MISSION POSSIBLE: WINNING STRATEGIES FOR LITIGATION MANAGEMENT

LITIGATION MANAGEMENT CLE SUPERCOURSE

NOVEMBER 7-10, 2019 **GRAND DEL MAR**

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CLASS ACTION TRENDS AND LEGAL DEVELOPMENTS

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Class Action Trends and Legal Developments
Emily Harris

For the first time, in a long time, the U.S. Supreme Court is unlikely to hear a case in its upcoming term that deals with class actions. This is a break from the steady roll-out of opinions since 2010 that have changed the class action landscape. What follows is a look at the recent past and issues percolating up from the lower courts, as well as the new amendments to Rule 23 that went into effect December 31, 2018.

CAFA Removal

The Class Action Fairness Act ("CAFA") provides a path for removal of state class actions to federal court, which would not otherwise be removable under the federal question and diversity jurisdiction doctrines. Under CAFA, Congress provides federal jurisdiction over class actions where the matter in controversy exceeds $5,000,000 and at least one class member is a citizen of a state different from the defendant. 28 U.S.C. §1332(d)(2)(A). Removal under CAFA may be had by "any defendant" and "without regard to whether any defendant is a citizen of the state in which the action is brought." 28 U.S.C. § 1453(b).

In Home Depot v. Jackson, 139 S.Ct. 1743 (May 28, 2019), the U.S. Supreme Court took up the question of whether a third party named in a class action counterclaim brought by the original defendant otherwise satisfies the jurisdictional requirements of CAFA. In a 5-4 opinion written by Justice Thomas, the Court concluded the answer was no. In Home Depot, Citibank filed a debt-collection action against the defendant, George Jackson. Jackson then counterclaimed against Citibank on his individual claims and also filed third-party class action claims against Home Depot, alleging unfair trade practices. Citibank dismissed its claims against Jackson and Home Depot removed the action under CAFA. The case was remanded back to state court on the ground that Home Depot, as a counterclaim party, could not remove the action because it was not a defendant under the relevant statutes.

Reaching the Supreme Court, the Court first reasoned under rules of statutory interpretation that 28 U.S.C. § 1441(a) limited removal to a defendant of a "civil action," not a "claim." Because a counterclaim is irrelevant to whether the district court had original jurisdiction over a civil action, "[s]ection 1441(a) does not permit removal based on counterclaims at all." 139 S.Ct. at 1748. The Court further concluded that CAFA did not provide a path for removal, despite the language in § 1453(b) that permits removal by "any defendant" to a "class action." Id. at 1750-51. In this respect the Court reasoned that the use of the term "any defendant" in CAFA "simply clarif[ies] that certain limitations on removal that otherwise might apply" – citizenship of the defendant and consent by all defendants – "do not limit removal under § 1453(b)." Recognizing, as the dissent argued that the Court's interpretation would allow a defendant to use the statute as a tactic to prevent removal of a class action under CAFA, the Court concludes its opinion by inviting Congress to amend CAFA to avoid the result. Stay tuned.

Personal Jurisdiction

The reverberations of Bristol Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017) continue throughout the lower courts, particularly in the class

context. In Bristol Myers Squibb, the Court held that unless there was general jurisdiction for a corporation, claims by nonresidents could not proceed due to a lack of specific personal jurisdiction. Id. at 1783-84. Left unanswered by the Supreme Court's opinion was whether the holding applied in federal court and whether the jurisdictional limits applies to class actions. As of the date of this article, no federal appellate court has addressed whether Bristol Myers Squibb prohibits national class actions. The district courts are divided on the issue. Some courts limit Bristol Myers Squibb to mass actions and hold that it does not impact the claims of absent class members. Other courts hold that absent class members are non-parties and Rule 23 allows nationwide classes. And, other courts have found that Bristol Myers Squibb does actually prohibit nationwide class actions if the defendant corporation is not sued in one of its home forums. See § 6:26.Personal jurisdiction over defendants in plaintiff class actions, 2 Newberg on Class Actions § 6:26 (5th ed.). One of the most recent of these cases is Bakov v. Consolidated World Travel, 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019). In Bakov, plaintiffs sought a nationwide class against a defendant for alleged Telephone Consumer Protection Act (TCPA) claims. Plaintiffs brought a motion to certify a nationwide class. While the court certified an Illinois-only class, it refused to certify a nationwide class holding that it lacked general jurisdiction over the defendant and that under Bristol Myers Squibb, it lacked specific personal jurisdiction over the defendant as to non-Illinois claims. Id. at *13-14. This is one issue that will surely make its way to the U.S. Supreme Court.

