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COVID-19: Its Impacts on Lawyers and the Practice of Law

ERISA: Remedies for Breaches of Fiduciary Duty

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Legal Leadership During a Crisis

BARRY P. GOLDBERG
SFVBA President
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I HOPE YOU AND YOUR FAMILY are well!

At this point, every single lawyer in the San Fernando Valley has been dramatically affected by the COVID-19 pandemic.

The Bar Association has been affected as well and, just like you, we are up and running as best as we can.

As SFVBA President, I issued a challenge to our staff to continue to provide excellent online and remote services to our members to assist in providing the tools to succeed in going forward.

I am encouraging our members to display leadership to their clients, colleagues and employees.

While this is an impactful event, it will end soon and we will all be judged on how we reacted. I am distressed by how many of my fellow lawyers have surrendered to anxiety and fear.

I plead with law firm owners not to panic and dismiss employees—business will return and there is plenty of public-sector help to tide you over.

There is no better time to continue to provide excellent legal services to our community regardless of your area of practice.

I would like to share some excerpts of a letter I recently wrote to my team:

"Let me give you the good news! We are all going to get through this so do not let fear and panic take over. Although this crisis is unique, crises still happen with some regularity. You need to keep your heads even though others are losing theirs! If any of you need anything for you or your family, please contact me directly.

"Let me give you some more good news—I will not abandon you during this crisis. Your jobs are solid and we are still in business. I have been taking steps to keep you secure in the coming months even though nobody is crashing any cars right now!

"I was inspired to write you this email this morning because I read a post online from a very good and well-established divorce and estate planning lawyer that I know. In sum, she said that she is "freaking out," and has let most of her employees go. I believe this is crazy for two reasons. One, who is going to do the work now and when things recover? And two, she is seeing doom and gloom instead of an opportunity.

"Opportunity?" you ask? Yes. Could you imagine if our firm did estate plans right now? Every single person I know would want a will, a trust and a medical directive in case someone got sick. We could sell a million of these. If that were not enough, could you imagine if we did family law right now? Every divorced client would need custody modifications and support payment adjustments... a lot of stay-at-home couples are going to immediately file for divorce. So—I ask you—who is going to do all that work and make all that money? The answer is the law firms that stayed cool and stuck with their teams!

"I am sharing my 'mindset' with you because I want you to take a few seconds to apply a positive mindset to your particular situation. Will you panic, freeze and give up? Or will you carry on, while others you know scramble for government help and stock up on toilet paper?

"To carry on, all I ask is that you keep up your regular work schedules, spoil our clients with care and try to solve as many problems as you can. We will get through this together.

"Thank you for being part of my team!"

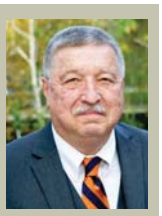
My fellow attorneys, all I ask is that you not give in to panic or desperation.

Please find apportunities to serve your clients in this great time of need.

When all is said and done, isn't that really why we chose our profession?

Trying Times…Again

MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

BACK IN THE DAY, I WORKED with the World Trade Institute of Pace University as a consultant, helping them cultivate West Coast trade associations as partners for their curriculum of international trade and logistics classes.

The Institute was headquartered on the 55th floor of the World Trade Center's East Tower, and early on that September morning some 20 years ago, it all came crashing down.

In my office hangs a photograph of the Twin Towers. Surrounding the photograph are the business cards of friends of mine that worked in the World Trade Center complex. Five of them were among the almost 3,000 innocents who didn't make it home to their families that day.

Every one of us lost someone or something that 9/11—a loved one, a dear friend, an acquaintance, a feeling of security, the blissful ignorance of the fact that there are those in the world who detest us because we, flawed to be sure, are still a genuinely free people with much to be grateful for.

It was, as Thomas Paine wrote two hundred-plus years before, a time that "tried men's souls."

They were, indeed, trying times, as they were when Paine penned those words in 1776, the very concept of what was to be a free and independent United States was a dream teetering on the edge of total evaporation.

I recommend reading David McCullough's epic book, *1776*, to see how close our country came to un-being.

Victory at Yorktown over the strongest army in the world, the Bill of Rights, the Constitution and the halting baby steps of the new Republic were beyond the horizon of even the most optimistic among those freezing in the snow, compelled to eat their shoe leather at Valley Forge.

Since then, we, as a nation, have seen many times that have shaken us to the core—civil war, a pair of world wars, depressions, recession, disease, financial panics, rabid terrorism, fanatic attacks on our values from within and without.

And, yet, here we are.

So it appears, though, that it is "trying time" again. This go-round, we are facing a faceless, microscopic enemy that has brought our society to a near standstill, causing fear, and burdening us with anxiety.

The most difficult battle, though, is shutting out the voice in our head that tells us to surrender to the panic and gnawing uncertainties.

That, perhaps is easier said than done, but, "Tyranny [read: COVID-19], like hell, is not easily conquered, yet we have this consolation with us, that the harder the conflict, the more glorious the triumph," wrote Paine. "The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of his country; but he that stands by it now, deserves the love and thanks of man and woman."

No summer soldiers or sunshine patriots here. Adapt and overcome. We are stronger than we think and we will shoulder-through.

Take the opportunity to peek at an even brighter future while standing on the shoulders of the giants who paid an often-staggering price to get us here.

See you when the time is right.

CALENDAR

MAY 2020

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	ZOOM MEETING 4 VBN VALLEY BAR NETWORK 5:30 PM	5	6	ZOOM MEETING 7 Membership and Marketing Committee 6:00 PM	8	9
10 Happy Mother's Day	11	WEBINAR 12 Probate and Estate Planning Section Death and Community Property 12:00 NOON Hon. Glen M. Reiser (Ret.) will share the latest on community property after death. (1 MCLE Hour) ZOOM MEETING Executive Committee 4:00 PM ZOOM MEETING Board of Trustees 5:00 PM	WEBINAR 13 Business Law and Real Property Section Business and Property Appraisals for Litigation 12:00 NOON Sponsored by BEACo Business Enterprise Appraisal Company, Inc. Larry Grant will lead the seminar. As founder and President of Business Enterprise Appraisal Company, Inc., Mr. Grant has provided valuation and related services to corporations, professionals, individuals, attorneys, and families in the Los Angeles community since 1959. Free to SFVBA Members! (1 MCLE Hour)	14	15	16
17	18	WEBINAR 19 Taxation Law Section Advising the Global Family on Tax Matters 12:00 NOON Attorney Alex J. Hemmelgarn will discuss the income tax, estate and gift tax ramifications of individuals of a global family looking to move or reside in the U.S. (1 MCLE Hour)	WEBINAR 20 Litigation Section Video Mediations: Privacy Issues and How to Mediate More Effectively 2:00 PM Sponsored by Ellis Bakh LLP Trial Lawyers What are the COVID-19 Effects on Mediation. How do video mediations work and what are the privacy concerns? Mediator Craig J. Silver will address these issues. Free to SFVBA Members! (1 MCLE Hour in Legal Ethics)	21	22 WEBINAR Bankruptcy Law Section Seven Lawyers and One Judge on Really Interesting Bankruptcy Matters 12:00 NOON Hon. Alan M. Ahart, U.S. Bankruptcy Judge (Ret.) and our panel of attorneys discuss significant cases and various current bankruptcy concerns. (1.25 MCLE Hours)	23
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By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 21.

ERISA

Remedies for Breaches of Fiduciary Duty

By Brent Dorian Brehm and Michelle L. Roberts

The Employee Retirement Income Security Act, or ERISA, is complicated and multi-layered. As such, it is critical to know when and how liability may be imposed on a benefit plan sponsor—often, an employer—after it makes a mistake in the administrative or functional phase of plans.


BENEFITS

THE EMPLOYEE RETIREMENT INCOME SECURITY Act of 1974 (ERISA) governs most employer-provided employee benefit plans offered by private-sector employers.

For aggrieved ERISA plan participants, the law guarantees the right to a "civil action" while ERISA pre-empts any state-law cause of action that duplicates, supplements, or supplants ERISA's civil enforcement remedy.[1]

Thus, ERISA provides the only remedy available if an individual could have brought her claim under ERISA, and where no other independent legal duty is implicated by a defendant's actions.[2]

Equitable Remedies

This decade has borne witness to a reawakening of long-forgotten equitable remedies that can be accessed under ERISA—specifically, ERISA § 502(a)(3)(B), 29 U.S.C. §1132(a)(3)(B)—the civil enforcement provision that empowers a participant, beneficiary, or fiduciary to obtain other "appropriate equitable relief" to redress any act or practice which violates ERISA or the terms of an ERISA plan, or enforce any provisions of ERISA or the terms of an ERISA plan.[3]

By way of background, § 502(a)(3) was generally viewed as a toothless civil enforcement provision, often providing no remedy for a wrong.[4] This impression stemmed from a 1993 U.S. Supreme Court decision, which held that ERISA does not authorize suits for money damages against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty.[5]

The Supreme Court construed § 502(a)(3)(B) to authorize only "those categories of relief that were typically available in equity," such as injunction, mandamus, and restitution and thus rejected a claim that it deemed as seeking "nothing other than compensatory damages" or legal relief.[6] [7]

Subsequent lower court decisions left considerable doubt as to whether monetary relief for breaches of fiduciary duty and other statutory violations were ever available under ERISA.[8]

This long-standing doubt effectively changed the status of fiduciary and a shield against liability was raised. The words of Benjamin Cardozo, holding a fiduciary to "[n]ot honesty alone, but the punctilio of an honor the most sensitive," was effectively lost.[9]

But, recent court decisions enfeebled this shield, permitting remedies where none appeared to stand before, particularly with respect to breaches involving health and life insurance benefits.

The focus of this article is on when and how liability may be imposed on a plan sponsor (often, an employer) after it makes a mistake in the administrative or "functional" phase of ERISA plans.

This phase is when administrators are answering questions about the plan or performing the day-to-day work that benefits require, such as collecting premiums, monitoring enrollment, or asking for items that need to be provided before coverage becomes effective.

ERISA was designed to provide for fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Considering how many employers provide ERISA regulated benefits, and the complexity in doing so, understanding the potential liability if a mistake is made in administering those plans becomes important.

This article explores the rising tension between ERISA's goals in the wake of equitable surcharge liability for employers when their mistake in plan administration harms a plan participant or beneficiary.

Breach of Fiduciary Duty

ERISA defines a fiduciary with respect to a plan to include an entity that exercises any control over the management of the plan or is responsible for the administration of such plan. 29 U.S.C. § 1002(21)(A). As such, plan insurers are not fiduciaries, unless they determine claims made against the plan.[10]

Since employers establish the plan and set its terms, they serve as fiduciaries, and are almost always named as a fiduciary in the plan documents.

