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The Voice

January 20, 2021

Volume 20, Issue 2

[This Week's Feature](#)

[And The Defense Wins](#)

[Upcoming Seminars and Webinars](#)

[Article of Note](#)

[DRI Cares](#)

[Quote of the Week](#)

[COVID-19](#)

[DRIkids](#)

This Week's Feature



Employment and Tenancy Litigation Due to COVID-19, and Legislative Responses

By Denis F. Alia and Brian D. Fishman

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This Week's Feature

- Employment and Tenancy Litigation Due to COVID-19, and Legislative Responses
By Denis F. Alia and Brian D. Fishman

[MORE](#)

Article of Note

- Tips for a Successful Mentoring Relationship in a Remote Environment
By Chad Burgess and Caitlyn Haller

[MORE](#)

COVID-19

- DTCWV WITL Committee—Making Connections in Trying Times
By Jill Cranston Rice

[MORE](#)

And The Defense Wins

- Paul Caleo and Katrina Durek
- Keep The Defense Wins Coming!

[MORE](#)

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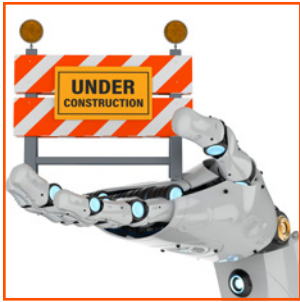
- Schnader Honors Jay Evans with Community Service Award

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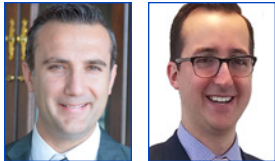
“With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.”

Abraham Lincoln ([second inaugural address](#), March 4, 1865)

This Week's Feature

Employment and Tenancy Litigation Due to COVID-19, and Legislative Responses

By Denis F. Alia and Brian D. Fishman



Over the past several months, a wave of lawsuits has been filed against employers and/or landlords as a result of the coronavirus. Below, we discuss some of these lawsuits, as well as some of the legislative responses to COVID-19 litigation.

Employment Discrimination

Allegations of employment discrimination during the pandemic have generally taken one of two forms: either plaintiffs claim that they were terminated because they contracted COVID-19, in violation of disability discrimination prohibitions, or the employee claims that he or she was terminated for a discriminatory reason, but COVID-19 was used as a pretext to conceal the real reason for such termination.

In one case, a plaintiff took a one-month leave of absence due to contracting COVID-19. After testing negative and planning to return to work, she was terminated due to concerns that she could still be infectious. The plaintiff claimed she was terminated illegally because of her disability, *i.e.*, the contraction of COVID-19. *Worthy Tihara v. Wellington Estates LLC*, C.A. No. OCNL001409-20, June 15, 2020, Ocean County, New Jersey. In a recent case in Pennsylvania, an African-American plaintiff who was the only non-white employee in her department brought suit on the basis of discrimination, claiming that while she was told she had been laid off due to the pandemic, she was the only department member eliminated, while two new, white employees had been hired in the prior month. *Chynelle D. Branch v. Korman Communities*, 2:20-cv-03754-JP, August 2, 2020, E.D. Penn. In Ohio, an African-American plaintiff claimed that she had been harassed due to her race, but when she lodged complaints about her company's handling of COVID-19, she was terminated for poor work performance. She filed suit against her employer, alleging the reasons given for her termination were pretext to conceal race discrimination. *Shatila Bell v. Solon Pointe at Emerald*

Ridge, LLC, et. al., CV-20-937087, September 11, 2020, Cuyahoga County, Ohio.

The Equal Employment Opportunity Commission (EEOC) has issued guidance on the interplay between the Americans with Disabilities Act and COVID-19, including outlining specific restrictions on what employers can require of their employees. To avoid claims that any termination is due to a COVID-19 related disability, or that termination during the pandemic is a pretext for an illegal firing, employers should closely follow the EEOC guidelines and use due care to ensure fair, equal treatment of all workers, especially while employees work remotely, or take leaves of absence deemed necessary under newly issued protocols.

