LITIGATION MANAGEMENT: COASTING BEYOND THE CHAOS

~ A LITIGATION MANAGEMENT CLE SUPERCOURSE ~

PRESENTED BY
THE NETWORK OF TRIAL LAW FIRMS

OCTOBER 26-29, 2017
THE TERRANEA RESORT

Coasting Beyond the Chaos

- Litigation Management SuperCourse -
October 26-29, 2017
the Terranea Resort

THE NETWORK trial.com

Focusing on Trial and Litigation, Dedicated to Continuing Legal Education

Over 5,000 Attorneys in 22 Separate and Independent Trial Law Firms Praticing in Over 120 Offices Throughout the United States

The Network is a not-for-profit corporation producing cutting-edge CLE.
The Network of Trial Law Firms, Inc. is a not-for-profit membership association. The goal of the 22 law firms participating in the Network is to provide their clients with high-quality trial and litigation representation through advances in education, technology, business and science. The Network sponsors activities to accomplish that goal, including research and study of advances in the state-of-the-art of legal representation, and sponsors continuing legal education seminars for corporate and outside counsel and insurance professionals. Our CLE programs aid in the dissemination of new information and effective techniques and technologies to attorneys and claims professionals serving corporations and insurers.

Since 1993 we have conducted two three-day CLE seminars each year. In 2000, we added one-day CLE seminars to our offerings. Our focus is always excellence in litigation management and trial results. We are the home of the "Litigation Management Supercourse," a program that our attorneys created in 1993 and have produced and updated more than 60 times since then together with various not-for-profit CLE organizations and bar associations.

The Network does not practice law and is neither a law firm nor a partnership of law firms. The Network does not render legal advice nor make referrals. Only the individual lawyers within each member law firm practice law and render legal advice. Each member law firm is solely responsible for the matters entrusted to its care. No member law firm is responsible for the work, professional service or legal advice provided by any other member law firm. The Network does not refer clients to law firms or to attorneys. The listing in these materials of any law firm's name is not an endorsement or recommendation of that law firm by The Network or by any law firm that may be a member of the Network.

Note: Each member law firm of The Network of Trial Law Firms, Inc. has attorneys who are licensed to practice in that firm's home office state. In addition, many member law firms have attorneys who are licensed to practice in other states. Please check with the individual firm in which you are interested for those states in which some or all of its attorneys are licensed to practice law.

Officers and Directors

Jessie Ziegler
Bass Berry & Sims
Chair

Jerry Glas
Deutsch Kerrigan
Vice-Chair

Steve Fogg
Corr Cronin
Treasurer

Nikki Nesbitt
Goodell DeVries
Secretary

Bobby Hood, Jr.
Hood Law Firm
Officer at Large

Lee Hollis
Lightfoot Franklin
Past Chair

Felice Wagner
Executive Director
and General Counsel

Edd Schillay
Director of Operations
and MCLE

Member Firm Profile

Akerman LLP is a leading transactions and trial law firm known for its core strengths in middle market M&A, within the financial services and real estate industries, and for a diverse Latin America practice. With more than 600 lawyers and government affairs professionals and a network of 20 offices, Akerman is ranked among the top 100 law firms in the United States by The American Lawyer (2015). Akerman also is ranked among the top 50 law firms for diversity in The American Lawyer's Diversity Scorecard (2015). More information can be found at akerman.com or twitter.com/akerman_law.

Miami, FL | Boca Raton, FL | Fort Lauderdale, FL
Jacksonville, FL | Naples, FL | Orlando, FL
Palm Beach, FL | Tallahassee, FL | Tampa, FL
West Palm Beach, FL | Chicago, IL | Dallas, TX
Denver, CO | Las Vegas, NV | Los Angeles, CA
Madison, WI | New York, NY | Salt Lake City, UT
Vienna, VA | Washington, DC

akerman.com

Firm Contacts

Christine Welstead
305.374.5600
Miami, FL

Larry Rochefort
561-671-3603
West Palm Beach, FL

James Miller
305.982.5624
Miami, FL

David Spector
561.653.5000
West Palm Beach, FL

Timothy McDermott
904.598.8611
Jacksonville, FL

Michael Marsh
305.982.5507
Miami, FL

BASS BERRY SIMS

CENTERED TO DELIVER.

For more than 85 years, the law firm of Bass, Berry & Sims PLC has provided superior client service and unsurpassed legal representation. Our more than 200 attorneys represent and advise Fortune 500 companies as well as regional and local businesses, including acting as the principal corporate counsel for approximately 30 public companies.

Our team of more than 80 litigators is ready to serve our clients' best interests and has a long track record of not only winning, but also understanding clients' business objectives.

We approach disputes by addressing not only the matter at hand, but also by analyzing litigation trends facing the client and suggesting creative solutions to minimize risk over the long term. Our focus is to serve each of our clients' best interests as efficiently and effectively as possible. We establish a course of action, propose alternative fee arrangements and evaluate early settlement possibilities or opportunities for an early dismissal to avoid expense and protracted litigation. That said, we are prepared to serve as resolution negotiator or staunch advocate; whichever is necessary. We utilize the latest advances in technology to improve communication, discovery and trial preparation, all leading to sound victories.

Our Litigation & Dispute Resolution Practice Group is built on great reputations in corporate and securities, government investigations, healthcare, financial services and commercial litigation. From that foundation, we are especially focused on significant and growing areas of litigation that affect our clients, and align with our unique strengths.

A few of our many representative matters include:

Lead counsel for a major retailer in successful and much-publicized prosecution of the company's rights under a $1.6 billion merger agreement; obtained order of specific performance and ultimately achieved a favorable settlement valued at approximately $215 million prior to the commencement of a related solvency proceeding in New York federal court.

Lead counsel for a nursing home company in consolidated litigation involving a multi-fatality nursing home fire, resulting in the successful resolution of 30 of the 32 cases within one year from the date of the fire and the two remaining cases within three years. The mediator, in his report to the court, described this process as "the most successful mass tort mediation in the jurisprudence of Tennessee.".

Defense of a major pharmaceutical company in 2,500 Federal Court lawsuits involving diet drug litigation; a team of 45 attorneys and legal professionals conducted fact discovery in the individual cases, expert selection and retention for nation-wide litigation, and discovery of plaintiff's experts.

Representation of numerous public companies in shareholder and securities class action litigation in Tennessee.

Nashville, TN | Knoxville, TN | Memphis, TN
Washington, DC

bassberry.com

Jessie Zeigler
615-742-6289
Nashville, TN

Overton Thompson
615.742.7730
Nashville, TN

David Esquivel
615-742-6285
Nashville, TN

David King
615.742.7890
Nashville, TN

bsp Bush | Seyferth | Paige
LAW OFFICES

The trial attorneys at Bush Seyferth & Paige PLLC ("BSP") try lawsuits across the country – with trial skills second to none. Some of America's best-known companies look to BSP to represent them in catastrophic injury cases, class actions, complex business litigation, and appeals.

In 2003, Cheryl Bush, Patrick Seyferth, and Raymond Kethledge formed BSK (now BSP). Each founding partner was committed to creating a firm of best-in-class trial attorneys, appellate attorneys, and defenders of class action lawsuits. Every BSP attorney has impressive academic and professional credentials. More than half of BSP's attorneys have held judicial clerkships, including several each from United States Courts of Appeals, United States District Courts, and the Michigan Supreme Court.

BSP's enduring vision is to deliver powerful, responsive corporate legal services without compromising these essentials: Personal attention from first-chair attorneys; Efficient case management based on a client's individual goals; Forceful, fearless presentations in court; and Consistent case evaluation, unchanged on the courthouse steps.

The firm has successfully handled complex, high-stakes litigation and appeals in over 30 states and several foreign countries. BSP is highly successful in winning complex cases, winning appeals, and defeating class certification.

BSP is a proud member of the National Association of Minority and Woman Owned Law Firms ("NAMWOLF") and the National Association of Women's Business Owners ("NAWBO") and is certified by the Women's Business Enterprise National Council ("WBENC").

Troy, MI

bsplaw.com

Cheryl Bush
248-822-7801
Troy, MI

Patrick Seyferth
248-822-7802
Troy, MI

Moheeb Murray
248-822-7809
Troy, MI

Stephanie Douglas
248-822-7806
Troy, MI

Roger Meyers
248-822-7844
Troy, MI

Michael Williams
269-820-4100
Kalamazoo, MI

CORR CRONIN MICHELSON BAUMGARDNER FOGG & MOORE LLP

CCMBFM

Corr Cronin Michelson Baumgardner Fogg & Moore LLP is recognized as one of the premier trial law firms in the Pacific Northwest, handling major cases in Washington, Oregon, Alaska, and Idaho for clients of all sizes – from individuals and regional companies to Fortune 500 corporations.

We combine the legal talent normally found in large law firms with the responsiveness and service of a boutique. Our founding partners are all former partners from the 200-lawyer firm of Bogle & Gates (including the former co-chairs of Bogle & Gates' Litigation Department).

We have been fortunate to have been recognized for our work by the following publications:

Global Law Experts: Named us 2011 Washington Litigation Law Firm of the Year. Chambers USA: Picked us as one of its "Leading Firms" in Washington for commercial litigation every year since 2003, and, in 2010, called us an "outstanding group" (the highest rating) and noted us as having been praised by sources as "lawyer-for-lawyer ... the finest firm in town."

Benchmark America's Leading Litigation Firms and Attorneys: Listed us as "Highly Recommended" (the highest rating) every year since 2008.

U.S. News & World Report: Included us in its 2010 and 2011 "Best Law Firms" editions with a "Tier 1" ranking (the highest possible) in Seattle for commercial litigation.

Best Lawyers: Called us among Washington's best for commercial litigation, injury defense litigation, and "bet-the-company litigation."

Seattle, WA

corrcronin.com

Steve Fogg
206.274.8669
Seattle, WA

Michael Moore
206.621.1502
Seattle, WA

Emily Harris
206.621.1477
Seattle, WA

Kevin Baumgardner
206.621.1480
Seattle, WA

DeutschKerrigan

Deutsch Kerrigan views the task of resolving a legal problem as a partnership between the client and its outside counsel. Our goal is to work closely with each client to provide high quality, effective legal service which exceeds the client's expectations.

Our clients have the confidence in us to represent them beyond Louisiana for the same reasons they trust us with their problems in Louisiana: we get results, and we get them efficiently. To do this, we begin by knowing our clients. We learn our clients' business, their business philosophy, their goals and how they achieve them. When faced with a particular problem, we combine this knowledge with our knowledge of the law and our familiarity with the agency, court or other tribunal that will apply that law to craft a solution that will best meet the client's goals.

With over 60 attorneys and a substantial support staff of paralegals and legal assistants, we apply our legal and support resources carefully to most effectively meet the needs of our clients. Every file is assigned to an experienced attorney who coordinates all work on the case and maintains ongoing communication with the client. With the client's permission, that attorney may handle the case alone or draw on the talents and skills of other attorneys in the firm.

Because regular communication with our clients is essential, in addition to meetings and telephone conversations, we use the latest technology to communicate. Each of our attorneys has access through a state-of-the-art network to e-mail, the Internet, database, word processing and calendaring programs. Our dial-up networking and Internet capabilities also allow us to share the information on our network with our clients. We are also developing an Extranet to expand this ability and provide for the management of complex litigation. Through our membership in The Network of Trial Law Firms, a separate non-profit organization that includes 2,700 attorneys nationwide practicing in 75 local offices in 24 separate and independent trial law firms, we use an Intranet to share information with other attorneys throughout the country. Our use of technology also extends to our communication with judges and juries. Our trial presentation capabilities were featured in a major California criminal trial, in which a Deutsch Kerrigan paralegal operated the same system that we use in our own cases.

The firm utilizes creative alternatives to traditional litigation procedures. We have successfully engaged ad hoc judges, arbitrators and mediators in resolution of such matters. We have convinced the courts to use mini-trials or selected issue resolution to bring practicality to complicated cases.

We provide our clients with a wide variety of legal services in most major practice areas, including, aviation, bankruptcy, commercial, commercial litigation, construction, energy, environmental, estate planning, fidelity & surety, franchising & distribution, intellectual property and technology, labor & employment, litigation, oil & gas, products liability, real estate, tax and toxic torts.

New Orleans, LA | Gulfport, MS

deutschkerrigan.com

Robert Kerrigan
504.593.0619
New Orleans, LA

Jerry Glas
504.593.0627
New Orleans, LA

Ted LeClercq
504.593.0647
New Orleans, LA

William Wright
504.593.0623
New Orleans, LA

Joe McReynolds
514.593.0606
New Orleans, LA

Nancy Marshall
504.593.0602
New Orleans, LA

Member Firm Profile

FARELLA BRAUN + MARTEL LLP

Farella Braun + Martel LLP represents clients throughout the United States and abroad in sophisticated business transactions and complex commercial, civil and criminal litigation. We are known for our imaginative legal solutions and the dynamism and intellectual creativity of our lawyers. The attorneys in each practice group work cohesively in interdisciplinary teams to advance the clients' objectives in the most effective, coordinated and efficient manner. Founded in 1962, we are headquartered in San Francisco and maintain an office in the Napa Valley that is focused on the wine industry.

We are practiced trial lawyers. Our experience includes complex litigation involving class actions, antitrust, and unfair competition; business litigation involving securities, commodities and M&A disputes; intellectual property and technology litigation involving patents, trademarks, trade secrets and copyrights; and environmental litigation involving natural resources, federal and state cost recovery, CEQA, Proposition 65 and complex toxic torts. Farella Braun + Martel is regarded highly for our employment, construction, insurance coverage, and white collar criminal experience, and is regularly sourced for our proven appellate capabilities.

Our business attorneys advise clients in all aspects of corporate, partnership and LLC law. We represent public and family held companies with corporate and securities needs including public and private financing, international transactions, asset securitization, insolvency and loan workouts, tax and wealth succession planning. Our team works closely with our employment and intellectual property practice groups to provide a full complement of services to deal makers. We also offer comprehensive real estate, land use, environmental and construction departments that work together on commercial, brownfields, mixed used, industrial and large scale residential project development.

Since our inception, Farella Braun + Martel has received industry and peer recognition equal to any firm in the country. Our attorneys include fellows of the American College of Trial Lawyers, American College of Appellate Lawyers, American College of Construction Lawyers, American College of Environmental Lawyers and American College of Investment Counsel. Our environmental, construction, insurance, intellectual property, litigation and wine industry practices have been recognized in peer reviewed sources as the top in their practice including Best Lawyers, Chambers USA, U.S News and various practice specific honors.

San Francisco, CA | St. Helena, CA

fbm.com

Firm Contacts

Sandra Edwards
415.954.4428
San Francisco, CA

Brandon Wisoff
415.954.4449
San Francisco, CA

Jeff Fisher
415.954.4912
San Francisco, CA

FormanWatkins

Forman Watkins & Krutz was established in Jackson in December 1986 as a civil practice firm with a strong emphasis in product liability and commercial litigation.

Our firm is national and regional counsel for a number of major companies in many fields. Our clients include manufacturers, distributors, insurers, and financial and educational institutions. We practice in all courts and jurisdictions at all levels.

Our attorneys have substantial expertise in mass tort cases, commercial matters, environmental litigation, insurance, and anti-trust, bankruptcy, transportation, labor-management relations, securities, mergers and real estate. Many of our trial attorneys are nationally recognized in their fields and are often asked to assume responsibilities far outside of Mississippi in substantive areas involving widespread litigation.

Jackson, MS | New Orleans, LA | Houston, TX
Detroit, MI | Red Bank, NJ

formanwatkins.com

Joshua Metcalf
601.974.8722
Jackson, MS

Brian Hannula
601.974.8783
Jackson, MS

Tanya Ellis
601.960.3210
Jackson, MS

Jennifer Studebaker
601.973.5983
Jackson, MS

Freeborn

Your Future Is Our Purpose

Freeborn & Peters LLP is a full-service law firm, headquartered in Chicago, with international capabilities.

Freeborn & Peters supports its clients in the following legal disciplines: Litigation, Corporate Law, Real Estate, Bankruptcy and Financial Restructuring, and Government and Regulatory Law.

The firm is highly regarded for its ability to handle particularly complex commercial disputes, including those in the fields of antitrust, environmental, shareholders' rights, directors' and officers' liability, restrictive covenants and trade secrets, and intellectual property.

Freeborn & Peters is always looking ahead and seeking to find better ways to serve its clients. It takes a proactive approach to ensure its clients are more informed, prepared and able to achieve greater success – not just now, but also in the future.

While the firm serves clients across a broad range of sectors, it has also pioneered an interdisciplinary approach that serves the specific needs of targeted industries, including insurance and reinsurance; food; transportation, including railroads, trucking, and logistics; and private equity.

Freeborn & Peters is an organization that genuinely lives up to its core values of integrity, caring, effectiveness, teamwork, and commitment, and embodies these values through high standards of client service and responsive action. Its lawyers build close and lasting relationships with clients and are driven to help them achieve their legal and business objectives.

Chicago, IL | Springfield, IL | Richmond, VA

freeborn.com

David Gustman
312.360.6515
Chicago, IL

Jennifer Fitzgerald
312.360.3585
Chicago, IL

Member Firm Profile

GIBBONS

Founded in 1926, Gibbons is ranked among the nation's top 250 firms by The National Law Journal. The firm provides transactional, litigation and counseling services to leading businesses regionally, nationally and internationally.

Gibbons expanded its Philadelphia office with the addition of 25 attorneys from Hecker Brown Sherry and Johnson, a prominent Philadelphia civil litigation boutique. This expansion is a key aspect of Gibbons' strategic plan to enhance its ability to serve clients from offices throughout the region.

Gibbons was recently ranked one of the top 100 firms in the nation for diversity by Multi-Cultural Law magazine, and Gibbons' attorneys are recognized among the nation's leading business attorneys by The Best Lawyers in America, Chambers USA Guide to America's Leading Business Lawyers and Super Lawyers publications.

The firm's 200+ attorneys counsel businesses and business owners in all legal areas including Business & Commercial Litigation, Corporate, Criminal Defense, Employment Law, Financial Restructuring & Creditors' Rights, Government Affairs, Intellectual Property, Products Liability, and Real Property & Environmental.

Philadelphia, PA | Newark, NJ | Trenton, NJ
New York, NY | Wilmington, DE

gibbonslaw.com

Firm Contacts

Alan Gries
215.446.6267
Philadelphia, PA

John Romeo
215.446.6223
Philadelphia, PA

Madeline Sherry
215.446.6201
Philadelphia, PA

Steve Imbriglia
215.446.6209
Philadelphia, PA

GOODELL DEVRIES

Goodell, DeVries, Leech & Dann specializes in litigation and litigation management. Our firm was founded in 1988 by experienced trial lawyers who successfully defended product liability, professional malpractice, commercial, toxic tort and insurance coverage litigation. We offer our clients aggressive, high quality representation in the management and trial of sophisticated litigation traditionally handled by only the largest law firms while providing the personalized, cost-efficient service usually associated with smaller law firms.

Our firm's 65 attorneys offer a rich diversity of litigation expertise and experience, representing clients in the pharmaceutical and medical device, industrial and consumer products, healthcare, insurance, consumer finance, technology, electronics, automobile and construction industries.

The diversity of the specialized knowledge of our firm's lawyers allows complex litigation matters to be handled by an interdisciplinary team of lawyers able to contribute specific individual skills as needed. At the same time, the depth of litigation experience among the individual attorneys enables us to avoid overstaffing litigation matters. This flexibility in staffing, combined with a commitment to controlled, quality growth, permits Goodell, DeVries, Leech & Dann to provide effective representation at a reasonable overall cost.

Baltimore, MD | Philadelphia, PA

gdldlaw.com

Linda Woolf
410.783.4011
Baltimore, MD

Jeff Hines
410.783.4041
Baltimore, MD

Nikki Nesbitt
410.783.4026
Baltimore, MD

Rick Barnes
410.783.4004
Baltimore, MD

Donald DeVries
410.783.4006
Baltimore, MD

Tom Cullen
410.783.4019
Baltimore, MD

HOOD LAW FIRM LLC

The Hood Law Firm offers a wide variety of litigation services in all State and Federal Courts throughout South Carolina and the United States. The goal of the Hood Law Firm is to provide the highest quality legal services to our clients in a cost effective and professional manner. The firm combines the personal attention of the partners in every case with the assistance of well qualified associates and legal assistants as well as state-of-the-art computer technology.

The Hood Law Firm was established in 1985 by Charleston attorney Robert H. Hood, formerly a partner in the law firm of Sinkler, Gibbs & Simons. Specializing exclusively in civil litigation cases, the firm has grown rapidly since its inception and continues to grow to meet the needs of its diverse clients.

The majority of the firm's cases involve the defense of personal injury cases, specifically in the areas of professional malpractice, insurance (including coverage disputes), toxic torts, automobile accidents, general negligence, and products liability. Other types of cases include commercial, banking, business litigation, employment disputes, sexual harassment, civil rights and constitutional claims, collection and construction cases. The firm also handles plaintiff's cases involving contract disputes, commercial litigation, personal injury and product liability.

The firm and Mr. Hood are rated AV by Martindale-Hubbell. The firm is listed in the Bar Register of Preeminent Lawyers and in A.M. Best's Directory of Recommended Insurance Firms. Mr. Hood has been listed in The Best Lawyers in America since its first edition in 1978.

Charleston, SC

hoodlaw.com

Bobby Hood, Sr.
843.577.1201
Charleston, SC

Molly Craig
843.577.1215
Charleston, SC

Bobby Hood, Jr.
843.577.1219
Charleston, SC

James Hood
843.577.1223
Charleston, SC

Blanton O'Neal
843.577.1211
Charleston, SC

Barbara Showers
843.577.1207
Charleston, SC

LIGHTFOOT

Ranked as one of the top commercial litigation firms in Alabama by the current edition of Chambers USA: America's Leading Lawyers for Business, Lightfoot Franklin & White, LLC was founded on January 15, 1990 and we presently have over 60 lawyers. In order to focus on what we do best, we have restricted our practice to civil litigation matters, with the exceptions of environmental compliance advice, white-collar crime and internal investigations. Although we handle all types of civil litigation in state and federal courts, our primary areas of practice include commercial disputes, product liability, antitrust, consumer fraud, appeals, intellectual property, catastrophic personal injury and death, environmental/ toxic torts, class actions, professional malpractice, securities fraud, employment and communications.

Our stock in trade is our reputation of being able to take the most difficult cases to trial, when necessary, and to achieve excellent results. We will furnish, upon request, a summary of every jury verdict we have received since 1987, which demonstrates our trial record. While we are dedicated to trying and winning cases, we understand the need to control the cost of litigation. Therefore we only perform work that materially advances the interests of our clients, and we staff cases with the minimum number of attorneys necessary to perform that work. Additionally, we understand the importance of a client's desire sometimes to target certain cases for early settlement, and when that is the case, we expeditiously get those cases in a posture for early resolution. We are committed to the utilization of all forms of Alternative Dispute Resolution. Several of our partners serve frequently as mediators and arbitrators, and virtually all of our attorneys have successfully employed all types of ADR.

Our appellate practice also has a tremendous reputation. We are regularly retained post-verdict to handle post-trial motions and appeals of multi-million dollar verdicts. We have literally handled the largest appeals in the history of the state and take pride in our track record in the Supreme Court of Alabama, the Eleventh Circuit Court of Appeals and other appellate courts. We have participated in approximately 400 reported appellate decisions since the firm's formation in 1990.

We employ the latest technology and are committed to improving and upgrading to keep up with new technological advancements. All of our attorneys regularly communicate with clients electronically, not only by e-mail, but also via our secure extranet and our in-house video conference center, which improves communication and the speed with which legal services can be delivered. We use the latest research and presentation tools and have our own in-house document management and trial technology departments. These capabilities enable us to present our cases more effectively and at less expense. We are on the cutting edge of successful litigation capability, whether the criterion is technological, tactical or jury rapport.

Birmingham, AL

lightfootlaw.com

Firm Contacts

Lee Hollis
205.581.0766
Birmingham, AL

Jack Sharman
205.581.0789
Birmingham, AL

J. Chandler Bailey
205.581.1515
Birmingham, AL

Kevin Clark
205-581.5808
Birmingham, AL

Haley Cox
205-581.1519
Birmingham, AL

MASLON

Through decades of dedicated service, Maslon's Litigation Group has earned a reputation for being the lawyers to call when clients are facing the most complex legal issues and high stakes litigation matters. That's why Chambers USA ranks Maslon as one of the top commercial litigation firms in Minnesota. Past editions have described Maslon's Litigation Group as "[r]esponsive, insightful, innovative and intellectually strong, with attorneys who are loyal to the client and service-oriented" (2011), and have featured the following client statements:

"I have been extremely impressed with [Maslon's] litigation group as a whole. They are quick to assess a case and are extremely realistic about the likelihood of success. When they engage in litigation, they are outcome-focused." (Chambers USA, 2013)

"They have a broad range of commercial litigators and great products lawyers. They are rock-solid." (Chambers USA, 2012)

We offer clients a broad range and depth of experience, and regularly represent major manufacturers, financial institutions, utility companies, and corporate and individual clients in a wide variety of commercial cases. We have successfully resolved disputes in state and federal trial and appellate courts, as well as in various alternative forums and administrative agencies.

Maslon clients can expect to have a litigation strategy tailored to fit their specific needs, taking into account the amount or matter in controversy, each client's distinct business needs, its relationship with the community and employees, and its litigation philosophy. We also recognize that not every dispute requires litigation and are committed to thoughtful exploration of alternatives to litigation where practical. When litigation is necessary, we inform clients about innovative strategies to reduce the expense and uncertainty of litigation, such as arbitration, mediation, mini-trials and summary jury trials.

Our broad litigation experience includes: Appeals; Business Litigation; Competitive Practices/Unfair Competition; Construction and Real Estate Litigation; Corporate Trust Litigation, Employment Litigation; Insurance Coverage Litigation; Intellectual Property Litigation; Probate and Trust Litigation; and Tort and Product Liability.

With over fifty years in practice and more than 80 attorneys, Maslon is dedicated to achieving excellence in the practice of law, helping clients reach their most ambitious personal and business goals. In addition to our litigation services, Maslon offers extensive experience in the areas of advertising & marketing, business & securities, estate planning, financial services, labor & employment, and real estate.

Minneapolis, MN

maslon.com

David Suchar
612.672.8321
Minneapolis, MN

Terry Newby
612.672.8328
Minneapolis, MN

Nicole Narotzky
612.672.8373
Minneapolis, MN

Jason Lien
612.672.8319
Minneapolis, MN

Cooper Ashley
612.672.8363
Minneapolis, MN

Moore&VanAllen

Litigation: The firm conducts a broad civil litigation practice. Clients include businesses of all sizes, institutions, insurers, and self-insured companies. Our attorneys regularly appear in state and federal courts and before administrative agencies. We have experience in all alternate forms of dispute resolution, including mini-trials, mediation, and arbitration. We also have defended a large number of class actions. Our attorneys provide preventive counseling and litigation services on contract disputes; bankruptcy; lender liability; employment matters; product liability; construction disputes; entertainment; securities; franchising; collection of foreign debts and execution of foreign judgments in North Carolina; intellectual property disputes, including trade secrets, patents, trademarks and copyrights; environmental matters, including toxic torts; unfair trade practices, including antitrust, tying agreements, competitive bidding practices, promotional programs and practice, and exclusive dealing arrangements; confidentiality agreements; medical malpractice; suretyship; tax and estate matters; and title matters.

Employment: Moore & Van Allen Employment and Labor attorneys work hard to defend our clients' rights before government agencies, and arbitrators, courts and to solve our clients' problems short of litigation.

We take a proactive approach to labor and employment relations by understanding each client's business objectives, identifying risks, and assisting in developing strategies to achieve those objectives. In addition to providing management training and policy development, we advise clients daily on responses to labor and employment issues. This combination of education, guidance and prevention results in significant cost savings, as well as establishing a more productive work place.

We regularly represent clients from coast to coast in various state and federal courts, as well as before administrative bodies-- handling claims of unfair labor practices, discrimination, sexual harassment, employee misclassification and pay disputes, wage and hour disputes, wrongful termination, workers' compensation, denial of benefits, fiduciary liability, and employment contract disputes.

Our attorneys also represent companies in complex employment litigation involving class actions, collective actions, and actions concerning unfair competition, employee non-compete, nonsolicitation, and confidentiality covenants, as well as trade secret, tortious interference, and employee raiding claims.

Because we are part of a full service law firm, our clients also receive the benefit of the experience of attorneys in Moore & Van Allen's Employee Benefits, Immigration, Corporate, and Tax teams when any of these issues arises in an employment matter.

Charlotte, NC | Research Triangle Park, NC | Charleston, SC

mvalaw.com

Tony Lathrop
704.331.3596
Charlotte, NC

Tom Myrick
704.331.1128
Charlotte, NC

Bobby Bowers
704.331.3560
Charlotte, NC

Valecia McDowell
704.331.1188
Charlotte, NC

Scott Tyler
704.331.2463
Charlotte, NC

NIXON PEABODY

Nixon Peabody LLP is recognized as a “Global 100” law firm—one of the largest in the world. With 800 attorneys collaborating across major practice areas in 17 cities, including Boston, Chicago, London, Los Angeles, New York, Rochester, San Francisco, Shanghai, Silicon Valley, and Washington, DC, the firm’s size, diversity, and advanced technological resources enable it to offer comprehensive legal services to individuals and organizations of all sizes in local, state, national, and international matters. Our clients include emerging and middle-market businesses, national and multinational corporations, financial institutions, public entities, educational and not-for-profit institutions, and individuals.

While some firms possess litigators, few offer experienced and proven trial lawyers that keep clients trial-ready for any challenge across a broad spectrum of practices. And Nixon Peabody is one of the few firms with the experience and capability—and successful trial results—to serve as national trial counsel for clients who require a consistent approach to class action and aggregate litigation matters filed in multiple states.

Starting on day one, our clients are paired with courtroom veterans from Nixon Peabody’s trial team (NP Trial) who have a proven record of success trying cases to verdict in some of the most challenging venues. Our dedicated trial team provides early input on case strategy and contributes to the client’s case through all aspects of the life cycle until the matter is resolved. The unique approach of NP Trial not only keeps clients protected in and out of the courtroom, it offers the most efficient and effective means possible to reach a successful outcome—so our clients can get back to business.

Our diverse people and points of view allow us to attract the best people, and provide a rich and stimulating work environment that fosters innovation and a high-performance culture. Our atmosphere of mutual respect has helped Nixon Peabody earn recognition as a top employer. The firm has been ranked among the “Top 100 Law Firms for Diversity” (Multicultural Law Magazine 2009) and has earned the highest rating (100%) by the Human Rights Campaign Foundation’s Corporate Equality Index on lesbian, gay, bisexual, and transgender equality in corporate America. Nixon Peabody was recognized by FORTUNE magazine as one of the “FORTUNE 100 Best Companies to Work For®” in 2008, 2007, and 2006.

New York, NY | Boston, MA | Albany, NY
Buffalo, NY | Jericho, NY | Manchester, NH
Rochester, NY | Providence, RI | Chicago, IL
Hong Kong | London, UK | Los Angeles, CA
San Francisco, CA | Shanghai, China | Silicon Valley, CA
Washington, DC

nixonpeabody.com

Joseph Ortego
212.940.3045
New York, NY

Scott O’Connell
617.345.1150
Boston, MA

Vivian Quinn
716.853.8134
Buffalo, NY

Kevin Fitzgerald
603.628.4016
Manchester, NH

David Tennant
585.263.1021
Rochester, NY

Louis Dolan
202.585.8818
Washington, DC

PMMC LAW

Parsons McEntire McCleary & Clark: We are courtroom lawyers, focused upon trials, appeals, arbitrations, and advocacy in all forums.

Today's business leaders need advocates skilled in resolving complex and costly business disputes. Our lawyers fit the bill. We have handled thousands of cases and appeared in hundreds of courtrooms and arbitral forums, across the nation. We have a keen understanding of judges, juries, arbitrators, and other decision makers. We rest our cases upon a firm legal foundation. We present the facts and law of each dispute simply, convincingly.

Our clients include Fortune 500 companies and other significant businesses and institutions. We work in small teams, honoring the Texas tradition of "One riot - - One Ranger". We strive for early analysis, planning, economy, and resolution in each case. We also provide pre-litigation counseling - - to help clients avoid litigation or prepare for a coming storm.

Houston, TX | Dallas, TX

pmmclaw.com

Roger McCleary
713.960.7305
Houston, TX

Jeff Parsons
713.960.7302
Houston, TX

Sawnie McEntire
214.237.4303
Dallas, TX

David Walton
214.237.4335
Dallas, TX

Kristen McDanald
713.960.7359
Houston, TX

PORZIO
BROMBERG&NEWMAN P.C.

Founded in 1962, Porzio, Bromberg & Newman, P.C. is a cutting-edge law firm representing a wide variety of industry sectors. With over 80 lawyers throughout offices in Morristown and Princeton, NJ, New York City, Washington, DC, and Westborough, MA, the firm is committed to serving clients, providing high quality work and achieving results. Porzio provides a broad array of litigation, corporate, transactional and counseling services to clients ranging from Fortune 500 corporations to individuals to public entities.

At Porzio, a dynamic approach to problem solving and client service creates the energy and passion that form the foundation of the firm. Porzio meets clients' rapidly changing needs by realigning our considerable resources to address demanding matters. Porzio is a business-oriented multidisciplinary law practice where attorneys collaborate with each other and with clients to find solutions to challenges and problems.

We strive to incorporate diversity and inclusion in our daily practices. By sharing the unique perspectives and capabilities of our people, we enrich our workplace and expand our potential, to the ultimate benefit of our clients.

Porzio is a workplace community dedicated to excellence, the highest quality client service, and our clients' success. We recognize that a high quality and diverse workforce is key to accomplishing these goals. Personal and professional integrity, collegiality, teamwork, mutual respect and commitment to one another are values we hold dear.

Our adherence to these core values enables us to accomplish our clients' objectives and achieve extraordinary results. We insist on fidelity to our core values. They are not mere words; they are the embodiment of who we are, what we do, and how we act.

Our clients are our paramount responsibility. We listen to them and understand their needs and goals. We efficiently employ our resources and substantive knowledge, skills, and experiences to achieve our clients' objectives. We provide premium client service, superior work product and bring value and exceptional results to our clients. Our culture inspires us to innovate.

Morristown, NJ | Princeton, NJ | New York, NY
Washington, DC | Westborough, MA

pbnlaw.com

Diane Averell
973.889.4150
Morristown, NJ

Vito Gagliardi, Jr.
973.889.4151
Morristown, NJ

Charles Stoia
973.889.4106
Morristown, NJ

SANDBERG PHOENIX & VON GONTARD P.C.

Sandberg Phoenix & von Gontard P.C. was founded in 1979 with nine attorneys. The firm has grown steadily to become one of the leading law firms in the St. Louis metropolitan area and the Midwest.

Regional Representation: The firm's main offices are located in downtown St. Louis, Missouri. The firm also maintains offices in Carbondale, Edwardsville, Alton, and O'Fallon, Illinois, in recognition of the regional nature of the St. Louis economy. All of the firm's attorneys become licensed to practice in both Missouri and Illinois.

Client Representation: Superior legal service, a cost conscious approach to the delivery of services, and client satisfaction are hallmarks of Sandberg, Phoenix & von Gontard, P.C. The firm recognizes that in a competitive economy, legal services must be delivered efficiently and economically. The firm provides detailed billing statements to clients and works with its clients to contain costs consistent with the nature of the particular case or project. During and at the conclusion of each matter, the firm sends questionnaires to its client requesting evaluation of the service provided by the firm.

Practice Development: Sandberg Phoenix & von Gontard P.C. recruits outstanding students from the top law schools of the region and the country. Most of the firm's attorneys were members or editors of their law school journals, and many served as judicial clerks before joining the firm. The firm sponsors a summer intern program under which outstanding students work for the firm, usually between their second and third years of law school. The summer program both accelerates the student's understanding of the practice of law and permits the firm to identify superior individuals who will become members of the firm after graduation. Internal continuing legal education programs, attendance at professional seminars, and training with senior attorneys assure continuing professional development.

Professional Affiliations: The firm is honored to have been nominated and elected into membership of The Network of Trial Law Firms. The Network of Trial Law Firms is a national organization comprised of a select number of premier law firms from around the country with practices concentrated in civil litigation.

St. Louis, MO | Clayton, MO | Edwardsville, IL
Carbondale, IL | O'Fallon, IL | Alton, IL
Overland Park, KS

sandbergphoenix.com

Teresa Bartosiak
314.446.4283
St. Louis, MO

John Sandberg
314.446.4214
St. Louis, MO

Lyndon Sommer
314.446.4264
St. Louis, MO

Mary Anne Mellow
314.446.4226
St. Louis, MO

Snell & Wilmer

Founded in 1938, Snell & Wilmer is a full-service business law firm with more than 400 attorneys practicing in nine locations throughout the western United States and in Mexico, including Phoenix and Tucson, Arizona; Los Angeles and Orange County, California; Denver, Colorado; Las Vegas and Reno, Nevada; Salt Lake City, Utah; and Los Cabos, Mexico.

As a large, full-service firm, Snell & Wilmer provides the competitive advantage of having the ability to call upon the diverse experience of our attorneys to address the particular and evolving legal issues of any engagement. A team of attorneys and support staff can be easily assembled for large scale projects or emergency situations. To maximize these advantages, Snell & Wilmer attorneys are organized into practice groups. This gives clients easy accessibility to the unique skills and knowledge of each attorney.

For more than seventy years, Snell & Wilmer has been dedicated to providing superior client service. As a result, we have earned a reputation for providing our clients with what they value - exceptional legal skills, quick response and practical solutions delivered with the highest level of professional integrity. Snell & Wilmer's attorneys and staff continue to be strongly committed to these objectives.

Phoenix, AZ | Tucson, AZ | Orange County, CA
Salt Lake City, UT | Las Vegas, NV | Los Angeles, CA
Reno, NV | Denver, CP | Los Cabos, Mexico

swlaw.com

Joel Hoxie
602.382.6264
Phoenix, AZ

Amy Sorenson
801.257.1907
Salt Lake City, UT

Greg Marshall
602.382.6514
Phoenix, AZ

Warren Platt
714.427.7475
Orange County, CA

Alex Fugazzi
702.784.5202
Las Vegas, NV

Swift Currie

At Swift, Currie, McGhee & Hiers, LLP, our mission is simple: to be your first choice. We aim to fulfill that mission by setting the standard for valuable and innovative solutions while building and maintaining mutually prosperous and lasting relationships with our clients.

In addition, we will maintain the highest ethical standards, as well as our reputation for courteous, respectful and professional behavior; foster an environment of cooperation and teamwork, mutual respect and an open exchange of ideas; help each other excel, market and succeed; attract, develop and retain diverse, talented and exceptional professionals; maintain an appropriate work/life balance; and invest our time and resources in the communities in which we work.

Atlanta, GA | Birmingham, AL

swiftcurrie.com

Terry Brantley
404-888-6160
Atlanta, GA

Brad Marsh
404-888-6151
Atlanta, GA

David Atkinson
404-888-6166
Atlanta, GA

THOMPSON HINE

Clients from a broad range of industries entrust us with their most complex conflicts, high-profile matters and potentially costly trials in courtrooms across the country. Our trial lawyers handle all types of disputes, from contract claims to major class actions, giving us the wide-ranging experience that enables us to develop strategies to achieve clients' goals. Every trial is different, and recognizing that enables us to bring a creative and thoughtful defense approach to each case after thoroughly evaluating it with our client and gaining a comprehensive understanding of their needs and objectives. Our extensive trial experience gives us an unparalleled grasp of the importance of understanding and explaining complex facts necessary to achieve success at trial whether in front of a judge or jury.

Our trial lawyers are widely acclaimed by clients and peers and have earned recognition by the American College of Trial Lawyers, Chambers USA, Benchmark Litigation and The Best Lawyers in America®. BTI Litigation Outlook 2015: Changes, Trends and Opportunities for Law Firms also lists us among the top firms in the country in four areas of litigation and Benchmark Litigation has named us its Ohio Litigation Firm of the Year.

By applying proven legal project management principles to each engagement, we create a precise, efficient method for overseeing all aspects of a trial. We monitor costs to budget and communicate frequently regarding progress, developments and changes in scope, timeline or budget. Careful analysis and planning allow us to staff a trial team appropriately, using resources that control costs while providing the highest-quality counsel and service.

Our trial lawyers have also been at the forefront of offering clients alternatives to the standard hourly-rate billing structure. We devise tailored, value-based pricing arrangements with a sharp focus on achieving maximum cost-efficiency and meeting clients' needs for more predictability and better alignment with business objectives.

Our SmartPaTH solution earned recognition from The Financial Times, which ranked us first in the category "Most innovative North American law firms 2015: New working models." We also have been recognized nationally by BTI as one of the top seven firms innovating by making changes others are not to improve the client experience and as one of the top 22 firms considered best at developing and implementing alternative fee arrangements.

Cleveland, OH | Cincinnati, OH | Columbus, OH
Dayton, OH | Washington, DC | New York, NY
Atlanta, GA

thompsonhine.com

Tony White
614.469.3235
Columbus, OH

Tony Rospert
216.566.5861
Cleveland, OH

Wheeler Trigg O'Donnell LLP

The 90+ trial-tested lawyers of the Denver civil litigation firm Wheeler Trigg O'Donnell ("WTO") are known for trying precedent-setting cases in difficult jurisdictions throughout the country. WTO has tried more cases to verdict than any similar-sized firm in the region – 43 trials and 41 arbitrations in the last five years.

WTO handles trials, appeals, arbitrations, and related areas of complex civil litigation, including class actions and multidistrict litigation, on a local, regional, and national basis. We serve as resolution and trial counsel for many of the nation's best-known companies, including Whirlpool, General Electric, Chrysler Group, Pfizer, McKesson, Mercedes-Benz, Advanced Bionics, Allstate, Ford, USAA, and United Airlines.

WTO has defended clients against allegations related to bad faith, breach of contract, breach of warranty, product liability, professional liability and malpractice, franchise and distribution matters, intellectual property infringement, personal injury, toxic torts, discrimination and employment management, and other legal issues related to business operations. We represent companies and individuals in such diverse industries as pharmaceuticals, medical devices, insurance, automotive, banking and financial services, construction and engineering, energy, consumer products and services, health care, law, accounting, natural resources, telecommunications, food service, asbestos, manufacturing, and franchise and distribution.

Our lawyers are admitted to practice law in 19 states and the District of Columbia. We have served as lead trial counsel in all 50 states and have tried cases to verdict in 45 states, Puerto Rico, the Virgin Islands, and the District of Columbia. We have appeared before the U.S. Supreme Court, most of the U.S. courts of appeals, two-thirds of the U.S. district courts, over a dozen state supreme courts, and several federal regulatory agencies.

WTO has been able to attract first-rate lawyers to complement the depth and experience of our original team because of our reputation for excellence, the quality of our clients, and the challenge of their legal problems. Six of our partners are elected Fellows of the American College of Trial Lawyers and firm chairman Mike O'Donnell is an ACTL Regent. Martindale-Hubbell has given the AV peer-review rating to over 60% of our partners. Over 70% of our associates have served a state or federal trial or appellate judicial clerkship. Our firm and lawyers consistently appear in local and national rankings surveys such as Best Lawyers, Chambers USA, The Legal 500 U.S., and Colorado Super Lawyers.

Beyond the courtroom, WTO's almost 200 employees make up the professional and collegial culture that has earned us a top-10 ranking for the past nine years in the annual Denver Business Journal's best places to work survey. WTO was number one in 2008, 2010, and 2012. Our community-mindedness is unmatched as evidenced by our selection to receive the Denver Business Journal's 2010 Partners in Philanthropy award for the volunteer hours and charitable contributions donated to the community through the WTO Foundation.

Denver, CO

wtotrial.com

Mike O'Donnell
303.244.1850
Denver, CO

Hugh Gottschalk
303.244.1858
Denver, CO

Mike Williams
303.244.1867
Denver, CO

Carolyn Fairless
303.244.1852
Denver, CO

John Fitzpatrick
303.244.1874
Denver, CO

THE TEN-MINUTE VOIR DIRE

Jerry Glas
Deutsch Kerrigan (New Orleans, LA)
504.593.0627 | jerry@deutschkerrigan.com

Our right to intelligently exercise peremptory challenges is under constant attack. Every day, judges are redefining and limiting our opportunity to question and interact with potential jurors. Most federal courts judges have already taken over the initial questioning, and many now prohibit lawyers from having any interaction with potential jurors. Even our state courts, the last bastions of voir dire, are starting to fall. Every day, more and more state court judges are conducting voir dire and allowing only "limited follow up" by the lawyers. And, by now, you realize why:

Trial lawyers cannot be trusted.

We are paid advocates, and the stench of our bias fouls the courtrooms in which we practice. We ask questions that have nothing to do with a juror's qualifications. We harass unfavorable jurors, tricking them into making admissions that spare us from spending our precious peremptory challenges. Meanwhile, we hypocritically coddle favorable jurors with leading questions and cleverly rehabilitate jurors who should be excused for cause.