Arbitration

Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407 (2019), is a follow-up to the Supreme Court's 2010 opinion in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010), where it was held that a court may not compel arbitration on a classwide basis when an arbitration agreement is silent. Nine years later in Lamps Plus the Court revisited its opinion, not only reaffirming it but taking it a step further holding that the FAA also "bars an order requiring class arbitration when the agreement is ambiguous." Id. at 1412 & 1416. "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice the principal advantage of arbitration," its informality, "which makes the process slower, more costly and more likely to generate a procedural morass than final judgment." Id. at 1416. After Lamps Plus, a defendant cannot be forced to arbitrate on a classwide basis unless, the agreement clearly allows for class arbitration; otherwise, the only claim that will be compelled to arbitration is an individual claim.

Arbitration Agreement's Impact on Class Notice and Membership

In re JPMorgan Chase & Co., 916 F.3d 494 (5th Cir. 2019), the Fifth Circuit Court of Appeals considered the issue of whether class notice should be provided in a conditionally certified FLSA class action to potential opt-in class members who had executed arbitration agreements. The court concluded the trial court erred in ordering notice to employees who had executed arbitration agreements because the arbitration agreement was uncontested and, as a result, those employees cannot participate in the litigation.

In the several months since the 5th Circuit's opinion, several decisions in FLSA matters have distinguished the In re JP Morgan Chase holding, concluding that when there is a challenge to the validity and enforceability of an arbitration agreement by the collective action proponents, it is appropriate for notice to be sent to all potential opt-in class members. Camp v. Bimbo Bakeries USA, Inc., 2019 WL 1472586 (D. NH. Apr. 3, 2019); Beattie v. TTEC Healthcare Solutions, Inc., 2019 WL 4242664 (D. Colo. Sept. 6, 2019). Again, this is an issue to watch as it percolates up through the courts.

Rule 23(f) Appeals

Under Rule 23(f), a Court of Appeals may permit an appeal from an order granting or denying class certification. The petition for permission to appeal must be filed "within 14 days after the order is entered." In Nutraceutical Corp. v. Lambert, the Supreme Court addressed the question of whether the 14-day deadline for filing a Rule 23(f) petition could be equitably tolled. In the underlying case, a class was initially certified. Two years later, the court decertified the class. Within the 14-day period, the plaintiff advised the court orally that it intended to file a motion for reconsideration. The court told the plaintiff to file its motion within 20 days of the class decertification order, and plaintiff met that deadline. The plaintiff filed a Rule 23(f) petition within 14 days of the court's denial of its motion for reconsideration.

The Rule 23(f) petition was denied as untimely. On review, the U.S. Supreme Court noted that while Rule 23(f) is not jurisdictional, the "text of the rule [did not] leave room for such flexibility" as to allow equitable tolling. 139 S. Ct. at 714. Rather, according to the Court, Rule 26(b)(1), which generally authorizes extensions of time, specifically and expressly carves out the ability of the Court of Appeals to extend the time for a petition for permission to appeal. Id. at 715. As such, the rules "compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." Id. This is not to

say that a Rule 23(f) appeal must always be filed within 14 days of the order granting or denying a class. As the Court recognized, "[a] timely motion for reconsideration filed within the window to appeal does not toll anything; it 'renders an otherwise final decision of a district court not final' for purposes of appeal."

Rule 23 Amendments and Court Approval of Class Action Settlements

On December 1, 2018, new amendments to Rule 23 took effect. The new amendments are focused on class action settlement procedures.

Preliminary approval factors: Prior to December 1, 2018, Rule 23 provided only that a court was to determine that a settlement was "fair, reasonable and adequate." District courts and appellate courts looked to caselaw to define the factors to be considered, which varied to some extent across the country. Amended Rule 23(e)(2) now sets forth a unified set of factors, requiring courts to consider whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

These unified factors are to add to, rather than replace, factors previously considered by the courts when reviewing class action settlements.