Despite some employers arguing to the contrary when mistakes happen, if it is a named plan administrator, it can be sued for breach of fiduciary duty when handling administrative or functional aspects of the plan.[11]

The duties of an ERISA fiduciary include the duty of loyalty, a duty to disclose, and requires a fiduciary to "discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries."[12]

This includes the obligation to convey complete and accurate information material to the participant's circumstances, even when the participant has not specifically asked for the information.[13]

A fiduciary has an affirmative duty to inform when it knows silence might be harmful.[14]

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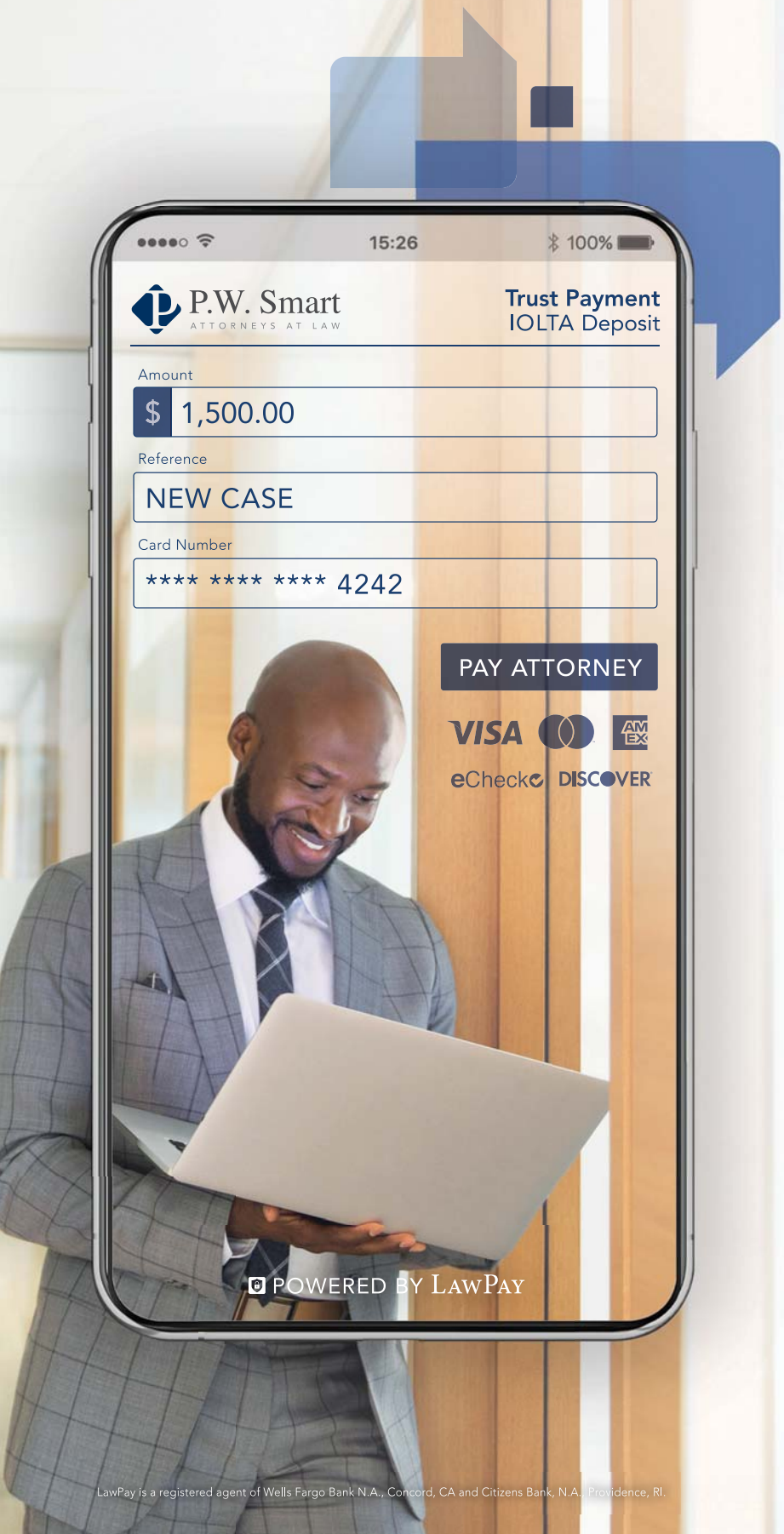

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When it comes to plans involving insurance—health, life, disability, etc.—a fiduciary may not administer the plan in such a way that it creates a situation where essentially risk-free profits can be obtained from premiums paid on non-existent benefits. The mere refund of premiums may be insufficient to right such a breach of fiduciary duty as the fiduciary must always be guided by the purpose of making coverage a reality.[15]

A fiduciary is also liable when its breach caused an employee to be inadequately informed in her decision whether to pursue benefits.[16]

A showing of detrimental reliance on the fiduciary's breach is not required for equitable recovery—all that needs to be established is the violation injured the individual in question.[17]

Finally, a fiduciary may be liable for a co-fiduciary's actions where it has enabled such other fiduciary to commit a breach or it has knowledge of a breach by the co-fiduciary. In such a circumstance, both fiduciaries are liable, unless one of them made reasonable efforts to remedy the breach.[18]

Equitable Surcharge

A breach of fiduciary duty claim must be brought under § 502(a)(3) and thus is limited to equitable relief. Many lawyers recall learning a maxim from law school that money damages are not available in equity, which provides things like specific performance or injunctions. Legal remedies allow recovery of monetary damages. But that is not completely accurate.

The U.S. Supreme Court's decision in *CIGNA Corp. v. Amara* marked a sea change for the understanding of the equitable relief provided by ERISA under § 502(a)(3).[19]

In *Amara*, the U.S. Supreme Court entered the way-back machine to the time before the merger of law and equity. Citing to cases as far back as 1817 and hornbooks from 1823, it explained § 502(a)(3) provided any remedy available to the courts of equity. Those remedies were indeed broad, as a maxim of equity states that "[e]quity suffers not a right to be without a remedy."[20]

The Court then reviewed three traditional equitable remedies: reformation of the contract, estoppel, and surcharge.

Each of those remedies are potentially powerful. Reformation can change the terms of a contract—as contrasted with the power to enforce contracts as written—in order to remedy a false or misleading statement provided by a fiduciary. Estoppel essentially puts the employee into the same position she would have been in had the fiduciary's false statements been true. But surcharge has proven to be the most influential of the three, perhaps because surcharge can take the form of a money payment.[21]

Equitable surcharge is a form of injunction that can require a fiduciary to pay monetary compensation for a loss resulting from its breach of duty or to prevent unjust enrichment. Another benefit of surcharge is that it does not require detrimental reliance—a prerequisite for estoppel.[22]

Through surcharge an employee or beneficiary is simply ordered to be made whole following a breach–an extremely flexible remedy in which the court can "mold the relief to protect the rights of the beneficiary according to the situation involved."[23]

A fiduciary can be surcharged under § 502(a)(3) upon a showing by a preponderance of the evidence of actual harm caused by its breach of fiduciary duty. Harm can be as broad as the loss of a right protected under ERISA, such as the right to apply for a particular benefit.

Mistakes Resulting in Monetary Surcharge Against Employers

With the legal and remedial framework in place, how has this played out in the real world? Lots of ways. In presenting the rules, this article focused on first-party entities–employers and insurance companies.

But the rules apply to any entity that develops ERISA fiduciary responsibilities, including third-party vendors, as many employers outsource the administration of benefits.

In such a case, the vendor may find itself financially responsible for mistakes made in the administration of the benefits.

Failing to Answer Participant's Specific Questions

Echague v. Metropolitan Life Ins. Co. involved liability attaching to a vendor for breach of fiduciary duty and surcharge.[24]

Carol Echague had $440,000 in life insurance benefits through an ERISA plan offered by her employer. The employer outsourced administration of the life insurance benefits, and multiple other benefits, to TriNet Group, Inc.

She stopped working and took a leave of absence after she was diagnosed with cancer.

TriNet sent Echague several letters that explained to her that it was important for her to understand her rights and responsibilities while on leave. The letters directed her to several written materials, directed her to an online portal, and recommended an '800' telephone number if she had questions regarding her benefits, but never specifically addressed her life insurance.

Thereafter, Echague emailed TriNet, informing it that she did not want any insurance to lapse and inquiring where to send premium payments for continued insurance.

In response, TriNet simply resent Echague copies of its prior letters and did not provide her with any information in direct response to her inquiry. Because her employer had always paid the premiums, Echague did not start paying the premiums on her life insurance.[25]

After Echague died, MetLife denied her husband's life insurance claim because the policy had lapsed for failure to pay premiums. He appealed, arguing that neither he nor his wife had been informed that the life insurance was at risk of terminating and that neither he nor his wife received notice from anyone that premiums were not being paid. A lawsuit followed.[26]

The court found that TriNet could be held liable as a plan fiduciary because it administered the plan despite the delegation of claims determinations to MetLife. For example, TriNet sent COBRA and FMLA notices, transmitted premium payments to MetLife, and kept track of what employees were in the plan.[27]

However, the court did not find TriNet's breach was in providing Echague with non-specific information when she went out on leave of absence.

Rather, it was TriNet's response to the email that breached its fiduciary duties because the response failed to provide complete and accurate information to Echague regarding her situation.[28] The court determined TriNet had a duty to specifically answer her question—which it failed to do—and provide more than generic and duplicative information.[29]

TriNet's mistake was that it failed to provide a specific answer to a specific question. The result—a judgment against the company for $440,000 through the doctrine of equitable surcharge.[30]

Failing to Address Each Plan Requirement

Dr. Scott Erwood worked for WellStar Health System, Inc. and had $1,000,000 in life insurance coverage through its ERISA plan.

After suffering a seizure, Erwood was diagnosed with a brain tumor. As a result, he stopped working full-time, and transitioned to part-time employment before leaving work completely.

Around the time Erwood stopped working in full, he and his wife met with WellStar's benefits representatives to discuss benefits after his employment ended.

At the meeting the Erwood's repeatedly asked if all their coverage was going to remain the same. It was repeatedly confirmed that it would. The life insurance benefit was discussed, but not one specific aspect—conversion.[31]

Under the life plan, after Erwood ended his FMLA leave—during which he paid premiums to maintain his medical, dental, vision, and life coverage—thus converting the life insurance benefit from an ERISA benefit to an individual benefit, it being the only way to continue his life insurance. WellStar did not send him any information regarding conversion and continuation of the life insurance benefit after his FMLA leave ended.

This remained true even though WellStar knew Erwood was dying and that he had been approved for $250,000 of

early life insurance benefits under the plan's Terminal Illness Benefit.[32]

After Erwood died, his wife presented LINA with a claim for the remaining $750,000 in life insurance benefits. LINA denied the claim because he was no longer an active employee at WellStar nor had he elected to continue his policy via conversion to an individual policy.[33]

Soon thereafter, she sued WellStar for breach of fiduciary duty.

The court found that WellStar had, in fact, breached its fiduciary duty owed to Erwood when it remained silent on the single non-addressed benefits issue during the meeting called for the express purpose of informing the Erwoods about maintaining all of their benefits.

WellStar had successfully informed the Erwoods about how to keep all of his benefits in force during the FMLA leave and had even been successful in informing the Erwoods about how to keep all of Erwood's benefits in force after the FMLA leave—with the only exception being his life insurance benefits.[34]

WellStar's mistake was that it failed to address every single plan requirement to continue plan benefits during a meeting called for the general purpose of providing information about continuing plan benefits.

The result—a judgement against WellStar for $750,000 through the doctrine of equitable surcharge.

Failing to Track Eligibility Requirements for Coverage

Tammy Frye worked for American Greetings, which provided a suite of benefits through MetLife.[35]

The responsibility for administration of her benefits was delegated to MetLife. One perk of the plan was the ability to elect certain coverage for dependents, including life and AD&D insurance coverage.

However, eligibility for dependent coverage ended when the dependent reached the age of 23.

Frye elected to obtain various benefit coverages on her son, including both life and AD&D insurance. During the process of enrolling her son in coverage, which was done entirely through MetLife's website, Frye provided his date of birth. The coverage went into force and premiums continued to be paid through payroll deductions.

When Frye's son turned twenty-three, she did not alert American Greetings or MetLife of this fact. And neither of them alerted Frye that her son had aged out of coverage.

Frye's son died in a traffic accident at the age of twenty-four-and-one-half. She then submitted a claim for benefits, which MetLife denied on the basis that her son was ineligible for coverage at the time of his death.

Frye appealed, arguing that she thought she had insurance; she had never been told about the age cut-off; American Greetings and MetLife knew about her son's age because it was provided during his enrollment for medical insurance, not the life or AD&D insurance; and neither MetLife nor American Greetings had sent her any information about conversion when her son aged out. The appeal was denied, and a lawsuit followed.[36]

The court ruled that American Greetings and MetLife breached their fiduciary duties owed Ms. Frye by implementing a flawed administrative process. With specificity, the court determined it was a breach to allow employees like her to pay for coverage for dependents who either are ineligible or become ineligible.[37]

The court was concerned by the potential that allowing that to happen might lead to MetLife receiving "essentially risk-free windfall profits from employees who paid premiums on non-existent benefits but who never filed a claim for those benefits."[38]

It also faulted only American Greetings and MetLife for the failure of communication, as they "are the fiduciaries on the scene."[39]

American Greetings and MetLife's erred by not tracking the age of insureds to ensure they are notified when coverage ends. The judgment against both American Greetings and MetLife amounted to the full life and AD&D coverage amounts via surcharge.

Paying Premiums for Ineligible Employees

Referral, a small company with fifteen employees, employed Teresa McGee.[40]

The company offered employees a life insurance plan that included basic benefits, as well as the opportunity to purchase additional coverage under a voluntary life policy. Between the two, McGee was insured for $143,550 in life insurance.

Unfortunately, she was diagnosed with breast cancer and was compelled to stop working.

At that point, Referral's Managing Director told McGee that he would continue to pay the premiums to guarantee that she continued to maintain her life insurance. He did so because he knew her condition was terminal.

Referral was true to its word and paid life insurance premiums for McGee for over a year after she stopped working. It did not convert McGee's insurance or notify her of her conversion rights. Unfortunately, the plan stated that it only covered employees who were in active employment.