We suggest or tell jurors about the evidence they will hear, and we shamelessly solicit promises about how they will respond. We tell personal stories and jokes, dazzling them with our wit and charm. We flirt. We smile. We ask convoluted questions and we repeat those questions until we get the soundbite we desire. Unchecked, we shine the spotlight on ourselves, waste the court's time, try our case before the first juror is sworn, and brag about it at the next cocktail party.

We are a threat to the civil justice system and the bane of a judge's existence. There isn't an appointed or elected judge in America who doesn't believe--on some level--they can do a much better job of conducting voir dire than the lawyers seated before them.

We stand convicted of abusing the right to voir dire, and our sentence fits our crime. Just look at us! Squirming in our seats while the judge asks questions that have no hope of discovering bias. Gritting our teeth while the judge wastes time sharing stories, playing the "hey, do you know so and so" game, and making friends with the jurors. Pretending to smile while the judge cleverly rehabilitates jurors who should never be allowed to serve. Holding our tongue while the judge thanks dream jurors for their candor instead of clarifying what those jurors really meant and establishing that the jurors really could be fair. Suffering at the judge's unskilled hand what the judge should be suffering at ours. It is absolute torture, and we are left with no choice.

We must adapt. We must forget the latitude we enjoyed during the Golden Age of voir dire. We must discard our "go to" questions and jokes. No more name dropping. No more asking about bumper stickers and magazine subscriptions. No more deep dives into their real feelings about insurance companies and "big bad" corporations.

We must adopt a new playbook. When the judge finally finishes conducting voir dire, and skeptically asks if we have any "follow up questions," we must stand up and ask questions designed to send the right message about us, our client, and our case. We have to resist the urge to pit ourselves against the judge by trying to rehabilitate jurors the judge personally identified as biased and by "following up" with jurors who the judge personally rehabilitated.

We must resist the urge to ask questions that broadcast what we don't want in a juror (i.e., what we are afraid of) and suggest a lack of confidence in our case. Instead, we must

launch into a line of questioning that expresses absolute confidence in our case and either broadcasts what we do want in a juror or what we know will ultimately decide the case. We must make jurors feel honored to be "selected" or make certain they are focused on the right issue.

Here are some suggestions on how to embrace the "ten minute" voir dire by designing a line of questions that establish the perfect "theme" for voir dire.

1. Let The Court Discover Bias

Yes, trial lawyers owe it to their clients to discover whether jurors have certain biases or prejudices—either for or against—the parties, their counsel, witnesses, testing, and claims (to name only a few). But those questions do not have to be asked by lawyers.

It may be better for the court to ask the questions designed to discover bias because: (1) jurors are more likely to respond honestly to the court; (2) jurors are less likely to resent being asked a personal question when the question is asked by the court; and (3) the court's asking the question sends a message to the jury that such bias/prejudice will not be tolerated.

Consider the standard questions seeking to determine whether jurors are biased against corporations: "Would you be more likely to hold a corporation liable than an individual?" and "Can you treat a corporation the same as an individual?" How many corporation-hating jurors actually volunteer that bias to the corporation's attorney (knowing that's what the corporation's attorney wants)? How many jurors will be insulted by the question? And, perhaps most importantly, what message does it send when a corporation's attorney asks that question (other than "we're afraid that some of you hate us and we can't get a fair trial)? Wouldn't it be better for the court to ask these questions, and send the message that the court recognizes the risk of such bias and will not tolerate such bias. Wouldn't the court's asking the question be as (or more) effective than a jury charge?

Prepare and file a motion with the court requesting that the court include in "its voir dire" specific questions that you want asked to discover bias and prejudice. No, the court is not going to ask all of the questions you submit. No, the court is not going to ask the questions as cleverly as you would have. No, the court is not going to follow-up the way you would have. But letting the court ask the pedestrian questions frees you up to ask only those questions necessary to establish your voir dire theme and easily associated with that theme.

2. Forget Speed Dating

Only trial lawyers and jury consultants are so vain and naïve as to think they can reliably "figure out" a stranger with five questions or from ten facts. How well do you really know your spouse or your best friend? Or your mother or you neighbor? Do you know them well enough to predict, with any certainty, how they would vote if they served as a juror in one of your cases? Well, I've been married to my wife for more than eighteen years, and I can only reliably predict how she will vote when a waiter offers a chocolate dessert or I offer to do laundry.

People are complicated. Yes, well-framed questions can reveal the existence of certain basic relationships. But a juror's ultimate opinion is often shaped by his or her personal experiences. How can a lawyer possibly determine whether the plaintiff's personality will remind them of a dear high school friend or a despised ex-spouse? What question could possibly reveal whether a juror will hate your expert's accent, eye contact, or bluntness?

Resist the urge to "speed date." If the court allows only limited follow up, resist the temptation to respond by trying to cram an hour of questions into ten minutes. Even people who are "speed dating" aren't dumb enough to take that approach (at least, I hope they don't. I really don't know. Again, I've been married for more than eighteen years).

3. Don't Try To "Fix" What The Court Did

Jurors respect the judge and mistrust trial lawyers. Remember that the black robe, the gavel, and the elevated bench are all impressive. Most jurors will assume that the judge knows more law in general and more about voir dire in particular than the lawyers who pass through their courtroom. By the time the judge finishes asking questions, most jurors will have the same reaction to the judge's asking the lawyers "any follow up": I can't imagine he forgot anything. And when the lawyer stands up and says "yes, Your Honor," most jurors will have the same thought: Here comes the lawyering! So the first question out of your mouth had better be a good one.

Resist the temptation to rehabilitate a juror whose bias or prejudice the court has already discovered. Consider how it will look and sound to the other potential jurors. It will appear that you want a biased and prejudiced potential juror, that you don't care about the court's opinion, and that you are trying to help the biased juror. Is the risk of giving that impression to the jury worth the .01% chance that you'll get an answer that persuades the court to deny a challenge for cause?

Resist the temptation to attack a juror who the court has already questioned about a bias or prejudice, especially if the court concluded the line of questioning by asking if the juror can be "fair and impartial" or "can follow the law." Consider how it will look and sound to the other potential jurors. It will appear that you don't trust the juror's answer or the court's legal instincts (because the court accepted the answer). And it may give the impression that you're the type

of lawyer who fights every ruling. Is the risk of giving that impression to the jury worth the .01% chance that you'll get an answer that persuades the court to grant your challenge for cause?

4. Establish A Voir Dire Theme

Jurors will draw conclusions about you, your client, and the key trial issue based on the questions you ask during voir dire. Stop focusing on what an answer might tell you about the juror and start thinking about what the question might tell the jurors about you and your client.

What would you think if, during speed dating, your date asked you three questions: (a) "what do you do for a living"; (b) "what kind of car do you drive"; and (c) "how much did your watch cost you?" What would you immediately conclude is most important to your date? What impression would you have of your date? And would anything your date said after those questions matter?

Trial lawyers, especially those granted only limited voir dire, should choose a voir dire theme and make certain that every question is consistent with that theme.

Here are some examples of voir dire themes that send the right message:

a. "We want smart jurors."

One generic but effective theme for voir dire is "we want smart jurors." By asking questions designed to identify smart jurors, you send the message "we win if we get smart jurors" because smart jurors will understand the evidence and find for your client. Additionally, if any of the "smart" jurors don't get selected, the jury may (perhaps correctly) conclude that opposing counsel "cut" them because opposing counsel is afraid of smart jurors.

Ask questions like the following:

- Does anyone enjoy crossword puzzles or Sudoku?
- Did anyone's college degree require a lot of reading & analysis?
- Does anyone's job require them to read & analyze a lot of material?
- Does anyone's job require them to be particularly logical or methodical?
- Does anyone's job require them to objectively analyze the basis for complaints?
- Does anyone's job require them to objectively analyze conflicting estimates?

This line of questioning may prompt potential jurors to volunteer useful information about themselves, but it will definitely send the message that you and your client want smart jurors. And it may suggest the other side took this matter to trial "counting on" or "hoping for" dumb jurors.

b. "We want hard-working jurors."

You have to know yourself and your venue. If you sell yourself to the jury as some variation of Saturday Night Live's "caveman" lawyer, you may feel hypocritical or uncomfortable asking jurors about their college degrees or logical ability. And, if the court discovers during its questioning that only three potential jurors have college degrees or jobs, you may need to rethink or tweak your "we win if we get smart jurors."

Another generic but effective theme for voir dire is "we want hard-working jurors." By asking questions designed to identify hard-working jurors, you send the message "we win if we get hard-working jurors" because they will take the time to understand the evidence that favors your client. Additionally, if any of the "hard-working" jurors don't get selected, the jury may (perhaps correctly) conclude that opposing counsel "cut" them because opposing counsel wants lazy jurors.

Ask questions like the following:

- Does anyone's job require them to roll-up their sleeves and read hundreds of pages a week?
- Who is willing to roll-up their sleeves and wade through thousands of pages of medical records?
- Does anyone know of a reason why they might not be the right juror to be asked to listen to hours of medical testimony, either because of problems with hearing, seeing, attention, concentration, or any other problem?
- Was anyone allergic to science (or math) class in high school?
- Does anyone religiously watch television shows about ERs (perhaps in a medical causation case)?

Of course, it is possible to combine two generic themes, ask both lines of questioning, and send

the message that "we want smart jurors and hard-working jurors."

c. "We want fact-checkers."

The outcome of many trials is determined by how a plaintiff performs on the stand. If you want the trial to come down to whether the jury believes a plaintiff's subjective complaints, design a line of questions that focuses potential jurors on the need for a plaintiff to support their self-serving testimony with objective evidence. By asking questions about their ability to "consider and weigh" evidence that might contradict a plaintiff's testimony, you express confidence in your ability to produce evidence that contradicts and undermines that testimony (so make sure it does!).

Ask questions like the following:

- Will anyone automatically assume that the plaintiff is telling the truth or correctly recalling their symptoms?
- Is everyone comfortable (or willing to roll up their sleeves) and check the facts?
- Is everyone comfortable judging the plaintiff's credibility?
- Can you "consider and weigh" whether surveillance video contradicts plaintiff's testimony?
- Can you "consider and weigh" whether eyewitness testimony contradicts plaintiff's testimony?
- Can you "consider and weigh" whether plaintiff made a contradictory prior statement to police or doctors?
- Can you "consider and weigh" whether the records of the first physical examination after the accident contradicts plaintiff's testimony?
- Can you "consider and weigh" whether the result of MRIs and CT scans contradicts plaintiff's testimony (or do you think that MRIs & CT scans are "voodoo" science)?
- Can you "consider and weigh" whether neuropsychological testing contradicts plaintiff's complaints?

By focusing on the plaintiff's testimony and repeating the word "contradicts," you hammer-home that plaintiff must do more than take the stand and say "trust me." By asking jurors if they could "consider and weigh" contradicting testimony, you suggested that plaintiff's testimony will be contradicted by objective evidence (so make certain that it will!).

d. "Best expert should win."

The outcome of many trials will be determined by whether the jury believes the testimony of your expert (versus theirs). If you want the trial to come down to a battle of experts, design a line of questioning that focuses potential jurors on the importance of the expert testimony, and evaluates their ability to compare qualifications, materials, and methodology. By asking questions about their ability to judge experts based on their qualifications, materials, and methodology, you express confidence in your expert's ability to win a "battle of the experts."

Ask questions like the following:

- Does anyone work with a neurologist?
- Does anyone have a family or friends who are neurologists?
- Has anyone ever researched (this particular) neurological issue?
- Does anyone think that the opinion of all neurologists should be given equal weight?
- Can everyone "consider and weigh" whether one neurologist is better qualified?
- Can everyone "consider and weigh" how the neurologist reached that opinion (or validity of his "methodology")?
- Can everyone "consider and weigh" the basis for a neurologist's opinion?
- Can everyone "consider and weigh" whether one neurologist failed to read (or failed to request or wasn't provided) all of the medical records?
- Can everyone "consider and weigh" whether peer-reviewed medical literature supports that neurologist's opinion?
- Can everyone wait until they've heard from both neurologists before making up their minds?

By repeating the word "neurologist" in every question, you hammer-home that the trial will be a "battle of neurologists." By asking jurors if they can "consider and weigh" qualifications, you express

confidence that your neurologist is better qualified. By asking jurors if they can "consider and weigh" whether one neurologist failed to read all of the medical records, you suggest that your client read all of the medical records and theirs didn't (so make sure that's the case!).

e. "Treating physician should win."

It is unlikely that plaintiff attorneys will ever embrace the concept of the ten minute voir dire, but defense counsel should prepare for that possibility. One potentially effective voir dire theme for plaintiffs would be "the treating physician should decide this case." If a plaintiff attorney recognized that the outcome of the trial would be determined by a "battle of experts," and that the defense expert was better qualified or informed, plaintiff's counsel could frame the issue for the jury by focusing on the inherent advantages of being a treating physician.

Imagine if a plaintiff attorney used his or her ten minutes of voir dire to frame the "real issue" for the jury by asking the following questions:

- Do any of you work for a doctor who treats patients?
- How many of you all have a treating physician?
- How many of you all have seen your treating physician for more than a year?
- How many of you all trust your treating physician?
- Can you "consider and weigh" how many times a doctor treated or examined the plaintiff before the accident?
- Can you "consider and weigh" how many total minutes the doctor spent treating or examining the plaintiff before the accident?
- Can you "consider and weigh" how many times the doctor has treated or examined the plaintiff since the accident?
- Can you "consider and weigh" for how long a doctor has treated or known a plaintiff?
- If the court instructs you to give greater weight to a treating physician, can you follow that instruction?

No plaintiff attorney has ever framed the trial this way, but it could be incredibly effective—which is why every defense attorney should religiously prepare a "counter" voir dire theme. Without sharing my specific questions (for any plaintiff attorneys who may someday read this), I will say that an effective counter theme would likely start with "is anyone going to automatically assume that a treating physician is correct?" and would likely involve asking whether jurors can "consider and weigh" the specific evidence supporting the opinion of the defense expert.

f. "One issue determines the winner!"

The outcome of many trials will be determined by the jury's answer to a single critical question. If you want the trial to come down to a single question or issue, design a line of questioning that focuses potential jurors on the importance of that issue and (at least purports to) and evaluate their ability to determine that issue fairly and impartially. By asking questions about one and only one issue, you can frame the purpose of the entire trial for the jury and express confidence in your ability to prevail on that issue.

For example, in a case involving a manufacturing defect claim, we knew the product met specifications, but we were wary of plaintiff's argument that the product must have deviated from its design because it wasn't designed to cause cardiac arrest. When the federal court allowed only ten minutes of voir dire, we decided to frame the trial by focusing the jury on the issue of whether the product met specifications. We asked questions like the following:

- Has anyone ever been responsible for making certain that a product met specifications?
- As anyone ever worked for the manufacturer of a product that was built to specifications?
- Has anyone ever been injured by a product that deviated from specifications?
- Has anyone ever filed suit alleging that a product failed to meet specifications?
- Is anyone going to assume that, because plaintiff filed a manufacturing defect claim, our product must have deviated from specifications?
- Can everyone "consider and weigh" the results of testing designed to determine whether a product deviated from specifications?
- Can everyone "consider and weigh" whether an expert analyzed (or requested) testing of a

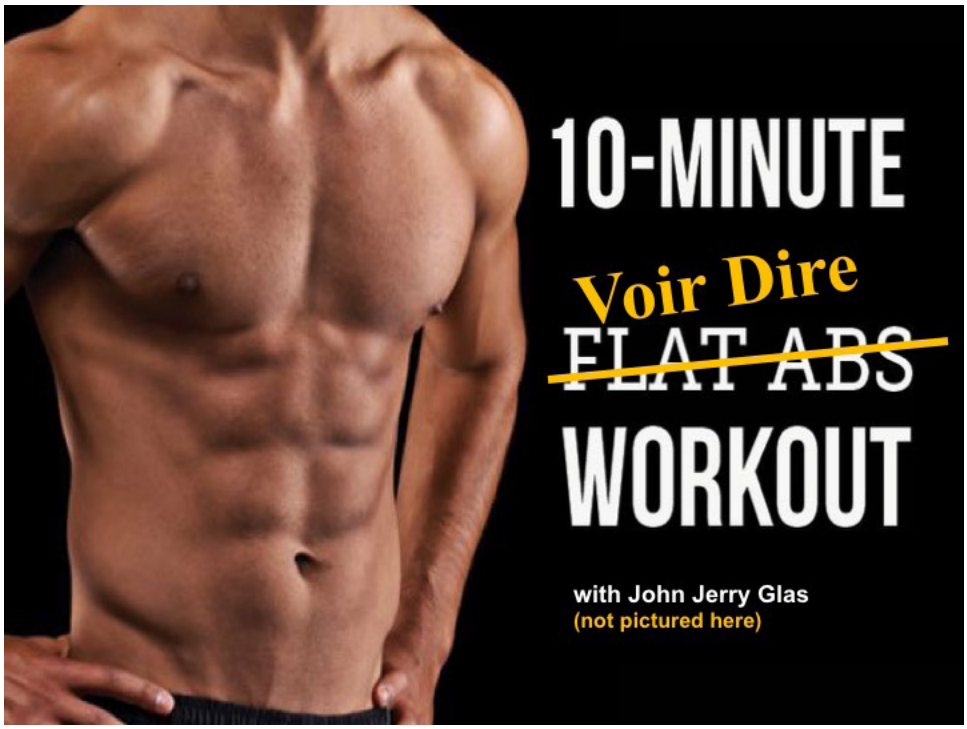
product before offering an opinion as to whether it met specifications?

By repeating the word “specifications” in every question, we hammered-home that plaintiffs were required to prove that our product deviated from specifications. By asking jurors if they could “consider and weigh” testing that was “designed to determine whether a product deviated from specifications,” we suggested that the results of the testing proved our product did not. By asking jurors if they could “consider and weigh” whether an expert considered the results of such testing, we suggested that plaintiff’s expert failed to consider that testing. In so doing, we framed the “real issue,” and the jury absolutely expected plaintiffs to stand up during opening statement and identify how the product specifically deviated from specifications (which opposing counsel did not do).

5. Conclusion

More and more courts are going to limit trial lawyers to “ten minute” voir dire. More and more clients are going to ask trial lawyers to share their approach to the “ten minute” voir dire allowed by the court. Start working on your “ten minute” voir dire now. Start considering the advantages of choosing to perform a ten minute voir dire and establishing a voir dire theme even when the court allows unlimited voir dire. Consider how each question reflects on you and your client. Consider how you can frame the entire trial by focusing on one witness, one issue, or one piece of evidence during your voir dire.

Get the most out of your ten minute voir dire!



1. Forget Speed Dating

Yes, there was a time when you could ask all your favorite questions and tell all your favorite jokes. But those days are over.

1. Forget Speed Dating

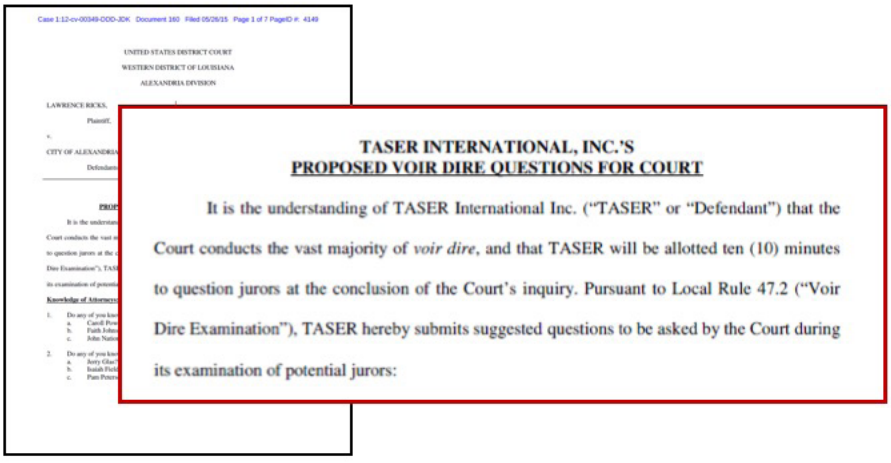
Yes, there was a time when you could ask all your favorite questions and tell all your favorite jokes. But those days are over.

You can't do it. It's not possible. Don't try.

2. Let The Court Do The Heavy-Lifting

If the court wants a workout, give the court a workout.
Submit your bias & prejudice questions.

Let Court Handle Bias



Case 1:12-cv-00349-DDD-JDK Document 160 Filed 05/26/15 Page 1 of 7 PageID #: 4149

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LAWRENCE RICKS,
Plaintiff,
v.
CITY OF ALEXANDRIA

TASER INTERNATIONAL, INC.'S
PROPOSED VOIR DIRE QUESTIONS FOR COURT

It is the understanding of TASER International Inc. ("TASER" or "Defendant") that the Court conducts the vast majority of *voir dire*, and that TASER will be allotted ten (10) minutes to question jurors at the conclusion of the Court's inquiry. Pursuant to Local Rule 47.2 ("Voir Dire Examination"), TASER hereby submits suggested questions to be asked by the Court during its examination of potential jurors:

Let Court Handle Bias

Bias Against Law Enforcement Officers:

22. Have any of you, your family or your friends had their civil rights violated? Please explain.

23. Have any of you, your family or your friends been treated unfairly by a law enforcement officer? Please explain or ask to approach the bench to discuss privately.

24. Have any of you, your family or your friends been incarcerated in a detention facility, jail, or prison? Please explain or ask to approach the bench to discuss privately.

25. Have any of you, your family or your friends ever filed a complaint or lawsuit against a law enforcement officer or agency? Please explain or ask to approach to discuss privately.

26. Have any of you, your family or your friends ever protested, demonstrated, or been critical of the police for any reason? Please explain or ask to approach the bench to discuss privately.

27. Do any of you distrust the testimony of law enforcement officers? If so, why?

Let Court Handle Bias

Bias Against Holding A Drug-User Accountable:

40. Do any of you believe that illegal drugs like cocaine should be legalized in Louisiana? If so, why?

41. Have any of you ever provided medical treatment, care or counseling to a person who was addicted to an illegal drug like cocaine?

42. Have any of you, your family or friends used illegal drugs?

43. Have any of you, your family or friends become addicted to illegal drugs?

44. Do any of you believe that a man who ingests cocaine is less responsible for his actions?

45. Do any of you believe that a man who ingests cocaine should not be held accountable for his actions?

46. For *any* reason, would it be difficult for you to determine the fault of a person who had cocaine in his system when he acted?

Let Court Handle Bias

- Give validity to the questions.

Let Court Handle Bias

Bias Against Diagnosis Of Excited Delirium Syndrome:

47. How many of you have heard of "excited delirium syndrome"?

48. Have any of you ever provided medical treatment or care to someone who was experiencing "excited delirium syndrome"? Please describe.

49. Have any of you ever researched, studied, or read about excited delirium syndrome? Please explain.

50. For *any* reason, would it be difficult for you to fairly and impartially determine whether *cocaine-induced* excited delirium caused Mr. Ricks' death?

Let Court Handle Bias

- Give validity to the questions.
- Get more honest answers

Let Court Handle Bias

- Give validity to the questions.
- Get more honest answers.
- Avoid uncomfortable exchanges.

I tend to be sympathetic to people. It was no recourse. Because what happened when they did the surgery she drowned in her own blood. It was -- you know, it is something I try not to talk about.

THE COURT:

I'm not -- I will tell everybody this. This is not here to stir up feelings and bad memories. It is important for the lawyers and their clients to know --

PROSPECTIVE JUROR:

She was 19.

THE COURT:

I'm very sorry, ma'am, that happened. Am

Let Court Handle Bias

- Give validity to the questions.
- Get more honest answers.
- Avoid uncomfortable exchanges.
- Create appellate issues.

2. Let The Court Do The Heavy-Lifting

If the court wants a workout, give the court a workout. Submit your bias & prejudice questions.

Save your strength. You're going to need it.

3. Establish One Theme

You have the time and ability to establish one theme. That theme must send a message about the strength of your case or the core issue in your case.

3. Establish One Theme

You have the time and ability to establish one theme. **That theme must send a message about the strength of your case.**

One Theme

1. Type of Jurors You Want

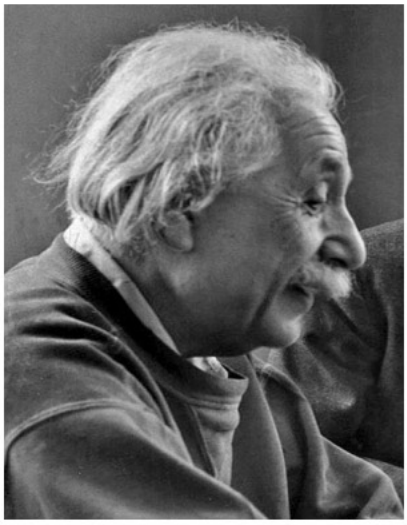
2. Core Issues In The Case

3. Establish One Theme

You have the time and ability to establish one theme. That theme must send a message about the strength of your case or the core issue in your case.

Consider how you look and sound.

One Theme



We Want Smart Jurors

- College degree requires a lot of reading & analysis?
- Job requires reading & analyzing a lot of material?
- Job requires them to be particularly logical or methodical?
- Job requires objectively analyzing basis for complaints?
- Job requires objectively analyzing conflicting estimates?
- Enjoy crossword puzzles or Sudoku?

One Theme

We Want Hard-Workers

- Job requires you to "roll up your sleeves" & read hundreds of pages?
- Job requires you to "roll up your sleeves" & analyze conflicting data?
- Willing to "wade through" thousands of pages of medical records?
- Anyone allergic to science class in high school?
- Religiously watch television shows about ERs?
- No problems with hearing, seeing, attention, or concentration?

One Theme

We Want Fact-Checkers

Are you going to <u>automatically</u> believe whatever the plaintiff says or can you consider & weigh whether Plaintiff's testimony is <u>contradicted</u> by

- Surveillance Video?
- Eyewitness Testimony?
- Prior Statements To Police/Doctors?
- Physical Examination?
- MRIs and CT scans?
- Neuropsychological Testing?
- Expert Analysis & Testimony?
- Medical Literature?

1. Type of Jurors You Want

2. Core Issues In The Case

Must Prove Deviation From Specifications

- Been responsible for checking whether product meets specifications?
- Work for manufacturer of product that must be built to specification?
- Been injured by a product that deviated from specifications?
- Will assume that, because plaintiff filed suit, product must have deviated from specifications?
- Consider results of testing designed to determine whether met specifications?
- Consider whether expert analyzed, requested, or was provided testing before offering opinion on specifications?

One Theme

Treating Doc Wins

- Work for doctor who treats patients?
- Seen your treating physician for more thar a year?
- Trust your treating physician?
- Consider # times doctor treated or examined a plaintiff *before* accident?
- Consider # times doctor treated or examined plaintiff *after* accident?
- Consider whether doctor was responsible for treating or just issuing report?
- If the court instructs you to give great weight to the treating physician, can you follow that instruction?

One Theme

KNOWLEDGE & EXPERIENCE:
CONDUCTED ELECTRICAL WEAPONS

When Hired:	Kerwin	Swerdlow
Served on Scientific & Medical Advisory Board for TASER International, Inc.?	No	Yes
Served on Board for any CEW Manufacturer?	No	Yes
Published [first author] a peer-reviewed CEW scientific paper?	No	Yes
Published [senior author] a peer-reviewed CEW scientific paper?	No	Yes
Published any peer-reviewed CEW scientific paper?	No	Yes
Written any CEW scientific papers?	No	Yes
Retained as an expert in a CEW lawsuit?	No	Yes
Researched effect of CEWs?	"Yes"	Yes
Touched a CEW?	No	Yes
Seen "in real life" a TASER M26 CEW?	"Yes"	Yes
In the broadest possible sense, did you have any exposure or experience with TASER CEWs?	No	Yes

Best Expert Wins

- Family/friends are neurologists?
- Think opinion of all neurologists should be given equal weight?
- Comfortable comparing & judging neurological opinions?
- Consider neurologist's qualifications?
- Consider neurologist's method?
- Consider what neurologist read?
- Consider whether medical literature supports neurologist's opinion?
- Wait to hear from both neurologists?

3. Establish One Theme

You have the time and ability to establish one theme. That theme must send a message about the strength of your case or the core issue in your case.

Consider how you look and sound.

Don't try too many. You'll hurt yourself.

3. Identify (Bird Dog) The Lions

Focus on identifying the Lions on the jury and only use your peremptory challenges on them.

"The right of peremptory challenge is not of itself a right to select, but a **right** to **reject** jurors, and no one defendant can complain of challenges by a co-defendant."

State v. Cazeau, 8 La.Ann 109 (La. 1853) (citations omitted)(bold original).

1. Learn More About Their Profession

The Big Four

1. Teachers
2. Preachers
3. Doctors
4. Lawyers

1. Learn More About Their Profession
2. Learn More About Their Spouse

Find The Lions

EDITION US

THE HUFFINGTON POST

NEWS | POLITICS | ENTERTAINMENT | LIFESTYLE | IMPACT | VOICES | VIDEO | ALL SECTI

THE BLOG 01/31/2013 07:57 am ET | Updated Apr 02, 2013

'Opposites Attract' Or 'Birds Of A Feather' — What's Best For A Long Marriage?

By Karl A. Pillemer, Ph.D.

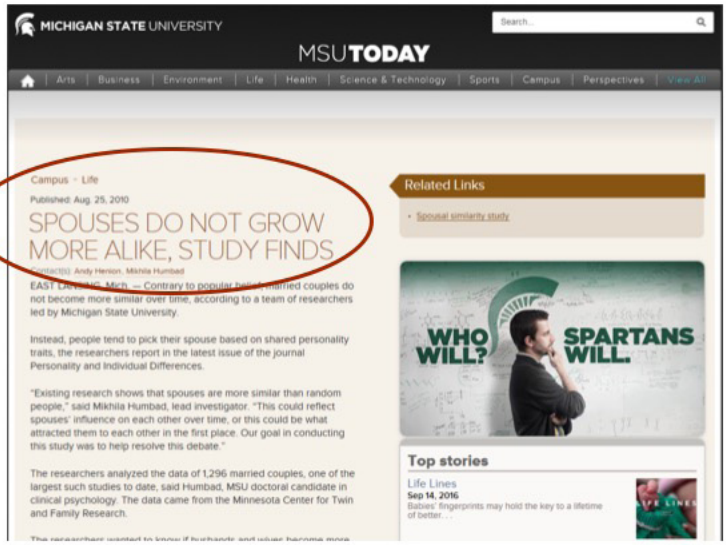
I've spent time over the past year talking with young people about their hopes for marriage. And the question that comes up more than any other is: "How do I know if the person is the right one for me?" Is there a way to tell if someone is likely to be a compatible long-term mate, or a difficult and contentious partner?

Sounds complicated, right? But in our interviews with hundreds of long-married couples about what works and what doesn't for a long and satisfying relationship, one simple and straightforward answer emerged again and again. It turns out that our elders believe there's something close to a "magic bullet" when it comes to deciding in a relationship: "Should I stay or should I go?" And it all comes down to *similarity*.

But first, let's take a look at conventional wisdom. Popular opinion tells us that opposites attract. Look at Romeo and Juliet coming from two perpetually feuding families. Or Tony and Maria in "West Side Story," one Polish-American, the other Puerto Rican, and as different as they are they can't resist one another. We believe that such different types are

SUBSCRIBE TO &
FOLLOW SO YOU
TO RAISE A FEMI

Find The Lions



MICHIGAN STATE UNIVERSITY

MSUTODAY

Arts | Business | Environment | Life | Health | Science & Technology | Sports | Campus | Perspectives | View All

Campus • Life

Published: Aug. 25, 2010

SPOUSES DO NOT GROW MORE ALIKE, STUDY FINDS

Contact(s): Andy Henion, Mikhila Humbad

EAST LANSING, Mich. — Contrary to popular belief, married couples do not become more similar over time, according to a team of researchers led by Michigan State University.

Instead, people tend to pick their spouse based on shared personality traits, the researchers report in the latest issue of the journal Personality and Individual Differences.

"Existing research shows that spouses are more similar than random people," said Mikhila Humbad, lead investigator. "This could reflect spouses' influence on each other over time, or this could be what attracted them to each other in the first place. Our goal in conducting this study was to help resolve this debate."

The researchers analyzed the data of 1,296 married couples, one of the largest such studies to date, said Humbad, MSU doctoral candidate in clinical psychology. The data came from the Minnesota Center for Twin and Family Research.

Related Links

• Spousal similarity study

Top stories

Life Lines
Sep 14, 2016
Babies' fingerprints may hold the key to a lifetime of better . . .

1. Learn More About Their Profession
2. Learn More About Their Spouse
3. Learn More About Millenials

The Big ~~Four~~ Five

1. Teachers
2. Preachers
3. Doctors
4. Lawyers
5. **Millenials**

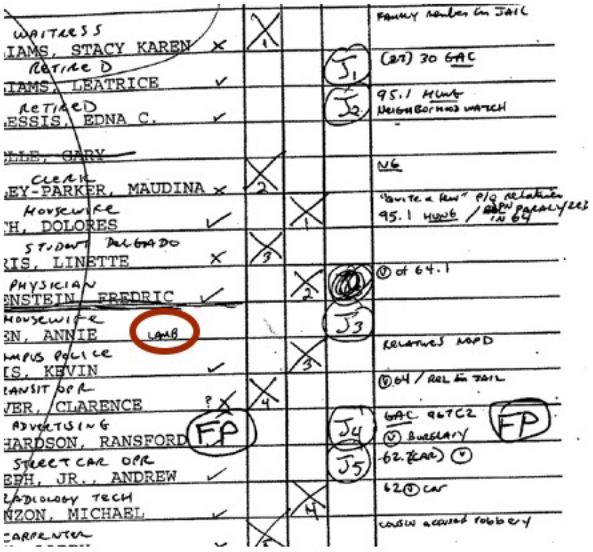
Find The Lions

3. Identify (Bird Dog) The Lions

Focus on identifying the Lions on the jury and only use your peremptory challenges on them.

Don't follow up with Lambs.

Find The Lions



3. Identify (Bird Dog) The Lions

Focus on identifying the Lions on the jury and only use your peremptory challenges on them.

Don't follow up with Lambs.

Avoid rehabilitating Lions.

THE COURT:

The fact that you have familiarity with these types of injuries would that affect your ability to be fair and impartial in this case?

PROSPECTIVE JUROR:

I would have to hear more about the case to be honest.

THE COURT:

You are not going to hear any more in the voir dire because the whole point is just the simple the fact that someone was injured and

The lawyer wants you to believe that the injuries were caused while the other side does not want you to believe the injuries were caused. So you are going to be in this jury trying to treat and diagnose the injury?

PROSPECTIVE JUROR:

I would have to say just the nature of what I hear, yes. I am not sure if I would be as impartial as someone who doesn't have as much medical knowledge.


10-MINUTE
Voir Dire
FLAT ABS
WORKOUT
with John Jerry Glas
(still not pictured here)

John Jerry Glas

Partner
Deutsch Kerrigan (New Orleans, LA)

504.593.0627 | jerry@deutschkerrigan.com
http://www.deutschkerrigan.com/professionals/professional/g/john-jerry-glas

John Jerry Glas is the Vice-Chair of the Civil Litigation Department. He has tried more than 70 jury trials to verdict, and serves as lead national trial counsel for the worldwide leading manufacturer of conducted electrical weapons.

Jerry represents national insurance and excess insurance companies, trucking companies, grocery and restaurant chains, and law enforcement agencies when faced with pending litigation. Over the last 18 year with the Deutsch Kerrigan, Jerry has successfully handled a number of matters involving police liability, product liability, and serious traumatic brain injury and class action lawsuits.

He recently authored "Feeding Lions During Closing Argument," Chapter 19 in the ABA's 2015 peer-reviewed textbook: From The Trenches: Trial Tips From 21 of the Nation's Top Trial Lawyers.

Born and raised in New Orleans, Jerry taught religion at Jesuit High School before attending law school. Jerry joined the firm in 1999 after serving as a Senior Assistant District Attorney for the Parish of Orleans, and enjoys teaching trial practice as an Adjunct Professor at Loyola University College of Law. Jerry is married and has two wonderful daughters.

Practices
- Commercial Transportation
- Appellate Litigation
- Aviation Litigation
- Manufacturer's Liability and Products Liability
- Premises Liability

Industries
- Retail and Restaurant
- Transportation
- Insurance
- Manufacturing

Accolades
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Missouri Lawyers Weekly, Largest Defense Verdicts, 2013
- 2016 "Top Lawyers" list by the New Orleans Magazine
- New Orleans CityBusiness Ones to Watch: Law, 2015, 2017
- Louisiana Super Lawyers List, 2015-2017
- Best Lawyers® in America, Personal Injury Litigation, 2012-2018
- Federal Bar Association's Camille Gravel Public Service Award, 2009
- Louisiana State Bar Association's Pro Bono Publico Award, 2009
- New Orleans CityBusiness "Leadership in Law" list of 2012, 2017

Education
- J.D., Louisiana State University, 1996
- M.A., Philosophy, University of Toronto, 1992
- B.A., Philosophy, College of the Holy Cross, 1991

FAST & FURIOUS: GEARING UP FOR TRO'S AND PRELIMINARY INJUNCTIONS

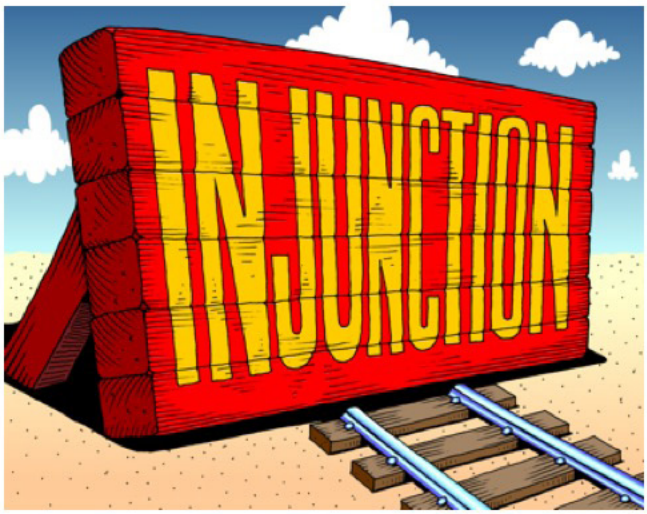
Paige Mills
Bass Berry & Sims (Nashville, TN)
615.742.7770 | pmills@basberry.com

FAST AND FURIOUS

Gearing Up for TRO's and Preliminary Injunctions

Paige W. Mills
Bass, Berry & Sims PLC
Nashville, TN
pmills@bassberry.com (615) 742-7770

BASS BERRY + SIMS



Scope of Injunction /Restraining Order

- Tailor request to specific relief needed; avoid shotgun approach.
- Seek injunction against specific transaction or target which causes harm.

Timing

- Forego T.R.O. unless critical emergency requires immediate relief.
- If emergency exists, file request for T.R.O. and preliminary injunction simultaneously.
- Make timely application for relief; delays in filing or early filing for conjectural harm will undercut irreparable harm argument.

Early Discovery

- Consider whether formal discovery, particularly a deposition, is necessary to support injunction.
- Move for early discovery limited to selected matters.
- Arrange for transcription, summarization and filing of deposition so it will be available to court at hearing.

Informal Discovery

- Careful documentation of case is critical prior to filing for injunction.
- Survey informal discovery sources, i.e., client, client's books and records, former employees of opposing party, public records, credit reports, trade journals, competitors, mutual customers.
- Conduct and document witness interviews early.

Experts

- Certain types of cases are ideally suited to experts, i.e., data misappropriation (engineer); computer piracy (computer software analyst or programmer).
- Consider whether expert testimony will help case and whether opposing experts will undermine case significantly.
- Analytical evidence, i.e., surveys, customer response, opinion polls, product comparisons, software analysis, can be particularly persuasive.

Documentation of Demands

- Send demand letter requesting action from opposing party unless timing and other strategy considerations preclude this course of action
- Document and detail in supporting materials all informal efforts and demands to obtain relief.

The Hearing

- Although cases are often heard on the basis of affidavits and oral argument, live testimony may be appropriate for technical areas, where credibility is the actual issue and where understanding of complex issues is required.
- Live testimony can backfire, particularly where investigation and discovery are at early stages and much is un-known.
- Use demonstrative exhibits in briefs and at hearing.

Meeting the Standards

- Make realistic assessment of chances for success--this is determinative of whether to proceed with injunction or whether to resist injunction and seek settlement.
- Define realistically the irreparable harm to client and possible harm to opposing party and third parties.
- Avoid restating the standards for relief without articulating the specific facts supporting case; articulate the irreparable harm and demonstrate that monetary damages are insufficient (i.e., irreparable harm will result because trade secrets—the products of years and dollars of research—will be disclosed and once disclosed, their value will be lost).

Ways to Establish Irreparable Harm

- Loss of Sales and Market Share
- Immediacy of Harm
- Inability of Defendant to make good on large damages claim
- Likelihood of price erosion or a loss of market share
- Loss of employee jobs, increase of manufacturing costs, damage to plaintiff's reputation as exclusive source of product, damage to customer relationships.

Standards

Majority test:

- (a) likelihood of prevailing on merits
- (b) irreparable injury
- (c) balancing of harm to others
- (d) public interest

Standards (cont.)

Alternate tests:

- (a) probable success and possible irreparable injury; or
- (b) sufficiently serious questions going to merits and balance of hardships tipping decidedly toward movant.

Notice

Temporary restraining order

- Notice generally required unless, (i) irreparable injury would result before adverse party can be heard and, there is certification by attorney of efforts regarding notice and why notice should not be required.

Notice (cont.)

Preliminary injunction

- Notice required in all circumstances.

Form of Pleadings

Brief format and length

- Brief should specify exact relief sought and why movant meets standards.
- Check local rules regarding page limitations.

Supporting documents/affidavits

- Limit attachments to necessary documents.
- Bind and tab exhibits and attachments for ease of reference.
- Tailor size of submission to complexity of case and evidence; every injunction is important but overkill and drowning the court in a sea of paper will not insure success.
- Make specific references in brief to affidavits and exhibits.
- Draft affidavits in format which is compatible with brief.
- Consider having your witnesses ready to appear live in the event that Defendant puts on live testimony. Relying on your moving declarations may not be enough if Defendant puts on sufficient rebuttal evidence.

Hearing

1. Nature of evidence

- Hearing is based on affidavits unless live testimony requested by party and granted by court or requested by court.
- If live testimony requested, specify reasons that case cannot be heard on affidavits; distinguish from other injunction cases.
- Check with clerk regarding format and length of hearing.
- Request/hire reporter if live testimony.
- Evidence from hearing which is admissible at trial becomes part of record and need not be repeated at trial; however, if it is a jury trial, the jury must hear all of the evidence.

Hearing (cont.)

2. Consolidation with trial on merits—Rule 65(a)(2)

- (a) May seek consolidation of injunction hearing and trial.
- (b) Appropriate where substantial part of hearing will be relevant and admissible evidence at trial; duplication avoided.
- (c) Consolidation will expedite final disposition.

Form of Order

1. Temporary restraining order

(a) Without notice—no findings but order must include:

- (i) date/hour of issuance;
- (ii) definition of injury and Why irreparable;
- (iii) explanation of failure to provide notice;
- (iv) expiration date;
- (v) acts to be restrained;
- (vi) amount of bond.

(b) With notice—implied by Rule that findings required in state courts—Rule 52(a)(5)(c).

Form of Order (cont.)

2. Preliminary injunction

(a) Findings and conclusions required.

(b) Order must include:

- (i) reasons for issuance;
- (ii) acts to be restrained (in reasonable detail);
- (iii) specificity in terms.

Limitations on Relief Granted

1. Duration

- (a) T.R.O. without notice (usually 10-14 days).
- (b) T.R.O. expires unless extended for good cause before expiration.
- (c) Adverse party may move for dissolution or modification of T.R.O.
- (d) Preliminary injunction generally lasts until final judgment or until end of agreed period, i.e., expiration of period of noncompetition pursuant to agreement.

Limitations on Relief Granted (cont.)

2. Territorial restrictions

(a) Scope of injunction limited to persons under court's jurisdiction pursuant to concepts of due process and statutes.

(b) Actual notice may be irrelevant if no jurisdiction.

Limitations on Relief Granted (cont.)

3. Notice and scope

(a) Order is binding only upon parties, officers, agents, servants, employees and attorneys plus those in active concert who receive actual notice (personal service or otherwise).

(b) A party can find itself enjoined, even if it has been dismissed or is not a party. (*Cooler Master* case).

Bond

1. Order not effective until bond posted; required except:

- (a) in dissolution cases;
- (b) when movant is state or municipality;
- (c) when movant is federal government;
- (d) when exempted by statute.

Amount of bond

(a) Consider bond amount in initial planning; cost may be prohibitive considering the potential benefit or client's financial position.

(b) Factors considered:

- damages enjoined party will suffer;
- damages enjoined party can recover;
- duration of order;
- hardship to parties;
- bond may be modified to meet unexpected contingencies.

