic had taken his own life—the heavy weight of financial and other life pressures simply being too much for him to bear. The realities of these moments in time often hit hardest when they hit closest to home. I hope and pray we can and will care for one another during these challenging times.

Looking Inward

By Monté L. Williams

If only we lived in a world where tragic incidents like what we witnessed with George Floyd didn't occur. If only. As a nation, we have watched our country become divided once again over issues of race, fairness, equal justice and civil rights. You could say it's been a long time coming. We have watched peaceful protests, rioting, political speeches, and a community in mourning because of prevailing racial inequities in our country. The reactions and emotions are personal, largely based on an individual's own experiences. When we are faced with situations like this, as we are too frequently, we must act. When faced with an opportunity to understand better, be more compassionate, to make change—we must. Will it be hard? Yes. Will it be awkward? Yes. Will feelings get hurt? Yes. Is it worth it? Absolutely.

In my opinion, it all starts by looking inward. We must take personal responsibility for advancing the dialogue and the subsequent action. That is, we must stop talking in terms of a collective, *i.e.*, "we," and start appreciating the personal role we each play in our future. You and I must be personally accountable for what happens next. You and I must have the courage and commitment not only to continue the dialogue (on all sides), but to make/insist on positive change. Each of us must have a heart-to-heart discussion with ourselves. I challenge you to find a quiet place and step into your "truth room." Ask yourself tough questions about race, your perspective on race, your support for that perspective, and then answer the questions truthfully.

I am an African-American lawyer who is also a former police officer. To say my perspectives are varied is an understatement. To that end, I have engaged in many honest discussions related to race over the past several weeks with colleagues, close friends, and family.

All of the conversations were interesting and, often, enlightening. In some instances, the tone of the discussion left me optimistic about the future as it relates to issues of race. Other discussions offered a new perspective, while some left me scratching my head, wondering if the gap created by the discrepancy of perspective is too wide to overcome. Overall, however, I am encouraged. The sentiments expressed during the discussions were sincere and the general tone was a legitimate hope for a better understanding of issues.

For example, I had a conversation with a police officer friend who happens to be white. He admitted that one of his concerns, when having discussions related to race, is being labeled a racist if he fails to communicate his perspective accurately or doesn't ask the right question. In his opinion, it's safer to avoid the topic all together if possible. He also confessed that issues related to race were not ordinary topics discussed with his children (who are now adults). He taught his children that people are all the same; there is no difference. He wasn't sure if his approach was the right one but, for him, it was the safest and it aligned with what he believed (*i.e.*, that people are all the same). In light of current events, however, he wanted to revisit the issue, and challenge himself to find ways to engage in meaningful dialogue with people of color without being offensive. He questioned whether his "people are all the same" approach properly prepared his kids for discussions of race and their ability to appreciate the differing perspectives people of color may have on a particular issue.

During another conversation with a lawyer who is also white, I was told that racism exists but that it is not systemic. In support of his belief, I was told that "black people have more opportunity today than ever before, in many instances, more opportunity than whites." According to him, discussions related to race are important and should happen, and he acknowledged there are people who are racist. He then went on to say that systemic racism in this country is a fallacy. Later in the discussion I asked the lawyer how many black friends were in his circle. Suffice it to say, he indicated there were only a few. To me, this was an important point to raise in light of his perspective—that racism is not systemic evidenced by the opportunities black people have today. It was important because I believe it is not enough to simply understand an individual's position or belief. I believe we must dig deeper and try to understand the "why."

Many discussions focused on the opinion and belief that police officers target people of color and there must be a complete overhaul of the "system" before any meaningful change can occur on the issue of race, particularly issues on police relations and communities of color. To be fair,

they admit the existence of "good" police officers, but maintain that notwithstanding the good ones, there are too many "not so good" ones on the street and their presence is adversely affecting people of color at a higher rate than others. The group in this camp do not have many friends (if any) with a law enforcement background. As mentioned above, this is another important point in understanding the "why."

I could go on for pages outlining more discussions, which ranged from those who feel that rioting and destruction of property shouldn't be endorsed, that what happened to George Floyd was wrong but if he wasn't a criminal he wouldn't have been arrested in the first place, that police are out to kill black people, and on and on. The opinions were varying and often deeply rooted.

