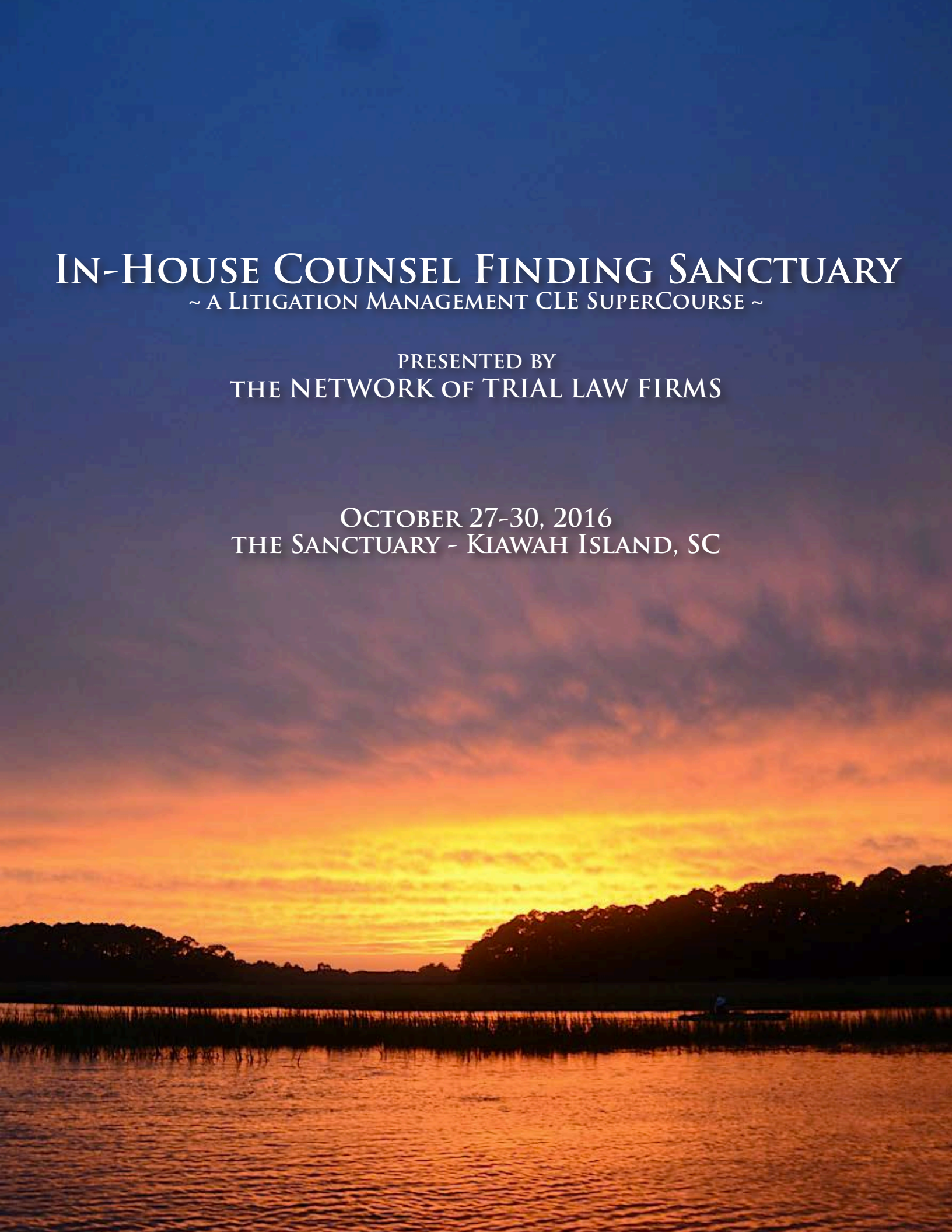

In-House Counsel Finding Sanctuary

~ a Litigation Management CLE SuperCourse ~

presented by

the Network of Trial Law Firms

October 27-30, 2016

the Sanctuary - Kiawah Island, SC

In-House Counsel Finding Sanctuary

- Litigation Management SuperCourse -
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THE NETWORK trial.com

Focusing on Trial and Litigation, Dedicated to Continuing Legal Education

Over 5,000 Attorneys in 20 Separate and Independent Trial Law Firms Praticing in Over 120 Offices Throughout the United States and Canada

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 20 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.

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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.

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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.

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Blakes

Blake Cassels & Graydon LLP is one of Canada's leading law firms. With more than 550 lawyers nationwide, we have offices in each of the major Canadian commercial and regulatory centers: Montréal, Ottawa, Toronto, Calgary and Vancouver. Internationally, Blakes has a strong presence in many markets, including offices in New York, Chicago, London, Bahrain, Beijing and associated offices in Al-Khobar, Saudi Arabia, and Shanghai.

Blakes national litigation and dispute resolution practice is one of the largest and most successful in Canada. Our national approach to litigation focuses on understanding our clients, exploring all methods of dispute resolution and litigating on their behalf when appropriate. Our clients benefit from specialized, cost-effective input from leading lawyers throughout the Firm. Blakes litigators also work closely with other practice groups to help reduce litigation risk.

Blakes represents many leading Canadian, US and international clients on a wide range of complex litigation in virtually every forum across Canada, including the Supreme Court of Canada. Blakes lawyers regularly appear on cases at the forefront of developments in Canadian law, including those which involve: class actions; communications; competition or anti-trust matters; constitutional and Charter of Rights; construction; corporate commercial agreements; energy; environmental claims; information technology; insurance; intellectual property; labour and employment; life sciences; media; pension and employee benefits; procurement; product liability; professional negligence; real estate; restructuring and insolvency; securities; tax; and white collar crime.

Blakes' lawyers also have an extensive background in domestic and international commercial arbitration, acting as counsel in disputes and as arbitrators under the rules of all major national and international arbitral institutions. Blakes also has strong experience in international and domestic mediation.

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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."

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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.

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Dykema

Midwest based Dykema is one of the country's most respected law firms. Since inception, our mission has been to provide the best possible legal advice and service to our clients. We offer experience and expertise in a broad range of areas including corporate law, securities, litigation, class actions, consumer finance, real estate, banking, administrative law, health care law, insurance law, intellectual property, trade regulation, bankruptcy and creditor rights, labor, taxation, estate planning, employee benefits, computer and environmental law.

Dykema has grown steadily through the years. Our client base includes individuals, publicly held companies, hundreds of privately held corporations, limited and general partnerships, associations, hospitals and managed care networks, banks and financial institutions, and retailers. This diversification has resulted in our expansion and continued growth.

To meet the extensive range of our clients' needs, we work together in interdisciplinary groups and teams. This approach helps us to respond rapidly, efficiently and cost-effectively to the most complex situations. A sophisticated interstate computer network unites all of us regardless of office location, so that each lawyer can draw on the resources of the entire firm to address a client's legal concerns. In many cases, our network is linked directly into our clients' systems for ease of information exchange.We are proud of the fact that our success is directly linked to the success of those we serve, and is due, in great part, to the many enduring relationships we formed with emerging businesses years ago that are still maintained today. We also look forward to the success of our new, entrepreneurial clients - many of whom are just beginning to establish footholds in their respective markets.

Dykema is committed to provide our professional services in a manner that produces recognizable value to our clients by investing in knowledge of our clients and their industries, developing alternative billing arrangements aligning the clients' interests and our interests together, providing dedicated client service teams and utilizing the latest in information technology systems.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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
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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
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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

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ETHICAL CONSIDERATIONS FOR LITIGATORS AND TRIAL ATTORNEYS

NIXON PEABODY

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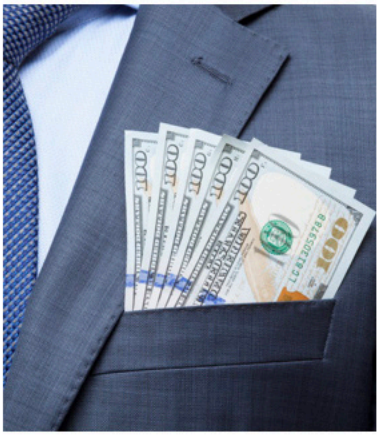
WALKING THE LINE

FACT WITNESSES - PAYMENT



Can you Pay Fact Witnesses?

— ABA Model Rule 3.4(b)

— ABA Ethics Opinion 402 (8/2/96)

— Restatement (3rd) of Law Governing Lawyers § 117

— *U.S. v. Blaszak*, 349 F.3d 881 (6th Cir. 2003)

FACT WITNESSES - PREPARATION

— Examples of what you **MAY** discuss:

- Witness's recollection and probable testimony
- Possible lines of hostile cross-examination
- Evidence that may be introduced

— Testimony may also be rehearsed, but the lawyer may not assist in having the witness testify falsely to a material fact

FACT WITNESSES – OFFERING FALSE TESTIMONY

A Lawyer Cannot Knowingly Offer False Testimony

— Key concept: "knowingly" v. "reasonably believes"

- ABA Model Rule 3.3(a)(3)
- Restatement (3rd) of Law Governing Lawyers §120

Safe Harbor Provisions: A lawyer can refuse to offer evidence he believes or knows to be false.

— ABA Model Rule 3.3(a)(3)

— Restatement (3rd) of Law Governing Lawyers §120(3)

CLIENT IS LYING

Lawyers have a duty of candor towards the tribunal under **ABA Model Rule 3.3.**

— Possible actions if client is lying:

- Persuade the client not to offer false evidence
- Take remedial action
- Refuse to offer evidence known to be false
- Withdraw

"I object to the prosecution calling my client a liar. The witness is merely fact-based reality challenged!"

DEFENDING AND TAKING TESTIMONY

Discussions with Witness During Testimony Breaks

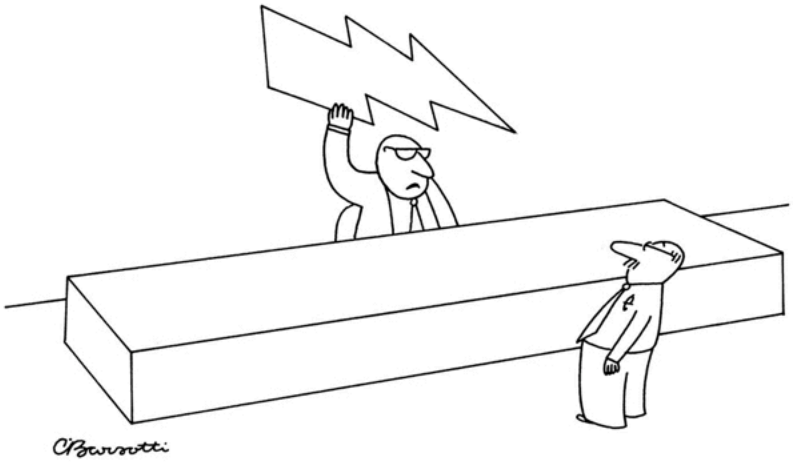
Hall v. Clifton Precision, 150 F.R.D. 525 (E. D. Pa. 1993)

Bluffing

Cincinnati Bar Ass'n v. Statzer, 101 Ohio St. 3d 14 (2003)

IN-HOUSE COUNSEL AS WITNESS

CAN IN-HOUSE COUNSEL BE ASKED TO SERVE AS A WITNESS?



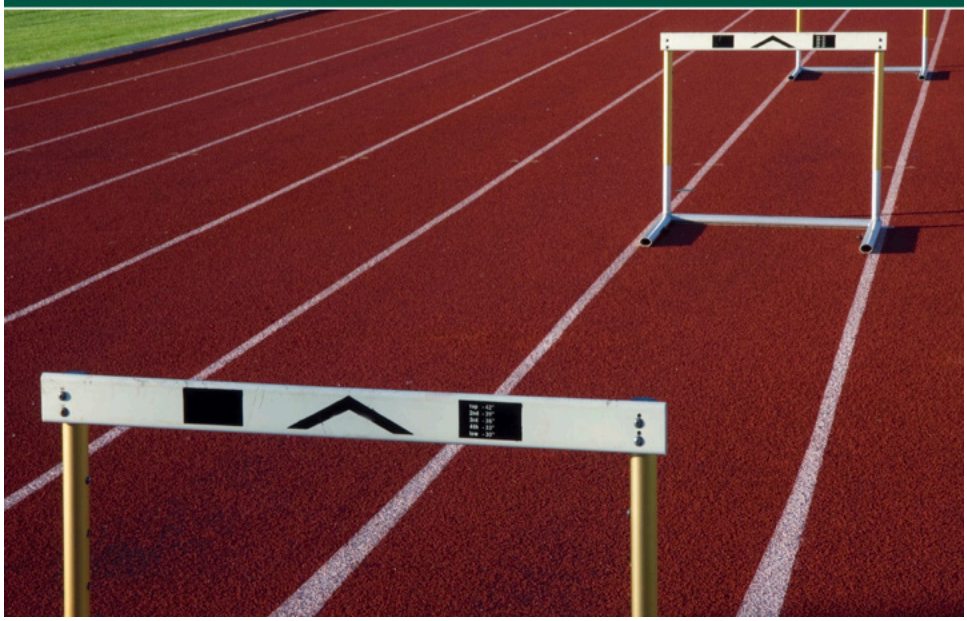
"The board of directors has given me new powers."

IN-HOUSE COUNSEL AS WITNESS

— *In re Subp. Issued to Dennis Friedman*, 350 F.3d 65 (2d Cir. 2003)

- Being a lawyer by itself will not shield you from being called as a witness
- The Second Circuit takes a flexible approach to determine if taking the deposition of a lawyer is appropriate
- Considerations Include:
  - Need to depose the lawyer
  - The lawyer's role in connection with the matter on which discovery is sought and in relation to the litigation
  - Risk of encountering privilege and work product issues
  - Extent discovery is already conducted

OTHER UNIQUE ETHICAL ISSUES



SETTLEMENT NEGOTIATIONS

Duty of Candor

— Affirmative Misrepresentations:

- ABA Model Rule 4.1
- ABA Ethics Opinion 439 (4/12/06)
- *Slotkin v. Citizens Cas. Co.*, 614 F.2d 301 (2d Cir. 1979)

— Use of Technically True Statements

- ABA Model Rule 4.1
  - Puffery
- *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1 (1st Cir. 2005)

JUDICIAL MANIPULATION

Docket Assignment

— Wait to Bring a Motion (TRO/OTSC)

— Wait to File a Motion

— File and Dismiss Concurrent Motions

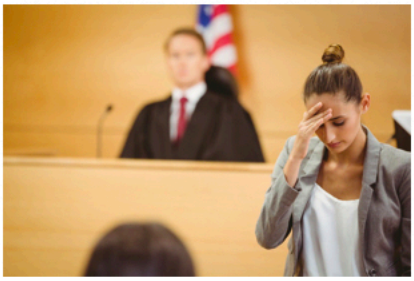
LITIGATION PRIVILEGE

Restatement (2nd) of Torts § 586

— Attorneys have privilege "to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding. . ."

Front, Inc. v. Khalil, 24 N.Y.3d 713 (2015)

— Statements made by attorneys prior to commencement of litigation are subject to *qualified* privilege.



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Joseph Ortego is the practice group co-leader of Nixon Peabody's Commercial Litigation practice, chair of NP Trial®, an international team of the firm's most successful and experienced trial lawyers, and chair of the firm's Aviation practice. He represents major private and publicly traded companies and their executives, having tried over 100 cases to verdict in both federal and state courts throughout the country and has successfully represented clients before arbitration tribunals around the world.

Joe has been selected by his peers for inclusion in The Best Lawyers in America© 2016 in the field of Product Liability Litigation - Defendants. He has been listed in Best Lawyers in America since 2012.

Joe was also recognized by The Legal 500 United States 2016 editorial as a leading attorney in the Product liability and mass tort defense: Toxic tort and Aerospace/aviation categories (as well as in previous editions); by Benchmark Litigation as a New York local litigation star; and by Martindale-Hubbell Peer Review Ratings in its highest category, AV Preeminent.

Additionally, Joe is recognized by New York Metro Super Lawyers, LMG Life Sciences as a "Life Sciences Star" and Who's Who Legal in Life Sciences. In the New York Metro Super Lawyers' 2015 edition, Joe was amongst the top 100 lawyers.

Services
- Complex Commercial Litigation
- Appellate
- Products: Class Action, Trade & Industry Representation
- NP Trial®
- Aviation Product Liability
- Insurance
- Life Sciences
- Health Effects - Toxic & Complex Torts
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- Food, Beverage & Agriculture
- Arbitration
- Class Actions & Aggregate Litigation
- Labor & Employment
- Consumer Products
- Global Disputes
- Financial Services Litigation
- Data Privacy & Cybersecurity

Education
- Boston University School of Law, J.D.
- Syracuse University, B.A., with honors

ARE TRIAL LAWYERS FUNGIBLE?

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Fun-gi-ble [ˈfənjəbəl]

- **ADJECTIVE**
  1. being of such a nature that one part or quantity may be replaced by another equal part or quantity in the satisfaction of an obligation *(oil, wheat, and lumber are fungible commodities)* *Lawyers????*
  2. *Interchangeable*

Or DOES it make a difference?

GC's of Corps & Insurance Cos.

- Generally Risk Averse: Avoid trial at all costs - regardless of facts
  - Time, money
  - Risks to reputation *(punitive damages & bad PR)*
  - Judicial "Hell-Holes"
  - Fighting bias - jurors don't like Corps/Ins. Cos. *(does anyone like Wells Fargo right now?)*

GC: Hates Tort Litigation

- Hire a "big firm" (Board can't complain)
  - Huge rates & legions of associates
  - Love "focus groups" & then settle
    - *Isn't that why I have insurance – tell them to pay & make it go away or else…?*
- Problem: Big firms have few, if any lawyers w/trial experience to verdict

Plaintiffs' Theme

- *Profits $$$$ over People & Safety*
  - Corporate greed: care about bottom line
- Corp Documents: "Feed the Flame"
  - Marketing Div: Maximize sales & profits
  - Science Div: "Rush" new drugs to market
  - VC's: Just want positive results & profit
- Corp 30(b)6 Witness: Poorly prepared – "deer in the headlights"

Complicating Factors

- Judicial Hell-holes:
  - WVA; East TX; SF; Philly; Madison County, IL; Vegas; Baltimore City
- Discovery Wars: Issues for Sanctions
  - Threaten punitive damages
  - Huge cost to respond
  - Distract from actual weak liability

Need Counsel Who Have Trial Experience in Tough Jurisdictions

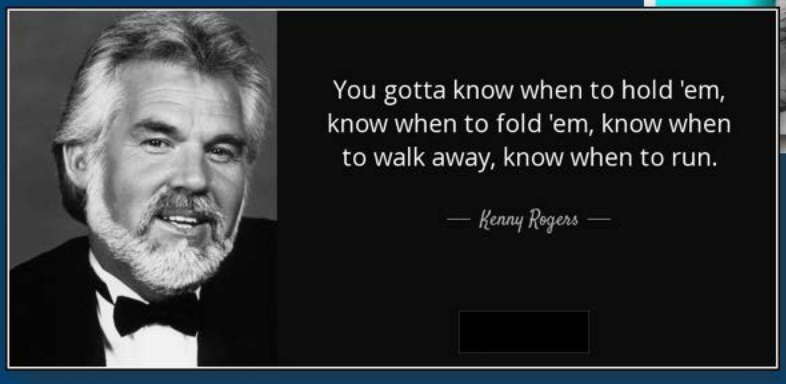
Negotiate from Position of Strength

- Settlement: Sometimes best option depending on many factors
  - But having an *experienced trial lawyer* allows defense to negotiate from a position of strength or WIN THE CASE

Negotiate from Position of Strength

"Speak softly & carry a BIG stick"...

or



5 Questions to Ask!

9


Trial Experience
1st: How many cases to verdict have you taken in last 5 yrs?
"We're all trial lawyers by training"
"I've tried cases over the yrs... but most settle... but man, have I gotten great settlements"
"I was ready to go to verdict but client wanted me to shut it down"
10


Trial Experience
2nd: Have you tried a catastrophic, high exposure case to verdict?
"Trying a case is like riding a bike – never forget"
When you take your loved one to a cardiac surgeon/invasive cardiologist – you ask:
How many heart surgeries/stents done?
What are your complications & rate?
Not a "PC" experiment w/Jury
11

Trial Experience

- 3rd: Ask to speak to their clients
  - Early in Case: 80% chance of winning
  - Trial nears: Case IS 50/50 (big "cop out" – lawyer can't lose0
  - During Trial: Lawyer collapses – "better settle before hits papers… avoid punitives?"
  - You pay $10 million lawyer says – "could've been $20 M, I saved you $10 M"

ARE YOU KIDDING ME?

12

Excuses: Sympathy or Bad Judge

- 4th: Why our chances of winning so low when we have good facts?
  - There's a lot of sympathy for plaintiff
  - Tough jurisdiction - bad judge
  - Jury won't understand the science so let's do a "focus group" – Really???
- Good trial lawyers tell *"a story"*
  - Ask lawyer to give a 10 min opening: tell me a story - if can't – WRONG LAWYER

13

Success Factor

- 5th: How many big cases have you tried & won?
  - "I really don't keep statistics like that b/c so many cases settle "
  - ?Well – it depends on how you define WIN – I've gotten some great settlements in middle of trial "

LEAVE & DON'T COME BACK

14

Recent Cases Taken to Trial

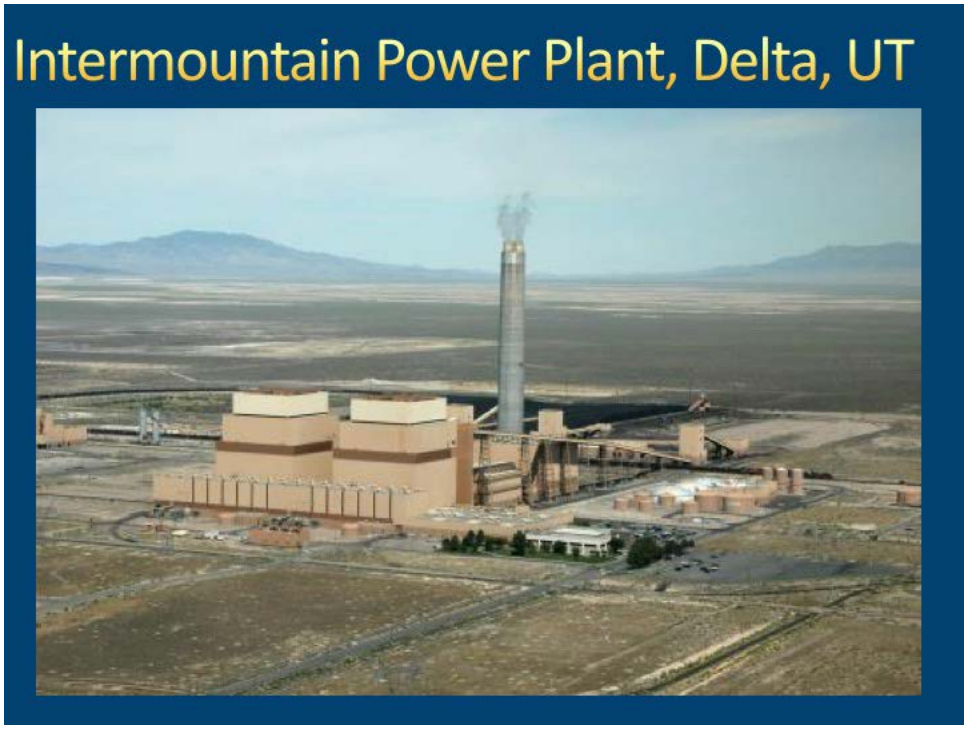
Gunn Hill Dairy v IPP

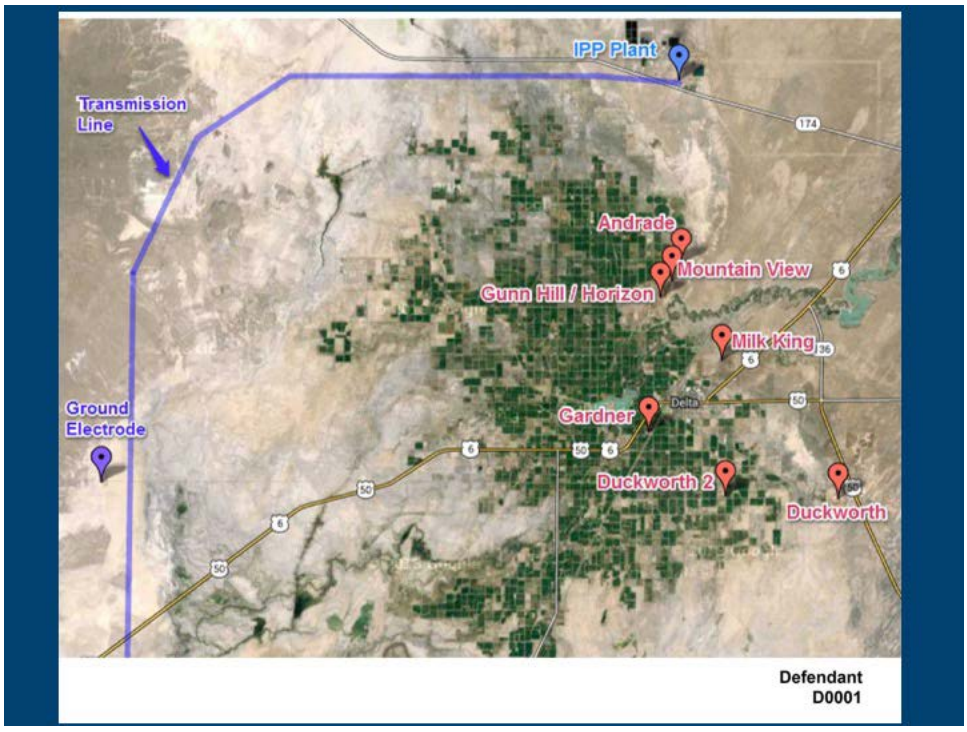
- 18 Dairy Farmers sued power company alleging stray voltage adversely impacted milk production – wanted $1.5 billion
- For 9 yrs: 90% defensible – had best experts; billed millions in fees
- Eve of Trial: Panic set in – please come in

Plaintiffs' Claims?

- Cows harmed b/c of **"Stray Current"** from IPP (less than what turns on laptop) that travels 18 miles through ground from grounded electrode, causing:
  - Less Milk Production than average in Utah
    - But is actually *higher than average* - less than what they would like it to be
  - Higher Death rates than Utah average
    - But if *lower than average* – still higher than they want it to be

  Claiming Hundreds of $Millions in Damages


Intermountain Power Plant, Delta, UT


IPP Plant
Transmission Line
Andrade
Mountain View
Gunn Hill / Horizon
Milk King
Ground Electrode
Gardner
Duckworth 2
Duckworth
Defendant
D0001

Plaintiffs' Case

1. Larry Neubauer – 100% of His Living by "Stray Voltage Consulting" for Plaintiffs – Never Tested a Farm Where He Didn't Find it – found current on farms. (What a Shock!)
2. Plaintiffs' Did No Testing to Confirm Source – Current "Must Be Coming" from IPP Electrode – 18 Miles Away
3. Current impacts Cows – Overwhelming Scientific Evidence Says it Doesn't
4. Plaintiffs' Suffering $100s of Millions in Lost Profits – yet Outperforming Rest of State

Larry "The Legend" Neubauer
Plaintiffs' Expert
Electrician

- "Larry the Legend" of SV Litigation
  - HS Diploma, Union electrician but failed Master Electrician Exam – 8 x; failed contractor exam (blind in one eye);
  - 100% of Income from "SV Consulting" for Plaintiffs since 1996 – made millions
  - "Tested" 1,500 Dairies @ $4,200 – $7,800 "Initial Consultation"
    - Average $ 6K x 1500 - $9 million
  - Sold expensive "Fix Traps" to farmers that don't work – but told them –just sue Utility Co – recover more

What's This Case About?

- MONEY: *"This case is about money – it's not about right & wrong – it's about money"* (Larry Neubauer)
  - Every farm has stray voltage – I can prove it – & every farmer has lost 30 – 40% of income from it"

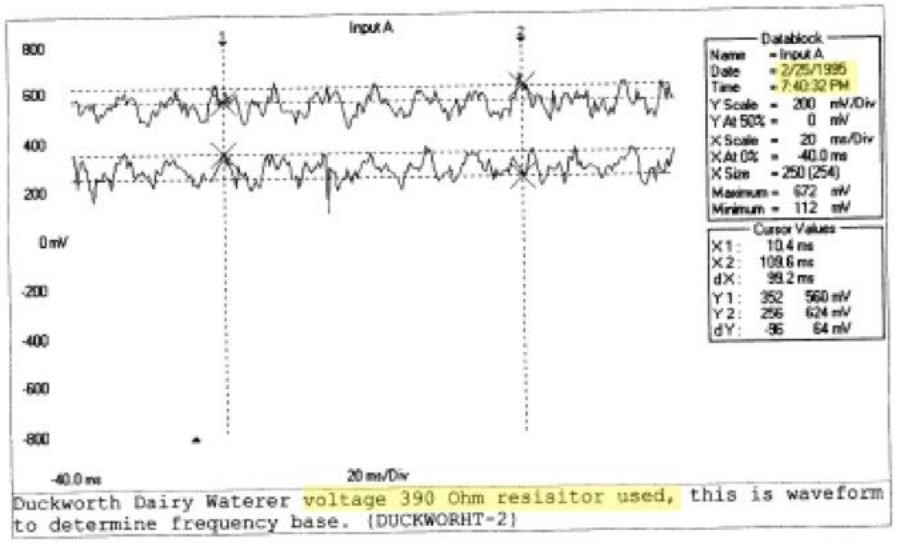
Larry Neubauer

Manipulation of Data

- Neubauer Fluke Readings: To increase numbers – manually changes "legend" to appear he has more data - FRAUD
  - Doesn't calibrate Meters – incorrect dates

Experienced Lawyers Spend Time Wisely:

Reviewed Readings to Discover Multiple "Faulty Readings" & Completely Discredit Plaintiffs' Expert



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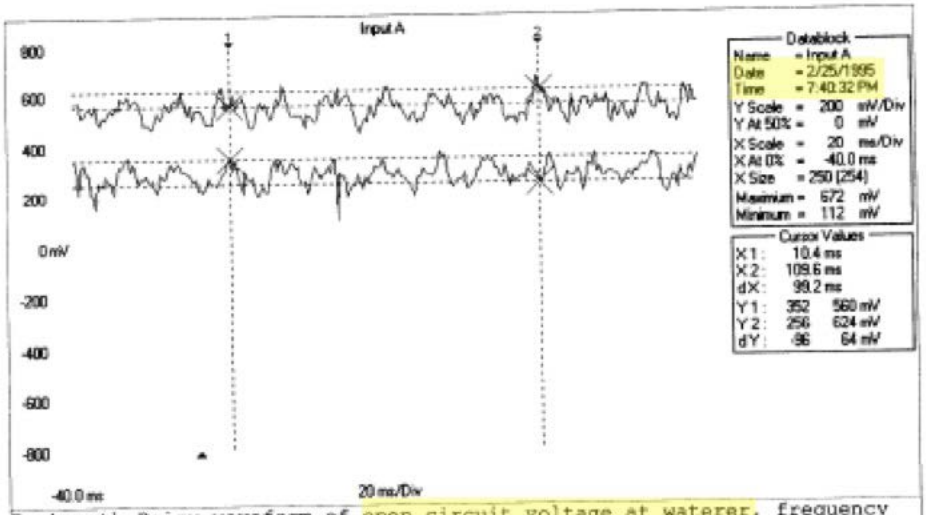

Duckworth Dairy waveform of open circuit voltage at waterer, frequency base Started 5/27/02 (DUCKWORTH-4)

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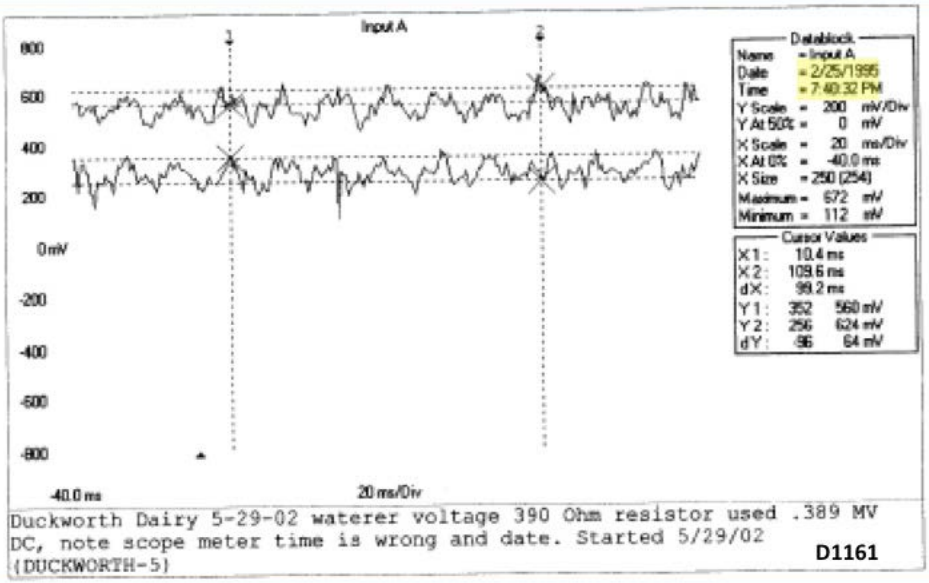
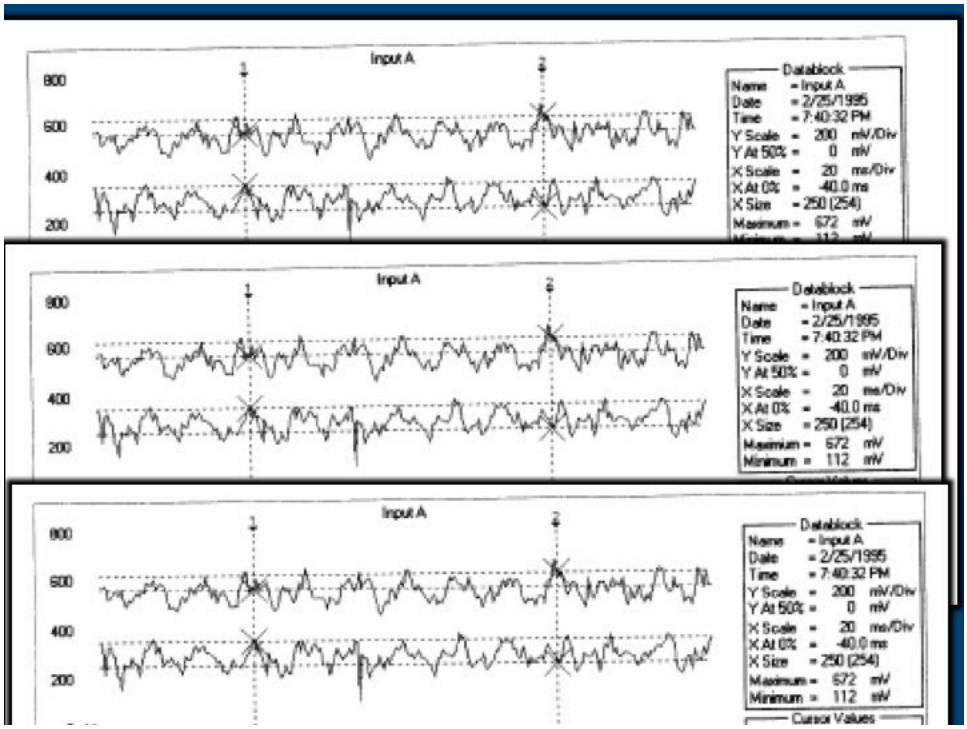
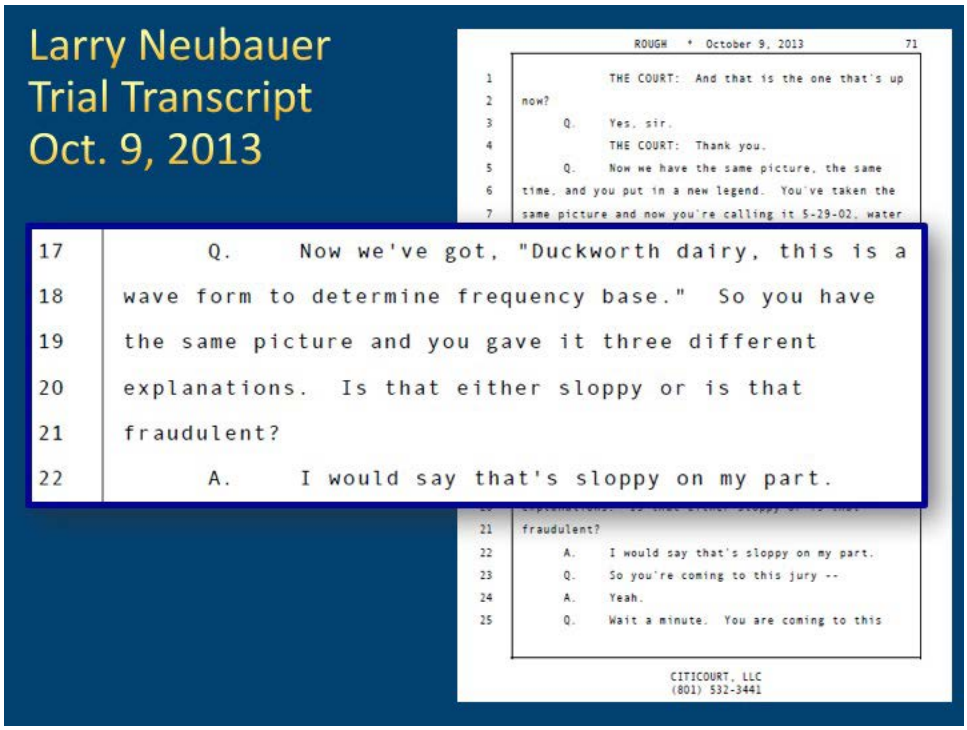


Duckworth Dairy 5-29-02 waterer voltage 390 Ohm resistor used .389 MV DC, note scope meter time is wrong and date. Started 5/29/02 (DUCKWORTH-5)

D1161


Input A
800
600
400
200
Datablock
Name = Input A
Date = 2/25/1995
Time = 7:40:32 PM
Y Scale = 200 mV/Div
Y At 50% = 0 mV
X Scale = 20 ms/Div
X At 0% = -40.0 ms
X Size = 250 (254)
Maximum = 672 mV
Minimum = 112 mV
Cursor Values


Larry Neubauer
Trial Transcript
Oct. 9, 2013
ROUGH * October 9, 2013 71
THE COURT: And that is the one that's up now?
Q. Yes, sir.
THE COURT: Thank you.
Q. Now we have the same picture, the same time, and you put in a new legend. You've taken the same picture and now you're calling it 5-29-02, water
17 Q. Now we've got, "Duckworth dairy, this is a
18 wave form to determine frequency base." So you have
19 the same picture and you gave it three different
20 explanations. Is that either sloppy or is that
21 fraudulent?
22 A. I would say that's sloppy on my part.
21 fraudulent?
22 A. I would say that's sloppy on my part.
23 Q. So you're coming to this jury --
24 A. Yeah.
25 Q. Wait a minute. You are coming to this
CITICOURT, LLC
(801) 532-3441

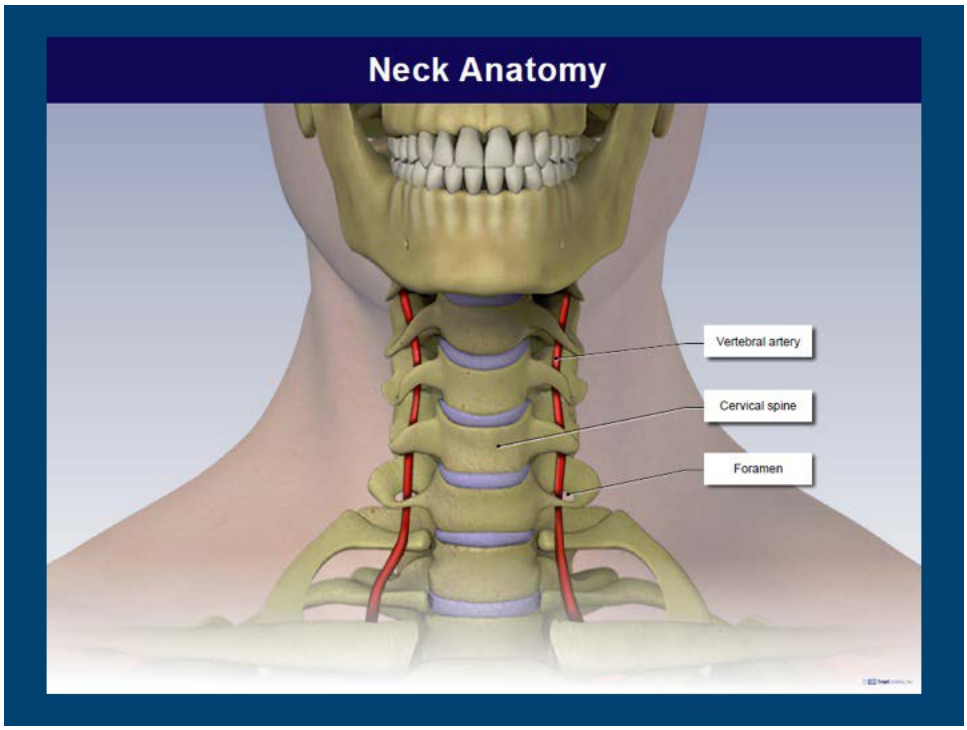
Lee Case: Stroke

- Extremely rare condition – front head trauma causing VAD (no neck pain) – led to R PCA stroke
  - VAD Occurrence Rate: *1 in 150,000 – RARE* - High Mortality & Morbidity
  - Head trauma causing VAD – w/no neck trauma - leading to stroke in right PCA: 1 in 1,000,000

ISSUE No. 2: Causation

Any options at WMC to change outcome? **NONE**

- tPA (contraindicated)
- Retrieval Device (50 % mortality & no experience)



Classic Advice to Medical Students:

When You Hear Hoof Beats Think Horses - Not Zebras

VAD – Rare & Rarer

- Dr. DuQuette: 4 in 13 yrs
- Dr. Poore: Never in 38 yrs
- Dr. Newman: 1 in 13 yrs
- Dr. Lewis: Never in 31 yrs
- Dr. Lovell: Never

AND NO ONE HAS EVER SEEN A VAD W/HEAD TRAUMA & NO INJURY TO NECK

Except Dr. Wheeler – sees 3 or 4/yr??

July 4th: Dr. Wheeler

- Transferred to WMC: Dx'd w/ VAD (PCA)
  - Tells Ms Shelley… "if only you had come earlier – *I could have prevented stroke"*
- Wheeler Trial Tr. (Aug. 19th, p. 99)

Q. Now, one of the reasons that you're so heavily invested in this case is before you ran a single test on Jack Lee, you told both him and Sherry Shelley, Geez, if someone had just called me, I could have prevented all this damage, didn't you?

A. I don't recall the precise words that I used. But I had a conversation like that with them, yes.

Dr. Wheeler Admitted It Was Reckless

- Page 100 (Aug. 19th):

Q. Page 100, line 15. Question: "Would you agree with me it would be reckless to tell any stroke patient or his family members that you could assure a good outcome if they could get timely administration of tPA?"

Answer: "I think it's a hundred percent inappropriate in every medical situation to assure a patient of any particular outcome. So yes, I'd say that's reckless."

July 4th: Dr. Wheeler

- Wheeler (Neurologist): *"I will revolutionize stroke treatment in Wyoming"*
  - Everyone who touched Lee – Lovell (ED), Lewis (Trauma Surgeon), Sramek (Neurosurgeon), Polson (Internist) – all incompetent b/c didn't call me

Dr. Wheeler Trial Testimony

- Page 266 (Aug. 19th):

So everybody that touched Mr. Lee, including calling your neurosurgeon on the third, the hospitalist, they all blew it, and if only they had called you, it would have been better; right? That's what you came to tell this jury?

A. Yes.

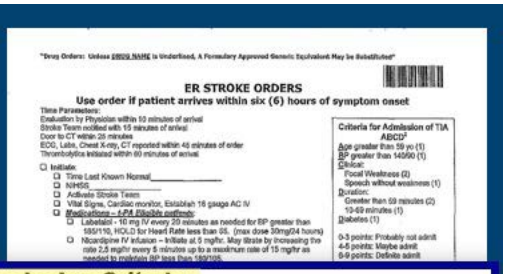
Judge: "You know, on that note, it's now 5 pm – let's call it a day"

Wheeler's Criticisms: 2009 – 2013

"I could have done *something* different if only he'd been sent to WMC earlier"

WMC Protocol for tPa

Absolute contraindication



ER STROKE ORDERS

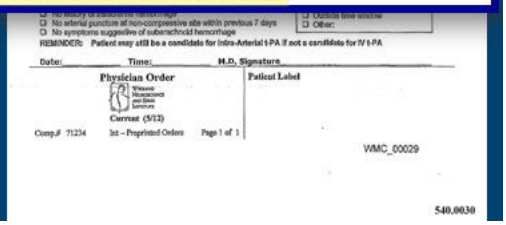
Use order if patient arrives within six (6) hours of symptom onset

IV t-PA Inclusion Criteria

Mark all inclusion criteria that apply. Use caution with patients who have NIHSS of 22 OR CT evidence of large infarction.