Amount of Bond (cont.)

(c) Treat bond issue in briefs; suggest reasonable amount, not unrealistically low or high.

(d) Be prepared to post bond upon entry of order.

(e) Make advance arrangements with clients, particularly out-of-state clients, to have surety available to execute bond.

Damages for wrongfully issued order.

(a) Damages limited to bond amount.

(b) Action on bond and against surety may be in same proceeding—Rule 65.1.

Bond Issue Can be Critical

- A high bond should cause the plaintiff to seriously consider whether it wants to seek an injunction at all.
- Exposes Plaintiff to fee shifting and other liability it might not otherwise face. Posting a large bond on an early, undeveloped record pay pose undue risk.
- Bonding requirement is often overlooked as a means of protecting the enjoined party that might take the sting out of losing the preliminary injunction motion.

Exoneration of security.

(a) Surety on preliminary injunction should not be exonerated until after final judgment and expiration of appeal period.

What if Injunction is Denied?

- Denial of request for injunction is immediately appealable.
- Standard would generally be abuse of discretion.
- But rather than appeal, consider simply trying the case.

Attorneys' Fees

1. Available for quashing preliminary injunction or at trial for wrongfully issued order.

2. Minority Rule: Available for prevailing party at preliminary injunction hearing.

Ethical Issues

Does the lawyer have a conflict?

- Is the relief you are seeking on behalf of one client problematic for another?
- Celguard, LLC v. LG Chem, Ltd
  - Law firm disqualified for obtaining injunction that was directly adverse to another client

Paige Waldrop Mills

Member
Bass Berry & Sims (NAshville, TN)

615.742.7770 | pmills@bassberry.com
http://www.bassberry.com/professionals/m/mills-paige-waldrop

Paige joined Bass, Berry & Sims in 2001 and was named a Member of the firm in 2005. She concentrates her practice in complex litigation and intellectual property and technology and currently serves as co-chair of the firm's Intellectual Property & Technology Litigation Practice Group. She is a seasoned trial lawyer with more than twenty years of litigation experience. Paige routinely represents clients all over the country in patent, trademark, copyright, trade secret, entertainment, advertising, privacy, Internet and technology disputes. She has successfully prosecuted and defended numerous temporary restraining order and preliminary injunction proceedings in these areas and regularly prosecutes and defends trademark oppositions and cancellations before the U.S. Patent and Trademark Office. Her practice also includes providing business advice and consultation with clients in the identification and protection of their intellectual property, as well as in data security and privacy matters. Paige maintains a personal blog, "IP Law @ Tennessee [and beyond]," related to current IP law topics and relevant court decisions.

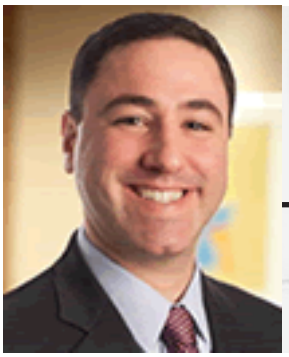
Paige's practice also includes extensive experience in the litigation of commercial and employment disputes as well as tort and insurance matters.

Related Services
- Intellectual Property & Technology
- Intellectual Property Litigation
- Trademarks
- Patents
- Litigation & Dispute Resolution
- Digital Media, Content & Marketing
- Privacy & Data Security

Publications
- Paige Mills Cautions Against Use of Social Media in IP Infringements Cases; July 22, 2016
- Paige Mills Outlines Modest Approach to Enforce IP Rights; May 2, 2016
- Trade Secrets Legislation Sails Through Senate; April 5, 2016
- Mind the (Statutory) Gap: Federal Circuit Confirms No Liability for Joint Infringement of Method Claims; May 15, 2015
- Supreme Court Holds that TTAB Ruling May Bind Federal Court; March 25, 2015
- Paige Mills Authors Article Advocating for "Nicer" Cease and Desist Letters; March 3, 2015

Accolades
- Best Lawyers in America® — Litigation: Intellectual Property; Trademark Law; Copyright Law; Advertising Law; Entertainment Law: Music (2010-2018)
- Nashville Business Journal "Best of the Bar" (2015-2017)
- Managing Intellectual Property's IP Stars — Patent Star (2016-2017)

Education
- University of Tennessee College of Law - J.D., 1993 - cum laude
- University of Tennessee - B.A., 1986 - cum laude



PANEL: WHAT KEEPS IN-HOUSE COUNSEL UP AT NIGHT AND WHAT CAN OUTSIDE COUNSEL DO ABOUT IT?

David Suchar
Maslon (Minneapolis, MN)
612.672.8321 | david.suchar@maslon.com

Compliance

Companies are facing regulatory uncertainty.

- There are consistent changes in federal and state regulations.
- There is growth in number and complexity of regulations, particularly at the federal level.
- There is renewed uncertainty concerning international arrangements (e.g. Brexit, NAFTA).

Companies are facing different regulations across jurisdictions.

- Companies may be subject to different state regulations.
- Companies may be subject to different US and foreign regulations. - Being subject to enforcement in multiple jurisdictions means that companies may also may be penalized multiple times for the same conduct (e.g., enforcement actions related to the Libor scandal).

US regulations govern or impact international operations.

- US regulations which apply to US companies operating in foreign countries (e.g. Foreign Corrupt Practices Act).
- US legislation may force other countries to pass similar legislation for uniformity (e.g., Foreign Account Tax Compliance Act).

Such concerns are even more pronounced in highly-regulated sectors, such as finance and healthcare.

Risk and Crisis Management

Data security and privacy.

- Companies are producing and storing more data, so they need to focus much more energy on securing that data, particularly personal or other protected information.
  - Estimated data production will be approximately 30 times greater in 2020 than it was in 2010.
  - Cybersecurity threats come from a number of places.
  - External threats – hacking/phishing/malware/ransomware.
  - Internal threats – employee action, whether malicious or inadvertent.
  - Breaches via third parties, such as outside vendors.
- Companies need policies and procedures in place.
  - Policies for preventing data breaches.
  - Planned procedures for if (or when) data is compromised.
- There are many potential costs for a data breach.
  - Reputational costs resulting in lost customers/revenue.
  - Enforcement against the company under laws requiring protection for certain information (e.g., HIPAA, HITECH Act, Gramm Leach Bliley Act, Minn. Stat. § 325E.61).

  - Other civil liability – class actions, derivative suits, and shareholders suits.
  - Direct response costs and lost productivity.
- Made more complicated by proliferation of mobile devices and virtual work environments.
- Companies must also generally ensure adequate oversight of third-parties to whom they outsource.

Shareholder activism is on the rise.

International companies must also plan for geopolitical changes (e.g., Brexit, NAFTA, international sanctions, other conflict).

Investigations

DOJ is more focused on individual accountability for corporate wrongdoing, as outlined in the Yates Memo in September 2015.

The government will view company cooperation as a mitigating factor for any misconduct, so companies have an increased incentive to cooperate in investigations. Therefore, the government has increased its dependence on in-house counsel conducting investigations of their own company.
- This increases the risk that in-house counsel may have an adversarial relationship with management or other employees.
- Consider using outside counsel to conduct investigations.

In-house counsel needs to ensure that client and privilege issues are clear while conducting investigations.
- Need to give Upjohn warnings to the company's employees during investigation which make clear (1) that the company controls whether to waive privilege regarding information received, (2) the attorney represents the company, and (3) the company's interests may be adverse to the employee's.
- It may be desirable to have separate counsel for employees to avoid confusion about attorney-client relations and protect privilege.

Litigation management

In-house counsel continue to look for ways to manage and lower costs for electronic discovery while the amount of ESI continues to increase. - More companies have been hiring outside vendors for document processing and review or using computer assisted review.

In-house counsel should ensure documents are managed well generally, and during litigation to avoid spoliation.

Focus areas of litigation:
- Companies are experiencing more labor and employment claims, particular in downsizing or unionized environments.
- There has been an increase in nationally based litigation.
- Protecting intellectual property and defending alleged infringement.

In-house counsel must be sensitive to other impacts litigation has on the company, such as draining employee time, morale, etc.

Cost avoidance

Companies are doing more legal work in-house.

Companies can enter into alternative fee arrangements with outside counsel.

Companies can move some or all of their work to lower cost firms.

Companies can push to get to mediation quickly.

Companies can employ technology to assist with managing information, for example with particular cases (computer assisted review) or deals (using technology for due diligence).

Overall Challenges

There will be tension between legal departments wanting to avoid risks while not preventing the business units from operating.

Legal departments have been forced to do more with less resources.

In-house counsel is often a jack of all trades which gives them many substantive areas and responsibilities to juggle.

PANEL: WHAT KEEPS IN-HOUSE COUNSEL UP AT NIGHT AND WHAT CAN OUTSIDE COUNSEL DO ABOUT IT?

David E. Suchar, Moderator
Maslon LLP

With Discussions By:
Dorothy Capers - National Express
Alfredo Gomez - Guidance Software
Garrett Heenan - UnitedHealth / OptumRx
Scott Hulsey - GE Energy Connections
Daniel Terrell - Stream Energy

MASLON

Overview

- Compliance
- Risk and Crisis Management
- Investigations
- Litigation Management
- Cost Avoidance
- Questions

Compliance

- Changes in regulations within a jurisdiction.
  - Growth in number and complexity of regulations
- Differences in regulations between jurisdictions.
  - Differences between states
  - Differences between United States and other countries
- Changes in international agreements.

Risk and Crisis Management

- Monitoring operational risk.
- Procedures in place for risk and crisis management.
- Important other groups with whom to work in order to prevent and manage risks and crisis.

Data and Cybersecurity

- Companies are producing and storing much more data.
- Increasingly virtual and mobile work environments.
- Data breaches are becoming more common.
  - Equifax, SEC in the last month
- Potential costs
  - Reputational, enforcement actions, civil liability
- Policies for preventing and managing a breach.

Other Risks

- Increased shareholder activism.
- Necessity of overseeing third-parties.
- Geopolitical changes.

Investigations

- Agencies have an increased focus on individual misconduct.
- Companies are increasingly being called on to perform internal investigations.
  - In-house counsel's varied roles in an investigation
- Attorneys need to delineate between acting on behalf of the company and individuals.
  - Company is in-house counsel's client
  - Company controls privilege issues

Litigation Management

- Document and data management.
  - How to manage increased amount of electronically stored information (ESI)
  - Approaches for more efficient processing
- Most important substantive areas of litigation.
  - Employment, intellectual property
- Litigation impacts on the company.

Cost Avoidance

- Methods for reducing costs.
  - Keeping work in-house
  - Alternative fee arrangements
  - Moving work between firms
  - Alternative dispute resolution
    - Early mediation, arbitration
- Role that technology plays in reducing costs.

Overall Challenges

- Risk avoidance v. business needs.
- Resources – how to do more with less.
- How to be the legal jack of all trades within the organization.

QUESTIONS?

David E. Suchar

Partner
Maslon (Minneapolis, MN)

612.672.8321 | david.suchar@maslon.com
http://maslon.com/dsuchar

David Suchar is a partner and serves as chair of Maslon's Construction & Real Estate Litigation Group and co-chair of its Government & Internal Investigations Group. His construction experience includes defect, payment and lien claims as well as all manner of construction-related insurance coverage claims, negotiations, and litigation. As a former federal prosecutor, David has also counseled and represented clients at trial and through all aspects of various government, administrative, and internal investigations, including criminal prosecutions, inquiries, and subpoenas from state and federal agencies.

David has developed a niche practice representing commercial policyholders in insurance coverage disputes, including claims made on commercial general liability, professional liability, pollution, and crime policies. A frequent presenter on construction and insurance coverage issues, David serves as contributing editor of The Construction Lawyer, the flagship publication of the ABA Forum on Construction Law. In addition, he was included on the 2014-2016 Minnesota Rising Stars lists (in Business Litigation and Construction Litigation) as part of the Super Lawyers® multiphase selection process.

David's in-court experience sets him apart from the crowd. He has acted as first-chair trial counsel for a variety of bench and jury trials in courts across the country. In addition to his work in the areas of construction and insurance coverage litigation and government and internal investigations, David has successfully litigated various high-end contract and commercial litigation matters.

Areas of Practice
- Business Litigation
- Construction & Real Estate Litigation
- Government & Internal Investigations
- Insurance Coverage Litigation
- Intellectual Property Litigation

Selected Experience
- Lead counsel for a Fortune 500 international engineering, architecture, and construction firm, obtaining complete summary judgment dismissal of approximately $2 million personal injury lawsuit involving allegations of design negligence. Summary judgment order was not appealed. (Minnesota State Court, Fillmore County, 2015).
- Counsel for top national structural engineering firm for its work on the new Minnesota Vikings Stadium.
- Counsel to a Fortune 500 engineering, construction, and fabrication company, as Plaintiff in multi-district federal lawsuits pursuing insurance coverage and bad faith claims related to a $600 million construction project. Case settled after partial summary judgment victory on key liability issue.

Recognition
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2014-2016 (Minnesota Rising Stars is a designation given to only 2.5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Contributing Editor of the Construction Lawyer, the official journal of the ABA Forum on Construction Law.

Education
- Georgetown University Law Center; J.D., cum laude, 2002
- DePaul University; B.A., with high honor, 1998

DANGEROUS LIAISONS: ETHICAL IMPLICATIONS INHERENT TO FRIENDING YOUR ADVERSARY

Kerri Wright
Porzio Bromberg & Newman (Morristown, NJ)
973.889.4327 | kawright@pbnlaw.com

Social media has become part of the fabric of our society. With over 1.8 billion active users as of January 2017, Facebook alone has become a daily component of life for most Americans and thus a necessary marketing tool for companies. As a result, just as the corporations we represent cannot afford to ignore social media, neither can litigators. However, the ever-changing presence of social media is fraught with ethical pitfalls that may snag the unwary litigator.

Competent Legal Representation Includes Social Media
With every matter and every representation, all litigators must ask themselves whether they have an ethical obligation to understand social media and the legal implications of social media on their case and on their client? Given the popularity and prevalence of social media, the answer is likely going to be yes.

Under American Bar Association Model Rule of Professional Conduct (ABA RPC) 1.1, and equivalent state ethics rules, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." By way of further guidance, Comment [8] provides that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (RPC 1.1, Comment 8)

Several state bar associations have opined that in order to comply with the requirement to maintain "competence" a lawyer must be knowledgeable about social media and its potential impact on his or her clients. The North Carolina Bar Association issued a formal ethics opinion in which it held that "[a] lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently." (N.C. State Bar, 2014 Formal Ethics Op. 5, July 17, 2015) Providing further guidance, the North Carolina Bar concluded that "[I]f the client's postings could be relevant and material to the client's legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments."

As for the implication of Comment [8], lawyers should presume that "relevant technology" includes social media. (Id.; see also N.H. Bar Ass'n Op. 2012-13/05) The New Hampshire Bar Association stated in an opinion that "counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation." (N.H. Bar Ass'n Op. 2012-13/05) Similarly, the New York City Bar has found that a lawyer "can – and should – seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties." (NY City Bar, Formal Ethics Op., 2010-2)

Caution Must Be Exercised When Communicating with Represented Parties and Witnesses
RPC 4.2 prohibits certain communications with represented persons. "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The act of "friending" a represented party is a communication,

even if facilitated digitally through Facebook. However, is it a communication "about the subject of the representation"? The answer to this question largely depends on the motivation of the attorney requesting to "friend" the adverse party. Since one would not likely have an interest in "friending" that adverse party if not for the pending legal matter, the communication would be prohibited.

The San Diego County Bar Association undertook an extensive analysis of this same issue, under both the ABA RPC and the California Rules of Professional Conduct, concluding that a lawyer issuing a "friend" request to an adverse represented party would violate the rules of professional conduct. (S.D. Ethics Committee, Op. 2011-2) San Diego likened this digital request to a real world scenario as follows: "Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently." Clearly, not permitted.

Comment [7] to RPC 4.2 provides "[i]n the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Therefore, this same general rule applies when the communication is with an executive or high-ranking employee of a represented company. (S.D. Ethics Committee, Op. 2011-2)

Presumably, one's adversary would not provide consent for social media communications with his client any more than he would provide consent for his client to be deposed without him being present. Therefore, obtaining consent to search through an adverse parties social media accounts is not likely an available tool.

Publicly available material, even if on social media, is likely fair game under the ethics rules. (Oregon State Bar, Formal Ethics Op., 2013-189, 2005-164) "Accessing the publicly available information on a person's social networking website is not a "communication" prohibited by Oregon RPC 4.2." (Id.) The opinion likened publicly-available social media content to reading a magazine or purchasing a book written by an adversary. The New York State Bar Association, Committee on Professional Ethics, also found that "as long as the lawyer does not 'friend' the other party or direct a third person to do so, accessing the social network pages of [a represented] party will not violate" the various relevant RPCs. See also Kentucky Bar Association, Ethics Op. KBA E-434 (finding publicly available social media sites fair game for access by a lawyer).

When dealing with unrepresented parties, including witnesses, lawyers must continue to take care in their social media interactions. Under RPC 4.1, lawyers are prohibited from knowingly "mak[ing] a false statement of material fact or law to a third person" and from "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." As officers of the court, lawyers are held to a higher standard than the general public when it comes to the communications they undertake on behalf of clients. Several jurisdictions have weighed in on whether it would be unethical for lawyers to create false social media profiles or make somewhat less than truthful statements about who they are and what their intentions are when dealing with witnesses or unrepresented parties on social media. In short, neither of these actions is generally acceptable.

The New York City Bar Association has opined that lawyers or their agents, such as private investigators, would violate the rules of professional conduct if they "resort[ed] to trickery via the internet to gain access to an otherwise secure social networking page. . . ." (NY City Bar, Formal Ethics Op., 2010-2) However, the opinion notes that it would be proper for a lawyer to send a "friend" request (to an unrepresented person) using her real name and profile and that a lawyer doing so would not be obligated to voluntarily disclose the reason for making the request. (Id.) The opinion stresses caution in noting that the "virtual" world is relatively casual and it is much easier to deceive an individual in the "virtual" world than in real life. "The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to 'open the door' to strangers, social networking users often do just that with a click of the mouse." (Id.) (See also New York County Lawyers' Association, Ethics Op. 745 for similar guidance) Oregon and Philadelphia have issued similar opinions, denouncing "trickery" or the use of an "alias" to access non-public social media information. (Oregon State Bar, Formal Ethics Op., 2013-189; Philadelphia Bar Association, Prof. Guid. Committee, Op. 2009-02) The Philadelphia opinion takes this issue and adds another layer -- prohibiting a lawyer from asking another non-lawyer to contact the witness using his or her true identity. In this situation, the opinion makes clear that such contact "omits a highly material fact, namely that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent

on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness." The committee took issue with the fact that this material fact would be withheld from the witness "for the purpose of inducing the witness to allow access," when she may not have done so had she known the true identity of the ultimate inquirer or the purpose for the inquiry. (Id.)

Thus, lawyers must take care when asking others to make contact with a witness, even if that other person will not do anything deceitful.

Caution Must Be Exercised When Advising One's Own Client

The dramatic expansion of social media has led to issues not only with regard to how a lawyer is permitted to use social media as a tool, or "weapon" if you will, but how far a lawyer may go to protect his or her own client from, well, the client itself. Lawyers must be careful that they do not engage in unethical or unlawful behavior when guiding their own clients' social media behaviors and postings. Initially, it should be clear that lawyers are required to advise clients about the legal implications of social media posts or comments. Slightly less clear is the extent to which lawyers may counsel clients to remove previously posted material or comments.

RPC 1.2(d) provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ." Lawyers must, therefore, understand the law on spoliation and obstruction of justice in their respective jurisdictions in order to determine whether deletion of material on a social media site might rise to the level of criminal or fraudulent conduct. RPC 1.2(d) goes on to provide that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Therefore, lawyers should be prepared to discuss social media with their clients. Compliance with this rule will require a careful fact-sensitive inquiry into the nature of the matter for which the client is being represented as well as the specific posts under consideration for removal.

It is not only prudent, but may be ethically required, for a lawyer to counsel a client on how to handle future posts as well as the future security of the client's social media accounts. Counseling a client to increase the security settings on an account generally is permissible. (N.C. State Bar, 2014 Formal Ethics Op. 5, July 17, 2015) Further, it appears permissible for lawyers to go so far as to "pre-screen" or review what a client plans to publish on a social media page (so long as the lawyer does not knowingly direct or facilitate the publishing of false or misleading information). (New York County Lawyers' Association, Ethics Op. 745)

As for what already has been posted by a client when the lawyer is engaged, that will require much more care and attention to the facts of the representation and the applicable law. One should keep in mind, however, that virtually anything could be relevant for impeachment purposes. For example, if a lawyer counsels his client to remove a post at the beginning of litigation, it may become relevant later on if his client testifies dishonestly. There has been an expansion of spoliation cases in the last several years focusing on the deletion of social media postings or the deactivation of social media accounts. See Chapman v. Hiland Operating, LLC, 2014 U.S. Dist. Case No. 1:13-cv-052 (D.N.D. May 29, 2014)(ordering plaintiff to reactivate her Facebook account after she testified during her deposition that she deactivated it at the direction of her attorney); Gatto v. United Air Lines, Inc., 2013 WL 1285285 (D.N.J. Mar. 25, 2013)(granting an adverse inference to defendants after plaintiff deactivated his Facebook account following multiple requests for access during discovery); Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013)(awarding defendant $722,000 in sanctions, with $542,000 coming directly from plaintiff's counsel, as a result of counsel's instruction to his client to "clean up" his Facebook and Myspace accounts, after which the client deleted several photographs, deactivated his account, and lied during his deposition about his actions). According to both the Philadelphia Bar Association Professional Guidance Committee and the New York Bar Association, Social Media Ethics Guidelines, lawyers may instruct a client to delete information that may be damaging, but "but must take appropriate action to preserve the information in the event it should prove to be relevant and discoverable." (Philadelphia Bar Association, Prof. Guid. Committee, Op. 2014-5; NY State Bar Association, Social Media Ethics Guidelines, June 2015).

* * * *

The proliferation of social media for both personal and business purposes has brought these very important ethical issues to the forefront in recent years. Unfortunately, as a result of the complexity and rapidly-changing nature of technology and social media, courts and ethics committees appear to be struggling to keep up. The available guidance is state-specific and seems to change every few years. Therefore, lawyers need to take the time regularly to review and familiarize themselves with the ethics opinions in the jurisdictions in which they practice. Before guiding clients on their social media presence it is imperative that lawyers know not only the ethical parameters for dealing with social media, but also the substantive case law governing a matter, as well as the standards for spoliation that might apply to any deleted material.

PORZIO
BROMBERG&NEWMAN P.C.

DANGEROUS LIAISONS: ETHICAL IMPLICATIONS INHERENT TO FRIENDING

Presented By:

Kerri A. Wright, Esq.

DO I NEED TO CARE ABOUT SOCIAL MEDIA AS A LITIGATOR?

2

ABA Model Rule 1.1 Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

3

Must you understand social media and how your client and adversary may be using it?

YES

If potentially relevant and material to client's legal matter.

5

ABA RPC 1.1, Comment 8

- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .

6

Now that you know you cannot ignore it . . .

7

Hypothetical:
What Can Lacy Do?

- Lacy Litigator represents "Big Pharma" pharmaceutical company in a case brought by Patrick Plaintiff.
- Patrick claims he can no longer surf as a result of taking Big Pharma's drug.
- Patrick is 26 years' old and Lacy knows he is active on social media.

8

If Lacy "Friends" Patrick, does she violate ABA Model Rule 4.2?

9

Model ABA Rule 4.2 Communication With Person Represented By Counsel

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

10

YES

In almost every jurisdiction that has weighed in on this issue.

11

Additional guidance . . .

- High ranking employees of corporation, off limits
- Publicly accessible social media, fair game

12

Hypothetical, *Cont*.

- Patrick's Facebook page is private.
- Lacy knows she cannot "Friend" Patrick.
- Wanda Witness says Patrick has pictures on his Facebook page of him surfing last week.
- He didn't produce them in discovery and denied it during his deposition.
- Wanda doesn't want to get involved.

Can Lacy Create a Profile and "Friend" Wanda?

13

Rule 4.1 Truthfulness In Statements To Others

- In the course of representing a client a lawyer shall not knowingly:
- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

14

Can Lacy Hire An Investigator To Find Facebook Pictures of Patrick?

15

ABA Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

16

ABA Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistance, *Cont'd*

- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

  (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

17

ABA Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistance, *Cont'd*

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

18

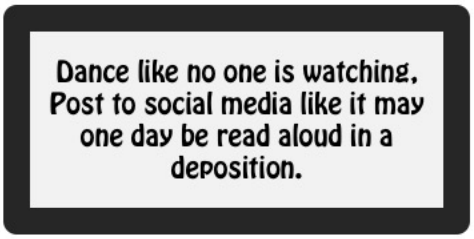
Hypothetical 2.0

- Lacy now represents Daryl Defendant and "Big Pharma" in an employment case.
- Patty Plaintiff accuses Daryl of sexual harassment.
- Daryl has a Facebook account and you learn from Wanda that he posts all sorts of inappropriate comments of a sexual nature on his page.

19

What can and should Lacy do?

- Does she have an ethical obligation pre-suit to give Daryl advice on his postings?
- Does she have an ethical obligation during suit to give Daryl advice on his postings?



20

What can and should Lacy do?

- May Lacy instruct Daryl to "clean up" his Facebook account?
- Does this answer change if it is pre-suit? (At this point, Patty has only filed an internal complaint).

21

What can and should Lacy do?

- May Lacy instruct Daryl to change the security and privacy settings on his Facebook account to the highest level of restricted access?
- Does this answer change Lacy is in litigation?

22

Kerri A. Wright

Principal
Porzio Bromberg & Newman (Morristown, NJ)

973.889.4327 | kawright@pbnlaw.com
http://pbnlaw.com/attorneys/wright-kerri/

Kerri Wright is a principal of Porzio, Bromberg & Newman, P.C. and a member of the firm's Litigation Practice Group, where she co-chairs the Education and Employment Team. She focuses her practice in the areas of education law and employment law, specifically in representation of management in both employment counseling and employment litigation.

Kerri handles a variety of employment law matters for the firm's public and private sector clients in state and federal courts as well as before administrative agencies, including the EEOC and the New Jersey Department of Labor. She has litigation and counseling experience in numerous areas of employment law, including issues involving wage and hour claims, restrictive covenants, harassment, discrimination, and whistleblowing. She has successfully defended management in class-action wage and hour lawsuits and has handled numerous investigations by management into allegations of employee wrongdoing. Kerri has significant experience representing and counseling school boards, charter schools, private schools and colleges in a variety of areas. She is one of only a few experts in the State in the area of reconfiguring school districts, including the creation and dissolution of regional school districts and the creation and termination of sending-receiving relationships.

As an elected member of the Chester Board of Education in Morris County, Kerri is serving in her fourth term. She served several years as the President of the Board, and currently serves as the Chair of the Board's negotiation committee. She has successfully negotiated employment contracts and collective bargaining agreements with each one of the Board's labor groups.

Practice
- Education
- Employment and Labor
- Litigation

Honors and Awards
- Recognized on the New Jersey Super Lawyers List, Education and Employment, 2017
- Recognized in the 2016 edition of New Jersey Law Journal's New Leaders of the Bar
- Recognized in the 2012-2015 editions of New Jersey Super Lawyers "Rising Stars," Employment & Labor
- LeadNJ Graduate, 2014
- International Association of Defense Counsel, Trial Academy, Graduate, 2008

Education
- Emory University School of Law, Atlanta, Georgia, J.D., cum laude, 2005; Emory Law Journal, Articles Editor; Order of the Coif; 2005 State Bar of Georgia Labor and Employment Law Section Award; Dean's Award for Academic Achievement in Employment Discrimination; Dean's Award for Academic Achievement in Torts; Dean's List
- Seton Hall University, Newark, New Jersey, Masters of Public Administration, 2002
- Seton Hall University, South Orange, New Jersey, B.A., magna cum laude, 2001; Dean's List; Member of Pi Sigma Alpha, Political Science Honor Society; Member of Sigma Tau Delta, English Honor Society

DEVELOP COMPELLING, STRATEGIC AND CREDIBLE THEMES THROUGH DISCOVERY RESPONSES

Kevin Clark
Lightfoot Franklin & White (Birmingham, AL)
205.581.5808 | kclark@lightfootlaw.com

Judges hate discovery disputes. All litigators have heard that mantra so much that it is indelibly imprinted on our subconscious. While this observation undoubtedly holds true most of the time, some lawyers extrapolate from this dynamic that hearings on discovery disputes are nothing more than terrible ordeals to be endured with as little collateral damage as possible. Too many defense attorneys preparing for a hearing on a motion to compel focus their efforts on playing defense by memorizing well-worn clichés, phrases, and doctrines that seemingly constitute the defense lawyer's Bible for fending off discovery motions. However, the savvy litigator looks beyond the immediate needs of defending her client against the opposition's fishing expedition and burdensome requests to take advantage of an opportunity to educate the court on the major themes and key legal issues that will be critical to the ultimate resolution of the lawsuit. We need to be careful that we are not so focused on winning the battle that we lose the war.

That is not to say that a litigator should assume defeat in the battle over the particulars of an adversary's discovery requests. Rather, I have found in my own practice that educating the judge about my clients' themes and key legal issues provides much needed context for my discovery objections and thereby enhances the court's reception of those objections. I have had so much success with this approach that I often welcome discovery disputes, not as evidence that I am unable to work effectively with my adversary and resolve problems, but as a valuable opportunity to be the first advocate to start framing my case in the mind of the judge. I hope that my success in this arena will encourage others to revisit how they approach discovery disputes and their efforts to resolve those disputes. If we are strategic, analytical, and proactive in those disputes from the very outset, we may end up laying favorable groundwork for some critical rulings on future motions.

Success in defending your client's discovery responses begins with determining the essence of your case from its outset. Once we determine the key themes of our client's defense, those themes should govern our every action in the life cycle of the case, including discovery. Some attorneys get so caught up in the analysis of what legal objections are available to them in the abstract that they forget to ask the all-important question – why? We should not object to discovery requests simply because we can. Rather, whether to object at all and how to do so should be governed by the themes we have developed and consciously strengthen throughout the life cycle of the case. It does not help our clients to assert objections that fail to advance their ultimate cause, are likely to draw the opposition's fire, and will require the use of precious capital with the court. Moreover, fighting for the sake of fighting is expensive and will not win us any points with our increasingly cost-conscious clients.

We begin our efforts to identify our client's key themes with a careful review of the complaint. At the risk of eliciting painful memories of law school, I encourage my fellow litigators to be adept at issue-spotting as we review the plaintiff's allegations – a task often made all the more difficult by the lack of clarity in those allegations. Sometimes you will discover a legal issue that is of such importance to the client that it may become the driving force behind your approach to discovery, motion practice, and even the trial.

Another aspect of developing sound themes early in our cases is to obtain the client's relevant documents. Most of my clients voluntarily undertake the search and recovery of such documents shortly after they have been served with the complaint. However, good lawyers proactively request

those documents as soon as they become aware of the case. We cannot develop accurate, effective, and enduring themes if we do not know what it is in our clients' documents. We also need to start interviewing fact witnesses as early as possible to develop the themes and legal issues that will govern our approach to discovery. Good litigators understand the importance of developing the company's story through the mouths of those who will take the stand when the case goes to trial. Not only is it important to elicit relevant factual input from these witnesses, but we also need to evaluate how credible these witnesses will testify during a deposition and at trial. Although some clients can be resistant to spending the money necessary to conduct a thorough factual examination so early in the life of the case, we need to remind such clients that an ounce of prevention is worth a pound of cure.

The effective handling of discovery requests also requires that we know the relevant rules of the game. Answering discovery in most law firms is often a very efficient exercise. A young associate is tasked with finding some relevant exemplars so that he can import our firm's typical objections, defenses, and limitations into the responses for the case at hand. While this process is normal and usually inures to the benefit of our clients, there are some inherent risks that need to be managed. One of those risks is the potential to assert outdated and obsolete objections when the ground shifts beneath our feet. We recently experienced such shifting when the Federal Rules of Civil Procedure were amended in 2015. As noted by some courts, it is obvious that some lawyers have not adapted their approach to responding to discovery to these changes in the Rules.

One of those changes was to Rule 26(b)(1) of the Federal Rules of Civil Procedure. Under the new F.R.C.P. 26(b)(1), the touchstones for the proper scope of discovery are relevance and proportionality. Rule 26(b)(1) even goes so far as to specify the relevant factors to consider in assessing proportionality, such as the importance of the issues at stake, the amount in controversy, and the parties' relative access to relevant information. Gone are the days when it was appropriate to note that discovery is objectionable because it is not reasonably calculated to lead to the discovery of admissible evidence. Now, the questions are whether the discovery requests are relevant and proportional to the needs of the case.

Although we should ask our clients for all potentially relevant documents at the outset of our cases, we almost always need to revisit those requests after receiving the plaintiff's discovery requests. That is because plaintiff's attorneys often have a more expansive definition of relevance than we do in the context of discovery. When that happens, we tend to carefully scrutinize those requests, identify all available objections and limitations to the scope of those requests, and then ask our clients for the information and materials needed to respond to the requests, as narrowed by our own analysis of what the plaintiff is entitled to obtain. While that is a good practice to mitigate the dismay that some clients feel upon reviewing an overreaching and burdensome set of discovery requests, I want to encourage lawyers not to limit their client inquiries to the narrowed universe of materials we have deemed unobjectionable. I offer that encouragement because I have found that it is always helpful to know the entire universe of potentially responsible materials in my client's possession to help me formulate fallback positions when necessary. For example, if you take an aggressive position on the scope of a discovery request and find yourself on the losing end of that argument during a future hearing on the plaintiff's motion to compel, it will help you to develop effective fallback positions in real time if you know what the plaintiff can obtain if he wins the full breadth of his original request. Of course, your client inquiries also should include requests for information on how difficult it will be for the client to access those additional documents.

Another piece of advice I offer in navigating the straits of discovery disputes is to always contextualize your objections. As I noted earlier in this article, the strength of our clients' objections is enhanced when the presiding judge understands the essence of our cases and what is needed to resolve the disputes at the heart of those cases. Accordingly, when I draft a response to a motion to compel, I almost always include a short narrative paragraph that explains the major themes and, if applicable, the key legal issues of the case. Before the judge wades into the particulars of my client's objections to the plaintiff's discovery requests, I want her to understand how my client views this case and how the asserted objections flow naturally out of that view of the case.

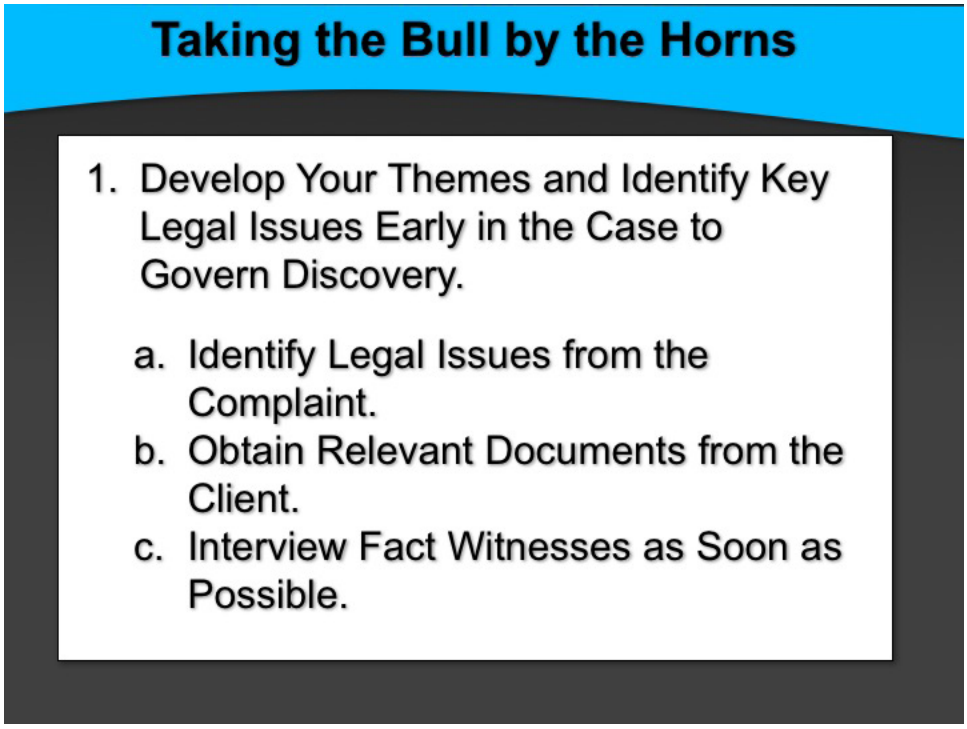
The same advice holds true for hearings on discovery disputes. I always go to such hearings with a succinct, punchy description of the case slanted in my client's favor. Whether or not I get the opportunity to speak first, I take the time to educate or remind the judge what the case is about before I move on to the details of why certain requests are objectionable under the relevant law. The judge needs to know the case's big picture to evaluate why your client is fighting so vigorously against the plaintiff's discovery requests.

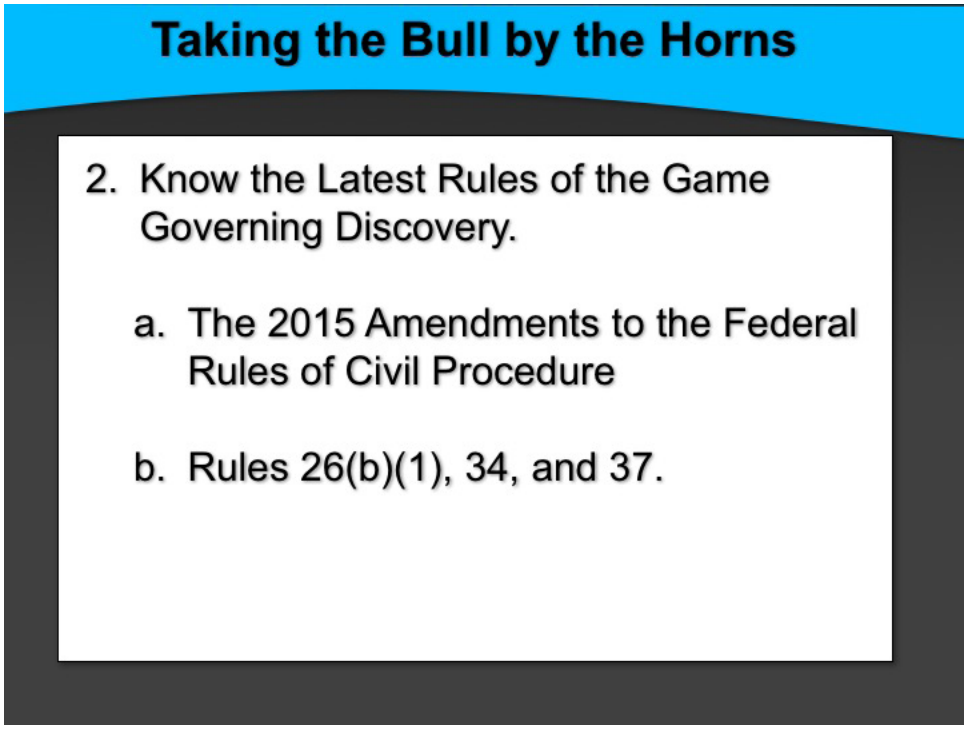
This process of educating the judge on the big picture requires repetition as well. Litigators need to repeat their key themes and legal issues not only during a particular hearing, but every time we are before the judge for that particular case. I recall defending an insurance company in a breach of contract and fraud action filed in state court. My client's primary legal defense was admittedly a little unusual and complicated. Accordingly, every time I appeared before

the judge, including some hearings on discovery disputes, I would begin my arguments with a brief explanation of that legal theory and its importance in evaluating the propriety of discovery. When my client filed a summary judgment motion based on that legal theory and that motion was heard by the court, I remember the judge noting that he was finally starting to warm up to the theory after having heard me present it every time I appeared in court. That simple acknowledgment of my client's argument ultimately led plaintiff's counsel to settle the case on terms very favorable to my client. That development underscored the importance of repetition in educating judges on my clients' key themes and legal issues.

Finally, compelling advocacy through discovery requires litigators to make the most of their time before the Court for discovery disputes or any other purpose. To do so, one of the habits I have developed is to prepare visual aids to summarize my legal arguments for the Court. Through trial and error, I have learned that such visual aids catch the judge's eye and can help him concentrate on the legal argument as it is being made. Furthermore, judges often reserve their rulings on discovery disputes until a later time. Accordingly, even if you feel confident that you won the day with your brilliant oral argument, the memory of that brilliance may have faded by the time the judge gets around to ruling on the dispute. If you have left the judge with a short, powerful summary of your argument, he may reference that visual aid and be reminded of his leanings in your favor during the oral argument.

While it is true that judges generally hate discovery disputes and expect good lawyers to broker acceptable compromises among themselves during discovery, resist the temptation to concede an inevitable loss when you get crosswise with your adversary over the proper scope of discovery. Rather, after having carefully investigated the case and developed your clients' themes, use those themes to educate the court and lay the groundwork to win the war. Even if you lose some ground in individual discovery battles, that educational process is time well spent if you can convince the judge of the overall reasonableness of your client's key themes and legal issues.


Taking the Bull by the Horns
1. Develop Your Themes and Identify Key Legal Issues Early in the Case to Govern Discovery.
a. Identify Legal Issues from the Complaint.
b. Obtain Relevant Documents from the Client.
c. Interview Fact Witnesses as Soon as Possible.


Taking the Bull by the Horns
2. Know the Latest Rules of the Game Governing Discovery.
a. The 2015 Amendments to the Federal Rules of Civil Procedure
b. Rules 26(b)(1), 34, and 37.

Rule 26(b)(1)

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is **relevant** to any party's claim or defense and **proportional** to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Relevance and Proportionality

In re: Bard IVC Filters Products Liability Litigation, 317 F.R.D. 562 (D. Arizona 2016).

1. The intended scope of discovery never was "if it appears reasonably calculated to lead to the discovery of admissible evidence."
2. "Relevancy alone is no longer sufficient – discovery must also be proportional to the needs of the case."

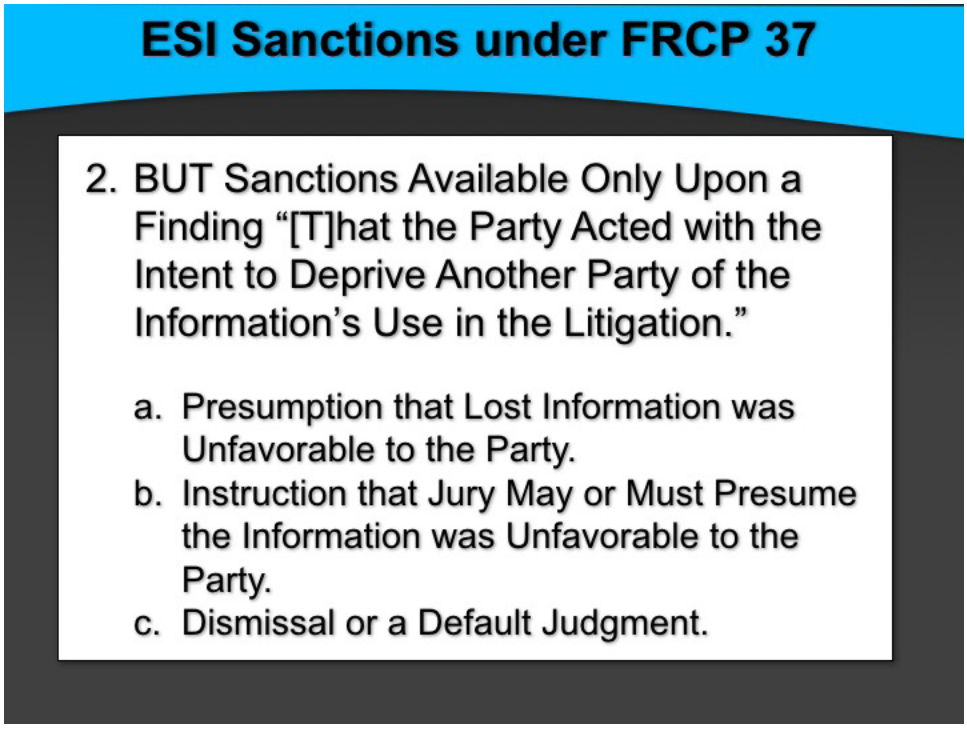
FRCP 34

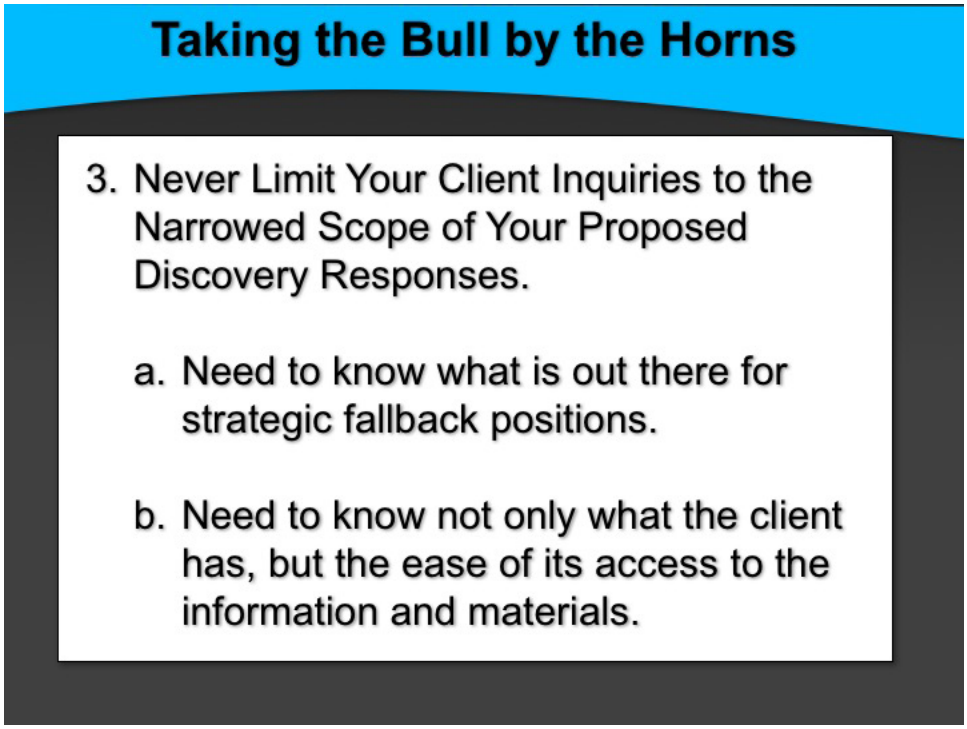
Fischer v. Forrest, 2017 WL 773694
(S.D.N.Y. February 28, 2017)

1. No More Open-Ended Promises to Produce Documents.
2. Objections Must be Stated with Specificity.
3. Objections Must State Whether Anything is Being Withheld Based on those Objections.

