THE IMPACT OF Social Movements ON LITIGATION

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Me Too, Black Lives Matter, COVID-19 … these hot topics in society impact daily interactions and decisions.

Organized at some level but sustained in support of a social goal, social movements like those listed above often seek the implementation or prevention of change in society's structure or values. Sociologists might identify these as more cultural and social efforts rather than political efforts, although coming out of a presidential election year, opinions on that may differ. Often, social movements attempt to impact opinion and conduct, seeking reform, revolution, redemption or changes in behavior. Whether one agrees or disagrees with a particular movement, these movements impact viewpoints on important issues.

Because these social movements affect society's feeling about issues, they can influence litigation. Juries are comprised of members of society. Jurors thought processes and values can, and in many cases, will be affected by these movements. The question then becomes how specifically will these social movements affect litigation? Will they increase the number of lawsuits filed? Will factfinders, including judges or juries, view their roles differently because of these social movements? How much will these movements change the rules of the litigation game? The answer to these questions may differ in degree but clearly, these movements will have consequences. This article suggests some scenarios created by these movements in the world of litigation.

ME TOO

The Me Too movement, as an example, was fueled by cases involving sexual abuse and sexist behavior in the workplace, from the Hollywood setting (e.g. the Harvey Weinstein case) to the newsroom (e.g. Matt Lauer, Bill O'Reilly). While it was not always the case in claims involving harassment, given the extensive coverage afforded this movement, it seems to have had the effect of influencing a citizen's likelihood of accepting that an alleged victim is telling the truth. That effect can have both positive and negative implications in litigation. There is certainly, and appropriately, pressure for judges and jurors to ensure harassment claims are taken seriously. However, all parties in a courtroom are entitled to a "presumption of innocence" and each must still prove their case using the correct burden of proof.

Me Too evidence has existed in employment discrimination cases for years. A party alleging discrimination would try to show a pattern of discriminatory behavior by a supervisor through a pattern of conduct with other employees. Rule 404 of the Federal Rules of Evidence addresses the use of character evidence, and in the context of Me Too evidence, requires a detailed review of the timing and circumstances of the treatment of other employees to ensure the comparison is fair and relevant.

The attention given the Me Too movement has increased the ease with which this type of evidence is used, and the frequency with which it is accepted by judges and juries. Courts are still required to strictly evaluate this form of evidence and not automatically admit it. Practitioners, therefore, must aggressively address the details of the comparators. Challenging the ease with which Me Too evidence is offered, and believed, and not allowing factfinders to get caught up in this movement is critical.

BLACK LIVES MATTER

The Black Lives Matter movement and cases involving alleged police brutality have brought racial bias to the forefront. The extent to which these movements will influence jury selection and juror

viewpoints in a particular case cannot be underestimated. Legal academia is filled with courses on implicit bias, suggesting jury selection as the prime location where perceived bias must be addressed. Parties and their lawyers must realize people are more sensitized to concerns about racism and are challenged not to stereotype, which will impact how a party presents his or her position in a litigated case. Even more consideration must be given to addressing how the parties to a lawsuit will be viewed by judges and juries.

In a more nuanced point, the movement surrounding how persons of color are treated by law enforcement professionals has led to arguments that an important legal defense in cases of excessive force should be eliminated. That defense, qualified immunity, is not limited to excessive force claims. But its application in excessive force claims has led to pressure for its elimination.

Generally, qualified immunity is a defense available to certain public officials, including police officials, in cases alleging constitutional violations whereby the official is shielded from liability if that official's conduct did not violate clearly established law. Said with a little less legalese, this defense is applicable when a reasonable officer would not have known a particular action was unconstitutional. This usually occurs if a situation has never been addressed by a court before. The defense makes intuitive sense—why should an officer be held liable if he did not, and could not, have known the action was unconstitutional? The Black Lives Matter movement suggests eliminating this defense is the only way to reform poor police behavior because all officers must know they cannot use unnecessary force, and because race must have been an improper motive. That analysis fails to consider the requirement for a detailed review of the facts to ensure the circumstances at issue were clearly known to violate rights, which is why others support maintaining this important defense.

Qualified immunity was created by United State Supreme Court case law. Overturning it would require clear legislation or a case to get to the United States Supreme Court for this doctrine to be fully vetted and possibly overturned. Either of these options will, and should, take time. While concerns about officers' violating the rights of a person of color is an understandable concern, that concern does not necessarily jibe with an officer's right to not be held financially responsible for an act he did not, and reasonably could not, have known was unconstitutional.

COVID-19

The pandemic has raised many employment law questions, and more matters involving requests for accommodations, both in a workplace and in remote work locations, are likely to be filed. All employers will have to amend, if not rewrite, employee manuals. Public employers will be challenged to manage equal treatment of employees while ensuring all essential services to the public continue to be provided.

COVID-19 certainly has influenced how litigation will play out logistically, which may influence outcomes of cases. Some courts are delaying trials. Others are imposing restrictions, such as trying cases remotely or simply requiring the wearing of masks by all in a courtroom. The inability of lawyers, judges or juries to observe parties and witnesses in person changes the dynamic of how evidence will be presented and considered in a case. Lawyers may feel less effective in cross-examining a witness who is not in front of them; juries may not be able to gauge body language of a witness who is testifying. Witnesses and juries cannot be sequestered and evidence cannot be secured in the same manner as with in-person courtroom experiences. For trials that do take place in person, the simple fear some persons might have to be physically together for a trial will likely reduce the number of available jurors overall, and otherwise distract jurors from paying attention to evidence introduced in front of them.

Social movements have consequences in many contexts. Remaining open-minded to the movements while at the same time carefully considering their impact is a dual track best followed in the context of litigation.