- ☐ Symptom onset less than 3 hours
- ☐ Patient is over 18 years of age
- ☐ No seizure at onset of stroke
- ☐ Has not received heparin within 48 hours OR does not have elevated PTT
- ☐ No previous stroke or head trauma resulting in loss of consciousness within last 3 months
- ☐ No rapidly improving neurological deficit
- ☐ PT less than 15 sec or INR less than 1.7
- ☐ Platelet count over 100,000/mm
- ☐ No major surgery within previous 14 days

Dr. Newman: Would be "actionable" if used



Physician Order

Patient Label

WMC_00029

540.0030

Dr. Wheeler Trial Testimony

- Page 27 (Aug. 20th):

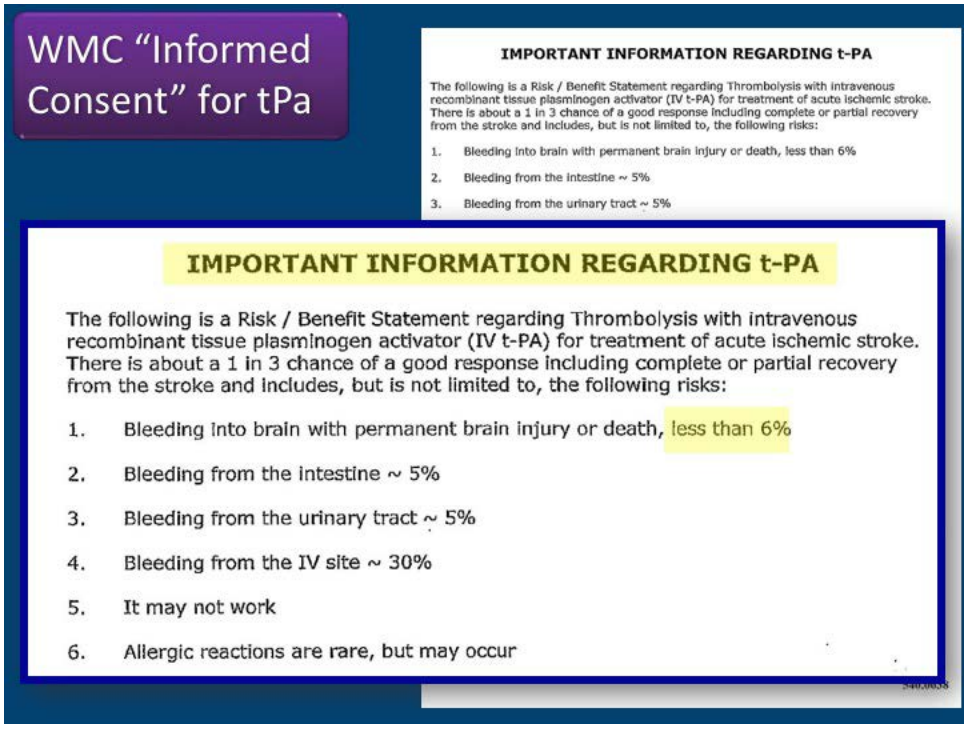
Answer: It's my opinion that if I had the opportunity to review the case with the doctor in the ER at about 12:48 or thereabouts, there is significant probability I would have recommended giving him tPA.

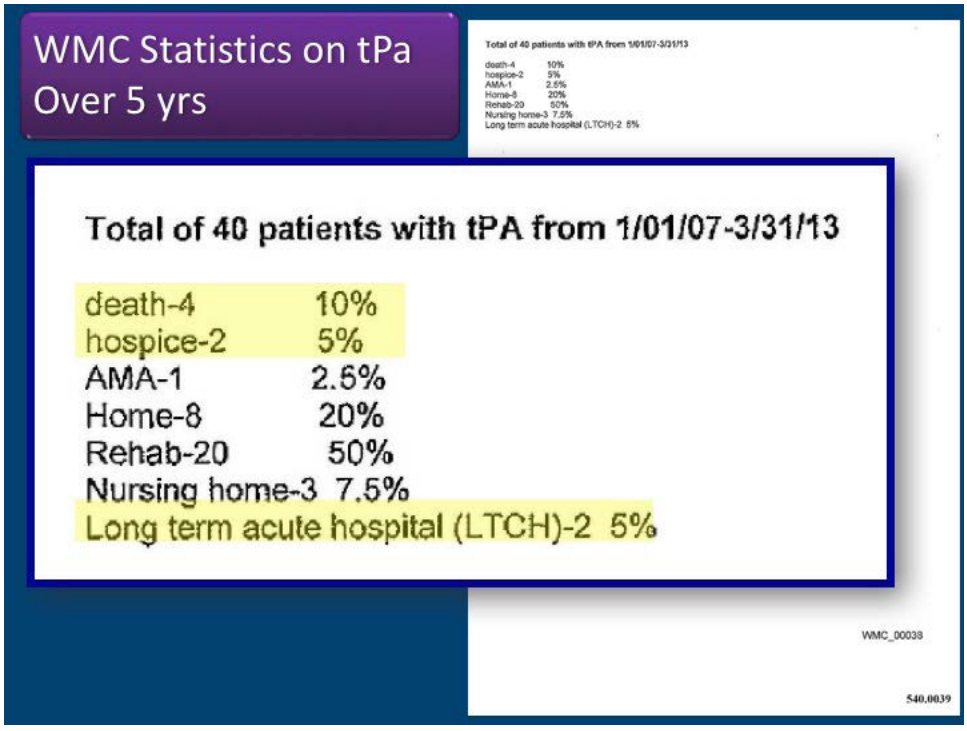
Did you say that, sir? Did I read that correctly?

A. Yep, and I still agree with that.

Q. So you would have violated your protocol 'cause your judgment is better than written protocols; that true?

A. Well, I wrote the protocols, so I guess that may be true.


WMC "Informed Consent" for tPa
IMPORTANT INFORMATION REGARDING t-PA
The following is a Risk / Benefit Statement regarding Thrombolysis with intravenous recombinant tissue plasminogen activator (IV t-PA) for treatment of acute ischemic stroke. There is about a 1 in 3 chance of a good response including complete or partial recovery from the stroke and includes, but is not limited to, the following risks:
1. Bleeding into brain with permanent brain injury or death, less than 6%
2. Bleeding from the intestine ~ 5%
3. Bleeding from the urinary tract ~ 5%
IMPORTANT INFORMATION REGARDING t-PA
The following is a Risk / Benefit Statement regarding Thrombolysis with intravenous recombinant tissue plasminogen activator (IV t-PA) for treatment of acute ischemic stroke. There is about a 1 in 3 chance of a good response including complete or partial recovery from the stroke and includes, but is not limited to, the following risks:
1. Bleeding into brain with permanent brain injury or death, less than 6%
2. Bleeding from the intestine ~ 5%
3. Bleeding from the urinary tract ~ 5%
4. Bleeding from the IV site ~ 30%
5. It may not work
6. Allergic reactions are rare, but may occur


WMC Statistics on tPa Over 5 yrs
Total of 40 patients with tPA from 1/01/07-3/31/13
death-4 10%
hospice-2 5%
AMA-1 2.5%
Home-8 20%
Rehab-20 50%
Nursing home-3 7.5%
Long term acute hospital (LTCH)-2 5%
Total of 40 patients with tPA from 1/01/07-3/31/13
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AMA-1 2.5%
Home-8 20%
Rehab-20 50%
Nursing home-3 7.5%
Long term acute hospital (LTCH)-2 5%
WMC_00038
540.0039

Dr. Smith Stipulation

STATE OF WYOMING) IN THE DISTRICT COURT
) ss.
COUNTY OF FREMONT) NINTH JUDICIAL DISTRICT

STIPULATION OF FACTS

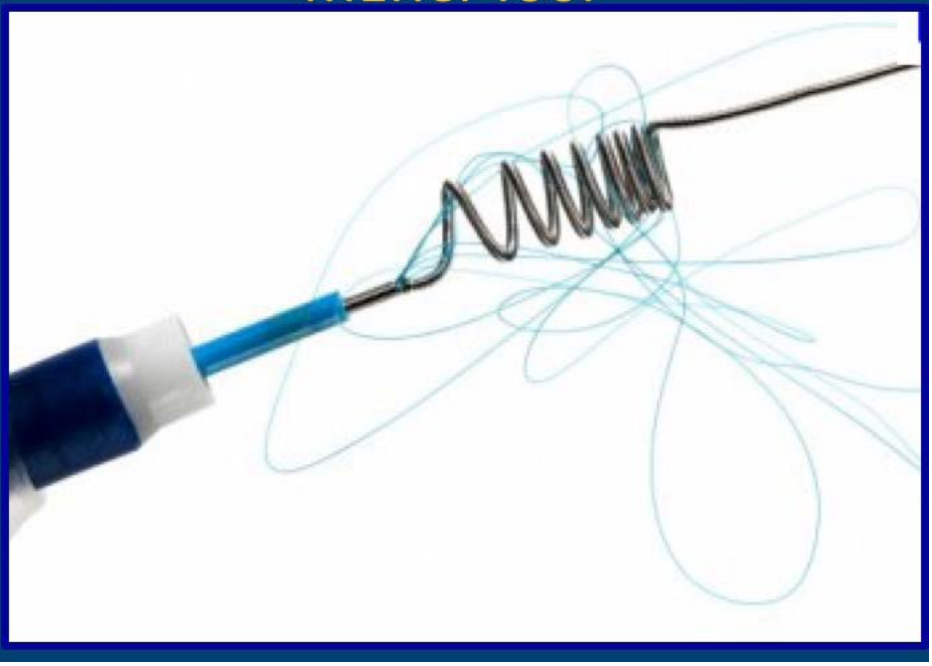
No. 38526

PHYSICIANS, PC, JASON LOVELL, D.O., and DENNIS LEWIS, MD,
Defendants.

1. Geoffrey G. Smith, M.D. was the on-call interventional radiologist on July 2, 2009 at the Wyoming Medical Center;
2. Dr. Smith had no training or experience using the mercy retrieval tool; and
3. Dr. Smith had never performed the intervention of IA TPA in a posterior cerebral artery prior to July 2, 2009.

Dated this 21st day of August, 2015.

MERCI Tool



Mayo Clinic
2014

ORIGINAL ARTICLE
J Clin Neurol 2014;10:17-23

Print ISSN 1738-6586 / On-line ISSN 2005-5013
http://dx.doi.org/10.3988/jcn.2014.10.1.17

Open Access

Outcomes of Endovascular Mechanical Thrombectomy and Intravenous Tissue Plasminogen Activator for the Treatment of Vertebrobasilar Stroke

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Open Access

Outcomes of Endovascular Mechanical Thrombectomy and Intravenous Tissue Plasminogen Activator for the Treatment of Vertebrobasilar Stroke

Introduction

Intravenous tissue plasminogen activator (IV-tPA) and mechanical thrombectomy are known to improve the outcomes of acute ischemic stroke among certain patients.[1-3] Patients suffering from posterior-circulation (vertebrobasilar) occlusions suffer high morbidity and mortality rates, and previous studies have demonstrated that those with posterior-circulation occlusions have a poor prognosis regardless of the treatment modality used.[4-6] It has also been demonstrated that increasing age is associated with worsening morbidity and mortality for acute ischemic stroke patients treated with ei-

Table 2. Mechanical thrombectomy outcomes in posterior-circulation stroke according to age

	<50 years	50–64 years	p*	≥65 years	p*	All patients
n	180	218	-	233	-	631
Demographics						
Female, n (%)	75 (41.5)	72 (33.0)	0.08	81 (34.6)	0.15	227 (36.0)
White race, n (%)	121 (83.1)	161 (85.6)	0.53	151 (74.7)	0.06	433 (80.8)
CCI, mean±SD	1.5±1.7	1.8±2.0	0.16	2.3±2.8	<0.01	1.9 (2.3)
Primary outcomes						
In-hospital mortality	55 (30.4)	101 (47.4)	<0.01	98 (43.0)	<0.01	253 (40.8)
Discharge to long-term care facility	46 (25.6)	76 (34.9)	0.04	88 (38.7)	<0.01	210 (33.6)
Discharge to home/short-term care facility	79 (44.1)	41 (18.9)	<0.01	42 (18.3)	<0.01	162 (25.9)
Secondary outcomes						
ICH	35 (19.4)	35 (16.2)	0.40	29 (12.4)	0.05	99 (15.7)
Tracheostomy	26 (14.9)	30 (13.8)	0.77	31 (13.8)	0.77	87 (14.1)
PEG/PEJ	31 (17.0)	40 (18.4)	0.73	22 (9.4)	0.02	92 (14.7)
LOS (ignoring deaths)	11.8 (18.8)	12.2 (21.6)	0.88	11.7 (32.3)	0.97	12.0 (24.7)

*Compared to age <50 years.
CCI: Charlson comorbidity index, LOS: length of stay, ICH: intracranial hemorrhage, PEG/PEJ: percutaneous endoscopic gastrostomy/percutaneous endoscopic jejunostomy.

Overall, almost 75% of patients receiving mechanical thrombectomy and 66% of those receiving IV-tPA either died or were discharged to long-term care facilities.

Hire Experienced Trial Lawyers

Nothing beats TRIAL EXPERIENCE

50

DON'T BE AFRAID TO MAKE A CHANGE

- Choose someone with national scope of practice
- Choose someone who tries & wins high-exposure cases
- Choose a trial lawyer w/ significant trial exp – not a "litigator"

It's YOUR MONEY – spend it wisely

51


The Right Lawyers Make All the Difference
THE FOLLOWING PREVIEW HAS BEEN APPROVED FOR
ALL AUDIENCES
BY THE MOTION PICTURE ASSOCIATION OF AMERICA

John M. Fitzpatrick

Partner
Wheeler Trigg O'Donnell (Denver, CO)

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John ("Fitz") Fitzpatrick is the epitome of a trial lawyer's trial lawyer. For more than 30 years, he has been in the trenches, steadily trying in excess of 220 cases to verdict, and obtaining defense verdicts in the vast majority of those cases. Fitz has truly developed a reputation as the go-to, bet-the-company trial attorney for high-exposure, catastrophic matters. His cases have involved allegations of injury attributable to medical devices, pharmaceuticals, asbestos, medical malpractice, infant car seats, natural gas explosions, and stray voltage from power companies.

Fitz's experience ranges from class action lawsuits involving both consumer products and employment issues to bad faith insurance claims to birth trauma and traumatic brain injury cases. His ability to quickly assess a case, tell a story, and charm a jury contributes to his exemplary record of success and has resulted in his being retained as lead trial counsel in high-exposure cases involving nationally recognized companies. Fitz's clients include General Electric, AT&T, Yum! Brands, Allstate, Family Dollar, and Evenflo. He is also national trial counsel to major insurance companies, such as ACE, Aegis, AIG, CNA, Electric Insurance Mutual, and Premier, for catastrophic, product liability, toxic tort, medical malpractice, and personal injury claims.

Clients often call on Fitz to parachute into a trial two to three weeks before jury selection and get up to speed—if not set the pace—very quickly.

In addition to representing top companies in their high-stakes trials, Fitz is national trial counsel for asbestos personal injury and wrongful death cases for General Electric, Foster Wheeler, Leslie Controls, Velan, and Dana Corporation.

Practice Areas
- Commercial Litigation
- Employment
- Environmental Litigation
- Mass Torts
- Healthcare Professional Liability
- Personal Injury Defense
- Product Liability
- Professional Liability
- Toxic Torts

Government Service
- United States Army -- Major, Airborne Ranger, Prosecutor, Senior Trial Attorney, 1974-1988

Education
- Notre Dame Law School, J.D., 1981, cum laude
- United States Military Academy, West Point, B.S., 1974

Whose Law Is It Anyway?

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Whose Law is it Anyway?: Litigating Choice of Law Issues

David Suchar
Maslon LLP

MASLON

Roadmap

- Why Does Choice of Law Matter?
- Litigating choice of law clauses in contracts
- Litigating in the absence of contract clauses
- Differing Approaches on the issues
- Practice Tips
- Pre-Filing Strategy
- First to File and other Considerations
- Choice of Law can be the whole ballgame

Why Does Choice of Law Matter?

- In 2015, there were at least 4,655 "conflicts cases" where the court, in some way, decided upon a choice of law issue
- Conflict of Law and Choice of Law
- Choice of law issues inject uncertainty
- Outcome dispositive in certain areas of law

Why Does Choice of Law Matter?

- Crossing state lines can change fundamental liability outcomes
  - Example: Construction/Insurance Coverage:
  - Under a CGL policy, can defective construction constitute an "occurrence?"
  - Fundamental question. Case dispositive.
  - **Answer depends on which state's law applies.**
    - Illinois, no.
    - Indiana, yes.
    - Washington & North Dakota, yes.
    - Wyoming, no.

Why Does Choice of Law Matter?

- Practical impact:
  - Accident occurs in one state
  - Insured based in another
  - Insurer based in another
  - Policy negotiated and signed in one jurisdiction
  - Delivered in another
  - Underlying case in yet another jurisdiction
  - Element of uncertainty for all parties

Litigating Contract Provisions

- Courts commonly enforce contractual Choice of Law provisions
  - Especially if contract provisions select same state for governing law AND venue
  - *See also* Uniform Commercial Code § 1-301
  - *But* some statutes may make forum or law selection clauses unenforceable

Litigating Contract Provisions

- Statutory Localizing Provisions
  - Some contracts cannot select foreign state law
    - California makes choice-of-law provisions in contracts between Californian contractor and Californian subcontractor unenforceable
    - Ohio makes choice-of-law provisions in construction contracts for improvements to Ohio real property unenforceable
    - Tennessee, in actions under its Consumer Protection Act, makes choice-of-law provisions in consumer contracts unenforceable

Litigating without Contract Provisions

- Without a law-selection clause, court must determine which state's law to apply
  - Several different approaches
  - Conflicts of law and choice of law

Various Approaches to COL

- First Restatement (Vested Rights Approach)
  - Apply law of place where last event occurred that gave rise to suit
  - Used in 10 States for torts and 12 for contracts
- Second Restatement (Most Significant Relationship test)
  - Apply law of place with most significant relationship to parties and/or action
  - Used in 24 States for torts and 23 for contracts

Approaches Continued

- Examples in Insurance cases
  - Site-Specific Approach
    - Apply law of the state(s) where the insured risks are located
  - Uniform Contract Interpretation Approach Even when the policy covers multiple risks situated in multiple states, apply law of state where contract was made

Modern Trends

- Modern trends in choice of law approaches
  - Emphasis on due process rights of litigants
  - Presumption of forum law
  - Depeçage (selection of law on issue-by-issue basis)
  - Most often common law, but some statutory choice of law

Strategy, Tips and Tricks

- Pre-filing strategy: can we be the plaintiff?
  - By understanding choice of law approaches pre-filing, plaintiff may have opportunity to select favorable law
    - First to File gets forum's choice of law approach
    - Will a Declaratory Judgment establish parties' relationship in a certain state so that applicable law is most favorable to my client?

First to File

- First to File strategy
  - Initial forum determines choice of law
    - Forum's state law determines choice of law approach
    - In federal court, subsequent transfers **do not change** initial forum's choice of law *Van Dusen v. Barrack*, 376 U.S. 612 (1964)
    - In federal court, subsequently filed cases may be dismissed

First to File Continued

- Federal Courts' First-to-File Rule
  - Common law rule of comity
  - Subsequent court may dismiss case if already filed elsewhere
- Anticipatory Suit Exception
  - Subsequent court can decline to follow the Rule if party second suit filer shows first suit was merely anticipatory
    - Courts inquire into pre-filing communications
    - Courts are especially inclined to apply the anticipatory suit exception if the first-filer used a delay caused by settlement negotiations to file suit.
    - See Advantages from *Van Dusen* above

Shaw Case

- Choice of Law can be the whole ballgame
  - $600M Washington construction project
  - $110M lawsuit for allegedly defective construction
  - Case filed in Washington state
  - Louisiana insured, manufacturing took place, policy negotiated and delivered in Louisiana

Shaw Case Continued

- Case first filed in Washington with competing case in Louisiana
- Transferred to Washington then back to Louisiana
- First Filed Rule
- *Van Dusen*-Transferor Court's rules
- Louisiana court applies depeçage and Washington law on Bad Faith claims
- Washington law considerably favorable to insured
- Depeçage can be beneficial in other ways

Benefits of Depeçage

Final Thoughts

- Practice Tips on Choice of Law Pre-Filing Strategy
  - Declaratory Judgment
  - First to File Advantage
  - Choice of law fact considerations
  - Know the substantive law
  - Choice of Law can be whole ballgame
  - Hire counsel conversant in subject matter with COL experience

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David Suchar is a partner and serves as co-chair of Maslon's Construction & Real Estate Litigation Group. His construction experience includes defect, payment, lien, and inefficiency claims as well as all manner of construction-related insurance coverage claims, negotiations, and litigation. David has developed a niche national practice representing commercial policyholders in insurance coverage disputes, including claims made on commercial general liability, professional liability, pollution, and crime policies. His recent successes include multi-million dollar recoveries for such matters in Florida, Louisiana, Washington, Virginia, and Maryland.

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 on behalf of contractors, architects, engineers, and owners, David also has years of experience with licensing and royalty disputes, restructuring litigation, government investigations (civil and criminal), and various contract and commercial litigation matters.

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 has been included on the 2014-2016 Minnesota Rising Stars lists (in Business Litigation) as part of the Super Lawyers® multiphase selection process.

Before joining Maslon, David served as an Assistant U.S. Attorney at the U.S. Department of Justice. As a line federal prosecutor, he successfully represented the United States as lead counsel in hundreds of contested hearings in federal district court and oral arguments in the United States Court of Appeals. Before his Department of Justice service, David was a member of the litigation practice group at Kirkland & Ellis LLP in Chicago. In between college and law school, David served as an AmeriCorps VISTA volunteer and grant writer at Habitat for Humanity.

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

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.)

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

PANEL:
WHISTLEBLOWERS - WHAT IN-HOUSE COUNSEL NEED TO KNOW

Linda Woolf
Goodell DeVries Leech & Dann (Baltimore, MD)
410.783.4011 | lsw@gdldlaw.com

Federal Whistleblower Update:
What In-house Counsel Need to Know

Linda Woolf, *Goodell DeVries, LLP*
Christine Zack, *Fundamental Administrative Services*
Patrick Murphy, *GE Healthcare*
Mark Dapier, *Turner Acceptance Corp.*

What is a Whistleblower

Generally, an individual who stops, reports, testifies, or takes other action against illegal activity or violations of specific public policies.

Participates in a *protected activity*	*Opposes* unlawful practice

Two Types of Whistleblower Protection

- Retaliation Protection
- Qui Tam and Incentive/Bounty Programs

Retaliation

Common Examples:	• Title VII, ADEA, ADA, FLSA, OSHA, FMLA, SOX, FCA, CPSIA, Dodd-Frank
Specific Example:	• Affordable Care Act

Retaliation Claim Elements

(1) The employee must be engaged in a *protected activity*;

(2) The Employer must take a *materially adverse action* against the employee;

(3) There must be a *causal connection* between the protected activity and the adverse action.

Protected Activity

- The underlying unlawful practice alleged by the whistleblower does not impact the employee's protected activity.
  - Participation Protection
  - Opposition Protection
  - Good Faith Reasonable Belief Standard
- What steps can a company make to prevent successful retaliation claims?

Sarbanes-Oxley Act, 18 U.S.C. § 1514A

- SOX anti-retaliation provision protects certain whistleblowers who report corporate fraud and financial or securities-related wrongdoing.
  - Creates a cause of action for employees of publically traded companies who allege they were retaliated against.
  - Creates civil and criminal anti-retaliation provisions to protect whistleblowers

Dodd-Frank Wall Street Reform and Consumer Protection Act

- Broadened whistleblower protections in the financial industry.
  - e.g., extended the SOL for SOX violations/claims.
  - Enhanced remedies including reinstatement, double back pay with interest, attorney's fees, and reimbursement of litigation expenses.
- Created new protections for employees who provide information to the SEC.

False Claims Act, 31 U.S.C. § 3730(h) ("FCA")

- Employees protected from retaliation for engaging in protected activity with a *reasonable belief that the employer committed fraud against the government.*
- Protected Activity:
  - Courts consider whether the employee expressed concern to his or her employer about specific fraud or illegality against the government.
  - Employee concern must be related to employer's alleged submission of a false claim for payment to the government.

Qui Tam / Incentive / Bounty Programs

- Incentivizes private citizens to file claims on behalf of the Federal Government.
  - Relators assist the government in civil actions against companies alleged of legal violations.
  - Government can either choose to pursue or not pursue a whistleblower's claim.
  - If the government does not pursue, the whistleblower can bring proceeding independently.
  - Under either government or *qui tam* suits, the whistleblower may receive a bounty award for providing information in successful litigation.

Dodd-Frank

- Created Incentive Programs for Information on Securities violations
  - Commodity Futures Trading Commission Whistleblower Incentive Program.
  - Securities and Exchange Commission Whistleblower Incentive Program.

False Claims Act

- Types of FCA Qui Tam Suits
  - Off-Label Marketing
  - Illegal Kickbacks
  - Upcoding

Universal Health Servs., Inc. v. U.S., 136 S. Ct. 1989 (2016)

- Facts:
  - Teenage girl, beneficiary of Medicaid, received counseling services at a health clinic.
  - Prescribed medication and had an adverse reaction; suffered multiple seizures and died.
  - Decedent was treated by unlicensed medical professionals, who submitted treatment claims under the Medicaid program.
  - *Qui Tam* suit brought against the healthcare services facility.
- Implied certification theory of liability:
  - Defendants submitted claims for payment while violating licensing requirements.

FCA Case Study – Quest Diagnostic

- 2005
  - Quest alleged to have manufactured, marketed, and sold test kits despite knowing some of the kits produced results that were materially inaccurate and unreliable.
  - $302 Million settlement with whistleblower receiving $45 Million.
- 2015
  - Quest alleged to have submitted duplicative claims to Medicare for various services rendered.
  - $1.79 Million settlement with whistleblower receiving $358,000

Employees Behavior

- "Reasonable Opposition Requirement"
  - Employee must conduct him/herself reasonably in opposing an allegedly unlawful practice.
- "Purloined Documents"
  - Generally, an employee who unlawfully obtains confidential information for a retaliation claim may still face criminal charges.
  - Purloined documents usually may not be used in litigation.
- What is reasonable?

Yates Memo – Sept. 9, 2015

- To better seek accountability from individuals who commit corporate misconduct, DOJ offered the following guidance:
  - (1) In order to qualify for any cooperation credit, corporation must provide all relevant facts relating to the individuals responsible for the misconduct;
  - (2) Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
  - (3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

Yates Memo – Sept. 9, 2015

- (4) Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
- (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases;
- (6) Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

Linda S. Woolf

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Ms. Woolf is the Managing Partner of the firm and one of its founding members. Ms. Woolf's practice is devoted to the representation of clients in catastrophic loss, class action and multidistrict litigation, complex commercial, insurance coverage, construction, and government liability litigation. Linda: Has defended national and local, private and public employers in employment-related claims in federal and state courts and at the administrative level. Has obtained numerous summary judgments in favor of private sector and government employers arising from claimed violations of federal and state employment statutes, including claims under Title VII of the Civil Rights Act for wrongful termination, disparate promotion and training opportunities, disparate disciplinary measures, and retaliation based on race, religion, sex and disability. Has defended claims asserted under the ADA, the FMLA, the Equal Pay Act of 1963, the ADEA, COBRA, the FLSA and state wage and hour laws. Has represented businesses and their officers, directors and management in cases involving claimed breaches of employment contracts and related business torts. Substantial experience in enforcing and challenging enforcement of restrictive covenants in employment agreements. Has negotiated separation and severance agreements on behalf of employers and employees.

Practice Areas
- Product Liability
- Class Action Litigation
- Commercial and Business Tort Litigation
- Insurance Law
- Employment Litigation
- General Tort Liability Litigation
- Hospitality Law

Honors and Awards
- Best Lawyers in America, Lawyer of the Year, Mass Tort Litigation/Class Action - Defendants (2016)
- The Daily Record - Maryland's Top 100 Women (2007, 2012)
- Best Lawyers in America, "Bet-the-Company" Litigation Award (2010 - 2017)
- Best Lawyers in America, Commercial Litigation (2009 - 2017)
- Best Lawyers in America, Mass Tort Litigation/Class Action - Defendants (2012-2017)
- Best Lawyers in America, Product Liability Litigation - Defendants (2014-2017)
- Maryland Super Lawyer (2007-2015)
- Maryland Super Lawyer, Top 50 SuperLawyers in Maryland (2009- 2014)
- Maryland Super Lawyer, Top 25 Women and Leader in Business Litigation (2007 - 2011)
- SuperLawyer Corporate Counsel, Top Attorney in Business Litigation (2008) The Daily Record - Leadership in Law Award (2006)

Education
- University of Baltimore (B.A., magna cum laude, 1982)
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Taking The Air Out Of The Whistle In Whistleblower Litigation

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Taking the Air Out of the Whistle in "Whistleblower" Litigation

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The Prominent Role of the "Whistleblower" in Contemporary Law and Culture

- Daniel Ellsberg
- Karen Silkwood
- Erin Brockovich
- Edward Snowden

The Two Words Least Likely to Appear Together in 21st-Century American Journalism:

"***Alleged***" and "***Whistleblower***"

The Proof is in the Headlines:

The Washington Post
Energy Department investigated for retaliating against whistleblowers

Bloomberg
Highway Guardrails Are Deadly Spears on Impact, Says Whistleblower

Whistleblower Petitions for Expanded First-Responder Protection
The New York Times

THE WALL STREET JOURNAL.
Whistleblower Files Another Complaint Against Infosys
Ex-employee Who Initiated Visa Practices Investigation Alleges Company Retaliated Against Him

Chicago Tribune
Whistleblower files federal lawsuit against Morgan Stanley, FINRA

Forbes
Whistleblower Fingers Tax Tricks At Private Equity Firms

L.A. union trusts' attorney accused of conspiring to fire whistle-blower
Los Angeles Times

USA TODAY
Investigator: VA downplayed whistle-blower findings

Whistleblower Protection Statutes on the March

Environmental:	Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") 33 U.S.C. § 1367
Nuclear Energy:	Energy Reorganization Act of 1974 ("ERA") 42 U.S.C. § 5851 (provision added in 1978)
Commercial Aviation:	Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") 49 U.S.C. § 42121 (enacted in 2000)
Public Companies:	Sarbanes-Oxley Act ("SOX") 18 U.S.C. § 1514A (enacted in 2002)
Finance:	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 12 U.S.C. § 78u-6

Whistleblower Protection Statutes on the March - A Recent Development -

Government Contractors: National Defense Authorization Act of 2013 ("NDAA"), 41 U.S.C. § 4712

- Grants whistleblower protection against "reprisals" directed at employees of government contractors.
- NDAA is restricted to:
  - contracts awarded after July 2, 2013;
  - task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; or
  - pre-existing contracts modified to include a contract clause providing for the applicability of such amendments.
  - 2017 re-authorization pending.

"Whistleblower Protection" Laws Stack the Deck Against the Employer

- Expansive definitions of "protected activity."
- "Materiality" of alleged adverse impacts seldom required.
- Low standards of causation: "a contributing factor."
- One-way cost and attorneys' fees recovery provisions.
- Administrative adjudication as a crap shoot.
- And . . . .

The Gift that Keeps on Giving: The "Frequent Filer"

- The tactic: Keep reapplying for every job opening posted by the erstwhile employer, then bring multiple follow-on claims for "retaliation" in hiring.
- The acknowledged master: Sayed Hasan
  - His saga underscores inability of the ARB and the courts to rein in abusive filings.
- Now a standard tactic enshrined in every whistleblower support group's playbook.

How to Take the Air Out of the Whistle?

An Ounce of Prevention . . .

Implement a Robust Compliance Program

When a Claim Arises:

- Hire an experienced, skillful trial attorney *IMMEDIATELY.*
- Turn him or her loose to work the evidence energetically.
  - *"There's gold in them thar hills . . ."*

News Flash: Many "Whistleblower" Cases are a Load of . . . Nonsense

- Often brought by disgruntled employees harboring longstanding grievances unrelated to whistleblowing.
- Frequently after-the-fact constructs reframing bad workplace performance or misbehavior.
- But . . . they take on a life of their own . . .
  - Self-identified "whistleblowers" in prominent industries will be egged on by support groups, the media, and politicians.
  - The actual facts be damned . . .

The Game Plan

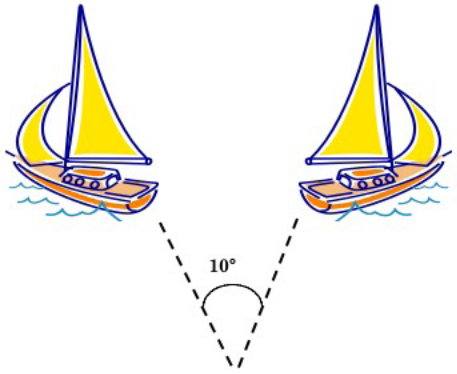
Carpe Diem

- Many claimants' lawyers will neglect up-front preparation.
- Depositions can make or break your case.
- Re-frame the issue: Whose motivation?
  - Frame the narrative.
- Focus on the legal elements of the claim (often subject to changing case law definitions).

Carpe Lingua

- Lock-in the case terminology early.
- Prepare a glossary of key terms to use/avoid.
- Small gradations of language matter.
- Full-text question outlines.
  - Be prepared to pay for this level of preparation.

The Rule of 10 Degrees



Gather, Review, and Analyze the Claimant's Documents as Early as Possible

- Personal electronic files (private email, iPhone, social media)
  - Candid communications with friends/family often reveal true motives.
- Company email accounts and other electronic files.
  - Refutation of "whistleblower"-type concerns
  - Proof of real reasons for employment actions
  - Evidence of motives.
- IMMEDIATELY START PREPARATION OF A WITNESS/DEPOSITION FILE.
  - The trial lawyer should play an active role in this process.

Gather and Review Key Company Witnesses' Documents at the Outset

- The integrity of the document collection/review process.
  - Many cases ultimately subject to federal discovery rules.
- Find out if there is a real problem.
  - Find "bad documents" and put them into context.
- Defend the employment action taken.
  - Gather documents that show lack of animus toward the claimant, inclusion in decision-making, etc.

Interview Key Company Managers and Other Witnesses as Soon as Practicable

- Get this done early − well before the claimant's deposition.
- Identify good evidence as well as weaknesses in the company's case.
- Develop a psychological profile of the claimant: what makes him or her tick?
- KEY: IDENTIFY THE BEST COMPANY WITNESSES
  - . . . AND THOSE WHO SHOULD STAY AWAY FROM THE COURTHOUSE!

Deposing the Alleged Whistleblower

- **Always** videotape the claimant's deposition.
- ***The trial lawyer must take this deposition*** – **INSIST ON IT.**
  - "Discovery" is a misnomer:
    - Video deposition = Trial (cross-examination) testimony.
    - Use for "any purpose" at trial (opening/closing, high impact impeachment, crossing other witnesses, stand-alone testimony, etc.).
- Use the deposition to tell the defense story through the claimant:
  - Use the claimant's own documents aggressively.
  - Home in on the claimant's true motive.
  - Question the claimant closely regarding satisfaction of the elements of the claim − amazingly, many whistleblower claimants will not be prepared on those elements.

Deposing the Alleged Whistleblower

(continued)

- Incorporate precise shades of meaning into deposition questions:
  - A leg up in establishing case terminology in depositions = a leg up at summary judgment and trial.
- Ask the ultimate questions − lightning need strike only once.
- Allow the self-important claimant to talk and explain to his/her heart's content − plenty of rope . . .
  - Set the traps, but don't spring them all . . .

Seize the Terminology: "No actual safety violation"

Deposition Testimony of Plaintiff in Whistleblower Litigation

Q: Was there ever an instance where an aircraft took off while out of compliance with the Federal Aviation Regulations?

A: Not that I'm aware of.

Q: So is it fair to say you were never aware of any actual safety violations by the airline?

A: That's fair to say.

Q: So you're not claiming that Mr. Smith or any of his superiors ever did anything to compromise safety, are you?

A: Oh, no.

Defending Company Witness Depositions

- **DANGER:** One bad answer − on videotape – is locked in for all time.
- Budget substantial time and money to ensure adequate preparation.
  - Go through all pertinent documents/potential trial exhibits, and anticipated questions regarding them.
  - Adoption/incorporation of case themes and nomenclature.
  - Conduct mock video deposition questioning.
    - Credibility, Credibility, Credibility.
    - Television is a cool medium.
- A special challenge: the CEO deposition

Media Strategy

- Multi-disciplinary.
  - Should involve in-house and outside counsel, media relations staff, government relations staff (if applicable), and key executives.
- Should complement − but not necessarily be dictated by − litigation strategy.
- Don't swing for the fences − the media will likely be against the company no matter what.
- The perils of "no comment."
- Beware video interviews subject to "editorial control."
  - Or "We should have thought twice before agreeing to appear on *60 Minutes* . . ."

WHISTLEBLOWER STATUTUES

Recent Whistleblower Statutes

National Defense Authorization Act of 2013 ("NDAA"), 41 U.S.C. § 4712, effective July 2, 2013

Under the NDAA, employees of contractors, subcontractors and grantees are granted whistleblower protections for any "reprisals" that occur because an employee of a government contractor disclosed, among other things, "a substantial and specific danger to public health or safety." 41 U.S.C. § 4712(a).[1]

The NDAA is restricted to (1) contracts awarded after July 2, 2013; (2) task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; (3) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments. *See* Pub. L. 112-239, 126 Stat. 1840 (Jan. 2, 2013). At the time of "any major modification to a contract," agencies are ordered to insert the applicable provision into all old contracts. *Id.*

The statute of limitations for filing a complaint under the NDAA is three years after the alleged reprisal. 41 U.S.C. § 4712(b)(4).

Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), 12 U.S.C. § 78u-6, effective July 21, 2010

Section 922(a) of the Dodd-Frank Act prohibits retaliation against whistleblowers who (1) provide information to the SEC; (2) initiate, testify or assist in any SEC investigation or legal action related to information provided by the whistleblower; or (3) make disclosures that are required or protected under SOX or the Securities Exchange Act of 1934. 12 U.S.C. § 78u-6(h)(1)(A).

In contrast to SOX, section 922(a) of the Dodd-Frank Act allows an employee alleging retaliation to bring an action directly in federal district court, allowing the employee to bypass the OSHA process that must be exhausted by SOX whistleblower claimants. 12 U.S.C. § 78u-6(h)(1)(B)(i).

The statute of limitations for filing a complaint under section 922(a) of the Dodd-Frank Act is six years after the date of the violation or three years "after the date when facts material to the right of action are known or reasonably should have been known by the employee," but no more than 10 years after the date of the violation. 12 U.S.C. § 78u-6(h)(1)(B)(iii).

In addition to section 922(a), the Dodd-Frank Act includes other whistleblower protections. Sections 922(b) and (c) and 929A amend the SOX whistleblower provision, 18 U.S.C. 1514A. Section 1057 provides a new cause of action for whistleblowers who provide information about certain consumer protection violations. Section 1079B expands the scope of protected whistleblowing activity under the False Claims Act.

Sampling of OSHA Whistleblower Statutes

Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, whistleblower provision included when statute enacted in 2002

SOX prohibits publicly traded companies from discharging, demoting, suspending, threatening, harassing or in any other manner discriminating against an employee because such employee provided information, caused information to be provided, otherwise assisted in an investigation or filed, testified, or participated in a proceeding regarding any conduct that the employee reasonably believes is a violation of SOX, any SEC rule or regulation, or any federal statute relating to fraud of shareholders. 18 U.S.C. § 1514A(a).

A claim under SOX must be filed with the Department of Labor within 180 days after the date on which the violation occurs or 180 days after the date on which the employee became aware of the violation. 18 U.S.C. § 1514A(b)(2)(D).

If the Secretary of Labor fails to issue a final decision within 180 days, an employee may seek *de novo* review in the appropriate federal district court. 18 U.S.C. § 1514A(b)(1)(B).

Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, whistleblower provision added in 1978

The ERA prohibits an employer from discharging or otherwise discriminating against any employee who (1) notifies his employer of an alleged violation of the ERA or the Atomic Energy Act; (2) refuses

1 The NDAA as originally enacted incorporated a whistleblower pilot program with a four year sunset clause. 41 U.S.C. § 4712(i). That program would have expired in 2017. The draft re-authorization of the NDAA for Fiscal Year 2017, which is currently still before Congress, likely will not only renew whistleblower protections under the act but also further bolster military whistleblower rights. Various drafts of the bill have incorporated provisions that: categorize retaliatory investigations as prohibited personnel actions, require development of uniform procedures for conducting whistleblower investigations, and require assistance for servicemembers in filing claims by detailing the specific information or documents required. NDAA whistleblower provisions should be reviewed and analyzed once the bill takes its final form as law, as military contractors may be affected in new ways by the adjustments to prior provisions.

to engage in any practice made unlawful by the ERA or Atomic Energy Act if the employee has identified the alleged illegality to the employer; (3) testified before Congress or at any federal or state proceeding regarding the ERA or the Atomic Energy Act; (4) commenced, caused to be commenced or is about to commence or cause to be commenced a proceeding under the ERA or Atomic Energy Act; (5) testified or is about to testify in any such proceeding; or (6) assisted or participated in such a proceeding or any other action to carry out the purposes of the ERA or the Atomic Energy Act. 42 U.S.C. § 5851(a).

A claim under the ERA must be filed with the Department of Labor within 180 days after a violation occurs. 42 U.S.C. § 5851(b)(1).

Similar to SOX, the ERA also provides for a "kickout" provision to federal district court if the Secretary of Labor fails to issue a final decision. Unlike SOX, the ERA provides for a much longer time period of one year before the claimant can seek *de novo* review in the appropriate federal district court. 42 U.S.C. § 5851(b)(4).

Other OSHA Whistleblower Statutes

Affordable Care Act (ACA), Section 1558, 29 U.S.C. 218C

Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. § 2651

Clean Air Act ("CAA"), 42 U.S.C. § 7622

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610

Consumer Financial Protection Act of 2010 ("CFPA"), Section 1057 of the Dodd-Frank Act, 12 U.S.C. § 5567

Consumer Product Safety Improvement Act ("CPSIA"), 15 U.S.C. § 2087

FDA Food Safety Modernization Act (FSMA), Section 402, 21 U.S.C. 399d

Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109

Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1367

International Safe Container Act ("ISCA"), 46 U.S.C. § 80507

Moving Ahead for Progress in the 21st Century Act ("MAP-21"), 49 U.S.C. § 30171

National Transit Systems Security Act ("NTSSA"), 6 U.S.C. § 1142

Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 660(c), Section 11(c)

Pipeline Safety Improvement Act ("PSIA"), 49 U.S.C. § 60129

Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9(i)

Seaman's Protection Act ("SPA"), 46 U.S.C. § 2114, as amended by Section 611 of the Coast Guard Authorization Act of 2010

Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971

Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105

Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121

Federal Whistleblower Statutes*

The False Claims Act, 31 U.S.C. §§ 3729-3733, imposes liability on persons and companies who defraud governmental programs. The *qui tam* provision within the FCA, or its "whistleblower" provision, applies to those who file claims on the government's behalf. Successful claimants are entitled to a reward of 15 to 30 percent of the government's recovery.

There are many additional federal whistleblower statutes that are not encompassed by the OSHA whistleblower statutes referenced above. Federal statutes providing whistleblower protections often fall into one of the following categories:

Corporate/Financial/Manufacturing Whistleblower Protections

Environmental Whistleblowers Protections

Nuclear Whistleblower Protections

Workplace Health and Safety Whistleblower Protections

Criminal Prohibition against Retaliation

Federal Contractor Fraud

Federal Employee Whistleblower Protections

Labor Rights

IRS Whistleblower Informant Awards

*In addition to federal law, state law may provide whistleblower protection for employees.

What Constitutes an Adverse Action?

Retaliation statutes protect whistleblowers from an "adverse action" as a result of their protected activities. Termination, demotion and loss of pay have traditionally served as the mainstay adverse actions. However, the scope of what constitutes an adverse action in federal whistleblower statutes has varied widely over the past two decades, due in large part to the political goals of whichever administration happens to have appointed the Secretary of Labor. Broad interpretations of adverse actions in the 1990s were gradually supplanted by narrower views in the 2000s, which are now being replaced in turn with an increasingly expanding definition that accepts a much wider swatch of qualifying employment actions. Companies in industries regulated by whistleblower retaliation statutes should be aware of this shifting environment and cognizant of the types of adverse actions—both those actionable on their own as discrete adverse actions and those actionable as part of a hostile work environment—when taking even the most mundane actions involving their employees.

I. Discrete Adverse Actions

a. Pre-Williams - Materially Adverse Standard

In the 1990s, the Department of Labor deemed a wide array of employment actions to be adverse, finding that "[g]enerally speaking, any employment action by an employer that is unfavorable to the employee's 'compensation, terms, conditions, or privileges of employment' may be considered an 'adverse action' . . ." Diaz-Robinas v. Florida Power & Light Company, Case No. 92-ERA-10, 1996 WL 171408 at *3 (DOL Off.Adm.App.) (citing DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983)). Federal courts were similarly broad in their interpretation. See, e.g., Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir. 1996) (finding adverse action where complaining employee "was excluded from meetings, seminars and positions that would have made her eligible for salary increases, was denied secretarial support, and was given a more burdensome work schedule"). During the 2000s, the broader Department of Labor jurisprudence was gradually replaced by adverse action standards imported from Title VII cases, including "tangible job consequences," "significantly diminished material responsibilities" and "ultimate employment decisions." Id. at 20. These varied, and often conflicting, standards created splits in the federal circuits and in Department of Labor jurisprudence, but generally narrowed the interpretation of "adverse action."

The Supreme Court in Burlington Northern & Santa Fe Ry. Co. v. White, addressed this adverse action circuit split, specifically speaking to Title VII's anti-retaliation provision. 548 U.S. 53 (2006). The Court recognized the need to separate truly adverse actions from trivial actions like petty slights, minor annoyances, personality conflicts, or snubbing by supervisors and coworkers because Title VII did not "set forth a general civility code for the American workplace." Id. (quotation omitted). Thus, the Court held that Title VII "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee . . . . mean[ing] that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id. at 57.