ESI Sanctions under FRCP 37

1. The Court May Order Curative Measures Where ESI "[T]hat Should Have Been Preserved in the Anticipation or Conduct of Litigation is Lost Because a Party Failed to Take Reasonable Steps to Preserve It and It Cannot be Restored or Replaced through Additional Discovery."


ESI Sanctions under FRCP 37
2. BUT Sanctions Available Only Upon a Finding "[T]hat the Party Acted with the Intent to Deprive Another Party of the Information's Use in the Litigation."
a. Presumption that Lost Information was Unfavorable to the Party.
b. Instruction that Jury May or Must Presume the Information was Unfavorable to the Party.
c. Dismissal or a Default Judgment.

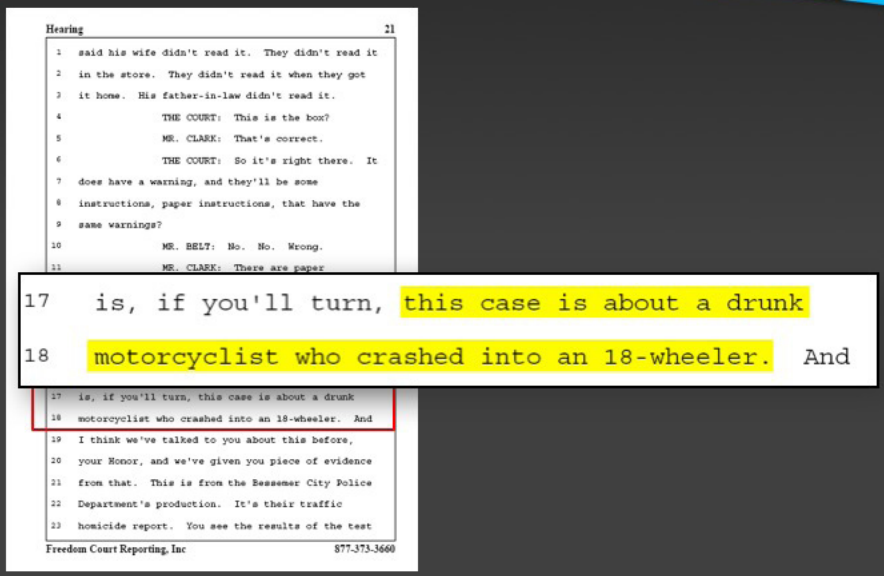

Taking the Bull by the Horns
3. Never Limit Your Client Inquiries to the Narrowed Scope of Your Proposed Discovery Responses.
a. Need to know what is out there for strategic fallback positions.
b. Need to know not only what the client has, but the ease of its access to the information and materials.

Taking the Bull by the Horns

4. Contextualize Your Discovery Objections in Disputes.

   a. Consider Including a Short Introductory Paragraph Highlighting Your Client's Themes in Your MTC Briefing.
   b. Develop a Succinct, Powerful Description of Your Case that Inures to Your Benefit.

Taking the Bull by the Horns



Hearing 21

said his wife didn't read it. They didn't read it in the store. They didn't read it when they got it home. His father-in-law didn't read it.

THE COURT: This is the box?

MR. CLARK: That's correct.

THE COURT: So it's right there. It does have a warning, and they'll be some instructions, paper instructions, that have the same warnings?

MR. BELT: No. No. Wrong.

MR. CLARK: There are paper

17 is, if you'll turn, this case is about a drunk

18 motorcyclist who crashed into an 18-wheeler. And

19 I think we've talked to you about this before,

20 your Honor, and we've given you piece of evidence

21 from that. This is from the Bessemer City Police

22 Department's production. It's their traffic

23 homicide report. You see the results of the test

Freedom Court Reporting, Inc 877-373-3660

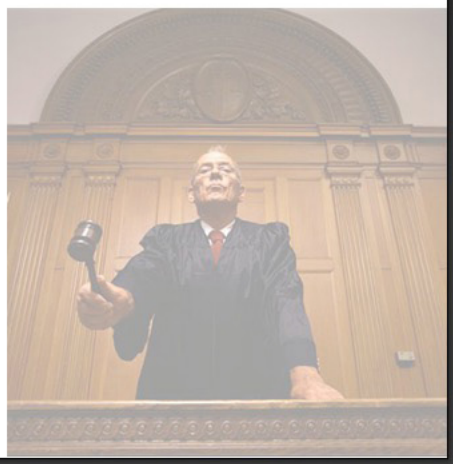
Taking the Bull by the Horns

4. Contextualize Your Discovery Objections in Disputes.

   a. Consider Including a Short Introductory Paragraph Highlighting Your Client's Themes in Your MTC Briefing.
   b. Develop a Succinct, Powerful Description of Your Case that Inures to Your Benefit.
   c. Repetition of Your Themes and Key Legal Issues is Critical to Framing the Case the Way You Want the Judge to See It.

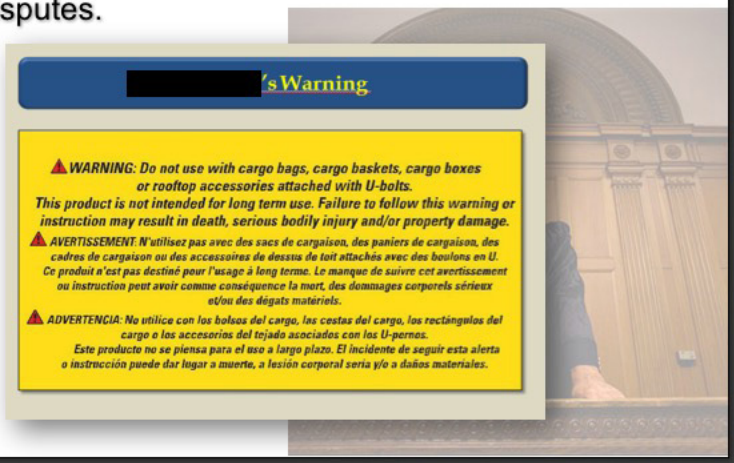
Taking the Bull by the Horns

5. Use Visual or Audio Aids in Hearings on Discovery Disputes.



Taking the Bull by the Horns

5. Use Visual or Audio Aids in Hearings on Discovery Disputes.

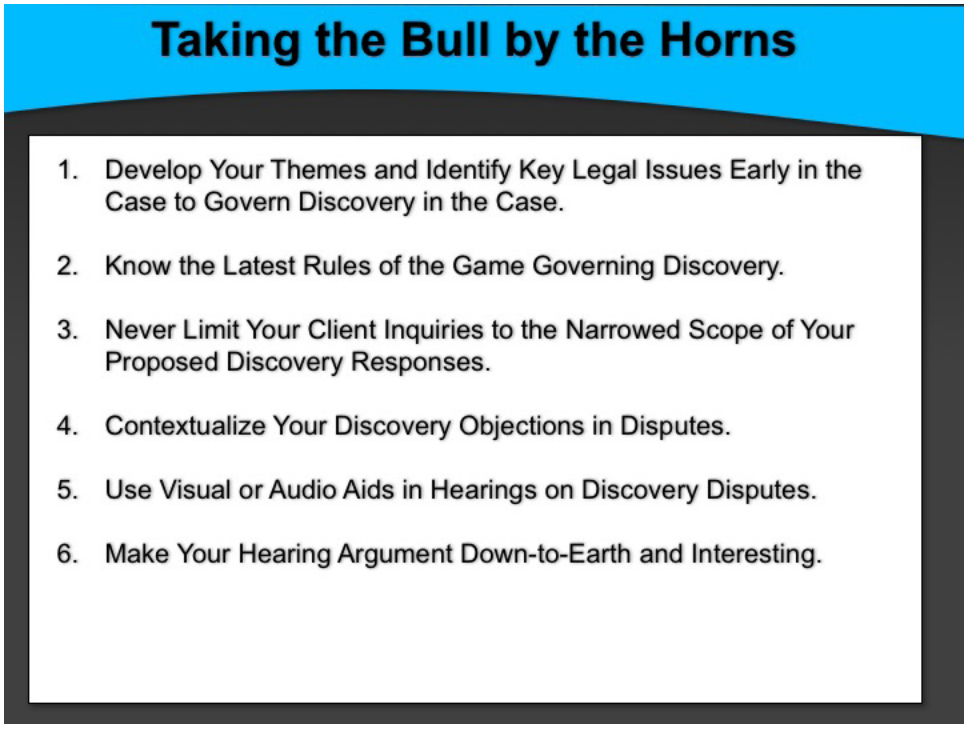


Taking the Bull by the Horns

6. Make Your Hearing Argument Down-to-Earth and Interesting.

   a. My Barbershop Test.

   b. Unleash the Power of Memorable Storytelling.


Taking the Bull by the Horns
1. Develop Your Themes and Identify Key Legal Issues Early in the Case to Govern Discovery in the Case.
2. Know the Latest Rules of the Game Governing Discovery.
3. Never Limit Your Client Inquiries to the Narrowed Scope of Your Proposed Discovery Responses.
4. Contextualize Your Discovery Objections in Disputes.
5. Use Visual or Audio Aids in Hearings on Discovery Disputes.
6. Make Your Hearing Argument Down-to-Earth and Interesting.

Kevin E. Clark

Partner
Lightfoot Franklin & White (Birmingham, AL)

205.581.5808 | kclark@lightfootlaw.com
http://www.lightfootlaw.com/attorney/kevin-e-clark/

Kevin Clark is a partner in the firm. In 1998-1999, he clerked for the Honorable Bernice B. Donald, United States District Judge for the Western District of Tennessee. His practice consists of general civil defense litigation, with an emphasis on toxic torts, product liability, employment discrimination and consumer fraud, including the defense of class action lawsuits. He regularly appears before state and federal courts in Alabama and has tried several jury cases.

Kevin has spoken at several legal seminars, including the DRI Toxic Torts & Environmental Law Seminar, the DRI Employment Law Seminar, DRI's Best Practices for Law Firm Profitability Seminar and DRI's first annual Diversity for Success Seminar. Kevin also is a member of the American Bar Association, the National Bar Association, the Alabama Defense Lawyers Association, the Alabama Lawyers Association and the Magic City Bar Association. He was appointed to the Birmingham Bar Association's 2007 Task Force on Diversity Initiatives and served on the Alabama State Bar Diversity in the Profession Committee. Kevin is a Fellow in the Litigation Counsel of America, the American Bar Foundation and the Alabama Law Foundation. He is recognized for product liability defense in the 2013, 2014, 2015 and 2016 editions of Alabama Super Lawyers and was selected as a Rising Star in the publication's 2010 and 2012 editions.

In addition to these law-related activities, Kevin served on the University of Tennessee Alumni Association's Board of Governors from 2004-2010. He was elected to serve as Treasurer for the University of Tennessee Alumni Association ("UTAA") for the 2006-07 fiscal year. He served on the Executive Committee for the UTAA and the UTAA Strategic Planning Steering Committee.

Kevin is a proud husband and father of three, including a set of fraternal twins.

Practice Areas
- Product Liability
- Catastrophic Injury
- Environmental and Toxic Torts
- Employment Law
- Professional Liability Litigation
- Consumer Fraud and Bad Faith
- Business Litigation
- Appellate
- Class Actions

Presentations and Publications
- Diversity: More Than A Program Or An Initiative, But A Way Of Doing Business

Education
- B.S., University of Tennessee, 1995 summa cum laude
- J.D., Vanderbilt University Law School, 1998

NAVIGATING THE ROUGH WATERS OF CALIFORNIA PRODUCTS REGULATIONS

Sandra Edwards
Farella Braun + Martel (San Francisco, CA)
415.954.4428 | sedwards@fbm.com

Big Picture: Product Liability in California

California applies its strict product liability laws to all products put into the stream of commerce and sold to the public, and those laws govern a wide array of products. In California, unlike some states, a plaintiff need not prove the product was unreasonably dangerous or that the defect was hidden or concealed. Simply put, a manufacturer, distributor or retailer is liable in tort if a defect in the manufacture or design of the product causes injury while the product is being used in a reasonably foreseeable way. Liability for injuries resulting from those products extends to all parties in the "stream of commerce," which includes companies involved in the design, manufacture, production, distribution, and sales of those products.

Most plaintiffs tend to allege, at a minimum, theories of strict product liability, negligence, and/or breach of warranty as a basis for liability. All three theories may be pled in the alternative. This article focuses more narrowly on the theory of strict product liability under California law, for which there are three avenues of pleading and recovery. Namely, that the plaintiff was harmed by a product distributed/manufactured/sold by the defendant that: (1) contained a manufacturing defect, (2) was defectively designed; and/or (3) did not include sufficient warnings of potential safety hazards. Although the plaintiff must establish that the product was defective at the time it was sold, liability can be imposed when the defendant should have foreseen the post-sale alteration and could have designed the product to prevent – or diminish the risk of – that alteration. Strict product liability may be invoked by consumers and users of the product, but also by anyone to whom an injury from the defect is "reasonably foreseeable." Strict product liability actions may encompass both latent and patent defects.

a. Manufacturing Defect

A plaintiff proves the existence of a manufacturing defect by establishing all of the following:

- that the defendant manufactured, distributed, or sold the product;
- the product contained a manufacturing defect when it left the defendant's possession;
- the plaintiff was injured; and
- the product was a substantial factor in causing the plaintiff's injury.

In broad strokes, a product contains a manufacturing defect when it differs from the manufacturer's intended result, or from other ostensibly identical units of the same product line.

b. Design Defect

A product is defectively designed when it is built to its intended specifications, but the design itself is inherently defective, which renders the product unsafe and causes some harm or injury. A plaintiff may prove his or her injury was the result of a design defect through evidence that a different design would have prevented the injury. In California, two tests govern: the consumer expectations test and the risk-benefits test, either of which may be used. Under the consumer expectations test, the plaintiff must prove that the design was defective because the product did not perform as safely as an ordinary consumer would have expected it to when used, or misused, in an intended or reasonably foreseeable way, and that resulted in plaintiff's injury. A consumer expectations instruction may be given even if the mechanism by which the injury resulted requires

expert testimony. Unlike the risk-benefit test, "state of the art" medical and scientific knowledge at the time the product was manufactured is not factored into determining whether a product failed to meet this test.

The risk-benefit test requires the plaintiff to prove that the design of a product was a substantial factor in causing the harm/injury; the defendant then has the opportunity to prove that the intended benefits of the designed product outweigh its risks. A number of factors are considered in making this determination, including: the likelihood the harm would occur; the feasibility of an alternative safer design; the cost of an alternative safer design; and the disadvantages of that alternative design.

It is worth noting that a product may be defective even if its design does not deviate from the industry norm, and compliance with a government safety standard does not automatically preclude liability.

c. Failure to Warn

The final potential avenue for recovery under California strict product liability laws is the failure to warn doctrine. Under this theory, the plaintiff must prove that the product had potential risks or side effects that were known or knowable in light of general industry knowledge at the time of manufacture, distribution, and/or sale; that ordinary consumers would not have recognized those potential risks or side effects; that the defendant failed to adequately warn or instruct of those potential risks; and that the failure to properly warn was a substantial factor in causing the harm or injury.

Failure to warn claims can be based on allegations of inadequacy of the warning, or on the absence of a warning. Adequacy of the warning is evaluated in light of the existing knowledge at the time the product was manufactured, and is ordinarily a question of fact. When the sole claim is failure to warn, the defendant is entitled to present evidence of the "state of the art," that is, the particular risk was neither known nor capable of being known by the application of scientific knowledge at the time of manufacture or distribution.

d. Some California Nuances

There are many defenses that are more uniquely alleged in California. Some interesting defenses include the component parts doctrine, which provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated, unless the component itself was defective and substantially contributed to or caused the harm. Second, depending on the type of product at issue, there may be a number of exceptions and/or defenses that apply, such as the learned intermediary doctrine for pharmaceutical and medical devices. For failure to warn claims, a "sophisticated user" defense may also be available.

Now, What is California's Proposition 65 About?

In 1986, California voters approved an initiative known as the Safe Drinking Water and Toxic Enforcement Act of 1986, better known by its original name of Proposition 65. Proposition 65 requires the State to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm. This list, which must be updated at least once a year, has grown to include approximately 900 chemicals since it was first published in 1987.

Proposition 65 requires businesses to notify Californians about certain chemicals in the products they purchase, in their homes or workplaces, or that are released into the environment. Proposition 65 also prohibits California businesses from knowingly discharging significant amounts of listed chemicals into sources of drinking water. Proposition 65 regulates three exposure pathways to a Proposition 65-listed substance: (1) consumer product exposure, (2) occupational exposure, and (3) environmental exposure. Each exposure pathway varies from the others, and each triggers different warning obligations. It is therefore critical that a company subject to Proposition 65 identify which of these exposure pathways could apply.

Proposition 65, codified at California Health and Safety Code ("HSC") § 25249.6, states the following:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a substance known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual.

The Office of Environmental Health Hazard Assessment (OEHHA) administers the Proposition 65 program. OEHHA, which is part of the California Environmental Protection Agency (Cal/EPA), also evaluates all currently available scientific information on substances considered for placement on the Proposition 65 list.

Enforcement of Proposition 65 is by the California Attorney General's Office, by a local district attorney or city attorney (for cities with a population in excess of 750,000) or, most commonly, by private citizens or organizations bringing citizen suit claims for alleged violations. HSC § 25249.7. If found to be in violation, the statute provides for a civil penalty of up to $2,500 per day for each violation. Id. at § 25249.7(b). In determining the penalty amount, the court is required to consider the nature and extent of the violation, the number and severity of the violations, the economic effect of the penalty to the violator, whether the violator took good faith corrective measures, the willfulness of the misconduct, the

deterrent effect of the penalty, and any other factor justice may require. Id. In practice, this can significantly vary the assessed penalty.

a. What types of chemicals are on the Proposition 65 list?

The list contains a wide range of naturally occurring and synthetic chemicals that are alleged to cause cancer or birth defects or other reproductive harm. These chemicals include additives or ingredients in pesticides, common household products, food, drugs, dyes, or solvents. We often see private enforcer actions around lead, cadmium, DEHP and other phthalates, and BPA.

b. What requirements does Proposition 65 place on companies doing business in California?

Businesses are required to provide a "clear and reasonable" warning before knowingly and intentionally exposing anyone to a Listed chemical. This warning can be given by a variety of specified means, such as by labeling a consumer product, posting signs at the workplace, distributing notices at a rental housing complex, or publishing notices in a newspaper. Once a chemical is listed by OEHHA, businesses have 12 months to comply with warning requirements.

Proposition 65 also prohibits companies that do business within California from knowingly discharging listed chemicals into sources of drinking water. Once a chemical is listed, businesses have 20 months to comply with the discharge prohibition.

Businesses with fewer than 10 employees and government agencies are exempt from Proposition 65's warning requirements and prohibition on discharges into drinking water sources. Businesses are also exempt from the warning requirement and discharge prohibition if the exposures they cause are so low as to create no significant risk of cancer or birth defects or other reproductive harm.

c. What does a warning mean?

If a warning is placed on a product label or posted or distributed at the workplace, a business, or in rental housing, the business issuing the warning is aware or believes that one or more listed chemicals is present. By law, a warning must be given for listed chemicals unless exposure is low enough to pose no significant risk of cancer or is significantly below levels observed to cause birth defects or other reproductive harm.

For chemicals that are listed as a carcinogen, the "no significant risk level" is defined as the level of exposure that would result in not more than one excess case of cancer in 100,000 individuals exposed to the chemical over a 70-year lifetime. In other words, a person exposed to the chemical at the "no significant risk level" for 70 years would not have more than a "one in 100,000" chance of developing cancer as a result of that exposure.

For chemicals that are listed as causing birth defects or reproductive harm, the "no observable effect level" is determined by identifying the level of exposure that has been shown not to pose any harm to humans or laboratory animals. Proposition 65 then requires this "no observable effect level" to be divided by 1,000 in order to provide an ample margin of safety. Businesses subject to Proposition 65 are required to provide a warning if they cause exposures to chemicals listed as causing birth defects or reproductive harm that exceed 1/1000th of the "no observable effect level."

OEHHA develops "safe harbor numbers" for determining whether a warning is necessary or whether discharges of a chemical into drinking water sources are prohibited. According to OEHHA's website, a business may choose to provide a warning simply based on its knowledge, or assumption, about the presence of a listed chemical without attempting to evaluate the levels of exposure.

d. What are safe harbor numbers?

A business has "safe harbor" from Proposition 65 warning requirements or discharge prohibitions if exposure to a chemical occurs at or below these levels. These safe harbor levels consist of No Significant Risk Levels for chemicals listed as causing cancer and Maximum Allowable Dose Levels for chemicals listed as causing birth defects or other reproductive harm. OEHHA has established over 300 safe harbor levels to date and continues to develop more levels for listed chemicals.

e. What if there is no safe harbor level?

If there is no safe harbor level for a chemical, businesses that expose individuals to that chemical would be required to provide a Proposition 65 warning, unless the business can show that the anticipated exposure level will not pose a significant risk of cancer or reproductive harm. OEHHA has adopted regulations that provide guidance for calculating a level in the absence of a safe harbor level. Regulations are available at Article 7 and Article 8 of Title 27, California Code of Regulations ("CCR"). Determining anticipated levels of exposure to listed chemicals can be very complex, and usually requires the assistance of a toxicologist or other consultant.

What's Different About the New Regulations?

The new warning regulations go into effect into effect on August 30, 2018. However, the new regulations expressly

provide that businesses can begin complying with them prior to the effective date. So while compliance with the old regulations will continue to constitute "clear and reasonable" warning under Proposition 65 until August 30, 2018, compliance with the new regulations will constitute "clear and reasonable" warning under Proposition 65 both before and after August 30, 2018.

Proposition 65 regulations broadly define a "consumer product exposure" as an exposure to a Proposition 65-listed substance that results from a person's acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer product, including the consumption of food. 27 CCR § 25600.1(d). "Consumer product" is in turn defined in the new regulations as any "article, or component thereof, including food, that is produced, distributed, or sold for personal use, consumption, or enjoyment of a consumer." Id. at § 25600.1(e).

The term "consumer" is not defined. However, the definitions of other specified terms make clear that this exposure pathway is concerned with retail products that are sold for personal use. As stated above, any exposure resulting from a "reasonably foreseeable use" of a consumer product will be deemed to be a consumer product exposure.

Of particular relevance to this article, the new regulations establish significant new standards for Proposition 65 warnings for consumer products in California. For example, the warning itself is revised to generally require identification of the listed chemical that poses exposure from the product; where more than one listed chemical is contained in the product and poses exposure, the new regulation allows either the identification of the multiple chemicals or the use of the term "including and identification of one of the chemicals ("This product can expose you to chemicals including [name of one or more chemicals] which is [are] known to the state of California to cause . . . "). The new warning language also includes a URL to the OEHHA website for further information. See 27 CCR §25603.

The new regulations also specify responsibilities for communication of Proposition 65 warnings. Proposition 65 has consistently been construed as requiring a warning that is clear and reasonable to a consumer at the time they are deciding to purchase or, in some situations, use the product (exposure prohibited "without first giving a clear and reasonable warning." See HSC §§25249.6, 25249.11(f). The express terms of the statute also seek to minimize burden on retailers by placing primary responsibility on the "producer" or "packager" of the product. The new warning regulations provide much greater detail in defining the responsibilities of manufacturers, producers, packagers, importers, suppliers, distributors and retailers of consumer products. See 27 CCR §25600.2.

The new regulations also provide much greater detail regarding the methods for communication of Proposition 65 warnings for consumer products, including for online and catalog sales. Specifically, in addition to specifying labels, shelf signs, shelf tags at each point of display of the product at brick and mortar stores, for online sales the new regulations require the warning be provided either in full text or a "clearly marked hyperlink" on the product display page "or otherwise prominently displaying the warning to the consumer prior to completing the purchase." See 27 CCR §25602(b). The new regulations contain similar requirements for catalog sales. See 27 CCR §25602(c).

Finally, the new regulations recognize that a party to an existing, court-ordered consent judgment specifying Proposition 65 warning requirements will continue to be deemed to be in compliance with Proposition 65 if they continue to comply with the warning requirements of the consent judgment.

FARELLA BRAUN + MARTEL LLP

NETWORK OF TRIAL LAW FIRMS: OCTOBER 27, 2017

Selling Products in California: The Gauntlet of Product Regulations

Sandra A. Edwards, *Chair, Environmental and Product Department*

Welcome to Sunny California

2

Home to Hollywood and Silicon Valley

3

Larger Population than Canada

4

Lots of Plaintiff's Lawyer

5

Little Known Fact

6

Product Liability In California: "Seller" Beware

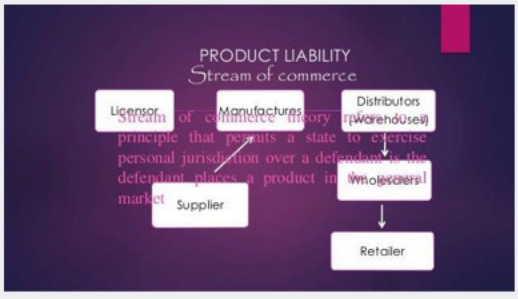
Common Product Related Claims

- Negligence
- Fraud/Misrepresentation
- Breach of Warranty (Implied/Express)
- Consumer Protection Statutes

7

Strict Product Liability in California

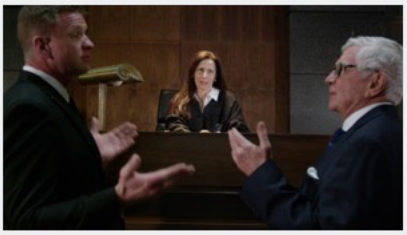
A manufacturer, distributor or retailer is liable if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way.



8

Product Liability: Plaintiff Burden of Proof

- Product used in an intended or reasonably foreseeable way
- Manufacturing or design defect when it was sold/leased to consumer
- Proximate cause of the injury



9

Strict Liability: Plaintiff Burden of Proof

Plaintiff is NOT required to establish:

- Product was unreasonably dangerous
- Supplier knew of the defect
- Defect was hidden or concealed
- Person using was unaware of the defect

10

Strict Liability: Manufacturing Defect

Plaintiff burden of proof:

- Defendant manufactured, sold, distributed
- Contained a manufacturing defect
- Plaintiff was injured
- Substantial factor in causing injury

11

Product Liability: Design Defect

When product is built according to intended specifications but design is defective

- Two Tests:
  - Consumer Expectations
  - Risk-Benefit

12

Design Defect: California Nuances

- Pharmaceuticals and medical devices *generally* immune
- Industry norm not the standard
- Compliance with government safety standard not the standard
- Post-accident modifications

13

Strict Liability: Failure to Warn

"[Manufacturer knew or should have known of the danger and the necessity of warnings to ensure safe use.]"

14

Strict Liability: Failure to Warn

15

Failure to Warn: California Nuances

- Cannot be based on danger that is obvious
- Not if danger generally known and recognized
- "Sophisticated User" defense may be available
- If sole claim, "state of art"

16

WARNING: Proposition 65 Ahead

17

Prop. 65: Another "Warning" Liability

- "OEHHA" lead agency
- Duty to Warn requirement:
  - Consumer Product Exposure
  - Environmental Exposure
  - Occupational Exposure

18

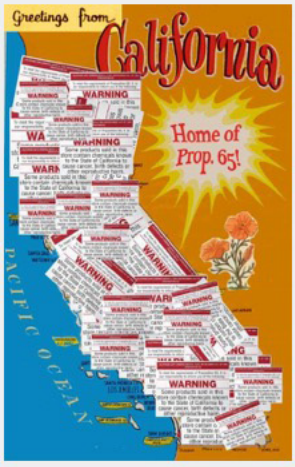
Prop. 65: Another Warning Requirement

"No person in the course of doing business shall knowingly and intentionally expose any individual to a substance known to the state to cause cancer or reproductive toxicity without first giving **clear and reasonable warning** to such individual."

19

Prop. 65: Overview

- Either **carcinogenic** or **reproductively toxic**
- Exempted when can demonstrate "**no significant risk**" at the exposure level



20

Prop. 65: Enforcement

- Over 900 Listed Substances
- AG, DA, City Attorney, or private enforcer
- $2,500 per day, per violation for civil penalty

21

Prop. 65: Amendments Effective 8/30/18

- Consumer exposures
- Occupational or Environmental exposures

22

Prop. 65: Consumer Exposure Warnings

- "Consumer product exposure": exposure to a List Chemical that results from a person's acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer product, including the consumption of food.
- "Consumer product": any "article, **or component thereof**, including food, that is produced, distributed, or sold for personal use, consumption, or enjoyment of a consumer."

23

Prop. 65: Consumer Product Exposure

- Methods: (1) on-the-product, (2) retailer notification with display materials, (3) electronic warnings, (4) product display page warnings for internet and catalog purchases.
- Content: Triangular warning symbol, the word "**WARNING**" in all caps and bold print and the following language

24

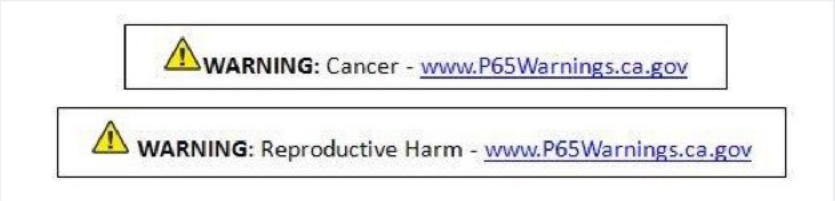
Prop. 65: Consumer Product Exposure

- Only **one** substance per applicable endpoint
- Safe harbor protection by naming any one or more of the substances
- Substance name listed in the same manner as identified on the substance list.

25

Prop. 65: On-Product Warnings

- On-Product Warnings: abbreviated version of the Prop. 65 warnings where impractical to include the longer warning.



26

Prop. 65: Consumer Product Exposure

- Court-approved settlement supersedes
- Specific regulations govern certain products

27

Sandra A. Edwards

Partner
Farella Braun + Martel (San Francisco, CA)

415.954.4428 | sedwards@fbm.com
http://www.fbm.com/Sandra_A_Edwards/

Sandra Edwards, the Chair of Farella's Environmental Law Department, has extensive trial experience in federal and state court in her litigation practice and as a former Assistant District Attorney for the City and County of San Francisco.

In her product-related practice, Ms. Edwards has strategically and effectively defended her corporate clients in both individual and class action lawsuits for a wide range of products, including pharmaceuticals, medical devices, electronic equipment, agricultural chemicals and construction materials. She has significant experience in high-stakes environmental lawsuits involving toxic torts, groundwater and contaminated sites, the Clean Water Act, CERCLA, FIFRA and Proposition 65, as well as private attorney general actions and citizen suits. Her clients include chemical and agricultural companies, manufacturers, pharmaceutical companies and developers.

Ms. Edwards also has extensive experience in construction law, and during a recent state court trial, negotiated the settlement of a multi-party litigation on behalf of one of the nation's largest aviation authorities. She represents owners, developers and contractors and has successfully handled claims for breach of contract and professional negligence, and for extra work, delay, disruption and loss of productivity.

Prior to acting as Department Chair, Ms. Edwards served two terms as a member of Farella's five-person Advisory Board, which provides long-term strategic direction for the firm. She is listed among the Northern California Super Lawyers for 2014–2017 and named in The Best Lawyers in America in the area of Product Liability Litigation - Defendants for 2018.

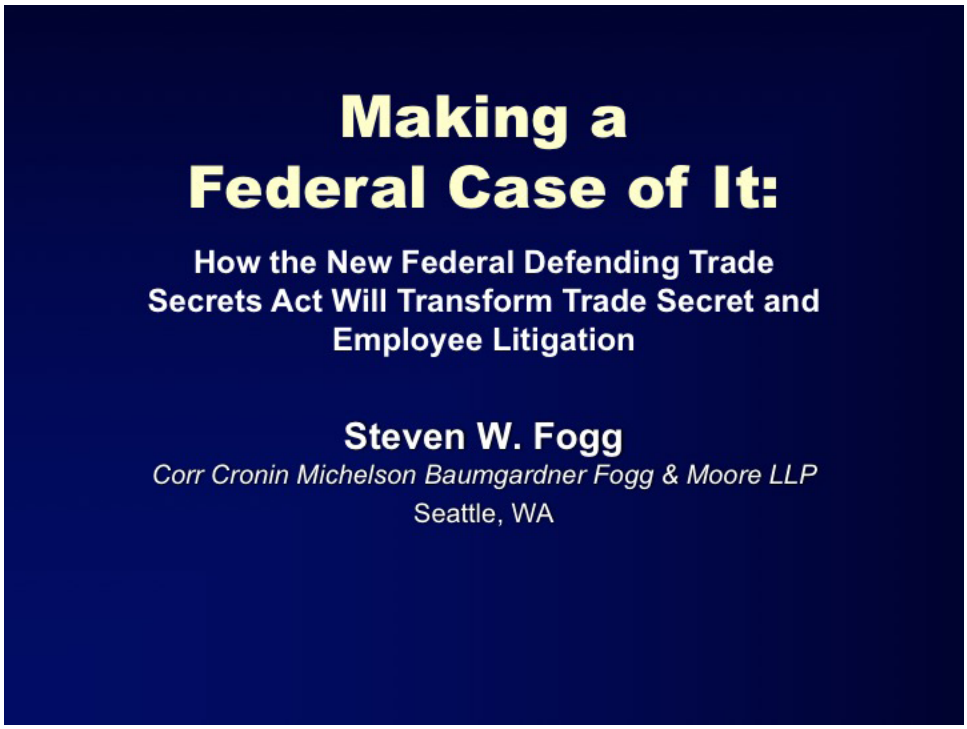
Related Practices
- Environmental Litigation
- Environmental Law
- Life Sciences
- Product Liability and Stewardship
- Proposition 65 Counseling and Defense
- Construction

Affiliations
- Sustaining Member, Product Liability Advisory Council (PLAC)
- General Counsel, Secretary, Board of Directors, San Francisco Chamber of Commerce (2008-present)
- Co-Chair, Subcommittee of Women Environmental Lawyers, Environmental Litigation Committee, American Bar Association Section of Litigation (2010-present)
- Co-Chair, Joint CLE Program Planning Subcommittee, Environmental Litigation Committee, American Bar Association Section of Litigation (2007-2008)
- Co-Chair, ADR Subcommittee, Environmental Litigation Committee, American Bar Association Section of Litigation (2006)
- Former Assistant District Attorney, City and County of San Francisco

Education
- University of San Francisco School of Law (1991), Law Review
- Occidental College (A.B., 1988)

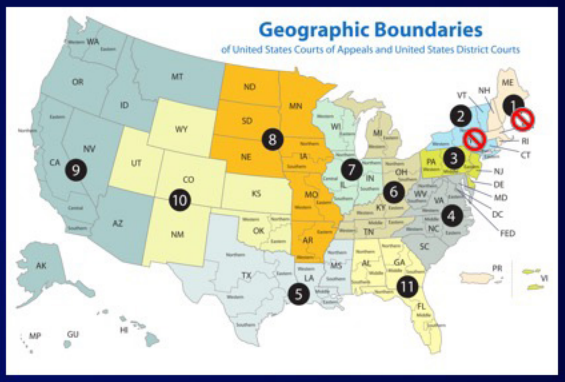
HOW TO USE THE NEW FEDERAL TRADE SECRETS ACT TO PROTECT YOUR COMPANY'S I.P.

Steve Fogg
Corr Cronin Michelson Baumgardner Fogg & Moore (Seattle, WA)
206.274.8669 | sfogg@corrcronin.com



Trade Secrets . . . 2 Years Ago

- Trade secret law is State law. The Uniform Trade Secrets Act (UTSA) is effective in 48 states but **varies from state to state**.



Trade Secret Litigation: Pre-DTSA

- No access to federal court without another federal statute or diversity jurisdiction
- Uneven substantive rules, definitions, pleading requirements, discovery tools
  - And courts take inconsistent approaches (including **blue penciling**) to non-compete agreements
- Median cost for a trade secret lawsuit for $1M-$10M at risk is $925k (yes, nearly $1M).

Introducing: The (Federal) Defending Trade Secrets Act

- Forbes: The Biggest IP Development in Years
- Uniform standards and uniform discovery rules
  - DTSA does not replace state trade secret law
  - DTSA offers an additional enforcement venue
  - But will federal protection lead to more consistency and more predictable discovery?

Is the UTSA Dead?

Differences Between the DTSA & UTSA

- Elements of a trade secret claim largely unchanged
- While similar, some differences are noteworthy
  - DTSA Defines "Trade Secret" and "Misappropriation"
  - Statute of limitations may differ
  - Who is an employee? Who is a trade secret owner?
  - Brand new "whistleblower" and "*ex parte* seizure" sections

With differences come strategic and tactical opportunities

Federal Jurisdiction (For Removal, Too)

- Federal Claim = Federal Question Jurisdiction
  - Plaintiffs no longer need to shoehorn CFAA claims
- DTSA assertion in pleadings permits removability
- Limitations
  - Must allege nexus to interstate commerce
  - Standing requires trade secret ownership
  - Don't forget personal jurisdiction!
    - *Gold Medal Products Co. v. Bell Flavors & Fragrances, Inc.*, 1:16-cv-00365, 2017 WL 1365798 (S.D. Ohio Apr. 14, 2017).

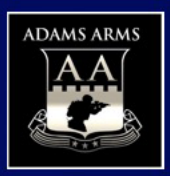
Key Federal Definitions

- "Trade Secret" 18 U.S.C. § 1839(3)
  - *United States v. Nosal*, 844 F.3d 1024, 1041–44 (9th Cir. 2016) (interpreting the definition of "trade secret")

- "Misappropriation" 18 U.S.C. § 1839(5)
  - Disjunctive: Either "acquisition," "disclosure," or "use"
  - Misappropriation must have been through improper means, or with knowledge of wrongfulness
    - Does not include reverse engineering, lawful acquisition

DTSA Effective Date May 11, 2016

- Some "continuing misappropriations" allowed
  - Unlike UTSA, DTSA applies if you allege a post-effective-date act of that is part of a continuing violation
  - Note: secrets can only be disclosed once
    - If "acquisition" and "disclosure" occurred before enactment, must plausibly allege post-enactment "use" to state a DTSA claim.
- *Adams Arms, LLC v. Unified Weapons Systems, Inc.*, No. 8:16-cv-1503-T-33AEP, 2016 U.S. Dist. Lexis 132201 (M.D. Fla. Sept. 27, 2016)

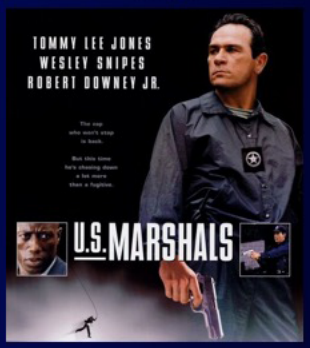


DTSA Remedies Are Similar

- Damages for actual loss and/or unjust enrichment
- Alternatively, reasonable royalty
- Exemplary damages (up to 2x) for willful or malicious misappropriation
- Injunctive relief, or where an injunction would be inequitable, payment of a reasonable royalty
- Attorneys' fees for bad faith misappropriations
  - Also for bad faith motions to terminate injunctions
- Plus, new "*ex parte* seizure" remedy . . .

New Remedy: *Ex Parte* Seizure by US Marshals

- But "only in extraordinary circumstances."
  - 18 U.S.C. § 1836(b)(2)(A)(i)
  - To prevent abuse, the DTSA sets out an extremely high standard and requires a full hearing within 7 days
- Courts heeding "extraordinary circumstances" test
  - *Mission Capital Advisors LLC v. Romaka*, No. 16-cv-5878 (S.D.N.Y. July 29, 2016)



New Affirmative Defense: Whistleblower Protections

- Statutory safe harbor to disclose trade secrets:
  - To the (federal, state, local) government to investigate
  - To the Court under seal
  - . . . or to an attorney solely for purpose of reporting a suspected violation of law
- Affirmative Defense, not an immunity
  - *Unum Group v. Loftus*, 220 F. Supp. 3d 143, 147 (D. Mass. 2016)
- Protections apply **broadly** (not just employees but consultants and contractors, too)
- Employers must provide notice to be eligible for enhanced willfulness damages

Non-Preemption: Or, How DTFA Complicates Things

- No preemption of state trade secret law
  - "Nothing in the amendments made by this section shall be construed . . . to preempt any other provision of law." 18 U.S.C. § 1836(f).
  - Congress wanted to allow states (e.g., CA) to protect employees
- So . . . DTSA is a layer on top of existing law? What happens when:
  - Conflict between state and federal definitions?
  - There is a Circuit split because federal courts rely increasingly on state trade secret law?

DTSA Litigation: Year One

- About 360 DTSA cases have been filed
  - More cases filed without DTSA claims than with
- Most of the DTSA cases involve former employees
  - No 007s here; methods of acquisition low-tech/mundane
- One case has gone to verdict:
  - $2.5 million for state and DTSA claims

(*Dalmatia Import Grp., Inc. v. FoodMatch Inc.*)

Can We Get a TRO Against Ex-Employees under DTSA?

Yes, But: DTSA Limits Injunctive Relief

- You may seek a TRO/PI to prevent threatened or actual misappropriation by an employee, but . . .
- . . . DTSA prohibits injunctions that prevent a person from entering in to an "employment relationship"
  - 18 U.S.C. § 1839(3)(A)(i)(1)(I)
- . . . DTSA also prohibits injunctions that conflict with state law prohibiting restraints on employment
  - 18 U.S.C. § 1836(b)(3)(A)(i)(II)

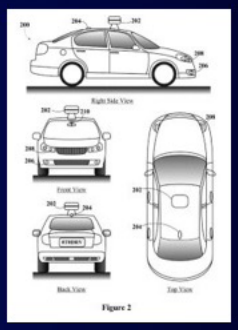
Note: these limits do not apply to non-solicitation agreements

Notable DTSA Caselaw Injunctive Relief

- *Henry Schein, Inc. v. Cook*, No. 16-cv-03166 (N.D. Cal.)
  - TRO (June 10, 2016): granted in part as to non-solicitation of former clients; denied as to forensic imaging of personal devices
  - PI (June 22, 2016): granted in part as to ex-employee access to secret material; denied as to non-solicitation of former clients

Notable DTSA Caselaw Injunctive Relief

- *Waymo LLC v. Uber Technologies, Inc.*, No. C 17-00939, 2017 WL 2123560 (N.D. Cal. May 15, 2017)
  - Granted preliminary injunction as to ex-employee working on similar project; denied as to Uber's freedom to continue project.



- *But see*:
  - *UCAR Tech. (USA) Inc. v. Li*, No. 5:17-cv-01704-EJD, 2017 U.S. Dist. LEXIS 59965 (N.D. Cal. Apr. 19, 2017)
  - *GTAT Corp. v. Fero*, No. CV 17-55-M-DWM, 2017 WL 2302973 (D. Mont. May 25, 2017) (denying preliminary injunction)

Can we Argue Inevitable Disclosure under DTSA?