Wrongful Death

Employers are rarely found liable for employee injuries in the workplace, as workers' compensation systems usually restrict the extent of an employer's liability toward its employee for injuries tied to the workplace. The coronavirus pandemic may change this trend. The notion behind some of the early lawsuits is that employers failed to adhere to state and federal guidance for preventing the spread of the virus, including use of face masks and physical distancing. Plaintiffs allege that because of such failures, any workers' compensation bar does not apply, and the employer is not immune from employee lawsuits. For instance, the widow of a Safeway employee in California who died of COVID-19 sued her husband's employer, alleging that it allowed employees to work while they were sick, and also posted a memo that stated, "a mask will not protect you from the respiratory drops an infected person coughs out." Walmart and Tyson have faced similar lawsuits from employees alleging that their employers put them at risk by not following state and federal guidelines. *The First Wave of COVID-19 Workplace Lawsuits Is Here*, Advisory Board, August. 3, 2020, <https://www.advisory.com>. As companies scramble to adapt to the fluid circumstances and evolving protocols, the recommended approach is to err on the side of caution and temporarily

This Week's Feature

prohibit employees who exhibit symptoms from returning to work.

Housing

The federal government has taken steps to minimize the impact of the crisis in an effort to ease the burden on homeowners and tenants during the pandemic. Such steps include placing moratoriums on evictions, prohibiting shutting off utilities due to non-payment, and prohibiting late fees. On September 1, 2020, the Center for Disease Control and Prevention issued the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 order, which prevented landlords from evicting certain groups of residential tenants through December 31, 2020 ([subsequently extended through January 31, 2021](#)). Among the protected groups are tenants unable to pay rent due to loss of income, and who would become homeless or have to move into a shared living setting if evicted, and who have a qualifying level of income. *Emergency Bans on Eviction and Other Tenant Protections Related to Coronavirus*, September 28, 2020, <https://www.nolo.com>.

States have varied in their approaches towards protecting tenants. For instance, in Massachusetts, the court denied a preliminary request to block state officials from enforcing the eviction moratorium, holding that access to stable housing is a “crucial component” of containing COVID-19 in the state, and that the economic risk to the public and state outweighs the financial burden landlords face in the short term. In fact, state officials had predicted 20,000 eviction cases would flood the court system if the moratorium were to expire. *In Massachusetts, Superior Court Judge Won't Block State's Eviction Moratorium; Plaintiff's Plan to Appeal*, MassLive, August 26, 2020, <https://www.masslive.com>.

Legislative Action

Senate Republicans proposed a bill to shield employers from liability arising out of claims related to coronavirus, as long as the businesses took “reasonable efforts” to comply with government guidelines, and tied passage of such a bill to further economic relief. Jeff Stein and Erica Werner, *White House willing to cut a stimulus deal without 'liability shield,' breaking with McConnell*, Washington Post, July 31, 2020, <https://www.washingtonpost.com>. Concerns have been raised that the bill may reduce the incentive for employers to create the safest possible workplaces and

could endanger more workers. Other legislative proposals include funneling lawsuits to federal courts (which are perceived as more favorable to defendants), capping punitive damages, allowing employers to countersue for “meritless” claims, and allowing the Department of Justice to sue attorneys who exhibit a “pattern” of coronavirus lawsuits.

As federal coronavirus liability protections remain uncertain, some states have already acted to limit COVID-related liability on the local level. State legislatures in Georgia, Nevada, North Carolina, Utah, Wyoming, Mississippi, Oklahoma, Louisiana, Kansas, and Tennessee have enacted liability protections, and in other states, including Arkansas and Alabama, executive orders have afforded similar relief. Patrick Gleason, *COVID Liability Protection Enacted In Nine States, With Tennessee Set To Be Number 10*, Forbes, August 13, 2020, <https://www.forbes.com>. In Tennessee, a party will not be liable for loss, damage, injury, or death that arises from COVID-19 unless the claimant proves that the party caused the injury by an act or omission constituting gross negligence or willful misconduct. Employers in states that offer these protections should continue to be mindful that state-level protections will not stave off suits based on breaches of federal law, unless and until the federal government acts.

Denis F. Alia is an associate attorney practicing at **Cetrulo LLP** in Boston. He concentrates his practice in the defense of litigation matters, including claims arising from product liability, toxic torts, automotive accidents and insurance claims, and premises litigation. Mr. Alia has represented a broad range of companies, including manufacturers of heavy industrial equipment and automotive friction parts, and ride-sharing companies. He is also a member of the national coordinating team that manages multi-jurisdictional toxic tort litigation for a Fortune 500 company. You can reach Mr. Alia at dalia@cetllp.com.