I was (and am) always compelled to point out that I am not an authority on the "black experience." I am only an authority on *my* black experience—an experience and perspective that can, and often does, change as I experience more of life. Likewise, I'm not an authority on the "police experience," *i.e.*, how police officers think, how they react, etc. I can only offer my perspective based on my experience. More importantly for this discussion, I can only offer my perspective as an African-American former police officer turned lawyer.

These various exchanges I referenced have also made me question whether we are truly listening to each other. Take it one step further: Are we listening to ourselves and what we say? My father is a retired army colonel and a man who lived through the civil rights era. He will tell you that his generation had similar opportunities to discuss issues of race, police interactions with people of color, and social justice. He recalls being optimistic about the country's future based on conversations with his white colleagues and counterparts, but now wonders whether the past discussions were as fruitful as he once believed based on the similarities between the discussions of the past and those dominating the headlines today.

My father's point is that if his generation was as committed to addressing issues of race as it claimed, why are the same issues confronting us today? One answer might be our reliance on the collective when discussing race and what needs to be done, which leads me back to my initial point. It is time to go beyond the collective. Ask, "what can I do?," not, "what can we do?" Don't pass the responsibility to someone else. Of course, larger dialogues are occurring and they are necessary. But let's acknowledge and accept the role we each play. I contend, as lawyers, that we have an even higher responsibility to keep the dialogue moving forward in a positive way.

In closing, here are some takeaways that are sticking with me, some observations and some personal feelings. I've learned that trying to paint this issue with a broad brush won't cut it. I've learned that I am frustrated to hear more outrage over riots than the loss of black lives. This does not mean that I condone violent rioting and destruction of property. It means I believe it can be acknowledged that rioting and lawlessness are unacceptable while at the same time listening to the reality of a community and its belief that there are far too many unjustified killings of people of color. I've learned that I am frustrated for feeling the need to apologize for supporting law enforcement—I've been an officer, I've trained them and I now advocate for them in my practice of law. I've learned we can't speak in absolutes—"never" and "always" won't help the problem. With all of that said, my biggest takeaway is that, as a country, we are in need of healing. And to me, the path to healing comes with understanding and change. I challenge you not to be afraid to get involved. Get outside your comfort zone! Dare I say, our country is depending on it.

Monté L. Williams, a former state trooper, works to protect his clients at trial, managing litigation, negotiating settlements, conducting investigations, or partnering with them to find ways to avoid future problems. He collaborates with his clients long before litigation is a reality to protect them and fight for the best possible outcome. From **Steptoe & Johnson's** Morgantown, West Virginia, office, Mr. William's is the head of the firm's General Litigation Practice Group and Oil & Gas Emergency Response Team.

Keep The Defense Wins Coming!

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

John J. Garvey III and Jason E. Abeln

DRI members John J. Garvey III and Jason E. Abeln of **Garvey Shearer Nordstrom PSC** (Ft. Mitchell, Kentucky/Cincinnati, Ohio), achieved a defense verdict following a four-day jury trial on March 12, 2020, in Campbell County Circuit Court, Newport, Kentucky, Case No. 15-CI-502, one of the last verdicts recorded in the state before the COVID-19 pandemic suspended most all court operations in Kentucky.

In the case of *Cincinnati Insurance Company a/s/o Longnecks, LLC and A&C Properties, LLC v. Neiheisel Plumbing, Inc.*, the plaintiff claimed in excess of $900,000 in subrogation, for recovery of its payment of damages that its insureds suffered after a fire at the Longnecks Bar & Grill in October 2013. The court bifurcated trial on liability from damages by means of an agreed order.

In November 2012, Longnecks hired its regular plumber, Neiheisel Plumbing LLC, to replace the flexible gas line from the supply to an existing, gas deep fryer that would become known as "fryer #2" during the fire cause and origin investigation. Fryer #2 was the middle of three fryers against an outer wall of the kitchen, with fryer #1 to its left and fryer #3 to its right. Eleven months later, a gas leak and subsequent fire, captured on video surveillance inside the restaurant, essentially destroyed the kitchen and caused significant damage to the entire structure by way of flame, smoke, and suppression efforts.