- What is inevitable disclosure?
  - Caselaw in some states permits "a plaintiff [to] prove . . . misappropriation by demonstrating that [a] defendant's new employment will inevitably lead [the defendant] to rely on the plaintiff's trade secrets."
    - *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995).
- Inevitable disclosure has been rejected in CA and other states
- Congress was concerned about inevitable disclosure.
  - 18 U.S.C. § 1836(b)(3) prohibits injunctions based merely on what someone knows; requires evidence of threatened misappropriation

Can we Argue Inevitable Disclosure under DTSA?

- But Caselaw suggests that the demise of the rule is not inevitable
  - *Molon Motor & coil Corp. v. Nidec Motor Corp.*, No. 16 C 035345, 2017 WL 1954531 (N.D. Ill. May 11, 2017)
  - *Fres-Co Sys. USA, Inc. v. Hawkins*, 690 F. App'x 72 (3d Cir. 2017) (not specifying whether applying PA law or DTSA)

Short Answer: Yes, but only if your state recognizes the rule.

  - Illinois and Pennsylvania have adopted inevitable disclosure doctrine

DTSA Choice of Law "Bramble"

- Bottom line: substantive law under DTSA still depends a lot on forum law
  - *First W. Cap. Mgmt. Co. v. Malamed*, 2016 WL 8358549 (D. Colo. Sep. 30, 2016) (applying CO law rather than CA law and entering a two-year injunction forbidding solicitation of former clients)
  - *Engility Corp. v. Daniels*, 2016 U.S. Dist. LEXIS 16637 (D. Colo., Dec. 2, 2016) (one-year injunction forbidding Daniels from soliciting any work from former client)

Will DTSA leave each of us more-or-less where we started?

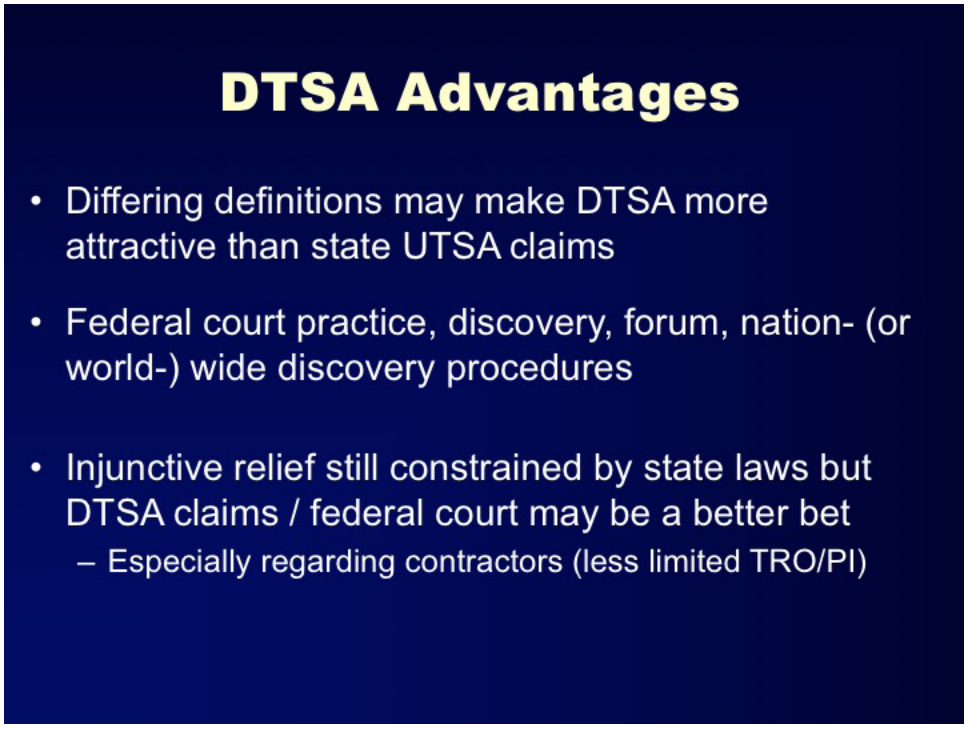
DTSF Strategy and Tactics: Jurisdiction & Forum

- Key questions:
  - Assert DTSA or just state law claims?
  - File in federal or state court?
  - Use DTSA to get into federal court but rely on state law to use inevitable disclosure and unconstrained injunctions?
- For enforcing non-competes (if allowed in your state) may be cleaner and faster to avoid DTSA claim during TRO proceedings
- It may be possible to assert DTSA along with other common-law torts
  - UTSA preempts common law torts relating to trade secrets

DTSF Strategy and Tactics: Pleading and Disclosure

- No heightened pleading rules; *Twombly* standard
  - Must plead elements of misappropriation, that the trade secret is confidential and has value, ownership, etc.
- DTSA does not require any specific disclosure of trade secrets at pleading or the outset of discovery
- Courts go both ways, though, between requiring "general identification" or "sufficient particularity" of the trade secret at issue

Scope of secret must reflect what is actually confidential


DTSA Advantages
• Differing definitions may make DTSA more attractive than state UTSA claims
• Federal court practice, discovery, forum, nation- (or world-) wide discovery procedures
• Injunctive relief still constrained by state laws but DTSA claims / federal court may be a better bet
– Especially regarding contractors (less limited TRO/PI)

Steven Fogg

Partner

Corr Cronin Michelson Baumgardner Fogg & Moore (Seattle, WA)

206.274.8669 | sfogg@corrcronin.com

http://www.corrcronin.com/profiles/steven-fogg/

Steve is a name partner in the firm. A Chambers-ranked jury trial lawyer who has tried more than eighty cases to verdict, Steve's high-stakes trial practice runs the gamut from complex commercial litigation with nine-figure exposure to product liability lawsuits alleging catastrophic injuries to high profile intellectual property disputes. Steve also uses his experience as a former SEC Enforcement lawyer and criminal prosecutor to help individuals and companies respond to governmental investigations and lawsuits.

Prior to joining the firm, Steve was a homicide prosecutor in Seattle, where for several years he exclusively tried murder cases, including a number that received front-page media attention. Before moving to Seattle to become a prosecutor in 1994, Steve practiced in Washington, D.C., where he worked for a securities litigation boutique and as a staff attorney for the Securities and Exchange Commission Division of Enforcement.

Featured Cases

- Project Thunder vs. TNS – Member of trial team defending large public company in earn-out dispute stemming from defendant's acquisition of a telecommunications software company. Case settled on favorable terms in November 2015 after two days of trial.
- SEC vs. Dargey et al. – Mr. Fogg represented a large number of Chinese investors in real estate projects that are the subject of a SEC fraud case. In October 2014, Mr. Fogg won an order from federal judge releasing $5.5 million of his clients' funds prior to the appointment of a receiver.
- Kim vs. Delta Inn et al. – Mr. Fogg led a team that defended Delta Inn Incorporated in a four-week trial that took place in November and December 2012 in King County Superior Court. The plaintiff sought an eight-figure award in this lawsuit, which revolved around the disputed ownership of a hotel company. Mr. Fogg and his team obtained a defense verdict for their client.

Accolades

- Fellow, American College of Trial Lawyers
- American Board of Trial Advocates
- Named as one of "America's Leading Business Lawyers", Litigation: General Commercial, Chambers USA 2017
- Named "Lawyer of the Year" by U.S. News and World Report and Best Lawyers for Products Litigation in Seattle in 2014
- Named "Local Litigation Star" by Benchmark Litigation, 2015, 2016, 2017
- Selected as Top 100 Washington Super Lawyer for 2017
- Selected as Top 100 Washington Super Lawyer for 2016
- Selected as a Top 100 Washington Super Lawyer for 2015
- Repeatedly named Washington Super Lawyer, 2012-2017
- Repeatedly recognized as a "Best Lawyer in America" in the fields of Commercial Litigation and Personal Injury Litigation, 2012-2017
- Repeatedly named one of "Seattle's Best Lawyers"
- Repeatedly named as one of the top litigators in the city in Seattle Metropolitan magazines "Top Lawyers" issue
- Rated AV Preeminent by Martindale-Hubbell, which is the highest rating an attorney can obtain

Education

- J.D., University of Virginia School of Law, 1989
- B.A., English, College of William and Mary 1986 (Honors all eligible years)

STUCK BETWEEN A ROCK AND A HARD PLACE: RESPONDING TO A RULE 45 NON-PARTY SUBPOENA

Scott Etish
Gibbons (Philadelphia, PA)
215.446.6261 | setish@gibbonslaw.com

The decision to pursue ESI from a non-party via subpoena may result in a lengthy, expensive, and sometimes onerous process for both the non-party and the requesting party. The non-party may incur exorbitant costs associated with responding to the subpoena, the requesting party may wait months or even years to receive the ESI, and the issue may end up being submitted to the court via a protracted motion process. Even more, the requesting party may be liable for cost-shifting if it is not careful to avoid undue burden and expense upon the responding party.

This article provides advice for navigating the provisions of Fed. R. Civ. P. 45 to most effectively and cost-efficiently pursue non-party ESI by subpoena. It also explains how a non-party can use the protections built into Rule 45 to effectively comply with, and object to non-party subpoenas. This article also provides practical considerations for practitioners on either side of a non-party subpoena to utilize in a manner that will help them shift some or all of their costs, including attorneys' fees, onto the other party.

Introduction to Rule 45

Federal Rule of Civil Procedure 45 governs non-party subpoena practice, as it (1) sets rules to the form, content and service of subpoenas; (2) requires places for compliance; (3) allows for cost-shifting and recovery of attorneys' fees; (4) sets duties in responding to a subpoena; and (4) allows for transfer of a subpoena-related motion.

The need for requesting parties to avoid undue burden or expense is of particular importance to both requesting and responding parties, and this issue is at the heart of the vast majority of disputes involving non-party subpoenas. Federal Rule of Civil Procedure 45(d)(1) states that "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorneys' fees – on a party who fails to comply." Pursuant to Rule 45(d)(3), "[o]n timely motion, the court for the district where compliance is required must quash or modify a subpoena that . . . subjects a person to undue burden."

Additionally, Rule 26(b)(1)-(2) requires courts "in all discovery" to consider a number of factors potentially relevant to the question of undue burden, including: (1) whether the discovery is unreasonably cumulative or duplicative; (2) whether discovery sought is obtainable from some other source that is more convenient, less burdensome or less expensive; and (3) whether the burden or expense of the proposed discovery outweighs its likely benefit.

Effectively Seeking ESI from Third Parties to Avoid Undue Burden and Cost-Shifting

In light of Rule 45(d)(1)'s pronouncement that a party seeking ESI from a non-party must take "reasonable steps to avoid imposing undue burden or expense" on a non-party, the requesting party must be strategic in seeking ESI from non-parties. Failing to follow best practices could result in a court quashing or modifying a subpoena and/or cost-shifting back to the requesting party. Accordingly, it is critical for a requesting party to: (1) carefully assess non-party ESI needs before seeking ESI from a non-party; (2) communicate with non-parties throughout the process; and (3) carefully draft the subpoena to avoid undue burden.

Assessing Non-Party ESI Needs - The requesting party will need to determine the scope of ESI its adversary in the litigation has possession, custody or control of before

dragging non-parties into a dispute. In particular, a requesting party should be careful about seeking ESI from a non-party when the adversary in the litigation will have the same information, especially where the requesting party has not yet exhausted the discovery process. Indeed, it will be difficult to convince a court that discovery is needed from a non-party when the adversary in the litigation is not objecting to the production of communications with the non-party. As such, non-party discovery can be particularly effective in situations where it is revealed during discovery that a non-party may have access to potentially relevant information that is not in the possession of the party in the litigation.

Communication - The key to successful non-party subpoena practice is transparency and communication with opposing counsel, the court and even the non-party whose ESI is being sought. If you anticipate the need to seek non-party discovery, then the parties should discuss this during the first Rule 26 meet and confer, address in the joint case management conference memorandum as well as at the actual Rule 16 conference before the court. In addition to interaction with opposing counsel and the court, practitioners would be well-served to go the extra mile in working with the non-party whose ESI is being sought.

A party serving a Rule 45 subpoena seeking ESI should: contact the non-party before serving the subpoena (if possible); serve a written litigation hold; and discuss issues with the non-party such as burden, format, cost, and duration of the hold to determine the most practical, cost-effective method for compliance. As part of this process, consider the following questions: (1) what is the nature of your relationship to the non-party; (2) what is the non-party's expected method for data collection and review; (3) can you agree on search terms; (4) what custodians' ESI will be searched; (5) what is the volume of potentially relevant ESI per search term and/or custodian; and (6) what is the expected burden. Careful consideration of these questions will help ease the potential burden upon a non-party and allow a requesting party to demonstrate a good faith basis for their non-party subpoena.

Drafting Reasonable Discovery Requests: Avoiding Undue Burden or Expense - As discussed above, pursuant to Rule 45(d): a party "must take reasonable steps to avoid imposing undue burden or expense." Courts "must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply." Accordingly, practitioners should pay careful attention to Rule 45, and make sure to draft narrowly tailored, targeted requests in the first instance. In drafting the requests, the goal should be to demonstrate that the requests are not intended to burden or harass, but to minimize costs. In this connection, make sure to: (1) restrict requests to the relevant time period; (2) tailor requests to relevant subject matter; (3) identify relevant custodians, if possible; and (4)specify the form of production, as permitted by Rule 45(d)(2)(B).

Failing to follow these best practices could lead to a situation where the requesting party can be held responsible for attorney's fees associated with third-party's response to requesting party's motion to compel, including preparation for and participation in oral argument. See Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015) (holding that the subpoena was overbroad on its face and requesting party failed to comply with its Rule 45(d)(1) duty to avoid imposing undue burden). Practitioners should be flexible, if appropriate, in follow up communications with a non-party after the subpoena is served. Rigid adherence to the requests after a responding party has attempted to compromise and explain why certain requests cannot be met will not serve a requesting party well.

Responding and Objecting to the Subpoena Seeking ESI

There are few things more frustrating in litigation than receiving a non-party subpoena seeking extensive ESI, especially in cases where the non-party has little to no interest in the outcome of the litigation. In these situations, one of the very first discussions between outside counsel and the client will focus upon putting together a strategy seeking to quash the subpoena and/or shift costs back to the requesting party. As the responding party, your early focus should be on: (1) complying with deadlines and obligations; (2) issuing a legal hold and preserving ESI; (3) communicating with the subpoena sender; and (4) potentially engaging in motion practice including requests for cost-shifting.

Objections and Complying with Deadline to Respond - Pursuant to Rule 45(d)(2), objections to a non-party subpoena are due 14 days after service, unless the subpoena specifies a later (or earlier) time. There is no minimum time period under the rule but reasonableness governs. In comparing Rule 45(d)(2)(B) (14 days to object) with Rule 34(b)(2) (30 days to respond), the practitioner might be surprised to realize that non-parties have a significantly shorter window of time to file objections than parties do as part of discovery. A non-party receiving a Rule 45 subpoena should immediately implement a written litigation hold and seek an extension of the 14-day response deadline, including for objections.

In responding to a subpoena, make sure to stay away from boilerplate objections. See Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015) (boilerplate objections insufficient; each request must be separately responded to). Be prepared to show evidence of ESI "not reasonably accessible" because of undue burden or cost (affidavits from custodians, IT, or vendors; cost estimates). It is also prudent to request cost shifting early to lay groundwork for future application to the

court. This is a great way to create a record of undue burden (cost) and good faith attempts to cooperate.

Communication - This article earlier discussed the importance of communication by the requesting party in non-party subpoena practice. Similarly, the responding party should work hard to establish a process with transparency and cooperation, and key steps should include discussions with the requesting party: (1) confirming the scope of the requests; (2) negotiating the terms of production (custodians, search terms); (3) educating the requesting party about the scope of relevant ESI that is reasonably accessible and the ideal form of production; and (4) raising specific objections to overly broad requests and propose how to narrowly tailor requests (limit custodians or search terms, specify different form of production, offer a sampling). Additionally, the responding party should be prepared to demonstrate evidence of why ESI is "not reasonably accessible" because of undue burden or costs, and these assertions should be bolstered by affidavits from IT personnel, custodians or vendors and cost estimates. It is imperative to establish a record of undue burden and good faith attempts to cooperate.

If the party serving the subpoena has not already done so, the nonparty should discuss the burden, format, cost, and duration of hold issues up front. The parties and nonparties should confer on any problems that arise before filing any motions with the court. Finally, the nonparty should make sure to obtain a written release from the litigation hold once the production is completed.

Cost-Shifting - As noted previously, requesting parties are required to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" pursuant to Rule 45. Costs are more easily recoverable by third parties under Rule 45 than by parties under Rule 34 and 26. A court will look to protect rights of non-parties, especially where their connection to the claims is attenuated. Many courts follow the principles advocated in the Sedona Conference's 2008 Commentary on Non-Party Production & Rule 45 Subpoenas and consider: (1) the scope of the request; (2) the invasiveness of the request; (3) the need to separate privileged material; (4) the non-party's interest in the litigation; (5) whether the requesting party ultimately prevails; (6) the relative resources of the requesting party and non-party; (7) the reasonableness of the costs sought; and (8) the public importance of the litigation.

Case law on requests for cost-shifting is extremely fact sensitive, but it is fair for non-parties to expect some reimbursement for costs and reasonable attorneys' fees in cases where the non-party does not have an interest in the litigation. Best practices for a non-party faced with an improper Rule 45 subpoena should: (1) estimate the costs of compliance to the requesting party's subpoena as specifically as possible; (2) put the requesting party on notice from the outset as to the non-party's request for cost-shifting; (3) attempt to obtain an agreement for reimbursement of such costs; (4) seek protection from the court if the requesting party will not enter into an agreement; and (5) keep a detailed record of the expenses involved in compliance.

GIBBONS

Stuck Between a Rock and a Hard Place:
Responding to a Rule 45 Non-Party Subpoena

Scott J. Etish

Program Agenda

I. Introduction to Rule 45

II. Effectively Seeking ESI from Third Parties

III. Responding and Objecting to the Subpoena Seeking ESI

III. The Courts and Cost-Shifting

Part I

Introduction to Rule 45

- Background of Rule & recent amendments
- ESI-related provisions
- Comparisons to Rules 26 & 34

Rule 45 At a Glance

- Governs third party subpoena practice
- Sets form, content, service of subpoena
- Requires certain places for compliance
- Protects the recipient of a subpoena
- Allows cost-shifting and recovery of attorneys' fees for undue burden

Rule 45(d)(1): Protecting a Person Subject to a Subpoena

- *Avoiding Undue Burden or Expense; Sanctions*. A party or attorney responsible for issuing and serving a subpoena **must** take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required **must** enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

Part II

Effectively Seeking ESI from Third Parties to Avoid Undue Burden and Cost-Shifting

- Assessing third party ESI needs
- Communicating with third parties
- Drafting the subpoena

Assessing third party ESI needs

- Does your adversary have possession, custody, or control of all relevant ESI?
- Where is the relevant ESI stored?
- How much ESI do you need from nonparties?
- Practice pointer: raise potential third party discovery issues at the Rule 16 conference

Communicating with third parties

- Communicate early and often
- Consider offering to manage the production and storage of third party ESI
- Consider offering to review the production subject to a clawback agreement
- Minimize a non-party's burdensome administrative tasks

Drafting reasonable discovery requests: avoiding undue burden or expense

- Draft narrowly tailored, targeted requests in the first instance!
- Show that the requests are not intended to burden or harass, but to minimize costs
- Restrict requests to the relevant time period
- Tailor requests to relevant subject matter
- Name relevant custodians, if possible
- Always specify the form of production, as permitted by Rule 45(d)(2)(B)

Drafting reasonable discovery requests: avoiding undue burden or expense

- Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015): despite lack of any factors justifying cost-shifting, court held that the subpoena was overbroad on its face, therefore the requesting party failed to comply with its Rule 45(d)(1) duty to avoid imposing undue burden.
  - Requesting party was responsible for attorney's fees associated with third-party's response to requesting party's motion to compel, including preparation for and participation in oral argument.

Summary of Best Practices: Seeking ESI From Non-Parties

- Assess your third party ESI needs early and raise with the Court
- Engage in early, constant communications with the third party
- Offer to store, manage, and review ESI to ease administrative burdens
- Offer to assume all or part of the costs of production via a cost-sharing agreement
- Draft narrowly-tailored, targeted requests to avoid undue burden or expense
- Create a record of reasonableness!

Part III

- Responding and Objecting to the Subpoena Seeking ESI
- Complying with deadlines and obligations for form and manner of production
- Issuing a hold and preserving ESI
- Communicating with subpoena sender
- Engaging in motion practice

Rule 45(d)(2): Response and Objection Deadline

- Objections are due 14 days after service
  - unless the subpoena specifies a later (or earlier!) time; no minimum time period under rule but reasonableness governs
- Compare Rule 45(d)(2)(B) (14 days to object) with Rule 34(b)(2) (30 days to respond)
- Takeaway: nonparties have a significantly shorter window of time to file objections

Communicating with sender of subpoena: early, constant communications

- Confirm the scope of the requests
- Begin to negotiate the terms of production (custodians, search terms)
- Educate the requesting party about the scope of relevant ESI that is reasonably accessible and the ideal form of production
- Raise specific objections to overly broad requests and propose how to narrowly tailor requests (limit custodians or search terms, specify different form of production, offer a sampling)
  - Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015): boilerplate objections insufficient; each request must be separately responded to.

Communicating with sender of subpoena: early, constant communications

- If subpoena otherwise would impose an undue burden, inform requesting party ASAP.
  - Considerations include accessibility of the data, volume of expected production, whether a vendor is necessary.
- If non-party makes a timely objection to a subpoena, an order to compel production is required.
- If overbroad, make specific objections.

Filing motions to quash or modify a subpoena

- Motions filed in the district "where compliance is required" i.e., the district local to the subpoenaed witness
  - Exceptions under Rule 45(f) (2013 amendment) - compliance court may transfer to issuing court on consent of for "exceptional circumstances"

Opposing motions to compel

- Refer back to Rule 45(d)(1) and party's obligation to avoid undue burden or expense - imposes "must" obligations on both the requesting party and the court
- Detail efforts to meet and confer in good faith and party's non-compliance with Rule 45(d)(1)
- Consider cross-motion for sanctions, including cost-shifting and legal fees

Summary of Best Practices: Responding and Objecting to Subpoena Seeking ESI

- Remember the 14-day objection period
- Issue a legal hold notice upon trigger event (and respond/object to party's hold notice)
- Maintain constant communications with party
- Create a record of undue burden/cost
- Negotiate parameters of production
- Request cost-shifting
- File a motion to quash or modify if necessary
- Consider cross-motion for sanctions if motion to compel is filed

Part IV

The Courts and Cost Shifting

- Legal tests for cost-shifting
- Federal standards
- Recovering attorneys' fees

Costs More Easily Recoverable

- General Principles:
  - Costs are more easily recoverable by third parties under Rule 45 than by parties under Rule 34 and 26
  - Rule 45(d)(1) *mandates* that the requestor be reasonable and the Court enforce this obligation
  - Court's look to protect rights of non-parties, especially where their connection to the claims is attenuated

Federal Standards for Cost-Shifting

- Many courts follow the principles advocated in the *Sedona Conference's 2008 Commentary on Non-Party Production & Rule 45 Subpoenas* and consider:
  - the scope of the request;
  - the invasiveness of the request;
  - the need to separate privileged material;
  - the non-party's interest in the litigation;
  - whether the requesting party ultimately prevails;
  - the relative resources of the requesting party and non-party;
  - the reasonableness of the costs sought; and
  - the public importance of the litigation.

Summary: Overlapping Factors in Cost-Shifting Tests

- Key similarity: Subpoena cannot impose an undue burden on the non-party.
- Subpoena must be narrowly tailored.
- Is discovery reasonable accessible to non-party?
- Relative financial resources of the requesting and non-party.
- Consider the equities involved in the case.

Scott J. Etish

Director
Gibbons (Philadelphia, PA)

215.446.6261 | setish@gibbonslaw.com
https://www.gibbonslaw.com/scottetish/

Scott Etish is a problem solver. He is a litigator who works with clients to understand their business objectives and navigate them through times of crisis. In many situations, this means seeking to resolve disputes cost effectively through negotiation without litigation. If negotiations are not realistic or are unsuccessful, Mr. Etish will not hesitate to take a more aggressive approach. Mr. Etish represents an extensive range of clients from diverse industries, including food manufacturing, transportation, pharmaceutical, and real estate. His diverse litigation practice is focused primarily on complex commercial disputes, involving business torts, partnership and shareholder agreements, real estate, construction, restrictive covenants, and trademark litigation.

Services
- Business & Commercial Litigation
- Electronic Discovery & Information Management Counseling

Experience
- Representing a commercial landowner with respect to environmental matters involving underground storage tanks.
- Representing an international consumer packaged food company with respect to claims involving breach of contract, misappropriation of trade secrets, and unjust enrichment involving the design of an automated storage and retrieval system (ASRS) to be installed at a 402,000-square-foot meat processing facility.
- Representing a title insurance company with respect to litigation involving the duty to defend and priority of coverage.
- Representing the owner in a construction litigation involving claims for breach of contract and breach of a performance bond.
- Representing health care provider in a suit involving numerous counts, including violations of the Sherman Antitrust Act and Racketeer Influenced and Corrupt Organizations Act (RICO), breach of contract, and tortious interference with contract.
- Represented a produce distributor in numerous commercial and product liability lawsuits associated with the 2006 E. coli O157:H7 outbreak in the Mid-Atlantic states.
- Represented a regional supermarket chain in real estate litigation matters and obtained expedited relief on claims related to a “going dark” provision and summary judgment defending claims related to an “area restriction” in commercial leases.
- Represented manufacturing companies in litigation involving restrictive covenants, non-competes, and trade secrets in situations involving executives commencing employment with a competitor.
- Represented a major pharmaceutical company in responding to a state attorney general’s subpoena with respect to marketing practices.
- Represented a special litigation committee compiled by the board of directors of a banking institution to investigate a shareholder derivative suit.

Honors and Awards
- Selected to the Pennsylvania Super Lawyers Rising Stars list, Business Litigation
- The Legal Intelligencer “Lawyers on the Fast Track,” 2014

Education
- Rutgers School of Law - Camden (J.D.); Research Editor, Rutgers Law Journal
- Wesleyan University (B.A.)

TRIAL READY: HANDLING HIGH-VOLUME, LOW-EXPOSURE CASES EFFECTIVELY

Greg Marshall
Snell & Wilmer (Phoenix, AZ)
602.382.6514 | gmarshall@swlaw.com

The Trial-in-a-Box Program - Collaboration paves the road to value

Many in-house litigation attorneys supervise a body of cases that are just a thorn in their side. They're low to moderate exposure cases. They consume an amount of time and company resources that are entirely disproportionate to the risk they present. They require in-house attorney time verifying discovery responses, tendering corporate representatives and employees for interviews, affidavits, depositions, and trial, keeping those key personnel from their business duties.

These cases are often filed in jurisdictions where companies might not have established outside counsel, requiring in-house attorneys to spend their time educating new outside lawyers about their business and how the company defends lawsuits. All along, the legal department is burning through its declining outside counsel budget, while responding to pressure from the business lines about how to stop the bleeding.

The settlement values of these cases are not informed by risk. They are informed by the distraction they cause to the business, and the expense of defending them. Standing on your principles is great, but the economics of a vigorous defense are hard to justify in these cases, if not impossible. Companies just want out of these low to moderate exposure cases, chalking up the expense to doing business.

If this scenario is familiar, then this article is for you. I personally consider it to be failure of the defense bar and civil justice system to have clients that feel compelled to settle meritless litigation – particularly litigation attacking the core of their business – purely out of business distraction and defense cost concerns. That's not how our justice system was designed to function. And I'm convinced that through collaboration we can come up with ways to solve this dilemma and fight the good fight. This article discusses one idea, something we call a "trial-in-a-box" program.

Doing more with less

Before discussing solutions, let's set the stage by discussing what's important to legal departments and what they want from their outside counsel.

According to a survey of chief legal officers last year, what companies want from their outside counsel, in order of preference, are: (1) greater cost reduction, (2) improved budget forecasting, (3) non-hourly based pricing structures, (3) modification of work to match legal risk, (4) more efficient project management, and (5) greater effort to understand our business. See 2016 Chief Legal Officer Survey, an Altman Weil Flash Survey.

Law departments with budgets of over $50 million are spending, on average, over half their budget on litigation. See ACC Chief Legal Officers 2017 Survey, Key Findings. Unsurprisingly, another survey ranked reducing outside legal costs as the top "key challenge" faced by legal departments. See 2016 Legal Department In-Sourcing and Efficiency Report, The Keys To A More Effective Legal Department, Thomas Reuters.

While one of the leading strategies law departments employ to reduce costs is to "match work with legal risk levels" (about 40% of surveyed chief legal officers actively do so, see 2016 Chief Legal Officer Survey, an Altman Weil Flash Survey), legal departments are not going to tolerate any reduction in client service or legal expertise, which are the top two reasons law departments moved books of business

from one firm to another. Id.

How are we going to do this?

Achieving what chief legal officers want from outside counsel is a shared objective that requires active collaboration. Change continues to come. According the same 2016 survey, almost 75% of legal departments plan to maintain or decrease their outside counsel legal spend going forward. See 2016 Chief Legal Officer Survey, an Altman Weil Flash Survey. Outside counsel must find ways to litigate for less, while maintaining high levels of service and expertise, or watch their books of business leave.

There may be a little bit of tension about whether outside counsel are doing their part. The results of the chief legal officer survey revealed an almost inverse relationship between the level of priority legal departments put on making changes to improve the value proposition and what they think their outside counsel are actually doing to advance those changes. See 2016 Chief Legal Officer Survey, an Altman Weil Flash Survey. That's not good.

What that survey don't talk about is what law departments are doing, or not doing, to help their outside counsel meet these objectives. Aside from asking outside counsel to reduce hourly rates or propose alternative, flat fee-type engagements that seem good for budgets, but don't address value, are there things law departments can be doing too? Being what law departments want can't be all on outside counsel's shoulders. I think many times outside counsel, like me, feel a little like Jerry McGuire, pleading with our clients to "help me help you!"

Death by a thousand cuts

Last year, a very good client of mine approached me about helping its outside lawyers be who the client wanted them to be. Let me explain. The company manufactures a variety of consumer products. One of those products has to do with residential plumbing. Occasionally, that product is installed incorrectly or is otherwise misused and abused, fails, and leaks water. Sometimes enough water that insurance companies get involved, pay on insurance claims, and then sue the company in subrogation lawsuits.

I've been representing this particular company for more than a decade defending product liability litigation. But there was something I didn't know about how they managed low exposure claims. Several years earlier the company had entered into an agreement with some of the large national insurers. The agreement looked something like this: If the insurer had a claim that fell within a certain dollar value, the company would pay a pre-determined percentage of the claim based on the age of the product, no further questions asked.

As you would expect, the insurance companies loved this arrangement. It was an open tap. If their inspectors could pin the leak on this particular product, regardless of other factors that might have caused or contributed to the leak, the insurer would tender the claim and get paid. Unsurprisingly, over the years, the number of claims ballooned.

The situation was a little extreme, but not entirely atypical of how most legal departments deal with low to moderate exposure defensive litigation. I would guess that most legal departments routinely settle meritless litigation out of pragmatism, for no other reason than to avoid business distraction and paying outside counsel legal fees that will almost certainly eclipse the amount in controversy on a case by case basis.

The impetus of the Trial-in-a-Box program

The company finally grew sick of this abusive arrangement. There was a new head of litigation at the helm. The company was paying a not so insubstantial amount of claims every year under the arrangement. The claims attacked the core of the company's business – the design of its industry-leading product – and there was suddenly an appetite to do something to curb the claims.

The company decided to take a gamble. They figure if they cancelled the agreement and forced the insurer to retain lawyers and prosecute lawsuits, and if the company could beat back those lawsuits enough times, the insurer would stop pushing the claims. At the least, the company bet that the volume of claims would go down enough to justify the increased defense costs of the new strategy. In essence, the company was willing to pay to take the target off its back.

There was a certain amount of company pride in this decision too. Settling meritless lawsuits attacking the core of your business is at best distasteful, and at worse demoralizing. But what remained was how to pull it off in a way that made business sense.

There's lots of ways companies are minimizing legal spend, and the popular tread has been to internalize as much work as possible. See General Counsel Up-At-Night Report, ALM Intelligence (2017) (estimating that almost 75% of legal work is internalized, but not separating litigation work). In-sourcing wasn't going to work because the company gets sued all over the country. We needed lawyers in most of the 50 states, and we needed good lawyers because the company wanted to win, every time.

We needed to find a way to quickly and efficiently educate outside lawyers about company history, product design, manufacturing, and quality assurance – simply stated, to give them a greater understanding of the business. And we had to find a way to give them the tools they needed to

achieve the cost reduction and improved budget forecasting law departments want from their outside counsel.

What we came up with was a pre-packaged, cradle to grave defense program that we called the Trial-in-a-Box program. The program took the form of a data base that could be shared with new outside counsel as they were hired, and comprised of three essential components: a research library, litigation materials, and evaluation tools.

Research library

You can't defend a company without knowing the business, and that's a steep learning curve for newly retained outside counsel. Knowing the business has little to do with legal abilities. It's the sort of knowledge that comes with long years representing the company, and we had find a way to educate new lawyers in as little as an afternoon about the company, how the product was designed, built, tested, installed, and functioned.

We started by putting together a series of memorandums and a 15 minute video designed to be reviewed and digested in about an hour. They addressed everything from the history of the company, overview of the products it manufactured, the design milestones of the product, a step by step overview of the manufacturing process with accompany photographs and video from the manufacturing plant, quality testing, industry and engineering standards, and installation and maintenance.

Our objective was two-fold. First, we wanted our outside lawyers to be as close to experts as we could make them in a short amount of time. Second, and just as important, we wanted our outside lawyers to believe that our product was the best the industry had to offer, that popular design criticisms and proposed alternative designs plaintiff experts advanced didn't make any sense, and instill in our outside counsel a sense of pride and that these cases can and should be won.

Litigation materials

Our objective with this section was to give outside counsel, prepackaged, every court filing they would need to make, every discovery request, response, or objection they would need to assert, the protective order and supporting materials they would need to file, every witness outline they would need to draft, and every trial exhibit they would need to identify. Where we couldn't prepare these materials in advance – because every case is different – we provided samples from which counsel could draw.

We recognize that discovery in these low to moderate exposure cases cause headaches for in-house litigation managers. Requests are easy to make, and often abusive, as plaintiff lawyers ratchet up the burden and expense on companies to coerce settlements. But over the years, the company's more established outside counsel had seen all these requests before, so we compiled approved responses and objections into a text searchable database that paraprofessionals could draw from.

We did the same for offensive discovery, proposing lists of requests that counsel could issue when answering the complaint, putting plaintiffs on their heels from the start. We designed them so that outside lawyer could simply choose from a list of applicable requests, and then have a paraprofessional or secretary format and serve them. In doing so, we took what would normally consume a few hours of attorney billable time into something that could be accomplished in 5 minutes.

Our outside counsel tend to depose the same types of fact witnesses and engineering experts in these cases, so we prepared outlines assembled and made better from what the company's more established outside lawyers were using individually, so they could be shared with all. We also compiled a library of prior depositions and impeachment materials for experts plaintiffs repeatedly designate. In doing so, we converted what would have consumed a solid day or two of attorney billable time for deposition preparation into a couple hours.

But the most important contribution was the development of a series of first class, demonstrative exhibits and videos for use at trial. When educating judges and juries about engineering principles, demonstratives explain in seconds what few of us could explain with words. The exposure of any one case in this class of low exposure cases could never justify the cost of developing trial exhibits like these, but collectively they most certainly do. It allows our outside lawyers to educate the jury in ways that the plaintiff bar simply can't do.

Evaluation tools

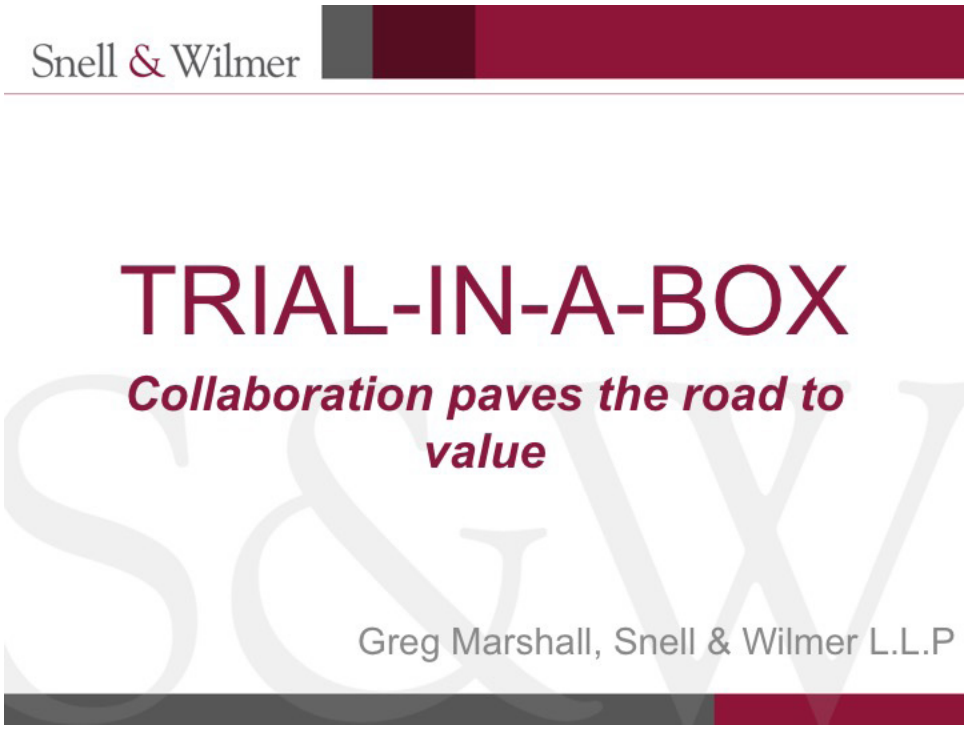
Of course, early case evaluation is essential, but instead of relying on outside counsel to divine what was most important, we developed checklists with the key information we needed to know about each type of case to mount an effective defense. Was the product out of warranty? Was the product installed in compliance with the three key recommended practices in the owner's manual? Was the product installed with the three main safety devises recommended in the owner's manual? Was the product periodically maintained by doing the three things the owner's manual required?

Collaboration paves the road to value

Developing this type of program is not something that outside counsel can accomplish alone. Only pro-active thinking and collaboration can create this sort of value. The benefits from programs like these are not just the reduction of outside

legal spend, but freeing up the time of in-house to attend to more important tasks.

Whether trial-in-a-box type programs are an appropriate tool any individual law departments might employ, the objective of this article is simply to impress that the value proposition is best served by collaboration between in-house and outside counsel. Speaking as an outside counsel, I care deeply about my clients' interests and giving them value, and we can do so much better working together.



"You have a pretty good case, Mr. Pitkin. How much justice can you afford?"

Doing more with less.

What would you like to see from your outside counsel?

- **Greater cost reduction – 52.5%**
- **Improved budget forecasting – 43.1%**
- **Modification to match risk – 33.1%**
- **Efficient project management – 32.8%**
- **Understand business – 22.4%**

2016 Chief Legal Officer Survey, An Altman Weil Flash Survey

Where are law departments spending their money?

- **Law departments with budgets of over $50 million are spending, on average, over half their budget on litigation.**

ACC Chief Legal Officers 2017 Survey, Key Findings.

What key challenges are faced by the legal department?

- **Reducing outside legal costs (ranked first most often)**

2016 Legal Department In-Sourcing and Efficiency Report,
The Keys To A More Effective Legal Department, Thomas Reuters

How are we going to do this?

Do you plan to increase or decrease your overall spend on outside counsel?

- **35.2% = decrease**
- **73.4% = remain or decrease.**

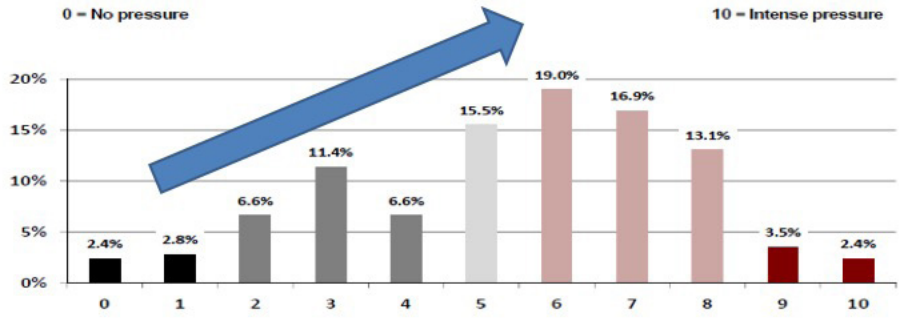
2016 Chief Legal Officer Survey, An Altman Weil Flash Survey

Why did law departments shift work to another law firm in the last 12 months?

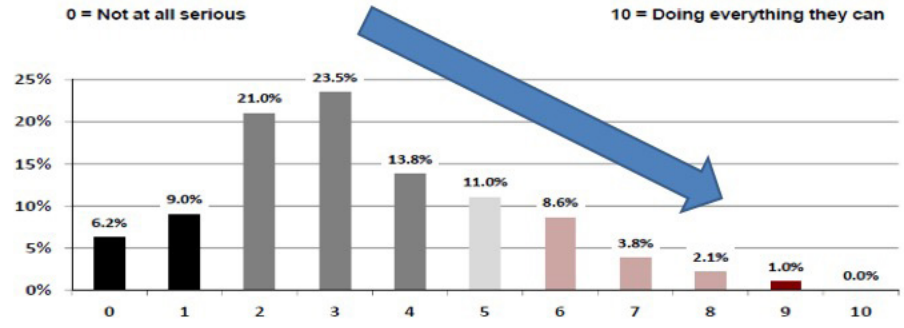
- **Client service – 53.3%**
- **Legal expertise – 50.6%**
- **Low fees – 41.25%**

2016 Chief Legal Officer Survey, An Altman Weil Flash Survey

How much pressure are corporations putting on law firms to change the value proposition?



How serious are law firms about changing the value proposition?



Help me help you!

Death by a thousand cuts.

Trial-in-a-Box

Research library

- Company history
- Design milestones
- Step by step manufacturing
- Quality testing
- Industry and engineering standards
- Installation and maintenance

Litigation materials

- Indemnification agreements
- Sample discovery requests and responses
- Protective orders and motions
- Subpoenas
- Witness outlines
- Sample motions
- Trial exhibits

Evaluation tools

- Primarily check list format

Collaboration paves the road to value.

What are the results of increased efficiency during the day for in-house counsel?

- **Can focus on strategic work**
- **Can focus on legal aspects of the job**

2016 Legal Department In-Sourcing and Efficiency Report,
The Keys To A More Effective Legal Department, Thomas Reuters

"You have a pretty good case, Mr. Pitkin.
Let me tell you how we're going to win!"

Gregory J. Marshall
Partner
Snell & Wilmer (Phoenix, AZ)

602.862.6514 | gmarshall@swlaw.com
https://www.swlaw.com/people/greg_marshall

Greg Marshall co-chairs the firm's Financial Services Litigation Group, focusing his practice on the defense of banks and lenders. Mr. Marshall's clients include national and international banks, regional banks, mortgage lenders and servicers, credit card issuers, automobile finance servicers, credit unions, and money transmitters. Mr. Marshall's practice includes management of regional and national defense programs involving pattern litigation. Mr. Marshall has defended clients in a wide variety of litigation and regulatory matters, including qui tam, class action, and multi-district litigation (MDL). Mr. Marshall has substantial experience litigating claims involving the Dodd-Frank amendments, CFPB regulations, U.S. Treasury regulations and directives, HAMP and HARP, MERS, and lien priority disputes. Mr. Marshall also has substantial experience defending claims arising under the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Reporting Act (FCRA), the Telephone Consumer Protection Act (TCPA), the Unfair Debt Collection Practices Act (UDCPA), and state unfair and deceptive acts or practices (UDAP) statutes.

Related Services
- Class Action Litigation
- Commercial Litigation
- Financial Services Litigation
- Insurance
- International
- Non-Profit/Tax-Exempt Organizations
- Product Liability Litigation

Representative Experience
- Defended and tried bellwether case involving Fair Credit Reporting Act claims against secondary mortgage market participant.
- Defended national mortgage servicer against putative class action claims challenging servicing fees.
- Defended national banks in pattern qui tam litigation regarding unpaid transfer taxes.

Professional Memberships and Activities
- Snell & Wilmer Financial Services Litigation Group, Co-Chairperson
- Federal Bar Association, Phoenix Chapter, Board Member
- Snell & Wilmer Hiring Committee
- Snell & Wilmer Pro Bono Committee, Chairperson (2009-2014)
- Phoenix Art Museum, Men's Art Council Director (2005-2007)
- Arizona Bar Foundation, Legal Services Committee, Director (2005-2006)

Professional Recognition and Awards
- Southwest Super Lawyers, Rising Stars Edition, Banking (2012-2013)
- Arizona's Finest Lawyers
- Top 50 Pro Bono Attorneys, Arizona Foundation for Legal Services & Education (2011)

Education
- Emory University School of Law (J.D., 1999); Dean's Fellow; Order of the Barristers; Order of the Advocates
- University of Arizona (B.A., cum laude, 1995)

OFFENSIVE TRADEMARKS: WHAT THE #@$%!