Class notice: Notice under Rule 23(b)(3) has entered the modern age. The rule now expressly contemplates that notice to class members may be provided by "electronic means or other appropriate means." The rules now also require parties to provide "frontloaded" information to the court so that it can determine whether to give notice to a proposed settlement class. Under Rule 23(e)(1)(B), the court is direct notice to the class members if "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Last, Rule 23(f) has been amended to state that Rule 23(f) appeals may not be taken from an order on class notice under Rule 23(e)(1).

Settlement objectors: Amendments to Rule 23(e)(5)(A) now requires objectors to a settlement to "state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." In addition, under Rule 23(e)(5)(B), "no payment or consideration may be provided in connection with (i) forgoing or withdrawing an objection, or (ii) forgoing, dismissing or abandoning an appeal from a judgment approving the proposal" unless such action has been approved by the court after a hearing.

Class Action Settlement Standing

In Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016), the Supreme Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." In other words, a statutory right to sue is insufficient, in and of itself, to meet the concrete injury requirement.

In Frank v. Gaos, the Supreme Court extended the reasoning of Spokeo and held that the obligation of a court to assure itself of Article III standing "extends to court approval of proposed class action settlements." 139 S. Ct. 1041, 1046 (2019). Before the district court, the defendant had moved to dismiss the plaintiff's claim based on lack of Article III standing. The district court denied the motion based on a Ninth Circuit case (Edwards v. First American Corp.) holding that standing existed whenever there was a statutory cause of action. Because the holding in Edwards was abrogated by Spokeo, no court had reexamined the plaintiffs' standing in the interim period after the parties entered into a cy pres class action settlement. The Supreme Court granted a petition to review whether the cy pres settlement was fair and reasonable. The Solicitor General filed an amicus brief, arguing that standing should be addressed first in light of Spokeo. The Supreme Court examined the issue and concluded that "a court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute and federal courts lack jurisdiction if no named plaintiff has standing." Id. Thus, the Court agreed that the settling plaintiff's standing must be examined to ensure the court has jurisdiction to consider the class

action settlement, and remanded the case for further proceedings. Frank has returned to the district court, where briefing is yet to commence to examine the standing issue.

Cy Pres Settlements

After much anticipation, the Supreme Court issued its decision in Frank v. Gaos, in which Rule 23 watchers to learn the fate of cy pres only class action settlements. As noted above, the Court did not reach that issue but instead tackled another thorny issue – that of plaintiff standing to support a class action settlements.

While Frank v. Gaos was proceeding to the U.S. Supreme Court, a similar class action settlement also involving Google was pending before the Court of Appeals for the Third Circuit, In re Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316 (3rd Cir. 2019). In that case, Google also entered into a class action settlement to resolve claims on a nationwide basis. Like the one in Frank v. Gaos, the settlement only provided for monetary payments to class counsel for attorneys' fees, to class representatives for service awards, and to cy pres recipients from a $5.5 million settlement fund. 934 F.3d at 321. No monetary compensation was to be paid to class members who would be asked to give a broad release of claims, including statutory damages. Id. The district court approved the cy pres only settlement finding that "payments to absent class members would be logistically burdensome, impractical, and economically infeasible, resulting (at best) with direct compensation of a de minimis amount." Id. at 324. The court rejected intervenor's (Ted Frank) objections that there were pre-existing relationships between Google, class counsel and the cy pres recipients, holding that there was no conflict of interest. Id.

After concluding that the plaintiffs had Article III standing under Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) and Frank v. Gaos, 139 S.Ct. 1041 (2019), the Third Circuit addressed whether the cy pres only settlement was fair, reasonable and adequate. The Third Circuit first examined the issue in the abstract and concluded that in a Rule 23(b)(2) class, a settlement was never intended to involve individualized determinations in liability or damages. As such, the court determined that a cy pres only (b)(2) settlement could satisfy Rule 23's certification and fairness requirements because it belongs to the class as a whole. Id. at 328.