For four years after Burlington Northern, the "materially adverse" standard was applied more or less ubiquitously and uniformly by the Department of Labor and federal courts to a wide variety of retaliation statutes, such as Title VII, Sarbanes-Oxley and the Energy Reorganization Act. As an illustrative example, under this standard, warning letters were generally found to not be adverse actions. See, e.g., Melton v. U.S. Dep't of Labor, 373 Fed. Appx. 572 (6th Cir. 2010) (finding that a warning letter without tangible employment consequences was not a materially adverse action under the Surface Transportation Assistance Act); Simpson v. United Parcel Service, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar.

14, 2008) ("ARB precedents have held that warning letters do not meet the adverse action requirement of the whistleblower statutes because they do not have tangible job consequences."); LoVecchio v. US Airways, ALJ No. 2010-AIR-19 (ALJ Dec. 23, 2010) (finding that a warning letter was not an adverse action since it was not known to co-workers and was not accompanied by discipline or a loss of pay).

b. Williams & Menendez – Department of Labor Broadens Its Interpretation

In 2010, the Administrative Review Board ("ARB") for the Department of Labor announced that Burlington Northern's "materially adverse" standard from the Title VII context, while persuasive, is not controlling in actions brought under the Aviation Investment and Reform Act for the 21st Century ("AIR 21"). See Williams v. American Airlines, Inc. ("Williams"), ARB No. 09-018, ALJ No. 2007-AIR-4, at 9-16 (ARB Dec. 29, 2010). Williams involved an employer that held a counseling session with an employee to address poor performance and added an entry about the discussion into the employee's permanent counseling record. Id. at 4. The facts showed that the counseling record entry, while not itself disciplinary, was often used as the first step in the disciplinary process and expressly referenced future corrective action up to and including termination should the employee's job performance not improve. Id. at 5. The ALJ applied Burlington Northern's materially adverse standard to find that, in the totality of the circumstances, the counseling record entry was an adverse action inasmuch as a reasonable employee would be dissuaded from engaging in protected activity. Id. at 9.

The ARB affirmed the finding of an adverse action, but on different grounds. The ARB first noted that unlike Title VII, the Department of Labor's broad implementing regulations interpreting AIR 21's prohibition against discrimination expressly included efforts "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee" where the employee has engaged in protected activity. See id. at 9-16; 29 C.F.R. § 1979.102(b). Accordingly, the ARB held that while actions considered materially adverse under Title VII precedent are similarly adverse actions under AIR 21, the broader AIR 21 regulations have no "expressed limitation to those actions that might dissuade the reasonable employee" from filing or supporting a claim and expressly include adverse actions that are not necessarily tangible or ultimate employment actions. See Williams, ARB No. 09-018 at 11 n.51 & 15 (specifically highlighting "intimidating" or "threatening"). Applying this broader standard, the ARB found that "a written warning or counseling session is presumptively adverse where (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline." Id. at 11. Further, the ARB found that even under the Burlington Northern standard the counseling session constituted a materially adverse action because "[e] mployer warnings about performance issues are manifestly more serious employment actions than the trivial actions the Court listed in Burlington Northern" and are "usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them." Id at 14.

The following year, the ARB extended Williams to claims brought under Sarbanes-Oxley, a statute with language similar to the AIR 21 regulation, which states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." Menendez v. Halliburton, Inc., ARB Nos. 09-002 & 09-003, ALJ No. 2007-SOX-5 (ARB Sep. 13, 2011). The ARB found that "[b]y explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action . . . ." Id. at 15. It reasoned that prior ARB holdings that an adverse action is that which would deter a reasonable employee from engaging in protected activity is not significantly limited by the phrase "terms and conditions of employment," meaning that the harm is not limited to economic or ultimate employment-related actions such as loss of pay or termination. Id. at 18.

c. Going Forward: Burlington Northern or Williams & Menendez?

Following the ARB's expansive decision in Menendez, the defendant employer sought review by the Fifth Circuit. Regardless of the pending appeal, the ARB fully accepted the Williams and Menendez holdings and applied them widely to statutes with similar implementing regulations. Department of Labor cases

addressing warning letters or other similar employment actions held to Williams' reasoning, finding adverse actions where the employer's acts were the first step in disciplinary actions or had an inherent reference to potential discipline. Compare Occhione v. PSA Airlines, Inc., ALJ No. 2011-AIR-12, at 23 (ALJ May 9, 2013) (finding that a complainant's failure of an impartially applied test "cannot constitute adverse actions within the meaning of the act, as there was no inherent 'reference to potential discipline'"), with Vernance v. Port Authority Trans-Hudson Corp., ALJ No. 2010-FRS-18, at 26 (ALJ Sep. 23, 2011) (finding an adverse action where a warning letter explicitly referenced the potential for discipline and was the first step in the company's disciplinary process). The vast majority of warning letter cases decided by the Department of Labor post-Williams found the letters to be adverse actions.

On Appeal in Menendez, the Fifth Circuit explicitly disapproved of the standard used by the ARB, and reiterated that "a SOX antiretaliation claim requires an 'adverse action' that meets Burlington's definition of material adversity, i.e., an action harmful enough that it well might have dissuaded a reasonable worker from engaging in statutorily protected whistleblowing." Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 260 (5th Cir. 2014). However, the Fifth Circuit nonetheless ruled that the employer action at issue in the case still constituted an "adverse action" under the Burlington Northern standard. Id. at n. 5 ("[W]e read the Review Board to have applied the proper standard, as required by Allen, and we understand language in the opinion that appears otherwise to be unfortunate dicta."). Thus, even moving forward under the standard set forth in Burlington Northern, an employer who "outs" the identity of a whistleblower may be deemed to have engaged in an adverse action.

Despite the Fifth Circuit's strong ruling in support of the Burlington Northern standard, the level of staying power of the Williams and Menendez rulings is yet to be seen. In the years pending its appeal, the reasoning in Menendez was accepted in other districts, who have yet to reconsider its application. See, e.g. Guitron v. Wells Fargo Bank, N.A., No. C 10-3461 CW, 2012 WL 2708517 (N.D. Cal. July 6, 2012) (denying a defendant's summary judgment motion on the adverse action issue, stating that Williams and Menendez have "materially undermined" the reasoning of prior federal Sarbanes Oxley decisions that rely on the Burlington Northern standard). Further, there have been at least a few instances since the Fifth Circuit's ruling where courts have continued to apply Menendez. See, e.g., Wiest v. Tyco Elecs. Corp., No. CIV.A. 10-3288, 2015 WL 1636860, at *7 (E.D. Pa. Apr. 13, 2015) (applying Menendez's "more than trivial" standard to determine whether action was adverse, making no mention of Burlington Northern). Thus, only time will tell whether the reasoning of the ARB or the Fifth Circuit will prevail in crafting the next era of jurisprudence regarding adverse actions.

II. Hostile Work Environment

Employers who skirt the expansive interpretation of an adverse action under *Williams* and *Menendez* must still beware of allegations regarding acts that would not generally qualify as discrete adverse actions, such as isolation, running an understaffed department, or being excluded from meetings. These disparate acts can be united into a hostile work environment claim that serves as a substitute for a discrete adverse action.

In order to establish liability on such a claim, the employee must demonstrate that:

> (1) she engaged in protected activity;
>
> (2) she suffered intentional harassment related to that activity;
>
> (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and
>
> (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

See, e.g., Jenkins v. EPA, 2003 DOL Ad. Rev. Bd. LEXIS 131, at *110-11 (ARB Feb. 28, 2003) (collecting cases). This is a relatively high legal standard to meet that is regularly rejected by the Department of Labor and federal courts, even where the behavior complained of is highly outrageous. See, e.g., Mahoney v. Donovan, 2011 U.S. Dist. LEXIS 130946 (D.D.C. Nov. 14, 2011) (collecting cases rejecting hostile work environment claims where co-workers touched their private parts in front of complainant, discussed plaintiff's private parts, and referred to plaintiff by racial slurs).

The primary roadblock to successful hostile work

environment claims is that they do not allow for general grievances, changes in working conditions, or even antagonistic behavior unless these conditions are severe and pervasive. See Gorokhovsky v. City of New York, 2011 U.S. Dist. LEXIS 54941, at *31 (S.D.N.Y. May 18, 2011) (holding that "vague allegations of isolated acts of hostility are insufficient as a matter of law to state a claim for hostile work environment"). For instance, "allegations of a hostile work environment based on 'stonewalling' and 'friction,' are insufficient to raise adverse action if the evidence does not show that such circumstances were pervasive, humiliating or interfered with a complainants' work performance." Menendez v. Halliburton, Inc., 2008 DOLSOX LEXIS 69, at *25 (ALJ Sept. 18, 2008), aff'd in part, rev'd on other grounds, 2011 DOL Ad. Rev. Bd. LEXIS 83 (ARB Sept. 13, 2011). Moreover, "[w]here employee communication, although critical of colleagues, remains within the normal tenor for that workplace, Respondent has no obligation, nor even a right, to quell such expression." Dierkes v. West Linn-Wilsonville Sch. Dist., 2003 DOL Ad. Rev. Bd. LEXIS 51, at *100 (ARB June 30, 2003).

Nonetheless, hostile work environment claims routinely survive summary judgment where it is determined that objectionable, but not independently actionable, behavior was pervasive and severe. See, e.g., Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000) (holding that regularly imposed verbal abuse can accumulate into a hostile work environment); see also Gowski v. Peake, 682 F.3d 1299 (11th Cir. 2012) (upholding jury determination that employer created "a workplace filled with intimidation and ridicule that was sufficiently severe and pervasive to alter [plaintiffs] working conditions," including spreading rumors about them, limiting their privileges, solicited complaints about them, prohibiting them from doing their work, reassigning them to other work, and giving low proficiency ratings). Moreover, while it does not appear that the Department of Labor's broadening of what constitutes an "adverse action" has impacted the hostile work environment analysis to date, it is possible that the broader interpretation could allow employees to argue for a wider view of hostile work environment as well.

Recent Whistleblower Developments

I. The Expanding Definition of "Employee" in Retaliation Cases

Sarbanes Oxley - Lawson v. FMR LLC, 134 S. Ct. 1158 (2014)

In March 2014, the Supreme Court of the United States issued a decision in Lawson v. FMR LLC that greatly expanded the scope of employees who may bring claims for whistleblower retaliation under the Sarbanes-Oxley Act. Section 806 of SOX provides that no publicly traded company, nor any officer, employee, contractor, subcontractor, or agent of such company may retaliate against "an employee." See 18 U.S.C. § 1514A (titled "Whistleblower Protection for Employees of Publicly Traded Companies"). The Court's decision held that this section protected not only employees of public companies, but also employees of private contractors or subcontractors that render services to those public companies. The majority, authored by Justice Ginsburg, noted that this interpretation was supported by the understanding that "outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract" and that to exclude these individuals because they did not work directly for a public company would defeat the statute's purpose.

The dissent, authored by Justice Sotomayor and joined by Justices Kennedy and Alito, argued that this interpretation gave SOX a "stunning reach" that would sweep in millions of people that are not logically within the reach of the statute, leading to such absurdities as a babysitter bringing a federal case against his employer, "a parent who happens to work at the local Walmart (a public company)," if the babysitter is fired after expressing concern that the parent's son participated in an internet purchase fraud. The dissent would have more narrowly interpreted the provision to find that it protected only those individuals who were employees of a public company, while the remainder of the provision merely restricted the public company from engaging representatives (officers, employees, contractors, subcontractors, and agents) to carry out retaliation by proxy.

The full impact of Lawson remains unclear; while some courts have declined to extend Lawson any further than necessary, other courts have pushed toward the expansive consequences warned of by Justice Sotomayor. In Wiest v. Lynch, the Eastern District of Pennsylvania argued that "[t]here is no reason to think that the Supreme Court's holding in Lawson

does not also apply, beyond contractors of public companies, to agents of public companies and those agents' employees." 15 F. Supp. 3d 543, 568 (E.D. Pa. 2014). Accordingly, Wiest held that an employee of a non-public subsidiary of a publicly held company was covered by SOX.

In contrast, other courts have declined to extend the reasoning in Lawson, and some have even limited its scope. In Gibney, the Eastern District of Pennsylvania accepted the reasoning in Lawson, but declined extend it to the facts before it. Gibney v. Evolution Mktg. Research, LLC, 25 F. Supp. 3d 741 (E.D. Pa. 2014). In that matter, the plaintiffs had been employed at a private company that provided mutual fund management to a public company. Those employees brought allegations that their private company was overbilling their services, thereby hurting the public company's shareholders. The Court declined to extend Lawson this far, and thus declined to extend SOX protection to the employees. In Anthony v. Nw. Mut. Life Ins. Co., the Northern District of New York provided two limitations on the expansion issued in Lawson. 130 F. Supp. 3d 644 (N.D.N.Y. 2015). First, that contractor employees who experience retaliation that is unrelated to the provision of services to a public company will not be covered. Id. at 62. And, second, that the fraud must be committed by the public company itself or one of its contractors, as "[a] private company's fraudulent practices do not become subject to § 1514A merely because that company incidentally has a contract with a public company." Id.

No matter how far this expansion may ultimately reach, it is clear that private employers that have relationships with public companies regulated by SOX, either by providing them services or serving as a subsidiary, should immediately implement compliance programs to forestall the wave of whistleblower claims they may face.

The Department of Labor's Administrative Review Board ("ARB") – Robinson v. Triconex Corp.

Recently, the ARB has been the central proponent and instigator of the trend toward broadly interpreting whistleblower statutes, especially with regard to who has a cause of action and whom they may sue. For example, Lawson explicitly relied on the ARB's interpretation of SOX as affording whistleblower protection to employees of privately held contractors. See Spinner v. David Landau & Assocs., LLC, ARB Case Nos. 10-111 & -115, ALJ Case No. 2010-SOX-029, at n.79 (ARB May 31, 2012). The Eastern District of Pennsylvania's decision in Wiest also cited Spinner, along with a handful of other recent ARB cases that have broadened the application of SOX. Now that federal courts have adopted the ARB's expanding interpretation of "employee" in the context of SOX, companies should be aware of the ARB's other decisions which may permit lawsuits that are not plainly obvious from a whistleblower statute's text.

Most notably, Robinson v. Triconex Corp., presents plaintiffs with another argument for the exponential expansion of who can be an "employee." ARB Case No. 10-013, ALJ Case No. 2006-ERA-031 (ARB Mar. 28, 2012). While the Supreme Court has held that a statute's undefined use of "employee" incorporates the common-law interpretation of the master-servant relationship, Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992), some plaintiffs have argued that Robinson supports a nearly unlimited understanding of "employee" that protects any individual in the regulated field from retaliation by any employer in the field regardless of whether there is any traditional employee-employer relationship between the two.

Robinson was a nuclear engineer and President of R&R Consolidated. Triconex supplied products, systems and services for the Nebraska Public Power District ("NPPD") as a subcontractor. Robinson, as an employee of R&R Consolidated, provided services to Triconex at the NPPD nuclear power plant pursuant to a master service agreement that Robinson entered into with TAC Worldwide, a job agency that coordinated independent contractors for Triconex. After more than a year of work, Triconex notified Robinson that his services would no longer be needed and the next month TAC Worldwide terminated its contract with R&R. Robinson filed a civil suit against Triconex in California Superior Court alleging wrongful discharge and a Department of Labor administrative action alleging violation of the whistleblower provisions of the Energy Reorganization Act ("ERA"). The state court granted summary judgment to Triconex, dismissing Robinson's complaint and relying on the traditional common law definition of "employee" to find that he was not an employee of Triconex. An ALJ dismissed the administrative complaint, both on collateral estoppel grounds and because Robinson could not establish

that he was an employee of Triconex.

On appeal, the ARB stated that prior interpretations of "employee" had been overly narrow and turned to a 1989 decision from then Secretary of Labor Elizabeth Dole, which held that "any on-site worker or any nuclear quality assurance worker is covered" by the ERA irrespective of which entity is accused of retaliation. Robinson, ARB Case No. 10-013, at 15 (discussing Hill & Ottney v. TVA, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989)). Indeed, the ARB reiterated Hill & Ottney's finding that the ERA "is not limited in terms to discharges or discrimination against any specific employer's employees, nor to 'his' or 'its' employees." Id. This odd interpretation arose in Hill & Ottney when complainants were employees of a company, Quality Technology Company ("QTC"), that had been hired by the Tennessee Valley Authority ("TVA") to identify concerns about quality and safety issues at nuclear power plants. After the QTC employees investigated and disclosed safety problems in TVA's nuclear power program, TVA restricted the scope of its contract with QTC and refused to renegotiate, causing QTC to terminate the complainants for lack of work.

Robinson was remanded for further findings, but the parties settled, so no judicial review occurred. However, Robinson has been cited in three cases since its ruling, once by the Supreme Court. See Lawson, 134 S. Ct. at 1175 n.20 (noting that the ARB has interpreted the ERA as protecting employees of contractors).[2] This citation by Lawson may embolden complainants under the ERA and other whistleblower statutes such as SOX or Dodd Frank to argue that an "employee" does not necessarily have to be your employee. However, an expansive interpretation of Robinson may be its own undoing. If Robinson stood for such a sweeping proposition that a worker could sue any employer in the field, any different approach to the "employee" issue would be meaningless and Robinson would occupy the field. This has not yet occurred, as the common-law understanding of "employee" has continued to be used in the ERA context by at least some ALJs. See, e.g., Nelson v. Energy Northwest, 2012-ERA-00002, at 13-21 (ALJ June 24, 2013) (applying, more than a year after Robinson, the common law definition of employee applied to the ERA in Demski v. U.S. Dep't of Labor, 419 F.3d 488, 491-92 (6th Cir. 2005)).

II. The Rise in Whistleblower Awards

With Dodd-Frank's regulations and whistleblower awards now in full swing, and the SEC expressing a commitment to the encouragement of more whistleblower complaints, record-breaking whistleblower awards are on the rise.

In 2010, Dodd-Frank authorized whistleblowers to receive between 10% and 30% of the monetary sanctions that the SEC are able to collect as a result of the whistleblowing activity. It took a full two years for the first whistleblower award, initially $50,000 and later supplemented to $200,000, to be paid in August 2012. The second award was not issued until June 2013 and amounted to a projected $125,000 split between three whistleblowers. However the awards took a stratospheric leap in October 2013 when the SEC issued its third award for $14 million. This trend has continued ever since, with awards reaching as high as $30 million in recent years. Since the program's inception, more than $107 million has been awarded to 33 whistleblowers.

This exponential rise in awards has been encouraged and supported by SEC officials. SEC Chair May Jo White stated in the press release announcing the first of many massive awards that "[w]e hope an award like this encourages more individuals with information to come forward." In 2014, SEC press release's continued to heap praise on whistleblowers who "perform a great service to investors and help us combat fraud." And in August, 2016, Jane Norberg, Acting Chief of the SEC's Office of the Whistleblower, praised the agency's issuance of over $100 million in awards, claiming they "demonstrat[e] the invaluable information and assistance whistleblowers have provided to the agency and underscore[e] the program's resounding success." With such resounding institutional support, it can be inferred that Dodd-Frank award trends will be continuing in the near future.

Importantly, the SEC is not alone in the trend of ramping up awards to whistleblowers. In November 2013, a $167.7 million award was divided among whistleblowers in three states for their assistance in

2 *Robinson* has also been cited on two occasions by the ARB. *See Richard Nelson v. Energy Northwest*, ARB Case No. 13-075, ALJ Case No. 2012-ERA-002 (ARB Sep. 30 2015) ("As explained in *Robinson*, the term 'employee' within the meaning of the ERA is broader than and distinct from the *Darden* common-law test."); *Thomas Spinner v. David Landau and Associates, LLC*, ARB Case Nos. 10-111, 10-115, ALJ Case No. 2010-SOX-029 (ARB May 31, 2012) (Cooper Brown, concurring) (finding section 806 of SOX follows the framework of analogous whistleblower statutes, and thus should be interpreted like the ERA in *Robinson*, as inclusive of employees of contractors despite the facts that there is no statutory definition of "employee").

qui tam actions under the False Claims Act. *See* Press Release, U.S. Dep't of Justice, Johnson & Johnson To Pay More Than $2.2 Billion To Resolve Criminal And Civil Investigations (Nov. 4, 2013). The IRS paid out over $175 million dollars over a two-year period for successful claimants that brought tax evasion to light. *See, e.g.*, IRS, Fiscal Year 2013 Report to the Congress on the Use of Section 7623 (2014). Even those statutes that do not rely on bounties have been the source of significant awards in recent years, with the Department of Labor issuing a number of multi-million dollar compensatory awards for statutes ranging from SOX to the Surface Transportation Assistance Act. *See, e.g.*, Press Release, U.S. Dep't of Labor, US Labor Department's OSHA Orders Clean Diesel Technologies Inc. To Pay Over $1.9 Million To Former CFO Fired For Reporting Conflict of Interest (Sept. 30, 2013).

III. The Evolution of Dodd-Frank's Anti-Retaliation Enforcement

Paradigm: a case study

In June 2014 the SEC brought its first ever enforcement action for violation of the Securities and Exchange Act's anti-retaliation provision that was added in 2011 by Dodd-Frank. The charges against Paradigm Capital Management, which were announced alongside news of a $2.2 million settlement of those charges, alleged that Paradigm had removed its head trader from the trading desk and stripped him of his duties in retaliation for his submission of information to the SEC about improperly conflicted trades. The SEC found that improper trades had been made in violation of Section 206 and 207 of the Investment Advisers Act of 1940 and that Paradigm had no legitimate reason for removing its head trader after he revealed those violations to the SEC. Paradigm's settlement involved a disgorgement of $1.7 million in administrative fees paid by clients in connection with the improper transactions, prejudgment interest of $181,771, a civil penalty of $300,000, and the hiring of an independent compliance consultant.

Notably, although a significant portion of the SEC's charges and press release highlight the anti-retaliation aspect of the case, the settlement's terms are focused almost exclusively on curing the conflicted trades and preventing future conflicts at Paradigm. Indeed, none of the monetary or supervisory penalties imposed on Paradigm were linked to the finding of retaliation.

In the order announcing the award, the Commission noted that the whistleblower "suffered unique hardships" for filing, and as a result, would receive the 30% statutory maximum of the underlying sanction, totaling over $600,000. It is significant that the SEC chose to allow Paradigm to fashion a settlement which does not address the explicit finding of retaliation. Given the SEC's full-throated support of whistleblowers, this appears at first blush to be a somewhat odd result, especially compared with the wide scope of terms in deferred and non-prosecution agreements in recent years. However, having explicitly found a violation of the anti-retaliation provision, and in making findings of "unique hardship," the SEC may simply have left it to the former head trader to collect on that finding by bringing a civil claim on his own behalf. The whistleblower's separate civil suit was settled by the parties in December 2012.

Are whistleblowers required to report to the SEC in order to receive protection under Dodd-Frank? An ongoing circuit split leaves this question unanswered.

It is currently unclear whether whistleblowers are required to report their findings to the SEC in order to qualify for protection under Dodd-Frank. The question arises from the interpretation of two provisions of the Act: the definition of a "whistleblower" in section 21F, and a subprovision regarding the prohibition on retaliation that was added by a conference committee just before final passage of the bill. The act defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities law to the Commission . . ." (emphasis added). However, subsection 21F(h) prohibits retaliation against those who make disclosures that are required or protected under Sarbanes-Oxley. Herein lies the problem, as SOX includes several provisions concerning the reporting of violations, not always requiring whistleblowers to engage the SEC. Some Courts have ruled the whistleblower definition unambiguous, barring claims by any employees who fail to report to the SEC. Other Courts have found that the lack of clarity between these two provisions warrants Chevron deference, and thus accept the SEC's broad interpretation which allows for the pursuit of Dodd-Frank remedies for retaliation despite not having reported to the commission.

In Asadi v. G.E. Energy (USA), LLC, an employee

of GE filed a complaint alleging that his termination, which followed his internal reporting of possible FCPA violations, was a violation of Dodd-Frank's whistleblower protection provisions. 720 F.3d 620 (5th Cir. 2013). GE moved to dismiss the complaint, asserting Asadi did not qualify as a "whistleblower" under Dodd-Frank as he failed to file a complaint with the SEC. The Court agreed, finding "[u]nder Dodd–Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC." Id. at 625. The Fifth Circuit is not alone, as many other courts have adopted a narrow interpretation of Dodd-Frank's retaliation provisions. See, e.g.,Banko v. Apple Inc., 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013) ("[T]he statute is not ambiguous; the "whistleblower protection" provided by Section 78u–6(h) is only available to individuals who meet the Dodd–Frank definition of "whistleblower" found in Section 78u–6(a)."); Duke v. Prestige Cruises Int'l, Inc., No. 14-23017-CIV, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015) ("Plaintiff does not allege that he provided any information to the Securities and Exchange Commission at any time in connection with his investigation. Accordingly, Count II, to the extent that it relies solely upon his participation in an internal investigation, is dismissed with prejudice.").

In contrast, the Second Circuit has found that "the tension between the definition in subsection 21F(a)(6) and the limited protection provided by subdivision (iii) of subsection 21F(h)(1)(A) . . . oblige us to give Chevron deference to the reasonable interpretation of the agency charged with administering the statute." Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015). Therefore, "[u]nder SEC Rule 21F–2(b)(1), Berman is entitled to pursue Dodd–Frank remedies for alleged retaliation after his report of wrongdoing to his employer, despite not having reported to the Commission before his termination." This interpretation is paralleled in cases within numerous circuits. See, e.g. Murray v. UBS Sec., LLC, No. 12 CIV. 5914 JMF, 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013) ("In short, because the SEC's rule clarifies an ambiguous statutory scheme the SEC was charged with enforcing and reflects the considerable experience and expertise that the agency has acquired over time with respect to interpretation and enforcement of the securities laws, this Court defers to the SEC's interpretation. Under its rule, the anti-retaliation whistleblower protection provisions of Dodd–Frank require Plaintiff to show that he either provided information to the SEC or that his disclosures fell under the four categories listed in Section 78u–6(h)(1)(A)(iii)."); Connolly v. Remkes, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at *6 (N.D. Cal. Oct. 28, 2014) ("[U]nder the Chevron framework that the statutory definition of "whistleblower" is ambiguous, and that the SEC's interpretation is a reasonable one that warrants deference.").

The Sixth Circuit may be the next appellate court to weigh in on the debate. On September 14, 2016, it heard oral argument in a case in which the plaintiff claims to have worn a wire in order to help federal agents uncover a massive fraud scheme involving a chain of gas stations. This issue will be one to watch in the years to come.

Whistleblowers As Heroes

In 2011, on the fortieth anniversary of the publication of the Pentagon Papers, the New York Times ran an op-ed by the executive director of the "National Whistleblowers Center" that detailed the origin of the US's very first whistleblower statute. Enacted in 1778, the statute was passed to protect a group of sailors who had been jailed after they informed the Continental Congress that their superior in the Continental Navy was torturing prisoners. As the jailed sailors pleaded to Congress, they had been "arrested for doing what they then believed and still believe was nothing but their duty." The resulting statute instituted a duty to provide the proper authorities with information of misconduct in the armed services and specifically authorized the payment of the jailed sailors' legal fees to fight the criminal libel charges they faced. The op-ed bemoaned that in comparison, modern national security whistleblowers like Bradley Manning were being punished for doing their duty to their country. Instead of being treated as heroes like they would have been in 1778, concluded the op-ed, these honest citizens are now being ignored, silenced, and intimidated.

Here, in a microcosm, is the framing of whistleblowers in the public consciousness. America loves an underdog, the tale of one person standing up for what is right against a faceless powerful entity, and the press is all too happy to portray aspiring whistleblowers in this light. This is why two words you will almost never see together are "alleged" and "whistleblower." Once a person comes forward with a grievance, they are a full-fledged whistleblower with all the spectacle that

title affords, irrespective of their own wrongdoing or whether their claim will prove to hold any merit. A look at the more high-profile modern whistleblowers, and the Oscar winners who have portrayed them, highlights the uphill battle faced by any company who finds itself squaring off against an employee who adopts the whistleblower nomenclature:

- Daniel Ellsberg – The Pentagon Papers (James Spader)
- Frank Serpico – Serpico (Al Pacino)
- Mark Felt aka "Deep Throat" – All the President's Men (Hal Holbrook)
- Karen Silkwood – Silkwood (Meryl Streep)
- Jeffrey Wigand - The Insider (Russell Crowe)
- Erin Brockovich – Erin Brockovich (Julia Roberts)

Indeed, being a whistleblower has a unique draw for employees who might otherwise toil in obscurity, offering a chance to be hailed as brave and important, the possibility of becoming a celebrity, and even significant financial rewards:

- Mark Whitacre, an executive at Archer Daniels Midland, served as an informant for the FBI in a price fixing case from 1992 to 1995. In the course of the investigation, it was revealed that Whitacre had embezzled $9 million from ADM in unrelated activities, which resulted in a loss of his immunity and a ten and a half years federal prison sentence. Despite Whitacre's guilty plea, many alleged ADM had exposed Whitacre's wrongdoing in retaliation for his whistleblowing. In fact, Whitacre's handlers at the FBI have spoken out about his conviction, arguing that he is a "national hero" and should have been pardoned in light of the case he helped build.
- In 2002, in what TIME called the Year of the Whistle-Blower, Sherron Watkins and Cynthia Cooper were named as Persons of the Year for their internal complaints at Enron and WorldCom, respectively, regarding improper accounting methods. Watkins and Cooper shared this honor with Coleen Rowley, an FBI staff attorney who brought to light allegations that the FBI had brushed off pleas from her Minneapolis field office that Zacarias Moussaoui, a now convicted 9/11 co-conspirator, was a man who must be investigated. Both Watkins and Cooper have published books and given numerous lectures about their whistleblowing experiences.
- Bradley Birkenfeld received a $104 million award from the IRS Whistleblower Office for his cooperation with federal authorities in a 2008 fraud investigation against his employer UBS. Birkenfeld collected his award after he was released from his 40-month sentence for abetting tax evasion by personally stuffing one of his customer's undeclared diamonds into a toothpaste tube to move them across borders. Among his non-monetary accolades was the distinction of being named "2009 Tax Person of the Year" for being the "Benedict Arnold of the private banking industry."
- Greg Smith, an executive director at Goldman Sachs, publicly resigned in a March 14, 2012, New York Times op-ed that accused his former colleagues of "callously" ripping their clients off. Two weeks later, Smith had signed a $1.5 million advance on a tell-all book and was profiled on various newsmagazine programs, such as 60 Minutes.
- Edward Snowden was hailed as initiating the most important leak in American history by Daniel Ellsberg, the man who had leaked the Pentagon Papers, in an article Ellsberg wrote for the newspaper that had broken Snowden's story in June 2013. Although considered by some as a traitor and currently living under temporary asylum in Russia, an equally vocal group has lauded Snowden as a true American hero. Either way, Snowden has become internationally famous/infamous and, as is the tradition, has been portrayed in the Oliver Stone film "Snowden," which was released in the United States in September 2016. It has already grossed over $19 million worldwide.

"Frequent Filer" Sayed Hasan: A Case Study

The long saga of the cases brought by "frequent filer" Sayed Hasan provides a good illustration of how even the least meritorious cases can be subject to extensive/prolonged litigation. Mr. Hasan has filed at least 28 separate retaliation cases with OSHA between 1986 and 2012 (almost all pro se). He has not ultimately prevailed in any of his claims; however, each respondent has had to deal with multiple claims,

many appeals, and (in many cases) lengthy evidentiary hearings before obtaining final relief.

The factual background recited in the reported decisions in Hasan's cases demonstrates a similar pattern. In his earlier cases, Hasan held temporary assignments; he made safety complaints to applicable regulatory agencies just as the assignments were winding down and filed retaliation claims when his assignments ended. Hasan thereafter submitted applications for re-employment to those employers and repeatedly filed failure to hire claims when he was not re-hired. See, e.g., Hasan v. Exelon Generation Co., LLC, 31 Fed. Appx. 328, 329-30 (7th Cir. 2002). Hasan later moved on to submit rapid-fire applications with other employers in the industry that had no prior relationship with him or his alleged "whistleblowing"; his applications included cover letters referring to his prior "whistleblowing" (including his mounting collection of whistleblower claims) and requesting that the employers "[p]lease do not discriminate and retaliate against me." See, e.g., Hasan v. Dep't. of Labor, 545 F.3d 248, 249 (3rd Cir. 2008).

No reported decision reflects any ultimate finding in support of Hasan's claims; indeed, most find them to be utterly without merit. For example, in Hasan v. Nuclear Power Servs., Inc. 86-ERA-24 (Sec'y June 26, 1991), the Secretary (predecessor to the Administrative Review Board ("ARB")) upheld summary dismissal based on the ALJ's determination that the failure to hire was "not based 'even in part'" on claimant's prior safety complaints, but was instead due to claimant's "abrasive, overbearing and superior manner harmful to good working relationships with other engineers and supervisors."

After many similar results in multiple tribunals, Hasan was finally sanctioned in Hasan v. Dept. of Labor, 301 Fed. Appx. 566 (7th Cir. 2008) (Easterbrook, J.). His claims were dismissed after the court determined that the decision by respondent Sargent and Lundy never to hire Hasan was not retaliatory, because—in addition to his lack of qualifications—it was based upon Hasan's "temperament," his "obstinate, inflexible" nature that made him "difficult to work with," and his having "consistently maligned the firm and its work," rendering him unable to adequately represent the firm to its clients. 301 Fed. Appx. at 567. However, it must be noted that this result occurred only after the case had been pending for five years, through eight days of evidentiary hearings and multiple appeals. The Seventh Circuit sanctioned Hasan for his "repeated frivolous litigation" which "drains judicial resources," noting the "flood of complaints" Hasan had filed against "various engineering firms and other companies that have rejected his employment applications," and adjudication of his claims as meritless by four separate Circuit Courts of Appeal. Id. at 566, 568. However, it appears to be the only tribunal to have done so.

In 2011, the ARB reversed a summary decision on the causation element in another failure to hire case brought by Hasan, stating that "[t]he issue of causation is generally a difficult issue to resolve by summary disposition because it often involves factual questions of motivation and intent." Hasan v. Enercon Servs., Inc. ARB No. 10-061, ALJ Nos. 2004-ERA-022, 2004-ERA-27 at 2 (ARB July 28, 2011). The ARB held that a hearing was required to determine the legitimacy of the reasons proffered by the employer for not hiring Hasan. Summary decision had been granted 3 separate times in this case—twice by the ALJ and previously by the ARB (which had been reversed by the Third Circuit on the ground that the "rejection" element of a failure to hire claim is met any time a claimant is not hired). Hasan v. Dep't of Labor, 545 F.3d 248 (3rd Cir. 2008). On remand, and after an extensive evidentiary hearing, the ALJ again dismissed Hasan's claims and the ARB affirmed. Hasan v. Enercon Servs., Inc., ARB No. 10-061, ALJ Nos. 2004-ERA-022, 27 (ALJ July 30, 2012), aff'd ARB No. 12-096 (Mar. 14, 2013).

And in the most recent chapter of Hasan's story, one of his claims was rejected on October 14, 2014, by the United States Supreme Court on Writ of Certiorari. Hasan v. Dep't of Labor, 135 S. Ct. 372, 190 L. Ed. 2d 253 (2014).

Kevin Baumgardner

Partner

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

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http://www.corrcronin.com/our-team/kevin-baumgardner/

Mr. Baumgardner is one of the founding partners of Corr Cronin. Mr. Baumgardner was formerly the Chair of Bogle & Gates's Product Liability/Personal Injury Practice Group, and was a member of that firm's Executive Committee. He has been named a "Super Lawyer" by Washington Law & Politics magazine numerous times, has been designated one of Seattle's "Top Lawyers" by Seattle Magazine and has been recognized as a Seattle "Litigation Star" by Benchmark, America's Leading Litigation Firms and Attorneys. Mr. Baumgardner is also included in the 2009 edition of The Best Lawyers in America and in the 2nd edition Guide to the World's Leading Product Liability Lawyers.

Mr. Baumgardner has tried cases in the state and federal courts of Washington and Alaska, and has appeared before an international sports law tribunal in Lausanne, Switzerland. He has also handled labor arbitrations, administrative trials, and civil case arbitrations. Mr. Baumgardner has represented dozens of Fortune 500 companies in complex litigation. Among the many individuals he has represented are a Nobel Prize winner and an Olympic medalist, both in matters concerning their professional standing. His broad-ranging litigation practice focuses on product liability, labor and employment, commercial, toxic tort and personal injury cases, as well as international sports law and the defense of alleged whistleblower litigation.

Representative Cases

- In re: Asbestos Litigation – Partner in charge for diverse group of defendants in Washington State asbestos cases. Obtained numerous summary judgments and negotiated favorable settlements.
- In re: Le Samurai – Defense of an Olympic medalist athlete against disciplinary charges; hearing before Federation Equestre Internationale tribunal in Lausanne, Switzerland.
- Palmer G. Lewis, et al. v. ARCO Chemical Company – Defense of implied indemnity claim regarding flammability characteristics of polystyrene beads used in rigid foam insulation, arising from school fire in Barrow, Alaska. Claims in excess of $3 million; plaintiff agreed to dismiss claim and take nothing after fact and expert deposition discovery by ARCO Chemical team headed by Mr. Baumgardner.
- KAL Litigation – Defense of major airline operator against multifarious claims brought in connection with DC-10 crash at Anchorage International Airport. Claims in excess of $20 million; multi-week jury trial (on cargo claims) resulting in defense verdict.
- Airline Industry "Whistleblower" cases – Mr. Baumgardner has successfully defended multiple claims brought by ex-airline employees under federal and state whistleblower provisions. In Smith v. Alaska, a case brought in King County (Washington) Superior Court, Mr. Baumgardner obtained summary judgment in favor of the airline in March, 2004.
- Bradford, et al. v. Alaska Airlines, Inc., et al. – Defense of airline against alleged "air quality" case brought by group of twenty-six flight attendants. Claims in excess of $2 million. Also successfully defended related grievance arbitration.
- Ashurst v. Schwartz, et al. – Defense of construction contractor and employee, who was exiting company work site in his pickup truck when he collided with a motorcycle driven by a Seattle police officer. Police officer, who was severely injured in the crash, brought claims in excess of $1.2 million. Multi-week arbitration resulted in finding of 75% contributory negligence and judgment highly favorable to defense.
- Bedrossian, et al. v. Stipek – Representation of individual investors in plaintiffs' securities/real estate fraud action, with accompanying infliction of emotional distress claims. Multi-week trial garnered judgment of nearly $1 million.

Education

- J.D., Columbia University School of Law, 1984 - Harlan Fiske Stone Scholar
- B.A., with high honors, English, Michigan State University, 1981 - Elected to Phi Beta Kappa

After The Worst Happens: The Punitive Damages Award On Appeal

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Snell & Wilmer

AFTER THE WORST HAPPENS: THE PUNITIVE DAMAGES AWARD ON APPEAL

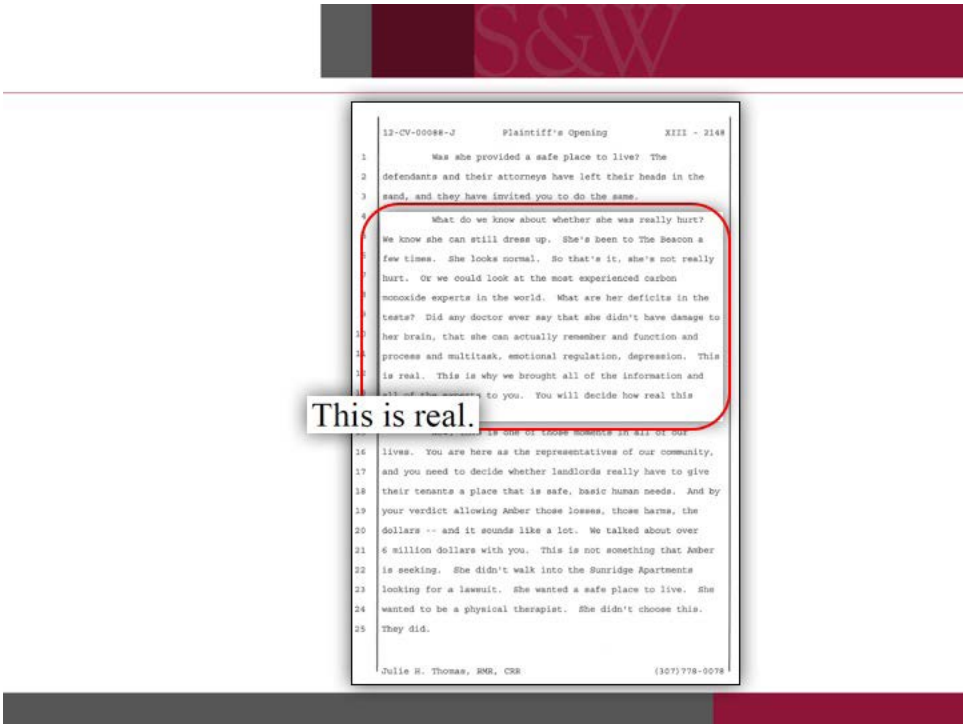
Amy F. Sorenson – Snell & Wilmer L.L.P.

Introduction – What Happened?

- Plaintiff → high levels of CO in her Casper, WY apartment
- Malfunctioning furnace
- Taken to hospital, treated, and released same day
- Resumed school, work . . . and living in apartment

The Case – Defendants' View

- Negligence case
- Minimal injury

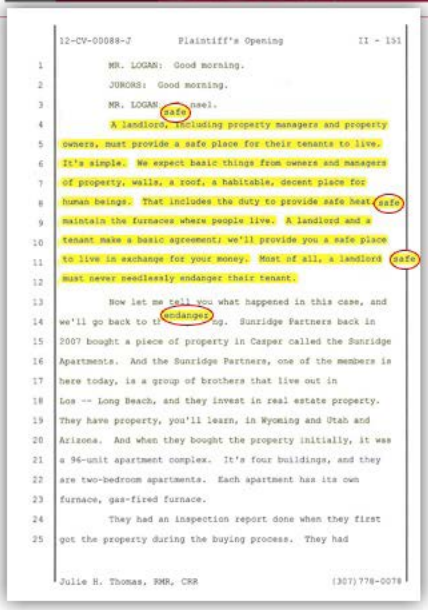


The Case – Defendants' View

- Negligence case
- Minimal injury
- Boiler plate punitive claim
- Repaired or replaced furnaces on as-needed basis
- Provided CO detectors to tenants as matter of company policy
- Plaintiff admitted throwing hers away

The Case – Plaintiff's View

- Multiple incidents of CO "poisoning" – including of Defendants' key witness
- Defendants engaged in alleged widespread "cover up"
- Defendants should have adopted a preventative maintenance program
- Defendants failed to "make safe"



12-CV-00088-J Plaintiff's Opening II - 151

MR. LOGAN: Good morning.

JURORS: Good morning.

MR. LOGAN: [illegible]nael.

A landlord, including property managers and property owners, must provide a safe place for their tenants to live. It's simple. We expect basic things from owners and managers of property, walls, a roof, a habitable, decent place for human beings. That includes the duty to provide safe heat, maintain the furnaces where people live. A landlord and a tenant make a basic agreement; we'll provide you a safe place to live in exchange for your money. Most of all, a landlord must never needlessly endanger their tenant.

Now let me tell you what happened in this case, and we'll go back to t[illegible]g. Sunridge Partners back in 2007 bought a piece of property in Casper called the Sunridge Apartments. And the Sunridge Partners, one of the members is here today, is a group of brothers that live out in Los -- Long Beach, and they invest in real estate property. They have property, you'll learn, in Wyoming and Utah and Arizona. And when they bought the property initially, it was a 96-unit apartment complex. It's four buildings, and they are two-bedroom apartments. Each apartment has its own furnace, gas-fired furnace.

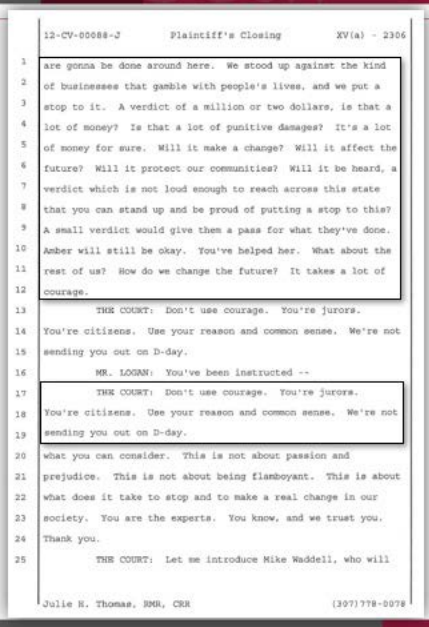
They had an inspection report done when they first got the property during the buying process. They had

Julie H. Thomas, RMR, CRR (307)778-0078

What Was the Appeal About?

- Trial
- Judgment

Trial



12-CV-00088-J Plaintiff's Closing XV(a) - 2306

are gonna be done around here. We stood up against the kind of businesses that gamble with people's lives, and we put a stop to it. A verdict of a million or two dollars, is that a lot of money? Is that a lot of punitive damages? It's a lot of money for sure. Will it make a change? Will it affect the future? Will it protect our communities? Will it be heard, a verdict which is not loud enough to reach across this state that you can stand up and be proud of putting a stop to this? A small verdict would give them a pass for what they've done. Amber will still be okay. You've helped her. What about the rest of us? How do we change the future? It takes a lot of courage.

THE COURT: Don't use courage. You're jurors. You're citizens. Use your reason and common sense. We're not sending you out on D-day.