Jennifer Fitzgerald
Freeborn & Peters (Chicago, IL)
312.360.6585 | jfitzgerald@freeborn.com

Our history has been marked by a waning and waxing of the tides with respect to offensive speech. Over the years once completely acceptable words and phrases have become laden with divisiveness and, sometimes, developed implications that are downright mean. These offensive terms can range from the more innocuous use of "Merry Christmas" instead of "Happy Holidays" to the more overt use of "Redskins" instead of "Native American" or, while still offensive, "Indians." The latter examples are much more egregious and, in the eyes of many, politically incorrect. It also highlights a trademark issue that has gained focused attention in recent years -- Can the NFL's Washington football team continue to refer to itself as the Washington Redskins and avail itself of all of the protections that Federal trademark law provides. Whether you find the name offensive or not, as a legal matter, it is an interesting study in the conflict between Congress' right to regulate the trade names individuals and groups choose to adopt and the First Amendment protection of free speech. Moreover, the issue is not limited to the Washington Redskins. There are a multitude of trademark applicants and registrants dealing with this very issue. The use of offensive trademarks has become a hot topic in the trademark world.

A trademark is a word, phrase, symbol or design that identifies and distinguishes the source of the goods of one party from those of another. Trademarks can be registered with the United States Patent and Trademark Office (USPTO) if they meet certain requirements, most notably use in interstate commerce. Trademarks can also be established under state law through common law rights. A registration with the USPTO, however, has several advantages, including providing notice to the public, a presumption of nationwide ownership, stronger enforcement rights, and access to federal courts.

Federal trademark law is rooted in the Lanham Act. 15 USC §§1051-1141. The Lanham Act was passed in 1946. It sets out the process for registration, enforcement and protection of trademarks. Relevant to this discussion, §1052(a) of the Act provides that:

> No trademark 'shall be refused registration on the principal register on account of its nature unless it … [c]onsists of matter which may disparage…persons, living or dead…or bring them into contempt, or disrepute.'

It is pursuant to this provision that the Washington Redskins found themselves in litigation. The Washington Redskins had actually been awarded several federally registered trademarks in 1967, 1974, 1978 and 1990. However, in 1992, Suzanne Shown Harjo, and several other plaintiffs, sought to cancel the team's registrations by arguing that REDSKINS is a racial slur and is, under the Lanham Act, disparaging. Harjo v. Pro-Football, 50 USPQ.2d 1705 (TTAB 1999). In 1999, the USPTO cancelled the registrations on the ground that the "subject marks may disparage Native Americans and may bring them into contempt or disrepute." The owners appealed the matter to the District Court for the District of Columbia. The court reversed on the grounds that there was insufficient evidence of disparagement and that the TTAB should have barred the matter on laches grounds. Pro-Football, Inc. v. Harjo, 68 USPQ2d 1225 (D.D.C. 2003). There were subsequent appeals. In 2005, the Federal Circuit remanded the case to the District of Columbia court for further consideration of the laches question, particularly in light of one of the named plaintiffs, Mateo Romero. Pro-Football, Inc.v. Harjo, 75 USPQ2d 1525 (Fed.Cir. 2005). Mr. Romero had only been one year old, in 1967, when the first trademark was registered, and when the laches clock

started running. However, in 2008, the District of Columbia court held that Mr. Romero's claims were still barred by laches since he waited at least 8 years after reaching the age of majority before petitioning to cancel the marks and that this delay prejudiced Pro-Football. Pro-Football, Inc. v. Harjo, 87 USPQ2d 1891 (D.D.C 2008). This decision was affirmed by the Federal Circuit. Pro-Football, Inc. v. Harjo, 90 USPQ2d 1593 (D.C. Cir. 2009). In 2009, the Supreme Court declined to take the case.

However, during the pendency of the Harjo cases, the Washington Redskins, and others, sought to register trademarks using the term REDSKINS including WASHINGTON REDSKINS CHEERLEADERS, REDSKINS PIGSKINS and REDSKINS HOG RINDS. The USPTO denied these marks on the grounds that they "consist of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs, or national symbols."

Arguably seeing the writing on the wall, or perhaps just taking direction from the Federal Circuit, in August 2006, six different, younger Native Americans, filed a petition to cancel the same six REDSKINS registrations that had been at issue in the Harjo case. Blackhorse v. Pro Football, Inc., Cancellation No. 92046185. The petition alleged that "each of the Petitioners had only just recently reached the age of majority, the age from which the D.C. Circuit Court of Appeals has determined that laches begins to run." On June 18, 2014, the USPTO cancelled the marks stating that the term REDSKINS was "disparaging to Native Americans at the respective times they were registered in in violation of §2(a)." Blackhorse v. Pro-Football, Inc., Cancellation No. 92046185 (TTAB June 18, 2014).

On August 14, 2014, Pro-Football, Inc. appealed the decision to the District Court of Virginia on the grounds that the TTAB ignored federal case law and the weight of the evidence as well as arguing that the ruling was an infringement on their First Amendment right to free speech and expression. Pro-Football, Inc. v. Amanda Blackhorse, Civ.No. 1:14-cv-01043 (August 14, 2014). The case brought out many opinions. The Department of Justice entered the case stating it would defend the constitutionality of the case. The ACLU went the other way, stating that while the name is offensive, the government should not be able to decide what types of speech are prohibited and that the Lanham Act is unconstitutionally vague in this regard.

On July 8, 2015, the District Court, ruling on cross motions for summary judgment, the upheld the trademark cancellations. Particularly, the Court held that "§2(a) of the Lanham Act does not implicate the First Amendment [and] second, the federal trademark registration program is government speech and is therefore exempt from First Amendment scrutiny." Pro-Football, Inc. v. Blackhorse, 112 F.Supp.3d 439 (E.D. Va. 2015).

The Washington Redskins appealed their case to the Fourth Circuit.

Somewhat concurrently, and certainly without as much media attention, Simon Shiao Tam, the lead singer of a band named The Slants, sought to trademark his band's name in 2011. The USPTO refused the registration stating that the mark "is disparaging to persons of Asian descent." The TTAB upheld the rejection in September, 2013. In re Simon Shiao Tam, Serial No. 85472044 (TTAB September 26, 2013). The TTAB explained that neither the fact that Mr. Tam is Asian, nor the fact that Mr. Tam did not find the word objectionable, failed to take "into account the views of the entire referenced group." Id.

Mr. Tam appealed the matter to the Federal Circuit. The case was argued in early 2015 and affirmed on April 20, 2015. In re Simon Shiao Tam, 785 F.3d 567 (Fed. Cir 2015) However, on April 27, 2015, the Federal Circuit vacated its panel opinion of April 20, 2015, reinstated the appeal and set the case to be heard sua sponte. It also requested new briefing, particularly on the issue: "Does the bar on registrations of disparaging marks in 15 U.S.C. §1052(a) violate the First Amendment?"

On December 22, 2015, the en banc Federal Circuit reversed the TTAB's decision holding that §2(a) violates the First Amendment. In re Simon Shiao Tam, 808 F.3d 121 (Fed. Cir. 2015). As recognized by Judge Moore, "Courts have been slow to appreciate the expressive power of trademarks…[w]ords—even a single word—can be powerful. Mr. Simon Shiao Tam named his band THE SLANTS to make a statement about racial and cultural issues in this country.... Many of the marks rejected as disparaging convey hurtful speech that harms members of oft-stigmatized communities. But the First Amendment protects even hurtful speech." Further, the panel held that refusal to allow the registrations burdens free speech by preventing the applicant from the benefits of a registration including "truly significant and financially valuable benefits" such as the right to stop importation of infringing goods and the recovery of treble damages. Id. The Court added that, the issue of what is "disparaging" is not consistently applied and noted that a "single examiner, with no input from her supervisor, can reject a mark as disparaging by determining that it would be disparaging to a substantial composite of a reference group."

On February 12, 2016, the Federal Circuit issued its formal mandate to the USPTO for further proceedings. On March 8, 2016, Tam filed a request with the USPTO requesting the "further proceedings" (and registration) commence. On March 10, the USPTO issued a guide to "Examination

for Compliance with Section 2(a)'s Scandalousness and Disparagement Provisions While Constitutionality Remains in Question." It outlined that marks that violate the provision will be issued "advisory" rejections and if a violation of §2(a) is the only ground for refusal, the application will be suspended.

On March 15, 2016, Tam filed a writ of mandamus, accusing the USPTO of ignoring the Federal Circuit's ruling and refusing to publish its trademark. The USPTO responded by commenting that the Federal Circuit did not establish "any particular timetable. On March 30, 2016, the Federal Circuit denied Tam's writ.

On April 20, 2016, the USPTO filed its Petition for a Writ of Certiorari. It claimed that because §2(a) does not prohibit any speech or conduct, or restrict trademark use or common law protections, it was improper for the Federal Circuit to have found an affirmative restraint on speech. It also noted the longstanding history of the provision.

While the USPTO writ was pending, the Washington Redskins also filed a petition for certiorari, even though their matter was still pending before the Fourth Circuit. The Redskins claimed that its case is "an essential and invaluable complement to Tam" and that a prejudgment review of the case "would allow the court to consider First Amendment question in the full range of circumstances, including both initial denials of registration, as in Tam's case, and after the fact registrations in the Redskins case."

In September, 2016, the USPTO writ was accepted. On October 3, 2016, the Redskin's request was denied.

As the Tam case was briefed, multiple amicus briefs were filed as well. Most notable was the one filed by the Redskins. It not only included a well-briefed position, but also an 18 page appendix of registered trademarks that may also be considered offensive. Among the registered marks it notes: AFRO-SAXONS, DAGO SWAGG, BAKED BY A NEGRO, CRIPPLED OLD BIKER BASTARDS, YID DISH, CRACKA AZZ SKATEBOARDS, RETARDIPEDIA, BOOBS AS BEER HOLDERS, and VAJAYJAY HAT.

On June 19, 2017, the case of Matal v. Tam was decided 8-0 in favor of Tam. The Court held that the disparagement clause of the Lanham Act violates the First Amendment's free speech clause. 582 U.S. __ (2017).

Justice Alito stated "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." Id. The registration of trademarks was not found to be government speech, and therefore the law was subject to strict scrutiny.

Therefore, the Slants were permitted to register their marks. Likewise, the cancellation of the Washington Redskins marks has been reversed. The Redskins case that was pending in the Fourth Circuit was dismissed and the marks that were put on hold by the USTPO decree, with respect to disparaging trademarks has been permitted to proceed in the registration process. However, the related portion of the law that applies to "immoral and scandalous" trademarks has not yet been deemed unconstitutional. In the case In Re Brunetti, a designer filed a trademark for the mark FUCT. The USPTO rejected the mark, and the TTAB affirmed the refusal stating "the term FUCT is the phonetic equivalent of the word [#$#&@]". It found that the term "FUCT" is "vulgar, profane and scandalous slang." In re Brunetti, No. 85310960 (TTAB, Aug. 1, 2014). The case was appealed to the Federal Circuit. However, before the Federal Circuit rendered its decision the Tam case was decided. The Federal Circuit has requested supplemental briefing on the applicably of the Tam decision on the Brunetti matter and no decision has yet been rendered.

Thus, the practice of trademark law has gotten more interesting since June 19th. There have been many new filings for marks not even fit to print here. The very cornerstone of democracy is free speech, and the ability to expressively disagree with the opinions of others. The bedrock of trademark law is the association of a mark with a good or service. Instead of the USPTO acting as gatekeeper, this role will now fall to the public. If you don't like the name of a product, don't buy it. If others agree with you, the mark will cease to be used in commerce, and no longer subject to the protections of the USPTO.

Offensive Trademarks
What the #@$%!

Jennifer Fitzgerald

Freeborn
ATTORNEYS AT LAW

Mom's the Boss

- Video: Filename: Yoplait-You're Not The Boss.mp4 goes here

Or is that offensive?

Washington Redskins

- Awarded Federal Trademarks in 1967, 1974, 1978 and 1990
- *Harjo* defendants petitioned the USPTO to cancel the marks under the law that no registrations should be granted if they are "disparaging, scandalous, contemptuous, or disreputable."

Washington Redskins

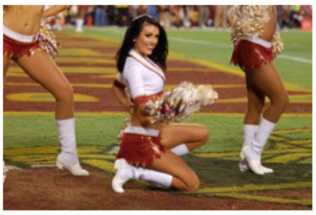
- 1999 USPTO cancelled the marks on the ground that the "subject marks may disparage Native Americans and may bring them into contempt or disrepute."

Washington Redskins

- Federal District Court reversed on the ground that there was insufficient evidence of disparagement
- Subsequent appeals were denied on laches; USCT declined to take the case

Washington Redskins

- Filed new trademarks for WASHINGTON REDSKINS CHEERLEADERS – DENIED
- Others filed with “Redskins” name, also denied – REDSKINS HOG RINDS



Washington Redskins

- Denied on grounds that: they "consist of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs, or national symbols."

Washington Redskins

- *Blackhorse* plaintiffs filed a new action to cancel in 2013
- June 18, 2014, USPTO cancels marks stating the term Redskins is disparaging to a "substantial composite of Native Americans."

Washington Redskins

- August, 2014, Redskins appealed
- The DOJ entered the case stating that it would defend the constitutionality of the trademark law.
- The ACLU filed an amicus brief, stating that while the Redskins name is insulting, the Lanham Act's provisions barring registration of terms is unconstitutionally vague.

Washington Redskins

- The Attorney General's office opposed the registrations based on a long history of cancellations and that Redskins is disparaging speech offensive to the unique cultural heritage of the American Indians

Washington Redskins

- On July 8, 2015, the District Court upheld the decision of the TTAB and found that "the evidence supports the conclusion that the Redskin Marks consisted of matter that 'may disparage' a substantial composites of Native Americans."

- On October 30, 2015, the Redskins appealed to the Fourth Circuit

The Slants

- Filed a trademark application on November 11, 2011
- USPTO refused on ground that the name is disparaging to people of Asian descent.
- Mr. Tam is Asian, and the band is using the name to "retake the negative stereotype"
- TTAB refused the registration

The Slants

- Mr. Tam appealed to the Federal Circuit; *en banc* Court held the disparagement case in §2(a) is facially invalid under the First Amendment because it imposes impermissible burdens on protected speech.

Washington Redskins

- The USPTO appealed and certiorari was granted in September 2016
- Although briefed and pending in 4th Circuit, unsuccessfully attempted to intervene in *Tam*
- Claimed their case was an "essential and invaluable complement to *Tam*"

The Slants

- Washington Redskins filed an amicus brief including 18 pages of registered and pending trademarks that it thought were also offensive.

1a

APPENDIX A

The following are examples of some of the PTO's current and live registrations. They are available through the PTO's database. *See* PTO, Trademark Electronic Search System, http://tmsearch.uspto.gov.

AFRO-SAXONS, apparel
Reg. No. 3726710 (Dec. 15, 2009)

AMERICAN REDNECK SOCIETY, social club
Reg. No. 4062574 (Nov. 29, 2011)

ANAL FANTASY COLLECTION, sex toys
Reg. No. 4507635 (Apr. 1, 2014)

ANAL INTENSIVE, adult entertainment
Reg. No. 2698644 (Mar. 18, 2003)

ANAL RING TOSS, live adult entertainment
Reg. No. 2950588 (May 10, 2005)

ASS FACE DOLLS, image database
Reg. No. 4733121 (May 5, 2015)

BABY DADDY INSURANCE, insurance brokerage
Reg. No. 4613011 (Sept. 30, 2014)

BAKED BY A NEGRO, baked goods
Reg. No. 4424120 (Oct. 29, 2013)

BARELY LEGAL XXX, adult entertainment
Reg. No. 3063002 (Feb. 28, 2006)

BARENAKED LADIES, live music, recordings, and apparel
Reg. No. 2637871 (Oct. 22, 2002)
Reg. No. 2461404 (June 19, 2001)

BETTER THAN SEX PEARL NECKLACE, wine
Reg. No. 5016155 (Aug. 9, 2016)

2a

BIG TITTY BLEND, coffee
Reg. No. 4616854 (Oct. 7, 2014)

BITCH, handbags
Reg. No. 4822287 (Sept. 29, 2015)

BITCH DON'T KILL MY VIBE, apparel
Reg. No. 4653950 (Dec. 9, 2014)

BITCH FACE, cosmetics
Reg. No. 3819705 (July 13, 2010)

BITCH RELAX, apparel
Reg. No. 4559906 (July 1, 2014)

BITCH SLAP, movies
Reg. No. 3998853 (July 19, 2011)

BITCHY GAY, apparel
Reg. No. 4800962 (Aug. 25, 2015)

BLACK MAN WITH A GUN, website and podcast
Reg. No. 4320289 (Apr. 16, 2013)

BLACKGIRLSDOPORN.COM, adult entertainment
Reg. No. 4718284 (Apr. 7, 2015)

BLAQMAN R E C O R D S, music
Reg. No. 4295071 (Feb. 26, 2013)

BONERBAIT, apparel
Reg. No. 5035019 (Sept. 6, 2016)

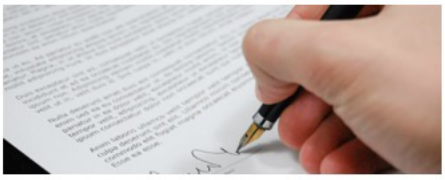
BOOBS AS BEER HOLDERS, adult entertainment
Reg. No. 4334788 (May 14, 2013)

BOOTY CALL, sex toys
Reg. No. 4243279 (Nov. 13, 2012)

BOUND GANGBANGS, adult entertainment
Reg. No. 4618921 (Oct. 7, 2014)

Matal v. Tam

- Supreme Court found 8-0, that the provisions of the Lanham Act which prohibited the registration on trademarks that may disparage persons, institutions, beliefs, or national symbols was unconstitutional as it violated the First Amendment.

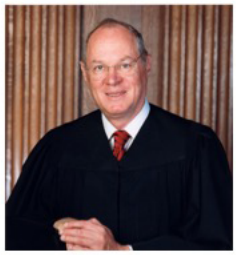


Matal v. Tam

- Justice Alito: “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.”

Matal v. Tam

- Justice Kennedy: “A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all.



Matal v. Tam

- The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."

So Now What

- 1. The Slants and The Washington Redskins are free to have their trademarks registered and any other marks that were "on hold" due to disparaging/offensive nature will move forward at the USPTO

So Now What

- 2. New “offensive” trademarks are being filed every day. Many filers, when questioned, claim they are trying to “capture the stereotype”

So Now What

- 3. While the question of disparaging trademarks under §2 has been resolved, the question of “immoral or scandalous” marks is still pending in *Brunetti* before the Federal Circuit.

So Now What

- The Federal Circuit has asked for supplemental briefing in light of *Tam*. *Brunetti* deals with a registration for FUCT for clothing.

So Now What

- 4. The Supreme Court has reiterated that the First Amendment is paramount to democracy.

So Now what

- 5. People will be offended…
- Video: Filename: I was offended – steve hughes.mp4
- https://www.youtube.com/watch?v=ceS_jkKjIgo

Conclusion

Jennifer L. Fitzgerald

Partner
Freeborn & Peters (Chicago, IL)

312.360.6585 | jfitzgerald@freeborn.com
https://www.freeborn.com/attorney/jennifer-l-fitzgerald

Jennifer Fitzgerald is a Partner in the Litigation Practice Group and has extensive business litigation experience in matters involving intellectual property, securities, antitrust and general commercial litigation. Her legal experience includes trial and appellate work on behalf of both plaintiffs and defendants in a wide range of complex litigation matters.

As a registered patent attorney, Jennifer has the ability to discuss inventions at their most scientific level but she also is skilled in the art of explaining technical issues to lay persons. She has advised clients and litigated patents on topics as varied as golf clubs, windshield wipers, diet modification software, visual skills enhancement, package design, medical products, acoustic echo cancellation technology, RFID technology and wireless communications.

She assists clients with prosecution and protection of trademarks and copyrights worldwide. She has organized raids against counterfeiters in China, actively assisted a client in the “reclamation” of trademarks in Europe and recovered U.S. domain names from cybersquatters. She maintains contacts with a worldwide set of foreign counsel to serve the international needs of her clients.

Initially stemming from her intellectual property and litigation backgrounds, Jennifer regularly advises clients in the area of product recalls. Having represented clients before the Consumer Products Safety Commission, National Highway Transportation Safety Administration and the U.S. Coast Guard, she is skilled in the assessment and management of a product recall, recognizing the sensitivity in protecting a brand and consumers alike. She also assists clients in evaluating internal practices and procedures related to recall preparedness. In these advisory roles, Jennifer and clients work together to minimize the impact of a recall on the company as a whole.

As a result of both her broad legal experience and her personality, Jennifer also serves as outside general counsel to several companies. In this context, she provides general advice and counseling services, and facilitates problem identification and resolution.

Practice Areas
- Litigation
- Intellectual Property
- Patent Litigation and Counseling
- Trademark Protection, Enforcement and Counseling
- Intellectual Property Litigation
- Trade Secret Protection and Enforcement
- Copyright Protection and Enforcement
- Restrictive Covenants and Trade Secrets
- IP Licensing and Transaction Counseling
- Antitrust
- Purchasing and Supply Chain Management

Education
- J.D., Loyola University Chicago School of Law; Case reporter for the Consumer Law Reporter and participated in the London Advocacy Program in 1994-1995
- B.S., University of Southern California

PANEL: EFFECTIVE LEGAL PROJECT MANAGEMENT

Tony Rospert
Thompson Hine (Cleveland, OH)
216.566.5861 | anthony.rospert@thompsonhine.com

"We must consult our means rather than our wishes," George Washington prudently observed. Although he was addressing wartime budgeting, his words resonate with today's corporate clients who are pressing their inside and outside litigation counsel to rein in litigation costs. Since 2009 clients have increasingly sought to reduce litigation costs by asking outside law firms to cut their rates. But cutting rates alone is not a sustainable strategy to achieve long-term savings when managing complex or recurring business disputes. That's why some forward- thinking clients are requiring more from outside law firms to control costs and deliver more value.

So, what can outside lawyers do to control costs and deliver more value to clients? There are many tools in the toolbox, including legal project management (LPM), process improvement, alternative fee arrangements/value billing and flexible staffing models. Thompson Hine embraces all of these in its approach to innovative service delivery. LPM tools and methodologies drive greater predictability and client communication, ultimately maximizing value to clients. Streamlined and standardized processes yield more efficiency and additional cost savings. Value pricing arrangements, as an alternative to the traditional billable hour, can meet a client's need to cap risk or achieve predictability. And flexible staffing models allow the law firm to use the right lawyer at the right price for each task in the litigation, thereby containing costs without sacrificing quality. Consider one other useful but underutilized tool for delivering more value: a customized litigation budget. Of all the crucial documents a trial lawyer will create during the life of a complex dispute – such as a well-drafted complaint, a comprehensive motion for summary judgment or flawless jury instructions – a sound litigation budget is arguably one of the most important. Outside counsel should view preparing a litigation budget not as a burden, but as an opportunity – an opportunity to collaborate with the client, to demonstrate a willingness to share risk, to minimize surprises and to maximize the chances bills will be paid without issue or delay. Moreover, a sound legal budget enhances communication and transparency regarding the ongoing progress of the matter, a goal shared by the client and the trial lawyer.

Litigation Budgeting: Thompson Hine's Standardized Approach

The challenge for a law firm is to build a culture that embraces budgeting as an opportunity, despite the uncertainties of litigation. At Thompson Hine, we have rallied around four key principles:

- Standardize and simplify the budgeting process.
- Give trial lawyers the right technology.
- Take advantage of prior efforts and prior results.
- Demonstrate commitment inside and outside the firm.

Using these principles, we have designed our own proprietary budgeting software that is available on every trial lawyer's computer. With this software, the trial lawyer can readily create a customized budget with sufficient detail to enable the client to make informed choices about scope, staffing and resources.

Our proprietary budgeting program is the product of collaboration among trial lawyers, IT specialists and our Director of Legal Project Management. Its user-friendly interface includes a series of prompts, drop-down menus and suggested possibilities drawn from the collective experience of our entire litigation group. Similar to a tax preparation program, the budgeting software asks questions and prompts the attorney to consider various aspects of the

litigation planning process. It allows the lawyer to adjust standard budget elements for maximum customization of the budget, while still drawing on the collective wisdom of the firm's past engagements. And it automatically performs all calculations, eliminating the potential for errors due to incorrect (or deleted!) spreadsheet formulas or manual miscalculations.

At its heart, the budgeting software prompts the lawyer to plan the anticipated work on the matter by reference to the standard ABA litigation task codes plus a proprietary set of firm- developed sub-task codes. Using high/low ranges to bracket the expected spend for each timekeeper and task, the program accounts for some of the uncertainty inherent in budgeting long-term future events. The software also accounts for the element of time: The lawyer estimates the start and end date of each task (or phase), giving the client a good picture of the expected timing of its legal expenditures in future periods.

Tracking Performance

After one creates a litigation budget, the job is only half complete. An important element of LPM is regular periodic reporting of actual billings versus budgeted billings throughout the life of the matter. Thompson Hine has invested in Budget Manager, a comprehensive software package that tracks budget-to-actual data. Whether the client requests it or not, our timekeepers code time entries for all matters; these codes correspond to the budgeted task codes, enabling Budget Manager to track budget-to-actual data in real time. We then can create reports that contain detailed budget-versus-actual statistics by timekeeper, phase and task, and share them with the client. If the unexpected happens, we are in a position to promptly advise our client and discuss options.

Takeaways

In light of escalating litigation costs and organizations' shrinking budgets for legal services, corporate clients are challenging their law firms to offer new and innovative ways to achieve their goals more economically. As part of a comprehensive, disciplined approach to managing legal projects, trial lawyers and their clients should embrace litigation budgeting as a positive, concrete way to help control costs, improve efficiency and provide the transparency and accountability clients need to better manage their resources and expectations, ultimately increasing the value clients receive for their legal spend.

Panelists

- Margie Conner

DAVEY

- Mark Dietz

DHL

- Jeff Sabatine

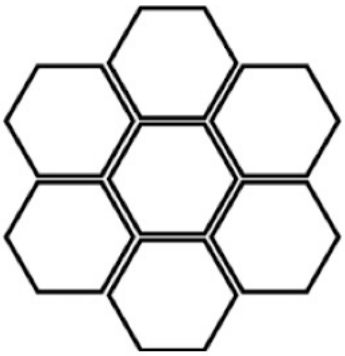
ForestCity

- Julie Lewis

Carestream

Agenda

- Overview of Legal Project Management
- 6 Components of LPM
  - Communicate
  - Scope
  - Plan
  - Budget
  - Monitor
  - Close



In-House Counsel Objectives

- Manage Expenses
- Improve Predictability of Cost
- Improves Outcomes
- Improve Perceived Value of Legal Department

LPM is a way of thinking

- More upfront planning
- Standardization where it makes sense
- More thoughtful & strategic staffing
- Better communication
- Closer monitoring of spending

Legal Project Management

Legal Project Management

Communicate

"Large in-house departments HATE surprise; they do not want to be caught off guard."

Tools for Communication: Protocol

Component	Definitions/Examples
Event / Type	Project kick-off, status, key event
Due Date / Frequency	Daily, weekly, monthly, ad hoc
Purpose	Inform, seek input
Content	Objective
Vehicle	Meeting, e-mail, conference call, all-hands meeting
Author / Reviewer / Sender	Responsible and Accountable Parties
Target Audience	Consulted and Informed Parties
Status	Completion, delay, etc.

Tools for Communication: Internal Action Items

THOMPSON HINE

Updated Action Item List

Project: [Project Name]

Project Task	Status	Priority	Who	Due Date	Notes
[Description of Task]	[In Progress, Awaiting Review, Final]	[High, Medium, Low]	[Attorney Name]		

SmartPath

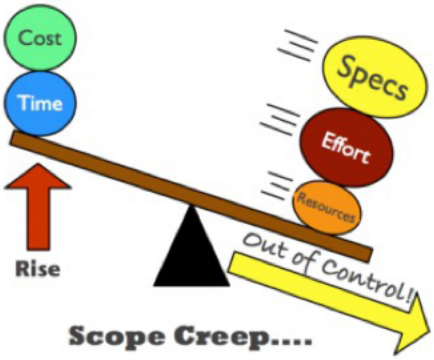
1

Privileged and Confidential Attorney-Client Communication/Attorney Work Product

Legal Project Management

Scope

"I insist on lawyers scoping out a matter early in the litigation. I want to prevent law firms from claiming 'scope-creep' further down the line which leads to increase costs and time."



Tools for Scoping: Project Description

Component	Description
Project Summary	Brief Synopsis of Project
Goals	Desired end result
Scope	Major activities to be undertaken
Out of Scope	Major activities NOT included in the project scope
Key Assumptions	Premises that underlie the plan
Risks	Threats to making Goals
Key Deliverables	Output produced or documented
Key Dates	End date and milestones
Key Players	Team Lead – managing activities Team Members – active participants

Tools for Scoping: Scope Memo

PRIVILEGED & CONFIDENTIAL

Use this template to record the essential information about the project. Get agreement from the client on these elements. Distribute to the project team. [Delete this text box]

Project Overview

Date: [dd month yy] | Prepared by: [participant name]

PROJECT NAME

Project name

PROJECT SUMMARY DESCRIPTION

Summary of the project, project stage, or key milestone, including begin and end dates and work performed.

SPONSORING BUSINESS UNIT		EXECUTIVE SPONSOR	
THOMPSON HINE TEAM		[CLIENT] TEAM	
[Participant name]	[Role on Project]	[Participant name]	[Role on Project]
[Participant name]	[Role on Project]	[Participant name]	[Role on Project]
[Participant name]	[Role on Project]	[Participant name]	[Role on Project]
[Participant name]	[Role on Project]	[Participant name]	[Role on Project]

BUSINESS OBJECTIVE

Describe the business objectives that are addressed by this project. What is the desired end state? What does success look like?

PROJECT SCOPE

Define the work that must be completed to deliver the product or service.

EXCLUSIONS FROM SCOPE

List major activities that that will not be undertaken.

KEY ASSUMPTIONS

What assumptions will affect scope if they are untrue or change?

MAJOR RISKS TO TIMELY COMPLETION

RISK	MITIGATION PLAN ? (Y/N)
List of the major threats to the project achieving its goals.	

Tools for Scoping: Scoping Checklist

THOMPSON HINE

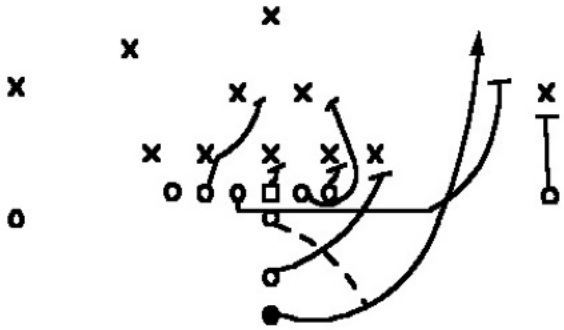
Early Case Assessment Checklist

Client Discussion Points:		Done
1.	What is a "success" for the Client?	
	○ Not the same as complete victory. May not even be what's in the pleadings (e.g., claim breach of contract, but really want to change relationship). Could be positive (e.g., recover this amount) or negative (e.g., avoid parallel federal investigation).	
2.	What are the immediate client risks?	
	○ e.g., want to avoid disclosure of certain documents; critical witness is about to be transferred to an inconvenient place	
3.	Who are the stakeholders at the Client?	
	○ in-house counsel, business unit(s), upper management, etc.	
4.	What business unit/department is paying for the litigation at the Client?	
5.	What is that business unit's experience with/tolerance for litigation?	
	○ Does the business unit know what it's in for (time, resources, etc.)?	
	○ Is a previous bad experience coloring their assessment of this case?	
	○ Does the business unit have a "fight to the death" policy? Will the business unit do everything possible – including taking a bad deal – to avoid going to trial?	
6.	Is there insurance coverage? Has the insurer been notified?	
	○ we can review insurance policies and advise whether coverage would apply	
	○ we may be able to suggest ways to bring the action within the coverage	
	○ insurance policies usually have very specific notice requirements, so it is important to confirm that they were followed (rather than getting a vague confirmation that the insurer was "notified")	
7.	Is a Litigation Hold in place?	
	○ DM #11707002 v.3 – litigation hold notice for client/employees	
	○ DM #11707532 v.2 – template for letter to client explaining litigation hold	

Legal Project Management

Plan

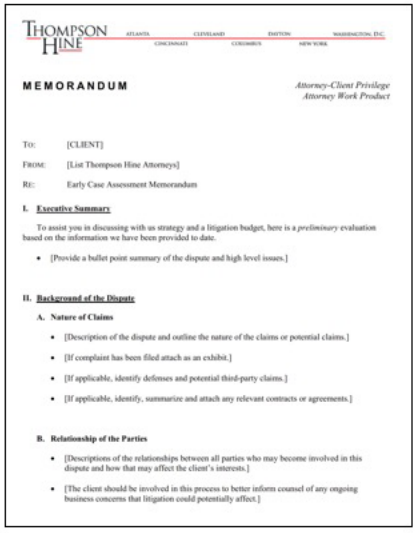
"Legal issues are reasonably predictable; including extraordinary stuff. It has a certain rhythm and can be put into a plan, but, at some point the plan may change. The relationship should allow you to work in and/or out of the box."



Plan: Benefits of Front-End Plan

- Control Legal Costs and Deliver More Value
- Improve Communication and Transparency
- Achieve Better Results

Tools for Planning: ECA Memorandum



THOMPSON HINE

ATLANTA CLEVELAND DAYTON WASHINGTON, D.C.
CINCINNATI COLUMBUS NEW YORK

MEMORANDUM

Attorney-Client Privilege
Attorney Work Product

TO: [CLIENT]

FROM: [List Thompson Hine Attorneys]

RE: Early Case Assessment Memorandum

I. Executive Summary

To assist you in discussing with us strategy and a litigation budget, here is a *preliminary* evaluation based on the information we have been provided to date.

- [Provide a bullet point summary of the dispute and high level issues.]

II. Background of the Dispute

A. Nature of Claims

- [Description of the dispute and outline the nature of the claims or potential claims.]
- [If complaint has been filed attach as an exhibit.]
- [If applicable, identify defenses and potential third-party claims.]
- [If applicable, identify, summarize and attach any relevant contracts or agreements.]

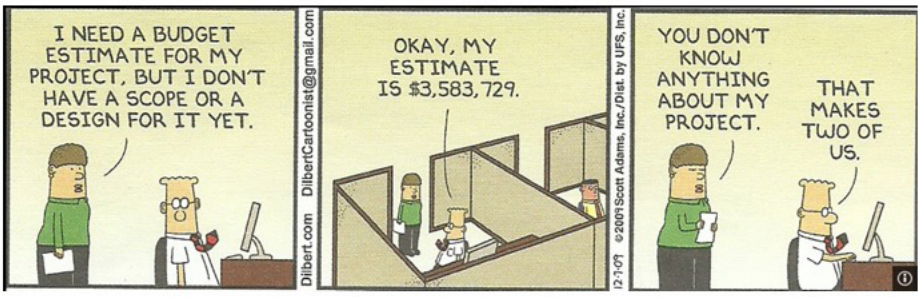
B. Relationship of the Parties

- [Descriptions of the relationships between all parties who may become involved in this dispute and how that may affect the client's interests.]
- [The client should be involved in this process to better inform counsel of any ongoing business concerns that litigation could potentially affect.]

Legal Project Management

Budget

"I want you guys to make money, but I also want you to bring your expertise in at a price that I can stomach."



Budget: Fee Arrangement

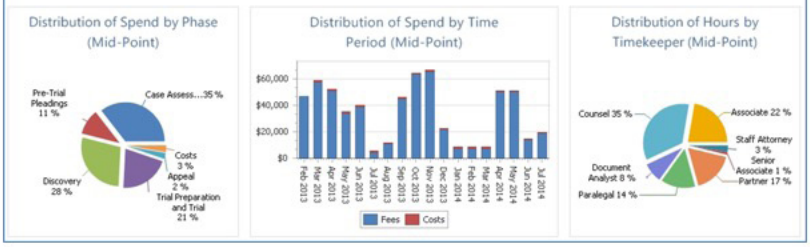
- **Blended Rate -** Client and law firm agree on a single hourly rate to be charged for all attorneys.
- **Fixed Fee -** Client and the law firm agree on a fixed fee to cover the cost of the legal work.
- **Fixed Fee with Collar -** Client and the law firm agree to a budgeted fee as well as a collar, set as a percentage of the budgeted fee.
- **Success Fee -** At the onset of the engagement, the client and law firm define what results will constitute "success" in the engagement.
- **Contingent Fee -** Firm agrees to heavily discount fees or bill no hourly fees to share in the upside of the engagement.

Budget: An Opportunity, Not A Burden

- Respond to your needs (control legal costs, deliver more value)
- Share risk with you
- Collaborate with you on expectations
- Avoid unhappy surprises

Tools for Budgeting: Budget & Work Plan

		Total					
		Hours			Fee Estimates		
Phase	Activity	Low	Mid	High	Low	Mid	High
L100	Case Assessment, Development & Administration	622	775	928	$174,095	$216,400	$258,705
L200	Pre-Trial Pleadings	157	192	227	$52,805	$64,375	$75,945
L600	E-Discovery	0	0	0	$0	$0	$0
L300	Discovery	401	485	569	$140,660	$171,600	$202,540
L400	Trial Preparation and Trial	300	360	420	$103,720	$125,750	$147,780
L500	Appeal	43	47	51	$13,440	$15,070	$16,700
	Costs				$16,100	$16,600	$17,100
	Total	1523	1859	2195	$500,820	$609,795	$718,770



THOMPSON HINE

CyberToasters Corp. v. BeltBuckles Ur

Budget Detail

		Fee Estimate		Rick Zeidler $555		Bill Sawyer $330	
		Low	High	Low	High	Low	High
L100	**Case Assessment, Development & Administration**						
L110	**Fact Investigation/Development**						
	All other Fact Investigation/Development	$55,680	$83,520	64	96	48	72
Totals		**$55,680**	**$83,520**	**64**	**96**	**48**	**72**
L120	**Analysis/Strategy**						
	All other Analysis/Strategy	$58,775	$85,725	9	11	144	216
Totals		**$58,775**	**$85,725**	**9**	**11**	**144**	**216**
L140	**Document/File Management**						
	All other Document/File Management	$55,480	$83,220	0	0	0	0
Totals		**$55,480**	**$83,220**	**0**	**0**	**0**	**0**
L190	**Other Case Assessment, Development and Administration**						
	All other Other Case Assessment, Development and Administration	$4,160	$6,240	0	0	0	0
Totals		**$4,160**	**$6,240**	**0**	**0**	**0**	**0**
Totals		$174,095	$258,705	73	107	192	288

THOMPSON HINE

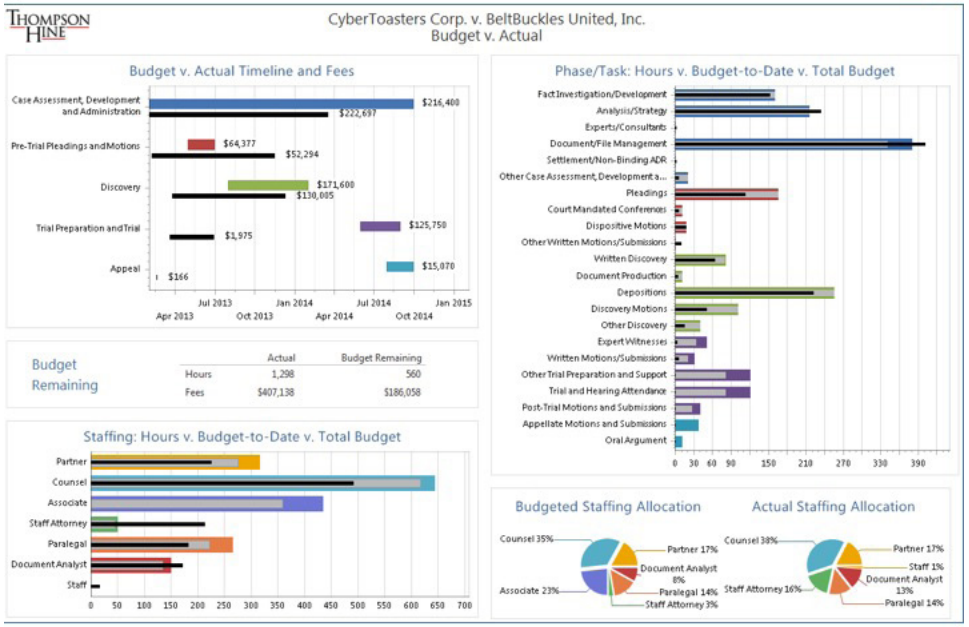
Acquisition of BeltBuckles United, Inc.
Budget Detail

	Fee Estimate		Partner $500		Senior Associate $310		Counsel $350		Mid-Level $2
	Low	High	Low	High	Low	High	Low	High	Low
G100 General Matters									
P200 Fact Gathering									
General inquiries, meetings, and instructions	$500	$3,120	1	5	0	2	0	0	0
Identification and collection of general information relevant to the transaction	$310	$930	0	0	1	3	0	0	0
All other Fact Gathering	$1,000	$2,000	0	0	0	0	0	0	0
Totals	**$1,810**	**$6,050**	**1**	**5**	**1**	**5**	**0**	**0**	**0**
P300 Structure/Strategy/Analysis									
Development of the strategy for the transaction	$1,430	$4,670	1	5	3	7	0	0	0
Tasks associated with structuring the transaction and planning the approach to meetings, conference calls, negotiations, and the transaction	$1,780	$5,720	1	5	3	7	1	3	0
Legal research (e.g., internal meetings and consultations with those with special expertise, and computer and on-line research)	$310	$310	0	0	1	1	0	0	0
Analysis of facts and research performed	$310	$310	0	0	1	1	0	0	0
Totals	**$3,830**	**$11,010**	**2**	**10**	**8**	**16**	**1**	**3**	**0**
Totals	**$5,640**	**$17,060**	**3**	**15**	**9**	**21**	**1**	**3**	**0**

Legal Project Management

Monitor

"Monitor, engage and be transparent; these have always been the keys to success for law firms I have worked with."



Legal Project Management

Close

"It only takes a few seconds to do a quick evaluation form at the end of a matter. Law firms should take the lead and ask their general counsel to take part."

"What if we don't change at all ...
and something magical just happens?"

Closing Questions

- After Action Review Questions:
  - Were you satisfied with the result from the standpoint of the objective or the range of possible outcomes?
  - Were you satisfied with it in terms of the substantive outcome?
  - Were you satisfied with the result in terms of the cost of getting to that outcome?
  - Were you satisfied with that outcome in terms of the timing?
  - Were your expectations as to timing met? If not, what were your expectations?

Tools for Closing: Lessons Learned Report

SmartPath — Thompson Hine

Lessons Learned Review Report

Review Date: [dd month yy]	Prepared by: [participant name]

PROJECT NAME
Project, project stage, or key milestone name

PROJECT SUMMARY
Summary of the project, project stage, or key milestone, including begin and end dates and work performed.

PROJECT OBJECTIVES & RESULTS

Objectives from Project Charter	Results regarding each objective
1. 2.	1. 2.

SCOPE COMPARISON
Identify additional or decreased scope

COST PERFORMANCE

AREAS OF WORK	BUDGETED	ACTUAL
List major components of project (e.g., discovery or "due diligence")	List budgeted hours by component	List actual hours by component

SCHEDULE PERFORMANCE

AREAS OF WORK	BUDGETED	ACTUAL
List major components of project (e.g., discovery or "due diligence") Project Completion Date	List scheduled completion by component	List actual completion by component

PROBLEM AREAS
Detailed list of each problem area identified.

ACTION ITEMS
Detailed list of all action items generated to resolve the problem areas.

LESSONS LEARNED RELEVANT TO OTHER PROJECTS
Detailed list of lessons learned to be considered in future projects.

Takeaways

- Invite your law firms to a discussion about ways to increase efficiency
- Identify your biggest pain point with outside counsel and hold a meeting to establish open communication on how to address
- Require early case assessment/work plan
- Require a budget
- Require quarterly reviews of engagements
- Begin after action review on all engagements
- Demonstrate measurable value to business people and assess value of outside counsel spend

Anthony J. Rospert
Partner
Thompson Hine (Cleveland, OH)

216.566.5861 | anthony.rospert@thompsonhine.com
http://www.thompsonhine.com/professionals/rospert-anthony

As a partner in the Business Litigation group, Tony helps clients overcome legal obstacles in order to protect their assets and manage litigation risk in pursuit of their strategic goals. He believes that a big part of his job is assessing risk for his clients in order to help them make the best possible decision. Tony also views himself as a legal quarterback for in-house counsel by matching the needs of his clients to the resources of Thompson Hine in order to ensure success.