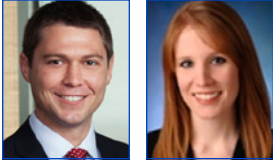
Brian D. Fishman is a litigation associate at **Partridge Snow & Hahn LLP**. He focuses his practice in a variety of areas, including insurance defense, construction, employment, contract, complex commercial litigation, and product liability. He has argued appeals before the First Circuit Court of Appeals, drafted briefs for the Massachusetts Supreme Judicial Court, and has represented clients in the superior and federal courts in both Massachusetts and Rhode Island. Mr. Fishman is based in the firm's Boston office.

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Article of Note

Tips for a Successful Mentoring Relationship in a Remote Environment

By Chad Burgess and Caitlyn Haller



Even in the best circumstances, choosing to invest time in a mentor/mentee relationship requires the full and ongoing participation of both parties. Now, as more of

the legal world operates in a virtual environment, the challenges of engaging with a mentor or mentee may seem daunting. Mentoring relationships may seem more difficult, with increased formality due to remote work and a loss of the previous ways to meet mentors in the office or through a bar association and other community involvement. Yet fostering a mentor/mentee relationship is more important than ever. We have endeavored to provide some tips for mentors and mentees to establish and even further grow their relationship during this challenging time.

Mentors provide a critical role in the career development of less experienced lawyers. To maximize the benefits of mentoring in a remote environment, please consider the following:

- Spend some time learning about your mentee as a person outside of the legal environment. Ease into the conversation by discussing a home office set up, but then move to asking about his or her family, any hobbies, and his or her favorite way to spend a weekend morning in quarantine.
- Share information about yourself that is not necessarily included on your LinkedIn page. Topics may include the local restaurant that you are supporting or anecdotes about your family. Creating space for a personal rela-

tionship allows your mentee to feel more confident and less intimidated when asking you for advice.

- Share some lessons you learned the hard way. Try to resist the urge to share only your triumphs and instead share how your mentor helped you navigate the early years of your career.
- Find ways that your mentee can add value to your practice. Young lawyers may be more proficient in under-

standing e-discovery or using social media to promote business development activities. Discussing and learning skills that may be more familiar to young lawyers promotes your continued engagement as a mentor.

- Do not belittle fears. As a mentor, you may be asked for advice in something you consider routine and simple. Rather than tell your mentee not to worry, consider suggesting



ways they can approach the task with more preparation. It may be helpful to connect your mentee with a colleague who has navigated a similar issue recently. Even if you think it is elementary, remember that your mentee has less experience than you and can benefit from your advice.

- Try to meet panic with a sense of calm. As a mentor, you may be a young lawyer's first call when he or she discovers a mistake on a case. In the young lawyer's frenzied state, he or she may quickly spill out the events leading to a mistake and jump to the conclusion that he or she has caused irreparable harm to a case. While remaining empathetic, try to adopt a calm tone and work through the problem together rather than piling on criticism. Modeling professionalism in managing and correcting

Article of Note

a mistake will help your mentee navigate similar issues independently in the future.

- Show up. Set a calendar reminder to set a video chat once a month. Consider setting the call during your usual lunch or coffee break, allowing yourself time to engage in meaningful discussion. Provide a few suggested topics for the call and ask your mentee to bring one discussion point to ensure that it is not a waste of time.

Mentees must drive the relationship through active participation, planning, and engagement. To express your interest and gratitude adequately to a more senior lawyer in providing counsel to you, please consider the following:

- Spend time getting to know your mentor outside of the office. Always be prepared with questions about the mentor's likes, interests, family, etc. Establishing a personal connection beyond work is essential to a good mentoring relationship.
- Get time on your mentor's calendar. Make it a point to set aside fifteen minutes or more every month or twice a month to have a phone or video call with your mentor. This will help establish a rhythm for your conversations. If you do not reserve time on your mentor's calendar in advance, the days, weeks, and months will fly by without any meaningful interactions.
- Seek professional advice from your mentor. While it is important to get to know your mentor on a personal level, it is just as important to seek his or her professional advice. Make sure to ask what career advice wishes he or she had received as an associate. Also, spend time understanding how your mentor built his or her practice, including what did and did not work.
- Find ways that you can add value to your mentor's practice. Share a case law update or an article you read

that is applicable to your mentor's practice area. If possible, try to work on a case or two with your mentor or look for a way to publish an article or update with your mentor.

- Look for opportunities for reverse mentoring. While it is important to learn everything, you can from your mentor, do not let the knowledge only flow one way. Be sure to share helpful information you learned through your personal and work life. After all, we all continue to learn each day.
- Seek information and guidance from people who are not your mentors. A meaningful relationship with a mentor can be a rewarding experience for both mentor and mentee. Aside from the mentor-mentee relationship, it is also important to learn from other co-workers whether good or bad. The key is to keep learning and apply good and bad lessons learned to your personal and professional life.