After the fire, it was discovered, and then stipulated in the trial, that the plumber's apprentice installed the Snap-Tite, Quick Disconnect fitting (QDC) in the wrong direction such that if the flexible hose were to become disconnected through the use of the QDC, the automatic safety shutoff value would not activate as intended. With the QDC installed backward, its actuation would permit natural gas to flow freely from the supply manifold into the kitchen. The QDC, when installed properly, is intended to permit easy movement of gas-fed appliances by allowing the quick disconnect of appliances with a resulting automatic shut off of the gas fuel supply without the need to turn off the supply manually. QDCs vary slightly by manufacturer, but in general, they are actuated by pulling back the brass sleeve affixed to the female end to release the spring-loaded pressure seal with the male end and allow the male and female ends to separate.

Immediately after the fire the Campbell County Fire & Explosion Investigation Team (CCFIT) assembled to investigate the fire loss and to try to determine the origin and cause. The team agreed that the origin of the fire was a gas leak in the area of and behind fryers #2 and #3, but the team concluded that the cause was undetermined. The plaintiff secured experts to opine pertaining to the origin and cause. The plaintiff's fire origin expert opined that the origin was a gas leak behind fryer #2, based on supposed "V" burn patterns but determined that the cause determination was beyond his ken. The fire origin expert then secured a mechanical engineer, who posited an "inadvertent disconnect" theory of causation, surmising that the flexible, but rigid gas hose connecting fryer #2 to the wall-mounted supply manifold twisted back on itself so as to actuate" the QDC sleeve when fryer #2 was pulled out from the wall during cleaning.

According to the mechanical engineer, the inadvertent disconnect caused the connection to separate, leading to the gas leak and eventual ignition via fryer #2's pilot light, and then the blaze. Photographs taken immediately after the fire showed the connection breached, with the female end disconnected and lying on the ground behind fryer #2; no witness testified in the trial that they had themselves separated the connection.

The defendant first hired a mechanical engineer, who opined that the swivel joint on fryer #3's wall-mounted supply manifold had degraded over time from the repeated action by employees of pulling out the fryer to clean it, resulting in a slow leak, the pilot light ignition, and the blaze. Each side issued a *Daubert* challenge to the opposing experts. The trial court denied all motions and set the matter for trial. Subsequently, the defense mechanical engineer expert suddenly and unexpectedly passed away. The defense turned a new engineering expert.

Two weeks before the trial, the plaintiff filed another *Daubert* challenge, this time against the more recently

retained defense engineering expert. The plaintiff's motion was denied. During the trial, the defense expert, who also had over 40 years of personal experience fighting fires as a volunteer fireman, as well as training in investigating fire cause and origin, plus experience as a civil engineer, constructing several gas supply projects, showed the jury fatigue damage to the swivel joint on fryer #3 that was consistent with wear and tear and which would result in the type of gas leak reported by the Longneck's employees. The expert also narrated the 16 minutes of video captured of the gas leak and resulting fire, conveying to the jury how the gas leak began as a slow leak from the degraded swivel joint at fryer #3 as opposed to the sudden and complete disconnect of the supply line to fryer #2. The expert explained how an inadvertent disconnect would have resulted in a significantly different event than shown on the video recording.

Testimony of the members of the CCFIT on cause was split between fryer #2 and fryer #3, but some said that they did not see fryer #2's QDC separated as shown in photographs taken shortly after the fire. One of the team members vividly recalled a phone call that he received from the plaintiff's fire origin expert a few weeks after the fire, accusing his team of spoliating evidence, a fact that the team member emphatically denied as untrue.

Jason Abeln handled direct examinations and cross-examinations of all expert witnesses during the trial, effectively challenging the plaintiff's experts as having failed to follow the dictates of NFPA 921 (the standard for fire cause and origin investigations), and demonstrating how the defense expert's adherence to NFPA 921 rendered his testing and opinions scientifically valid.

On day two of the trial, a juror who was incessantly coughing, causing great concern among the other jurors, was excused, leaving a panel of 12 and no alternate juror, as increasing awareness of the COVID-19 pandemic came to the fore.

After deliberating roughly 1.5 hours, a unanimous jury found Neiheisel Plumbing LLC negligent in installing the quick-disconnect fitting backward (a finding conceded by the defendant in the trial), but the requisite three-fourths majority (10-2) found Neiheisel Plumbing, LLC's negligence was not a substantial factor in causing the fire, thereby rendering the defense verdict.