MR. LOGAN: You've been instructed --

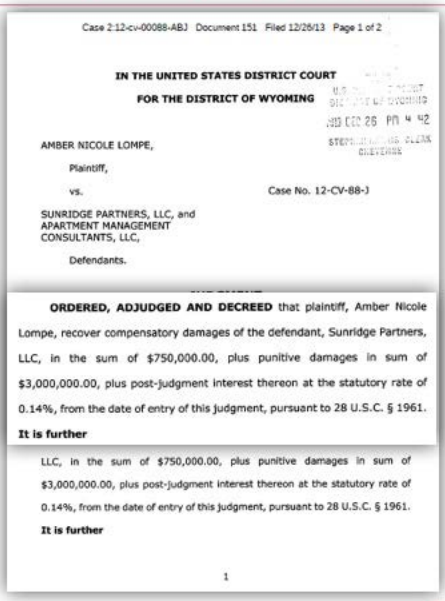
THE COURT: Don't use courage. You're jurors. You're citizens. Use your reason and common sense. We're not sending you out on D-day.

what you can consider. This is not about passion and prejudice. This is not about being flamboyant. This is about what does it take to stop and to make a real change in our society. You are the experts. You know, and we trust you. Thank you.

THE COURT: Let me introduce Mike Waddell, who will

Julie H. Thomas, RMR, CRR (307)778-0078

Judgment



Case 2:12-cv-00088-ABJ Document 151 Filed 12/26/13 Page 1 of 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AMBER NICOLE LOMPE,

Plaintiff,

vs.

Case No. 12-CV-88-J

SUNRIDGE PARTNERS, LLC, and APARTMENT MANAGEMENT CONSULTANTS, LLC,

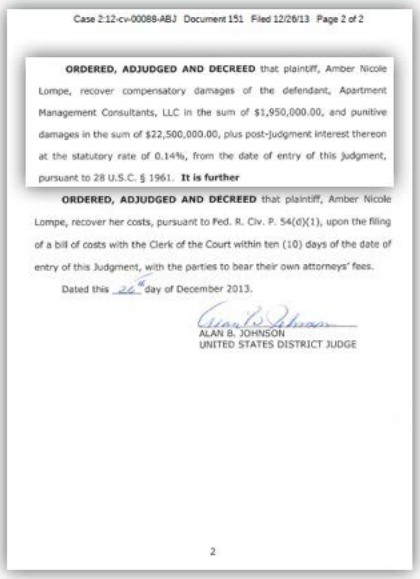
Defendants.

ORDERED, ADJUDGED AND DECREED that plaintiff, Amber Nicole Lompe, recover compensatory damages of the defendant, Sunridge Partners, LLC, in the sum of $750,000.00, plus punitive damages in sum of $3,000,000.00, plus post-judgment interest thereon at the statutory rate of 0.14%, from the date of entry of this judgment, pursuant to 28 U.S.C. § 1961. **It is further**

LLC, in the sum of $750,000.00, plus punitive damages in sum of $3,000,000.00, plus post-judgment interest thereon at the statutory rate of 0.14%, from the date of entry of this judgment, pursuant to 28 U.S.C. § 1961. **It is further**

1

Judgment



Case 2:12-cv-00088-ABJ Document 151 Filed 12/26/13 Page 2 of 2

ORDERED, ADJUDGED AND DECREED that plaintiff, Amber Nicole Lompe, recover compensatory damages of the defendant, Apartment Management Consultants, LLC in the sum of $1,950,000.00, and punitive damages in the sum of $22,500,000.00, plus post-judgment interest thereon at the statutory rate of 0.14%, from the date of entry of this judgment, pursuant to 28 U.S.C. § 1961. **It is further**

ORDERED, ADJUDGED AND DECREED that plaintiff, Amber Nicole Lompe, recover her costs, pursuant to Fed. R. Civ. P. 54(d)(1), upon the filing of a bill of costs with the Clerk of the Court within ten (10) days of the date of entry of this Judgment, with the parties to bear their own attorneys' fees.

Dated this 26th day of December 2013.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

2

Entry of Judgment: What Now?

- Retain appellate, bankruptcy counsel
- Seek stipulated / FRCP 62(b) stay within 14 days (but discretionary)
- Navigate bonding issues
- Digest the record
- Prepare FRCP 50, 59 post trial motion in 28 Days – period. See FRCP 6(b)(2)
- Steel yourself – FRCP 69 post judgment discovery
- Consider settlement

After the Notice of Appeal: What Next?

- Enlist amicus
- Pick your battles
- Own the (entire) record

After the Notice of Appeal: What Next?

- Own the (entire) record

Meaning these facts . . .

- Every furnace needing repair/replacement received it
- CO detectors provided per policy
- Responsible utility (SourceGas) never required inspection of all furnaces – even after Plaintiff's accident
- SourceGas testified that the furnaces "were not putting out carbon monoxide. They were not a danger"

After the Notice of Appeal: What Next?

Own the (entire) record

. . . and these

- Annual or biennial inspections had been recommended by professionals
- CO detectors frequently disabled, discarded by tenants
- Three prior CO exposures before Plaintiff's accident

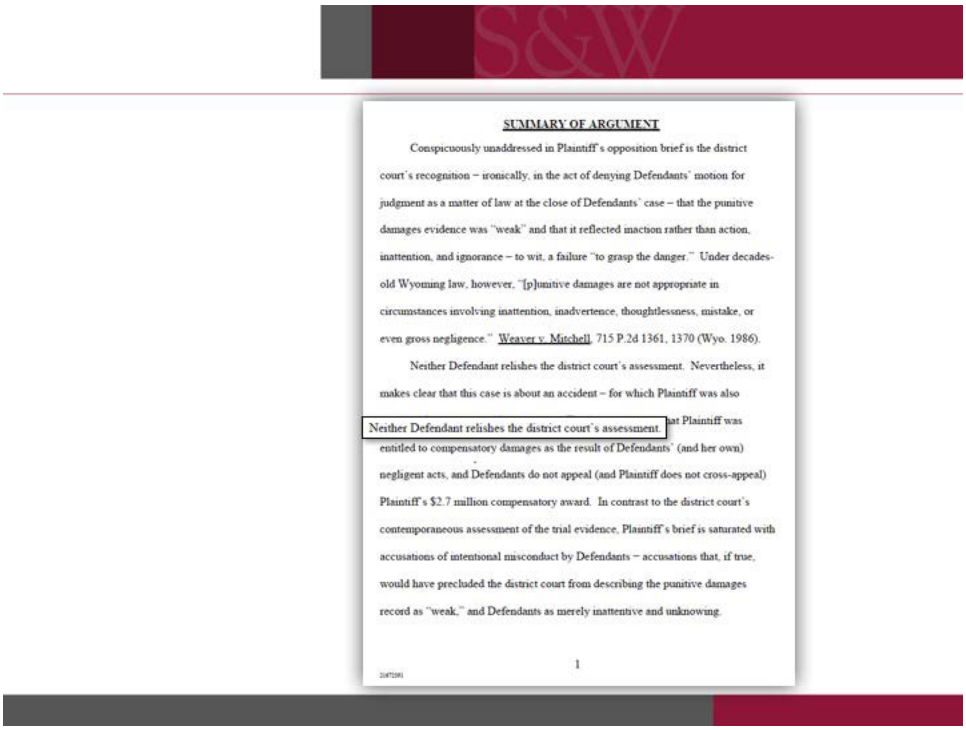
After the Notice of Appeal: What Next?

- Enlist amicus
- Pick your battles
- Own the (entire) record
- Take responsibility

After the Notice of Appeal: What Next?

- Take responsibility

> ". . . I'll allow that [punitive damages] evidence to go to the jury . . . . I recognize that that evidence for a disfavored form of relief is, is weak, and I say it's weak because . . . it is a failure to act rather than an act done in a negligent way. It is further an act that . . . smacks highly of inattention on the part of the defendants in this case as well as ignorance, if I accept . . . the testimony of . . . the regional manager who persists in calling the poisonous gas CO_2, and doesn't seem to have a grasp of the danger."



SUMMARY OF ARGUMENT

Conspicuously unaddressed in Plaintiff's opposition brief is the district court's recognition – ironically, in the act of denying Defendants' motion for judgment as a matter of law at the close of Defendants' case – that the punitive damages evidence was "weak" and that it reflected inaction rather than action, inattention, and ignorance – to wit, a failure "to grasp the danger." Under decades-old Wyoming law, however, "[p]unitive damages are not appropriate in circumstances involving inattention, inadvertence, thoughtlessness, mistake, or even gross negligence." Weaver v. Mitchell, 715 P.2d 1361, 1370 (Wyo. 1986).

Neither Defendant relishes the district court's assessment. Nevertheless, it makes clear that this case is about an accident – for which Plaintiff was also

Neither Defendant relishes the district court's assessment.

at Plaintiff was entitled to compensatory damages as the result of Defendants' (and her own) negligent acts, and Defendants do not appeal (and Plaintiff does not cross-appeal) Plaintiff's $2.7 million compensatory award. In contrast to the district court's contemporaneous assessment of the trial evidence, Plaintiff's brief is saturated with accusations of intentional misconduct by Defendants – accusations that, if true, would have precluded the district court from describing the punitive damages record as "weak," and Defendants as merely inattentive and unknowing.

1

After the Notice of Appeal: What Next?

- Enlist amicus
- Pick your battles
- Own the (entire) record
- Take responsibility
- Consider your audience
- Conduct mock argument

The Punitive Judgment on Appeal: Through the Looking Glass

- Negligence facts
- Hefty compensatory award
- Staggering punitive awards

The Punitive Judgment on Appeal: Through the Looking Glass

- Negligence facts
  - punitives require willful and wanton misconduct
  - "not appropriate in circumstances involving inattention, inadvertence, thoughtlessness, mistake"
  - means must show more than notice of problems (negligence), more even than missed opportunities (gross negligence), but
  - A state of mind "that approaches intent to do harm"

The Punitive Judgment on Appeal: Through the Looking Glass

- Hefty compensatory award
  - $3 million (allocated 25% - Property Owner, 65% - Property Manager, 10% - Plaintiff)
  - "Defendants do not herein appeal Plaintiff's $3 million compensatory award…"
  - "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)

The Punitive Judgment on Appeal: Through the Looking Glass

- Staggering punitive awards
  - Property Owner: $3 million in punitives for $750,000 in compensatory liability (4 to 1 ratio)
  - Property Manager: $22.5 million in punitives for $1,950,000 in compensatory liability (11.5 to 1 ratio)

The Punitive Judgment on Appeal: Through the Looking Glass

- **Hefty Compensatory Award + Staggering Punitive Award = Due Process Violation**
  - "exacting" de novo review → "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." State Farm, 538 U.S. at 425.
  - "That is, where compensatory damages are already substantial, a ratio of 1:1 may be the most the Constitution will permit." Lompe v. Sunridge Partners, LLC, 818 F.3d 1041, 1069 (2016)

Decision: Through the Looking Glass (and Back Again)

Property Owner:

- Out of state property owner/investors, retained well regarded property manager for apartments, no knowledge of furnace risk other than age
- Evidence "insufficient as a matter of law to establish willful and wanton misconduct"
- $3 million punitive award reversed entirely

Decision: Through the Looking Glass (and Back Again)

Property Manager:

- "A ratio of 1:1 under the present facts ensures that the punishment imposed on [the property manager] is 'reasonable and proportionate to the harm [Plaintiff] suffered" in light of compensatory damages
- "No evidence that [property manager] intended to cause harm to [Plaintiff] or to any other person"
- $22.5 million punitive award remitted to $1.950 million punitive award

Lompe v. Sunridge Partners, LLC, 818 F.3d 1041 (2016)

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Amy Sorenson is a regional civil litigator, defending business litigation matters in the Utah, Nevada and California courts. Her complex commercial litigation practice includes general business litigation, financial services litigation, intellectual property, and professional liability and business tort litigation in the federal and state courts, arbitration, and on appeal. Amy's financial services litigation experience includes the representation of lenders in a wide variety of litigation matters. Her business litigation experience is broad, and includes dealer termination litigation and arbitration, antitrust litigation, and unfair competition, licensing and copyright claims for a wide variety of businesses.

Related Services
- Commercial Litigation
- Financial Services Litigation
- Intellectual Property and Technology Litigation
- Professional Licensure
- Real Estate Litigation

Professional Recognition and Awards
- The Best Lawyers in America®, Commercial Litigation (2014-2016)
- 2013 Top Rated Lawyer in Technology, The American Lawyer & Corporate Counsel (June 2013)
- Utah Legal Elite, Civil Litigation, Utah Business Magazine (2007-2009, 2012-2015)
- Mountain States Super Lawyers®, Civil Litigation: Defense (2013-2016) -- Top 50 Women Lawyers (2014-2015); Rising Stars Edition (2012)
- Litigation Counsel of America, Fellow (2009)

Representative Publications and Presentations
- "Punitives Slashed in Wyoming Carbon Monoxide Case: In a win for tort reformers, an appellate court embraces a 1-1 ratio of punitive compensatory damages," Featured, The American Lawyer (May 2016)
- "How Do Law Firms Retain Women, and Why It Matters," Panel Speaker, Utah State Bar 2016 Spring Convention, St. George, UT (March 11, 2016)
- "Arbitration Agreements and Practice from a Litigator's Perspective," Panel Moderator, Snell & Wilmer Corporate Counsel Forum (March 24, 2015)

Community Involvement
- Legal Aid Society of Salt Lake, President, Board of Directors, Executive Committee (2004-present)
- Community Foundation of Utah Women's Giving Circle
- Friends of Utah Children, Past Co-Director

Education
- University of California, Berkeley, Boalt Hall School of Law (J.D., 1997) -- California Public Employee Relations Journal, Berkeley, California (1995-1997); Recipient, American Jurisprudence Award, White Collar Crime (1996); Recipient, Dragonette Memorial Award for Outstanding Achievement in Civil Litigation Trial Practice (1997); Recipient, Prosser Prize, Civil Trial Practice (1997)
- Yale University (B.A., English, cum laude, with distinction, 1994)

TCPA And FCRA:
Five Things You Need On Your Compliance Checklist

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TCPA and FCRA:
Five Things You Need on Your Compliance Checklist

David Esquivel
Bass, Berry & Sims PLC

BASS BERRY + SIMS

Telephone Consumer Protection Act

Why Should I Care?

Telephone Consumer Protection Act

- Regulates telemarketing and use of automatic dialing equipment for faxes, phone calls, and texts
- Consent is usually required
- Statutory damages from $500 to $1,500 ***per text or call***

1. Am I using an autodialer?

Autodialer

- Equipment that has the ***capacity*** to store or produce numbers using a random or sequential number generator and to dial such numbers
- "The capacity of an autodialer is not limited to its current configuration but also includes potential functionalities" – FCC
- Prerecorded messages = autodialer

2. Do I have consent?

- Prior, express ***written*** consent for telemarketing calls to wireless phones
- Prior express consent for informational calls to wireless phones
- Consent can be revoked through any "reasonable means"

3. Do I have insurance?

- CGL coverage likely has express exclusion
- Check D&O coverage

Fair Credit Reporting Act

Why Should I Care?

Fair Credit Reporting Act

- Governs communications "bearing on a consumer's creditworthiness, credit standing, credit capacity, general reputation, personal characteristics, or mode of living"
- Credit, insurance
- Employment
- Tenants

4. Are my FCRA employment disclosures ok?

- "A clear and conspicuous disclosure… in a document that consists solely of the disclosure, that a consumer report may be obtained"
- Not with a liability release or within the application itself
- Check online applications

5. Am I a consumer reporting agency?

- "Any person which…regularly engages… in assembling or evaluating information on consumers for the purpose of furnishing consumer reports to third parties…"
- Consumer reports involve consumer's "creditworthiness…character, general reputation, personal characteristics, or mode of living"
- Extensive compliance obligations

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David Esquivel concentrates his practice on counseling, investigations, and litigation in the financial services sector, with a particular emphasis on matters relating to the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA) and Telephone Consumer Protection Act (TCPA).

He provides counsel to nationwide consumer reporting agencies (CRAs) and furnishers of consumer data on how to ensure regulatory compliance under ever-increasing demands of federal regulatory agencies. David settled the claims of 120,000 consumers on behalf of a CRA in a nationwide class action and successfully defended a CRA against a variety of FCRA claims tried to jury verdict. He regularly advises on FCRA compliance issues, handling investigations conducted by the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB), and representing clients in class action and individual litigation.

David's experience in financial services compliance programs, government investigations, and regulatory proceedings is complemented by his engagement by the New York Stock Exchange (NYSE) to serve as a regulatory auditor. For seven years, David frequently worked on-site at the NYSE conducting interviews, reviewing regulatory programs, providing recommendations, and rendering bi-annual reports to the NYSE and Securities and Exchange Commission regarding the NYSE's compliance with federal securities laws and regulations.

David is very active in civic and pro bono matters. In 2014, he was a Fellow in the Leadership Council on Legal Diversity. He currently serves on the Mission and Advocacy Committee of the Saint Thomas Health Services board of directors. He chairs the firm's Pro Bono Committee and is past President of the board of directors of the Duke Law Alumni Association. In 2012, David was appointed by the Tennessee Supreme Court as a commissioner on the state's Access to Justice Commission. He has served as President of the board of directors for Conexión Américas and the Tennessee Justice Center. He currently serves on the boards of the Nashville Public Library Foundation and Maddox Charitable Fund.

Related Services
- Regulatory & Administrative Proceedings
- Consumer Financial Services
- Litigation & Dispute Resolution
- Banks & Financial Institutions
- Monitorships

Accolades
- Mid-South Super Lawyers (2010-2015)
- Tennessee Bar Association — Harris A. Gilbert "Pro Bono Attorney of the Year" (2005)
- Tennessee Bar Foundation — Fellow

Education
- Duke University School of Law - J.D., 1997 -- Order of the Coif
- Duke University - B.A., 1992

Settlement Means It's Over - Right?

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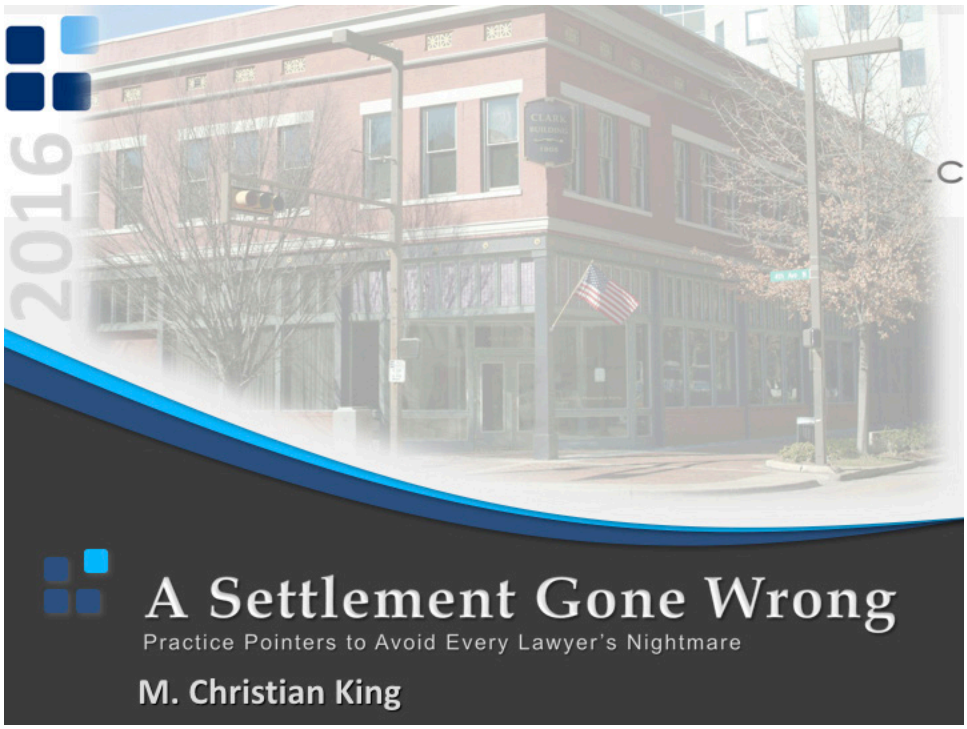
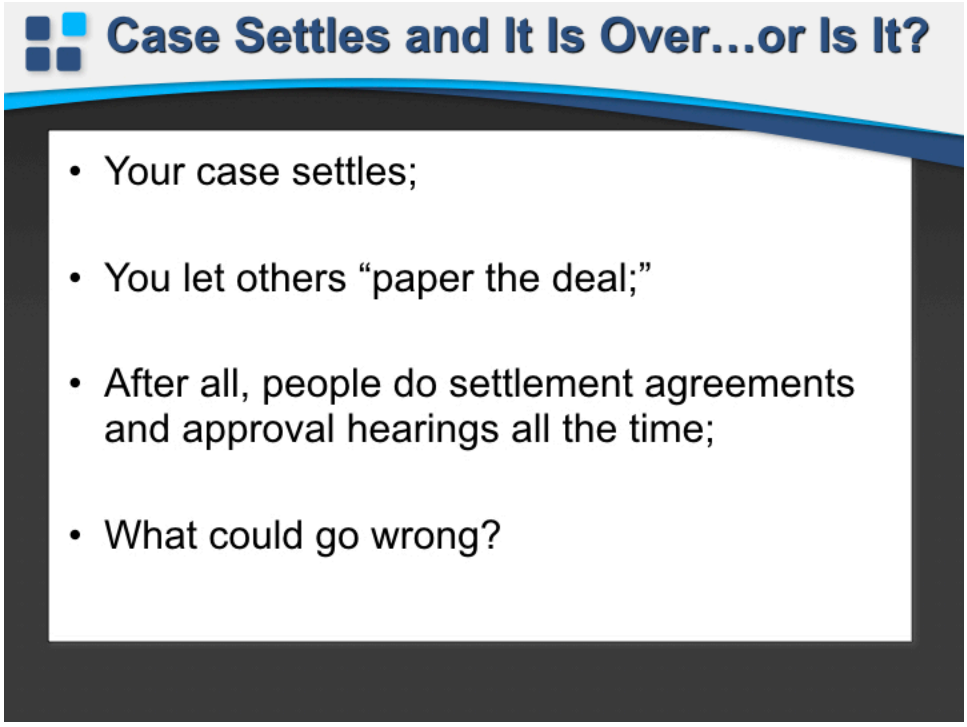
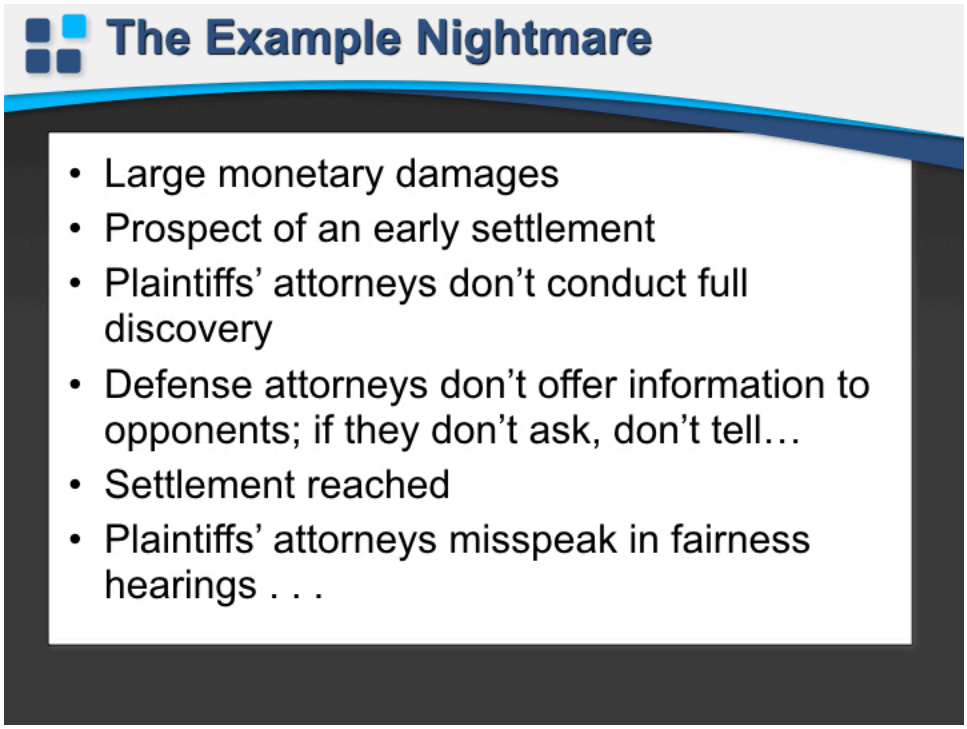
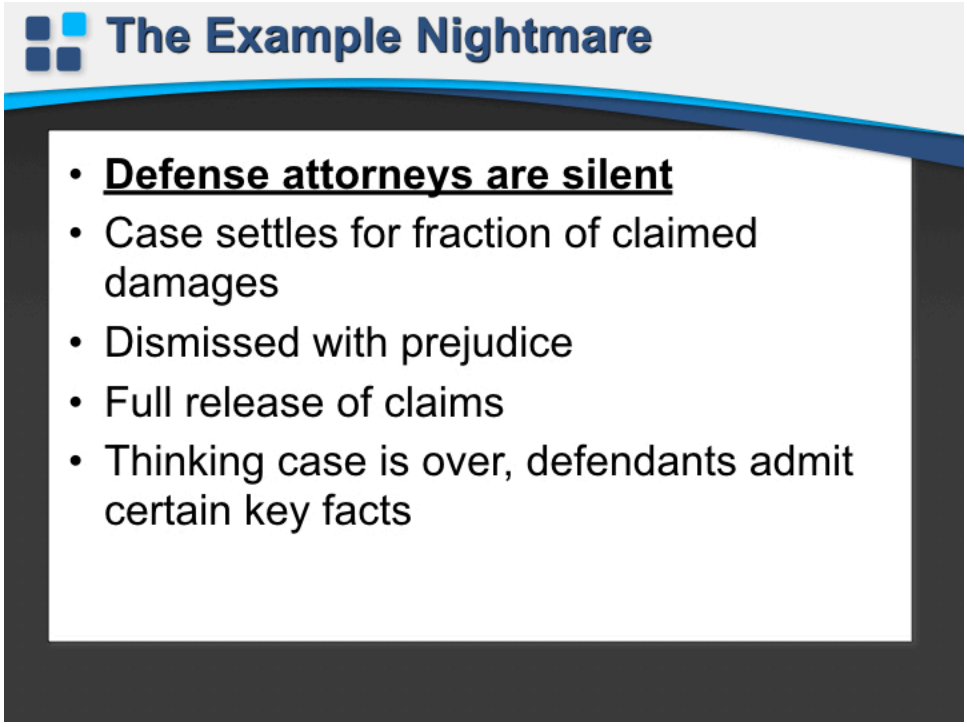
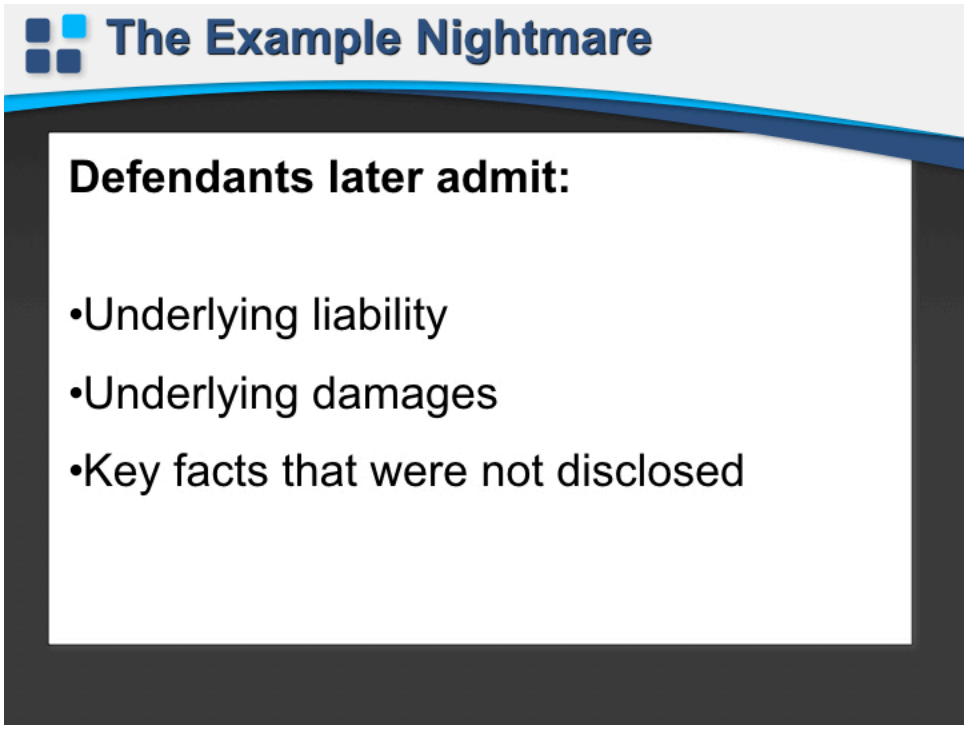
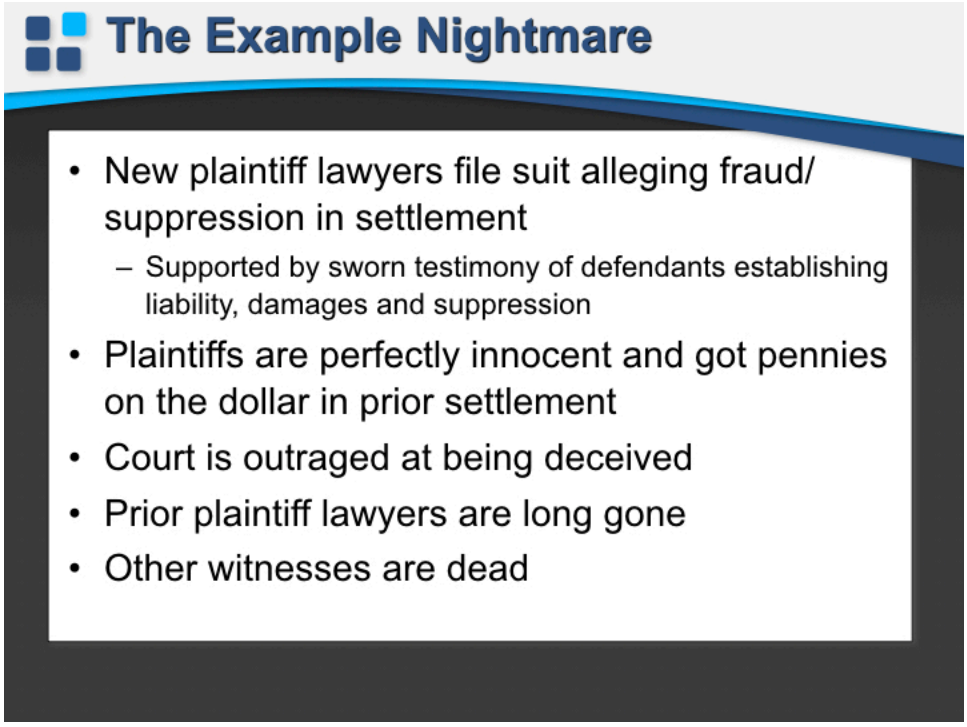


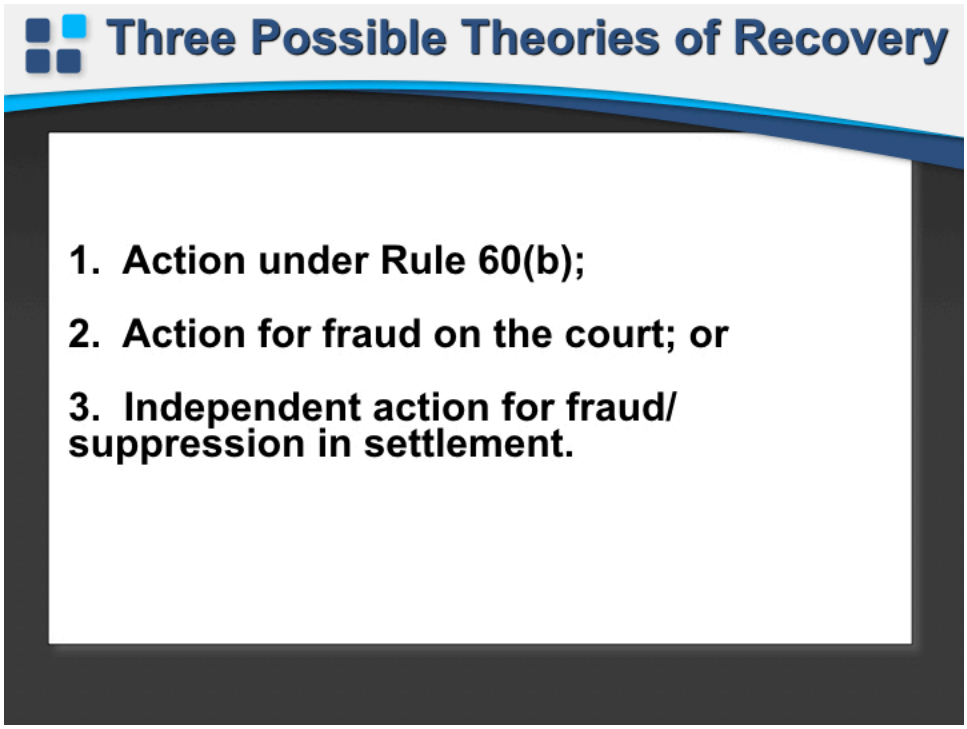

Case Settles and It Is Over…or Is It?
• Your case settles;
• You let others "paper the deal;"
• After all, people do settlement agreements and approval hearings all the time;
• What could go wrong?

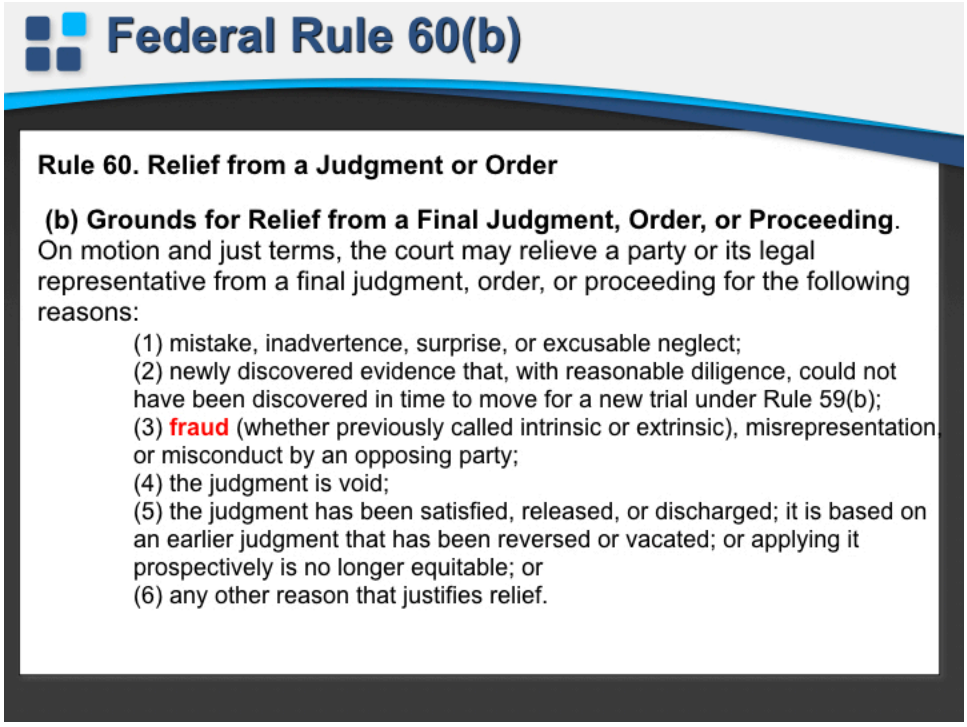

The Example Nightmare
• Large monetary damages
• Prospect of an early settlement
• Plaintiffs' attorneys don't conduct full discovery
• Defense attorneys don't offer information to opponents; if they don't ask, don't tell…
• Settlement reached
• Plaintiffs' attorneys misspeak in fairness hearings . . .

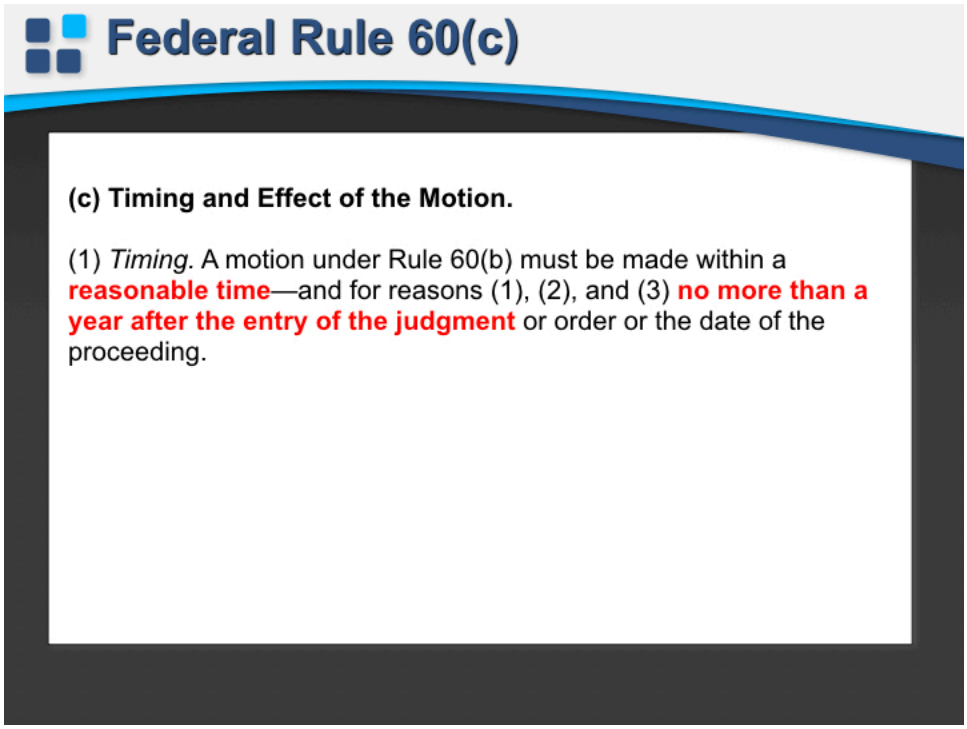

The Example Nightmare
• Defense attorneys are silent
• Case settles for fraction of claimed damages
• Dismissed with prejudice
• Full release of claims
• Thinking case is over, defendants admit certain key facts

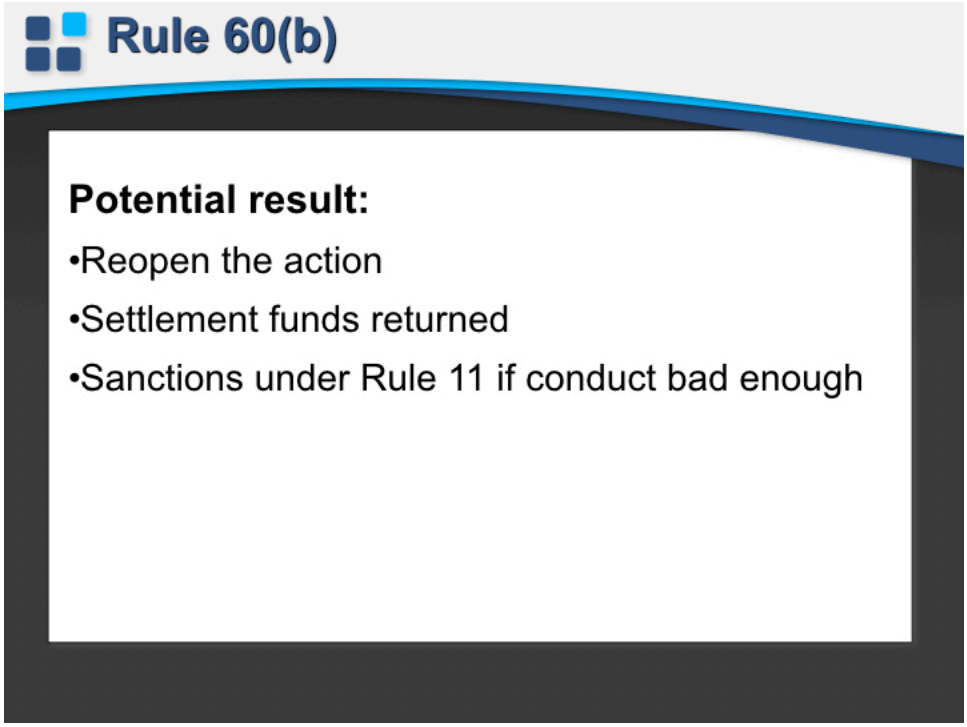

The Example Nightmare
Defendants later admit:
•Underlying liability
•Underlying damages
•Key facts that were not disclosed

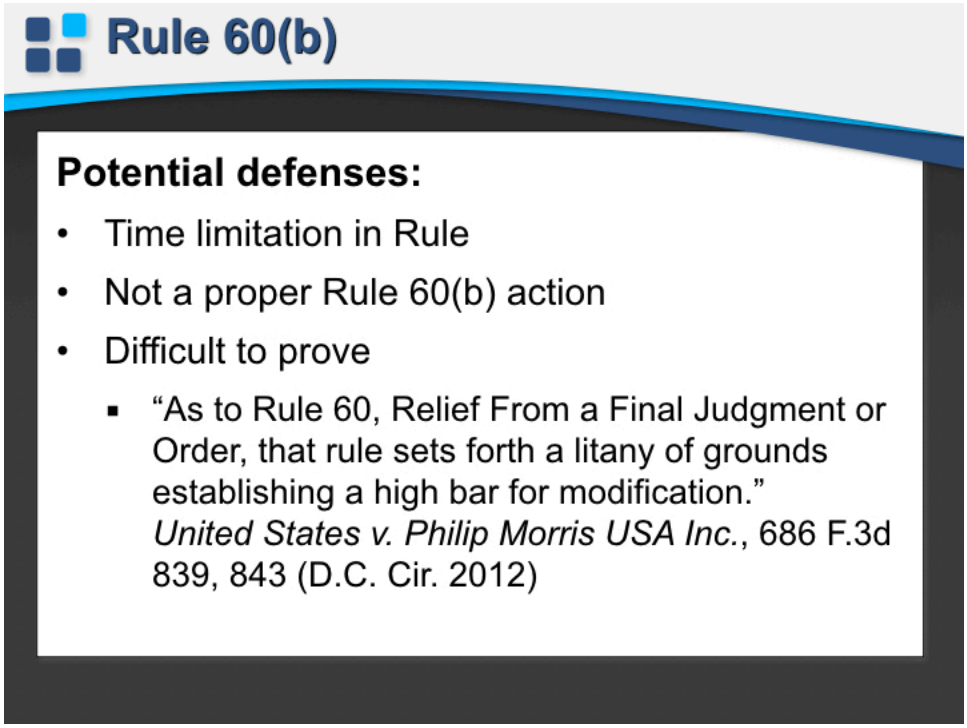

The Example Nightmare
• New plaintiff lawyers file suit alleging fraud/ suppression in settlement
– Supported by sworn testimony of defendants establishing liability, damages and suppression
• Plaintiffs are perfectly innocent and got pennies on the dollar in prior settlement
• Court is outraged at being deceived
• Prior plaintiff lawyers are long gone
• Other witnesses are dead

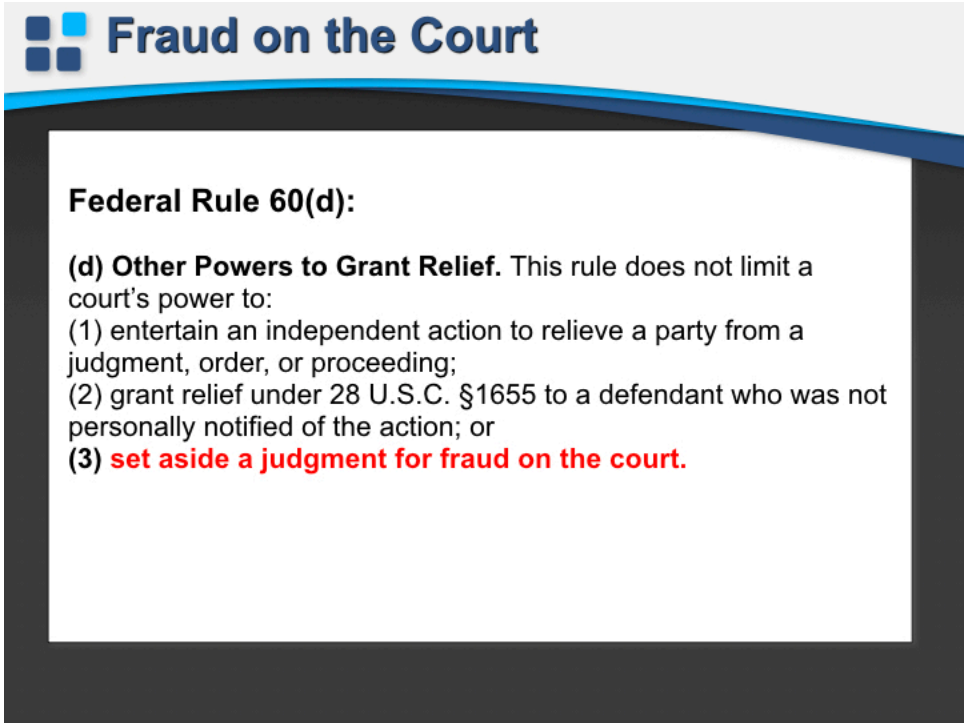

Three Possible Theories of Recovery
1. Action under Rule 60(b);
2. Action for fraud on the court; or
3. Independent action for fraud/ suppression in settlement.