Tony has a passion for helping his clients succeed by treating them like his best friends by being loyal, well-connected and honest with them about the strengths and weaknesses of their legal positions. As a result, clients rely on Tony as a "go-to" litigator for their most significant matters. Outside the courtroom, Tony is a certified BBQ judge and judges 7-10 sanctioned competitions per year.

Tony focuses his practice on complex business and corporate litigation involving financial service institutions, commercial and contract disputes, indemnification claims, shareholder actions, business transactions, and class actions.

Litigation can prove time-consuming and become costly, so for many disputes there may be more effective methods of resolution than traditional court litigation. Although Tony has an impressive record of courtroom achievements, he seeks to optimize case outcomes while managing the costs, time and stress of a lawsuit by regularly using arbitration, mediation and other forms of alternative dispute resolution (ADR) as pragmatic ways to meet his clients' needs.

Practice Areas
- Business Litigation
- Securities & Shareholder Litigation
- Environmental

Distinctions
- Member of Crain's Cleveland Forty Under 40 Class 2013
- Listed as an Ohio Super Lawyers ® Rising Star in Business Litigation, 2009, 2010, 2013, 2016 and 2017

Community Activities
- Cornucopia, Inc., Board Member and President, Executive Committee Chair
- John Carroll University Entrepreneurs Association, Master Member
- WIRE-NET, Member, Resource Development Committee
- Ohio Bankers League, Member
- Cleveland Leadership Center, Cleveland Bridge Builders Ad Hoc Curriculum Committee and Leadership Action Project Selection Committee
- Cleveland Bridge Builders, Flagship Program 2011
- Kansas City Barbeque Society, Certified Master BBQ Judge
- Federalist Society

Education
- Vermont Law School, J.D., magna cum laude, senior editorial board, business manager, Vermont Law Review
- John Carroll University, B.A., magna cum laude, Outstanding Political Science Major

CLASS ACTIONS: SUCCESSFULLY NAVIGATING THIS COMPLEX AND HIGH-RISK LANDSCAPE

Stephanie Douglas
Bush Seyferth & Paige (Troy, MI)
248.822.7806 | douglas@bsplaw.com

Tyson Foods Inc. v. Bouaphakeo - An Aberration in the Use of Statistical Sampling in Class Actions

Ernest Rutherford, the father of nuclear physics, once said: "If your experiment needs statistics, you ought to have done a better experiment." Imperfect by nature, statistics is the science of drawing inferences from data—data that is typically incomplete. Shortcomings include sampling bias, overgeneralization, lack of causality, and misreporting. Nevertheless, class-action plaintiffs often see statistical sampling as a means to circumvent otherwise applicable requirements of individualized proof through extrapolation.

Luckily, our judiciary has long disfavored the use of statistical evidence in class actions, refusing to permit "trial by formula" and rejecting damages models that fail to measure recovery on a class-wide basis accurately. Recently, the Supreme Court again weighed in on the use of statistical sampling in Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016). There, a class of employees sought to recover wages for time spent donning and doffing protective gear under the Fair Labor Standards Act. The Court opened the door for statistical evidence, but ever so slightly, allowing employees to rely on "representative evidence" of hours worked where their employer had failed to maintain time records as required under the FLSA.

Wishful thinking class-action plaintiffs may view Tyson Foods as broadly endorsing the use of statistical sampling as an evidentiary short-cut for class-wide proof. But close scrutiny exposes the decision for what it really is: an aberration likely limited to wage-and-hour disputes involving an evidentiary gap of the defendant's own doing. Of benefit to defendants, the decision offers a road-map for challenging the use of statistical sampling in class actions and leaves undisturbed many other viable defenses.

Historical Disfavor of Statistical Sampling

The class action is a powerful procedural device, allowing claims that are otherwise impractical to litigate separately to be brought in the aggregate where class members have suffered essentially identical harm resulting from mass production, mass marketing, or standardized corporate practice, for example. But because the mechanism is merely procedural, it cannot be used to abridge substantive rights, such as a defendant's ability to defend individual claims. In all but narrow circumstances, extrapolation of statistical sampling threatens this due process guarantee. And, like any evidence, statistical sampling must overcome challenges to reliability and relevance.

Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338 (2011)

The Dukes case involved three women who alleged that their supervisors had discriminated against them with respect to pay and promotions in violation of Title VII, and sought to represent an expansive class comprised of about 1.5 million current and former female Wal-Mart employees. In essence, the women alleged that a uniform corporate culture led supervisors to exercise their discretion in pay and promotions in a way that disproportionately favored men.

To obtain class certification under Federal Rule of Civil Procedure 23, the plaintiffs needed to demonstrate, among other criteria, that their case involved questions of law or fact common to all class members, known as the "commonality" requirement. To this end, the plaintiffs relied on (1) statistical evidence of pay and promotion disparities between men and women; (2) anecdotal reports of discrimination by female employees; and (3) testimony from a sociologist who concluded that the company was vulnerable to sex discrimination based on a "social framework analysis." The district court denied Wal-Mart's motion to strike this evidence

and certified the class. A divided Ninth Circuit Court of Appeals, sitting en banc, affirmed.

The Supreme Court reversed, finding commonality lacking. The statistical evidence was prepared by a labor economist who, having compared the number of women promoted into management positions with the number of women in the pool of hourly workers, concluded that the disparities could only be explained by sex discrimination. The labor economist also considered the workforce data of other retailers to conclude that Wal-Mart promotes a lower percentage of women than its competitors. This evidence fell short of showing commonality, the Court explained, because discretionary pay and promotion decisions are, by definition, not uniform. Surely, supervisors would argue that they consider a multitude of sex-neutral, performance-based factors when making pay and promotion decisions and would complain that the statistical evidence fails to account for whether women are qualified or interested in a promotion, for example. In other words, statistics told only half the necessary story: they showed a disparity, but failed to explain why the disparity reflected systematic discrimination.

The Court found the anecdotal evidence equally problematic. This evidence consisted of 120 affidavits reporting instances of discrimination, which amounted to just 1 report of discrimination for every 12,500 class members. The reports related to only 235 of Wal-Mart's 3,400 stores and did not fairly represent all states. According to the Court, even accepting the reported accounts as true, the evidence did not establish a nation-wide policy of discrimination.

Lastly, the Court found no value in the sociologist's testimony. The sociologist conceded that he could not calculate the percentage of employment decisions at Wal-Mart that might be the product of stereotyped thinking and, consequently, could not answer the critical commonality question.

As for damages, the Court agreed with Wal-Mart that eligibility for backpay would entail individualized determinations. Under Title VII's remedial scheme, in claims alleging a pattern or practice of discrimination, an employer who establishes that it took adverse action against an employee for any reason other than discrimination cannot be ordered to pay backpay. The Court criticized the Ninth Circuit for endorsing "trial by formula," whereby a sample of class members would be selected, backpay for those individuals would be determined, and the numbers would be extrapolated to arrive at a lump sum recovery for the entire class. The approach was akin to a compulsory bellwether settlement. Such a novel project, the Court held, would run afoul of the Rules Enabling Act, 28 U.S.C. § 2072(b), which forbids using the class-action device to "abridge, enlarge or modify any substantive right"—in Wal-Mart's case, its substantive right to defend each adverse employment action as non-discriminatory.

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

In Comcast, cable-television subscribers filed a class-action antitrust lawsuit, alleging that the cable company had entered into unlawful swap agreements in an effort to monopolize services using clusters and to charge customers above competitive levels. For Rule 23 purposes, the plaintiffs had to prove that the alleged individual injuries were capable of proof through common evidence and that resulting damages were measurable on a class-wide basis. Critically, although the plaintiffs had proposed four theories of injury, the trial court accepted only one. As for damages, the plaintiffs relied on their expert's regression model, comparing actual cable prices with hypothetical prices that allegedly would have applied but for the anticompetitive activity. The problem, however, was that the regression model did not isolate damages resulting from any one theory of injury, but rather assumed that all four theories of injury were in play. Nonetheless, the district court certified the class, and a divided panel of the Third Circuit Court of Appeals affirmed.

The Supreme Court reversed. Citing the unremarkable premise that damages must correspond to the applicable theory of injury, the Court observed that the regression model did not even attempt to satisfy this basic threshold. The methodology might have been sound, the Court suggested, had all four theories of injury remained in play. But that was not so, and the expert had conceded that his model did not attribute damages to any one theory of injury. Because the regression model did not accurately represent the applicable class-based injuries based on an improper assumption, the evidence was neither reliable nor relevant.

Tyson Foods Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016)

Most recently, in Tyson Foods, employees at a pig-slaughtering facility filed a class action, alleging that their employer's policy of not compensating employees for time spent donning and doffing mandatory protective gear violated the FLSA's overtime provisions. The district court certified the class, and the case proceeded to trial.

Because the employees sought only unpaid overtime, each employee had to show work in excess of 40 hours per week, inclusive of time spent donning and doffing protective gear. But because the employer failed to keep time records for donning and doffing activity, the employees had no choice but to rely on "representative evidence." This evidence consisted of 744 video recordings of donning and doffing activity along with a study by an industrial relations expert, in which he analyzed the recordings to arrive at average changing times for employees in different departments. Relying on the expert's testimony, the jury awarded $2.9 million in unpaid overtime. The district court denied Tyson Foods' motion to set aside the verdict, and a divided panel of the Eight Circuit Court of Appeals affirmed.

When the Supreme Court granted certiorari, the defense bar hoped for a categorical bar on the use of statistical sampling in class actions. But a divided Court dashed these hopes. Whether representative evidence is permissible, the Court reasoned, turns not on the form of the proceedings but, like any other evidence, on its reliability and relevance. Stated differently, representative evidence can be reliably used in a class action only if it could be used to prove each class member's claim in an individual action.

To answer this question, the Court turned to Anderson v. Mt. Clements Pottery Co., 328 U.S. 680 (1946), another collective action brought by employees seeking to recover unpaid time. Given the remedial nature of the FLSA, the Mt. Clements Court held that, where an employer failed to maintain adequate time records, an employee could meet his or her burden of showing hours worked through "reasonable inference," and the employer could negate such inference only with evidence of precise hours worked.

The workers in Tyson Foods, in the same fashion, sought to rely on statistical sampling to fill an evidentiary gap created by their employer's inadequate records, and the representative evidence would have been permitted in an individual lawsuit. In defense, albeit without a Daubert challenge or any testimony from a rebuttal expert, Tyson Foods argued that the sample study was unrepresentative and inaccurate—an issue common to all class members. As such, permitting the plaintiffs to rely on the representative evidence would not abridge any substantive right in violation of the Rules Enabling Act. And, unlike in Dukes, where the employees could not point to a common policy leading to company-wide discrimination, the employees in Tyson Foods had identified a common practice leading to undercompensation.

Although we should expect parties to bend and twist Tyson Foods to suit their particular interests, the holding, at its core, is quite limited. In wage-and-hour disputes where an employer has created an evidentiary gap contrary to a statutory obligation to maintain records (and possibly in analogous contexts), a plaintiff may rely on representative evidence if it is shown to be reliable and relevant and will not abridge any substantive right that would otherwise exist in an individual action.

Best Practices After Tyson Foods

Revisit Record Retention Policies

In both Mt. Clemens and Tyson Foods, the Court's primary basis for permitting proof through "reasonable inference" was the defendant's own failure to maintain records, much like a discovery sanction. Although unwilling to lay down any bright-line rules, the Court implied that representative evidence is more likely to be appropriate when the defendant has caused the evidentiary gap that gives rise to the need for the representative evidence in the first place. As another consequence, poor recordkeeping will typically prevent a defendant from pursing individual defenses (as no records means no proof), effectively negating any Rules Enabling Act violation that might otherwise serve as a viable challenge to class certification.

One key lesson from Tyson Foods, then, is to maintain records required by law, as well as any other records that would be needed to defend lawsuits that may logically occur given the nature of the defendant's business, giving consideration to applicable statutes of limitation to determine adequate retention periods. Employers of non-exempt workers in particular would be wise to revisit their timekeeping and payroll practices to ensure that they maintain adequate records to defend FLSA overtime disputes on an individualized basis. And all employers would be prudent to retain records on hiring, firing, and promotions of the sort that might be challenged in discrimination suits. But record retention may be equally important in other contexts. The Telephone Consumer Protection Act, as one example, requires telemarketers to maintain consent-to-call records for four years, and consent can serve as a defense to individual TCPA claims. For another, mortgage lenders are responsible for retaining certain records in connection with their lending practices. Putting aside the liability that might arise from lenders' failure to retain records, lenders might need those records to defend suits under the Fair Housing Act.

Without such records, defendants may invite use of statistical sampling and risk waiving an otherwise applicable Rules Enabling Act challenge to certification, as occurred in Tyson Foods. The difficulty lies, of course, in weighing these risks against the added expense of retention and the potential that the retained records will ultimately become evidence for plaintiffs. Answering that difficult question will involve industry-specific, and likely company-specific, considerations.

Distinguish Tyson Foods: No Duty to Maintain

The Court in Tyson Foods permitted representative evidence in large part to avoid penalizing employees for missing evidence that the employer should have kept in the ordinary course of business. The Court seems to have been animated by the same interests that drive spoliation sanctions; if a defendant deliberately destroyed relevant information, then one might rightfully surmise that the information would disadvantage the defendant. But what if plaintiffs seek to rely on representative evidence in situations where the defendant would have no reason, by statute or otherwise, to maintain the information that the plaintiffs need? A fair reading of Tyson Foods would suggest that permitting representative evidence under those circumstances would be less appropriate, and defendants should seize on this

distinction where applicable.

In a construction-defect class action, for example, homeowners might seek to prove class-wide damages by sampling allegedly defective homes and extrapolating the average diminution-in-value from the sample study to the entire class. But, unlike in Tyson Foods, the homeowners would not be "forced" to resort to sampling because of the builder's failure to maintain records, and assuming that a homeowner could isolate the diminution-in-value from the alleged defect, it would be theoretically possible (albeit time-consuming) to determine the diminution-in-value of each affected home. To extend Tyson Foods to situations of this kind, where the defendant had no duty to maintain records, would improperly transform a holding grounded in necessity and wrongdoing by the defendant into one grounded in mere convenience to plaintiffs. Such extension would shift the burden of proof, effectively requiring defendants to dis-prove liability.

Confine Tyson Foods to Wage-and-Hour Cases

Wage-and-hour disputes are unique, even within the employment law realm, and are often more conducive to aggregate adjudication by their nature. These claims typically assert an across-the-board compensation policy that is alleged to violate the law, such as failure to pay minimum wage or failure to pay overtime. The potential for individualized issues is lower than in other contexts, especially where, as in Tyson, the class of employees is entitled to a common evidentiary presumption. But be on the lookout for wage-and-hour cases that don't fit this mold.

Beyond wage-and-hour disputes, the variability between class members is potentially infinite. As explained in Dukes, whether someone has been subjected to discrimination, for instance, turns on individual experiences and circumstances that are not probative of the experiences of others who may (or may not) have been subjected to unlawful conduct themselves. Without commonality, sampling cannot reliably establish liability or damages on a class-wide basis.

Whenever possible, defendants should analogize their case to Dukes and point out elements of claims and defenses that necessarily turn on individual perceptions and injuries. For example, among other elements required to establish a hostile work environment, the individual plaintiff must subjectively perceive the work environment to be abusive. And in cases alleging personal injury, perhaps because of a defective product, defendants should point out variances in injury, causation, and damages (wage loss, medical expenses, pain and suffering, etc.). In all cases where liability and damages can be defended on individualized grounds, defendants should challenge statistical sampling and class certification as violating the Rules Enabling Act.

In re: Autozone, Inc., 2016 WL 4208200 (N.D. Cal. 2016), offers a recent success story. There, Autozone failed to maintain rest-break records, and the plaintiffs sought to fill this evidentiary gap with a survey in which respondents were asked to provide their recollection of events from years earlier. Of respondents who worked "short shifts," 25 percent reported that they were not permitted rest breaks, 58 percent reported that they were, and 16 percent could not remember. Of respondents who worked "mid-length shifts," 29 percent reported that they were not permitted rest breaks, 53 percent reported that they were, and 17 percent could not remember. And of respondents who worked "long shifts," 38 percent reported that they were not permitted rest breaks, 25 percent reported that they were, and 38 percent could not remember. Given this variation, the survey was more like the representative evidence in Dukes than the representative evidence in Tyson Foods; the rest-break survey, if probative of anything, showed the absence of a uniform policy. Much like in Dukes, "an Autozone employee in an individual action would not be able to point to other employees' varied experiences . . . to establish her own claim for missed rest breaks." Thus, the court held that allowing the survey in a class action would improperly enlarge the rights of employees and deprive Autozone of its right to litigate individual issues, contrary to the Rules Enabling Act.

Pursue Daubert Challenges and Retain Rebuttal Experts

Critically, in Tyson Foods, the employer did not challenge the expert's study under Daubert and did not offer testimony from a rebuttal expert. As such, the Court found "no basis in the record to conclude it was legal error to admit that evidence." A prudent defendant will therefore pursue both avenues of attack. Rebuttal testimony should also do more than simply shoot holes in the models offered by plaintiffs; in some cases, the expert would be well advised to offer an alternative model that produces a more accurate result.

After all, the Court in Tyson Foods was careful to note that not all inferences drawn from representative evidence in FLSA cases will be reasonable, and defendants may challenge such evidence as statistically inadequate or as relying on improper assumptions. In Comcast, for example, the statistical evidence improperly assumed that four theories of liability were in play, when, in the end, the court accepted only one theory as viable.

Factors such as sample size will bear on reliability. In Dukes, for example, the Court found 120 employee anecdotes of reported discrimination, a 1-to-12,500 ratio, inadequate. Other factors include the extent to which the sample meaningfully represents the entire class; the extent to which the sampling methodology is reliable (including whether favorable data is "cherry picked"); and the purpose for which the sample is being offered. Defendants should be prepared to explain why statistical deficiencies like these go

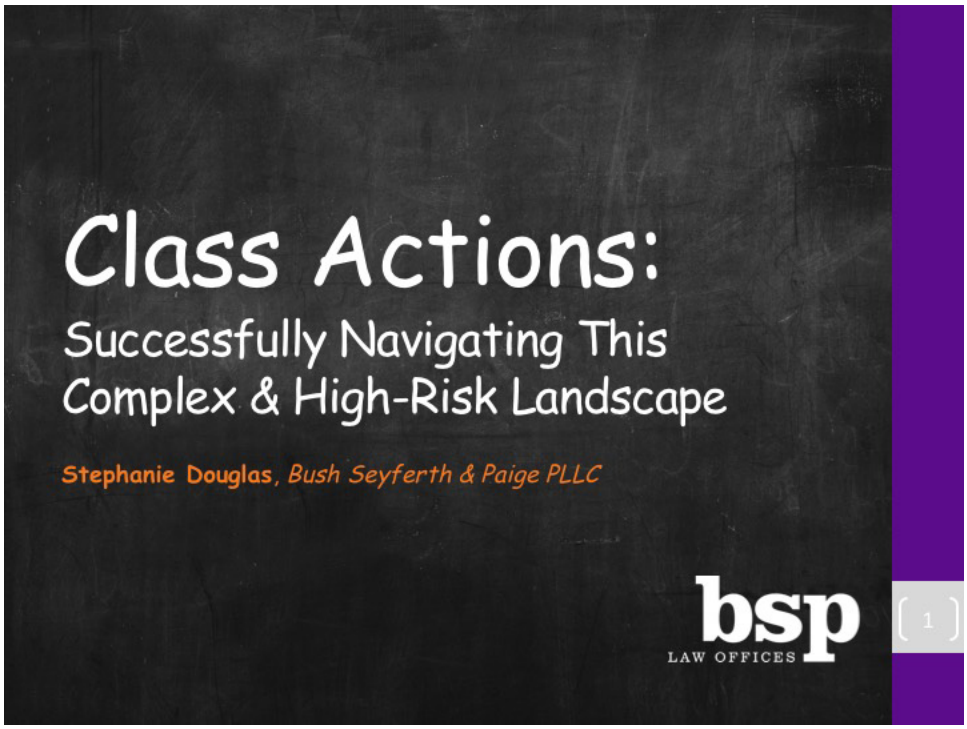
to admissibility and not simply weight.

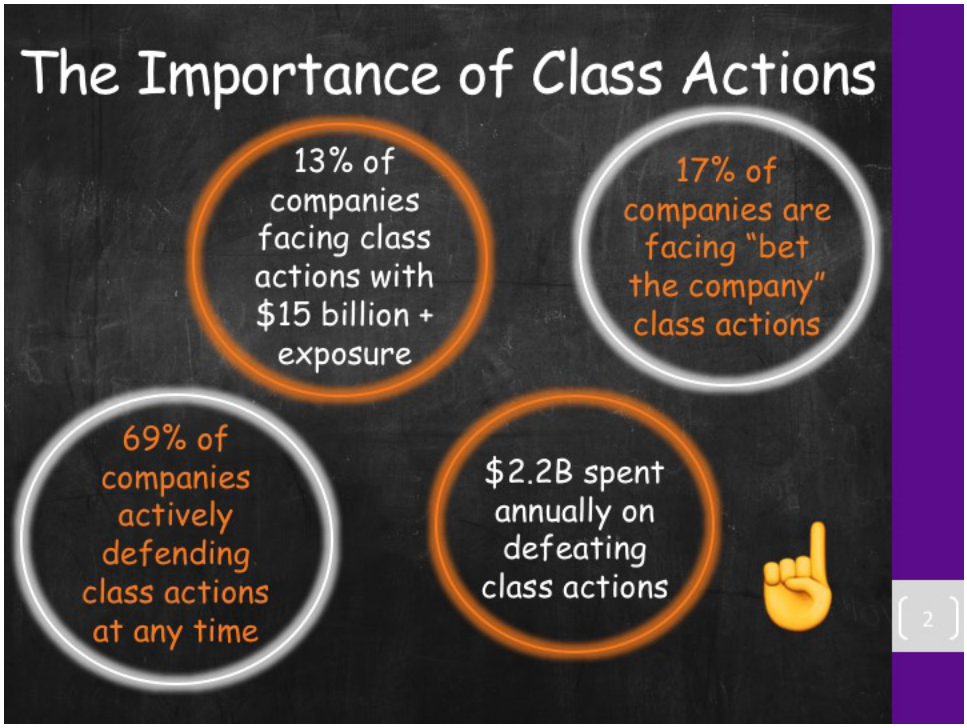
Autozone again offers useful insight, as the survey there was excluded as unreliable under Daubert, in large part based on the declaration of Autozone's expert, a qualified labor economist and statistician. The court noted several scientific deficiencies. First, the survey had a remarkably low response rate, which suggested "nonresponse bias." That is, where responders to a survey are systematically different from non-responders, the survey cannot be reliably used to draw conclusions about the entire class. Second, because the survey sought information "as part of a class action lawsuit," recipients understood themselves as potential beneficiaries of the lawsuit, undermining the objectivity of their responses, a phenomenon called "self-interest bias." Third, the survey unrealistically depended on perfect memory. Surely, respondents could not be expected to recall whether a shift eleven years ago was 3 hours 35 minutes in length or 3 hours 25 minutes in length, and yet the survey called for this distinction. Some survey responses made no sense, and several respondents provided different answers at deposition than in their survey responses. Lastly, the survey lacked sufficient precision because it swept in at least one statutorily-exempt manager and did not address the fact that many responders had voluntarily not taken rest breaks. Having excluded the representative evidence as unreliable, the court found the case unmanageable as a class action and granted the defendant's motion to decertify.

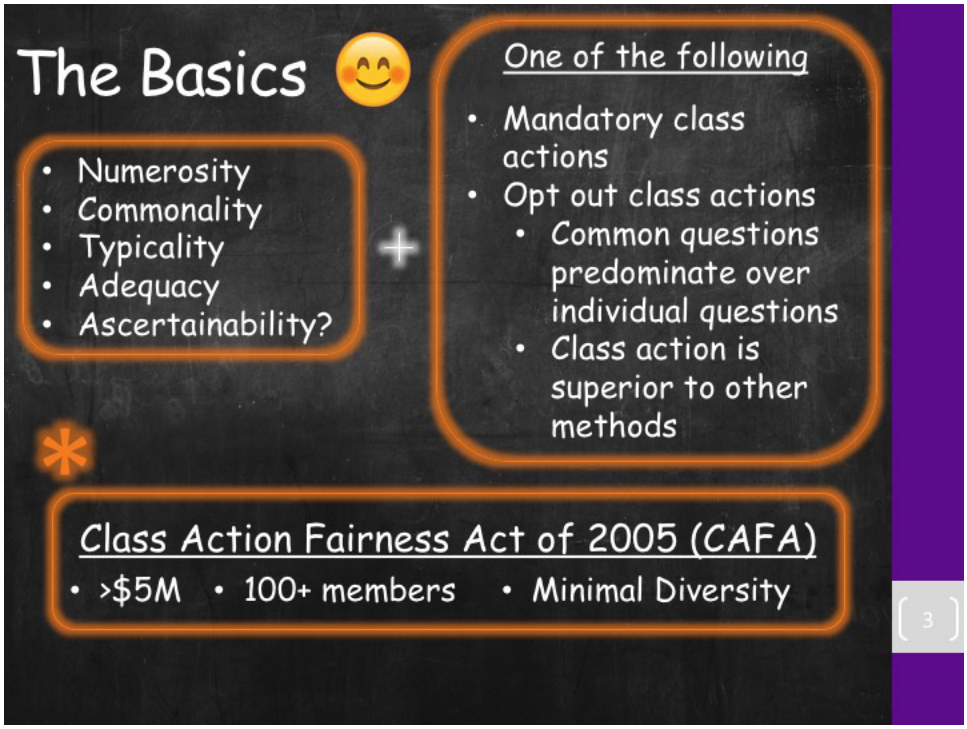
As Autozone demonstrates, challenges to statistical evidence are alive and well after Tyson Foods. Defendants who anticipate efforts to rely on sample surveys would be wise to retain qualified experts to uncover the various pitfalls that plague statistical models of class-wide proof and should be sure to raise Daubert challenges. The time to raise those attacks may be at the class certification stage. If plaintiffs aim to establish commonality and predominance through statistical proof, then they should be compelled to show that their method is not "junk science."

Conclusion

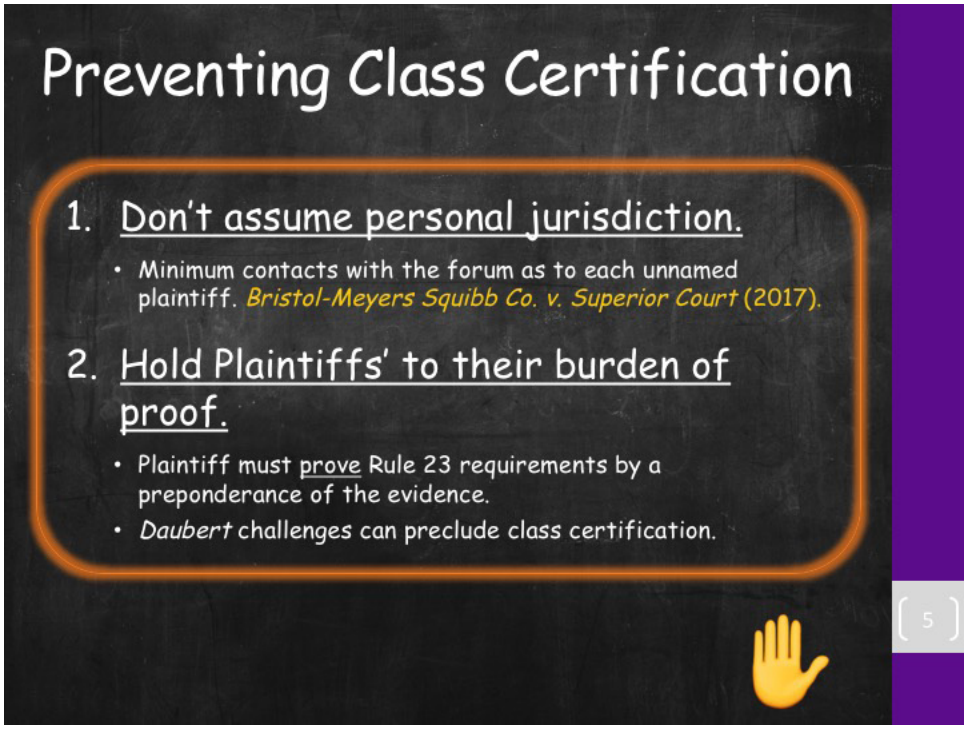
In sum, Tyson Foods is likely to go down in history as a hollow—or at least narrow—victory for class-action plaintiffs, unlikely to offer much value outside wage-and-hour disputes involving evidentiary gaps created by the defendant's failure to maintain records as required by law. The above best practices and defense strategies can be employed to defeat efforts to extend Tyson Foods beyond its limited reach and ensure that the use of statistical proof remains the rare exception.

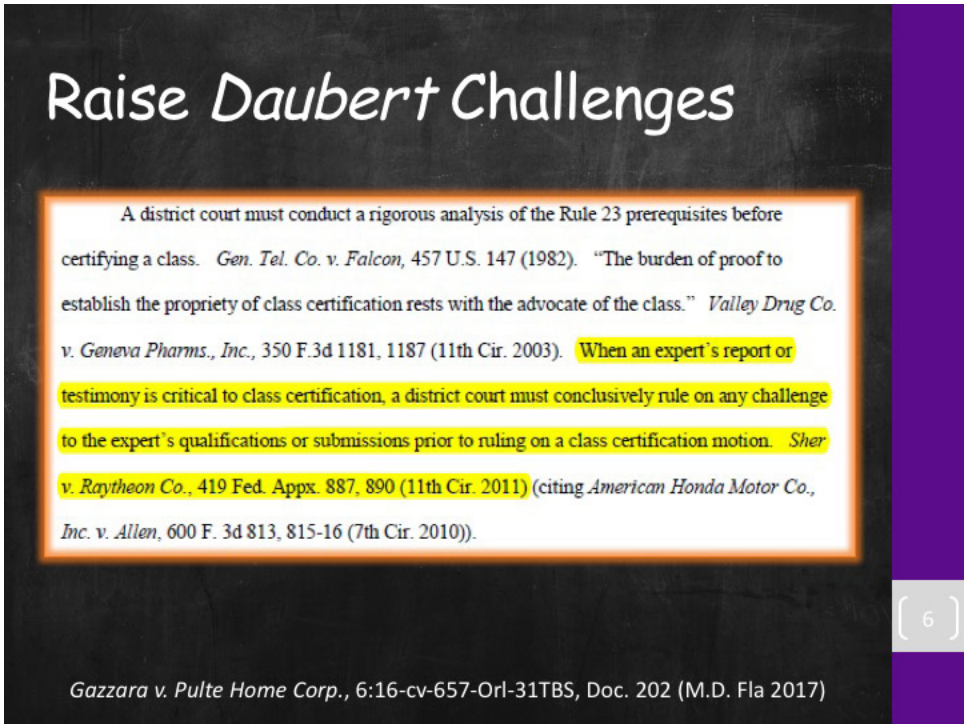


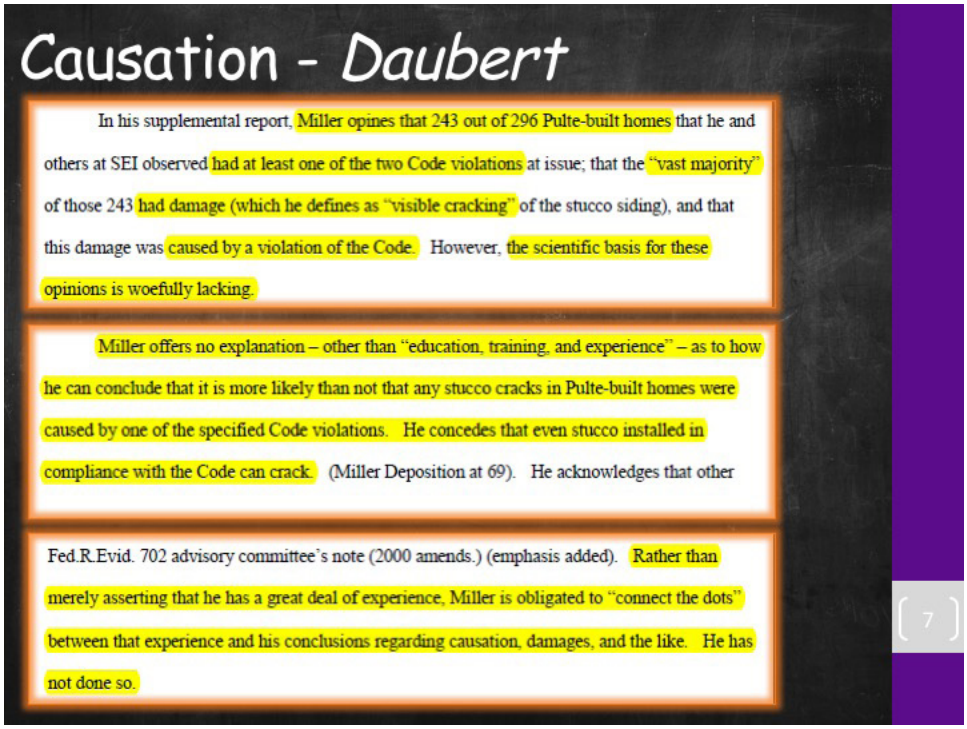

The Importance of Class Actions
13% of companies facing class actions with $15 billion + exposure
17% of companies are facing "bet the company" class actions
69% of companies actively defending class actions at any time
$2.2B spent annually on defeating class actions
2


The Basics
Numerosity
Commonality
Typicality
Adequacy
Ascertainability?
One of the following
Mandatory class actions
Opt out class actions
Common questions predominate over individual questions
Class action is superior to other methods
Class Action Fairness Act of 2005 (CAFA)
>$5M
100+ members
Minimal Diversity
3


Why is Certification so Crucial?
At certification, the case binds absent class members.
+
Risk, cost, and plaintiffs' negotiating position all increase dramatically after certification.
4


Preventing Class Certification
1. Don't assume personal jurisdiction.
• Minimum contacts with the forum as to each unnamed plaintiff. Bristol-Meyers Squibb Co. v. Superior Court (2017).
2. Hold Plaintiffs' to their burden of proof.
• Plaintiff must prove Rule 23 requirements by a preponderance of the evidence.
• Daubert challenges can preclude class certification.
5


Raise Daubert Challenges
A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class. Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982). "The burden of proof to establish the propriety of class certification rests with the advocate of the class." Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1187 (11th Cir. 2003). When an expert's report or testimony is critical to class certification, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. Sher v. Raytheon Co., 419 Fed. Appx. 887, 890 (11th Cir. 2011) (citing American Honda Motor Co., Inc. v. Allen, 600 F. 3d 813, 815-16 (7th Cir. 2010)).
6
Gazzara v. Pulte Home Corp., 6:16-cv-657-Orl-31TBS, Doc. 202 (M.D. Fla 2017)


Causation - Daubert
In his supplemental report, Miller opines that 243 out of 296 Pulte-built homes that he and others at SEI observed had at least one of the two Code violations at issue; that the "vast majority" of those 243 had damage (which he defines as "visible cracking" of the stucco siding), and that this damage was caused by a violation of the Code. However, the scientific basis for these opinions is woefully lacking.
Miller offers no explanation – other than "education, training, and experience" – as to how he can conclude that it is more likely than not that any stucco cracks in Pulte-built homes were caused by one of the specified Code violations. He concedes that even stucco installed in compliance with the Code can crack. (Miller Deposition at 69). He acknowledges that other
Fed.R.Evid. 702 advisory committee's note (2000 amends.) (emphasis added). Rather than merely asserting that he has a great deal of experience, Miller is obligated to "connect the dots" between that experience and his conclusions regarding causation, damages, and the like. He has not done so.
7

Preventing Class Certification

3. Challenge commonality & predominance.

- *Comcast* has not had the effect defendants had hoped. Many courts will certify liability only classes.
- Under *Tyson Foods*, statistics / representative proofs ordinarily should not be enough.

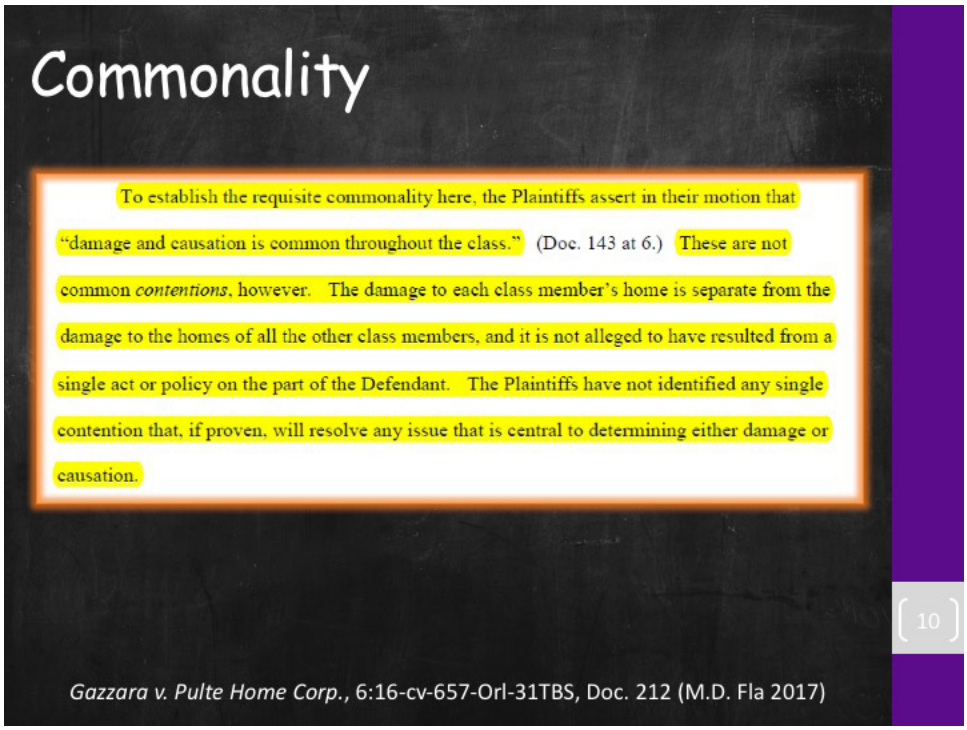
Stats Example

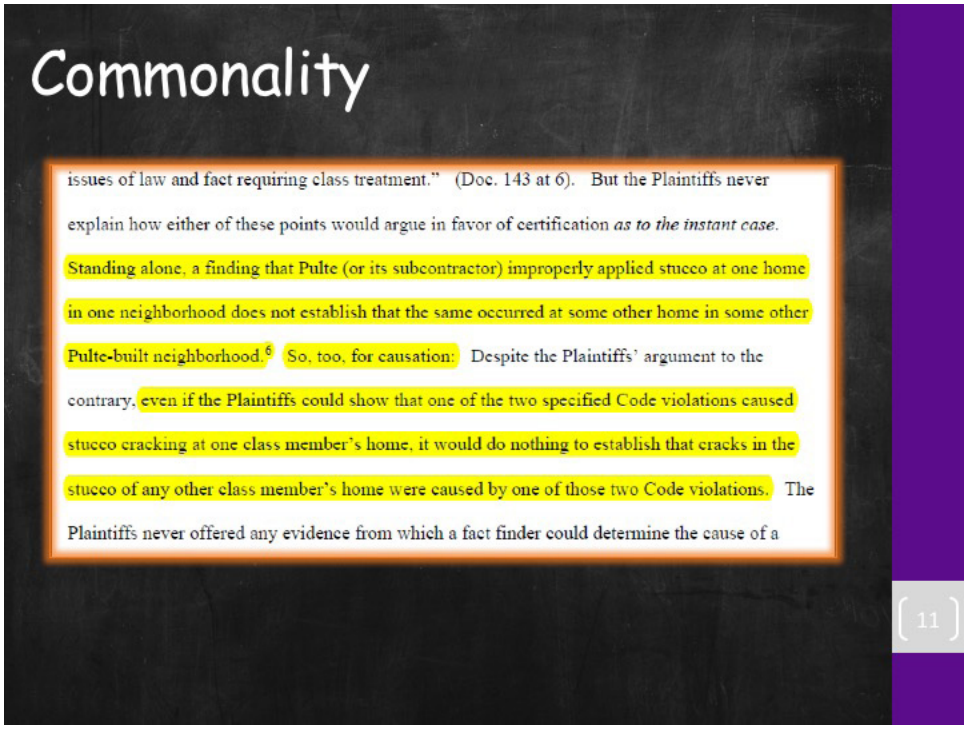
8

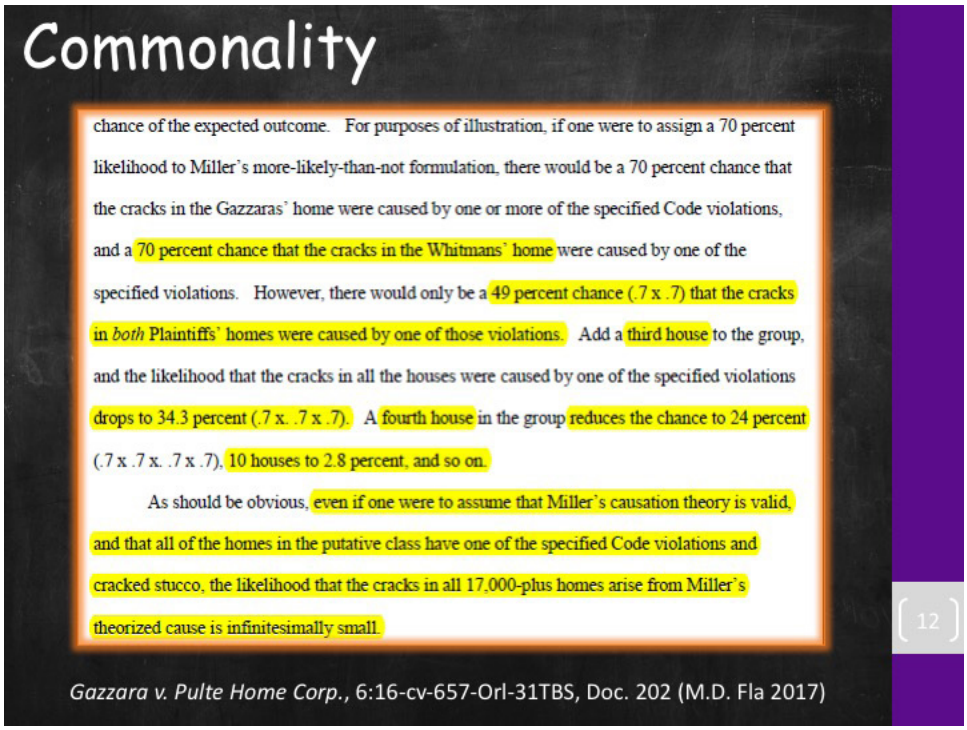
Commonality

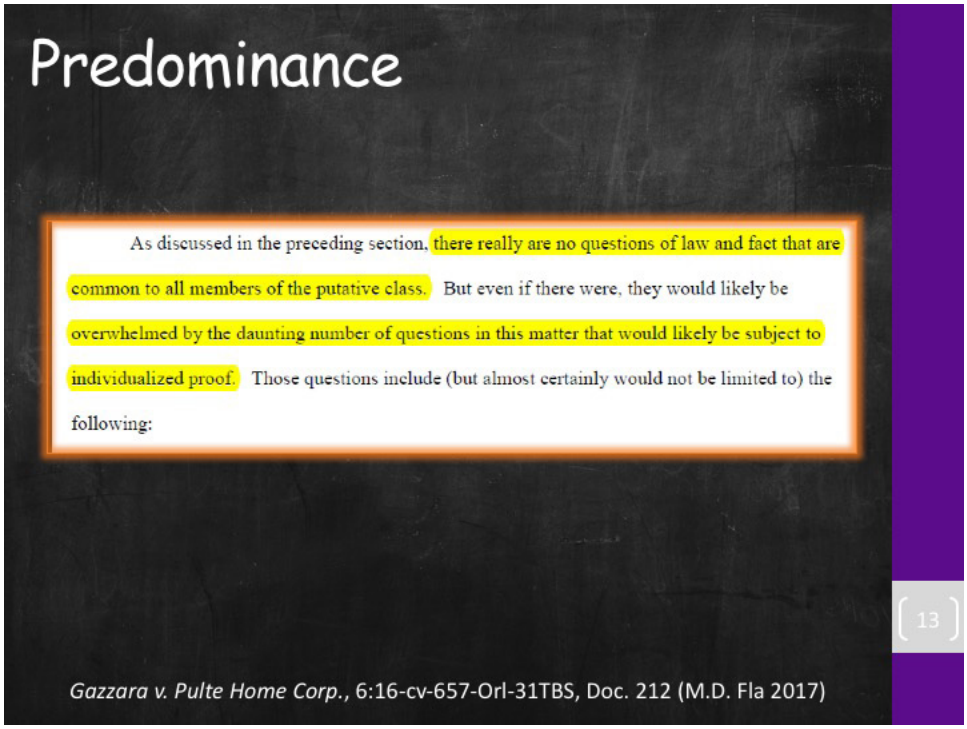
Even if Miller's causation theory had adequate support, it would not be suited to a class action, particularly one of this (potential) magnitude. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (internal quotation omitted). Rather, the plaintiffs' claims must depend upon a common contention, such as, in a Title VII case, allegations of discriminatory bias on the part of the same supervisor, *id.* at 350, or in this case, a discrete list of Code violations. But Miller's causation theory – that it is more likely than not that the cracks in any class member's home resulted from one of the specified violations – only applies in terms of a single home, not a group of homes. To put it in different terms, Miller is not asserting that the cracks in *every* home were caused by the Code violations in a single home. Each home must be considered individually.