Going Viral

Will Regulatory Estoppel Arguments Undermine the Virus Exclusion?

By Michael F. Aylward

Although the number of declaratory judgment actions seeking coverage for COVID-19 business interruption losses is now nearing 500, relatively few of these cases seek recovery under commercial property policies containing virus exclusions.

Indeed, the virus exclusion (Form CP 01 40 07 06) is a formidable obstacle to coverage for COVID-19 claims. This exclusion was promulgated by the Insurance Services Office in 2006 after the SARS pandemic raised the prospect of virus claims in the United States. It states that there is no coverage "for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Form CP 01 40 07 06.

Earlier this month, however, a Pittsburgh law firm filed suit in the Western District of Pennsylvania challenging the viability of this exclusion on a theory of "regulatory estoppel," a doctrine that was recognized twenty years ago in New Jersey (and Pennsylvania to a lesser extent) as a means of nullifying otherwise unambiguous pollution exclusions.

In *1S.A.M.T. Inc. d/b/a Town and Country v. Berkshire Hathaway, Inc.*, No. 20-2025 (W.D. Pa. June 11, 2020), a banquet and catering company located in New Castle, Pennsylvania, is arguing that its property insurer should be estopped from arguing that the virus exclusion is broader than what ISO and other trade associations explained when this exclusion was promulgated in 2006 following the SARS pandemic. The complaint alleges:

> 48. In their filings with the various state regulators (including Pennsylvania), on behalf of the insurers, ISO and AAIS represented that the adoption of the Virus Exclusion was only meant to "clarify" that coverage for "disease-causing agents" has never been in effect, and was never intended to be included, in the property policies.
>
> 49. Specifically, in its "ISO Circular" dated July 6, 2006 and entitled "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," ISO represented to the state regulatory bodies that:
>
> While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage to create sources of recovery for such losses, contrary to policy intent....
>
> 51. The foregoing representations made by the insurance industry were false. By 2006, the time of the state applications to approve the Virus Exclusion, courts had repeatedly found that property insurance policies covered claims involving disease-causing agents, and had held on numerous occasions that any condition making it impossible to use property for its intended use constituted "physical loss or damage to such property."

This argument rests on the Pennsylvania Supreme Court's ruling twenty years ago in *Sunbeam Corp. v. Liberty Mutual Ins. Co.,* 781 A.2d 1189 (Pa. 2001), in which the court ruled 3–2 (two justices having declined to participate) that lower courts had erred in granting the insurers' demurrer and dismissing a policyholder's complaint with prejudice where, in the majority's view, the insurer had properly pleaded the elements of a claim for estoppel based upon representations concerning the scope of the exclusion that the insurance industry had made to the Pennsylvania Insurance Department in 1970. The supreme court remanded the question back to the trial court to determine if, consistent with these statements to regulators, insurers meant to continue to cover gradual pollution that was not intended by the insured.

Sunbeam relied on *Morton International v. General Accident Ins. Co.,* 134 N.J. 1, 629 A.2d 831 (1993), which is the only other state supreme court decision that has endorsed the "regulatory estoppel" doctrine. In *Morton*, the New Jersey Supreme Court declared that "sudden," if given its literal meaning, would limit coverage to "big boom" type polluting events. However, the court ruled that statements made to insurance regulators in 1970 by the Insurance Rating Bureau (ISO's predecessor) were grossly misleading. In particular, the court focused on IRB's statement that

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent.

In light of these statements the *Morton* court ruled that the insurers are now estopped to additionally argue that the exclusion bars coverage for gradual pollution. Despite the fact that conventional estoppel did not apply since few policyholders had any awareness of these 1970 regulatory filings when they purchased their insurance, the court adopted the theory of "regulatory estoppel" for cases in which state regulators are, in effect, proxies for the insurance-purchasing public.

> In misrepresenting the effect of the pollution-exclusion clause to the Department of Insurance, the IRB misled the state's insurance regulatory authority in its review of the clause, and avoided disapproval of the proposed endorsement as well as a reduction in rates. As a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution-exclusion clause to state regulators.