The court determined Referral breached its fiduciary duty when it made a misrepresentation to McGee by informing her that it would continue to maintain her life insurance coverage. This was true even if the company did not know whether it could continue her coverage via premium payments. The misrepresentation was material simply because it prevented McGee from making an informed decision regarding her coverage and other options.[41]

Referral's mistake was in not checking whether the continued payment of premiums would, in fact, continue

coverage. The result was a judgment against Referral for $143,550 via equitable surcharge—an amount Referral was unable to pay and did not have insurance to cover and, possibly, could lead to bankruptcy.[42]

Failing to Provide Employees with a Summary Plan Description (SPD)

Michelle Snitselaar worked for Mount Mercy University.[43]

Under the terms of the school's life insurance plan, a lawful spouse was eligible for dependent coverage, while a spouse's coverage ends on the date of divorce or annulment. At that point, the dependent may convert the coverage to an individual policy.

However, Snitselaar and her husband were never provided with a summary plan description regarding this coverage—a violation of ERISA, 29 U.S.C. § 1024(b)(1).

In 2010, she enrolled for life insurance coverage under the plan for herself and her husband.

The couple eventually divorced and, in February 2015, the Snitselaar's divorce was finalized and, less than three months later, her now ex-husband died.

Snitselaar then filed a claim for the $60,000 in life insurance she believed was still in force.

Unum denied the claim because the divorce ended the coverage and the benefit had not been converted.[44]

Snitselaar argued that she was never informed in writing or verbally of the right to convert or that divorce could affect the policy. A lawsuit followed with the court ultimately finding that Mount Mercy had "clearly" breached its fiduciary duty by failing to timely deliver a certificate of coverage or summary of benefits to Snitselaar.

But was there harm and causation? Yes—simply by failing to provide the summary plan description or notice of the conversion rights, Mount Mercy had both harmed Snitselaar and caused that harm by keeping her uninformed.

Mount Mercy had not provided a summary plan description and not keeping track of an employee's divorce with a judgment found against it for $60,000 under the equitable "make-whole, monetary relief" of surcharge.[45]

Failing to Apprise Insurance Company of Important Information Specific to Employee

While only at the motion *to dismiss stage, Harris v. Life Ins. Co. of N. America*,[46] is informative, as well. Bruce Harris, the plaintiff's husband, received life insurance coverage through a plan sponsored by his employer BDO USA, LLP and insured by LINA.

After Harris was diagnosed with cancer, he stopped working and filed a long term disability claim to LINA under BDO's LTD plan. Because the LTD claim was approved, it triggered a provision in the life insurance plan allowing for twelve months of continued life insurance before the insurance terminated if it was not converted or ported. BDO and LINA were aware Harris' cancer caused him to leave work, the date

he left work, and that the cancer had prevented him from returning to work.

Shortly after Harris' disability claim was approved, BDO and LINA corresponded concerning the "need" to notify Harris about the conversion and portability options under the life insurance plan available when the twelve-month continuation period ended.

Despite that, Harris was not notified by either BDO or LINA. Rather, BDO allowed Harris to continue making life insurance premium payments several months beyond the termination of his coverage.

Eventually, BDO wrote to Harris and informed him that his employment had terminated. The letter included information about continuation of benefits upon termination and stated that LINA would contact him and provide him with conversion and portability options for his life insurance policy.

Neither LINA nor BDO followed up with Harris or provided paperwork regarding conversion or portability options. BDO did not communicate with LINA that the time had come when it "needed" to provide Harris with this paperwork.

BDO filed a motion to dismiss contesting that it was not obligated, as a fiduciary, to provide Harris with conversion and portability information or alert him to the lapse of his coverage. In denying the motion, the court recognized three ways BDO had breached its fiduciary duty—subjecting itself to potential equitable remedies, including surcharge.

First, though Harris had not alleged he inquired of BDO or LINA concerning his conversion or portability rights, BDO was aware that Harris was severely, even terminally, ill. This awareness, if true, triggered BDO's fiduciary duty to inform.

BDO was on notice Harris would be interested in continued life insurance. BDO breached its fiduciary duty in failing to provide him with the information to convert and/or port his life insurance policy when BDO knew he would likely want—and need—to continue his coverage.

Second, because BDO made an affirmative representation to Harris that information and paperwork would be forthcoming, even if from LINA, and BDO did not follow through on its assurance, BDO had breached its fiduciary duty.

Third, the acceptance of premiums after Harris' coverage had lapsed was a breach of fiduciary duty because it was tantamount to confirming coverage. It was not necessarily case determinative that Harris did not continue to pay those premiums until the time of his death.

These cases mentioned above show that, while administering ERISA plans might be complex, given the relative paucity of case law regarding ERISA surcharge, mistakes may not be that common, or lawyers may not fully understand the true power of equitable surcharge.

Yet, given the ease with which courts will ensure plan participants get the ERISA benefits they reasonably believed they held, it is important for plan administrators and insurers to be extra diligent in the process, while these types of surcharge cases may rise in prominence as claimants learn that monetary relief might be available to remedy breach of fiduciary duty.

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[1] 29 U.S.C. § 1132.
[2] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 201, 124 S. Ct. 2488, 2491, 159 L. Ed. 2d 312 (2004).
[3] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).
[4] For example, in *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003 (9th Cir. 1998), the plaintiff alleged that Prudential's delay in authorizing a potentially life-saving medical procedure resulted in the death of the plan participant. The Ninth Circuit explained that although Prudential may have been unjustly enriched by not paying for the procedure, it could not order money damages for the plaintiff as an appropriate equitable remedy under ERISA. *Id.* at 1010-11. This was despite that ERISA preempted any state law claims that could have provided a remedy. *Id.* at 1008.
[5] *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).
[6] *Id.* at 256.
[7] *Id.* at 255.
[8] *See e.g., Hein v. F.D.I.C.*, 88 F.3d 210, 224 (3d Cir. 1996) (instructing the district court to dismiss all three of the plaintiff's fiduciary duty claims for monetary damages because such damages are not available pursuant to *Mertens*); *Knieriem v. Grp. Health Plan, Inc.*, 434 F.3d 1058, 1064 (8th Cir. 2006) (rejecting "surcharge" remedy as unavailable under ERISA § 1132(a)(3)(B); *Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir. 2008) (finding that the plaintiffs cannot recover money damages through their claim for breach of fiduciary duty under ERISA § 502(a)(3)).
[9] Dana M. Muir, "Fiduciary Status as an Employer's Shield," *2 U. Pa. J. Lab. & Emp. L.* 391, 392 (2000).
[10] *King v. Blue Cross and Blue Shield of Illinois*, 871 F.3d 730, 745 (9th Cir. 2017).
[11] *Dawson-Murdock v. National Counseling Group, Inc.*, 931 F.3d 269, 277-78 (4th Cir. 2019).
[12] 29 U.S.C. § 1104(a)(1); *King*, 871 F.3d at 745-46.
[13] *King*, 871 F.3d at 744.
[14] *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3rd Cir. 1993).
[15] *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 182-83 (4th Cir. 2012); *Frye v. Metropolitan Life Ins.* Co., 2018 WL 15694885 at *4 (E.D. Ark. Mar. 30, 2018).
[16] *Van Loo v. Cajun Operating Co.*, 703 F. App'x 388, 394 (6th Cir. 2017).
[17] *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 958 (9th Cir. 2014).
[18] *Echague v. Metro. Life Ins.* Co., 43 F. Supp. 3d 994, 1022 (N.D. Cal. 2014).
[19] *CIGNA Corp. v. Amara,* 563 U.S. 421 (2011).
[20] *Amara*, 563 U.S. at 440.
[21] *Id.* at 440-42.
[22] *Id.* at 443.
[23] *Id.* at 444.
[24] *Echague v. Metropolitan Life Ins. Co.*, 43 F. Supp. 3d 994 (N.D. Cal. 2014).
[25] *Id.* at 1001.
[26] *Id.* at 1002.
[27] *Id.* at 1014.
[28] *Id.* at 1017.
[29] *Id.* at 1019-20.
[30] *Id.* at 1024.
[31] *Erwood v. Life Ins. Co. of North America*, 2017 WL 1383922 at *2-3 (W.D. Penn. April 13, 2017).
[32] *Id.* at *4-5.
[33] *Id.* at *5.
[34] *Id.* at *10.
[35] *Frye v. Metropolitan Life Ins. Co.*, 2018 WL 1569485 at *1 (E.D. Ark. Mar. 30, 2018).
[36] *Id.*
[37] *Id.* at *3.
[38] *Id.* at *4.
[39] *Id.*
[40] *McBean v. United of Omaha Life Ins. Co.*, 2019 WL 1508456 at *1-2 (S.D. Cal. Apr. 5, 2019).
[41] *Id.* at *9.
[42] *See Referral Only, Inc. v. Travelers Property Cas. Co. of Am.*, 2019 WL 1559145 (S.D. Cal. Apr. 10, 2019).
[43] *Snitselaar v. Unum Life Ins. Co. of Am.*, 2019 WL 279995 at *2 (N.D. Iowa Jan. 22, 2019).
[44] *Id.* at *3.
[45] *Id.* at *10.
[46] *Harris v. Life Ins. Co. of N. America*, --- F. Supp. 3d ---, 2019 WL 6769660 (N.D. Cal. Dec. 11, 2019).

ERISA: Remedies for Breaches of Fiduciary Duty
Test No. 139

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. ERISA governs all public sector employee benefit claims.
❑ True ❑ False

2. ERISA pre-empts any state-law cause of action that duplicates, supplements, or supplants ERISA's civil enforcement remedy.
❑ True ❑ False

3. ERISA §502(a) contains ERISA's civil enforcement provisions.
❑ True ❑ False

4. Courts have always recognized ERISA as providing for monetary relief for breach of fiduciary duty.
❑ True ❑ False

5. An ERISA fiduciary is anyone that exercises any control over the management of an ERISA plan or is responsible for the administration of such plan.
❑ True ❑ False

6. Plan insurers are always ERISA fiduciaries.
❑ True ❑ False

7. ERISA protects employers from being sued for breaches of fiduciary duty.
❑ True ❑ False

8. An ERISA fiduciary must provide information only in response to a specific request for that information.
❑ True ❑ False

9. A named plan administrator can be sued for breach of fiduciary duty when handling administrative or functional aspects of an ERISA plan.
❑ True ❑ False

10. An ERISA fiduciary must discharge her duties with respect to an ERISA plan solely in the interest of the participants and beneficiaries.
❑ True ❑ False

11. An ERISA fiduciary has an affirmative duty to inform a participant of information when it knows silence might be harmful.
❑ True ❑ False

12. A showing of detrimental reliance on a fiduciary's breach is required to recover an equitable remedy.
❑ True ❑ False

13. For life insurance claims, a refund of premiums is always enough to cure a breach of fiduciary duty.
❑ True ❑ False

14. There is only co-fiduciary liability if a fiduciary has actual knowledge of a breach by the co-fiduciary.
❑ True ❑ False

15. An equitable surcharge can take the form of a money payment.
❑ True ❑ False

16. A fiduciary can be surcharged under § 502(a)(3) upon a showing by a preponderance of the evidence of actual harm caused by its breach of fiduciary duty.
❑ True ❑ False

17. A generic response to a participant inquiry is always sufficient if it directs a participant to a source that can answer her question completely.
❑ True ❑ False

18. An employer should avoid learning of a participant's terminal illness to avoid liability for breach of fiduciary duty.
❑ True ❑ False

19. It is never an employer's fault if an employee lets her life insurance coverage lapse.
❑ True ❑ False

20. Monetary relief is available for some breaches of fiduciary duty by an ERISA plan administrator.
❑ True ❑ False

ERISA: Remedies for Breaches of Fiduciary Duty

MCLE Answer Sheet No. 139

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:

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20750 Ventura Blvd., Suite 140
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METHOD OF PAYMENT:

❑ Check or money order payable to "SFVBA"
❑ Please charge my credit card for
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CVV code Exp. Date

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Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.

Name _____
Law Firm/Organization _____
_____
Address _____
City _____
State/Zip _____
Email _____
Phone _____
State Bar No. _____

ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

Online Dispute Resolution:
The Time is Now

By Jennifer Johnston Terando, R.N.

THE ROOTS OF ONLINE DISPUTE RESOLUTION (ODR) trace back to eBay, which, several years ago, created an ODR program where, once a buyer or seller opened a claim, mediation was conducted, individually, through asynchronous email communications between an eBay mediator and the parties.

Since then, ODR has developed in additional formats from text programs to artificial intelligence platforms, such as Smartsettle, where unique algorithms are subject to patent protection.