But, the court was not persuaded that the cy pres settlement in the case before it could be approved for two reasons. First, despite settlement as a (b)(2) class, the class members would be required to grant a broad release of claims that included statutory damages (which had made class certification under (b)(3) more difficult). Id. at 329. On that basis, the court remanded to the district court to determine if a "defendant can ever obtain a class-wide release of claims for money damages in a Rule 23(b)(2) settlement." Id. at 329-30. With respect to cy pres, the court also found that it was troubled by the selection of the cy pres recipients and whether the district court had sufficiently analyzed the intevenor's objections with respect to conflicts of interest. Id. at 330-31. As it stands now, both Frank v. Gaos and In re Google have been remanded to their respective district courts for further proceedings, which will undoubtedly address the appropriateness of the cy pres only settlements and will likely make their way back up to the higher courts.

CLASS ACTION TRENDS AND LEGAL DEVELOPMENTS

Emily Harris
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" Would we like to join The Class Action Lawsuit-of-the-Month Club ? "

CLASS ACTION TRENDS

- Over 50% of U.S. companies face class action lawsuits
- The number of class action lawsuits companies are facing in a year are on the rise
- The leading types of class actions continue to be labor & employment and consumer fraud cases

CLASS ACTION TRENDS

- Corporate spending on class action defense continues to rise
- The number of in-house attorneys dedicated to class actions is on the rise
- Settlement rates for class actions continue to rise

CLASS ACTION TRENDS

- Only 2% of class action cases go to trial

CAFA REMOVAL

Home Depot v. Jackson, 139 S. Ct. 1743 (2019)

"Section 1441(a) does not permit removal based on counterclaims at all."

CAFA's use of "any defendant" does not allow for removal of counterclaims.

PERSONAL JURISDICTION

Bristol Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017)

"For specific jurisdiction, a defendant's general connection with the forum are not enough."

"In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'"

A state does not have specific personal jurisdiction over defendant to entertain nonresident claims.

PERSONAL JURISDICTION

Does *Bristol Myers Squibb* Prohibit Nationwide Class Actions?

Courts are divided:

- Only applies to mass actions
- Absent class members are not parties
- National class prohibited if corporation is not sued in its home forums

CLASS ARBITRATION

Lamps Plus v. Varela, 139 S. Ct. 1407 (2019)

The FAA "bars an order requiring class arbitration when the agreement is ambiguous."

"Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principal advantage of arbitration" – "its informality."

ARBITRATION AND CLASS NOTICE

In Re JPMorgan Chase & Co., 916 F.3d 494 (5th Cir. 2019)

In FLSA collective action, it was error to provide notice to employees who had executed arbitration agreements because they could not participate in the litigation.

RULE 23(f) PETITIONS

Nutraceutical Corp. v. Lambert, 139 S. Ct. 710 (2019)

Federal Rules of Appellate Procedure "compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist."

AMENDMENTS TO RULE 23

- New amendments are the first amendments to Rule 23 since 2003.
- Amendments are effective December 1, 2018.
- Amendments were four years in the making.
- Amendments focus on the class action settlement process.

AMENDMENTS TO RULE 23

Rule 23(c)(2)(B) – Class Notice for (b)(3) Classes:

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

AMENDMENTS TO RULE 23

RULE 23(e) – Class Settlements:

(e) The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(3)(2); and

(ii) certify the class for purposes of judgment on the proposal.

AMENDMENTS TO RULE 23

Rule 23(e)(2) – Uniform Factors for Preliminary Approval:

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~:~~

- **(A)** the class representatives and class counsel have adequately represented the class;
- **(B)** the proposal was negotiated at arm's length;
- **(C)** the relief provided for the class is adequate, taking into account:
  - **(i)** the costs, risks, and delay of trial and appeal;
  - **(ii)** the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  - **(iii)** the terms of any proposed award of attorney's fees, including timing of payment; and
  - **(iv)** any agreement required to be identified under Rule 23(e)(3); and
- **(D)** the proposal treats class members equitably relative to each other.

AMENDMENTS TO RULE 23

Rule 23(e)(5) – Class Objectors:

(5) ***Class-Member Objections.***

- **(A)** *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.
- **(B)** *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:
  - **(i)** forgoing or withdrawing an objection, or
  - **(ii)** forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

AMENDMENTS TO RULE 23

Rule 23(f) – Appeals from Class Certification Orders:

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule (23)(e)(1). ~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

CLASS SETTLEMENT STANDING

Frank v. Gaos, 139 S. Ct. 1041 (2019)

"Article III standing extends to court approval of proposed class action settlements."