Although policyholder counsel made aggressive efforts to spread the message of "regulatory estoppel" in the decade after *Morton*, with the sole exception of *Sunbeam,* state and federal courts uniformly refused to adopt this theory, whether because extrinsic evidence of intent is admissible where policy language is otherwise unambiguous or because the doctrine of estoppel requires that the party seeking to enforce a contract have relied to his or her detriment on a misstatement by the other contracting party. *See, e.g. Federated Mut. Ins. Co. v. Botkin Grain Co.,* 64 F.3d 537 (10th Cir. 1995); *Buell Industries v. Greater New York Mutual Ins. Co.,* 791 A.2d 489, 259 Conn. 527 (2002); *E.I. DuPont v. Allstate Ins. Co.,* 693 A.2d 1059 (Del. 1997); *American States Ins. Co. v. Kiger,* 662 N.E.2d 945 (Ind. 1996); *Cessna Aircraft Co. v. The Hartford Acc. & Ind. Co.,* 900 F. Supp. 1489 (D. Kan. 1995); and *Anderson v. Minnesota Insurance Guarantee Association*, 534 N.W.2d 706 (Minn. 1995).

Indeed, even *Sunbeam* is not particularly strong precedent. It did not go as far as *Morton* and was only a 3–2 decision in a case in which two other justices had recused themselves. Furthermore, it has been given limiting effect by the Third Circuit in an unpublished decision. In *Hussey Copper,* 319 Fed. App'x 507 (3rd Cir. Aug. 23, 2010), the federal court refused to find representations made by ISO to Pennsylvania insurance regulators should estop Royal from asserting the application of an absolute pollution exclusion to products claims. In particular, the court found that the ISO statements, when read in context, showed that ISO consistently represented to regulators that the pollution exclusion would apply to claims like these and were not contrary to Arrowood's position.

Furthermore, unlike the representations to regulators that were at issue in *Morton* and *Sunbeam,* there is no inconsistency between the ISO Statement of Purpose concerning the "virus exclusion" and the positions that insurers are now taking in response to COVID-19 claims. The claim in *1S.A.M.T.* that the insurers' representation that commercial property policies would generally not cover pandemic losses is "false" represents an interpretation of conflicting case law around the country. It was (and remains) the view of property insurers that pandemic losses were never meant to be covered. There is, therefore, no basis for arguing that the insurers are now taking an inconsistent position.

Additionally, this lawsuit fails to note that the ISO Circular stated that ISO had developed this new exclusion because "specific types" of "viral" contamination "warrant[ed] particular attention." ISO specifically identified SARS, which is caused by a coronavirus, as an example of viral contamination, and stated that "[t]he universe of disease-causing organisms is always in evolution." While ISO may not have anticipated the scope and devastation of COVID-19, this exclusion certainly anticipated the possibility of this or future pandemics and sought to insulate commercial property insurers from their consequences.

In short, while efforts will certainly be made to liken the 2006 AAIS and ISO documents concerning the virus exclusion to statements that were made to state regulators in the past concerning pollution exclusions, a reasoned assessment confirms that this virus exclusion was, in fact, adopted for the very sort of pandemic that now plagues our world and should survive "regulatory estoppel" assaults.

Michael F. Aylward is a senior partner in the Boston office of Morrison Mahoney LLP. He is the immediate past president of the American College of Coverage Counsel, a member of the American Law Institute and has served on the DRI Board of Directors, helmed its Law Institute and formerly chaired the DRI Insurance Law Committee.

DRI Town Hall: Acknowledging Systemic Racism

DRI is committed to the pursuit of justice for everyone and has organized a **Town Hall** series to help us express solidarity and frustration and, more importantly, contribute to making real and lasting change. Please join us for the first session, "**Acknowledging Systemic Racism: The Personal Experience and How to be an Ally**," on Monday, June 29, at 11:00 a.m. CDT. Personal experiences, the history of policing in black communities, accompanying black trauma, and how we can all be allies to the movement will be discussed. Sign up here: https://bit.ly/3esdLmh.

DRI Call for Nominees: Annual Professional Achievement and Service Awards

Do you have a colleague who deserves recognition for his or her professional contributions? **DRI's Annual Professional Achievement and Service Awards** celebrate and honor outstanding performance by state and local defense organizations, DRI law firms, and individual members, and we are looking for nominees.