As video-conferencing has reached new peaks of sophistication, ODR has expanded to include the hosting of traditional mediation, where mediators, lawyers and litigants mediate online in-real time.

The Conditions are Ripe for Implementation of ODR

In the wake of Covid-19, *Zoom* usage spiked almost overnight from an average of ten million daily users to an average of two hundred million daily users.[1]

Even prior to the pandemic, other factors were already paving the way for ODR.

Between 2005 and 2019, the number of super commuters who travel more than 90 minutes each way to work increased by 31.7 percent, and the number of Americans who work from home saw an even sharper increase of 76.0 percent. The growth of these two groups is driven by changing preferences, improved technology, and a lack of affordable housing in many of the nation's hottest job markets.[2]

The legal profession, which just a handful of years ago knew of no law firm format beyond brick and mortar, has seen a vast growth and acceptance of the virtual firm.

Perhaps the most influential factor over the past ten to fifteen years is the number of so-called millennials becoming members of the bar. Thus, the first generation of lawyers raised on technology, have no trouble merging its benefits into the practice of law.

Mobility in their practice is not an exception; it is a legitimate expectation.[3]

Is The Legal Profession Ready To Implement ODR?

ODR has been resisted by both mediators and lawyers, who describe dispute resolution, in particular mediation, as a deeply human interaction, not ripe for an on-line process. Legal scholars have referred to mediation as "an island of stability in a sea of change."[4]

Does this mean mediation is considered somehow stable or that there's been a lack of forward progress?[5]

While technology has immense impact on how we live, behaviorally, we have changed how we do things from banking to shopping to looking for a life partner. As a result, we have shifted the way in which we seek, process and analyze information, as well as the degree to which we concentrate on tasks.[6]

Many aspects of the human experience have been facilitated by technology or occur in a technology-immersed environment. As a result, traditional mediation practice must evolve to remain viable. Not minding that gap may, in fact, make the profession and process of mediation unappealing to the next generation of mediators, lawyers and litigants.[7]

Logistics of ODR

Multiple video-conferencing platforms have the technical capability to host on-line mediations, with *Zoom*, seemingly, used with the most frequency.

For ease of understanding, this article will describe a *Zoom*-hosted mediation.

The Mediation Center of Los Angeles, a project of the San Fernando Valley Bar Association, is the only Civil Mediation Resource Vendor to be awarded a contract by the Los Angeles Superior Court to provide online mediation, has implemented an extensive *Zoom* Certification process, which includes training and testing to assure panel mediators meet the highest ethical and technological standards for Online Dispute Resolution. Only those mediators who have successfully completed the certification process are authorized to conduct ODR.

Zoom allows for most of the convention of an in-person mediation to exist on-line—albeit, with a bit of a technological twist.

Once a Zoom mediation is set, the attendees are provided an on-line invitation, often accompanied with a password. When an attendee signs onto the platform for the mediation, they enter a virtual waiting room, similar to arriving in the mediator's office. The mediator then admits each person from the waiting room either into the shared conference room for a joint session, or into separate break-outs for caucus.

The break-out room feature on *Zoom* allows a mediator to place one or more attendees in a virtual room.

Using a two-litigant auto collision case as an example, a mediator might place the plaintiff and their lawyer in one break-out room, while the defendant, the defendant's lawyer and the insurance adjuster occupy a second break-out room.

The mediator can create further break-out spaces, if, for example, the need arises to commuincate with a lawyer outside of the presence of their client or if the defense counsel in a multi-litigant case desire to speak to one another.

With the ability to form up to fifty individual break-out rooms, it is possible to accommodate a multi-party mediation. The mediator also has the ability to move between the different break-out rooms, mirroring the in-person mediation where the mediator moves between physical rooms. When the mediator exits a break-out room, the remaining participants may speak privately.

*Zoom'*s Share Screen feature provides several options to facilitate the mediation. For those mediators who use a whiteboard, an electronic one is provided. It is also possible to connect an iPad to the meeting to allow the mediator to use a stylus to write on the whiteboard. Also, any files on a user's computer—contracts, excerpts of medical records or depositions, or *Day in the Life* videos,for example—can be shared with all of the participants.

When a settlement is reached, the final agreement can be drafted in *Microsoft Word* or any other program, while the other parties observe in real-time. Some programs, such as *Google Docs* allow all of the parties to work on the document in real-time, suggesting changes. This, actually, may be more productive than the in-person mediation where a triplicate form is filled in or multiple lawyers hover around a laptop as the document is drafted.

Via the use of *Docu-Sign* or a similar application, the settlement agreement can be signed by all parties prior to the conclusion of the mediation.

The mediator, as the meeting host, also has the ability to turn-off the share screen function. These are *Zoom*'s pertinent mediation features, but it also provides many others.

It is recommended that users spend time on the *Zoom* website, where there are informative tutorials and sign-up for an account—there are free versions—to orient themselves to the program prior to a mediation.

Benefits of ODR

- **Accessibility:** The increased acceptance, sophistication, reliability and availability of technology in society coupled with decreased cost makes ODR accessible. In turn, ODR may make mediation accessible to a litigant located a distance away. When a decision-maker is located out of state, rather than the requirement they be available by phone, they can sign on and participate meaningfully in the mediation.

- **Social Distancing:** One of the most cited terms, from our newly acquired pandemic vocabulary, is leading the pack of top reasons to use ODR. With civil courts closed and an anticipated, unprecedented backlog of cases, ODR provides a viable alternative forum to conduct mediations and resolve cases, providing access to a mediator within days or weeks.[8]

- **Time-Saving:** In an-person mediation, participants commute to a physical office, dealing with traffic, parking or public transportation, and waiting for the mediation to begin.

  At the conclusion of the mediation, they do it all in the reverse—oftentimes in rush-hour both ways. With ODR, participants simply sign on or off the platform from the comfort of their home or office.

  A significant amount of time is saved that can be invested in other legal work or be spent with family. This may also allow a litigant to take a half-day off of work, instead of a full-day, which can often present a challenge for litigants.

- **Cost-Efficient:** The cost of travel and facilities are eliminated. The only requirements are a Lap-top, iPad or even a phone—although a larger screen is more ideal—and a secure internet connection, which most people have or can obtain access to.

- **Document Sharing:** Allows all participants to hold documents in their hands.

- **Non-Verbal Cues:** As participants are seen live, the ability to observe non-verbal cues are present.

- **Safety and Comfort of Clients:** The benefits of ODR are often discussed with a light toward the benefits lawyers reap from the process. There are also litigant benefits. In-person mediation sometimes presents physical and/or social-emotional burdens to the litigants, which can be reduced or alleviated via ODR.

  A litigant may wish to avoid direct contact with a person with whom they shared a long personal relationship, which has deteriorated, or a person who is intimidating to them. When a litigant appears remotely from a secure space, such as their home or office, the concern of being in close physical proximity to the other litigant is eliminated, making the mediation less anxiety-provoking.

  Removing such stressors, may open-up a participant's willingness to communicate, as a person may hold back on their true feelings for fear of the discomfort of then seeing the other litigant in the bathroom, elevator or parking garage. While a lawyer may feel awkward about recommending on-line mediation to their client, there is a good chance the client may well feel a wave of relief.

- **Multiple-Mini Sessions:** Often a mediation concludes because one or more parties do not have the information they need, or new issues are raised, requiring further research and time to consider increasing the authority limits.

  With ODR, there is the option to pause a four-hour mediation at the two-hour mark. Reconvening at later time, the mediation can be conducted in the remaining two hours, once the issues, which would've otherwise concluded an in-person mediation have been addressed. While all good mediators follow-up via telephone or email, formally reconvening ODR for the remainder of the session may significantly increase odds of settlement.

  Flexibility and decreased extraneous costs offered by ODR make this an option uniquely available to ODR. If a *Zoom* meeting is scheduled as recurring, the meeting ID can remain the same for one year.

Drawbacks of ODR

- **Less Natural:** A study on videoconferencing revealed, that, while brief silence may feel natural in-person, a transmission

delay of 1.2 seconds on the telephone or a conferencing system may lead one user to perceive another as not interested or even less friendly.[9]

Videoconferencing has also been compared to being on stage, with users seeing themselves on camera, which, in turn, makes them more self-conscious and feeling a need to perform. Multiple images of people looking back at a person enhances this feeling, making it difficult for a person to be preoccupied with their appearance on camera.[10]

- **Rigid Positions:** The possibility has been raised that parties may be more apt to maintain rigid, less flexible settlement positions when they are in separate locations without direct human contact.

The determination of whether a case is better suited for ODR or in-person mediation should include a balancing of the benefits and drawbacks, as they relate to the particular case and litigant with great deference provided to a litigant's own preference.

One should exercise caution in correlating this decision with case size or value, as there will be situations where a litigant in a case of substance places a high-priority in participating from a location, such as their home, where they feel most comfortable and secure.

Ethical Considerations

Several bodies, including the International Council for ODR, have standards in place, which assist mediators in developing the best practices for successful online dispute resolution.[11]

In summary, these standards guide mediators to assure that the platform is accessible to all parties, that in addition to dispute resolution skills, the mediator possesses the necessary technical acumen to facilitate the resolution process, confidentiality and security are maintained, and that all participants are made aware of ODR's risks and benefits.

While a mediator has an ethical obligation to assure all parties are treated with dignity and that marginalized voices are heard, the use of technology may present unique scenarios—for example, when a litigant appears to be intimidated by the technology, a mediator must work to assure that that individual has the opportunity to speak.

ODR also presents the opportunity for mediation on a national or international scale, which also creates an ethical obligation for mediators to familiarize themselves with the laws of all implicated jurisdictions.

Steps for Successful ODR

As Alexander Graham Bell said, "Before anything else, preparation is the key to success."

It is imperative, then, to work with a mediator who thoroughly understands how on-line platforms function.

Participants should be prepared for the ODR with on-line guidelines that cover signing on; assuring the ODR is conducted in a quiet environment; clothing and lighting recommendations to assure attendees appear clearly on screen; bandwidth recommendations to prevent technology interruption; and mediator's cell phone number to keep all parties connected as a contingency option, should a technology glitch arise.

The guidelines should also set forth the statutory and ethical confidentiality obligations.

For example, ODR should not be conducted in public forums, such as a library or coffeeshop where others can overhear and where the wi-fi is not secure; nor should it be recorded or a third party cannot be present within earshot of the mediation.

To further assist in a smooth ODR process, some mediators hold their convening calls on *Zoom* or offer a pre-ODR *Zoom* session to allow participants to familiarize themselves with the platform.

Conclusion

With each challenge to human civilization, individuals who are prepared to meet new and changing conditions will be better prepared to thrive. Lawyers and mediators will need to adapt to the new reality of a changing world.

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[1] "A message to our users." Zoom, April 1, 2020, https://blog.zoom.us/wordpress/2020/04/01/a-message-to-our-users/.
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[5] *Id.*
[6] *Id,* 10.
[7] *Id*, 2.
[8] Los Angeles Superior Court."News Release: Covid-19." Accessed April 27, 2020. http://www.lacourt.org/newsmedia/uploads/14202041517144920_NR_GO_4-15-20-Final.pdf.
[9] Schoenberg, Katrin, Raake, Alexander and Koeppe, Judith. 2014. " Why are you so slow? -Misattribution of the conversation partner at the far-end." *International Journal of Human-Computer Studies*. 72, no. 5 (May): 477-487.
[10] Jiang, Manyu. 2020. "Why Zoom Videochats are so Exhausting." BBC, April 22, 2020. https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting.
[11] International Council of Dispute Resolution. "Standards." Accessed April 15, 2020. https://icodr.org/standards/.