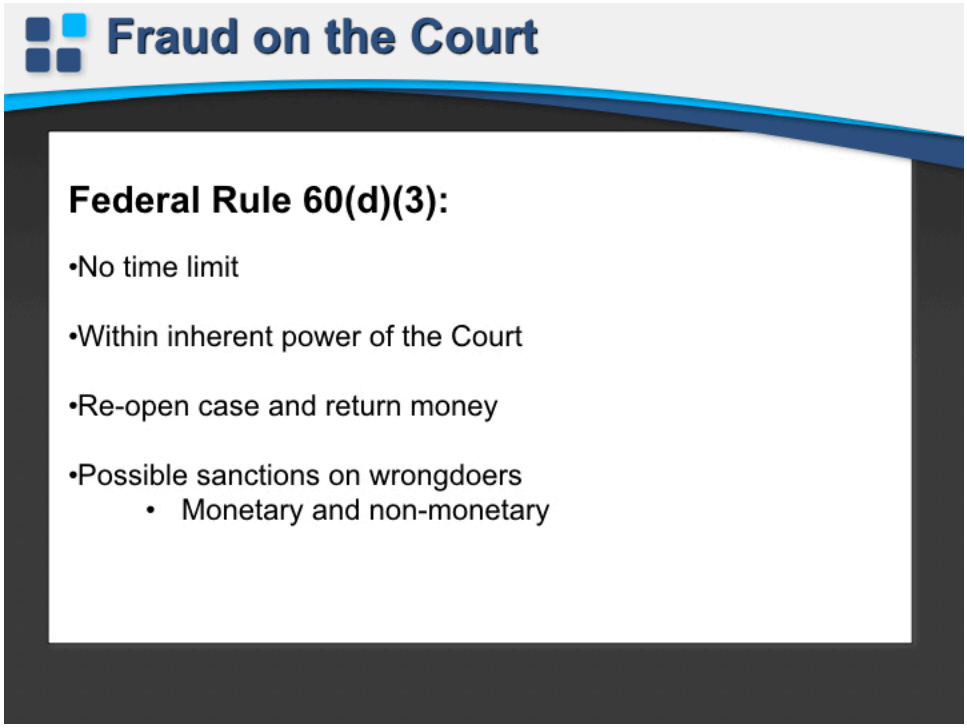

Federal Rule 60(b)
Rule 60. Relief from a Judgment or Order
(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

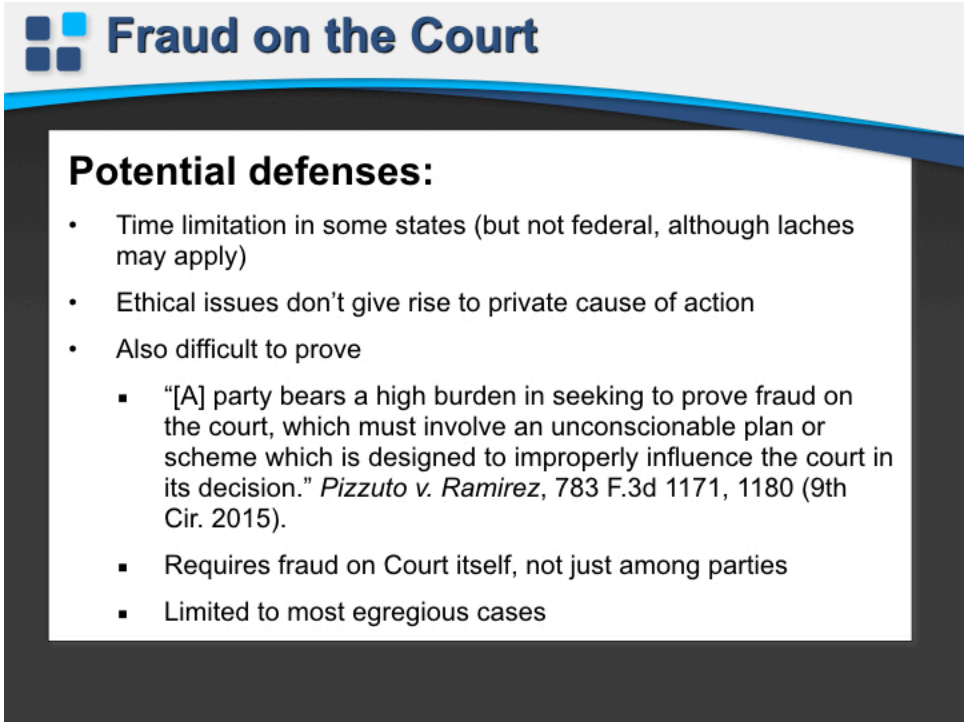

Federal Rule 60(c)
(c) Timing and Effect of the Motion.
(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

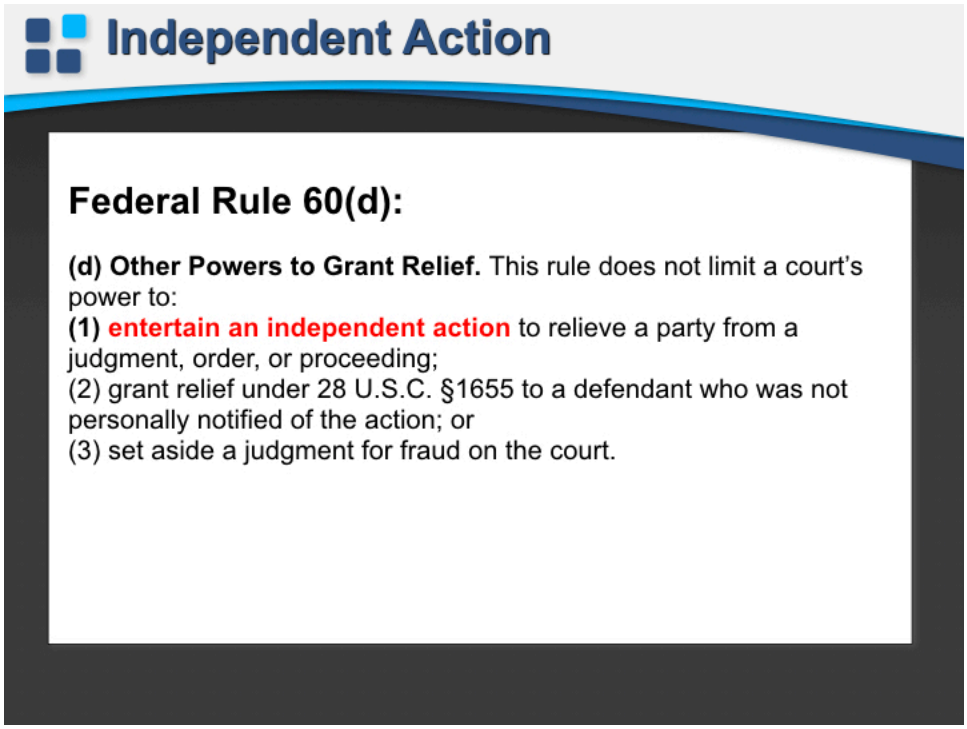

Rule 60(b)
Potential result:
•Reopen the action
•Settlement funds returned
•Sanctions under Rule 11 if conduct bad enough


Rule 60(b)
Potential defenses:
• Time limitation in Rule
• Not a proper Rule 60(b) action
• Difficult to prove
▪ "As to Rule 60, Relief From a Final Judgment or Order, that rule sets forth a litany of grounds establishing a high bar for modification." United States v. Philip Morris USA Inc., 686 F.3d 839, 843 (D.C. Cir. 2012)


Fraud on the Court
Federal Rule 60(d):
(d) Other Powers to Grant Relief. This rule does not limit a court's power to:
(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or
(3) set aside a judgment for fraud on the court.


Fraud on the Court
Federal Rule 60(d)(3):
•No time limit
•Within inherent power of the Court
•Re-open case and return money
•Possible sanctions on wrongdoers
• Monetary and non-monetary


Fraud on the Court
Potential defenses:
• Time limitation in some states (but not federal, although laches may apply)
• Ethical issues don't give rise to private cause of action
• Also difficult to prove
▪ "[A] party bears a high burden in seeking to prove fraud on the court, which must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Pizzuto v. Ramirez, 783 F.3d 1171, 1180 (9th Cir. 2015).
▪ Requires fraud on Court itself, not just among parties
▪ Limited to most egregious cases


Independent Action
Federal Rule 60(d):
(d) Other Powers to Grant Relief. This rule does not limit a court's power to:
(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
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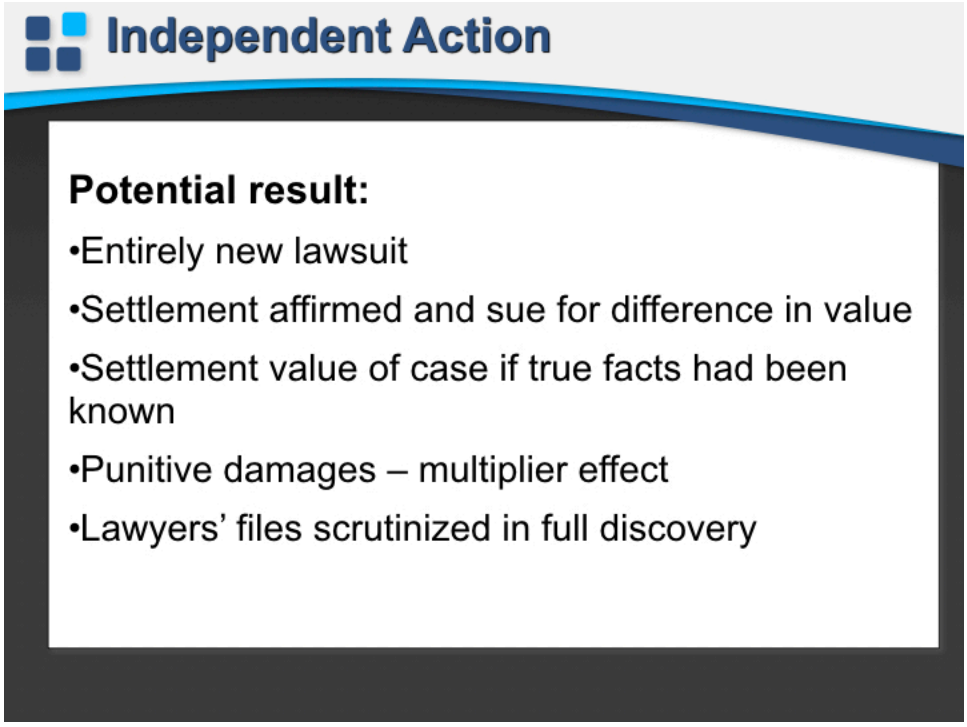
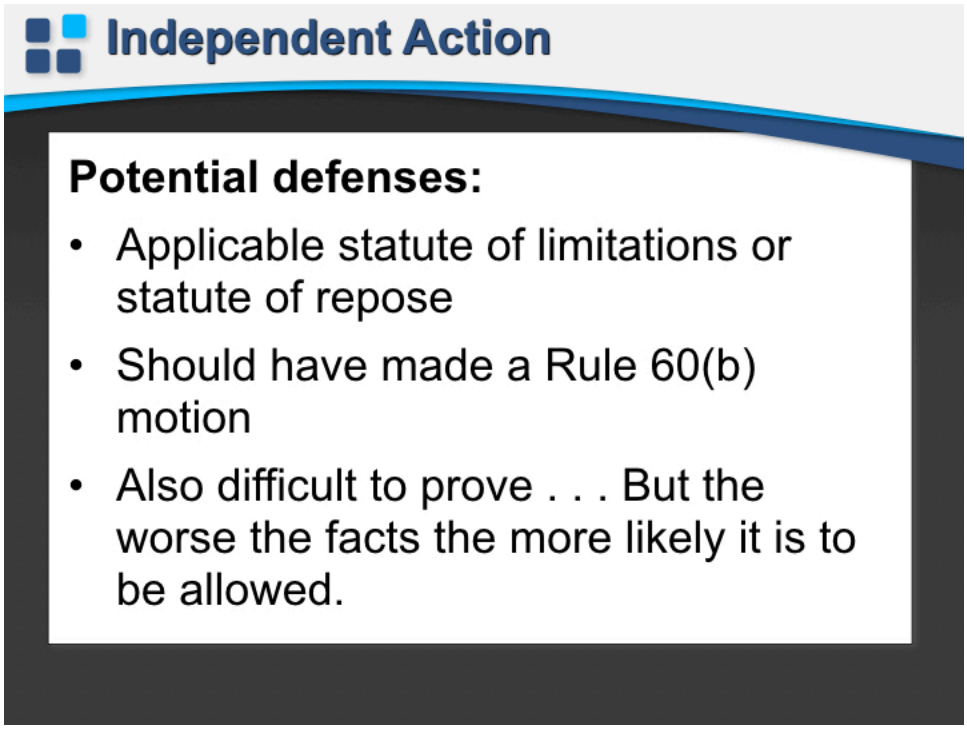
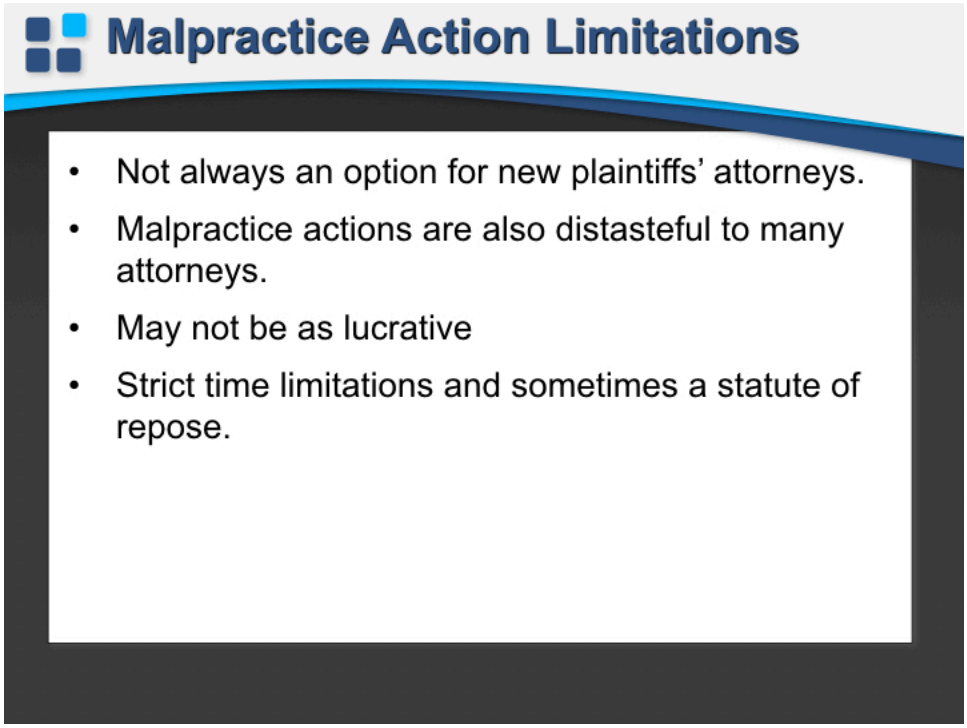
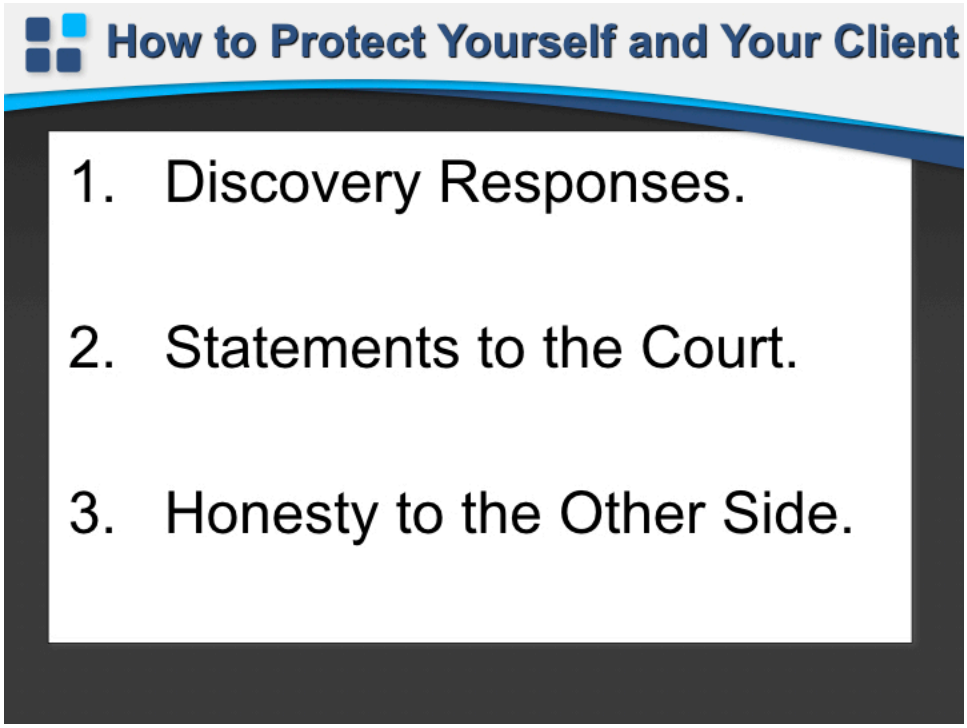
(3) set aside a judgment for fraud on the court.


Independent Action
Potential result:
•Entirely new lawsuit
•Settlement affirmed and sue for difference in value
•Settlement value of case if true facts had been known
•Punitive damages – multiplier effect
•Lawyers' files scrutinized in full discovery

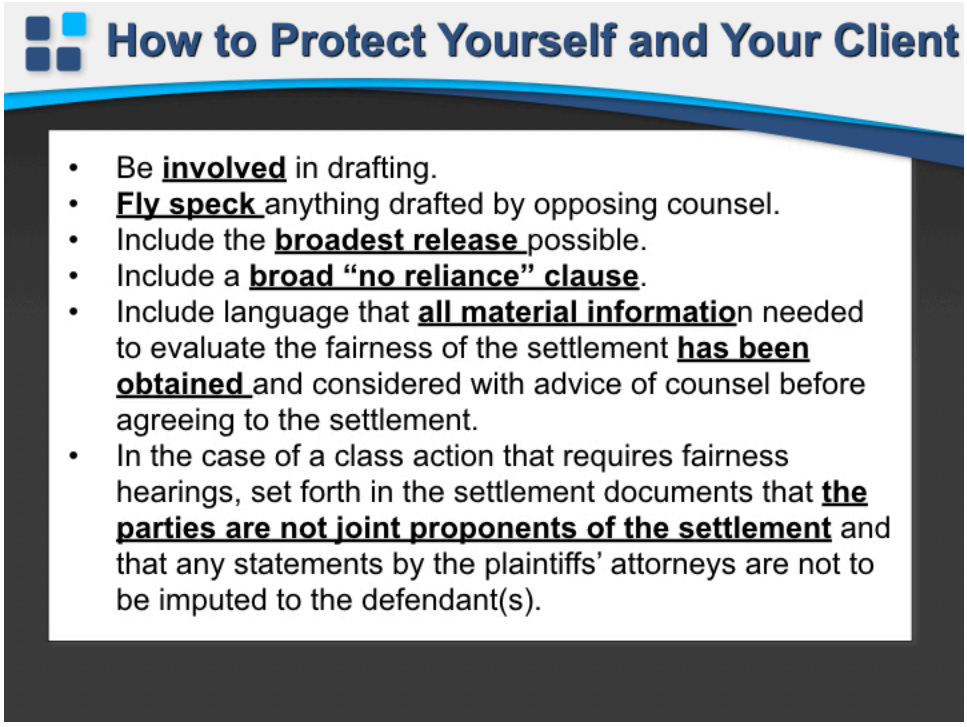

Independent Action
Potential defenses:
• Applicable statute of limitations or statute of repose
• Should have made a Rule 60(b) motion
• Also difficult to prove . . . But the worse the facts the more likely it is to be allowed.

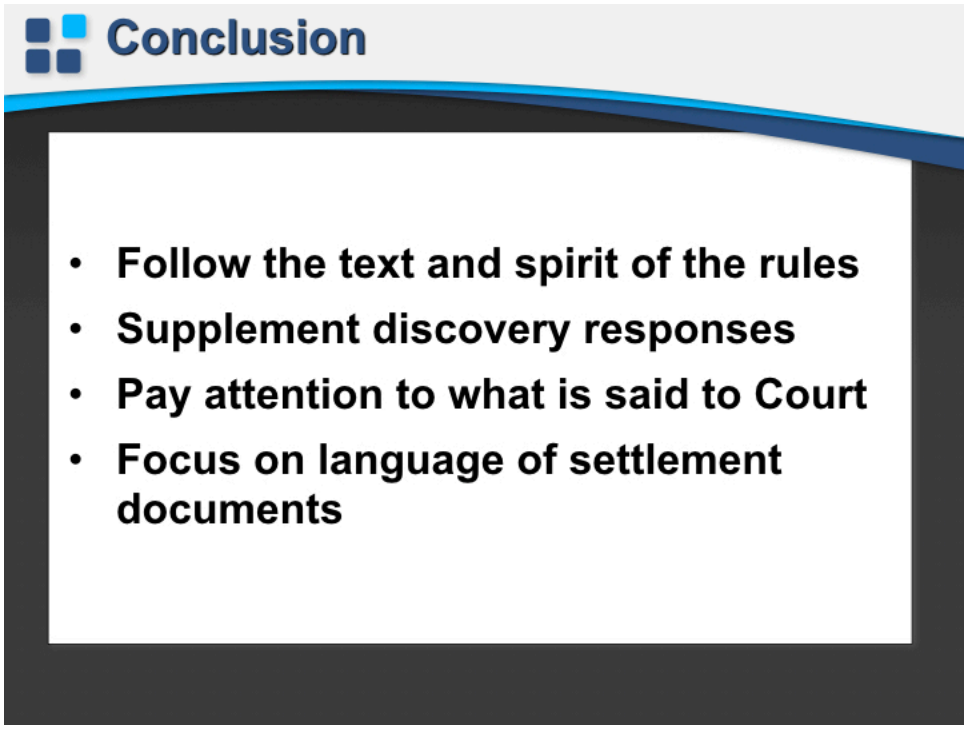

Malpractice Action Limitations
• Not always an option for new plaintiffs' attorneys.
• Malpractice actions are also distasteful to many attorneys.
• May not be as lucrative
• Strict time limitations and sometimes a statute of repose.


How to Protect Yourself and Your Client
DETAILS!


How to Protect Yourself and Your Client
1. Discovery Responses.
2. Statements to the Court.
3. Honesty to the Other Side.


How to Protect Yourself and Your Client
Proper Settlement Documents Once Agreement Reached.


How to Protect Yourself and Your Client
• Be involved in drafting.
• Fly speck anything drafted by opposing counsel.
• Include the broadest release possible.
• Include a broad "no reliance" clause.
• Include language that all material information needed to evaluate the fairness of the settlement has been obtained and considered with advice of counsel before agreeing to the settlement.
• In the case of a class action that requires fairness hearings, set forth in the settlement documents that the parties are not joint proponents of the settlement and that any statements by the plaintiffs' attorneys are not to be imputed to the defendant(s).


Conclusion
• Follow the text and spirit of the rules
• Supplement discovery responses
• Pay attention to what is said to Court
• Focus on language of settlement documents

A Settlement Gone Wrong: Practice Pointers to Avoid Every Lawyer's Nightmare

It finally happened. You settled the nightmare case. The case that kept you low on sleep and high on anxiety, not to mention in constant trouble with your significant other. So you're quick to catch up on sleep and move on to the cases that you neglected while you were otherwise occupied. You forget about those discovery responses that you never finalized and the documents you never produced, the documents that were made available to but were never inspected by the other side, and the discovery requests that you never supplemented—because why should they matter now? You quickly complete the settlement paperwork and put the nightmare to bed. You got a good result for your client, and everyone is satisfied.

But you can never be too sure. This paper gives a real-life example of what could happen if you fail to pay attention to detail during the pendency of a case or during settlement, and it explains how to avoid these potential pitfalls.

What, exactly, are these potential pitfalls, you wonder? How bad could it possibly be? Aside from the obvious threat of having a malpractice action filed against you, you could face (1) a potential Rule 60(b) motion, where the court retains jurisdiction, the settlement monies are returned, and the case is reopened; (2) a motion to reopen based on fraud on the court, which likewise reopens the action and could subject you to sanctions; or (3) a potential independent cause of action for fraud in the settlement where the plaintiff keeps the settlement proceeds and sues for the difference in the settlement value—i.e., what the case would have settled for had the true facts been known.

I. The Example Nightmare.

Imagine that you are involved in a series of securities class actions. You know from experience that the majority of class actions settle, and the focus of the case for your purposes is limiting damages and getting the best settlement possible. And, like every case, you try to be strategic. You wait for the other side to ask the right questions and discover the underlying facts. After all, litigation is an adversarial system, and you aren't going to do their job for them. But they never do any formal discovery. Instead, they review public filings, get some information informally, and want to settle quickly. A settlement is negotiated. Your client is happy to be done with the case, and the plaintiffs' attorneys are happy because they have achieved a nearly record-breaking settlement.

So, the plaintiffs' attorneys prepare a Stipulation of Settlement to present to the Court and do all the talking at the fairness hearings. At this point, it is over as far as you are concerned, and you leave it up to them to push the ball across the goal line, get the settlement approved, distribute the settlement funds and collect their fee. All that happens, the judge approves the settlement as fair and reasonable based on what is presented to him, and you move on to your next case. Or so you think.

But years later, the other side claims to discover that it had been operating under a misapprehension about some of the facts that it deemed material to the settlement. For example, plaintiffs' attorneys might discover documents from another source that should have been produced in the prior case. They might discover that discovery responses or sworn testimony given in the prior case was inaccurate. Or they might discover that more assets or insurance proceeds were available for settlement than they thought. That is when things get interesting.

The plaintiffs' attorneys (sometimes an entirely new set of attorneys seeking to benefit where others already have) file suit in a new action against the former defendants, alleging suppression and misrepresentation in connection with the settlement. They claim that they would have demanded millions more in settlement if they had known the true facts and seek compensatory and punitive damages running into the 9-figures.

The case can become a perfect storm. The plaintiffs' attorneys get to re-litigate the issues. Lawyers are witnesses. Their files are subpoenaed, and their time records are scoured with a fine-toothed comb. Witnesses are dead or in jail. The conduct of all of the lawyers is second-guessed. The court is outraged that it was "duped" into approving a settlement based on inaccurate information and feels like it has a duty to the class members to ensure that they are made whole. And even though the plaintiffs' attorneys didn't do their job in the initial lawsuit, the defendants are the ones being blamed for it.

We explain below the mechanisms through which a party can challenge a settlement and how to avoid this happening to you.

II. The Legal Mechanisms Available to Challenge a Settlement.

A. Rule 60(b).

The rules of procedure—in federal court and in most state courts—provide a specific method for setting aside a prior order or judgment. The federal rule, for example, permits a court to "relieve a party from a final judgment" for reasons such as mistake, newly discovered evidence, fraud, misrepresentation, a void judgment, release, "or any other reason that justifies relief." Fed. R. Civ. P. 60(b); see also e.g., Ala. R. Civ. P. 60(b); N.Y. C.P.L.R. 5015. But, importantly, these rules also set particular time frames in which a Rule 60 motion must be brought. The federal rule states that such a motion must be brought within a reasonable time, and for fraud, newly discovered evidence, and mistake/excusable neglect, no later than one year after the entry of judgment or order. By contrast, the Alabama Rule states that these motions must be made no later than four months after the judgment or order, but that the Rule "does not limit the power of the court to entertain an independent action within a reasonable time and not to exceed three (3) years after the entry of the judgment." Ala. R. Civ. P. 60(b). And the New York C.P.L.R. provides a specific limitation only if relief is sought on the basis of "excusable neglect; otherwise a motion need only be brought in a "reasonable time." N.Y. C.P.L.R. C5015:3. See also, e.g., Fla. R. Civ. P. 1.540(b) (permitting relief from a judgment, decree, or order in the event of "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc." and stating that "[t]he motion shall be filed within a reasonable time, and for [mistake, inadvertence, surprise, excusable neglect; newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party] not more than 1 year after the judgment, decree, order, or proceeding was entered or taken"); Mass. R. Civ. P. 60(b) (same); N.J. Ct. R. R. 4:50-1 & 4:50-2 (same),

Regardless of the jurisdiction, this mechanism for relief is ordinarily limited. The upshot of Rule 60(b) is generally that it "is available . . . only to set aside the prior order or judgment. It cannot be used to impose additional affirmative relief." United States v. One Hundred Nineteen Thousand Nine Hundred Eighty Dollars, 680 F.2d 106, 107 (11th Cir. 1982) (citation omitted); see also Adduono v. World Hockey Ass'n, 824 F.2d 617, 619-20 (8th Cir. 1987) (reversing district court for imposing sanctions and fees under a Rule 60 motion because it was limited under Rule 60 to setting aside its order of dismissal). Thus, while Rule 60 can be used to reopen an action, it has only the effect of unraveling the prior resolution and continuing the prior action. But see Fed. R. Civ. P. 60(d)(1) (noting that Rule 60 "does not limit a court's power to . . . entertain an independent action to relieve a party from a judgment, order, or proceeding."). And in that sense, it is perhaps the lesser of two (or more) potential evils because an independent action like our above example could have potentially far worse repercussions, particularly where fraud is allegedly involved. Moreover, in a Rule 60(b) action, the parties have the benefit of a judge already familiar with the case, which may not be the case with our other options.

Because of its limitations, plaintiffs and plaintiffs' attorneys often prefer not to choose this option if possible. Specifically, this method of undoing a settlement ordinarily has fairly strict time limitations across jurisdictions to promote finality in judgments, which means the window of time may have already passed by the time plaintiffs' attorneys decide to take action. See, e.g., AAA Nevada Ins. Co. v. Buenaventura, No. 13-17664, 2016 WL 1019269, at *2 (9th Cir. Mar. 15, 2016) ("What constitutes 'reasonable time' [under Federal Rule of Civil Procedure 60(b)] depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." quoting Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam))); Giroux v. Fed. Nat. Mortgage Ass'n, 810 F.3d 103, 108 (1st Cir. 2016) ("The high threshold required by Rule 60(b)(6) reflects the need to balance finality of judgments with the need to examine possible flaws in the judgments." quoting Bouret-Echevarria v. Caribbean Aviation Maint. Corp., 784 F.3d 37, 42 (1st Cir. 2015)); see also, e.g., United States v. Philip Morris USA Inc., 686 F.3d 839, 843 (D.C. Cir. 2012) ("As to Rule 60, Relief From a Final Judgment or Order, that rule sets forth a litany of grounds establishing a high bar for modification.").

But more importantly, plaintiffs' attorneys may prefer not to choose this option because it also involves giving the settlement money back and re-opening the case. And in some cases, such as the class action context like our example case, this route is simply not a viable option because it would be virtually impossible to refund the settlement proceeds after they have been distributed. And if a Rule 60(b) motion is not a realistic option in a particular case, plaintiffs' attorneys may resort to one of the next two options. But see Roger Edwards, LLC v. Fiddes & Son Ltd., 427 F.3d 129, 134 (1st Cir. 2005) (explaining that a Rule 60(b)(3) motion alleging fraud during the course of litigation can be easier to prove because one must prove "merely" that the fraud "substantially interfered with the movant's ability fully and fairly to prepare for, and proceed at, trial" and that "[t]his is a far less demanding burden than showing that a different result would probably have ensued" (internal quotation marks and citations omitted)).

B. Fraud on the Court.

A second, potentially worse option than your typical Rule 60(b) motion, is an allegation of fraud on the court. A subset of Rule 60 in federal court is an action for "fraud on the court," which falls under the "other powers to grant relief" provision of Rule 60(d). In federal court, actions for fraud on the court can come in many different forms, there is no time limit on them, and it is within the inherent power of the court to vacate a judgment that was obtained by fraud. See Drobny v. C .I.R., 113 F.3d 670, 677 (7th Cir. 1997) ("A] decision produced by fraud on the court is not in essence a decision at all, and never becomes final."); see also Wright & Miller,11 Federal Practice & Procedure § 2870 (3d ed.); see also, e.g., Ala. R. Civ. P. 60(b) (stating the rule "does not limit the power of a court to . . . set aside a judgment for fraud upon the court"); Fla. R. Civ. P. 1.540 ("This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court."); N.J. Ct. R. R. 4:50-3 (same). But see Matthews, Wilson & Matthews, Inc. v. Capital City Bank, 614 F. App'x 969, 971 (11th Cir. 2015) (noting that the equitable doctrine of laches "does apply"); N.Y. C.P.L.R. 5015 (treating fraud upon the court under the same provision as regular fraud); Va. Code § 8.01-428 (stating that a "motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree").

Given the general flexibility in federal court and in many states regarding time limits on bringing such actions along with the offensive nature of such an action—if legitimate—to a court, these allegations can be far more worrisome than an average Rule 60(b) motion. The remedy if such fraud has indeed occurred is ordinarily to vacate the judgment and deny "the guilty party [of] all relief." Boyer v. GT Acquisition LLC, No. 106-CV-90-TS, 2007 WL 2316520, at *4 (N.D. Ind. Aug. 9, 2007). Sanctions may be imposed, and the entire cost of the proceedings, including attorneys' fees, may be assessed against that party who perpetrated the fraud. See Wright & Miller, 11 Federal Practice & Procedure § 2870 (3d ed.).

In general, "[f]raud on the court which justifies vacating a judgment is narrowly defined as fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." United States v. Smiley, 553 F.3d 1137, 1144 (8th Cir. 2009) (internal quotation marks and citations omitted). Examples of fraud on the court in a settlement context can be seen most clearly in the class action or pro ami context, where court approval is required—as a fiduciary for the class or the minor—to settle the action. See, e.g., In re Tremont Sec. Law, State Law, Ins. Litig., No. 08 CIV. 11117, 2013 WL 795974, at *2 (S.D.N.Y. Mar. 1, 2013) (arguing fraud on the court after approval of settlement through fairness hearing); CA, Inc. v. Wang, No. 04-CV-2697 TCP, 2011 WL 5401324, at *15 (E.D.N.Y. Nov. 4, 2011) (same). But while those are the most obvious, fraud on the court can stretch much farther than just those scenarios in a settlement context. See Burlington N. R. Co. v. Warren, 574 So. 2d 758, 764 (Ala. 1990) (holding a consent judgment was fraud on the court and stating, "where fraud is practiced upon a party to induce the party to enter into an agreement, and the wrongdoer intends that the court adopt that fraudulent agreement as part of a judgment, then there is fraud upon the court."); id. ("[O]nly that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication."); R.C. by Alabama Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682, 690-91 (M.D. Ala. 1997),

aff'd sub nom. R.C. v. Nachman, 145 F.3d 363 (11th Cir. 1998) ("Fraud upon the court is . . . typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged."). Luckily, because fraud on the court is so difficult to establish, very few of these actions are successful. See, e.g., In re Sealed Case (Bowles), 624 F.3d 482, 489 n.4 (D.C. Cir. 2010) ("Appellant's allegations of fraud do not meet the high threshold for showing a fraud on the court."); Dempsey v. Arco Oil & Gas Co., 25 F.3d 1043 (5th Cir. 1994) (reviewing district court ruling for abuse of discretion and stating that a " reversal will be granted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust" (internal quotation marks and citation omitted)); see also, e.g., Pizzuto v. Ramirez, 783 F.3d 1171, 1180 (9th Cir. 2015) ("[A] party bears a high burden in seeking to prove fraud on the court, which must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." (internal quotation marks and citations omitted)); Matthews, Wilson & Matthews, Inc. v. Capital City Bank, 614 F. App'x 969, 971 (11th Cir. 2015) ("Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." (internal quotation marks and citation omitted)).

But if successful, a likely result is a reopening of the action and heavy sanctions (both monetary and non-monetary) against the party that committed the fraud. See, e.g., Haeger v. Goodyear Tire & Rubber Co., 813 F.3d 1233, 1237, 1254 (9th Cir. 2016) (affirming monetary and non-monetary sanctions by district court imposed under inherent power because of "deliberate decisions by [defendants] to delay the production of relevant information, make misleading and false in-court statements, and conceal relevant documents").

C. Independent Cause of Action for Fraud.

Finally, an opponent can attempt to affirm the settlement and sue for more money by way of an independent action for fraud, much like our example case. Although much more rare, this type of an action could be a tremendous threat, especially given the potential for punitive damages in fraud actions. Although many courts may not permit such an action and may conclude that Rule 60(b) is the only available remedy, some courts have held otherwise. See, e.g., Ex parte Caremark RX, Inc., 956 So. 2d 1117, 1125 (Ala. 2006) ("As the complaint is now drafted, [the] only option is to proceed with [the] misrepresentation and suppression claims as a new action."). But see, e.g., Pondexter v. Pennsylvania Human Relations Comm'n, 556 F. App'x 129, 131 (3d Cir. 2014) (dismissing new action with additional defendants); Villarreal v. Brown Exp., Inc., 529 F.2d 1219, 1221 (5th Cir. 1976) (holding that new complaint filed regarding prior settlement in reality fell under Rule 60(b)); Aldana v. Del Monte Fresh Produce N.A., Inc., 741 F.3d 1349, 1359 (11th Cir. 2014) (stating relief is available under this mechanism only to prevent a grave miscarriage of justice); id. ("The Supreme Court has made clear that such '[i]ndependent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." (internal quotation marks and citations omitted)). And of course, the worse the conduct appears, the more likely it becomes that a court will find a way to allow the action to proceed, regardless of any Rule 60(b) time limits. After all, as lawyers we have all heard the old adage that "bad facts made bad law," and it unfortunately turns out to be true more often than we would like.

Although "[p]roper resorts to independent actions are rare, Matthews, Wilson & Matthews, Inc. v. Capital City Bank, 614 F. App'x 969, 971 (11th Cir. 2015), if such an action is permitted to proceed, the potential damages could get worse than just sanctions by a court. Not only can the plaintiffs' recover the difference between what the settlement was and what it would have been had the suppressed or true facts been known, they can recover punitive damages to punish the defendants for the fraud and suppression. And in a case like our example case, where the members of the class are painted as innocent victims of a fraud, a high jury verdict becomes a very real risk.

III. A Malpractice Claim May Not Be a Viable Alternative.

The obvious alternative to a case like our example case is a malpractice action against the plaintiffs' attorneys who failed to conduct thorough discovery and do their jobs for the class members. And this may well be a

potential alternative (that is of course better for you and your client) if the timing is right. But, like Rule 60, there are time limitations that could apply. Most if not all states have statutes of limitations on malpractice claims against lawyers, and some states even have statutes of repose, making recovery impossible after a certain number of years. See, e.g., Ala. Code § 6-5-574 (Alabama); 735 ILCS 5/13-214.3 (Illinois); La. Stat. § 9:5605 (Louisiana); MCL 600.5838b (Michigan); N.C. Gen. Stat. § 1-15; Tenn. Code § 28-3-104 (Tennessee). For this reason, a malpractice claim may not be a viable alternative for unhappy plaintiffs.

IV. How to Protect Yourself and Your Client.

A. Attention to Detail During the Case.

Often times it is easy to go through the motions of a case without thinking about strategy long term, particularly where settlement is on the table from the start, like in the case of a class action. But our example case illustrates that one can never be too careful in paying attention to the details and in thinking one step ahead. Below are just a few examples of ways in which you can protect yourself and your client during an action.

1. Discovery Responses. Discovery responses are something we often go through the motions of without truly thinking about the end game. It is dangerous to hide the ball or give evasive answers and rely on the plaintiffs' attorneys to be diligent and file motions to compel, particularly about "material" matters. If the plaintiffs' attorneys fail to push for all of the facts, any less than complete discovery responses could potentially be construed as suppression or misrepresentation in a later action for fraud. Moreover, Rule 26 in federal court and most if not all states imposes a duty to supplement discovery responses "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). Therefore, the rules create a duty of full disclosure, which you must comply with, even if your opponent is lazy.

2. Statements in Court. As officers of the Court, certainly most lawyers strive to be honest, but mistakes happen, especially in the heat of the moment. Keep in mind that in some circumstances, such as a fairness hearing or a pro ami hearing, you may even have an arguable duty to speak to correct the other side's misstatement as potential joint proponents of the proposed settlement. The key is to be sure that the court is aware of and has considered all material facts; otherwise you may later face an action for fraud on the court, or worse. Likewise, should you or someone from your own side misspeak, it is prudent to correct that misstatement—however small—during the hearing, by subsequent letter, and/or in a subsequent hearing. Taking precautions such as this will protect both you and your client from later collateral attack on any settlement.

3. Honesty to Opposing Counsel. While we work in an adversarial system, honesty is still always the best practice. Obviously, you should not divulge case strategy or privileged information, and it can be difficult to determine where to draw the line at times. But certainly, honest discovery responses are the responsibility of the client and the lawyer. Where supplementation of discovery responses is required under the applicable rules of civil procedure for some material change—do it! Do not sit on your hands and wait for a motion to compel that may never come. Do not "whistle past the graveyard" and hope the case settles before you have to correct a prior discovery response. Because you have an affirmative duty to supplement your responses, pointing the finger at the other side for failure to do their own job later may not help you.

B. Proper Settlement Documents.

As already discussed, most lawyers' inclination once settlement is reached in principle is to move on and let someone else handle the details or to gloss over important details in an effort to get the case over the finish line. Don't fall into that trap. Making sure that the settlement documents are iron clad may help in a later action challenging the very same settlement. Some suggestions include the following:

1. Be involved in the drafting of the documents so that you have control over the initial language, instead of simply revising the language that someone else chose.

2. Fly speck anything drafted by opposing counsel, even the most routine clauses, and correct any even arguable misstatements or misrepresentations.

3. Include the broadest release possible. Although this may not help in an action for fraud, including fraud in the release may convince some courts that

the parties meant what they said.

4. Include a "no reliance" clause that is as broad as possible and specifies that the plaintiffs' attorneys have done their own investigation into the merits of the case and that they rely on no representations by you or your client in entering into the settlement.

5. Include language that all material information needed to evaluate the fairness of the settlement has been obtained and considered with advice of counsel before agreeing to the settlement.

6. In the case of a class action that requires fairness hearings, set forth in the settlement documents that the parties are not joint proponents of the settlement and that any statements by the plaintiffs' attorneys are not to be imputed to the defendant(s).

V. Conclusion.

We like to think that when a case settles it won't come back to haunt us, but the reality is that many cases do, particularly when large sums of money are involved. The lesson from our example case is that even a series of small missteps could later be used against you and your client in an action for fraud in the settlement, fraud on the court, or in a Rule 60(b) motion. Don't ignore the details at the expense of your client. Make it a routine to strive for perfection all the way through the process, and you—and more importantly your clients—will never be disappointed.

M. Christian King

Partner
Lightfoot Franklin & White (Birmingham, AL)

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Mr. King is one of the founding partners of the firm and its former managing partner. After practicing law for over thirty years, he remains passionate about solving his clients' problems, whether through pre-lawsuit advice, negotiation, or trial.

Mr. King handles high stakes litigation, often involving derivative or class action allegations or significant punitive damages claims, at both the trial and appellate levels. Much of his work is for Fortune 100 companies, including those in the financial services, manufacturing, and energy sectors, and he often works hand-in-hand with lawyers throughout the United States to address serial claims against his clients. He has handled high exposure cases throughout the Southeast, and has tried many of them to verdict for both plaintiffs and defendants. In addition, Mr. King is often retained to handle post-trial motions and appeals in cases he did not try. Through this work, he has gained extensive experience with the post-trial and appellate review of punitive damage awards and the limits imposed by the U.S. Constitution on such awards. Mr. King has presented argument in the Alabama Supreme Court in numerous cases, including a number of seminal consumer fraud cases and the appeal of the largest judgment in Alabama history, and has also argued in several United States Circuit Courts of Appeals. Mr. King is a member of the Adjunct Faculty at The University of Alabama School of Law, where he teaches a course on Appellate Advocacy each Fall semester. He also lectures frequently at CLE events on class actions, punitive damages, appellate issues, and ethics.

Mr. King is a Fellow of the American College of Trial Lawyers and a member of the American Board of Trial Advocates (ABOTA). He has been listed for many years in The Best Lawyers in America, and is currently listed in the Bet-the-Company Litigation, Commercial Litigation, Environmental Litigation, and Securities Litigation categories. In addition, he has been named as a "local litigation star" by Benchmark Litigation and as a "notable practitioner" by Chambers and Partners. Mr. King has also been listed in the Alabama edition of Super Lawyers magazine from its inception, having been named as one of Alabama's Top Fifty in the inaugural edition.

Mr. King is the son of an outstanding Mississippi trial lawyer, is married to the daughter of an outstanding Alabama trial lawyer, and is the proud father of four sons.

Practice Areas
- Business Litigation
- Class Actions
- Appellate
- Securities and Shareholder Disputes
- Directors' and Officers' Liability
- Environmental and Toxic Torts
- Professional Liability Litigation
- Software and Technology Litigation
- Consumer Fraud and Bad Faith

Education
- B.A., Rhodes College, 1979 with distinction
- J.D., University of Virginia School of Law, 1982

Best Practices For Internal Investigations

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GIBBONS

Best Practices for Internal Investigations

What We Can Learn from NFL Headlines

John C. Romeo
Director, Gibbons P.C.

gibbonslaw.com

On the One Hand: Effective Workplace Investigations

"The Board believes that the hearing record shows that the Company conducted a fair and thorough investigation and that [the Investigator] conducted himself in a professional and objective manner"

On the Other Hand: The NFL in the News

"NFL Ignores Ball Deflation Science at New England Patriots' Expense"

- NY Times

"NFL Deflated the Truth – And Owes the Court a Correction"

- Washington Post

"True Scandal of Deflategate Lies in NFL's Behavior"

- NY Times

Effective Workplace Investigations




Preparation
- Good policies
- Good training
- Consistent execution

Responding to Allegations
- Identify with specificity
- Decide whether/what to investigate

Investigating
- Decide who will investigate
- Review policies
- Review documentary evidence
- Interview critical witnesses
- Document everything
- Maintain confidentiality

Take Appropriate Corrective Action, If Necessary

Identify Specific Allegations & Respond Promptly

Complaints come in many forms

- Written, verbal, from the complainant, a third party, anonymous source, etc.
- Criminal charges by law enforcement

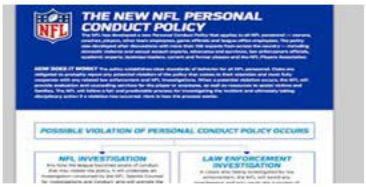
How do you handle?