These awards aim to recognize individuals for their achievements on behalf of the defense bar and the civil justice system or their involvement in community and public service activities that have a positive effect on society at large. Recognition enhances members' personal growth and accomplishments, provides us all with role models, and strengthens members' images in the legal and business communities and with the general public.

Please download a copy of our awards brochure and read how you can nominate a deserving individual, your organization, and its members. We encourage you to submit an entry for each award by **July 1, 2020.** Winners will be announced at the Celebration of Leadership on Friday, October 23, held in conjunction with the DRI Summit in Washington, D.C., from October 21–24, 2020. In addition, DRI will recognize award recipients in *For The Defense* and through press releases to national and local media.

Upcoming DRI Elections

Four **Director Elected Nationally** seats on the DRI Board of Directors, plus the offices of **Second Vice President** and **Secretary–Treasurer**, will be filled at the 2020 DRI Summit in Washington, D.C., October 21–24. To be considered for any position, a DRI member must first file a Declaration of Candidacy form. For more information, please contact **Nancy Parz** at DRI headquarters: nparz@dri.org or **312.698.6224**. **Declarations are due by July 1, 2020. This deadline is not being postponed.**

Harwell and Others "Feed the Partnership" in Chattanooga

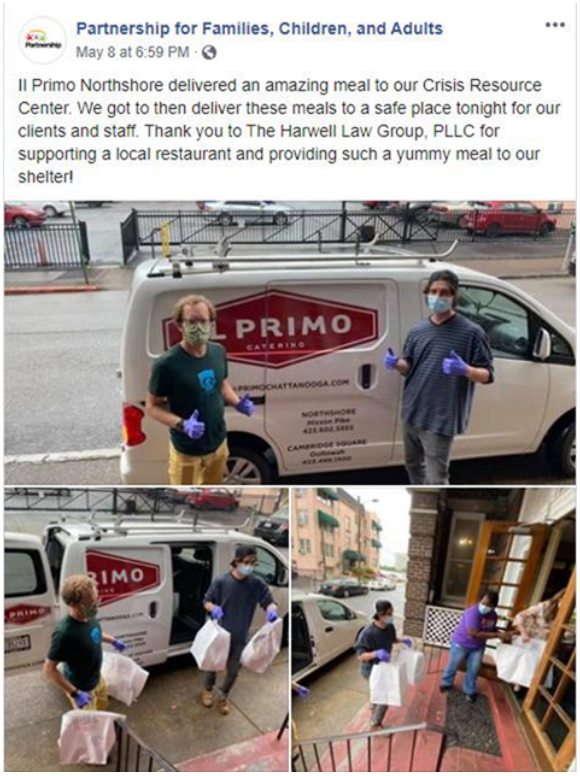
Beginning Friday, May 8, and for Friday nights going forward (funds reasonably permitting) until the end of this pandemic crisis, the residents and staff of the Partnership for Families, Children, and Adults (the Partnership) in Chattanooga, Tennessee, have been served professionally prepared dinners by local Chattanooga restaurants. The Partnership provides temporary shelter to victims of domestic violence and emergency shelter for homeless families.

Marc Harwell of the **Harwell Law Group PLLC** began the #FeedThePartnership campaign by purchasing dinners for the first two Fridays of the campaign—94 delicious Italian dinners from Il Primo.

Since May 22, law firms in Chattanooga that are plaintiff-based and law firms that are defense-based have stepped up to the request for help. As of May 29, approximately 182 dinners had been served. So both the Partnership and local restaurants are being helped.

If you have any doubts about the effect that such a relatively small gesture can do for someone in need, see the note below from a resident to the owner of one local restaurants.

If you want to help, please reach out to Marc Harwell's paralegal jennifer@harwelllawgroup.com. And please spread the word of help and hope via #FeedThePartnership.



Preventing Nuclear Verdicts in Trucking and Transportation Cases in the COVID-19 Era, June 26, 2020, 11:00–12:30 pm CDT

The trucking and transportation industry has been disproportionately affected by nuclear verdicts and settlements over the last decade. While the plaintiff reptile methodology is partly responsible for some of these enormous verdicts, several other key factors are clearly driving the increased frequency of plaintiff verdicts with exceptionally high damages. Many pundits have hypothesized that "millennial jurors" are largely to blame; however, jury decision-making analyses from real and mock trials have revealed contrary results.