Maintaining a mentor/mentee relationship during a pandemic requires flexibility, but the additional effort is well-worth the benefits of continuing to invest in other members of the profession.

Chad Burgess is an associate with **Hill Ward Henderson** in Tampa, where his practice focuses on medical malpractice, products liability, and premises liability matters. He is co-chair of the DRI Young Lawyers Activities and Networking Subcommittee.

Caitlyn E. Haller is an associate with **Greenberg Traurig LLP**, located in Chicago, where her practice focuses on product liability, including pharmaceutical and medical device matters. She is co-chair of the DRI Young Lawyers Activities and Networking Subcommittee.

Thank you to the DRI [Young Lawyers Committee's](#) publications team for coordinating this week's feature article and article of note.

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COVID-19

DTCWV WITL Committee—Making Connections in Trying Times

By Jill Cranston Rice



While no one would minimize the damaging, and for too many, devastating, health and economic effects of the pandemic, I generally try to look for opportunities and see a half-full glass, rather than a half-empty one. Before anyone had heard of COVID-19, the leaders of our state and local defense organization, the **Defense Trial Counsel of West Virginia**, had assigned a small steering committee to implement a women's committee, similar to those suggested by the [DRI Women in the Law Tool Kit](#).

The pandemic seemingly put a wrench in those plans, since our early discussions envisioned in-person sessions and networking meet-and-greets. But, once we were all forced to our homes in March, cutting us off from our work colleagues, friends, socialization, and travel, we quickly realized the work-from-home environment created a unique opportunity for our steering committee to leverage. We all were experiencing the same sense of isolation, and were seeking, if not yearning for, a connection—if only through our screens—that we knew our women's initiative could provide.

Since we didn't know how long we had to take advantage of a "captive" audience, we pivoted and moved quickly. We announced our Women in the Law Committee to the membership and immediately hosted our first virtual seminar in May, during which we introduced our mission and identified technology and other tips for working remotely. In July, we hosted a second webinar with female

federal and state court judges, who provided guidance on remote proceedings and court appearances. The organization's Fall newsletter was authored entirely by our new Women in the Law Committee members, and in December, we hosted a virtual happy hour, "Cocoa, Candy Canes & Camaraderie," which was exclusively social and fun.

Some may say they have Zoom-exhaustion, a word new to our vocabularies. But, in a time when we cannot hop on planes to a DRI leadership conference, seminar, or Annual Meeting—or meet in a conference room to share ideas—listen to stimulating CLE presenters, or visit with our longtime DRI friends over hors d'oeuvres in a ballroom, we are doing the best we can.

Our SLDO's Women in the Law Committee provided much-needed networking and connection for many of us, with the additional benefit of valuable professional growth, informative seminars, and even new members who joined to be a part of the committee. Make no mistake: the dreadful pandemic propelled the fast growth and success of this initiative and was critical to its successful launch. I am eager for our in-person seminar in 2021.

Until then, and until all of us can be together again, I'll be Zooming and enjoying my glasses half-full.

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And The Defense Wins

Paul Caleo and Katrina Durek



Congratulations to the **Burnham Brown** team of [Paul Caleo](#) and [Katrina Durek](#), both members of DRI, who, with the assistance of their team members, were successful in obtaining judgment against the plaintiff on behalf of their client, Nordstrom, in the matter of *Corrie Johnson v. Nordstrom, Inc.*, in Santa Clara County Case No. 18CV323923. The motion for summary judgment filed by the Burnham Brown team was granted by Judge Pierce earlier in 2020. The plaintiff then twice filed unsuccessful motions seeking a new trial and to set-aside the judgment, which were all ultimately denied. Time has now run on the plaintiff filing an appeal, so the judgment against the plaintiff with costs—after pursuing litigation against Nordstrom in two states—is finally *final*.