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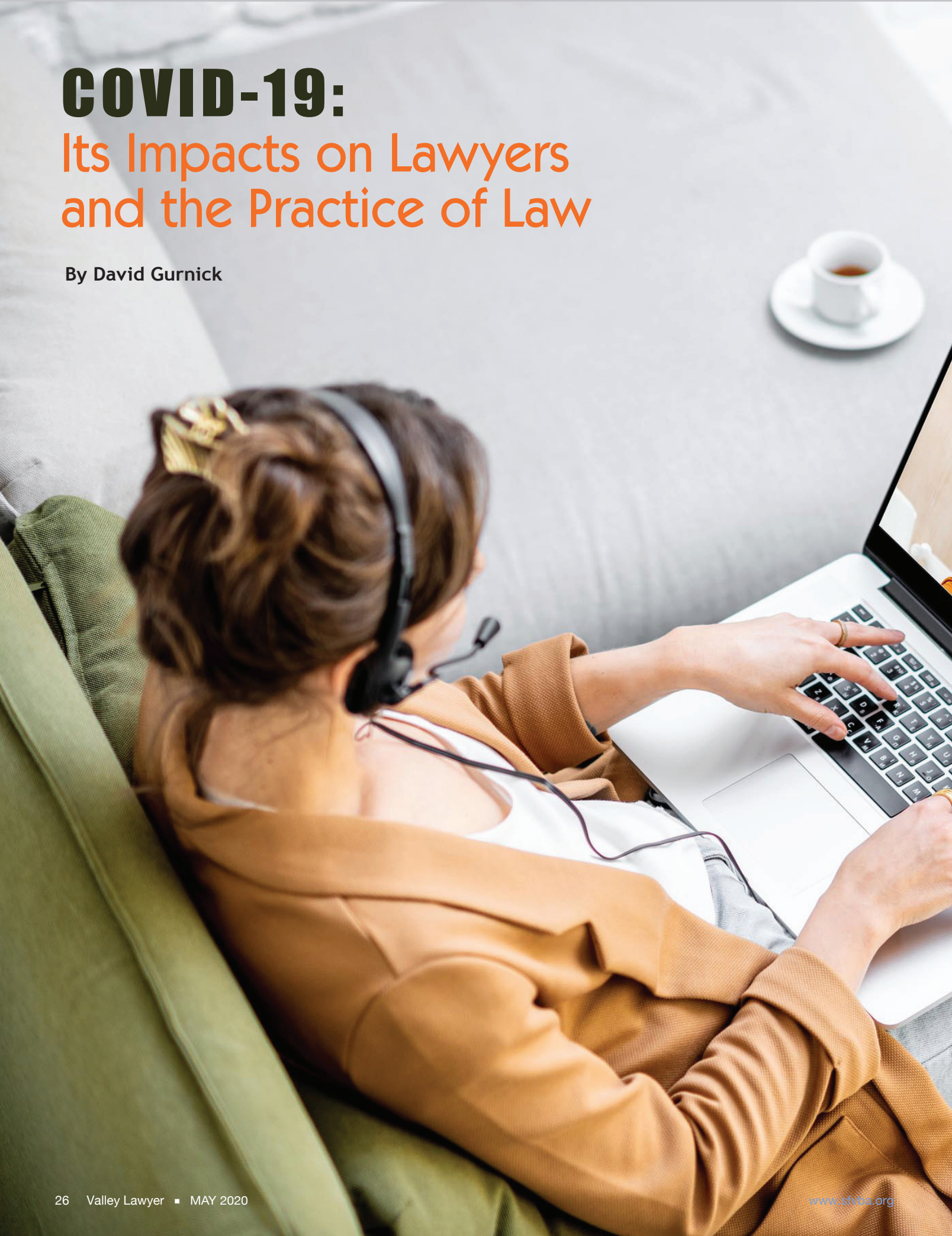
COVID-19:
Its Impacts on Lawyers and the Practice of Law

By David Gurnick



The COVID-19 virus has, quite literally, wreaked havoc on virtually every major aspect of society and daily life and has inacted dramatic changes for lawyers and the practice of law.

COVID-19. JUST THREE MONTHS ago, this word did not exist. It first appeared in the *Los Angeles Times* on February 12, 2020.

That was a day after the World Health Organization assigned the name to the disease that, at that point, had sickened more than 42,000 people in China. At that time, there were seven cases in California and just five more in the rest of the United States.[1] [2]

In only a few more weeks, the word, and the coronavirus it refers to, have upended the world. The barely-visible microbe has proved far more disruptive than the world's chronic ethnic and religious wars, trade disputes, border closures, and politics.

The virus has, quite literally, wreaked havoc upon virtually every major aspect of society and daily life and has inacted dramatic changes for lawyers and the practice of law.

While it is too early to tell all the ways life and the practice of law will be permanently remade due to the crisis, this article looks at some of the most apparent changes so far, and how lawyers are coping.

Background: The Coronavirus

Coronaviruses are not new.

They are mentioned in court decisions as early as 1991, as well as a published opinion in 1994. They get their name from a crown-like appearance or corona seen when viewed through an electron microscope.[3] [4] [5]

People may recall the SARS epidemic of the early 2000s , which was caused by a coronavirus. Most coronaviruses are mild. In fact, they also cause the common cold. They invade the upper respiratory tract, including the nose and throat and cause cold-like symptoms. COVID-19, like SARS, attacks the lungs and lower respiratory tract, making it much more dangerous.[6] [7] [8] [9]

Coronaviruses spread through person-to-person contact and airborne droplets.

For example, if someone coughs on something, the droplets remain in place. If someone touches it, and then touches their own eyes, nose, or mouth, they are likely to become infected. The incubation period is about 2-14 days, while an infected person may not show any symptoms for as long as 14 days.[10] [11] [12]

The current pandemic began in December 2019. It was first reported in the United States the following month and reportedly began in an unclean outdoor food-shopping center in Wuhan, China. Some people exposed there traveled abroad spreading the virus far and wide.[13] [14] [15]

Its spread to the United States—its highly contagious nature, its deadly effects, and lack of immunity or any vaccine—mean other actions must be taken to defend against it.

Governments have imposed urgent, unprecedented measures to fight the spread.[16]

Measures Taken and Their Effects

Already, the measures taken are wide-ranging.

The President Trump has declared a National Emergency. Individual states have issued emergency and disaster declarations, while all 50 states, the District of Columbia and all U.S. territories are working closely with the Federal Emergency Management Agency (FEMA). Under the President's COVID-19 emergency declaration, counties and cities nationwide have issued shelter-in-place, stay-at-home and safer-at-home orders.[17] [18] [19] [20]

Such orders have closed businesses, and mandated that people isolate themselves, avoid crowds, and stay at home.

Illustrative of the wide and deep effects of these measures, public gatherings have been restricted and in most places become unlawful.

Professional sports leagues have interrupted their seasons, while the annual collegiate basketball tournament—known as March Madness—was cancelled. Even the start of the Major League Baseball season was postponed, and whether the season will take place at all is in doubt.

Internationally, the quadrennial 2020 Summer Olympics has been postponed.

The world's amusement parks—Disneylands in California, Florida, Paris, Hong Kong, and Tokyo, Universal Studios, and the Cedar Fair—are closed and silent. Operas, concerts and theatre plays have ceased. Museums are shuttered. Giant cruise ships are docked or anchored offshore. The ringing ka-chings of Las Vegas casinos have been silenced as the casinos are closed, as are most shopping malls and movie theatres. Grocery stores, allowed to stay open, limit the number of customers inside, and require customers to lineup outside, six feet apart.[21]

At the businesses that are open, there are shortages of paper

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goods and packaged food despite the fact that there is no actual supply shortage.

People are afraid. The world has become dystopian.

In recent times, there have been widespread objections—some say discrimination—against people wearing face coverings in public.

A commentator noted, "in the new millennium, a series of nations have advanced legislation banning the wearing of face-veils."[22]

But suddenly, people have been *ordered* to cover their faces in public. The City of Los Angeles ordered employees of exempted businesses that are permitted to operate—grocery stores, restaurants open for pick-up or delivery, food delivery services, taxi and ride-share drivers, plumbers, electricians, janitorial workers and gardeners—to wear face masks or face coverings with many people in the general public now do the same voluntarily.[23]

A new phrase—social distancing—has entered the world's vocabulary with people being urged, often required, to remain six feet apart to reduce the risk of becoming infected.

The slowdown in business has resulted in a spike in unemployment claims, the stock market's largest-ever decline, and a previously booming economy's 180-degree turnaround with talk of a looming depression.

The federal government, seeking to address the resulting economic crisis, has taken drastic measures.

The Federal Reserve has lowered its interest rate to near zero with Congress passing the largest emergency aid measure in history, the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[24] [25]

CARES Act relief amounts to more than two trillion dollars. This number—a 2 followed by twelve zeros, that is $2,000,000,000,000—is almost incomprehensible.

Businesses and individuals are scrambling to apply for the CARES Act Paycheck Protection and Economic Injury Disaster Loan (EIDL) programs as laid-off workers apply for unemployment benefits and most Americans stand-by to receive stimulus checks, each for as much as $1,200. [26] [27] [28]

Measures Affecting Lawyers and the Practice of Law

Many of the defensive measures taken against COVID-19 impact the practice of law and particularly affect how lawyers work and connect with their clients.

The most pronounced, impactful measure has been the closure, reduction in operations and postponement of proceedings in both state and federal courts.

All California jury trials have been suspended through at least late May. State Supreme Court Chief Justice Tani Cantil-Sakauye issued an General Order allowing courts throughout California to extend deadlines for arraigning defendants, holding preliminary hearings and allowing proceedings to occur remotely. The state's Judicial Council approved emergency rules changing trial deadliness and bail schedules.[29]

Governor Gavin Newsom and many counties have ordered moratoriums on residential and commercial evictions for the non-payment of rent. In many jurisdictions, evictions cannot take place, in any event, due to courts throughout the state being shuttered.

Tenants who cannot pay rent, obviously will not. Inevitably, some tenants who could pay their rent, will take opportunistic advantage of the circumstances, though in most cases, the right to not pay rent is conditioned on suffering negative impacts of the current pandemic.

The U.S. Supreme Court extended the deadline for filing petitions for certiorari and ordered the

clerk to grant motions to extend time if the reasons are due to COVID-19.[30]

The Ninth Circuit restricted access to its courthouses to judges and court staff. The U.S. District Court for the Central District of California closed all courthouses to the public, except for criminal hearings.

The Court ordered that no civil hearings will take place except emergency time-sensitive matters, and those and all bankruptcy proceedings will be by telephone.[31] [32]

Impacts on Law Practice

The practice of law is, in reality, a service business.[33]

Private lawyers and their clients are experiencing the crisis and all its distresses. For some, in some fields, the crisis may generate legal work. Like almost everyone else, lawyers' personal lives are also being impacted.

And within the practice, the crisis is creating a wave of legal issues and questions.

Client questions have arisen about legal aspects relating to their health, updating estate plans, meeting sometimes complex statutory qualifications for massive government aid programs such as Paycheck Protection, EIDL and increased unemployment benefits.

Tenants are also seeking to avoid residential and commercial eviction, landlords with obligations seeking to maintain some flow of rents, and owners of all sorts seeking to save or salvage their businesses.

Work and business for many lawyers has dropped substantially. With business activity reduced, people laid-off from work, mandated distancing and intentional stay-at-home isolation, the volume of daily, ongoing interactions between people has plummeted.

Reduced levels of human activity and interaction are taking place with streets normally congested with automobile traffic empty. Stores normally bustling with people are quiet.

Less activity means fewer accidents. That means fewer personal injury claims with personal injury lawyers are receiving fewer calls from prospective clients. In some ways, fewer people out and about means fewer occasions for crime, major or minor and closed stores mean fewer petty thefts. Everyone can agree, a lower crime rate is a good thing, but there is a side effect with less work generated for criminal defense lawyers.

Fear and uncertainty can kill business transactions, both large and small.

In times of uncertainty, companies fear entering into new leases and other contracts that would lock them in to new obligations. The full range of business transactions has declined. Fewer deals also mean fewer disputes.

> "Under the President's COVID-19 emergency declaration, counties and cities nationwide have issued shelter-in-place, stay-at-home and safer-at-home orders."

Altogether, these mean less work for transactional lawyers and litigators.

By way of example, in late March, Xerox called off an attempted $34 billion hostile takeover of Hewlett Packard, due to the crisis.[34]

Closed courts mean fewer appearances. Suspension of jury trials means suspension of activity for trial lawyers. The decline in legal business has also caused major law firms to lay off personnel and reduce pay.[35]

Court reporters, document management companies and the range of service providers to the legal profession have also been impacted, as well.

Lawyers in large, medium and small firms, and in-house lawyers at companies, are now working from home with lawyer-client, lawyer-lawyer and inter-office meetings being conducted virtually using *Zoom*, *Skype*, *GoToMeeting* and other platforms.

Today, by utilizing virtual, electronically conducted meetings, clients and lawyers hear, see and are politely tolerant of more background—attention-seeking children, crying infants, barking dogs, meowing cats, spouses and significant others opening home-office doors inadvertently, or popping-in to say hello.

One apologizes for the distraction, but the other parties are sympathetic. They have similar circumstances at home too, and anyway, these sights and sounds of each other's homelife are mildly cheery intrusions, reminding isolated-at-home professionals of each other's humanity.

Court proceedings are increasingly telephonic. Courts have issued orders permitting more flexibility to conduct depositions using technology so that parties, counsel and court reporters may be remote from each other.