- "I'm just telling you this to get it off my chest – I do not want you to investigate it . . ."
- "I don't want anyone to get in any trouble because I complained."
- "Please don't tell anyone about this. I don't want to lose my job and, even if I don't, I worry that I will be treated differently."

What do your Supervisors/Managers Know?

Identify Specific Allegations & Respond Promptly

"Dolphins O-Line Coach Was Aware Of, Participated In Harassment"
- Deadspin.com



"NFL Personal Conduct Policy requires all players and club employees to report 'any incident that may be a violation of this policy, and, particularly when any conduct results in an arrest or other criminal charge'"

- Robert Mueller Report

Conducting the Investigation

First Question: Is an investigation necessary?

- Are key facts in dispute?
- Is this a systemic issue?
- Is there a legal obligation to investigate?
- Would the conduct violate the employer's rules or code of conduct/ethics?
- Do the allegations call for an organizational assessment?

If you determine that no investigation is necessary:

- Document the reasons why no investigation was conducted
- Follow-up with the complainant
- Encourage the complainant to report any new or additional information

If you determine that an investigation is necessary, commence the investigation PROMPTLY

- Don't set unrealistic expectations!

NFL Mistakes: Delay

"NFL: 'Deflategate' investigation to be finished in 2-3 days"
- Comcast SportsNet (01/20/2015)

"League statement suggests a long Deflategate investigation"
- NBC SportsTalk (01/23/2015)

"Umm Is The NFL and Roger Goodell Ever Going To Address #Deflategate Or Just Pretend It Never Happened?"
- Barstool Sports (03/17/2015)

Define Scope/Goals of Investigation

Pre-Investigation considerations:

- Define the SCOPE/OBJECTIVES of the investigation
- Determine if there is a need for INTERIM MEASURES
- Assess and PRIVILEGE/PRIVACY considerations
- Are there any LITIGATION HOLD obligations
- Will there be UNION involvement
- Determine the need for any SUBJECT MATTER EXPERTS
- Any immediate DOCUMENT RETENTION concerns

Be prepared to defend the investigation, including the choice of investigator and the process that was followed

Avoid common pre-investigation mistakes!

Selecting Proper Investigator(s)

- The Investigator should be impartial and objective, and have the necessary skills, training and time to properly conduct the investigation
- Investigation Guidelines
- Consider privilege issues (and waiver of privilege)
- Additional risks when conduct also is unlawful

Selecting Proper Investigator(s)

Impartiality is Key!

Investigator must be impartial and viewed as impartial

- By participants
- By those on the outside looking in

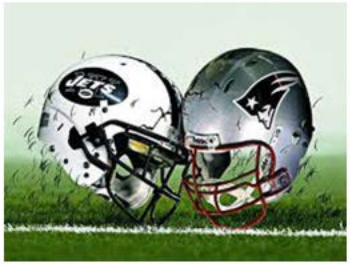
Avoid any actual or perceived conflict of interest

- Personal relationships
- Witnesses
- Same chain of command as complainant or alleged wrongdoer

NFL Mistakes: Perceived Bias

"Report: Former Jets employee in charge of Deflategate investigation NFL VP of Game Operations, Mike Kensil, is in charge of the Deflategate investigation, but has ties to the Patriots division rival, the New York Jets."

- Sports Illustrated



NFL Mistakes: Perceived Bias

NFL Mistakes: Perceived Bias

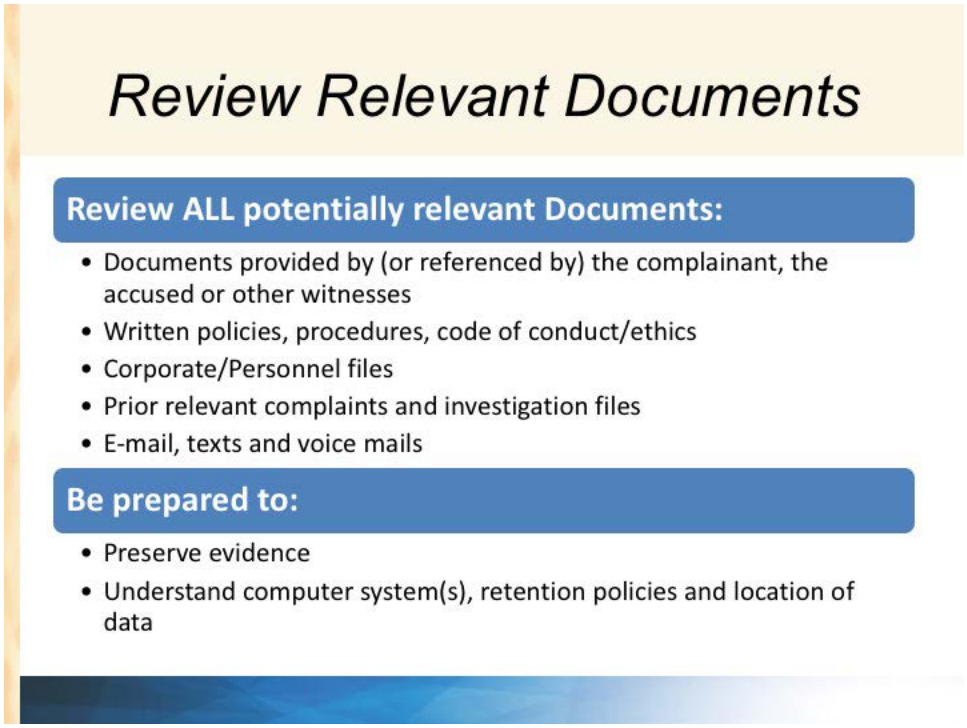
Hon. Richard M. Berman, U.S.D.J.

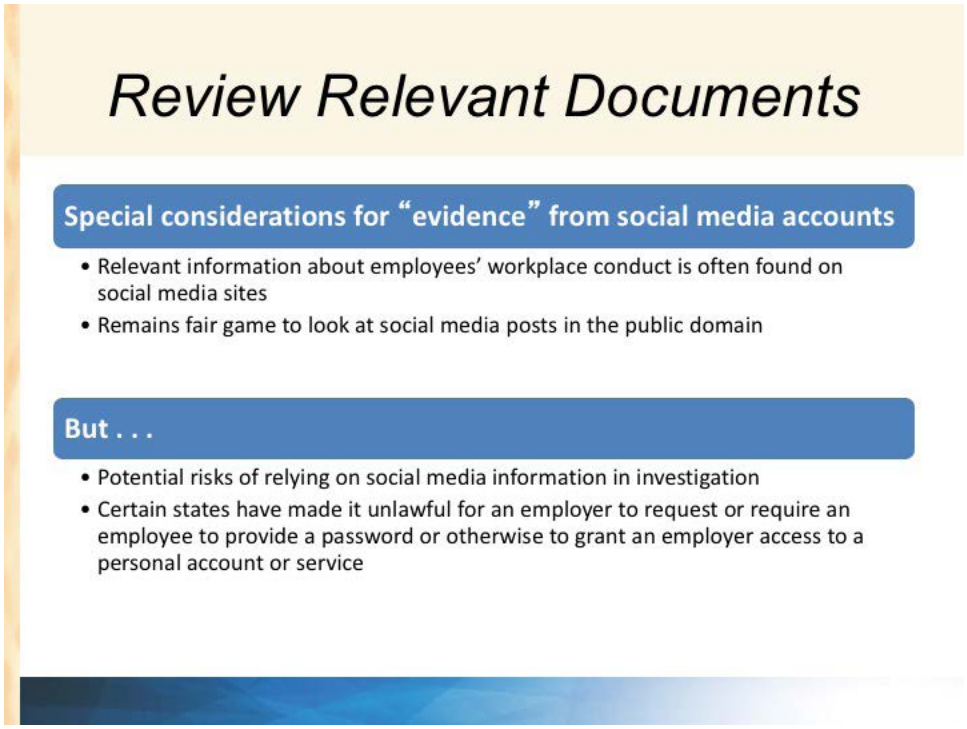
- On May 6, 2015, the findings of the Pash/Wells **"independent"** Investigation were made public.

NFL Mistakes: Sham Science?

"[T]he evidence [against the Patriots] was circumstantial — based on ambiguous text messages; Brady's discarding of a cellphone; and a trip to the bathroom by one of the staff members, who took the balls in with him — it was also buttressed by a lengthy scientific report prepared by ***Exponent***, a consulting firm with ***dubious bona fides***, having disputed the dangers of secondhand smoke and asbestos. Exponent was a hired gun, and its conclusions backed Wells's narrative."

-- NY Times


Review Relevant Documents
Review ALL potentially relevant Documents:
• Documents provided by (or referenced by) the complainant, the accused or other witnesses
• Written policies, procedures, code of conduct/ethics
• Corporate/Personnel files
• Prior relevant complaints and investigation files
• E-mail, texts and voice mails
Be prepared to:
• Preserve evidence
• Understand computer system(s), retention policies and location of data


Review Relevant Documents
Special considerations for "evidence" from social media accounts
• Relevant information about employees' workplace conduct is often found on social media sites
• Remains fair game to look at social media posts in the public domain
But . . .
• Potential risks of relying on social media information in investigation
• Certain states have made it unlawful for an employer to request or require an employee to provide a password or otherwise to grant an employer access to a personal account or service

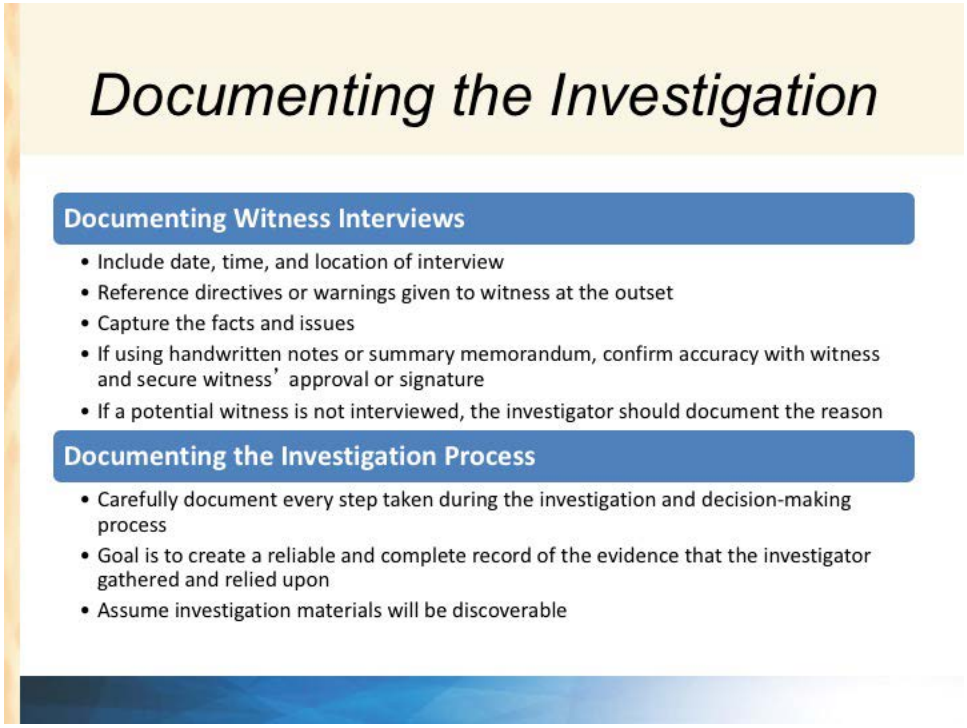
NFL Mistakes: Failure to Review

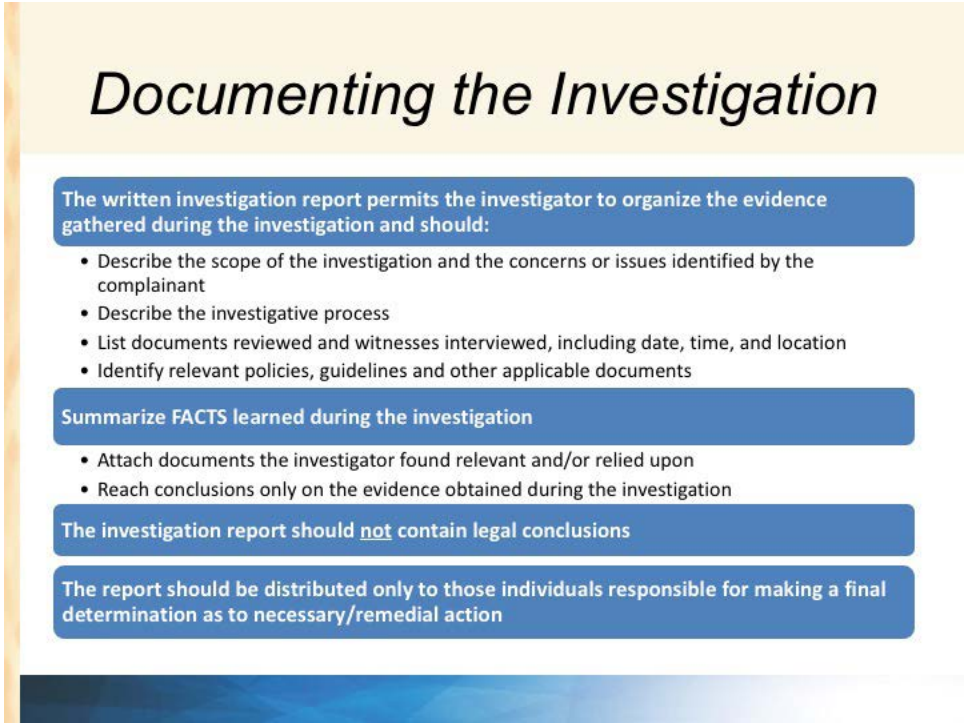
"Our investigation identified a number of investigative steps that the league did not take to acquire additional information about what occurred inside the elevator."

- Robert Mueller Report

The Associated Press reported that a law enforcement official had, in fact, sent a DVD copy of the surveillance video to the NFL. The official said that he received a voicemail confirmation of receipt in April from an NFL number.

NFL Mistakes: Failure to Review


Documenting the Investigation
Documenting Witness Interviews
• Include date, time, and location of interview
• Reference directives or warnings given to witness at the outset
• Capture the facts and issues
• If using handwritten notes or summary memorandum, confirm accuracy with witness and secure witness' approval or signature
• If a potential witness is not interviewed, the investigator should document the reason
Documenting the Investigation Process
• Carefully document every step taken during the investigation and decision-making process
• Goal is to create a reliable and complete record of the evidence that the investigator gathered and relied upon
• Assume investigation materials will be discoverable


Documenting the Investigation
The written investigation report permits the investigator to organize the evidence gathered during the investigation and should:
• Describe the scope of the investigation and the concerns or issues identified by the complainant
• Describe the investigative process
• List documents reviewed and witnesses interviewed, including date, time, and location
• Identify relevant policies, guidelines and other applicable documents
Summarize FACTS learned during the investigation
• Attach documents the investigator found relevant and/or relied upon
• Reach conclusions only on the evidence obtained during the investigation
The investigation report should not contain legal conclusions
The report should be distributed only to those individuals responsible for making a final determination as to necessary/remedial action

NFL Mistakes: Lack of Detail

November 28, 2014 Ray Rice Arbitration Decision

- "The Commissioner's notes are not detailed and do not contain any verbatim quotes of what Rice said happened in the elevator."
- More persuasive to me are [the NFLPA lawyer]'s more detailed and careful notes, which emphasize the exact words Rice said with quotation marks. The following are the relevant part of [her] notes, written with the emphasis and quotation marks as they appear in the original:
  - Exchanged words/arguing @ elevators
  - Ray thinks Janay "sort of slapped @ him"
  - Entered elevator, still arguing
  - Shoes (?) off
  - Janay moved toward him, "sort of slapped or swung"
  - "And then I hit her."
  - She fell, thinks hit head on railing
  - Seemed "knocked out"

NFL Mistakes: Lack of Detail

Dr. Roderick MacKinnon

Recipient of the 2003 Nobel Prize in Chemistry

"The major uncertainty in the Wells Report scientific analysis lies in the pregame measurement of ball pressures: there were two gauges that differ by approximately 0.4 psi, it is not certain which was used in the pregame measurement, and the data were not recorded."

Maintaining Confidentiality

Request that witnesses not interfere with the investigative process

AP Associated Press

Safeguard confidentiality of investigation without guaranteeing anonymity or complete confidentiality

NLRB Position:

- No blanket confidentiality requirements
- Document reasons for confidentiality request

NFL Mistakes: Leaks

Bob Kravitz (@bkravitz)	• "Breaking: A league source tells me the NFL is investigating the possibility the Patriots deflated footballs Sunday night. More to come."
Comcast SportsNet	• "Strong NFL link to recent 'Deflategate' leak"
Chris Mortensen (@mortreport)	• "NFL has found that 11 of the Patriots footballs used in Sunday's AFC title game were under-inflated by 2 lbs each, per league sources."
Dailymail.com	• "Only ONE of Patriots' 12 Deflategate balls was significantly under claims new leak as mysterious ballboy who had them revealed to be 'elderly man' on bathroom break."

Taking Corrective Action

Corrective action should be:

- Prompt and effective
- Designed to stop the conduct

If complaint is substantiated:

- Some level of discipline is likely necessary
- Consider training (individual/group)
- Follow up with complainant periodically
- Remind participants concerning strict prohibition on retaliation

If complaint is not substantiated:

- Training may still be appropriate
- Still follow-up with complainant
- Still remind parties about retaliation

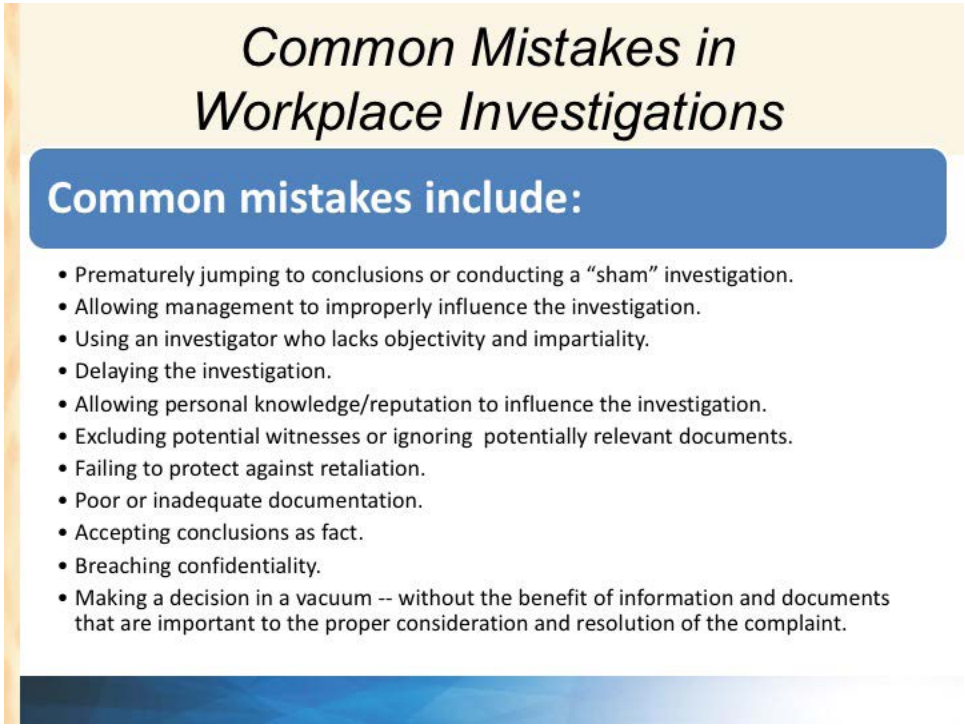
Either way, make sure to have additional review of future discipline or negative employee evaluations concerning the complainant

NFL Mistakes: Taking Action After Poor Investigation

"Outrage over Ray Rice's 2-game ban for 'knocking out' wife"
- New York Post

"Goodell fails brutally with two-game suspension for scary Ray Rice"
- CBSSports.com

"Roger Goodell admits he didn't get Ray Rice suspension right, announces new strict policy on domestic violence"
-Yahoo Sports



Employee complaints -- whether regarding discrimination or harassment, wage and hour violations, or failure to comply with health and safety laws -- constitute a significant liability risk for employers. If not handled properly, allegations of wrongdoing in the workplace, even those that initially appear insignificant and isolated, can, and often do, have a financial impact on the employer and can tarnish its reputation. When faced with allegations of improper conduct, a company will be judged by both how it responds to the situation and the action taken to address and prevent recurrence. A prompt and thorough investigation is often a business imperative and a legal requirement.

The Importance of a Workplace Investigation

Conducting a Prompt and Thorough Investigation is Important

1. As a general rule, an employer has a duty to conduct a prompt and thorough investigation when the employer becomes aware of improper conduct. Conducting a comprehensive but focused investigation at the first sign of trouble should stop the improper behavior and prevent future occurrences.

2. A properly conducted workplace investigation is valuable because it:

a. Sends a message to employees that the employer is committed to ensuring the fair and ethical treatment of its employees and will take their complaints seriously.

b. Gives "teeth" to policies and communicates to employees that the employer's policies are not just "for show."

c. Creates a positive working environment that encourage employees to raise workplace issues or concerns.

d. Boosts employee morale and increases the likelihood that the problem or issue can be identified and resolved internally.

e. Enhances the employer's reputation so that it can attract and retain a knowledgeable and effective workforce.

3. Importantly, a proper investigation followed by prompt remedial action can provide an employer with an effective defense to subsequent litigation. For example, an employer may raise an affirmative defense to a claim of supervisory harassment where no tangible adverse employment action was taken

against the plaintiff and where the employer can prove "two necessary elements: (a) that it exercised reasonable care to prevent and correct promptly any [discriminatory] or sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise." *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998)*: Burlington Inds. v. Ellerth*, 524 U.S. 742 (1998). This defense is commonly referred to as the Faragher-Ellerth defense.

4. Conducting an investigation is the right thing to do, not only because it reduces legal risk but also because it demonstrates that the employer is a good-, socially-conscious corporate citizen and cares about its working environment.

Failing to Conduct an Adequate Investigation Can Have Serious Consequences

1. Failing to conduct an investigation or conducting an inadequate investigation can compound an employer's problems.

2. A poorly-conducted investigation can form the basis for an employee's claim that the employer knew or should have known of the unlawful conduct and failed to take appropriate action.

3. A poorly-conducted investigation can also discourage employees from bringing complaints forward, ultimately depriving the employer of the opportunity to address and remedy inappropriate workplace conduct before it leads to litigation.

4. Failing to conduct an investigation or conducting an inadequate investigation leads to inconsistent application of or meaningless policies.

5. Case law proves that an employer that fails to conduct an investigation or conducts an inadequate investigation is vulnerable:

> *a. Notaro v. Fossil Indus.,* 820 F. Supp. 2d 452 (E.D.N.Y. 2011) (denying summary judgment to employer, finding that an issue remained as to whether "employer knew about the harassment but failed to do anything about it").
>
> *b. Sassaman v. Gamache,* 566 F.3d 307 (2d Cir. 2009) ("[E]mployers who fail to address claims of sexual harassment expose themselves to civil liability.").
>
> *c. Humphries v. CBOCS W., Inc.,* 474 F.3d 387 (7th Cir. 2007) (defendant employer's motion for summary judgment on retaliation claim defeated where defendant employer failed to conduct an investigation before plaintiff was terminated, one week after he complained about discriminatory workplace practices, for allegedly leaving a safe open overnight in defendant's restaurant).
>
> *d. Tolle v. Am. Drug Stores, Inc.,* 2006 U.S. Dist. LEXIS 84927 (D. Kan. Oct. 11, 2006) (failure to conduct certain interviews could lead jury to conclude investigation was a sham; therefore, employer's summary judgment motion denied).
>
> *e. McInerney v. United Air Lines,* 463 Fed. Appx. 709 (10th Cir. 2011) ($3 million jury award upheld where employee was fired after voicing complaints of sex discrimination, and her complaint was never investigated).

The First Step: Preventing Inappropriate Workplace Conduct

Develop Robust Policies and Monitor Effectiveness.

1. All employers, regardless of size, should have clear, written and well-publicized policies including equal employment opportunity, anti-discrimination, anti-harassment and anti-retaliation, standards of conduct, and reporting and investigating workplace complaints.

2. An effective policy is one that is periodically published to employees, clearly describes the prohibited conduct, and contains a practical grievance process. The policy should be vigorously enforced and provide alternate avenues of redress.

3. An effective policy is one that employees use. It is important to gauge employees' understanding and use of the policies

Training Managers and Employees. Periodic training of managers and employees concerning prohibited workplace behavior is a critical first line of defense. In addition, employees who are responsible for receiving and responding to workplace complaints and those charged with conducting investigations must be trained concerning the company's policies, investigation procedures and applicable laws. *See, e.g., Clark v. UPS*, 400 F.3d 341, 350-51 (6th Cir. 2005) (stating that "[w]hile there is no exact formula," an effective policy

should, among other things, provide training regarding the policy).

Responding to a Complaint: Organizing and Planning the Investigation

Initial Considerations. While case law does not identify any mandatory steps or procedures for an effective investigation, it does teach us through a discussion of the specific facts, what is and what is not deemed an effective investigation. For an employer to justifiably rely on the results of the investigation, it is critical that the investigation:

1. Be conducted thoroughly and in an objectively fair manner.

2. Lay the foundation for carrying out effective remedial measures and allow the company to initiate appropriate steps to resolve the problem.

Determine the Purpose, Objectives and Scope of the investigation.

1. Often, the purpose and objectives of the investigation go hand in hand. Certainly, the purpose of the investigation is to uncover relevant facts and to take action, when warranted, with the objective or goal of enforcing the company's policies and eradicating inappropriate behavior, preventing or reducing legal risk, and protecting the company's reputation.

2. Not all investigations require the same approach. Depending on the nature of the complaint, possible "evidence" and the policies in question, sometimes an informal and relatively quick inquiry will provide all of the information that is needed to reach a conclusion and effectuate a resolution. For example, the investigation of an allegation regarding a single email chain will be very different from one involving a sequence of oral discussions between co-workers.

3. A failure to understand the issues can throw the investigation off course and lead to the wrong conclusions.

4. Any laws implicated by the complaint and governing the investigation or legal obligations of the employer should be identified early in the investigation process.

Consider Whether the Status Quo Can Remain in Place or If Interim Measures Are Necessary. Some situations require that immediate action be taken to protect the complainant or other employees.

1. For example, where the allegations impact employee safety, such as threats of violence or physical danger, it may be necessary to implement interim measures. This can be a difficult determination to make in and of itself and avoiding a rush to judgment is critical.

2. If interim measures are necessary, what should they be and who should they affect? The employer should be careful not to take any action that could be perceived as penalizing the alleged victim or hastily imposing disciplinary measures on the accused.

Identify Subject Matter Experts. Consider whether an expert in a particular subject matter is needed to assist in the investigation. Subject matter experts can assist the investigator in identifying issues, understanding the facts, evaluating the alleged behavior, and formulating the recommended remedial action.

Identify Witnesses/Interviewees. It is critical that the investigator identify all individuals with, or who would be expected to have, knowledge that would inform the investigation.

Develop a Chronology. Establishing a chronology of events before and following the alleged conduct can be useful in understanding the facts and evaluating the credibility of witnesses.

Determining Who Should Conduct the Investigation

Investigator/s Should Be Impartial, Objective and Fair. Careful thought should be given to who should conduct the investigation.

1. It is critical that the right person, or people, be selected to conduct the investigation

2. There are a wide range of options in selecting an investigator and investigator selection will often depend on a variety of factors, including the size of the company. Choosing a member of Human Resources or Employee Relations in most instances makes sense given their understanding of the company's policies and governing laws so long as the individual has experience conducting investigations and can be objective.

3. A team approach to an investigation, rather than use

of a single individual, offers advantages. There is truth to the notion that two sets of eyes and ears are better than one. The roles of the investigation team should be discussed before the investigation begins.

4. The same individual, or investigative team, may not be right for every company investigation. The choice should be guided by the nature of the complaint and the objectives of the investigation.

5. Diversity is a valid consideration in selecting an investigator or investigation team. For example, a female employee who brings a sexual harassment complaint may be more comfortable with and more inclined to reveal embarrassing or uncomfortable facts to a female investigator. Similarly, diversity in communication style and approach may aid the investigation.

6. Whether the investigator is a human resources specialist, private investigator, outside consultant, legal counsel or team of two or more investigators, any potential or actual conflicts of interest should be considered. The investigator, or investigative team, must be unbiased and objective and perceived as such. The integrity of the investigation, both objectively and as perceived by those involved, is imperative.

The Investigator Should Have the Requisite Skills, Experience and Knowledge. The investigator must have the requisite skills and training to conduct a proper investigation. The investigator's experience gives him/her credibility in the eyes of those who participate in the investigation. At a minimum, the investigator should:

1. Be an effective interviewer and communicator.

2. Know or be in a position to assess the company's policies and procedures, practices, rules, culture, structure, and operations.

3. Maintain confidentiality and respect the privacy concerns of all parties involved.

4. Be someone that the employer has confidence in, since the investigator could become a witness in a future litigation or a government investigation.

Asserting and Maintaining Privilege in Investigations: Special Considerations for Attorneys As Investigators.

1. When deciding who should conduct an investigation, the possibility of having to disclose investigative materials in any future litigation is a valid consideration. Using an attorney as the investigator offers the possibility of protecting the investigation from disclosure through invocation of the attorney-client privilege or work-product doctrine.

2.The general rule. Disclosures by a client to an attorney made in order to obtain legal assistance or advice or in preparation for future or threatened litigation are privileged. Fisher v. United States, 425 U.S. 391, 403 (1976). It is well-established that a corporation is entitled to assert the privilege. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).

3. Privilege is not absolute. An attorney's participation in an investigation does not automatically render investigative materials privileged. Whether an employer can protect the confidentiality of investigative materials from disclosure by invoking a legal privilege is a fact-specific determination.

4. The attorney's role in the investigation. Because privilege only applies to confidential communications made to a client "by an attorney acting as such," Upjohn Co. v. United States, 449 U.S. 383 (1981), privilege may not apply where the attorney was acting in a business role, rather than in a legal role for purposes of offering legal advice or preparing for pending or threatened litigation.

a. The employer and counsel should clearly document that the investigation is being conducted by the attorney for purposes of providing legal advice or to assist with potential litigation.

b. In-house counsel are particularly susceptible to the argument that they were acting as business advisors, and not legal counsel. In-house counsel have varying responsibilities and may have been involved in personnel decision-making before the start of an investigation, making their investigations susceptible to disclosure. See Neuder v. Battelle Pacific Northwest National Laboratory, 194 F.R.D. 289, 292 (D.D.C. 2000) (privilege "applies only to communications made to an attorney in his capacity as legal advisor[,]" and "where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.").

c. When the attorney is conducting the interviews

and playing a hands-on role in the investigation, the attorney has an ethical obligation to ensure that the company's employees understand the attorney's role. In accordance with Upjohn Co. v. United States, 449 U.S. 383 (1981), the attorney should explain at the start of all employee interviews and discussions that

i. the attorney represents the company and not the individual;

ii. the investigation is being conducted for the purpose of providing legal advice and that the interview is covered by the attorney-client privilege;

iii. the attorney-client privilege belongs to the company; and

iv. only the company can waive the privilege..

5. Investigation used as a defense. Even when privilege might be available for certain communications, an employer asserting that it properly investigated a complaint and responded appropriately places the details of the investigation directly at issue, and cannot claim attorney-client privilege to preclude any scrutiny of the investigation. Whether the investigation will be used as a defense is something that should be considered before the investigation begins.

6. Increase the likelihood that investigative materials collected during attorney-led investigations are protected from compelled disclosure.

a. Clearly mark all relevant documents created during the investigative process as "Attorney-Client Privileged Communication" or "Attorney Work Product."

b. Carefully protect all documents that are created and collected during the process by limiting their disclosure. This can present challenges where information and documents must be disclosed for purposes of decision-making and implementing remedial action.

Conducting the Investigation: Gathering and Preserving Important Documents

Gather Relevant Documents.

1. One of the essential, preliminary steps in an investigation is the document collection and review process.

2. Where an investigation is conducted following an internal complaint of employee misconduct, the relevant documents to be gathered will generally be defined by the nature of the allegations. Potentially relevant documents may include documents provided by (or referenced by) the complainant, written policies and procedures, written code of ethics, personnel files, electronic files, prior relevant complaints and investigation files, organizational charts, supervisor files, emails, texts and voice mail messages, and possibly even information gleaned from social media websites.

3. The need to review electronically-stored information (ESI), including emails, text messages and instant messages, has become more commonplace in investigations since employees' reliance on these modes of communication has increased dramatically. Securing an image of the employee's electronic devices, such as the computer or cell phone, will allow the investigator to access and review the necessary information and documents.

Is It Necessary to Issue a Litigation Hold? Once a party reasonably anticipates litigation, that party has a duty to preserve information relevant to that litigation. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (Zubulake IV) (S.D.N.Y. 2003). A litigation hold can satisfy that duty by suspending a company's document destruction policies and informing certain persons that they must preserve relevant information.

1. As a general rule, the employer should issue litigation hold immediately after receipt of an employee complaint presented in the form of an attorney letter or administrative charge.

2. It is important to check the law in your jurisdiction to determine whether an internal complaint triggers the need to issue a litigation hold.

a. Absent other events, a mere internal investigation of an employee does not give rise to the duty to preserve. Ross v. IBM Corp., 2006 U.S. Dist. LEXIS 36031 (D. Vt. 2006).

b. Employer was placed on notice of potential litigation and thus had a duty to preserve documents as soon as the employee informed two of his supervisors, via verbal and email communications, of another supervisor's sexually harassing behavior. Broccoli v. Echostar Comm'ns Corp., 229 F.R.D.

506, 510-11 (D. Md. 2005).

c. In *Zubulake IV*, the court found that the duty to preserve arose, at the latest, when the plaintiff filed a complaint with the EEOC. 220 F.R.D. at 217. See also Scalera v. Electrograph Sys., 262 F.R.D. 162, 171 (E.D.N.Y. 2009) (duty to preserve relevant emails arose as of the time the defendants received the plaintiff's EEOC Charge). The facts in Zubulake IV, however, revealed other circumstances before the EEOC complaint was filed that triggered the duty to preserve. Id. "Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue." Id. at 218.

Conducting the Investigation: Witness Interviews

Determine Who Should be Interviewed.

1. Generally, the complainant should be interviewed first in order for him or her to relay the basic problem. However, it is likely that the complainant will need to be interviewed again as additional information comes to light.

2. The alleged bad actor should be interviewed immediately following the complainant. Doing so will ensure that the problem is fresh in the minds of the investigator(s) and lessens the perception of unfairness to the alleged bad actor by providing him or her an early opportunity to refute the allegations and identify witnesses.

3. To determine other possible interviewees, the investigator should consider any observers of the incident, individuals the complainant has requested be interviewed, individuals the accused has requested be interviewed and anyone else who may have relevant information. To determine the order of these interviews, consider the likelihood that a witness will have information that would be helpful to use in later investigative interviews.

4. If new information arises following an interview that is worth exploring with a prior interviewee, do not hesitate to re-interview that person.

Determine Where the Interviews Will be Conducted. As a general rule, it is appropriate to conduct the interviews at the employer's site. However, there may be circumstances where conducting the interviews off-site is warranted. Regardless of where the interviews are conducted, they should be conducted in a private location to maximize confidentiality.

Preserve Confidentiality, to the Extent Possible.

1. Importance of confidentiality. Confidentiality is often vital to the success of an internal workplace investigation. Employees are significantly more likely to come forward with complaints if they believe their concerns will be addressed confidentially. Additionally, the investigator may uncover information during the investigation that is damaging to the employer's reputation and in potential litigation if leaked. As explained above, the selection of an attorney-investigator can greatly influence the confidentiality of an investigation.

2. Responding to requests for confidentiality. At the outset of a witness interview, the investigator must ensure that the interviewee understands that confidentiality is not guaranteed, as some information about the allegations and those involved must be disclosed in order for all witnesses to fully share the scope of their relevant information.

3. The NLRB previously weighed in on confidentiality.

a. Investigators often ask employees to keep the investigation, and their participation in it, confidential while the investigation is underway. However, the National Labor Relations Board's (NLRB) decision in Banner Estrella Medical Center, 358 NLRB No. 93 (2012), highlighted the potential risks of a blanket request to employees not to discuss the investigation.

i. In Banner, an employer's human resources consultant routinely asked employees who filed internal, work-related complaints not to discuss their complaints with co-workers while the employer's investigation was ongoing. An employee who was so advised filed an unfair labor practice charge with the NLRB.

ii. The NLRB determined that the employer had violated Section 7 of the NLRA, which protects the right of employees to engage in concerted activity with respect to the terms and conditions of their employment. The NLRB concluded that in order to show a legitimate business justification favoring confidentiality that outweighed employees' Section

7 rights, an employer must identify a specific need to (1) protect witnesses, (2) avoid spoliation of evidence, (3) avoid fabrication of testimony, or (4) prevent a cover-up, before instructing employees to maintain confidentiality. According to the Board, a generalized concern over the integrity of the investigation is not a sufficient business justification for the confidentiality rule.

b. The decision in *Piedmont Gardens, 359 NLRB No. 46 (2012)*, in which the NLRB overruled long-standing precedent in *Anh*euser-Busch, 237 NLRB 982 (1978) and applied a balancing test to the disclosure of witness statements has also been called into question by the Noel Canning decision.

i. In Piedmont Gardens, the employer obtained witness statements from three employees in its investigation of a report that an employee had been sleeping on the job. The employer promised two of those witnesses that their statements would be kept confidential. Following the employee's discharge for sleeping on the job, the union filed a grievance and requested information, including the names, job titles and written statements of any witnesses related to the investigation. The employer, citing Anheuser-Busch, 237 NLRB 982 (1978), refused to produce the information but informed the union that it was willing to discuss an accommodation to disclosure. The union filed a charge with the NLRB.

ii. The NLRB overruled Anheuser-Busch and held that going forward, it will apply a "balancing test," that weighs the union's need for the information against "any legitimate and substantial confidentiality interest established by the employer."

Guidelines for Conducting and Controlling Interviews

1. The investigator should be focused. An orderly outline of basic questions should be created for each interviewee.

2. The investigator should start with broad, open-ended questions that are intended to uncover the "who, what, where, when and why" of the alleged conduct.

3. When questioning a witness, the investigator should not begin with overly difficult or embarrassing questions that may cause the interviewee to "clam up

4. Ultimately, the investigator must ask the difficult questions and the interviewee's discomfort should not stop the investigator from gathering what is needed to fairly and accurately understand and resolve the issue.

5. The investigator should explore tangents if the interviewee opens additional doors with an answer he/she provides. Sometimes what appears to be an innocuous statement leads to important information.

6. The investigator should emphasize the need for the interviewee to maintain the confidentiality of the investigation.

7. The investigator should advise all interviewees of the prohibition on retaliation, which applies to anyone involved in the investigation.

Documenting the Investigation

Creating a Proper Record. The investigator must carefully document the information learned during the investigation, and a record of each step of the investigation -- including dates, times, locations and persons present -- should be made.

1. All interviews must be documented through written notes, audio recordings or by having a court reporter transcribe the interviews. Although transcribing the interviews provides a complete and accurate record of the information shared during the interview, it can have a chilling effect on the interview process and cause employees to divulge less than they otherwise might have shared.

2. The notes should contain the facts gathered from the interviewee, not the investigator's impressions or conclusions.

3.If the investigator opts to create an interview record with written notes, he or she should consider having an additional person present during the interview whose job is only to take notes to ensure accuracy. In such a case, after the interview, both members of the investigative team should be involved in preparing the post-interview memoranda.

4. The investigator should even document the reason why a potential witness was not interviewed.

Assume All Documents Will Be Discoverable. It should be assumed that all documents gathered and written during the investigation will be discoverable. Thus,

the investigator should take caution when committing notes and ideas to paper and should avoid making speculative conclusions. When making credibility assessments after each interview, the investigator should rely upon observable facts instead of making legal determinations, drawing conclusions, or relying on his or her personal interpretations, opinions or assumptions about the witness. Observable facts may include the witness's demeanor, consistency in the facts reported, inherent plausibility, motive to falsify, bias, past problems of a similar nature, and whether corroboration of the facts reported exists.

Concluding the Investigation

Wrapping Up the Initial Investigation. Before the investigation is officially concluded, the original investigation plan should be reviewed to ensure that all tasks were completed and that the investigation complied with company policy and procedure. Additionally, the information collected during the initial document review and witness interviews must be organized and analyzed in order to draw reasonable and logical conclusions regarding the allegations. A review of the evidence should yield enough information to determine whether the complaint is valid, without merit or unsubstantiated. A review of the collected information may even reveal that new issues have been raised and need to be investigated, that certain witnesses need to be re-interviewed based on subsequently learned information, or that other information is necessary to help solidify the investigator's conclusions.

The Investigation Report. A written report is the most effective means of organizing evidence and conclusions and is critical to demonstrating that the employer took the allegations seriously and responded appropriately. The report should contain:

1. A description of the complaint and the investigative process.

2. Identification of any relevant company policies or guidelines.

3. A list of relevant evidence, including documents reviewed and witnesses interviewed, and if any known evidence was not reviewed, a reason why.

4. A summary of the facts learned during the investigation relevant to each allegation.

5. Conclusions. These should be based only on the evidence obtained during the investigation. Legal conclusions should be avoided, although conclusions regarding violations of policy are appropriate.

6. There is no need to make recommendations as to corrective action in the report, and the report should only be distributed to those individuals responsible for making a final determination as to corrective action.

Protecting Against Retaliation. Regardless of the outcome of the investigation, parties to the investigation should be reminded that retaliation against employees who make complaints or who participate in workplace investigations is strictly forbidden. To help protect against retaliation:

1. Information obtained during the investigation should not be discussed except on a "need to know" basis.

2. Employees and supervisors should be reminded of the anti-retaliation policy.

3. The situation should continue to be monitored, through periodic follow up with the complainant.

Corrective Action. The facts of the investigation should be immediately reported to those individuals charged with taking appropriate corrective action, which must be prompt, effective and designed to adequately address the conduct at issue. The appropriate corrective action depends on whether in the course of the investigation:

1. The Complaint is Substantiated. If the complaint is substantiated, employers has some flexibility in determining the action to be taken, taking into account the policy or law violated and the egregiousness of the situation. However, uniform and consistent treatment of like violations is important. If the employer chooses a course of remedial action different from that implemented under like circumstances, the employer must be prepared to justify the different treatment. The employer should also consider individual and/or group training, and follow-up with the complainant periodically. .

2. The Complaint is Not Substantiated or The Investigation is Inconclusive. Different issues are implicated if the investigation does not substantiate the complaint or the investigation is inconclusive. However, in both situations, employers should consider whether some action is warranted based upon the

facts revealed during the investigation. For example, the investigation may reveal that the accused would benefit from training to improve his/her management or communication style. Following up with the complainant and reminding the participants of the anti-retaliation policy is also necessary. Even though the investigation has concluded, monitoring the work environment may be necessary, particularly where the complainant and accused continue to work together.

Communicating the Outcome. Once a decision has been reached, it should be communicated to both the complainant and the accused. Though the communication should occur promptly following the investigation, it need not be detailed. With respect to others involved in the investigative process, relatively little information need be conveyed to respect the privacy of all parties involved. Detailed information should only be shared on a "need to know" basis.

Common Mistakes in Internal Investigations.

Despite all of the planning, organizing and documenting that occurs in an investigation sometimes mistakes are made. Common mistakes include:

1. Jumping to conclusions.

2. Allowing management to improperly influence the investigation.

3. Failing to give the alleged bad actor a fair chance.

4. Delaying the investigation. Do not allow the investigation to languish because of day-to-day business stresses or witness and investigator unavailability.

5. Allowing personal knowledge/reputation to influence the investigation.

6. Failing to exhaust all avenues of the investigation, such as by excluding potential witnesses or ignoring open issues.

7. Failing to inform the accused or others involved in the investigation process that retaliation is strictly prohibited and will not be tolerated or failing to follow up to ensure that there is no retaliatory conduct.

8. Poor or inadequate documentation.

9. Accepting conclusions as fact.

10. Breaching confidentiality.

11. Making a decision in a vacuum, without the benefit of information and documents that are important to the proper consideration and resolution of the complaint.

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Mr. Romeo represents both private and public employers in all aspects of federal and state labor and employment laws. He routinely provides practical strategic advice to clients dealing with difficult employee issues involving all aspects of the employment relationship. In addition, he has assisted employers in developing, drafting, and implementing employment policies, compliance and ethics programs, drug-free workplace programs, and executive employment agreements.

Prior to joining Gibbons, Mr. Romeo was Labor & Employment Counsel and Chief Ethics & Compliance Officer for American Water Works Company, Inc.

As Chief Ethics & Compliance Officer, Mr. Romeo oversaw American Water's ethics and compliance program. He served as Secretary to the Company's Ethics Committee and was responsible for providing regular reports to the company's Board of Directors.