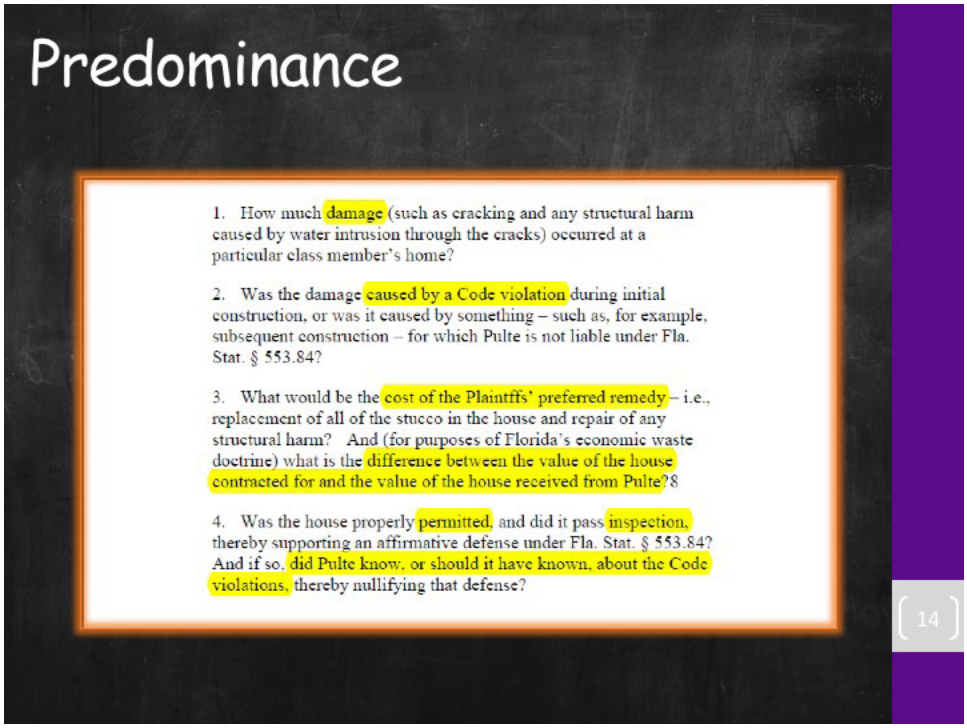
9

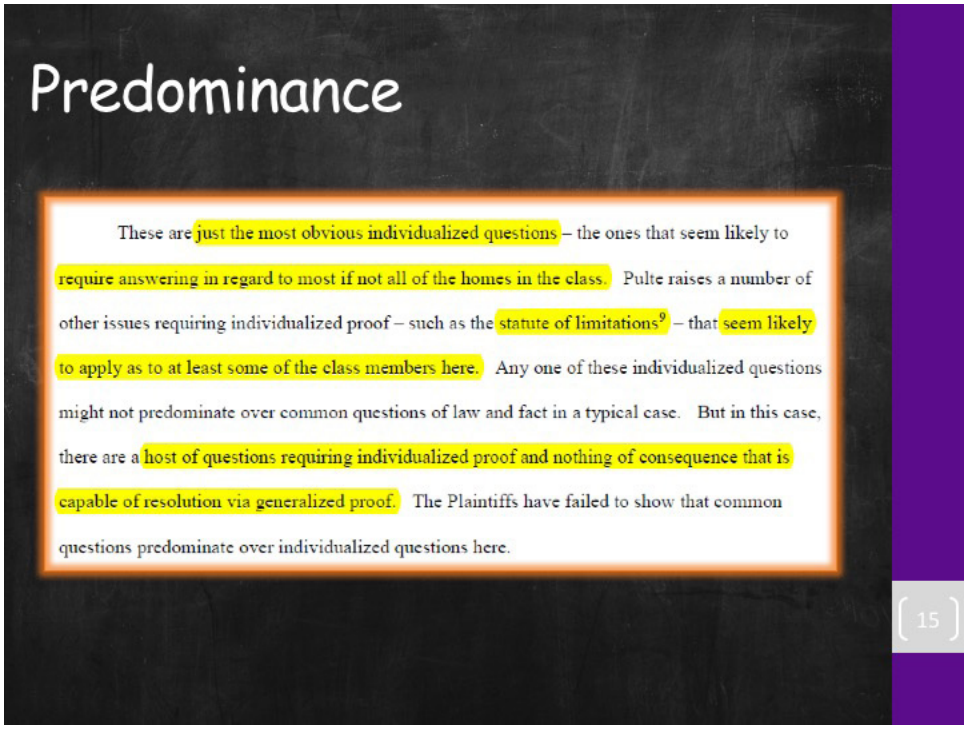

Commonality
To establish the requisite commonality here, the Plaintiffs assert in their motion that "damage and causation is common throughout the class." (Doc. 143 at 6.) These are not common *contentions*, however. The damage to each class member's home is separate from the damage to the homes of all the other class members, and it is not alleged to have resulted from a single act or policy on the part of the Defendant. The Plaintiffs have not identified any single contention that, if proven, will resolve any issue that is central to determining either damage or causation.
10
Gazzara v. Pulte Home Corp., 6:16-cv-657-Orl-31TBS, Doc. 212 (M.D. Fla 2017)


Commonality
issues of law and fact requiring class treatment." (Doc. 143 at 6). But the Plaintiffs never explain how either of these points would argue in favor of certification *as to the instant case*. Standing alone, a finding that Pulte (or its subcontractor) improperly applied stucco at one home in one neighborhood does not establish that the same occurred at some other home in some other Pulte-built neighborhood.[6] So, too, for causation: Despite the Plaintiffs' argument to the contrary, even if the Plaintiffs could show that one of the two specified Code violations caused stucco cracking at one class member's home, it would do nothing to establish that cracks in the stucco of any other class member's home were caused by one of those two Code violations. The Plaintiffs never offered any evidence from which a fact finder could determine the cause of a
11


Commonality
chance of the expected outcome. For purposes of illustration, if one were to assign a 70 percent likelihood to Miller's more-likely-than-not formulation, there would be a 70 percent chance that the cracks in the Gazzaras' home were caused by one or more of the specified Code violations, and a 70 percent chance that the cracks in the Whitmans' home were caused by one of the specified violations. However, there would only be a 49 percent chance (.7 x .7) that the cracks in *both* Plaintiffs' homes were caused by one of those violations. Add a third house to the group, and the likelihood that the cracks in all the houses were caused by one of the specified violations drops to 34.3 percent (.7 x. .7 x .7). A fourth house in the group reduces the chance to 24 percent (.7 x .7 x. .7 x .7), 10 houses to 2.8 percent, and so on.
As should be obvious, even if one were to assume that Miller's causation theory is valid, and that all of the homes in the putative class have one of the specified Code violations and cracked stucco, the likelihood that the cracks in all 17,000-plus homes arise from Miller's theorized cause is infinitesimally small.
12
Gazzara v. Pulte Home Corp., 6:16-cv-657-Orl-31TBS, Doc. 202 (M.D. Fla 2017)


Predominance
As discussed in the preceding section, there really are no questions of law and fact that are common to all members of the putative class. But even if there were, they would likely be overwhelmed by the daunting number of questions in this matter that would likely be subject to individualized proof. Those questions include (but almost certainly would not be limited to) the following:
13
Gazzara v. Pulte Home Corp., 6:16-cv-657-Orl-31TBS, Doc. 212 (M.D. Fla 2017)


Predominance
1. How much damage (such as cracking and any structural harm caused by water intrusion through the cracks) occurred at a particular class member's home?
2. Was the damage caused by a Code violation during initial construction, or was it caused by something – such as, for example, subsequent construction – for which Pulte is not liable under Fla. Stat. § 553.84?
3. What would be the cost of the Plaintffs' preferred remedy – i.e., replacement of all of the stucco in the house and repair of any structural harm? And (for purposes of Florida's economic waste doctrine) what is the difference between the value of the house contracted for and the value of the house received from Pulte?8
4. Was the house properly permitted, and did it pass inspection, thereby supporting an affirmative defense under Fla. Stat. § 553.84? And if so, did Pulte know, or should it have known, about the Code violations, thereby nullifying that defense?
14


Predominance
These are just the most obvious individualized questions – the ones that seem likely to require answering in regard to most if not all of the homes in the class. Pulte raises a number of other issues requiring individualized proof – such as the statute of limitations[9] – that seem likely to apply as to at least some of the class members here. Any one of these individualized questions might not predominate over common questions of law and fact in a typical case. But in this case, there are a host of questions requiring individualized proof and nothing of consequence that is capable of resolution via generalized proof. The Plaintiffs have failed to show that common questions predominate over individualized questions here.
15

Superiority

This failure extends to Rule 23(b)(3)'s superiority requirement as well. The focus of the "superiority" analysis is on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs. *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183–84 (11th Cir. 2010) (citation omitted). The predominance analysis has a significant impact on the superiority analysis; if common issues predominate over individual issues, then a class action is likely to be a superior vehicle for adjudicating the plaintiffs' claims. *Id.* at 1184 (citations omitted). Here, however, common issues do not predominate. And without belaboring the point, the Court finds that the plaintiffs have not presented any compelling arguments in favor of handling all of these claims in a single suit. Based on the assertions of the Plaintiffs, these are not cases with such small possible damages awards that they would not make financial sense to pursue in separate cases.[10]

16

Preventing Class Certification

4. Challenge ascertainability.

- Circuit split exists. (*Compare* 3rd Cir. *with* 9th Cir.)
- *Briseno v. ConAgra* may present the issue to the Supreme Court.
- Consider ascertainability for:
  - The difficult-to-identify class
  - The overbroad class
  - The fail-safe class

17

Ascertainablity

The Plaintiffs contend that the class in this case is "easily ascertainable." However, the only assertion put forward in support of this contention is that "Pulte has the home addresses of the class members." (Doc. 168 at 5). This is not correct. It may be true that Pulte has addresses as to at least some owners of the stucco-sided houses it built between April 18, 2006 and April 18, 2016 – though not necessarily as to subsequent purchasers of those homes. However, this is not "the class." According to the Plaintiffs' definition, "the class" consists of the owners of the stucco-sided homes Pulte built in Florida within that ten-year span *that have one of the two specified Code violations*. *See* SAC at 2-3. While the use of a defendant's records to identify class members is certainly permissible,[4] the Plaintiffs have not provided any evidence suggesting that Pulte kept records as to which homes were built with particular Code violations. They also have not provided any other "objective criteria" from which the identities of the class members could be ascertained. The Plaintiffs argue that class members can self-identify, but the prospect of thousands of mini-trials (as Pulte challenges the homeowners' membership in the class) renders that process administratively infeasible. *See Karhu v. Vital Pharmaceuticals*, 621 Fed. Appx. 945, 948-49 (11th Cir. 2015). Accordingly, the Court finds that the Plaintiffs' proposed class fails the threshold requirement of ascertainability.

18

Preventing Class Certification

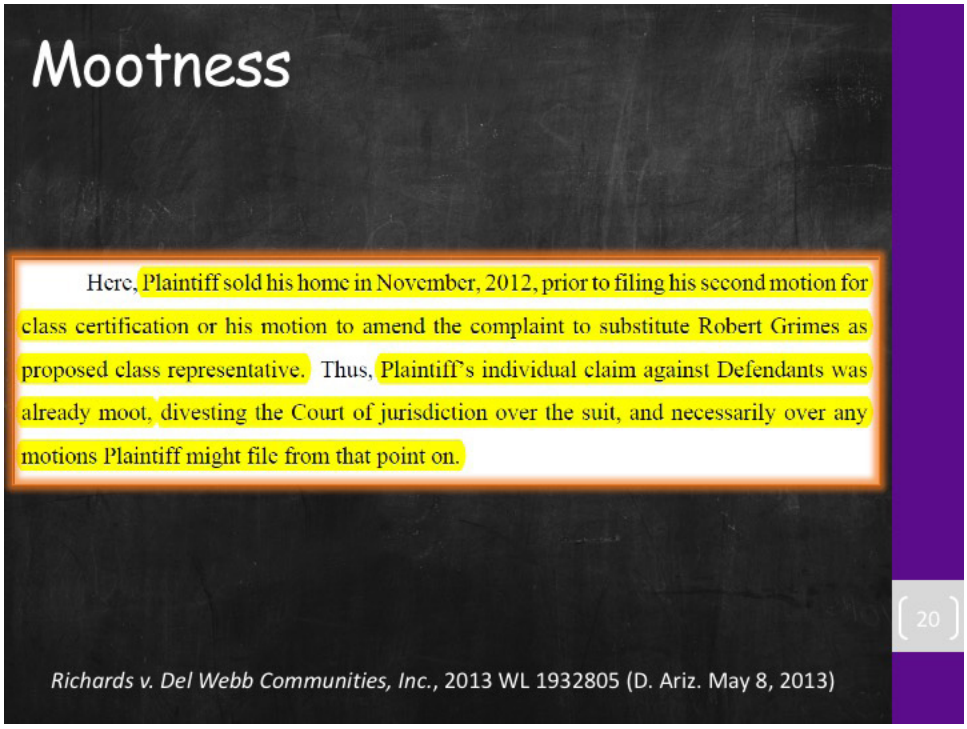
5. Watch for a standing or mootness challenge.

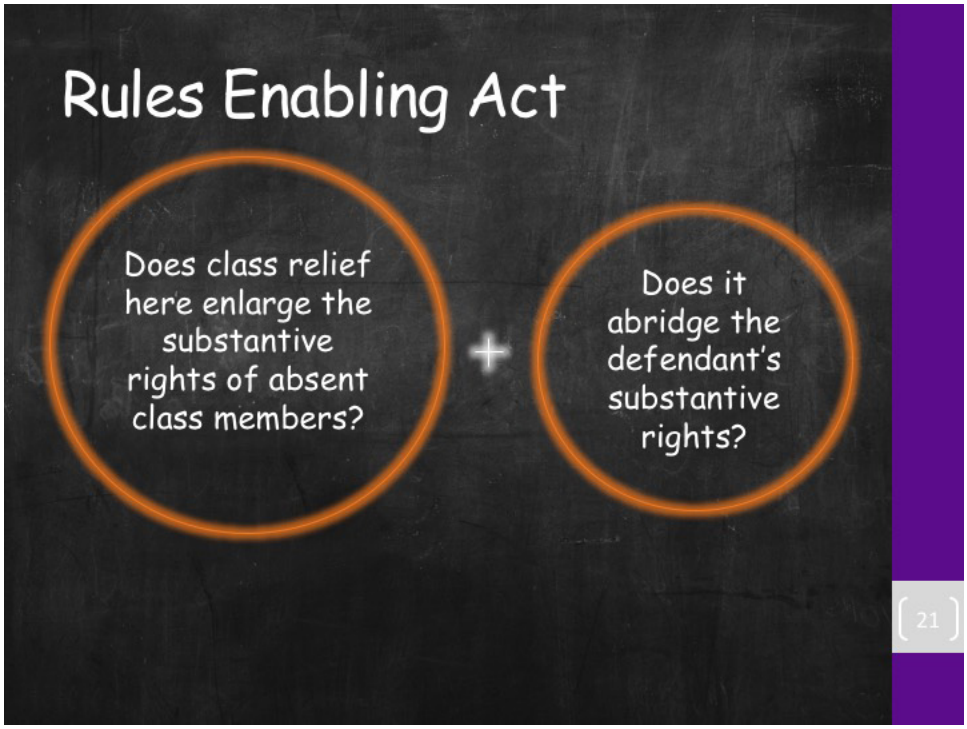
- *Spokeo* clarified that a private right of action does not confer standing, but no monetary or tangible injury is required.

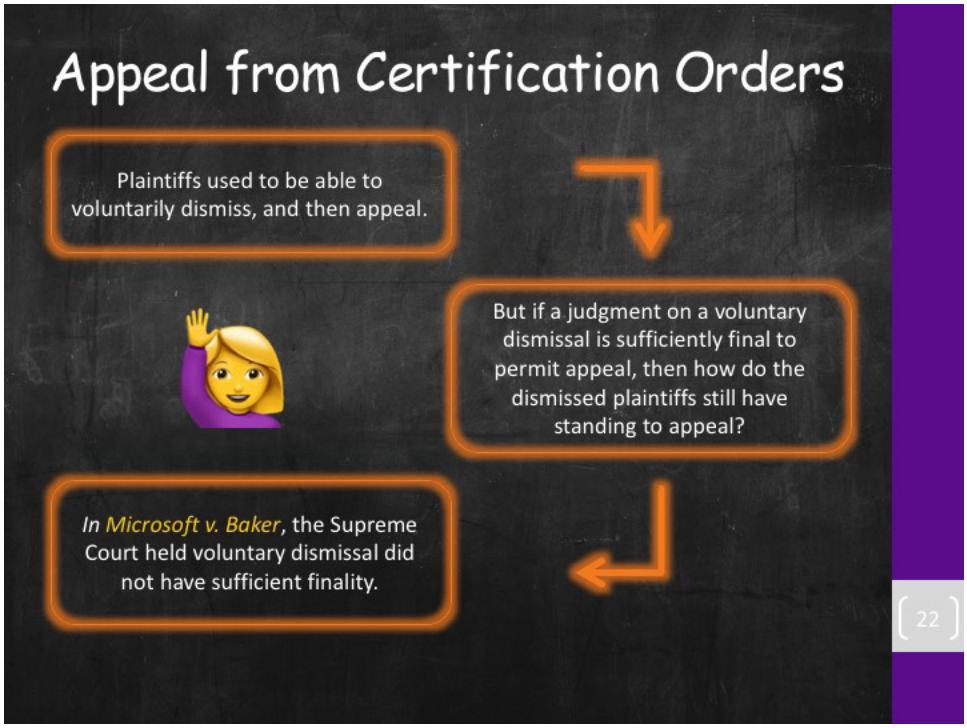
- Caution: Cannot remove under CAFA and then challenge Article III standing.

- *Campbell-Ewald* held that an offer of full relief does not moot, but left open whether tender of full relief does.

19


Mootness
Here, Plaintiff sold his home in November, 2012, prior to filing his second motion for class certification or his motion to amend the complaint to substitute Robert Grimes as proposed class representative. Thus, Plaintiff's individual claim against Defendants was already moot, divesting the Court of jurisdiction over the suit, and necessarily over any motions Plaintiff might file from that point on.
20
Richards v. Del Webb Communities, Inc., 2013 WL 1932805 (D. Ariz. May 8, 2013)


Rules Enabling Act
Does class relief here enlarge the substantive rights of absent class members?
+
Does it abridge the defendant's substantive rights?
21


Appeal from Certification Orders
Plaintiffs used to be able to voluntarily dismiss, and then appeal.
But if a judgment on a voluntary dismissal is sufficiently final to permit appeal, then how do the dismissed plaintiffs still have standing to appeal?
In Microsoft v. Baker, the Supreme Court held voluntary dismissal did not have sufficient finality.
22

Stephanie A. Douglas

Partner
Bush Seyferth & Paige (Troy, MI)

248.822.7806 | douglas@bsplaw.com
http://www.bsplaw.com/people/stephanie-a-douglas/

Stephanie Douglas leads BSP's appellate, class action, and complex briefing team. She focuses on translating complex legal and technical arguments into simple, understandable, and persuasive language. Her representative clients include Ford Motor Company, Pulte Home Company, Meadowbrook Insurance, and FCA US.

At the trial level, with an eye towards strategic decisions and issue preservation, Stephanie handles legal analysis, briefing, and argument on nearly any legal topic, including constitutional issues, contracts, product liability and other torts, tax, statutory interpretation, and employment law. On appeal, Stephanie both consults and handles appeals from start to finish. When she is not handling the appeal outright, Stephanie advises other attorneys inside and outside the firm on procedure and structure, edits and rewrites briefs for thematic and persuasive effectiveness, and moots oral arguments to identify and prepare responses to the most difficult anticipated questions.

Before joining BSP, Stephanie was a judicial law clerk to Judge Raymond Kethledge on the Sixth Circuit Court of Appeals and Judge John Feikens in the Eastern District of Michigan, and an associate at Honigman Miller Schwartz and Cohn LLP. In addition to her legal talent, Stephanie offers practical business and technical experience, which she acquired during her ten-year consulting career.

Related Services
- Appellate
- Class Action
- Commercial Litigation
- Product Liability Litigation

Honors and Awards
- Benchmark Litigation, Future Star (2015)
- DBusiness Top Lawyers (2016, 2018)
- Michigan Super Lawyers, Appellate Practice (2016 - Present)
- Michigan Super Lawyers, Rising Star – Appellate Practice (2013 – 2015)
- Michigan Lawyer's Weekly, Up & Coming Lawyers (2012)
- University of Michigan Law School, Order of the Coif
- West Publishing Award for Outstanding Scholastic Achievement
- Dean's Certificates of Merit (highest grade in class): Torts, Contracts, Criminal Law, Copyright Law, E-Commerce, Secured Transactions

Education
- University of Michigan Law School, J.D., summa cum laude, 2006
- University of Michigan B.S.E., magna cum laude, 1993

BURSTING THE BUBBLE: SUCCESSFUL STRATEGIES FOR CHALLENGING INFLATED MEDICAL EXPENSES

Terry Brantley
Swift Currie McGhee & Hiers (Atlanta, GA)
404.888.6160 | terry.brantley@swiftcurrie.com

Identifying the "reasonable" value of medical services can present a difficult and challenging issue for companies and insurers given the lack of uniformity associated with the application of the collateral source doctrine - which generally prevents evidence that a plaintiff received compensation or payments from a third party. Although most jurisdictions agree with the general rule that Plaintiffs can only recover the reasonable value of medical expenses, the agreement seems to stop there. Using the same collateral source rule, states have developed vastly different laws relating to the type of evidence that can be used to establish the value of a plaintiff's medical expenses. Some states define reasonableness as the amount ultimately paid for the care provided, thereby excluding any evidence of the amount charged for the care.[1] Unfortunately for the defense, this approach is followed in less than 10 percent of the states across the country. A second approach, followed by more than a third of the states, defines reasonableness as the amount charged; precluding the defense from introducing evidence that a lesser amount was actually paid and accepted.[2] Next, several states employ various hybrid approaches, falling somewhere between the amount billed and the amount charged on the continuum of reasonableness. For example, one variant of the hybrid approach allows the fact finder to determine the reasonable value based on evidence of both the amounts billed by the medical provider and the amounts paid to the medical provider.

One must only consider the following hypothetical to realize the significant differences associated with these approaches.

> John Doe was injured in a clear liability motor vehicle accident and was charged approximately $62,000 for his medical care. Doe, however, was fortunate enough to have medical insurance for which he paid approximately $5,000 in premiums between the time of the accident and the filing of his lawsuit. He also paid approximately $1,000 in copayments for his treatment. Ultimately, the insurance company, per its negotiated rates, paid $18,000 for his care.
>
> In Minnesota, Mr. Doe is limited to seeking $6,000 for the medical expenses associated with his care. The amount is based on the sum of his out-of-pocket costs and insurance premiums.
>
> In California, however, Mr. Doe is entitled to recover $18,000 for his medical expenses given that the amount paid is presumed to be the reasonable value of the services.
>
> In Georgia, however, Mr. Doe is entitled to recover $62,000 for his medical expenses given that the amount charged is presumed to be the reasonable value of the services.

The "Charge/Billed" approach identified in the Georgia example above clearly presents unique challenges given that reality and common sense dictate that the amount charged by medical providers does not represent the reasonable value or fair market value of the services. There are several options, however, to defend against Plaintiff's attempts to present the amount billed as the "reasonable value of medical services" in a state using a "charge based methodology." The first avenue of defense is the legal defenses in opposition to plaintiff's counsel's inevitable

1 California, North Carolina, Oklahoma and Texas laws generally allow a plaintiff to only recover the amounts actually paid by him or on his behalf. Evidence of unpaid billed amounts are not admissible to prove reasonable value. Nevertheless, the collateral source rule still applies to exclude evidence that any portion of the medical expenses was paid by or adjusted due to insurance

2 Arkansas, Colorado, Georgia, Hawaii, Kentucky, Mississippi, Nevada, New Hampshire, New Mexico, South Carolina, South Dakota, Vermont, Virginia, Washington, Wisconsin, West Virginia, Wyoming and the District of Columbia allow Plaintiffs to recover the amount charged/billed.

argument that the collateral source rule precludes any evidence about the "reasonable value of medical services" other than the amount billed. This first avenue of defense requires the defense to educate the courts on the collateral source rule and the difference between evidence that ABC Insurance Company paid for the plaintiff's medical bills (which does violate the collateral source rule) versus evidence of the amount the medical provider would agree or has agreed to accept for his services without any mention as to how, when or who paid the medical bills (which is not a violation of the collateral source rule). The second avenue of defense involves the use of experts to educate the courts as to the true value of the services provided. Combined, these two avenues of defense can help defense counsel reframe the issue of the "reasonable value of medical services."

I. Legal Arguments Available in Charge-Based or Hybrid States to Reframe the Usual Definition of "Reasonable Value of Medical Services" Beyond the Amount Charged

The purpose of the first avenue of defense is to put the collateral source rule in its proper place, allowing it to fulfill its purpose while at the same time giving the defense an opportunity to challenge plaintiff's evidence regarding the "reasonable value of medical services." Recent opinions in Tennessee and South Carolina provide solid roadmaps for challenging any attempt by Plaintiff's counsel to insist that the amounts billed represent the reasonable value of medical services provided. Johnson v. Trans-Carriers, Inc., No. 2:15-cv-2533-STA-dkv, 2017 U.S. Dist. LEXIS 275 (W.D. Tenn. Jan. 3, 2017); United States v. Berkeley Heartlab, Inc., No. 9:14-cv-00230-RMG, 2017 U.S. Dist. LEXIS 107481 (D. S.C. July 11, 2017). In Trans-Carriers and Berkeley, the courts address the application of the collateral source rule, and the misconception that evidence of the amount paid violates the rule. The Berkeley decision also provides an analysis of the type of expert testimony needed to challenge medical expenses, ultimately finding the amounts charged by physicians do not represent the reasonable value of the services.

A. Collateral Source Rule Should Not Improperly Increase Plaintiff's Damages

Trans-Carriers is particularly instructive from a defense perspective regarding the appropriate application of the collateral source rule to medical expenses. As an initial matter, the Court recognized, "in an action for damages in tort, the fact that the plaintiff has received payments from a collateral source, other than the defendant, is not admissible in evidence and does not reduce or mitigate the defendant's liability. The doctrine is a 'substantive rule of law that bars a tortfeasor from reducing damages owed to a plaintiff by the amount of recovery the plaintiff receives from sources that are collateral to the tortfeasor.'"[3] The Court, however, drew a distinction between the application of the collateral source rule and the issue before it noting, "[t]he issue is not whether the Court should admit proof that Plaintiffs have received payment for their medical expenses from a collateral source.[4] The issue is whether Plaintiff should be allowed to discharge his burden to prove the reasonableness of his medical expenses with evidence of the full, non-discounted medical charges."[5] The Court reasoned that the spirit of the rule was to preclude certain deductions, not to increase the amount of Plaintiff's damages such that they include amounts that Plaintiff never incurred.[6] The Court concluded the full, non-discounted medical expenses did not represent the reasonable medical expenses.

Based upon the foregoing, a persuasive argument can be made that exclusion of the full, non-discounted medical expenses does not violate the collateral source rule IF the parties do not introduce evidence that a third-party paid the medical expenses at issue. Instead, introduction of the amounts paid simply represents the true value of the services provided.

B. Providing Evidence of the Fair Market Value of the Services Provided

The Court in Berkeley took a slightly different approach with respect to determining the reasonable value of medical expenses and focused on the "Fair Market Value" of the services provided. The Court borrowed the Centers for Medicare & Medicaid Services (CMS) definition of Fair Market Value — the amount ordinarily paid by parties in arm's length transactions who are not in a position to refer business to one another.[7] Next, the Court performed an in-depth analysis of the realities associated with payments in the medical industry. The Court began its analysis by recognizing that the amount charged rarely reflects the amount actually paid and accepted. "[I]t is no secret that the sticker prices of services listed in physician bills and hospital chargemasters are totally unmoored from the reality of arm's-length transactions actually taking place in the marketplace."[8]

3 Id. at 7 citing Donnell v. Donnell, 220 Tenn. 169, 415 S.W.2d 127, 134 (Tenn. 1967) (abrogated on other grounds by Dupuis v. Hand, 814 S.W.2d 340 (Tenn. 1991).

4 Id.

5 Id.

6 Id. citing Keltner v. U. S., No. 2:13-cv02840-STA-dkv, 2015 U.S. Dist. LEXIS 76017 (W.D. Tenn. June 12, 2015).

7 Id. at 8.

8 What's The Cost?: Proposals To Provide Consumers With Better Information About Healthcare Service Costs, before the Committee On Energy And Commerce House Of Representatives, 109th Cong. (2006) (Statement of Dr. Gerald F. Anderson, Johns Hopkins, Bloomberg School Of Public Health, Health Policy And Management) ("List prices are established by the hospitals and physicians without any market constraints. Too often list prices have no relationship to the prices that are actually being paid by insurers."); George A. Nation III, Determining the Fair and Reasonable Value of Medical Services: The Affordable Care Act, Government Insurers, Private Insurers and Uninsured Patients, 65 Baylor L. Rev. 425, 429-30 (2013) ("[C]hargemaster or list prices . . . are grossly inflated because they are set to be discounted rather than paid . . . . [T]hey certainly do not represent the

Next, the Court looked at the basis for the amounts charged by physicians. The Court found that "[p]ursuant to statute, and subject to exceptions not applicable here, Medicare payments for physicians' services are (and were during the relevant period) the lesser of the Medicare Physician Fee Schedule (MPFS) amount and the physician's actual charge for the service. Thus, if MPFS establishes a payment of $100 for a service, a physician who charges $150 or $15,000 for the service would receive at most $100 from Medicare for the service."[9] Furthermore, most private insurers also pay the lesser of the amount charged and the amount in the agreed upon fee schedule.[10] Given the foregoing, in order to maximize payment, a physician must set his/her charges in excess of the amounts in the MPFS and the private insurer agreements. These amounts are typically set in an effort to ensure physicians "don't leave any money on the table."[11]

After recognizing the amounts charged by physicians rarely reflect the amount accepted as payment for the services, the Court noted there is a "difference between the expectation of payment and then the reality of payment." Moreover, many courts have acknowledged that physicians charges do not reflect the true value of their services.[12]

II. Expert Testimony to Assist in Addressing the Reasonableness of Medical Expenses.

The second avenue of defense for challenging the reasonable value of medical expenses is the use of expert witnesses. Indeed, the Court in Berkeley relied heavily on the expert testimony of the defense expert in supporting its opinion that the amounts charged do not reflect the value of the services rendered. The following experts should be considered:

A. Economist/CPA Experts

Health Economists testify regarding how the healthcare system works, particularly how medical pricing is performed and why medical bills are not proof or indicators of reasonable value; that "value" is an economic term which means the amount a seller is willing to accept and a buyer is willing to pay. Oftentimes, these opinions are not rooted in any economic or business theory of value. Instead, reasonable value is determined by what is "usual, customary and reasonable." One such methodology separates professional services and hospital charges and works as follows:

1. Physician Charges

With respect to Physician Charges, an expert will typically review all of the services provided and assign a Current Procedural Terminology (CPT) code to each. Next, the expert will obtain the 50th percentile for all charges for the same CPT code in a relevant zip code cluster from Context4Healthcare (C4H). C4H data is collected annually and is a widely-used and accepted benchmarking data source. Indeed, C4H contains more than one billion provider charges aggregated by billing and transaction agencies nationwide. Using this data, the expert will opine regarding the reasonable value for the service provided by the physician.

2. Hospital Charges

With respect to hospital charges, the expert will typically calculate the cost-to-charge ratio (CCR) for each relevant department from the Hospital Cost Report to the Department of Health and Human Services. Next, the charges for each service/supply to cost is reduced using the CCR. Lastly, the expert will add a profit margin above cost, typically in the range of 5-10 percent.

Forensic CPAs may also address this issue by testifying about the "value" of goods and services based on a similar methodology to that used by the economists. They serve as appraisers, like they would if they were valuing a business or real estate.

B. Medical Coding/Pricing Experts

Coders review the medical services and the bills to determine whether the bills accurately reflect the services provided as documented in the medical records. For example, a medical coding expert should ensure all services charged for were actually performed. The expert should also ensure the services have not been improperly coded and billed in order to increase reimbursement.

Some coding experts and pricing experts have experience in the insurance industry and testify — usually based on

usual price actually paid for the listed goods and services.").

9 Id. at 14.

10 Id.

11 Id. at 15.

12 See Aetna Life Ins. Co. v. Huntingdon Valley Surgery Ctr., 129 F. Supp. 3d 160, 174 (E.D. Perm. 2015) (Chargemaster or price list "rates are not 'actual charges' that providers intend to collect in full from insurers and members; they are (usually) the inflated 'sticker prices' [*18] for providers' services that the insurer itself then trims to set the allowed amount) (internal citations omitted); Howell v. Hamilton Meats & Provisions, Inc., 52 Cal. 4th 541, 129 Cal. Rptr. 3d 325, 257 P.3d 1130, 1144 (2011) ("[A] medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value."); Corenbaum v. Lampkin, 215 Cal. App. 4th 1308, 1330-31, 156 Cal. Rptr. 3d 347 (2013) (relying on Howell and concluding "that the full amount billed by medical providers for past medical services is not relevant to the value of the services . . . [and] Because the full amount billed for past medical services provided to plaintiffs is not relevant to the value of those services, we believe that the full amount billed for those past medical services can provide no reasonable basis for an expert opinion on the value of future medical services"); Ochoa v. Dorado, 228 Cal. App. 4th 120, 135, 174 Cal. Rptr. 3d 889 (2014) ("[T]he full amount billed, but unpaid, for past medical services is not relevant to the reasonable value of the services provided."); Johnson v. Trans-Carriers, Inc., 2017 U.S. Dist. LEXIS 275, 2017 WL 28004 at *2 (D.C. Tenn. 2017) ("The non-discounted charges were not reasonable because they did not reflect the rate for services in the actual marketplace: few insurers pay the hospital's listed, full charge."); Nassau Anesthesia Assoc. P.C. v. Chin, 32 Misc. 3d 282, 924 N.Y.S.2d 252, 254 (N.Y. Dist. Ct. 2011) ("Since hospitals and related providers rarely receive payment based upon their 'published rates,' those rates cannot be deemed determinative [*19] in assessing the value of the services."); Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc., 2003 PA Super 332, 832 A.2d 501, 510 (Pa. Super. Ct. 2003) ("If the Hospital recovers its published rates in only one to three percent of its cases, those rates clearly do not reflect the amount that members of the community ordinarily pay for medical services.").

databases of what Medicare, Medicaid and large insurers pay —as to a range or average amounts paid and accepted by medical providers in a geographical area for the same services. Some of these experts testify to an opinion as to the "reasonable" value of a service based on a threshold number (percentile) of the reimbursement range; i.e., a reasonable value for the services performed is what is paid and accepted at the 75th percentile of all providers and payers in the region.

III. Conclusion

While not all challenges to the use of the charged/billed amount by plaintiff's counsel to prove the "reasonable value of medical services" will be successful, every challenge made may assist in educating the courts in the pitfalls associated with accepting the amounts billed as the reasonable value of the services. As courts become more comfortable with the distinctions between evidence that violates the collateral source rule and evidence that does not, and relying on the expert testimony of medical economists and coding experts, the more likely it becomes that evidence of inflated medical expenses is excluded and only well-reasoned and supported evidence is admitted.

WHAT CAN PLAINTIFF RECOVER?

Reasonable Value of Services

- Amount billed
- Amount paid
- Hybrid

COLLATERAL SOURCE RULE

Exclusion of evidence that a third-party source paid for some or all of a plaintiff's alleged damages.

COLLATERAL SOURCE RULE

Rationale

- Defendant should not benefit from "prudent" plaintiff obtaining insurance.
- Deterrent effect of tort law diminished if liable party not required to pay full amount of damages.
- Any "windfall" should go to injured person and not the wrongdoer.

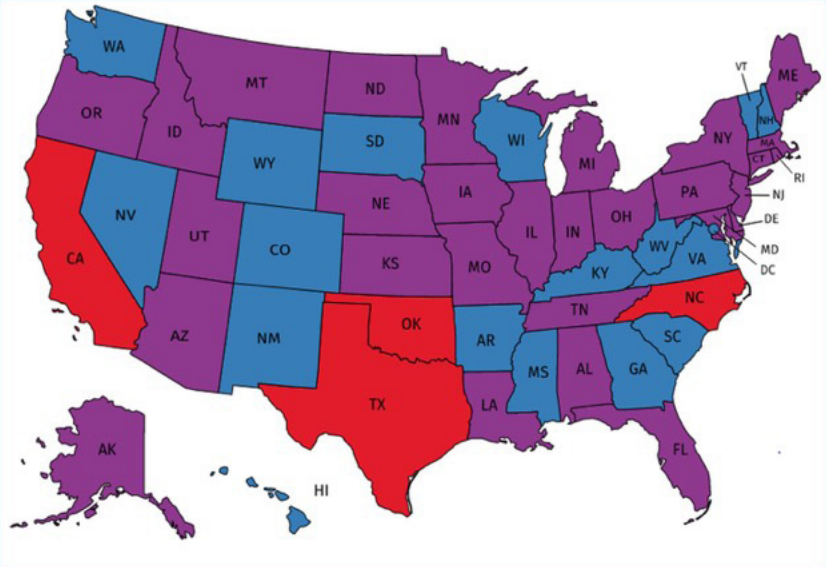
COLLATERAL SOURCE RULE

Arguments

- Healthcare insurance is a requirement.
- Compensatory damages should only include expenses actually paid and accepted.
- There should be no "windfall."
- Goal is to determine "reasonable" amount of expenses.

BILLED VS. REASONABLE

$400,000	Neck Surgery
$250,000	Hospital Stay
$1,750	Surgical Screw
$129	Box of Tissues
$57.50	Teddy Bear
$57	Piece of Gauze
$18	Diabetes Test Strip
$3	Skin Marking Pen
$1.50	Acetaminophen Tablet



RED STATES

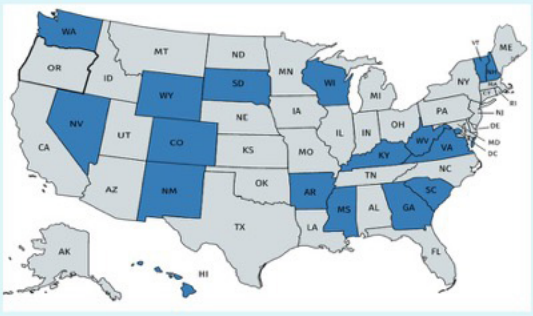
Maximum recovery is PAID amount

- CA, NC, OK and TX

BLUE STATES

Evidence of BILLED amount

- AR, CO, GA, HI, KY, MS, NV, NH, NM, SC, SD, VT, VA, WA, WI, WV, WY and DC



PURPLE STATES

Hybrid Approach

- Fact finder determines reasonable value based on evidence of both billed and paid amounts
  - AL, IN, IA, KS, MO, OH, PA, RI and TN

PURPLE STATES

- Post-verdict reduction
  - AK, CT, FL, ID, IL, ME, MD, MA, MI, MN, MT, NE, NJ, NY, ND, OR and UT
- Only certain (i.e., public) sources not subject to CSR
  - AZ, KS, DE, LA, MI, MT, NE and RI

LEGAL ARGUMENTS

- Amount paid does not violate the collateral source rule
- Collateral source rule should not inflate plaintiff's damages
- Amount billed does not reflect reasonable value of services rendered

POTENTIAL EXPERTS

- Health economists
- Forensic accountants
- Coding
- Pricing
- Hospital administrators
- Physicians

HEALTH ECONOMIST

Physician Services

- Assign CPT code
- Obtain 50th percentile of all charges from Context4Healthcare

Hospital Charges

- Calculate cost-to-charge ratio ("CCR")
- Reduce charges to reflect cost
- Add appropriate profit margin

Terry O. Brantley

Managing Partner
Swift Currie McGhee & Hiers (Atlanta, GA)

404.888.6160 | terry.brantley@swiftcurrie.com
https://www.swiftcurrie.com/professionals/terry-o-brantley-managing-partner

Terry O. Brantley currently represents clients in Georgia and South Carolina in a wide variety of tort actions involving both personal injury and property damage. Although Mr. Brantley has handled a broad variety of litigation, his practice primarily focuses on premises liability, products liability, intentional torts, environmental litigation and automobile litigation.

Mr. Brantley has served as lead counsel for large corporate clients, individuals and insurers handling their litigation needs throughout the State of Georgia. This representation has involved advising clients pre-suit as well as defending the matters through jury trial and appeal.

Mr. Brantley graduated from Jacksonville University, cum laude, with a B.S. degree in Mathematics. He received his J.D. degree from the Walter F. George School of Law at Mercer University. While attending Mercer, Mr. Brantley was selected as a member of the Mercer Law Review, Moot Court Board, Order of Barristers and Mercer's National Moot Court team.

Following graduation from the Walter F. George School of Law in 1997, Mr. Brantley began his legal career by representing Plaintiffs in lawsuits similar to those he currently defends. In 1999, Mr. Brantley joined Swift, Currie, McGhee and Hiers' litigation team and began his defense practice.

Practice Areas
- Automobile Litigation
- Bad Faith Litigation
- Catastrophic Injury & Wrongful Death
- Environmental Law
- Premises Liability
- Products Liability
- Professional Liability
- Real Estate Litigation
- Trucking Litigation

Awards and Recognition
- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Premier 100 Designation from the American Academy of Trial Attorneys (2015)
- 2015 USA – Premises Liability Attorney of the Year (ACQ Global Awards Category Winner)
- Awarded 2015 Premises Liability Attorney of the Year in Georgia by Global Law Experts
- Awarded 2014 and 2015 Premises Liability Attorney of the Year in Georgia by Corporate Intl Magazine
- MS Leadership Class of 2010

Education
- Walter F. George School of Law at Mercer University
- Jacksonville University

LITIGATION MANAGEMENT BREAK-OUT SESSIONS - SAMPLE AGENDA

IDENTIFYING THE INITIAL GOALS AND PLANS

- What is the primary goal from the start (Settlement or Trial)?
- What should be conveyed by in-house counsel on primary objective?
- What should be conveyed by outside counsel to client?
- Does exposure dictate how case is handled?
- Are the days gone where we take the case all the way to trial, regardless of cost/exposure formula?
- Is ADR or settlement talk ever effective early on in the case before discovery?
- At what point do you think parties should explore resolution?
- What are your experiences with having direct contact with in-house counsel and plaintiff's attorney to discuss resolution? Should this be done without outside counsel present?

MANAGING AND CONTROLLING THE LITIGATION

- How much of our strategy to we want to set out in paper discovery early on?
- Do we want to take depositions of everyone in sight, or selective depositions?
- At what stage do we get experts on board?
- Do we want to go with in-house experts AND outside experts, or one or the other?
- Do we want to depose opposing expert in every case, or are there advantages in not deposing experts?

- What is it that we want to accomplish by taking expert deposition? Do we really need to take a deposition to know what their opinions are? What is it we want to know for $500 an hour we are paying the expert?
- What are the difficult questions we want to ask the expert?
- How should in-house counsel and outside counsel coordinate and plan for experts?
- At what stage do we start planning for Frye/Daubert motions? Do we argue these motions only when we feel very confident that they will be granted pre-trial, or is there an advantage in arguing the motions and revealing our strategy to other side so they can be more prepared on voir dire of witness in trial?
- What are the most important things the in-house counsel wants from their trial counsel during discovery and pre-trial state?
- What are the most important things trial counsel wants from client and in-house counsel?

WINNING THE CASE AT TRIAL

- What is the most important part of the trial? (Voir Dire, Opening, Cross-examination, Direct Examination, Closing).
- Studies show 60-80% jurors form initial impression on liability after opening statement. What has been your experience?
- Do you put on a damage defense case?
- When do you attack damages?
- When, if ever, do you ignore damages?
- How do you handle punitive damages at trial?
- What are the advantages/pitfalls or bifurcation of liability and damages?
- Do you put on damage experts? (Product liability, construction litigation, etc.)
- Do use an economist or just attack plaintiffs?
- Do you use medical damage experts? (RN v. LPN v. Attendant care)
- What should role of in-house counsel be during trial?