Mediators and arbitrators are also quickly learning to use the latest technology to manage proceedings remotely.

The SFVBA-sponsored nonprofit Mediation Center of Los Angeles is actively promoting its ability to conduct Online Dispute Resolution, including training its panel mediators to use private, online breakout rooms and other useful features.[36]

Some Legal Work Has Been Generated

Though legal work has declined, not all legal work has stopped as the COVID-19 crisis has created significant legal issues and resultant work.

Criminal defense hearings, for example, with their constitutional priority are taking place, even if some are delayed or conducted by technology.

To reduce jail crowding, many low level—and some high profile—prisoners are being released from incarceration.

For example, on April 10, U.S. District Judge James Selna of the Central District of California granted a 90-day release and confinement at the home of a friend, of disgraced attorney Michael Avanatti, recently convicted of trying to extort millions of dollars from Nike, from a federal jail in New York.

Lawsuits, including class actions, have been brought against cruise lines and others alleging misrepresentations or failing to do enough, early on, to stop or prevent spread of the virus.[37]

For family law attorneys, many divorce filings have been put on hold. In contrast, a side effect of laid-off spouses confined to homes and apartments could actually increase divorces when the crisis eases.[38] These pressures also create concern for the risk of increased domestic violence.

No one wishes for these results. No one wishes for anyone to become ill. But as illness creates work for doctors, these sad side-effects of the crisis may create work for lawyers.

On a more upbeat note, there is some speculation that home-confinement of otherwise satisfied couples may generate a happy baby boom nine months hence.[39]

If anything, this crisis is a reminder of the need for estate planning.

By April 11, worldwide deaths from the coronavirus exceeded 102,000 and U.S deaths reached about 18,750.[40]

A perhaps grotesque side effect, but a truth about death, is that they will create work for probate lawyers.

The crisis impact on employment and employment lawyers is also significant with companies in financial distress—those whose businesses have substantially declined or been shuttered altogether—laying-off large numbers of people. As a result, there is a reciprocal increase in claims for unemployment benefits.

Companies have been challenged in their ability to comply with federal and state Worker Adjustment and Retraining Notification (WARN) Act requirements of prior notice before laying off workers.[41]

Lawyers have had to consult on whether WARN Act exceptions such as the exception for "unforeseeable business circumstances" involving a "sudden, dramatic, and unexpected action or condition outside the employer's control" apply.[42]

In the field of immigration law, travel and the issuing of visas have been in the news and highly controversial. As a result, international travel has largely ceased.

Force Majeure Revived

Many lawyers have had to renew attention and refresh their memories of legal concepts not considered since law school, such as the doctrines of force majeure and frustration of purpose. Many lawyers are analyzing the contours of these rules, to assist clients in avoiding contract obligations that have been rendered impossible, impracticable or more difficult due to the crisis.

At the same time, they are analyzing the same rules to help clients who want their contracts enforced, to respond to possibly exaggerated claims of force majeure, which apply to some kinds of disruptive events that will excuse a party from performing a contract.

It is sometimes described as requiring, but is not limited to, an Act of God or its equivalent. As one court said, delay or nonperformance of a contract may be excused "when the agreed-upon performance has been

rendered commercially impracticable by an unforeseen supervening event not within the contemplation of the parties at the time the contract was formed."[43]

A force majeure may potentially include any event that, in the circumstances, was a huge interference, occurring without the party's fault, that no amount of care or diligence could have avoided. To excuse non-performance, the event must cause that non-performance.

Many business contracts have force majeure clauses. When an outside event interferes with performance, it is useful to review the clause.

A contractual force majeure clause may excuse a party from performing, or permit delay in performance, if the event is within the scope of the clause, which may state the steps that a party is required to take to invoke the clause's benefits.

If a contract is silent about force majeure, that does not eliminate the rule and its potential use to excuse nonperformance.

California enacted force majeure as a rule of law with its Civil Code stating that performance of a contract is excused when "prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary."[44]

Many businesses face the challenge of other contracting parties claiming force majeure, but, it does not automatically make it so just because a dramatic event occurs and the other party claims it could not perform.

A company faced with the other party's non-performance may be able to show steps the other party can take to continue performance and comply with the agreement.

The disruptions to business and individuals have resulted in numerous claims to insurance companies under policies covering business interruption, and claims under contracts that provide for indemnification in various

circumstances. Some of those companies have already begun to issue denials of business interruption claims creating massive work for lawyers who tender claims, and those who defend insurers in coverage disputes.

The pandemic, social distancing, working remotely and confinement at home have changed the way lawyers market their services.

Networking groups like ProVisors, the Valley Bar Network and TENS cannot meet in person. Some are meeting electronically. Others have cancelled scheduled gatherings. Online webinars have increased and clients are being inundated with email bulletins and updates on COVID-19, legislation, announcements and the like.

Lawyers and trade associations view these communications as public services, with a marketing benefit. Clients do appreciate some of the information, but, in time, may become numb to the incessant bombardment of information.

Effects on Education Including Law Schools

The crisis has heavily impacted students at all levels.

Public and private schools, kindergarten to 12th grade, colleges and graduate schools have closed themselves to in-person classroom settings with remote learning taking place en masse. This includes law schools with students attending lectures, being called on by professors, answering questions and participating in class discussions remotely.

Current registrants of the LSAT may opt to take a variation of the exam at home.[45]

Some states, including California have postponed bar examinations, and others are likely to do the same. [46]

Many of this year's law school graduates will be delayed from becoming eligible for and admitted to practice law.

Changes to Law Practice Going Forward.

The COVID-19 crisis will undoubtedly have permanent effects on society, including the practice of law. It is impossible to tell yet what changes made now as emergency measures will last and what additional changes will come.

But some predictions can be made.

Over the next few years, courts will deal with cases concerning COVID-19 and effects of the crisis as a new, updated body of case law will develop on the contours of force majeure and commercial frustration.

At the same time, extensive published opinions will address the scope of business interruption insurance policies, indemnity clauses and other coverage questions on whether policy language does or does not cover various interruptions that have arisen from the crisis.

"Law practices will reevaluate their approach to staffing. Some lawyers who worked from home may find they enjoy that and that approach to work may well mushroom."

New bodies of law will also develop over the powers of government in health crises and separation of powers.

The COVID-19 crisis has seen the executive and judicial branches issuing orders and directives that extend statutes of limitation and other time deadlines, grant relief from rights to control property and other statutory rights and waive or change laws and may be seen by some to cross lines into roles of the Legislature. These actions will be challenged and ruled upon in published opinions.

Further questions will arise as, in some cases, trial and appellate courts may be called to review and rule upon orders they issued themselves, further testing separation of powers.

People will, for a time, be alert to sanitization, washing hands, covering noses and mouths when sneezing and coughing, and keeping at least some social distance. Our society will see increased pressure and receptiveness to staying home when sick, and people will be more sensitive to crowds.

The crisis experience will result in courts looking anew at how they operate and be more comfortable with increased remote and telephonic hearings.

Law practices will reevaluate their approach to staffing. Some lawyers who worked from home may find they enjoy that and that approach to work may well mushroom.

Telecommuting will increase and law firms will downsize their physical premises. There will be lasting and increased use of videoconference platforms like *Zoom*, *Skype* and *GoToMeeting* that will also be utilized for arbitrations and mediations, especially those for smaller claims.

Lawyers will be much more expansive and specific in drafting force majeure clauses in agreements of every kind and work with the courts to adopt contingency and continuity plans for future pandemics. Lawyers and the public will give more attention to estate planning, including provisions for an early demise as the threat of new diseases to come will be high on people's minds.

The Crisis of Our Times

America and the world have worked through many life-changing crises—wars both hot and cold, depressions,

recessions, 9/11, terrorism, revolutions, plagues, and countless natural disasters to classify only a few.

Today, the COVID-19 pandemic is the crisis of our times. It is far from over and its effects—short-, medium- and long-term—may have only just begun.

[1] Colleen Shalby, *Quarantine's end sparks joy and celebration; Final tests after 14 days show none of the evacuees in Riverside County have virus.* L.A. Times, Feb. 12, 2020.
[2] *Id.*
[3] *American Home Products Corp. v. California Biological Vaccine Labs* 1991 WL 335365 (C.D. Cal. 1991).
[4] *Urschel Farms, Inc. v. Dekalb Swine Breeders, Inc.* 858 F.Supp. 831 (N.D. Ind. 1994).
[5] Paul Arshagouni *An Introduction to Medical Issues Posed by International Health Threats in a Legal Framework* 12 Mich. St. J. Int'l L 199, 201 (2003) ("Arshagouni").
[6] See e.g., Joshua D. Reader, *The Case Against China: Establishing International Liability for China's Response to the 2002-2003 SARS Epidemic*, 19 Colum. J. Asian L. 519 (2006) ("Reader"). "SARS" refers to Severe Acute Respiratory Syndrome.
[7] Arshagouni, supra, note 5 at 201.
[8] Coronaviruses are the second most common cause of the common cold. Rhinoviruses are the leading cause. Reader, supra note 6.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Castillo v. Barr*, __ F.3d ___ 2020 WL 1502864, at *2 (C.D.Cal., 2020) ("people infected with the coronavirus can be asymptomatic during the two to fourteen day COVID-19 incubation"); *Malam v Adducci* __ F.Supp.3d __, 2020 WL 1672662, at *11 (E.D.Mich., 2020) (incubation period is up to fourteen days).
[13] *See e.g.,* Natasha Khan, *New Virus Discovered by Chinese Scientists Investigating Pneumonia Outbreak; Latest tally of people sickened in Wuhan is 59, with seven in critical condition*, Wall Street Journal (Online) Jan. 8, 2020.
[14] *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020). ("These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic.").
[15] *Id. See also*, Mark McPherson, *Soul-Work, Changing Face of Water Rights* (State Bar of Texas 2020) 3-I, 2020 WL 1276126.
[16] The COVID-19 mortality rate is ten times greater than influenza. *Castillo v. Barr*, supra note 12 at *2.
[17] See *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (Covid 19) Outbreak*, WhiteHouse.gov (Mar. 13, 2020), www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak.
[18] For a listing of state COVID-19 websites, see www.csbs.org/system/files/2020-03/Covid-19%20State%20Website%20List%20Mar%2016.pdf.
[19] www.fema.gov/coronavirus/disaster-declarations (visited Apr. 11, 2020).
[20] *See e.g.*, City of Los Angeles, "Safer At Home Order for Control of COVID-19" (Marc 19, 2020).
[21] *See e.g.,* Matt Byrne, *Coronavirus fears upend Gorham woman's cruise Opal Staudenmaier is stuck at sea because the ship's ports of call won't let travelers disembark Portland [Maine] Press Herald, Feb. 8, 2020.*
[22] Evan Darwin Winet, *Face-Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face*, 35 Hastings Int'l & Comp. L. Rev. 217 (2012).
[23] Public Order Under City of Los Angeles Emergency Authority (Apr. 7. 2020) (workers "must wear face coverings over their noses and mouths while performing their work").
[24] *See e.g.*, Claire Hansen, *Fed Lowers Interest Rate to Near-Zero As Coronavirus Spreads, U.S. News & World Report* (Mar. 15, 2020) www.usnews.com/news/economy/articles/2020-03-15/federal-reserve-lowers-interest-rate-to-near-zero-as-coronavirus-spreads.
[25] Pub. L. 116-136, 134 Stat. 281 (2020).
[26] *See*, NPR, *President Trump Signs $2 Trillion Coronavirus Rescue Package Into Law* (Mar. 27, 2020) www.npr.org/2020/03/27/822062909/house-aims-to-send-2-trillion-rescue-package-to-president-to-stem-coronavirus-cr (visited Apr. 11, 2020).
[27] 15 U.S.C. Sec. 636(a)(36).
[28] 15 U.S.C. Sec. 636(b)(9)(C).
[29] See, Cheryl Miller, *How COVID-19 Is Impacting California Courts: Roundup of Services* (Apr. 10, 2020) www.law.com/therecorder/2020/04/03/how-covid-19-is-impacting-california-courts-roundup-of-services/.
[30] U.S. Supreme Court Order (Mar. 19, 2020) 589 U.S. ___ (2020).
[31] Ninth Circuit Order (Mar. 16, 2020).
[32] Press Release, U.S. Dist. Court for Central Dist. of California (Mar. 19, 2020) www.cacd.uscourts.gov/sites/default/files/documents/Press%20Release%20-%20Activation%20of%20Continuity%20of%20Operations%20Plan.pdf.
[33] Of course, it is also a "profession." *See e.g.*, Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession As We Know It?*, 84 Minn. L. Rev. 1315, 1316–17 (2000) ("Academics and other commentators have debated whether the practice of law is a profession or a business…Perhaps it is closest to the mark to acknowledge that law practice is simultaneously a profession and a business.").
[34] *See e.g.*, Cara Lombardo, *Xerox Is Ending Hostile Takeover Bid for HP,* Wall Street Journal (Apr. 1, 2020) www.wsj.com/articles/xerox-to-end-hostile-takeover-bid-for-hp-11585684800 (visited Apr. 11, 2020).
[35] *See e.g.*, Debra Cassens Weiss, *Pay cuts and furloughs continue as more firms trim costs to address COVID-19* (ABA Journal, Apr. 9, 2020) www.abajournal.com/news/article/pay-cut-and-furlough-juggernaut-continues-as-more-law-firms-trim-costs-to-address-covid-19 (visited Apr. 11, 2020) (noting salary cuts and/or furloughs at Orrick, Herrington & Sutcliffe; Venable; Nixon Peabody; Shook Hardy & Bacon; Cozen O'Connor; Arent Fox; Loeb & Loeb; Baker Donelson; Cadwalader, Wickersham & Taft, Reed Smith and other firms); Aebra Coe, *3 More BigLaw Firms Slash Pay Amid COVID-19 Pandemic* (Law 360 Apr. 7, 2020) www.law360.com/articles/1261261/3-more-biglaw-firms-slash-pay-amid-covid-19-pandemic (visited Apr. 11, 2020) (noting salary reductions at Blank Rome; Winston & Strawn ; Brown Rudnick and other firms).
[36] www.mediationla.org/. Full disclosure: the author of this article is a member of MCLA's board of directors.
[37] See e.g., Ashler Stockler, Class Action Lawsuits Related to Coronavirus Spike Across the Country (Newsweek, Apr. 3, 2020) www.newsweek.com/covid-19-class-action-lawsuits-1496027 (visited Apr. 11, 2020) (noting various actions, including shareholder class-action against Norwegian Cruise Lines for representing positive outlooks in spite of COVID-19).
[38] *See e.g.*, Tyler Foggatt, *To Have and to Hold, in Quarantine and in Health*, New Yorker (Mar. 16, 2020) www.newyorker.com/magazine/2020/03/23/to-have-and-to-hold-in-quarantine-and-in-health (visited Apr. 11, 2020) (quoting Los Angeles divorce attorney Laura Wasser: "A quarantine experience, particularly where there are underlying issues of resentment and poor communication, could be devastating to a marital relationship").
[39] *Id.* (also quoting Wasser: "It could be an excellent opportunity to reconnect with your spouse," and "if a couple is on lockdown, it could reanimate their sex life.").
[40] Kurtis Lee and Michael Finnegan, *Pandemic deaths pass 100,000 globally*, L.A. Times (Apr. 11, 2020) p.2.
[41] 29 U.S.C. § 2102; Cal. Labor Code §§ 1400-1408.
[42] 29 U.S.C. § 2102(b)(2)(A); 20 C.F.R. § 639.9(b).
[43] *Hercules, Inc. v. United States*, 24 F.3d 188, 204 (Fed. Cir. 1994).
[44] Cal. Civil Code § 1511.
[45] Stephanie Francis Ward, *A remote LSAT is scheduled for May because of coronavirus*, ABA Journal (Apr. 8, 2020) www.abajournal.com/news/article/in-may-the-lsat-will-be-administered-remotely (visited Apr. 11, 2020) ("Because of the novel coronavirus pandemic, a remotely proctored version of the LSAT, which can be taken at home, will be offered in May, the Law School Admission Council announced.").
[46] Stephanie Francis Ward, *Three states postpone July bar exam; will others follow?*, ABA Journal (Mar. 30, 2020) www.abajournal.com/news/article/new-york-postpones-july-bar-exam-will-other-states-follow-connecticut-massachusetts (visited Apr. 11, 2020) (Connecticut, Massachusetts and New York).