Mr. Romeo is a former member of the Association of Corporate Counsel's Labor and Employment Committee and was active with the organization's Delaware Valley Chapter (DELVACCA), where he served as the Co-Chair of the Chapter's Compliance & Ethics Committee. Recently, he has given several presentations to DELVACCA audiences, on topics including the negotiation of CBAs in a down economy; use of social media in employment; and the Dodd-Frank whistleblower provisions.

Mr. Romeo has extensive experience defending single plaintiff, multi-plaintiff, and class claims under state and federal employment laws, including claims for discrimination, retaliation, and sexual harassment. He regularly appears in state and federal courts, as well as before various administrative agencies, such as the United States Department of Labor, the EEOC, the NLRB, and multiple state equivalent agencies, and has successfully defended multi-plaintiff wage and hour claims and class based disability discrimination claims. Mr. Romeo represents employers in OSHA inspections, investigations, retaliation, and OSHA-related litigation, including appeals of citations and negotiation of settlement agreements.

Mr. Romeo has experience bringing and defending restrictive covenant litigation involving non-compete agreements and unfair competition.

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Rather Unusual Questions For Your Expert During Trial Prep

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Times have changed. Lawyer's desire to call expert witnesses during trial created a new profession, and that profession now produces smarter, tougher, and stronger witnesses. These are not your father's experts. They are veterans of countless depositions, hearings and trials. They are comfortable in the courtroom, and they have a working knowledge of what is admissible and objectionable. They know infinitely more about their field, and they understand your trial strategy. Don't kid yourself. They know the questions you are going to ask before you ask them. So here's an idea: Don't.

Forget what you've been told about direct and cross-examination of an expert witness. Get rid of the same old playbook. Question conventional wisdom when it comes to examining an expert at trial. Consider adopting a new philosophy when it comes to examining an expert at trial. Consider a trial strategy based on a single, basic principle: You don't win a trial with their expert.

Direct Examination

You don't win a trial with their expert. You win a trial with yours. So why is it that we spend so much time talking about the art of cross-examination and so little time talking about the science of direct examination? Yes, lawyers at cocktail parties brag that the direct examination of an expert is like a rehearsed and choreographed dance.

The reality is that jurors are suspicious of trial lawyers and their hand-picked experts. They do not want to hear your expert, in response to every question you ask, reply "that's absolutely correct, counselor!" They want a real conversation, and the last thing that lawyers and their experts should give them is a rehearsed or choreographed performance.

We must rethink our approach to direct examination of experts or it will always be the most predictable, boring, and ignored part of trial. Toward that end, here are twelve rather unusual (often counterintuitive) questions to ask your expert during trial preparation–questions which represent a very different approach to direct examination:

- How can we make this more complicated?
- Why are you just sitting there?
- Who told you that you're funny?
- What is a good mistake I can make?
- What are they right about?
- What does the book say?
- How can we make their case better?
- What you got that theirs ain't got?
- What do you do all day?
- What are you really an expert in?
- Does Google agree with you?

- What do you have to say for yourself?

Ask these twelve unusual questions of your expert during trial preparation, and use what you learn during direct examination. Help your expert grab the jury's attention, earn the jury's trust, and teach the jury what they need to know. Prepare yourself for a candid, sometimes difficult conversation, and that will prepare your expert to win the trial.

1. How can we make this more complicated?

Jurors know more about science and medicine (and everything) than at any other time in history. They know there is more to the story, and they will be suspicious of your expert's folksy explanation. They do not want your expert to take the stand and read them Shakespeare for Dummies. They want your expert to take the stand and read them Shakespeare in the original Elizabethan dialect… and then read them Shakespeare for Dummies. Every trial-prep meeting should start by asking your expert how they would explain the most critical concept or opinion: (1) to their most learned peers; (2) to college students studying in their field; and (3) to their next-door neighbor.

At trial, solicit all three explanations and present all three exhibits. Use the first explanation and exhibit to demonstrate your expert's degree of understanding and experience (i.e., the "he's smart" exhibit). Use the second explanation and exhibit to make the concept more accessible to the jury (i.e., the "that makes sense") exhibit. Use the third explanation and exhibit to convince the jury your expert is correct (i.e., the "he's right" exhibit).

2. Why are you just sitting there?

Jurors have shorter attention spans and are more visual learners. They crave movement and they need visual reinforcement. So do not just ask your expert to describe the location of L5-S1 on the lumbar spine. Tell your expert to stand-up and point to it on a model of the lumbar spine or on an MRI or on your back (or all three).

There is a difference between telling a jury that your witness is a good doctor and showing the jury that your witness is a good doctor. Do not be satisfied telling the jury that your expert has been practicing for twenty years, let them see and hear twenty years of experience. If a finding from a physical examination is critical (i.e., finding of muscle spasm), have your orthopedic surgeon stand-up and demonstrate on you how they routinely administer physical exams. Let the jury see and hear how professional and second-nature an examination is for your expert. If a field sobriety test is the key to the case, let the jury see and hear the officer administer one to you. Watching your witness do what your witness does every day reminds the jury that your witness is an expert and that they should "trust" or "defer" to your witness. Let the jury see your experts doing their job, and it may make the jury's job much easier.

3. Who told you that you're funny?

You can't change your expert's personality during a one hour meeting, and you shouldn't try. Jurors do not expect genius to tolerate stupidity, and jurors do not expect hardened professionals to be warm and cuddly. If anything, jurors will be suspicious of brilliant experts who flatter ordinary (mere mortal) lawyers.

The real challenge is to discover your expert's real personality and disabuse your expert of any ridiculous notions they may have about themselves. You know that friend of yours who thinks he is funny? How about that friend who thinks he knows everything? Or that friend who thinks he is a lawyer? Well, you need to figure-out which one your expert is. Our job is to help our experts become who they are.

In the a (trucking accident) jury trial in Swain v. RLI Ins. Co., No. 05-cv-852, (E.D. La. 2005), we retained a gray-haired cardiologist who was unbelievably patient and kind (truly grandfatherly) toward me during our practice direct examinations, but was a nightmare to opposing counsel during his deposition. It was difficult to watch him bully opposing counsel with one-word answers, pained expressions, and openly hostile criticism of well-intentioned questions. We quickly realized that the jury would almost certainly dislike and be suspicious of his Jekyll-and-Hyde routine, and we shared our concerns with our expert. He told us he could be "folksy" on the stand. We told him, "you don't have that club in your bag."

We made an executive decision. We asked our cardiologist to be cantankerous to both lawyers. We told him not to suffer foolish questions from either lawyer. The cardiologist nodded his head and smiled.

Freed from having to pretend to be Mr. Nice-Guy, he took the stand at trial, relaxed, and answered questions like they were being asked by lazy medical interns. The jury loved him and agreed that the accident did not cause the plaintiff's subsequent heart problems. Turns out that a difficult witness is a trustworthy witness, and a little hostility (or disagreement) can go a long way in persuading jurors that your expert is objective and that the conversation they just witnessed was real.

4. What is a good mistake I can make?

The first time you spoke with your expert, you did not ask every question perfectly, and your expert did not flatter you or praise your understanding of the material. Your expert corrected you. Your expert read something to you or drew something for you. Somehow, your expert found a way to teach and persuade you. Otherwise, you would have settled the case. Recreate that real conversation for the jury and ask your expert what are some "common mistakes" or "common misconceptions" you should address.

We have to stop asking the questions we want to ask our expert, and start asking the questions jurors would ask. The goal of direct examination is not to take a juror's level of understanding and raise it to the level of your expert's understanding. The goal of direct examination is to take a juror's level of understanding and raise it to your level of understanding. The best way to do that is to allow the jury to experience the same learning curve you experienced (or a condensed version). Never deprive jurors of explanations and steps that helped you, and never ask jurors to make a logical leap you never had to make.

Every jury has a bias, prejudice, or misconception about some aspect of your trial (i.e., about a product, injury, diagnostic test, disease, etc.). When you identify that common misconception, do not try to disabuse the jury of it with a single, condescending question ("what if someone actually thought" or "what if someone stood-up in opening statement and said…"). Most misconceptions are based on one or more true premises, facts or metaphors. Let the jury hear your expert agree with the truth of those premises, facts or metaphors. Then ask why, if that premise/basis/metaphor is true, the common misconception is not also true. Let your expert correct you and explain it to you. Picture a juror who holds that misconception thinking "hey, I was thinking the same thing" while your expert is agreeing with the premises, and "oh, I see why that isn't true" while your expert explains where you went wrong. Of course, that is easier said than done, and you have to be sincere in your curiosity and questioning or the jury will recognize it as staged.

Plato did not want his students to play the fool, but he recognized the value of a good foil. That is the fine line that every trial lawyer must walk during direct examination. Never play the fool, but never miss the opportunity to play the foil. Ask the questions the jurors want answered and help the jury learn from your mistakes.

5. What are they right about?

Always bring the opposing expert's report and deposition transcript to your meeting with your expert. Show your expert everything their expert said and find out what premises, assumptions, calculations, and opinions are 100 percent accurate and complete. That is your real starting point because that is what jurors want to hear first. They want you to tell them specifically where the two roads diverge in the yellow wood before you ask them to choose a road (to travel by). If you do not tell them, they may try to figure it out for themselves during jury deliberations, and you do not want that.

6. What does the book say?

When you are sitting at a blackjack table, the dealer (who is almost always an expert at blackjack) doesn't tell you her opinion, she tells you "the book says to hit." And you do not hit fifteen because Gina from Little Rock, Arkansas told you to hit fifteen. You hit fifteen because "the book says to hit fifteen." Similarly at trial, give jurors a reason to believe your expert by reading them textbook passages and showing them textbook examples that support your expert's opinions.

Before the Nugent manslaughter trial, we noticed that the forensic pathologist supported his autopsy finding that the cause of death was sickle cell sudden death and his classification of the manner of death as "accidental" (versus "homicide") by including a citation to a textbook. When we learned that forensic pathologist found in the textbook an image (microscopic photography) of pre-mortem sickling that was identical to the sickling he saw when viewing the deceased's histology slides, we asked him to bring the textbook and the slide to trial. During our examination, the jury heard the following

exchange:

Q. And did you bring that textbook with you…

A. Yes, I did…

Q. I see it… We can't miss it. It's huge…

A. Uh, the title of it is Spitz and Fisher's… Medical, Legal Investigation of Death…

Q. Could you turn to that page please?

A. And it's page eleven or six.

Q. Okay. So, literally… what you saw in microscopic examination is a textbook example…

A. Uh, that's correct… [1]

For the rest of the Nugent trial, we referred to the death as a "textbook" case of sickle cell sudden death, and the jury agreed.

Always ask your expert to show you what a "textbook" example looks like, especially when textbook examples do not support the opposing expert's conclusions. Picture showing your expert "textbook" MRI images of acute trauma, and having your expert physically point to the edema in the MRI. Now picture your expert showing the plaintiff's MRI images, and physically pointing-out where there is no edema. Proving that the present case is not a "textbook" case can be half the battle.

7. How can we make their case better?

Jurors know that only the "really good" and the "really bad" cases go to trial, and they need to know which type of case they are deciding. Jurors often lack the knowledge and experience required to recognize "on a scale of 1 to 10" where a specific claim, defense, argument, or injury ranks; and the best way to teach them is to show them what a better claim would be or what a more severe injury would have been.

In a traumatic brain injury trial, have your expert respond to "gloom and doom" testimony about a subdural hematoma by explaining more severe injuries (that did not happen) like those involving mass effect, midline shift, or herniation. In a slip–and-fall case, your expert can attack the defendant's argument that the lighting was "reasonable" by discussing much better forms of lighting. Teach the jury what a much better claim/defense would have been, and the jury will learn why the current claim/defense is inadequate or untenable.

That trial strategy starts during the meeting with your expert. When you meet with your expert, find out what facts or circumstances would have made the plaintiff's case (or a defendant's defense) much better.

8. What you got that theirs ain't got?

Nothing is more effective during a jury trial than filling-out a chart comparing your expert's qualifications with theirs. Days later, jurors may not recall what each row addressed, but they will remember seeing a column of "yes" for your expert, and seeing a column of "no" for theirs. If you want that visual seared into a juror's mind, you have to bring a draft chart to your meeting, roll-up your sleeves, verify that you can write "yes" on every row of your expert's column. And, preferably, you should bring that same chart to your deposition of their expert and get them to say "no" to the exact same questions.

During the 2015 (wrongful death) jury trial in Ricks v. City of Alexandria, et al., No. 12-cv-349 (W.D. La. 2012), plaintiff hired a cardiac electrophysiologist who, during his deposition, made a number of startling admissions regarding his lack of knowledge and experience before he was hired. At trial, during cross-examination, we showed the jury a chart and made the jury watch us write "no" in nine of eleven rows for the plaintiff's expert. And the two times their expert answered "yes" (despite saying "no" during his deposition), he had to exaggerate his experience. For example, the jury actually heard their expert insist he technically "researched" the product (prior to his being hired) when, while casually reading a journal, he read something about the product in an article. Which is like saying you are an expert and you have researched post-traumatic stress disorder because you read American Sniper. The jury was treated to this exchange:

Q. Had you ever researched the effect of a conducted electrical weapon?

A. Yes.

Q. Prior to being retained in this case?

A. It was part of published data that I had seen.

1 Nugent, Trial Tr., Day 3 (10/25/10), p.18:15 to p.19:16.

Q. When articles came out you'd read them from time to time. Had you ever done a research project?

A. I read the medical journals.

Q. Had you ever done a research project?

A. No. [2]

2 Ricks v. City of Alexandria, No. 12-cv-349 (W.D. La. 2015), Daily (Rough Draft) Trial Tr., Day 2 (05/03/15).

Fortunately, the Ricks trial ended with a directed verdict for the defense, and we never had to call our expert. But, if the trial had continued, the jury would have watched us start the direct examination of our expert by writing "yes" in every row of our expert's column during direct-examination, and the completed chart (which should be left on the screen or displayed for the entire direct examination) would have looked like this:

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

Of course, what's good for the goose is good for the gander. You should expect opposing counsel to prepare the same type of chart, and you should ask your expert: "What's their expert got, that you ain't got?" Hopefully, your expert's answer will be "nothing." But, if there are significant differences in qualifications, you will at least have time to discuss those differences with your expert and to prepare a response.

9. What do you do all day?

Jurors often define who a person is by what they do. Make sure the jury sees the big picture by asking your expert to tell you what a "typical day" or a "typical week" is like in their practice.

During the Nugent trial, we decided to tender one witness as an expert "in the field of emergency medicine" and "on the physiological effects electronic control devices on the human body." Because our expert had conducted so many studies and published so many articles on the same product, we were concerned the jury would get the impression he was a "lab geek" or (worse) a "hired gun" who worked for the manufacturer

of the product he researched and tested. To make sure the jury saw the big picture, we elicited the following testimony about a typical week in his life:

Q. If you would, please tell the jurors about your actual practice, what you do in the course of a week?

A. Uh, several things. I wear many hats. Uh, in the course of a week I spend approximately twenty-four to twenty-five hours, uh, actually taking care of patients in the emergency department. Uh, I probably spend, uh, twenty to twenty-five hours, uh, doing what's called EMS, medical direction. So, I provide, uh, administrative and medical director services to, uh, some of the law enforcement and, uh, fire department paramedic programs that are around our area, and I spend an additional twenty to twenty-five hours on, uh, research activities. So, my typical work week is about seventy hours or so.[3]

Our expert's answer did not sound rehearsed, and his description of his typical work week emphasized he was neither a "lab geek" nor a "hired gun." We interviewed some of the jurors after they found our client not guilty of manslaughter. It was clear that those jurors realized our expert was a hard-working doctor who helped people every day, and they gave his testimony greater weight.

10. What are you really an expert in?

Make sure your expert agrees with the exact wording of every field in which he will be tendered as your expert witness. Your expert will always be the best judge of whether the field is too broad or too narrow.

Avoid tendering an expert as an expert in doing something. There is a difference between tendering your witness as an expert "in the field of cardiology" and "in open heart surgery;" between tendering your witness as an expert "in the field of economics" and "in calculating present value of future medical expenses;" and between tendering your witness as an expert "in the field of human factors" and "in analyzing the rise and run of stairs." Know whether courts in your jurisdiction have allowed experts in your witness' field to offer the type of opinions you will ultimately seek. If so, get the court to accept your witness in that field and then establish your witness' experience performing open heart surgery, calculating present value, or analyzing the rise and run of stairs.

11. Does Google agree with you?

Always assume at least one juror will ignore the court's instructions prohibiting independent research.[4] Prior to meeting with your expert, always perform relevant internet searches regarding the injury, illness, product or accident.

Do not allow the outcome of your trial to be determined in a basement apartment by a juror wearing pajamas and reading Wikipedia. Learn what Wikipedia says. Learn what your expert would say about that Wikipedia entry. Maybe the Wikipedia entry discusses an earlier model of the product. Maybe the Wikipedia entry contains factually incorrect statements. Maybe the Wikipedia entry cites an inapplicable or discredited medical study. Discuss with your client the pros and cons of handing that Wikipedia page to your expert during direct examination and letting your expert "set the record straight." Never introduce a Wikipedia entry for the sake of attacking a Wikipedia entry during direct examination unless you are absolutely certain your expert can destroy it absolutely. When in doubt, leave the inadmissible prejudicial material out!

12. What do you have to say for yourself?

There is a reason why every politician and every corporation wants to "get ahead" of every story. Jurors will never forgive you for "hiding" something unfavorable about your expert during direct examination. You must be the one to bring it up. You must ask the tough question that opposing counsel was going to ask. And, your expert must directly and honestly address it with you.

Do not meet with your experts until you've researched your experts like you were going to cross-examine them at trial, and then (gently) cross-examine them when you do meet. Your experts may not know their

3 Nugent, Trial Tr., Day 6 of Trial (10/28/10), p.7:13-24.

4 See Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (December 2009); see OneBeacon Ins. Co. v. T. Wade Welch & Assc., No. CIV.A. H-11-3061, 2014 WL 5335362, at *10 (S.D. Tex. Oct. 17, 2014) ("As judges of the facts, you must decide this case based solely on evidence presented here within the four walls of this courtroom. This means that during deliberations you must not conduct any independent research about this case, the topics involved in the case, or the individuals or corporations mentioned. In other words, you are prohibited from consulting dictionaries or reference materials; searching the internet, web sites, or blogs; or using any other electronic tools to obtain information to help you decide the case."); see also In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., 739 F. Supp. 2d 576, 610 (S.D.N.Y. 2010).

skeletons are "out there" on the internet or in published opinions. They may not fully understand how those skeletons could negatively affect the way jurors listen to their testimony. And they may be (unwisely) expecting you to object and the court to sustain your objection. Always show your expert what you found, and find out what your expert would want you to ask about that issue (during direct or redirect) and how your expert wants you to ask.

Yes, it can be difficult to walk the line between "preparing" your expert and "scaring" your expert into not wanting to testify at trial. Never play Devil's Advocate so aggressively you anger or alienate your expert during a meeting. Always approach the issue as if you are simply trying to make sure your expert's "side of the story" comes out at trial.

Before the 2015 (personal injury) Crayton v. Campbell, et al., No. 704-421, 24th Jud. Dist. Ct., Parish of Jefferson, LA, we realized the plaintiff's neurosurgeon and the defense neurosurgeon had both omitted from their expert reports any mention of the edema (swelling) in a lumbar MRI taken one year after the car accident—even though that edema was critical evidence of recent trauma. When we met with our expert, we showed him the MRI film, selected specific views to enlarge for the jury, and practiced direct examination questions about the extensive degenerative changes seen in the MRI. We also asked him about the significance of the edema, and explained why and when we would ask him one question to "steal their thunder" (i.e., "Mr. Glas criticized our expert for not mentioning the edema, so why didn't you mention the edema in your report?"). Only after hearing his perfectly reasonable answer, did we decide to raise the issue during our cross-examination of their expert and during our direct examination of our expert.

Cross-Examination

You don't win a trial with their expert. You win a trial with yours. So the next time you find yourself confronted with the challenge of cross-examining a courtroom-savvy expert, recognize that you stand at a crossroads. And you must choose:

> Is your goal to attack their expert's opinion or to clarify it for your expert?
>
> Is your intention to reveal the document or fact that will totally undermine their expert's key assumption or opinion (even though it will give him a chance to address it) or is it your intention to establish the significance of that assumption or opinion (and let your expert attack it)?
>
> Do you think that your three points will sound better coming from you or from your expert?

We must rethink our approach to cross-examining an expert. We have to stop thinking of how you can "win the trial" during your cross-examination of their expert and start thinking of what you can do to help your expert "win the trial" during direct-examination. Toward that end, a very different approach to cross-examination may involve twelve leading questions that start as follows:

- You are not an expert in (and you have never)…
- You define…
- You did not read…
- You were not provided with…
- You did not ask for…
- You assumed…
- Before reaching your conclusion, you physically...
- Before citing this, you didn't…
- Your diagnosis of exclusion required you to rule-in & rule-out…
- You omitted from your report…
- Did I write down your opinion correctly?
- Your opinion is ultimately based on…"

There is a fundamental difference between trying to wound their expert by yourself and trying to hold their expert perfectly still so that your expert can wound him during direct examination. Give serious consideration to the latter approach in every case. By asking questions like these, you can make sure that your expert isn't confronted with a moving target. Winning that battle can win the war.

1. You are not an expert in (and you have never)…

Before trial, you figured out ten (10) to twenty (20)

qualifications or credentials that your expert possesses that their expert does not possess. As discussed, supra Question No. 8 ("What you go that theirs ain't got?"), start your cross-examination by completing the column for their expert. Ask very specific questions designed to allow you to write "no" next to each qualification for their expert.

Remember to use leading questions and to only solicit a "yes" or "no." Never ask "why" they didn't obtain a credential or engage in a specific activity. Never ask your expert "why" they did not get an advanced degree or "why" they don't treat patients anymore- unless you already know the answer, absolutely love that answer, and have that specific answer highlighted in the expert's deposition transcript.

Try not to sound judgmental. Do not betray your contempt for the expert's lack of qualifications with your tone or with unnecessary words (i.e., "you didn't even get your doctorate in…" or "you never even treated a patient with…"). Resist the temptation to scoff or shake your head as you write "no." Just get the answer on the chart. You can stress the importance of each qualification with your expert (i.e., why did you feel it was important to get a doctorate…" or "what have you learned by actually treating patients with…"). Get the "no" and go!

2. You define…

You should start every deposition by asking a doctor to define and contrast every key term in the case. Ask the orthopedic surgeon to define "a herniated disc" and define "a bulging disc" and contrast the two. Ask a use-of-force expert to define "lethal force" and "less lethal" force and contrast the two.

Similarly, you should pin-down their expert during your cross-examination by requiring him to define key terms whenever: (a) your expert discovered a fact that is inconsistent with that definition; or (b) your expert can teach the jury what is wrong with that definition.

Discover during your deposition whether their expert has difficulty defining basic terms or concepts in the relevant field. During the Nugent trial, I deposed the elected coroner (whose specialty was in family medicine) who wanted to offer an opinion in the field of cardiac electrophysiology in a case involving a conducted electrical weapon about which he knew absolutely nothing. During the deposition, I asked him more than 50 basic questions, including the definitions of volt, watt, joule, ampere, and Ohm's law. He was unable and unwilling to define any of the basic electrical concepts. His performance was so awful that the District Attorney did not call him at trial; but, if the D.A. had called him, I may have challenged him with new definitions and solicited the same "I'm not going to define that" response I received more than 50 times during his deposition.

3. You did not read…

Experts often like to focus the jury's attention on one medical test, one physical examination finding, one supporting medical study, or one quote from one deposition. Do not take the bait and spend your time only talking about that one finding, study, or quote.

Always show jurors the big picture. Establish what their expert did not read. Mark a box "Yes" and "No" and physically place a copy of every medical study their expert did not read in the "No" box. Or make a pile of deposition transcripts or medical records (especially pre-accident or pre-mortem records) that they did not read. Wait until your expert takes the stand to pull-out the game-changing study or deposition testimony that their expert never saw because he never read it.

4. You were not provided…

There are cases in which opposing counsel fails to send all of the deposition transcripts and all of the medical records to an expert. The jury has a right to know whether the expert received a deposition transcript or set of medical records and chose not to read those transcripts or medical records. The jury also has a right to know if opposing counsel failed to send certain transcripts and records to the expert. It is your job to answer that question for them during your cross-examination of the opposing expert.

5. You did not ask for…

Sometimes, an expert knew (or should have known) about the existence of a diagnostic image, transcript, or medical record, and knew that opposing counsel did not provide it. When that is the case, you should point out every document that opposing counsel failed to request. Here are the steps:

- Show them the document that references the

(unsent and unseen) evidence.

- Confirm that they received the document.

- Confirm that the document references (unsent and unseen) evidence.

- Confirm that, after receiving the document, they did not obtain the evidence.

- Confirm that, after receiving the document, they did not ask opposing counsel to obtain the evidence.

Resist the temptation to ask them "why" they didn't obtain the evidence. Let opposing counsel ask that question during re-direct.

6. You assumed…

Garbage in…Garbage out. Many expert opinions are based on assumptions. Some assumptions are based on the evidence. Some assumptions are logical. And, sometimes, opposing counsel asks the expert to make certain assumptions. Make certain the jury knows that the expert's conclusions are based on those assumptions and get the expert to agree that the accuracy of those conclusions depends on the accuracy of the assumptions.

For example, opposing counsel may ask their economist to assume a base salary, and may ask their expert life care planner to assume that the treating physician is correct about the need for future surgery. Never the let the jury think that an economist personally concluded that opposing counsel was "right" to ask him to assume that base salary. Never let the jury think that a life care planner is qualified to testify that the treating orthopedic surgeon was "right" about the need for future surgery (and your orthopedic surgeon was "wrong"). Establish that the opposing economist is a calculator, and the life care planner is a price-checker - nothing more and nothing less.

7. Before reaching your conclusion, you (only) physically…

Most experts know how to defend their conclusions and their methodology. Do not let the jury get lost in a long-winded, complicated answer that explains how the expert "analyzed" and "assessed" and "weighed" and "deconstructed" and whatever. Anchor the jury by reminding them that the expert physically only read the materials sent by opposing counsel and then offered his opinion.

Consider stretching-out the point by identifying what the expert did not physically do (before confirming that he "only" read the materials sent). Use your deposition to prepare a list of actions that the expert did not take. Picture yourself at trial confirming that, before issuing an expert report, opposing counsel's forensic pathologist:

- Did not physically examine the patient.

- Did not physically examine the product.

- Did not physically crack a book in the expert's library.

- Did not physically pick-up the phone and consult with any other expert.

- Did not physically take any tissue samples.

- Did not physically touch any diagnostic images.

- Did not physically download or pull-up any electronic images.

- Did not physically look at anything under a microscope.

- Did not physically run any tests on anything.

- Did not physically perform any calculations on a calculator.

Resist the temptation to ask the expert "why not." Resist the temptation to ask the expert "how" it is possible to reach a conclusion "without" performing certain tests or calculations. Resist the temptation to point-out what your expert physically did because that will invite reply ("he didn't need to…") or an objection to speculation ("how can he know what opposing expert did?"). Whatever answer you think you are going to get – you're not going to get it. Just collect the "no" and go!

8. Before citing this, you did not…

Some experts will cite an article, study or deposition without actually reading the entire article, study or deposition. When deposing their expert, determine:

- Whether they read the whole article (not just

the abstract).

- Whether they took the time to identify exclusion and inclusion criteria.

- Whether they read every chart, graph or table in the article.

- Whether the article was subsequently amended.

- Whether the article or deposition testimony was subsequently discredited.

Nothing is better than getting an expert to "commit" to having read an entire article or deposition during cross-examination, and then having your expert point-out what contradicts their expert's conclusions in that article or deposition. Resist the temptation to ask them whether they read a specific passage or chart because you will be giving them a chance to explain why "that" passage or chart is not relevant or important.

9. Your diagnosis of exclusion required you to rule-in & rule-out…

Some experts, primarily medical experts, will offer an opinion based on a "diagnosis of exclusion," which is the process by which they rule-out other potential causes. During a recent mock trial, one mock juror commented that a diagnosis of exclusion is a "process of elimination not a process of confirmation."

Remember that a diagnosis of exclusion is a methodology that requires two separate steps: (a) establishing by a preponderance of the evidence the alleged cause is a viable, potential cause (general causation); and (b) ruling-out all other potential causes by a preponderance of the evidence. When confronted with a diagnosis of exclusion, make certain that you dedicate your deposition to:

- Establishing all of the "potential causes" identified by their expert.

- Establishing how their expert "ruled-in" the alleged cause.

- Establishing how their expert "ruled-out" the other potential causes.

For whatever reasons, some medical experts love to defend their methodology by describing it as a "diagnosis of exclusion." Welcome that answer because attacking a diagnosis of exclusion only requires your expert to persuade the jury that ONE potential cause cannot be ruled-out.

During your cross-examination, write-down every potential cause on a flip-chart and write-down the fact, study, or evidentiary basis given by the opposing expert for "ruling-out" each potential cause. Then wait until direct examination to show: (a) what potential causes their expert missed; (b) what errors their expert made in trying to "rule-out" the potential causes (that they did identify); and (c) what errors their expert made in trying to "rule-in" the alleged cause.

10. You omitted from your report…

Every young lawyer reads an expert report and makes a list of the evidence that opposing counsel's expert cited and relied upon in reaching a conclusion. But taking the next step can be even more important. Always make a list of facts and evidence that their expert omitted from the expert report. Start that portion of your cross-examination by getting the expert to agree that it is important for an expert:

- To be objective.

- Not to "cherry pick" their facts.

- Not to "hide" anything.

- To "fairly present" the evidence "for and against" them.

If an opposing expert omits critical evidence (fact, study, test) from their report, you should confront their expert during cross-examination and force them: (a) to admit that they "omitted" each piece of undisputed evidence from their report; and (b) to state whether they "intentionally" omitted or accidentally omitted (choice versus mistake) each piece of evidence. This can be a very effective part of your cross-examination, and it will be more effective (and more objection-free) than asking your expert to identify what was omitted from their expert's report. Resist the temptation to do more than establish the omission. Wait for direct examination to let your expert explain the importance of each omission.

11. Did I write down your opinion correctly?

Experts are often moving targets. If their expert has

four opinions, write them down on a flip-chart. Put pen to paper. Record those opinions so that you can have your expert methodically attack each (and you can draw a line through each). During direct examination, you should not try to paraphrase or summarize what their expert said earlier in the trial. Opposing counsel will object and the court will sustain that objection and instruct you to pose your question as a hypothetical (i.e., "if their expert testified…"). Be prudent. Do not try to write-down every opinion. If possible, write down only the most important opinion or only those opinions you actually plan on attacking during direct examination.

Always, always, always, record verbatim what opposing counsel's expert said during cross-examination. Word for word. Resist the urge to tweak, twist, spin, or change anything when you write-down the opinion. If you change a single word, the jury will write you off as a "typical lawyer" and (worse) they may think you were afraid to write it down correctly. If you change a single word, opposing counsel will object and the court may prohibit you from writing testimony down on a flip-chart.

12. Your opinion is ultimately based on…

There are times when five separate facts all support an expert's opinion, and that expert will never agree that his or her opinion "rests" or "is based" on only one of those five facts. However, when an expert does base an opinion on a single test result or fact, it is your sacred responsibility during cross-examination to confirm that the expert's opinion is based on that single test or fact.

The real work here must be done when deposing the opposing expert. During your deposition, make sure you: (a) discuss at great length the importance of the fact/test; (b) get the expert to agree that a specific opinion is based on that fact/test; and (c) confirm that the expert's opinion would change if that test/fact was absent or different. You will need that transcript if the opposing expert tries to crawfish at trial.

You must find a way to remind the jury of the relationship between that fact/test and the specific opinion. If you write only one thing down on your flip chart, then write down the fact/test, draw an arrow and write-down the opinion which is based on that fact. When you flip to that page (during direct examination), your expert and the jury will instantly be reminded of the relationship and the importance of the fact/test.

There are many ways to think about the flip-chart and writing down opposing counsel's opinion during cross-examination. You can pick your metaphor. Your flip-chart page (bearing their expert's opinion) is an archery target that you place in front of your expert during direct-examination, and your expert is the archer you ask to hit the target. Or it is an artillery target you ask your expert to destroy. But make no mistake. Your job is to put that target squarely in front of your expert and to make absolutely certain the jury understands the importance of your expert's next shot.

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Mr. Lewis litigates commercial lawsuits, products liability lawsuits, contractual and insurance coverage disputes and represents clients in the state and federal courts of appeals.

Mr. Lewis is a civil litigator with experience in trial and appellate practice. He also represents clients in premises liability disputes, tax-related cases, and multi-district litigation. He regularly presents materials on environmental litigation and regulation issues to attorneys and business professionals.

Mr. Lewis recently was voted a “Ones to Watch” in the legal industry by New Orleans CityBusiness.

Mr. Lewis served as law clerk for the Judges of the 23rd Judicial District of Louisiana. He attended law school at Louisiana State University, where he was a member of the Louisiana Law Review.

Practices
- Commercial Transportation
- Commercial Litigation
- Insurance Coverage
- Manufacturer’s Liability and Products Liability

Industries
- Transportation
- Insurance
- Manufacturing

Accolades
- New Orleans CityBusiness Ones to Watch: Law
- Super Lawyers “Louisiana Rising Stars” List, 2014, 2015

Successes
- Construction Defect - Salinger v. Diamond B Construction
- Premises Liability - Miles v. City of Kenner, et al.
- Insurance Coverage - Summary Judgement

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- J.D., B.C.L., Louisiana State University, 2007
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Social Media And Its Effect On Jury Trials

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About three months before the jury trial was set to begin in the high profile copyright case of Oracle America v. Google, the District Court Judge was considering a request by both sides that the venire complete a two-page jury questionnaire. Then one side requested an extra day to digest the answers prior to the start of voir dire. The other side requested two days. Neither side initially disclosed to the Court the reason why a full day or more would be needed to review two pages worth of answers. The Court "eventually realized that counsel wanted the names and residences from the questionnaire so that, during the delay, their teams could scrub Facebook, Twitter, LinkedIn, and other internet sites to extract personal data on the venire. Upon inquiry, counsel admitted this. The questionnaire idea cratered, and the discussion moved to whether internet investigation by counsel about the venire should be allowed at all." Oracle America, Inc. v. Google Inc., 2016 WL 1252794 (N.D. Cal. (Judge Alsup) March 25, 2016).

The Resources Available

According to Pew Research Center, 74% of online adults use a social networking site of some kind. (http://www.pewinternet.org/data-trend/social-media/social-media-use-all-users/) The numbers are consistent across gender, education, and income levels, varying only based on age. (http://www.pewinternet.org/data-trend/social-media/social-media-user-demographics/) By reviewing a potential juror's social media sites, the parties would have access to a wealth of information. For example, a Facebook "profile" may contain a prospective juror's:

- current city and home town;
- schools attended;
- education level;
- work experience;
- lists of personal connections (i.e., "friends");
- pictures and videos;
- check-ins at real world locations;
- commentary on news stories and discussions with "friends" about social or political issues;
- relationship status;
- favorite books, movies, TV shows, and news sources;
- hobbies;
- political preferences; and
- real time updates regarding the prospective juror's thoughts on jury duty.

Facebook is only one such site. As Judge Alsup noted in the Oracle case, useful information could potentially be gleaned from a wide variety of sites including LinkedIn,

Twitter, Instagram, Google+, Snapchat, Pinterest, and Tumblr. In addition to social media sites, potential jurors may also have profiles or postings on broadly available sites such as Spokeo, Intelius, Zillow, Scribd, online bulletin boards such as Reddit, State public records, and federal court online filing databases such as Public Access to Court Electronic Records (PACER).

The Court's Concerns

In determining what limits, if any, would be placed upon the parties' internet search of the venire panel, Judge Alsup approached the issue as one of fundamental fairness, considering that the jury members were going to be repeatedly admonished to refrain from conducting their own internet research about the law suit, the parties, the lawyers, or the judge. Oracle America, 2016 WL 1252794, *2 (citing Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (June 2012)).[1] Should the panel members learn of the internet research being undertaken, the Court was concerned that the jury members "will feel justified in going to the lawyers (and to the case itself) what the lawyers are doing to them" despite the no-research admonition. Id.

Second, the Court was concerned that the results of extensive research on jurors and their preferences would provide an opportunity for the lawyers to craft a "calculated personal appeal" to particular jury members based on those preferences. Id. Finally, the Court was motivated to act to protect the privacy of the venire. Because the jury members were private citizens, the Court found their "privacy should yield only as necessary to reveal bias or a reluctance to follow the Court's instructions." Id.

The Rules

Generally, internet and social media searches of prospective and empaneled jurors is allowed. But there are rules. The American Bar Association issued Formal Opinion 466 on April 24, 2014 and discussed the ethical implications of social media research on jurors. The opinion is based on the ABA's Model Rules of Professional Conduct, which have been adopted by all states but California. The opinion states that the "mere act of observing" a potential juror's social media sites is not improper ex parte contact with a juror, similar to how driving down a juror's street to get a sense of his or her environment is not improper. Asking a juror for access to his or her social media, such as asking to "friend" them on Facebook, is improper and likened to stopping the car and asking to look inside the juror's home. The ABA committee's opinion came soon after the Association of the Bar of the City of New York issued its "Formal Opinion 2012-2, Jury Research and Social Media" which discussed the question: What ethical restrictions, if any, apply to an attorney's use of social media websites to research potential or sitting jurors?

These opinions each identify essentially three issues to watch for:

No ex parte communications with jurors. Nothing about the nature of social media changes the bright-line rule that counsel cannot engage in ex parte communications with jurors or prospective jurors. ABA Model Rule 3.5 prohibits ex parte contact with jurors, and it was widely agreed that affirmatively reaching out to a juror on social media—i.e., to "friend," "connect with," or "follow" the juror—clearly would violate that rule. Passive viewing of juror's internet presence is acceptable, depending on whether the juror receives notice of the surveillance. If a juror received notice of the review of posted information, such as through an automated message that someone has "viewed your profile," that is acceptable under the ABA's Opinion, but it might be an ex parte communication under some state's rules, including New York's.

No deception. The ABA Opinion does not mention deception, but the NYC Bar Opinion says, "The attorney must not use deception to gain access to a juror's website or to obtain information." So, attorneys and their agents cannot look for information on jurors through a Facebook profile pretending to be someone they are not.

Report any juror misconduct. As mentioned above, judges admonish jurors repeatedly that they cannot discuss the case with anyone or engage in their own investigation, and that includes through the internet

1 Also, Florida Rule of Judicial Administration 2.451, directs trial judges to instruct jurors on the use of cell phones and other electronic devices. During the trial, the trial judge may remove the jurors' cell phones or other electronic devices. The trial judge also has the option to allow the jurors to keep the cell phones and electronic devices during trial until the jurors begin deliberations. Rule 2.451 prohibits jurors from using the cell phones or electronic devices to find out information about the case or to communicate with others about the case. The jurors also cannot use the electronic devices to record, photograph, or videotape the proceedings.

and social media. Still, there are instances of jurors describing trials on Facebook and even expressing their opinions on the case. If any social media search turns up commentary that violates the Court's instructions, then attorneys must reveal it to the Court. See Oracle America, 2016 WL 1252794, *3.

The Court's Control

In Oracle America, the Court considered a ban on internet research to be "within the sound exercise of discretion to protect the integrity of our process and to curb unnecessary intrusions into juror privacy." Oracle America, 2016 WL 1252794, *3. Courts may also seek to control this type of investigation through enforcement of its local and administrative rules. In Florida, Judicial Administration Rule 2.451 governs the use of any electronic devices in the courtroom. "Electronic Devices" is broadly defined to include any device capable of making or transmitting photographs, video recordings, any device capable of creating, transmitting, or receiving text or data; and any device capable of receiving, transmitting, or recording sound, or video, laptop computers, or other similar technological devices. While the Rule expressly governs the use of electronic devices by jurors, it also governs the use of electronic devices by others in the courtroom. Similarly, administrative orders in place in many district courts prohibit the use of any electronic equipment in the courtroom without a prior court order allowing its use.

Given the Oracle America opinion, and continued publicity of the availability of such jury research, you can expect to see the issue addressed in future pretrial or other court orders. In May, 2014, the Federal Judicial Center published the results of a survey of district court judges to assess "the frequency with which attorneys use social media to gather information about potential jurors during the voir dire process." Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations, Federal Judicial Center, May 2014, page 3.

The survey asked judges about their experiences with attorneys using social media in the courtroom during voir dire. The responses at that time indicated that the incidence of attorneys' social media use was largely unknown. Of the 348 judges who responded to the question, 73%, or 255 judges, indicated they did not know the number of trials, if any, in which attorneys have used social media during voir dire. Twenty five judges (or 7% of those who responded) indicated they knew attorneys had used social media in at least one of their trials. Of the 25 judges who have seen attorneys use social media during voir dire, the majority (21 judges, or 84%) reported it to have occurred in five or fewer trials. Id., at page 11.

Of note in the survey results, however, were the rules some judges already had in place to address the use of internet research on venire panels. While most judges responding to the survey did not specifically address the issue of attorneys' use of social media to research prospective jurors during voir dire, of the 31% of the 466 responding judges who do control this conduct, 120 judges forbid attorneys from conducting research on prospective jurors using social media during voir dire (26% of responding judges) and only 23 judges directly allowed it.

The Conduct (and Misconduct) of Jurors

Florida Standard Jury Instruction 202.2, and many other standards already in use, include specific instructions to the jurors to:

Consider Only the Evidence: It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you must not do any work or investigation of your own about the case. You must not obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever. This includes reading newspapers, watching television or using a computer, cell phone, the internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. You must not visit places mentioned in the trial or use the internet to look at maps or pictures to see any place discussed during trial.

The Pattern Jury Instructions approved by the 11th Circuit include an instruction on the Conduct of the jury which raises the issue that:

In this age of technology, I want to emphasize that in addition to not talking face-to-face with anyone about

the case, you must not communicate with anyone about the case by any other means. This includes e-mails, text messages, and the internet, including social networking websites such as Facebook, MySpace, and Twitter.

You also shouldn't Google or search online or offline for any information about the case, the parties, or the law.

Pattern Jury Instruction 1.1, 11th Circuit (2013).

Nonetheless, examples of jurors not following the rules are almost commonplace. However, not all use of electronic devices or even social media commentary by jurors constitutes error such that the verdict will be disturbed. Some examples of juror use and misuse of social media include:

• In Arkansas a murder conviction was overturned because a juror tweeted during the trial. See Dimas-Martinez v. State, 2011 Ark. 515 (Ark. 2011).

• In Smead v. CL Financial Corp., 2010 WL 6562541 (Cal. Super. Ct. 2010), the Court found that social media posts about the length of the trial were not prejudicial.

• In United States v. Ganias, 2011 WL 4738684, at *3 (D. Conn. Oct. 5, 2011) juror postings such as "Guinness for lunch break. Jury duty ok today" did not taint the trial.

• A Kentucky murder conviction was reversed when two jurors Facebook-friended the victim's mother during trial. Sluss v. Commonwealth, 381 S.W.3d 215, 229 (Ky. 2012).

• A Michigan juror was removed after posting a "guilty" comment on Facebook before the conclusion of trial. Martha Neil, "Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict," ABA J., Sept. 2, 2010.

• A Florida juror sitting on a civil trial was held in criminal contempt of court and incarcerated after contacting the defendant via Facebook after being dismissed from the jury. Martha Neil, "Juror Who Sent Defendant Facebook Friend Request and Joked About Being Booted by Judge Gets 3 Days," ABA J., Feb. 17, 2012.

• In May 2016, in another Florida court room, Judge Krista Marx sentenced a juror to eight days in jail for researching the case and using Facebook to encourage a fellow juror and after the trial urging a juror to make up a variety of lies that could sabotage the verdict for murder suspect. (http://postoncourts.blog.palmbeachpost.com/2016/05/26/pbc-juror-jailed-for-eight-days-for-misconduct-in-three-amigos-trial/)

• In Slaybaugh v. Slate, 44 N.E.3d 111 (App. Ind. 2015) the defendant moved for a mistrial after his conviction for felony rape. The defendant contended that a juror lied about not knowing the victim during voir dire after discovering a Facebook friendship between the juror and the victim's sister post-conviction. The judge ruled no mistrial since juror was not asked about Facebook usage or friendship.

• In Juror No. One v. Superior Court, 206 Cal.App.4th 854 (Ca. App. 3d Disc. 2012), the Court considered the application of the Stored Communications Act on the Court's ability to review all juror postings on social media which came to light following a criminal conviction.

Conclusion

In the Oracle case the jury questionnaire was rejected and a panel of ten, eight women and two men, were seated. Reports indicate the panel was selected after extensive questioning, which seems to indicate that internet research on the panel had been limited. (http://www.newseveryday.com/articles/41316/20160511/oracle-v-s-google-fight-jury-picked.htm) On May 26, the jury found that Android does not infringe on Oracle-owned copyrights. An appeal is planned.

Research and monitoring of juries is a service readily available in the marketplace. Courts clearly have the ability to place controls on how and when some of these services may be used. Be mindful of ethical considerations when engaging an outside vendor or when conducting internet research on juries yourself. Competitive advantages may be affected, but the time is coming when the scope and ability to conduct out of courtroom research on jury panels is subject to agreement of the parties or court order.

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Christine Welstead is an experienced trial attorney and is Board Certified by the Florida Bar in Civil Trial Law. For more than 20 years, her practice has focused on representing clients in state and federal courts throughout Florida on various litigation matters. Her breadth of experience includes whistleblower and qui tam claims, civil rights, product liability, intellectual property protection, and employment discrimination claims, having tried to verdict numerous jury trials in civil rights cases, employment disputes, and tort defense. Christine has also advised property owners and security companies, had numerous jury trials, and spoken in the area of negligent security since 1999.