This lawsuit arose out of an attempt by the plaintiff, Corrie Johnson, to use the California court system to make a collateral attack on a Georgia judgment from a lawsuit that she brought against Nordstrom that was finally upheld on appeal. The plaintiff's first amended complaint in the Santa Clara County California lawsuit alleged that she filed a complaint against Nordstrom for quantum meruit and unjust enrichment in Fulton County, Georgia, in 2014, claiming that she provided the idea to Nordstrom that ultimately became the "Nordstrom Rack App." The plaintiff alleged that Nordstrom owed her millions of dollars in damages based on the revenue and profits generated by its customers using the app, which was originally her idea. The plaintiff alleged in the California lawsuit that the summary judgment Nordstrom obtained in the Fulton County lawsuit in February 2015 was obtained or procured by extrinsic fraud and that this fraud was never the subject of the underlying suit. The plaintiff asked the California court to allow her to litigate the "fraud" on its merits in an attempt to offset the judgment obtained in the Georgia lawsuit.

The Burnham Brown team argued that although the plaintiff's first amended complaint stated a single cause of action for "extrinsic fraud," what was alleged appeared to be a claim for fraudulent concealment based on an alleged

duty to disclose information to an opponent in litigation. The team raised defenses of res judicata and/or collateral estoppel on behalf of Nordstrom and that the California lawsuit was time barred.

After the plaintiff filed two unsuccessful dispositive motions herself, the motion for summary judgment filed by the Burnham Brown team on behalf of Nordstrom relied on the Full Faith and Credit Clause of the U.S. Constitution in Art. IV, Section 1, to argue the collateral estoppel effect of the Georgia state judgment on the plaintiff's California lawsuit.

Relying on Evidence Code section 452(d), the motion included a detailed request for judicial notice of the content and legal effect of the ten critical documents and court orders in the Fulton County lawsuit, it argued that the plaintiff raised these identical issues of "fraud" in the Georgia lawsuit, and they were necessarily decided against her in a full and final judgment. Judge Mark Pierce of the Santa Clara County Superior Court agreed and granted the motion for summary judgment, concluding that the collateral estoppel effect of the Georgia judgment and post-judgment orders provided Nordstrom with a complete defense to the plaintiff's sole cause of action for extrinsic fraud. Judgment was entered against the plaintiff with costs and is now final.

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.

Schnader Honors Jay Evans with Community Service Award



DRI member [Jay Evans](#), a partner in **Schnader Harrison Segal & Lewis LLP's** litigation services department, was honored by the firm with the **2020 Earl G. Harrison Community Service Award**. Mr. Evans' volunteer efforts and leadership roles over many years for several non-profit organizations reflect a high stan-

dard for how attorneys and others can serve the community. He is president of the board for Pittsburgh's Arcade Comedy Theater. He started as a student and joined the board in 2015. During 2020, Mr. Evans volunteered regularly as a legal observer for the National Lawyers Guild. At Ridgewood Church, Mr. Evans and his family are involved with supporting its food pantry and teaching financial wellness classes.

In 2008, Schnader established the Earl G. Harrison Community Service Award. This award recognizes a firm attorney or staff member who demonstrates an unfailing commitment to helping others in the community and who has set an example for others to follow with regard to volunteering and giving back to the community.

In his home city of Philadelphia, Earl G. Harrison was recognized for his great professional abilities, as well as his unfailing responsiveness to the needs of the community. He served as vice president of the University of Pennsylvania in charge of law and as dean of its law school. He was an officer and director of the World Affairs Council of Philadelphia and general campaign chairman of the Philadelphia United War Chest, a predecessor of the United Way. Mr. Harrison also served as director of the Philadelphia Area Council of the National Conference of Christians and Jews, the American Civil Liberties Union, and the NAACP. He was a trustee of the Carnegie Endowment for International Peace, of the University of Pennsylvania, and of the Philadelphia (Bok) Award (of which he was also a chairman).

[Click here to read more.](#)

"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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DRIKids

Grace Evelyn and Frances Dollarhide

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

So people don't get hurt.

If you could put on a project to help out others, what would you do?

If someone fell, I would pick them up.

What do you like daydreaming about?

My family.

What's a memory that makes you happy?

Being with Callie (*Our dog who passed in 2019 - jd*).

What is the hardest thing about being a kid?

That we can't do things parents get to do.

What is your perfect meal?

McDonald's Happy Meal.

What do you want to be when you grow up?

A church person.

How can you make the world a better place?

Be good.

*Grace Evelyn (five years old) and Frances (three years old) are the daughters of DRI member [John Dollarhide](#), a partner at **Butler Snow** in Jackson, Mississippi, and his wife, Haley.*

"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@sbaleggers.ca.



Upcoming Seminars and Webinars



DRI 2021 seminars and webinars

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Quote of the Week

“With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.”

Abraham Lincoln ([second inaugural address](#), March 4, 1865)