High-Performance Leadership in Times of Crisis

By Robert Grossman

AS ORGANIZATIONS PREPARE TO SURVIVE AND thrive during this COVID-19 pandemic, high-performance leadership is more critical than ever.

Being a great leader means having a positive influence on those around you. It does not matter if you lead a team of two or a large, multi-national corporation, the principles of high-performance leadership are still the same.

As members of the professional community, understanding the importance of engaged and empowering leadership in a time of crisis is critical.

Leaders Need to Stay on Their 'A' Game Even During A Crisis

As a leader, your employees will look to you for cues on how to react to crises and sudden change.

According to Daniel Goleman, the author of the book *Emotional Intelligence*, if managers and leaders are not in control of their emotions, they may communicate stress and helplessness that may lead to a trickle-down effect and impact the entire organization.

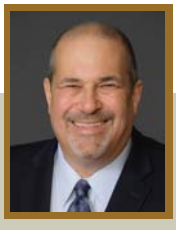
The ability to manage one's feelings is called emotional intelligence, which is defined as the awareness that emotions drive behavior and impact people, both positively and negatively.

According to the Harvard Business School, 90 percent of what sets high-performance leaders apart from their peers with similar technical skills is a high degree of emotional intelligence, which gives them the ability to manage interactions to improve relationships, build trust, and create a teamwork culture.

Leaders need to recognize how to manage their emotions, and those of their employees, especially in times of crisis, significant change, and severe pressure.

To help leaders improve their emotional intelligence, there is an effective model called The Response Chain, which begins with a Key Moment—a triggering event or situation that presents a challenge and elicits or demands a response.

When a Key Moment occurs, people make a choice consciously or unconsciously about how they will respond. In no small measure, their effectiveness as leaders, the quality of their lives, and their well-being are determined by how they handle such key moments.



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People who respond positively to their key moments grow in self-confidence and the assurance that they can maintain their 'A' game even in stressful situations.

High-Performance leaders become masters at practicing emotional intelligence every day. That enables them to offer encouragement and emotional support to their employees in times of crisis, sudden change, and during other exceptional times.

When leaders utilize their emotional intelligence, they can effectively encourage and support their employees by:

- Acknowledging the stress their workers are experiencing.
- Listening to their apprehensions and concerns.
- Empathizing with their anxieties.
- Inquiring how working remotely might work for them.
- Listening carefully to their responses.
- Reaffirming their feedback to demonstrate an understanding of their feelings.
- Allowing their concerns, not yours, to be the focus of the conversation.

According to recent research conducted by Yale University, emotionally intelligent leaders—senior-level lawyers, for example—are skilled at reading the emotions of their team members and identifying when someone is apprehensive or concerned.

Not only are they able to identify the core issue, they also readily acknowledge it and help their employees channel their emotions towards a positive solution aligned with the goals of the practice.

As a result, those attorneys inspire loyalty and enthusiasm among their fellow practitioners and staff. They are optimistic, empathetic, good communicators, and model effective leadership skills.

Crisis Leadership Demands Mutual Trust

It is common knowledge that COVID-19 is having a tremendous impact on businesses across the globe.

For some companies, having a remote workforce is how they do business already, while others are learning how to improve training and infrastructure to shoulder through this global crisis remotely.

Successful leaders must actively work to establish mutual trust with their team members and to communicate effectively by modeling trustworthy behavior—by following through on promises made, including being available during set times, reporting on milestones reached throughout the length of a project, and communicating when changes arise.

Leaders must also trust that their workforce possesses the skills and tools to accomplish the work at hand, the personal discipline to do so within the timeline required, and the flexibility to handle each task efficiently.

Effective remote leaders have an 'open-door' policy. They are available via phone, video conference, or other communication tools at set times and are flexible and responsive to changes and emergencies. They provide constant feedback, support and encouragement, reward success and share best practices with the entire team.

Remote leaders also use procedures like daily or weekly check-ins, monthly reports, team calls, and clear goals—not to micromanage or stymie flexibility, but to encourage productive remote work by tracking and supporting individual and team progress.

The Role of Trust

Leaders need to be able to trust their offsite employees to do their jobs without direct supervision. Knowing that they are trusted to do their jobs is a great motivator and gives build the confidence and initiative they need to effectively and efficiently work on their own.

Employees also need to trust their managers and be able to count on them to be treated as professionals.

How To Establish Mutual Trust

Leaders and employees earn one another's trust by showing they can be counted on. They must be honest, truthful and open with one another, behave with integrity and consistency, and follow through on their commitments.

Leaders can best earn their employees trust by:

- Being trustworthy.
- Trusting them to do the work. Instead of micro-managing, administer by objective. Hold employees accountable for meeting goals and focus on results.
- Being an enabler. Provide the support, feedback, and offsite encouragement employees need to accomplish their goals.
- Keeping actions consistent. It is not very easy to trust someone who does one thing one day and something else the next.
- Having an open-door policy. Be available or designate a substitute to be on-site should employees have questions or need help.
- Establishing a check-in policy. Work with employees to set up a reporting or check-in procedure.
- Communicating clearly and often.
- Be aware of the tone uses in verbal and written communications.
- Avoiding making it personal when things go wrong. Focus on the problem, not the individual involved.

Isolation During the COVID-19 Crisis

Those who are working remotely in response to COVID-19 are feeling disconnected and isolated from their colleagues.

These feelings of loneliness and disconnection can result in decreased productivity and engagement. Influential leaders understand that their new normal is not the same as before—that people are adapting, teams are restructuring, and work output is being recalibrated.

Good leaders trust their workforce and, during times of crisis, need to increase the number of touchpoints they have with individual employees to assure they have the tools and resources they need to do their work.

According to a study outlined in the *Harvard Business Journal*, 46 percent of remote workers said the best managers were those who "checked in frequently and regularly."

Innovative leaders are creating what are called virtual water coolers, where employees can meet to share their quarantine stories and challenges in a way to recreate the camaraderie found in a normal office environment.

Those leaders are setting clear goals and, at the same time, managing expectations in response to extraordinary in different ways. They are flexible, adaptable, emotionally intelligent, and trusting; they communicate, clearly advertising when they are—and are not—available by setting clear boundaries for work and home life.

A 2019 survey by *Buffer*, the social network management application, showed 99 percent of workers were amenable to remote work options. Even before the explosion of remote work in response to the COVID-19 pandemic, the practice was increasing in interest and practice.

Recent studies have shown that that productivity actually has increased significantly with the advent of remote work.

A Stanford University study, for example, showed a 50 percent decrease in attrition and reduced sick time among employees working remotely, and that, in the aftermath of the current global emergency, the option of remote work will continue to grow in significance.

Ultimately, leaders who can lead remotely will be more successful in their industries.

While the abrupt implementation of remote work in response to COVID-19 might cause immediate operational speed-bumps, it is essential to learn from past mistakes, intelligently build trusting, psychologically safe work environments with high-performancen flexible and responsive leadership.

As we begin to understand the full financial impact of the COVID-19 pandemic on the global economy, there has never been a better opportunity to lead with vision in a time of transformational adversity to a time of future, long-term success.

Member Focus

Without its individual members no organization can function. Each of the San Fernando Valley Bar Association's 2,000-plus members is a critical component that makes the Bar one of the most highly respected professional legal groups in the state. Every month, we will introduce various members of the Bar and help put a face on our organization.

Susan J. Wolf

Law School: Suffolk Law School, Boston MA

Area(s) of Practice: Family Law, Wills Trust, Bankruptcy

Years in Practice: 20 years

Firm: Law Offices of Susan J. Wolf, Canoga Park

What is your least favorite kind of music? "Country."

Of what personal accomplishment are you the most proud? "Professionally, running my own practice for twenty years and helping the community. Personally, my two kids. They are fantastic!"

What is your favorite vacation spot? Why? "Tahiti. There is nothing else like it. You are away from everything."

What is your favorite work of art? "Georgia O'Keeffe's Jimson Weed, White Flower No. 1."

Wolf grew up in Calabasas and has resided in the San Fernando Valley for all of her childhood years.

She graduated from San Diego State University and moved across country to attend Suffolk Law School in Boston, Massachusetts. "My Uncle, Father and I all graduated from Suffolk Law School and kept the family tradition going. Realizing my roots, family, and heart were in Southern California, I completed my third year at Pepperdine Law School, with an internship for Honorable Judge McCoy of the Los Angeles Superior Court."

Wolf opened her own practice in Canoga Park twenty years ago and she "has never looked back. Since then, I have been practicing law with a focus on family law inclusive of divorce, paternity, child custody, visitation, wills, trust, and bankruptcy law.'