This program is designed to provide defense attorneys, claims specialists, and in-house counsel in the trucking and transportation industry with a deep analysis of the causes of nuclear verdicts, as well as proven tactics to avoid these disastrous outcomes. The industry has the chance to use the current "timeout on the field" to reassess and refine their case assessment, file handling, witness preparation, and trial tactics in an effort to turn the tables on the plaintiffs' bar. Click here to register.

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

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

Truck Drivers and the Transportation Industry: The Public's Perception Post COVID-19, July 8, 2020, 12:00–1:00 pm CDT

Attendees will hear from an industry claims director and assistant general counsel, the general counsel of the American Trucking Associations, and a seasoned trucking attorney regarding the changing perception of truck drivers and the trucking industry as a whole in light of COVID-19.

The speakers will discuss in detail how the trucking industry responded to assist Americans in the midst of COVID-19, the recent press relating to truck drivers and the trucking industry as a result of how the trucking industry responded to COVID-19, and the educational opportunities for those working in the trucking industry (drivers, managers, and lawyers, among others) presented by this global health pandemic. Additionally, the speakers will discuss the ways in which the trucking industry and the legal profession can preserve and use the improved public perception of truck drivers and the trucking industry in the post-COVID-19 era to defend against a plaintiff's claims, including during the discovery phase, voir dire, and trial. Click here to register.

Upcoming Webinars

Shaping the Law to Meet the Challenges of Advanced Driver Assistance Systems Litigation, July 28, 2020, 12:00–1:30 pm CDT

The presentation will discuss two types of advanced driver assistance systems (ADAS) cases: (1) those in which the plaintiff argues that the vehicle should have been equipped with ADAS sooner, and (2) those in which the plaintiff argues that ADAS should have performed better. When it comes to these cases, many authors and presenters on this topic have argued that the same legal defenses should apply in the same way as they always have.

This presentation will use *Dashi v. Nissan N. Am., Inc.*, 247 Ariz. 56, 445 P.3d 13 (App. 2019), *review denied* (Jan. 7, 2020), as a jumping off point to discuss using novel applications of established legal theories to meet the challenges of ADAS cases. Rather than applying the same defenses in the same way, this presentation will suggest that the law needs to be shaped to meet the technology that will inevitably change the way that we drive. Click here to register.

DRI Membership—Did You Know...

DRI's Defense Library Series—It's Free, It's Online, and It's Knowledge that You Can Use

If you are not taking advantage of DRI's free, online Defense Library Series, you are leaving money on the table. Did you know that DRI tapped the experience and expertise of national defense leaders in their practice area to author and publish more than 18 publications that are free and online to all DRI members?

Go to www.dri.org and log in to your membership account. Click on "Legal Resources," scroll down to "Access DLS Titles" and select it, and then select a **practice area**. Among others, in the **Drug and Medical Device** category, you will find *FDA Basics for the Drug and Medical Device Lawyer*; in the **Insurance Law** category, you will find *Duty to Defend Compendium* and *Insurance Bad Faith–A Compendium of State Law*; in the **Intellectual Property Litigation** category, you will find *Remedies in Intellectual Property Cases*; and in the **Product Liability** category, you will find *Products Liability Defenses: A State-by-State Compendium*.

New Member Spotlight

Jonathon B. Snider, Taylor DeVore & Padgett PC

Jonathon B. (Yogi) Snider is a litigation associate with **Taylor DeVore & Padgett PC** in Indianapolis, Indiana. His practice primarily focuses on complex liability defense and insurance coverage disputes, with an emphasis in environmental matters. He is admitted to practiced law in Indiana and the U.S. District Courts for the Northern and Southern Districts of Indiana.

Before joining his practice firm, Mr. Snider was fortunate to serve as a term clerk for the Honorable Margret G. Robb of the Indiana Court of Appeals. He received his law degree in 2015 from the University of Dayton School of Law, where he served as the managing editor of the *University of Dayton Law Review* and the associate justice of the school's Moot Court Team. Outside of work, he enjoys spending time with his friends and family, hacking up the golf course, and following the English Premier League.

Quote of the Week

> "Threats to freedom of speech, writing, and action, though often trivial in isolation, are cumulative in their effect, and unless checked, lead to a general disrespect for the rights of the citizen."
>
> —George Orwell (b. June 25, 1903).