Areas of Experience
- Employment Litigation
- Hospitality Sector
- Intellectual Property Litigation
- Products Liability & Mass Torts
- Whistleblower & Retaliation Claims

Representative Experience
- Representation of Caribbean hotel sued for wrongful death in Southern District of Florida and raised personal jurisdiction issues.
- Representation of golf course operator in jury trial of claims made by player injured on course by fellow player in case of “golf rage.”
- Representation of municipality defending challenge to transfer the title of a multimillion dollar race track property.
- Represented two police officers in a civil rights case tried before a jury in the Southern District of Florida where Plaintiff claimed use of excessive force.
- Representation in Miami-Dade County on behalf of professional sports league to protect intellectual property rights in advance of major sporting event.
- Represented private country club in litigation brought by former proprietary member seeking to recover fair-market value of ownership.
- Representation of private security company in Miami-Dade County jury trial against whistle blower claims made by five former employees.
- Representation of private security firm with large government contract in qui tam litigation.
- Representation of private security company at jury trial of negligent security action brought by a homeowner in an exclusive gated community who suffered serious injuries in a dispute with a fellow homeowner.

Awards and Recognition
- Martindale-Hubbell, AV Rated

Education
- J.D., University of Miami School of Law, 1992; American Jurisprudence Book Award for Insurance Law, Recipient
- B.A., Tulane University, 1987

BULLET-PROOF EMPLOYEE HANDBOOKS

Vito Gagliardi
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PORZIO
BROMBERG&NEWMAN P.C.

Considerations for Corporate Policies Under Federal Labor Law

Vito A. Gagliardi, Jr., Esq.
Porzio, Bromberg & Newman, P.C.

Case Study: NLRB Judge Rules on Verizon's Handbook's Restrictions on Employee Activities

- NLRB's recent ruling reflects position that employers cannot ban employee use of company e-mail systems which management finds not to be in pursuit of company business.
- Issue is whether restrictions "chill" employees' Section 7 right to engage in concerted activities.

Code of Conduct Section 1.6 Solicitation and Fundraising

- Solicitation and fundraising distract from work time productivity, may be perceived as coercive and may be unlawful.
- Solicitation during work time (defined as the work time of either the employee making or receiving the solicitation), the distribution of non-business literature in work areas at any time or the use of company resources at any time (emails, fax machines, computers, telephones, etc.) to solicit or

Cont'd

Code of Conduct Section 1.6 Solicitation and Fundraising, *Cont'd*

- distribute, is prohibited. Nonemployees may not engage in solicitation or distribution of literature on company premises. The only exception to this policy is where the company has authorized communications relating to benefits or services made available to employees by the company, company-sponsored charitable organizations or other company-sponsored events or activities. To determine whether a particular activity is authorized by the company, contact the VZ Compliance Guideline.

4

Code of Conduct Section 1.8 Employee Privacy

- Verizon Wireless acquires and retains personal information about its employees in the normal course of operations, such as for employee identification purposes and provision of employee benefits. You must take appropriate steps to protect all personal employee information, including social security numbers, identification numbers, passwords, financial information and residential telephone numbers and addresses.

6

Code of Conduct Section 1.8 Employee Privacy, *Cont'd*

- You should never access, obtain or disclose another employee's personal information to persons inside or outside of Verizon Wireless unless you are acting for legitimate business purposes and in accordance with applicable laws, legal process and company policies, including obtaining any approvals necessary under these policies.

Code of Conduct Section 2.1.3 Activities Outside of Verizon Wireless

- Many employees participate in an individual capacity in outside organizations (such as their local school board or homeowners' association). Memberships in these associations can cause conflicts if they require decisions regarding Verizon Wireless or its products. If you are a member of an outside organization, you must remove yourself from discussing or voting on any matter that involves the interests of Verizon Wireless or its competitors. You must also disclose this conflict to your outside organization without

Cont'd

Code of Conduct Section 2.1.3 Activities Outside of Verizon Wireless, *Cont'd*

disclosing nonpublic company information and you must disclose any such potential conflict to the VZ Compliance Guideline.

Participation in any outside organization should not interfere with your work for Verizon Wireless. To the extent that your participation infringes on company time or involves the use of Verizon Wireless resources, your supervisor's approval is required.

Code of Conduct Section 3.3 Proper Use of Verizon Wireless' Property and Property Owned by Others

- Unless permitted by written company policy, it is never appropriate to use Verizon Wireless machinery, switching equipment or vehicles for personal purposes, or any device or system to obtain unauthorized free or discount services.

Code of Conduct Section 3.4.1 Prohibited Activities

- You may never use company systems (such as e-mail, instant messaging, the Intranet or Internet) to engage in activities that are unlawful, violate company policies or result in Verizon Wireless' liability or embarrassment. Some examples of inappropriate uses of the Internet and e-mail include: pornographic, obscene, offensive, harassing or discriminatory content; chain letters, pyramid schemes or unauthorized mass distributions; communications primarily directed to a group of employees inside the company on behalf of an outside organization.

14

Takeaways

- Social media policies are important – language must be carefully crafted.
- For corporate posts, consider current regulatory guidance and responsible department/official and review process.
- For employee posts, consider balance of regulatory and compliance obligations with rights afforded to employees.
- Once the policy is in place, monitoring must follow.
- Stay current with regulations, guidelines and industry standards as technology continues to evolve.

15

Case Study: NLRB Judge Rules on Verizon's Handbook's Restrictions on Employee Activities

- NLRB's recent ruling reflects position that employers cannot ban employee use of company e-mail systems which management finds not to be in pursuit of company business Issue is whether restrictions "chill" employees' Section 7 right to engage in concerted activities.

Code of Conduct Section 1.6 Solicitation and Fundraising

- Solicitation and fundraising distract from work time productivity, may be perceived as coercive and may be unlawful.

- Solicitation during work time (defined as the work time of either the employee making or receiving the solicitation), the distribution of non-business literature in work areas at any time or the use of company resources at any time (emails, fax machines, computers, telephones, etc.) to solicit or distribute, is prohibited. Nonemployees may not engage in solicitation or distribution of literature on company premises. The only exception to this policy is where the company has authorized communications relating to benefits or services made available to employees by the company, company-sponsored charitable organizations or other company-sponsored events or activities. To determine whether a particular activity is authorized by the company, contact the VZ Compliance Guideline.

  Rule specifically prohibits use of company resources (e.g., e-mails, telephones, etc.) to submit or distribute at any time. This is contrary to precedent which established that employees have a right to use their employers' e-mail systems to engage in Section 7 communications during their non-working time.

Code of Conduct Section 1.8 Employee Privacy

- Verizon Wireless acquires and retains personal information about its employees in the normal course of operations, such as for employee identification purposes and provision of employee benefits. You must take appropriate steps to protect all personal employee information, including social security numbers, identification numbers, passwords, financial information and residential telephone numbers and addresses.

- You should never access, obtain or disclose another employee's personal information to persons inside or outside of Verizon Wireless unless you are acting for legitimate business purposes and in accordance with applicable laws, legal process and company policies, including obtaining any approvals necessary under these policies.

  Rule is too broadly worded and is improper. Could be reasonably read to prohibit employees from discussing wages, hours, and terms and conditions of employment or disclosing employer information to a labor organization or for other protected, concerted activity.

Code of Conduct Section 2.1.3 Activities Outside of Verizon Wireless

- Many employees participate in an individual capacity in outside organizations (such as their local school board or homeowners' association). Memberships in these associations can cause conflicts if they require decisions regarding Verizon Wireless or its products. If you are a member of an outside organization, you must remove yourself from discussing or voting on any matter that involves the interests of Verizon Wireless or its competitors. You must also disclose this conflict to your outside organization without disclosing nonpublic company information and you must disclose any such potential conflict to the VZ Compliance Guideline.

  Participation in any outside organization should not interfere with your work for Verizon Wireless. To the extent that your participation infringes on company time or involves the use of Verizon Wireless resources, your supervisor's approval is required.

  "Read literally and in context, the rule does not tend to chill Section 7 activities."

Code of Conduct Section 3.3 Proper Use of Verizon Wireless' Property and Property Owned by Others

- Unless permitted by written company policy, it is never appropriate to use Verizon Wireless machinery, switching equipment or vehicles for personal purposes, or any device or system to obtain unauthorized free or discount services.

  As the reference to machinery cannot be reasonably

red to prohibit use of e-mail systems," rule does not violate Section 7.

Code of Conduct Section 3.4.1 Prohibited Activities

- You may never use company systems (such as e-mail, instant messaging, the Intranet or Internet) to engage in activities that are unlawful, violate company policies or result in Verizon Wireless' liability or embarrassment. Some examples of inappropriate uses of the Internet and e-mail include: pornographic, obscene, offensive, harassing or discriminatory content; chain letters, pyramid schemes or unauthorized mass distributions; communications primarily directed to a group of employees inside the company on behalf of an outside organization.

  Rule overly broad use of the word "embarrassment" chills Section 7 activities.

Takeaways

- Social media policies are important – language must be carefully crafted.
- For corporate posts, consider current regulatory guidance and responsible department/official and review process.
- For employee posts, consider balance of regulatory and compliance obligations with rights afforded to employees.
- Once the policy is in place, monitoring must follow.
- Stay current with regulations, guidelines and industry standards as technology continues to evolve.

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Vito A. Gagliardi, Jr. co-chairs the Litigation Practice Group, where he heads the Education and Employment Team. He represents school districts in numerous matters and handles an extraordinary variety of employment law matters for the firm's public and private sector clients in state and federal courts, before state and federal agencies, and before arbitrators. Vito litigates and counsels clients in every area of labor and employment law, including issues of restrictive covenants, harassment, discrimination and whistleblowing. He represents management in labor grievances and before PERC. Vito regularly guides clients through reductions in force and on employment issues related to restructuring and consolidation. He also handles investigations by management into allegations of employee wrongdoing.

Vito is certified by the Supreme Court of New Jersey's Board on Trial Certification as a Civil Trial Attorney. Vito, a Martindale-Hubbell AV-rated lawyer, has been listed in New Jersey Super Lawyers in the area of employment law since the list's inception in 2005.

Practice
- Business Disputes and Counseling
- Corporate, Commercial and Business Law
- Education
- Employment and Labor
- Governmental Affairs
- Litigation

Representative Matters
- Oversaw the only three regional school district dissolutions in New Jersey history, resolving hundreds of employment issues raised under law, statutes, regulations and collective bargaining agreements. All disputes were addressed successfully, and all litigations challenging any aspect of the dissolution were defeated.
- Used federal and state RICO statutes as effective counterclaims as part of the defense of employment litigations. Prevailed in one of the first published opinions involving the civil use of the state RICO statute.
- Represented then Mayor-Elect Cory Booker in litigation enjoining his predecessor from non-bid sales of city property.

Honors and Awards
- Recognized on the New Jersey Super Lawyers List, Employment & Labor (2005 - 2016)
- Recognized in Best Lawyers in America, Education Law (2012 - 2017), Corporate Law (2013), Litigation - Labor & Employment (2013 - 2017)
- Recipient, 2016 Chief George C. Tenney Award, New Jersey State Association of Chiefs of Police
- Recipient, 2011 President's Award, New Jersey State Association of Chiefs of Police
- Recognized in 2011 Super Lawyers Business Edition, Employment & Labor Law

Education
- Washington & Lee University School of Law, Lexington, Virginia, J.D., cum laude, 1989. -- Order of the Coif; Captain, National Moot Court Team; Burks Moot Court Competition, Best Oralist; American Jurisprudence Award in the Study of Evidence
- University of Notre Dame, Notre Dame, Indiana, B.A., 1986. - News and Sports Broadcaster, WVFI-AM/WSND-FM; College of Arts and Letters Student Advisory Council

Panel: Setting Reserves For Claims And Litigation

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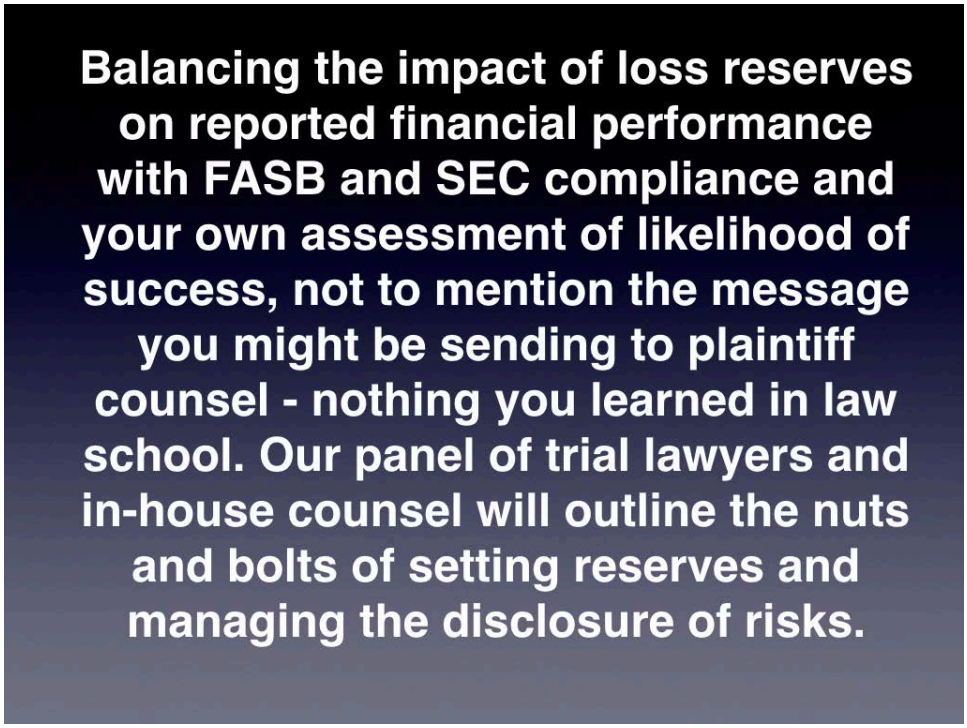
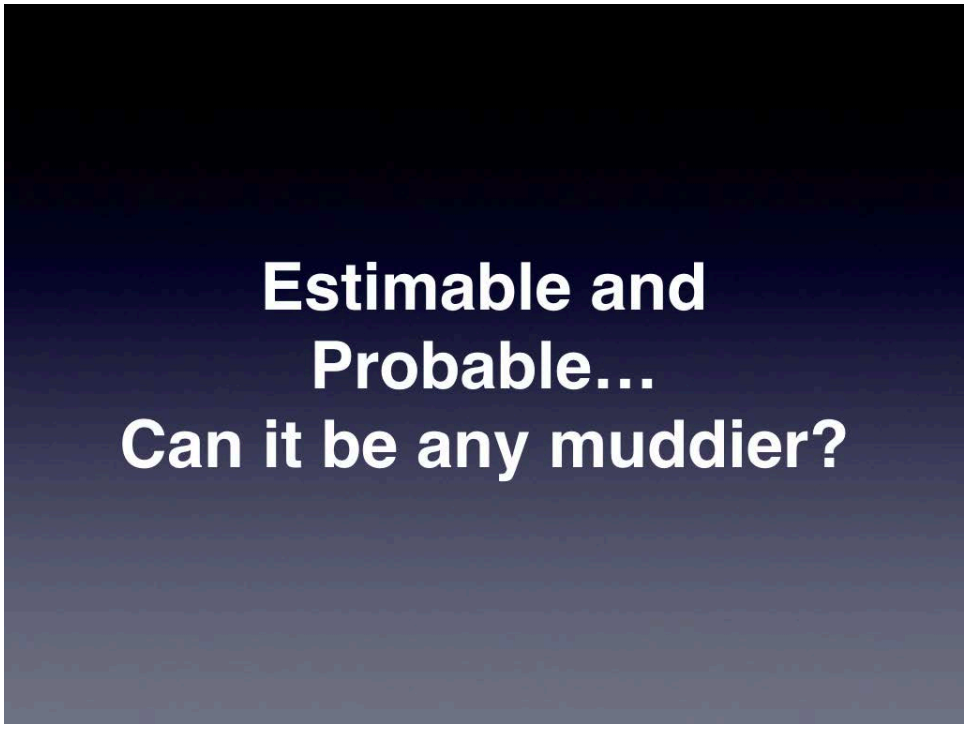
Panel Discussion:

Setting Reserves for Claims and Litigation

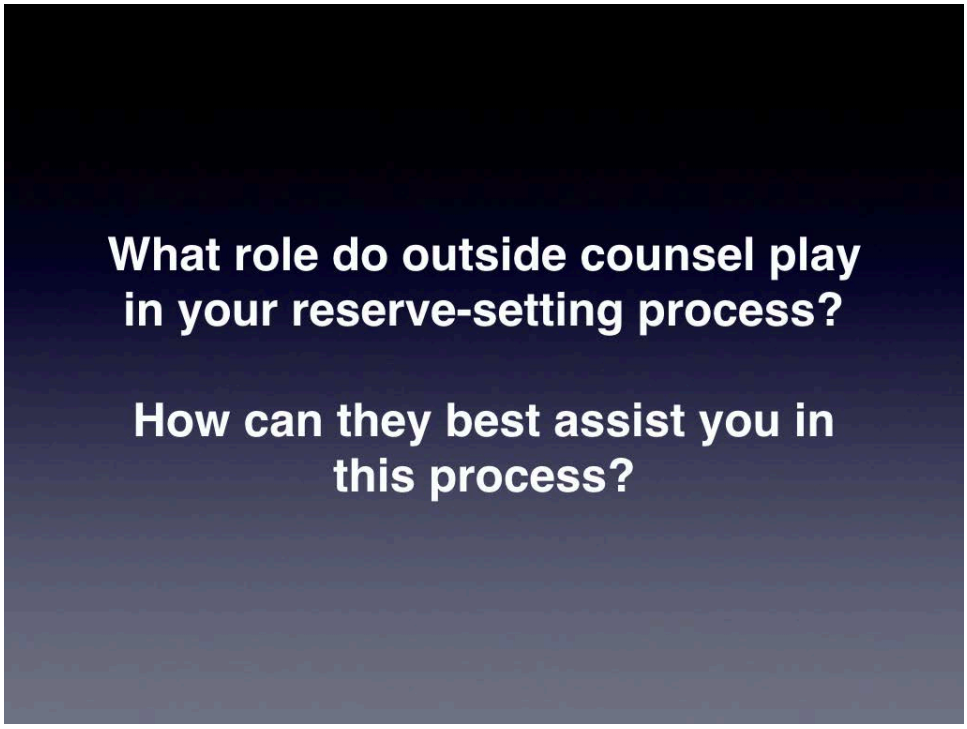
Moderator: Joshua Metcalf
Forman Watkins & Krutz
Jackson, MS

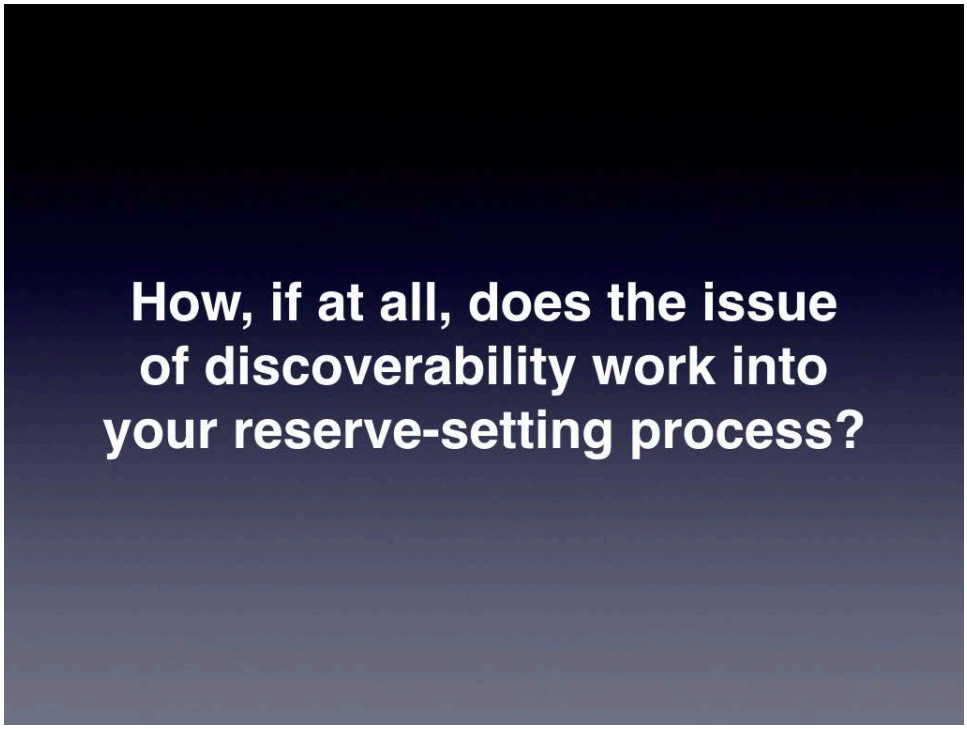

Balancing the impact of loss reserves on reported financial performance with FASB and SEC compliance and your own assessment of likelihood of success, not to mention the message you might be sending to plaintiff counsel - nothing you learned in law school. Our panel of trial lawyers and in-house counsel will outline the nuts and bolts of setting reserves and managing the disclosure of risks.


As an in-house attorney, what are the biggest challenges you face in setting litigation reserves?


Estimable and
Probable…
Can it be any muddier?

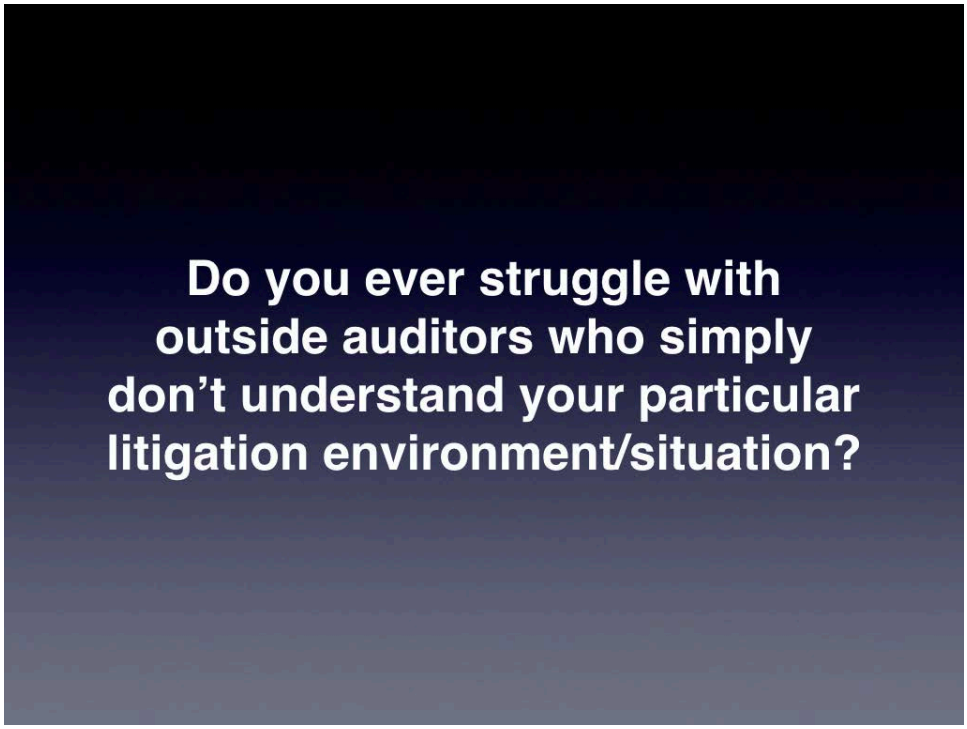

How do you approach
unasserted claims?


What role do outside counsel play in your reserve-setting process?
How can they best assist you in this process?


How, if at all, does the issue of discoverability work into your reserve-setting process?


How do you approach the issue of recurrent litigation?


What other issues do you run into when setting litigation reserves?


Do you ever struggle with outside auditors who simply don't understand your particular litigation environment/situation?

Joshua J. Metcalf

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http://www.formanwatkins.com/people/joshua-metcalf/

Devoted and driven, Joshua Metcalf never slows down. Always giving 100% of his effort to his work, Joshua has been organizing the defense of complex cases nationwide for fifteen years, building a respected reputation in that time. Having learned the need for attention to detail during his tenure at the Virginia Military Institute, Joshua uses his strong desire to serve and his relentless work ethic to offer his clients a detail-focused but efficient representation, which emphasizes creative strategies and a thorough deconstruction of his opponent's case. Vowing never to be outworked or out-prepared, Joshua offers clients a strong legal voice and an organized defense to help them identify the issues that really matter to them and to their cases, and to implement appropriate plans to ensure success from both a legal and business perspective. With an insatiable intellectual curiosity, Joshua loves digging into complex medical and scientific issues, and enjoys collaborating with the talented members of his team to produce a consistently excellent product for his clients. For Joshua, business is personal and, as his clients can attest, a close working relationship and regular communication is at the heart of any engagement with Joshua and his team. Joshua carries this same focused intensity with him away from work, which is reflected in his commitment to his community and his dedication to his wife and four children. If he is not in his office or on the road for a client, chances are you will find him with his wife and kids - at a gymnastics meet or baseball game, on a campout, or doing tractor therapy at the family's tree farm.

Important Litigation Involvement

- Coordinates the national defense for multiple Fortune 500 companies, developing defense strategy, negotiating settlements, and ensuring the efficient defense of all matters
- Coordinates the defense of numerous claims for noise-induced hearing loss
- Regularly litigates construction claims, obtaining numerous judgments and favorable outcomes on behalf of material suppliers
- Has defended thousands of claims for personal injury and property damage allegedly caused by organic solvents, formaldehyde, and numerous other industrial chemicals and substances
- Coordinated the defense of more than 1,500 claims of exposure to dioxin, pentachlorophenol and creosote, achieving a very favorable outcome for the client

Professional Recognition

- Martindale-Hubbell® Preeminent AV™ Peer Review Rated
- Mid-South Rising Stars® since 2010: Personal Injury Defense: Products
- Selected as one of Mississippi Business Journal's 2013 Leaders in Law

Pro Bono and Community Service

- Greater Belhaven Neighborhood Foundation
- Mississippi Volunteers Lawyers Project

Education

- University of Virginia School of Law, J.D.
- Virginia Military Institute, B.A.
- University of St Andrews, Scotland, Study Abroad Program

Cross-Border Litigation: Building Your Case And Enforcing Your US Judgement In Canada

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OVERVIEW

- Collecting Evidence in Canada
  - –Letters Rogatory
  - –Implied Undertaking of Confidentiality
- Enforcing U.S. Judgments in Canada

LETTERS ROGATORY

- U.S. litigants may seek the assistance of Canadian courts to discover and collect evidence in Canada
- An application supported by letters rogatory (letter of request) is necessary
- Letters rogatory must be carefully tailored to Canadian law

IMPLIED UNDERTAKING

- Evidence obtained through discovery is subject to an implied undertaking of confidentiality
- Precludes parties from using the evidence for purposes other than the litigation
- Undertaking may be required expressly from U.S. applicant
- Protective order may be issued instead

ENFORCING U.S. JUDGMENTS IN CANADA

ENFORCEMENT PROCEDURES

- Numerous enforcement mechanisms available and can vary by province
- Examples:
  - Examination in aid of execution
  - Garnishment
  - Registration of judgment against title to property
  - Seizure and sale of assets

RECOGNIZING U.S. JUDGMENTS

- Recognition necessary before U.S. judgment can be enforced
- Gives the U.S. judgment the same status as a Canadian judgment
- Two routes to recognition:
  - *Reciprocal Enforcement of Judgments Act / Court Order Enforcement Act*
  - Common law action

RECIPROCAL ENFORCEMENT OF JUDGMENTS LEGISLATION

- Permits recognition through registration
- U.S. judgment must come from a "reciprocating state"
- Other criteria, such as no ongoing appeal
- The legislation and list of reciprocating states vary from province to province

COMMON LAW ACTION

- Absent legislation, an action must be brought to recognize and enforce the U.S. judgment
- U.S. court must have had a "real and substantial connection" to the action or the parties
- Indicia can include, amongst other things: attornment, residence, presence in that jurisdiction, and the subject matter of the dispute

DEFENCES TO ACTION

- Once a real and substantial connection is established, defences may be available:
  - Fraud
  - Public policy
  - Lack of natural justice

TAKEAWAYS

- Collecting evidence:
  - –Letters rogatory must be carefully tailored to Canadian law
  - –Evidence is subject to an implied or express undertaking of confidentiality

It has never been more important to understand the impact of involving a foreign jurisdiction in commercial litigation. Business relations are increasingly global; legal disputes commonly spill from one country into the next. Perhaps most acutely, this trend exists at the Canada-United States border dividing two partners in one of the world's largest economic relationships.

Fortunately, in the pursuit of comity of nations, modern Canadian law has significantly eased the burden on U.S. litigants when their disputes touch Canada.[1] The principle of comity encourages reciprocity between courts by promoting order and fairness, respect for other states, and stability and predictability.[2] It is grounded in the modern need to facilitate the flow of wealth, skills, and people across borders.[3]

Comity means that Canadian courts frequently respond to letters rogatory from their U.S. counterparts by assisting with the collection of evidence.[4] Often, comity also causes Canadian courts to give effect to the laws and judicial decisions of the U.S.[5] Once a final U.S. judgment is rendered, the successful party can access Canadian enforcement mechanisms by having it registered or recognized in Canada.[6]

Despite this progress, collecting Canadian evidence and enforcing U.S. judgments are not always simple. Some of the subtleties and obstacles are discussed in this paper. As the law can differ between Canada's ten provinces, it focuses on the three largest: Ontario, British Columbia, and Alberta. Suffice it to say, to ensure effective access to judicial resources, an understanding of these principles should be sought from Canadian counsel at the beginning of any U.S. dispute involving the jurisdiction of Canadian courts.

LETTERS ROGATORY: COLLECTING EVIDENCE IN CANADA

There are many reasons U.S. litigants might seek the help of Canadian courts to collect evidence. Even if the dispute's subject matter has nothing to do with Canada, a party might have moved north, a key witness might reside in Canada, or crucial documents might be in the possession of a Canadian company.

Rather than be deterred, U.S. litigants should take heart in Canadian legislation empowering its courts to

1 See e.g. *Zingre et al. v. The Queen*, [1981] 2 S.C.R. 392, [1981] S.C.J. No. 89; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135; and *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52.

2 *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at para. 52.

3 *Morguard*, *supra* note 1 at para. 31.

4 *Zingre*, *supra* note 1 at paras. 18-22.

5 *Ibid* at para. 18.

6 *Beals v. Saldanha*, 2003 SCC 72 at paras. 19-23; and *Pro Swing*, *supra* note 1 at paras. 15 and 31.

assist. Pursuant to section 46 of the *Canada Evidence Act*[7], courts can order a person to undergo examination under oath and produce documents. Generally, Canada's provinces have legislation with equivalent provisions.[8] Not an example of clear legislative drafting, section 46(1) of the *Canada Evidence Act* reads:

> If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

This section contains three conditions, but its use is ultimately a matter of judicial discretion.[9] First, there must be an application to a Canadian court. Second, there must be an ongoing matter pending before a foreign court or tribunal. Third, it must be made to appear to the Canadian court that the foreign body is desirous of its assistance in collecting evidence. The third criterion can be satisfied by providing letters rogatory from the foreign body.

Canadian courts are liberal in granting these requests.[10] The overarching principle is that foreign requests will be given full force and effect unless they are contrary to Canadian public policy, or otherwise prejudicial to Canadian sovereignty or its citizens.[11] Prejudice to sovereignty can take the form of vague and general requests for document production, discovery requests in the nature of fishing expeditions, and examinations that risk putting the examinee in the position of having to commit an offence, amongst other things.[12]

With slight differences, courts in Ontario, British Columbia, and Alberta consider the following six factors in deciding whether to give effect to letters rogatory:

1. Whether the evidence is relevant;
2. Whether the evidence is necessary for trial and will be adduced if relevant;
3. Whether the evidence is otherwise attainable;
4. Whether the order is contrary to public policy;
5. Whether the documents sought are identified with reasonable specificity; and
6. Whether the order will be unduly burdensome.[13]

Letters rogatory should be drafted with these factors in mind, as their content drives whether the request will be granted. The inquiry should be kept narrow, specific, and consistent with Canadian law relating to the discovery and production of evidence.

For example, Canadian courts give deference to statements in letters rogatory that the requested evidence is relevant, particularly if the U.S. judge issued the letters after contested argument and thorough review of the pleadings and evidence.[14] Further, a request might be unduly burdensome – and hence denied – if it compels a person to do more than would be required if the action were being tried locally.[15] A court might be less likely to grant the request if it appears discovery is its primary purpose, rather than obtaining evidence for use at trial.[16]

It is important to note that if a request is granted, it will be subject to an implied or express undertaking of confidentiality, or to a protective order. In Canada, information obtained through discovery is subject to an implied undertaking that the information will not be used for any purpose other than that litigation

7 R.S.C. 1985, c. C-5.

8 See e.g. *Evidence Act*, R.S.O. 1990, c. E.23, s. 60; *Evidence Act*, R.S.B.C. 1996, c. 124, s. 53; and *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 56.

9 *Zingre*, *supra* note 1 at paras. 29-30.

10 *United States District Court, Middle District of Florida v. Royal American Shows Inc.*, [1982] 1 S.C.R. 414 at para. 11, [1982] S.C.J. No. 16.

11 *Zingre*, *supra* note 1 at para. 18.

12 *Ibid* at para. 19.

13 See: *Presbyterian Church of Sudan v. Taylor*, [2005] O.J. No. 3822 at para. 20, 275 D.L.R. (4th) 512 (O.N.C.A.); *EchoStar Satellite Corp. v. Quinn*, 2007 BCSC 1225 at para. 38; and *Richardson v. Shell* Canada Ltd., 2012 ABQB 170 at para. 26.

14 *Treat America Ltd. v. Nestlé Canada, Inc.*, 2011 ONCA 560 at para. 19; *EchoStar*, *supra* note 13 at para. 47; and *United Food and Commercial Works, Local 880 v. Simard*, 2012 ABQB 615 at para. 28.

15 *AstraZeneca LP v. Wolman*, [2009] O.J. No. 5344 at para. 29, 183 A.C.W.S. (3d) 410 (Ont. S.C.J.).

16 *Aker Biomarine AS v. KGK Synergize Inc.*, 2013 ONSC 4897 at para. 28; *EchoStar*, *supra* note 13 at paras. 39-40; *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 2005 ABQB 920 at para. 46.

(although parties can apply to vary or be relieved from this undertaking).[17] This weighty obligation precludes parties from publicizing the evidence or using it in other proceedings. In Ontario, before courts accede to letters rogatory they typically demand an express undertaking of confidentiality directly from the U.S. applicant.[18] Alternatively, a court might make a protective order with the same effect.[19]

ENFORCING U.S. JUDGMENTS IN CANADA

Once evidence has been collected and the U.S. court has rendered final judgment, Canadian courts offer a wide variety of mechanisms for enforcement. The judgment creditor might examine the debtor under oath to discover their income, assets and general financial circumstances, or the judgment creditor might garnish bank accounts and seize and sell property, to list just a few examples.[20]

There are two means of accessing these mechanisms. First, various provinces have legislation permitting foreign judgments to be registered and enforced by an application to court.[21] In the absence of this, U.S. judgment creditors must generally commence an action in Canada to recognize and enforce the judgment (actions are usually more complicated and costly than applications).[22]

Statutory registration is the quickest route to enforcement – when it is available. If the U.S. judgment is for money and comes from a "reciprocating" state with a Canadian province, then it can be registered and made enforceable as a judgment of that province by application. [23] This is intended to be straightforward and in many cases can be made without notice.[24]

However, there are impediments to registration. Some U.S. states are reciprocating jurisdictions with British Columbia[25] and Alberta[26], but not a single one is a reciprocating jurisdiction with Ontario.[27] Even if the judgment comes from a reciprocating state, registration is sometimes prohibited, such as when the original court acted without jurisdiction, when the judgment was obtained by fraud, or when the judgment may be subject to appeal.[28]

Actions are consequently the more common road to enforcement. On the basis of comity of nations, Canadian courts generously and liberally recognize and enforce foreign judgments.[29] As long as the foreign court properly exercised its jurisdiction, its final judgment will be given full faith and credit.[30] Even non-monetary awards such as injunctions and orders for specific performance can be enforced, although the substance of these orders will be closely considered and compared to what would have been available locally.[31]

The test in an action for recognition and enforcement is simple. Rather than probing the judgment's merits, Canadian courts ask whether the U.S. court had a "real and substantial connection" to the action or the parties.[32] Significant indicia of this include attornment, agreement to submit, residence, and presence in that jurisdiction.[33] If jurisdiction was not properly taken, then the foreign judgment will not be enforced.[34] To be clear, the focus is on the U.S. court's connection to the action and parties. When it comes to enforcing a foreign judgment, a real and substantial connection between the Canadian court and the action or parties is unnecessary.[35]

Once a real and substantial connection is established, the court will consider whether any defences apply.[36] These include fraud, public policy, and a lack of natural

17 *Juman v. Doucette*, 2008 SCC 8 at paras. 4, 32-35.

18 *AstraZeneca*, *supra* note 15 at paras. 60-61.

19 *Aker Biomarine*, *supra* note 16 at para. 30.

20 *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, ss. 3, 55 and 96; British Columbia, *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 13-4; *Civil Enforcement Act*, R.S.A. 2000, c. C-15, ss. 43, 48, 67, 74 and 77; Alta. Reg. 276/1995, s. 35.11; and Ontario, *Rules of Civil Procedure*, O. Reg. 575/07, s. 6(1), r. 60.07, 60.08 and 60.18.

21 See e.g. *Court Order Enforcement Act*, *supra* note 20; *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5 [Alberta *REJA*]; and *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6 [Ontario *REJA*].

22 *Beals*, *supra* note 6 at paras. 16-19.

23 *Court Order Enforcement Act*, *supra* note 20, ss. 29(8) and 33; Ontario *REJA*, *supra* note 21, ss. 1(1) and 4; and Alberta *REJA*, *supra* note 21, ss. 1(1) and 5.

24 *Court Order Enforcement Act*, *supra* note 20, s. 29(2); Ontario *REJA*, *supra* note 21, s. 2(2); and Alberta *REJA*, *supra* note 21, s. 2(2).

25 These are Alaska, California, Colorado, Idaho, Oregon, and Washington: Orders in Council 980/89, 1377/89, 1378/89, 1379/89, 980/90, and 981/90.

26 These are Washington, Idaho, and Montana: Alta. Reg. 344/85.

27 O. Reg. 322/92.

28 *Court Order Enforcement Act*, *supra* note 20, s. 29(6); Ontario *REJA*, *supra* note 21, s. 3; and Alberta *REJA*, *supra* note 21, s. 2(6).

29 *Chevron*, *supra* note 2 at para. 27.

30 *Morguard*, *supra* note 1 at para. 41.

31 *Pro Swing*, *supra* note 1 at paras. 15, 30-31.

32 *Beals*, *supra* note 6 at para. 37

33 *Ibid.*

34 *Ibid* at para. 39.

35 *Chevron*, *supra* note 2 at para. 75.

36 *Beals*, *supra* note 6 at para. 39.

justice.[37] Lack of natural justice requires that the defendant prove the foreign proceeding contravened Canadian notions of fundamental justice as they relate to procedure. [38] The decision's merits are irrelevant to this defence.[39] The defence of public policy turns on whether the foreign law offends Canadians' views of basic morality.[40] A judgment from a corrupt or biased court is an example.[41]

If the U.S. court had jurisdiction to render final judgment in the matter, and no defences apply, then the action for recognition and enforcement should succeed and the door should open to the full panoply of enforcement tools in that province. Perhaps just as importantly, success might permit the judgment to be easily registered by application in other Canadian provinces.[42]

CONCLUSION

When evidence is within Canada's jurisdiction, letters rogatory form an invaluable part of a U.S. litigant's arsenal. However, before obtaining letters rogatory from a U.S. court, Canadian law must be fully considered. Whether or not Canadian courts grant requests often turns on the letters' wording. The consequences of implied or express undertakings of confidentiality must also be understood, lest they be violated and repercussions suffered.

Enforcement within Canada's borders can also be crucial. In some provinces, some money judgments can be enforced by applying to court for registration. In other cases, an action must generally be brought to recognize and enforce the judgment. However, the test is not difficult. Demonstrating a real and substantial connection between the U.S. court and the dispute or the parties places the judgment debtor in a precarious position. Establishing one of the few defences to recognition is challenging.

In short, comity of nations is a powerful concept. It fosters order and fairness, reciprocity between courts, and deeper economic relations among nations. Its Canadian legal implications are profound. Faced with the prospect of litigation flowing into Canadian borders, savvy U.S. counsel will incorporate these principles into their litigation strategy from the very beginning.

37 *Ibid* at para. 40.

38 *Ibid* at paras. 59, 61 and 64.

39 *Ibid* at para. 64.

40 *Ibid* at para. 71.

41 *Ibid* at para. 72.

42 *Chevron*, *supra* note 2 at para. 49.

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Sean's practice involves all aspects of corporate/commercial litigation, with an emphasis on business law, securities law and construction law disputes. His trial and appellate experience in commercial litigation matters includes contested merger transactions, takeover bids, plans of arrangements, shareholder litigation, dissent proceedings, contractual disputes, negligence claims and defending class actions.

Sean has experience advising clients on compliance with domestic and international anticorruption legislation, including the Corruption of Foreign Public Officials Act.

Sean also advises investment dealers on matters of regulatory compliance and has represented clients in regulatory investigations and hearings conducted by the B.C. Securities Commission and other provincial securities commissions, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA).

Sean's experience includes a secondment to the B.C. Securities Commission (enforcement division), where he negotiated settlements and appeared as counsel in commission hearings.

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- Class Actions
- Business Crimes, Investigations & Compliance
- Anti-Corruption & Bribery
- Construction Dispute Resolution

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- Mining Litigation & Dispute Resolution

Awards and Recognition
- Chambers Canada: Canada's Leading Lawyers for Business 2016 (Litigation: White Collar Crime & Government Investigations)
- The Best Lawyers in Canada 2016 (Securities Litigation - Defence)
- Canadian Legal Lexpert Directory 2014 - 2016 (Securities Litigation)
- Benchmark Canada: The Definitive Guide to Canada's Leading Litigation Firms and Attorneys 2013 - 2016 (Securities Litigation)

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- Admitted to the British Columbia Bar - 2000
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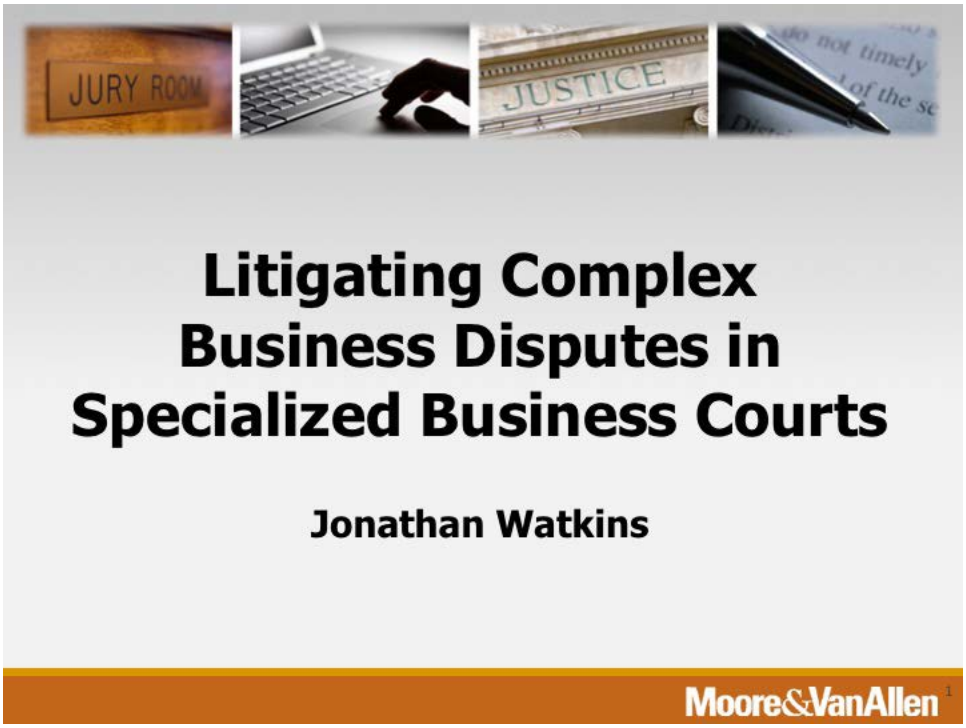

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Jonathan Watkins represents clients in complex litigation and white collar investigations. His litigation practice covers a wide range of commercial disputes, including intellectual property, antitrust, M&A, and securities litigation. Mr. Watkins has extensive trial court and appellate experience; he has represented clients at trial in federal and state courts across the country and before several federal and state appellate courts.

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Before joining Moore & Van Allen, Mr. Watkins practiced with Cravath, Swaine & Moore LLP in New York City.

Practice Areas
- Appellate & Constitutional
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- North Carolina Business Court Litigation
- Securities Litigation
- White Collar, Regulatory Defense, and Investigations

Of Note
- Selected for the North Carolina Rising Stars list, which is included in the North Carolina Super Lawyers magazine, for Business Litigation, in 2014-2016
- Named to the Access to Justice Pro Bono Partners 2013 Pro Bono Honor Roll by Legal Services of Southern Piedmont, Legal Aid of North Carolina–Charlotte, and Council for Children's Rights
- Mr. Watkins provided pro bono representation to a class of homeless families with children in a constitutional dispute with New York City and New York State, for which he received the Outstanding Pro Bono Service Award from the Legal Aid Society

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- B.S., Chemical Engineering, Lehigh University
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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?