She "enjoys working with families and assisting them in a resolution to their issues during their difficult life-altering times. It is important for the clients to see the bigger picture on their issues and to not get caught up in the minutia."

When she's not working, Wolf enjoys family time with her twin girls and husband, skiing and playing golf and tennis.

Who Do You Trust with Your Pet (Trust)?

By Susan B. Share

"The process of domestication probably started with the animals themselves; tamer animals were better able to take advantage of the resources made available by human settlements. Then people got involved, selectively breeding the cutest, cuddliest and most cooperative creatures until we got the pets we know today."[1]

WITHOUT A DOUBT, PEOPLE LOVE THEIR pets—companions that engender unconditional love, support, and endorphins.

During the current Covid-19 pandemic, it is no wonder that there is a shortage of animals at shelters because of the high volume of adoptions. But who will care for our furry and feathered friends when we are no longer able to?

In response, all 50 states and the District of Columbia have enacted pet trust laws.

Whether a stand-alone pet trust, or a provision relating to the care of a settlor's pets in a living trust, a trust can set forth specific instructions to provide continuity for the care of a settlor's pets either during a term of incapacity or after death. In California, it is Probate Code § 15212 that sets the parameters for a legally enforceable statutory pet trust.

One of the most important considerations when preparing a pet trust is whom to name as caregiver for the pet or pets in question. As with other fiduciary positions, it is important to name alternates in case the nominated individual is unable to serve in the desired capacity.

Recently, a colleague who works as a trust officer at a bank, related a story about a client who had recently passed away and was survived by his mean cat.

During the man's life, four of his friends readily agreed to serve as caregiver of the cat in the event the others were unable to serve.

However, the hypothetical became reality, when one by one, each declined to serve. The trust officer, with no one left to care for the cat, proceeded to inquire of each why they had agreed to serve and then later declined. Each in turn responded that the cat was indeed very attitudinal, but their friend was so nice they didn't have the heart to refuse him.

Ultimately, the cat's veterinarian agreed to take the cat and find a home for him.

Welfare for Life

Pet trusts provide for the welfare of the pet throughout the remainder of that particular pet's life with the pet having been alive during the lifetime of the settlor in order to be considered under the pet trust. In order to sustain the good health and maintenance of the pet, the trust is funded with a sum of money, or the pet provision allocates a stipend to the caregiver.

Frequently, the trust appoints a pet protector, akin to a trust protector often appointed in an irrevocable trust. This could be a person, an animal rights organization, or even a court appointee, who is tasked with enforcing the terms of the pet trust.

On occasion, a pet trust can provide housing for the caregiver during the lifetime of the pet.

In one such case, where a house was provided to the caregiver for the lifetime of a dog, the caregiver removed the identity chip from the dog after it had died and had it implanted into another dog so that he could continue to reside in the house.

Sometimes personal interest may color the caregiver's sense of responsibility.

Another anecdote involves two neighboring couples. When one of the wives died, the surviving wife brought the widower food and checked in on him regularly.

Later, her own husband died and the widower and the widow became friendly. Eventually the widower passed away and his estate plan named the woman as the caregiver of his dog, an obligation that came with a hefty inheritance for her.

Two days after the bequest was distributed to the merry widow, the dog mysteriously died.

Considering a Caregiver

The following questions are helpful to consider when choosing a caregiver for a pet:

- Is the caregiver a genuine animal lover?
- Does the caregiver have the time and room to home the pet?
- Can the caregiver afford to take care of the pet and/or is an adequate stipend provided to the caregiver to cover the costs of caring for the pet?
- Does the caregiver understand the living situation the pet is used to and comfortable with and will the caregiver be able to transition the pet to the caregiver's home?
- Will the caregiver be a temporary or permanent solution for the pet?
- Is a financial incentive being created to prolong the pet's life?

In addition to selecting a caregiver, the amount of money funding the trust is an important consideration.

The sum should be sufficient to cover the needs of the pet, or pets, including funding to cover healthcare costs, insurance, and the maintenance of a general quality of life. A good rule of thumb is to select a sum based on the projected life expectancy of the pet, taking into consideration how old the pet is currently, and then doubling the amount.

If, however, excessive sums are designated to fund a pet trust, then relatives have been known to challenge the trust, and a judge may decide to reduce the amount that funds the pet trust in favor of the objecting heirs. It is important to make sure the trust accounts for where the balance of the funds are to be distributed in the event that funds remain after the pet has passed on.

Otherwise, California Probate Code Section 15212 (b) (2), does impose a hierarchy of where the remaining funds are to be distributed.

Another problematic situation may affect older pet owners.

Caring for a pet should not dissuade the elderly from adopting pets as they have been shown to both extend and improve the quality of people's lives.

But what course of action needs to be taken if the senior citizen in compelled to move to an assisted living facility that does not allow pets, or the pet owner becomes incapacitated and cannot care for a pet?

In situations where the settlor's pet needs a caregiver, a pet trust can resolve the problem. In such a situation, it is advisable to establish the trust in advance as the settlor could be mentally incapacitated at the time when he or she needs to be separated from the pet.

Certain charitable animal care organizations will contract to take a pet when the owner dies and either provide a permanent home or find a permanent home for the pet.

However, the contracts can be expensive, sometimes with annual fees during the life of the owner to reserve a space for the animal when the owner dies, in addition to future room and board for the pet following the owner's death.

In such a situation, it often makes sense to apprise the successor trustee of the organization and have the trustee make the agreement with the organization following the death of the owner. While this does not ensure a space for the pet, it does save the annual fees during the life of the pet owner and, if the pet owner should outlive the pet, there would be no reason to have the agreement in place.

Other charitable organizations may concentrate on a certain breed of animal and may be very willing to accept and rehome such a pet.

What happens, though, when the gift to care for the decedent's pet, whether by trust or by will, is so excessive that it will certainly exceed the needs of the animal?

The most famous case of this sort was that of Leona Helmsley, the New York hotel magnate who left a fortune to her Maltese, named Trouble, when she died in 2007.

In that case the judge reduced the amount from $12 million to $2 million, ruling that the lesser amount would be adequate to care for Helmsley's dog.

Similarly, a fellow attorney related a case he had handled several years ago that involved a trust administration in which the decedent, an extremely wealthy elderly woman, had left everything to the care of her beloved cat, with the remainder following the cat's life to five animal charities.

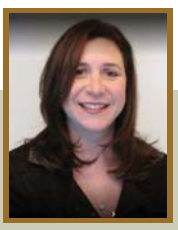
The judge ruled that $1 million, which was the estate tax exemption amount at that time, be set aside in a trust for the life of the cat and that the remainder be distributed among the five charities.

The cat, which was ten years old at the time of the settlor's death, lived to be seventeen years old and the funds proved adequate; she had a manicure and pedicure every day, therapy, fresh food, and, according to reports, apparently lived a contented life.

When the cat passed, the remaining funds in the trust were distributed among the five animal charities.

The outcome was the best that could be achieved—an extremely happy cat, five elated charities, and a substantial tax benefit.

[1] *Science*, February 6, 2017, "Dear Science, Why do we love our pets?" by Sarah Kaplan.



Susan B. Share practices estate planning, probate and trust administration. She serves as an advisor to the Solo and Small Firm committee of the California Lawyers Association and has a small spaniel mix named Steinway. She can be reached at ss@susanshare.com.

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A LIFE SO BEAUTIFULLY LIVED deserves to be appropriately remembered.

We at the San Fernando Valley Bar Association (SFVBA) and Attorney Referral Service (ARS) mourn the recent passing of long-time member Alan J. Wax and extend our most sincere condolences to his family.

A true San Fernando resident, he attended Taft High School in Woodland Hills before making a quick stop at Los Angeles Pierce Community College before attending UCLA.

He never strayed too far from his Valley home, even when he decided to pursue his law degree.

Graduating from the Glendale University College of Law, he was admitted to the California Bar in 1986 and joined his father, a long-time ARS panel member, to help build The Law Office of Wax & Wax.

ARS gained much from the brilliance and support of Wax when he joined its panel of attorneys in 2000 and his support of the Service and his energy and enthusiasm never wavered over the past two decades.

He was always willing to guide ARS staff and assist those Valley residents seeking help in workers' compensation-related matters to ensure their rights were protected.

He was a true pioneer for the hardworking men and women whose rights he championed. So much so that he decided to become a California State Bar-certified specialist in the workers' compensation law, an achievement not easily accomplished.

However, his commitment to his profession did not end there as, prior to his falling ill, he frequently served as a presenter at many SFVBA and ARS-organized events.

Often, he could be found sharing his knowledge with a young attorneys or picking a colleague's brain, and if all else failed, humoring a colleague with his witty and generous personality.

We at ARS wish to thank him for his gracious support and devotion to helping others. We cherish all of the years we were graced by working beside such an upstanding member.

Valley Community Legal Foundation
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Valley Community Legal Foundation

San Fernando Valley Bar Association
founded in 1926

A Look Back, A Look Ahead

STEVEN T. HOLZER
Board Member

SHolzer@lewitthackman.com

I HAVE HAD THE PRIVILEGE OF SITTING ON THE Board of the Valley Community Legal Foundation for the last 20 years and, from 2008-2010, I served as its President.

During those two decades, I have witnessed the VCLF go through both good and lean times; but whatever the condition, the mission of the Board has been resolutely focused on helping the community with access to legal assistance, promoting educational opportunities for those students interested in a career in the law, and with collecting and distributing charitable contributions to protect, among others, battered spouses.

In the past, the VCLF would hold a Gala each year in May to observe National Law Day. In its heyday, the event would raise tens of thousands of dollars.

Before the recession in 2008, we actually raised $50,000 from that year's Gala. In less affluent times, we of course raised less. But, however much we raised, the proceeds were used to assist those members of the public in need, as well as to reserve funds to enable the organization to operate.

Adapting to changing circumstances, the Foundation eventually decided to forego the Gala and began to raise funds through other means—annually auctioning to lawyers the cover page and main story in *Valley Lawyer* magazine and appealing for contributions at Valley Bar events such as Judges' Night. The Bar itself in recent years made a generous contribution to the work of the Foundation.

As we look to the future, the Foundation will be relying not only on its traditional methods

> "As we look to the future, the VCLF will continue not only with its traditional methods of fundraising, but is also adapting to the online world.

Most recently, the VCLF has sponsored the Constitution and Me program.

Now in its second year, the program provides Valley high school students with an active curriculum where they can engage in questions applying a Constitutional approach toward the differences between true threats and pure speech, and the line that is drawn between safety and freedom. Teams of judges and lawyers visit selected Valley high schools over the course of three sessions to have students review a fact pattern and apply existing law to the facts before presenting a Supreme Court argument.

As we look to the future, the VCLF will continue not only with its traditional methods of fundraising, but is also adapting to the online world.

For example, when you shop at smile.amazon.com, *Amazon* will give 0.5 percent of your purchase price to the Foundation. Go to https://smile.amazon.com/ch/95-3397334 and selecting the Valley Community Legal Foundation as your charity of choice. Overall, the sales do add up.

As the Foundation moves into a new era, community participation on the Foundation's Board is always welcome and there are important Board Committees—Grants, Education and Scholarship, for example—that could put your talents, abilities and energy to good use.

Consider expanding your role in community service by joining with us at the Valley Community Legal Foundation. If you are interested in participating, please contact Kira Masteller at kmasteller@lewitthackman.com.

ABOUT THE VCLF OF THE SFVBA

The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association, with the mission to support the legal needs of the Valley's youth, victims of domestic violence, and veterans. The Foundation also provides scholarships to qualified students pursuing legal careers and relies on donations to fund its work. To donate to the Valley Community Legal Foundation or learn more about its work, visit www.thevclf.org.

A Call to Action: Changing Lives, Transforming Communities

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Through a combination of individual representation, high impact litigation and public policy advocacy, NLSLA combats the immediate and long-lasting effects of poverty and expands access to health, opportunity, and justice in Los Angeles' diverse neighborhoods.

NLSLA is looking to build a team of volunteer lawyers in the following areas to be available through and after the COVID-19 Shelter in Place period.

Specifically, attorneys who practice in the following areas:

- Employment law (employees)
- Housing (homeless, tenants and borrowers)
- Consumer law (credit card debt and other debt)
- Bankruptcy
- Family Law
- Domestic Violence/Restraining orders

Valley Community Legal Foundation is asking our Bar Members, if able, to volunteer your time and talent for individuals seeking legal assistance through NLSLA. Please contact Skip Koenig at SkipKoenig@nlsla.org or Mally Ponce at MallyPonce@nlsla.org to have your name added to the list of pro bono volunteers.

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