"A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute and federal courts lack jurisdiction if no named plaintiff has standing."

CY PRES SETTLEMENTS

In re Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316 (3rd Cir. 2019)

Cy pres only settlement "belongs to class as a whole" and therefore not per se improper in Rule 23(b)(2) settlement classes, which are not intended to involve individualized determinations of liability or damages.

Concerns:

- Broad release including Rule 23(b)(3) damages
- Conflicts of interest in selection of *cy pres* recipients

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Emily is the firm's managing partner. Her practice focuses on complex civil litigation, class action defense, products liability, real estate litigation, and employment litigation, at both the trial and appellate level. Emily is also one of the lead attorneys pursuing wrongful death claims against landowners and government entities arising from the 2014 Oso Landslide. Emily excels in handling large and complex matters that require creative problem-solving, diligence, and fine attention to detail.

Prior to joining Corr Cronin in 2004, Emily was a litigation associate at O'Melveny & Myers LLP in Los Angeles, and she clerked for the Honorable Thomas G. Nelson on the United States Court of Appeals Ninth Circuit. Emily has been selected to the "Rising Star" list in Seattle's legal community. She is licensed to practice in Washington and California.

Featured Cases

- Rails to Trails Class Actions – Defending King County in numerous cases challenging ownership of former railroad corridors valued at over $100 million. Defeated motion for preliminary injunction, secured dismissal of claims for quiet title and a declaratory judgment regarding ownership of the corridor and obtained judgments quieting title in King County.
- Oso Landslide – Pursuing wrongful death claims arising from the March 22, 2014 Oso, Washington Landslide. Obtained significant spoliation sanction order against State of $1.2 million. With co-counsel, obtained $60 million settlement from the State and Grandy Lake Forest Associates.
- Fiber Optic Right of Way Litigation – Defense of telecommunications company in multiple class actions in state and federal courts alleging claims of trespass arising from installation of fiber-optic cable on railroad rights-of-way.
- Class Action Jury Trial – Defense verdict in four-week jury trial defending a national transportation company against multi-million dollar claims that its independent contractor drivers were employees.
- Products Liability Trial – Successfully defended bottle manufacturer and winery against products liability claims seeking more than $900,000 in damages. After a four week bench trial, obtained a complete defense verdict.

Presentations and Publications

- Ethical Duties for Lawyers Working with Expert Witnesses, Landslides in Washington, Law Seminars Int'l, Seattle, Washington, March 2017
- Occam's Razor: Simplicity as an Effective Trial Tool, Network of Trial Law Firms, Napa, California, April 2015 Class Action Jury Trials: Going the Distance, Network of Trial Law Firms, Naples Florida, May 2013

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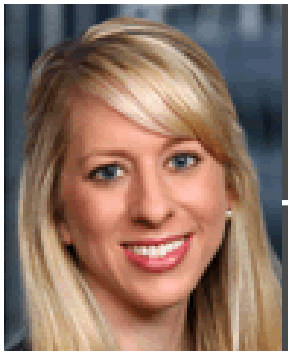

THE EFFECT OF "#METOO" AND "TIME'S UP" IN DISCRIMINATION LITIGATION

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Strict Liability for Workplace Harassment: Is the Faragher-Ellerth Defense Dead?
W. David Harless and Lauren Fisher White

Historically, women have suffered great disparities in treatment, dating back to the right to vote and extending to workplace protections. Even when Title VII to the 1964 Civil Rights Act was enacted, protection for women was not at the forefront, but was literally "back-doored" into the Act. Southern legislators anxious to derail legislation offered to improve civil rights to blacks had included women in the Act for the express purpose of killing the bill. So, the story goes, the southerner legislators believed that northern proponents of the race-based protections would never pass legislation protecting women.[1]

The #MeToo movement has highlighted often long overlooked disparities in pay and treatment within, and outside, the workplace. It is now in the forefront of both traditional and social media. As such, it has impacted how not only our clients, but courts, perceive both the "wrong" and how the laws should correct these wrongs. Perhaps more importantly, and specific to the purposes of this presentation, #MeToo, related events culminating in #MeToo, and the loosening of evidentiary standards regarding "Me Too" evidence may result in an employer's strict vicarious liability for workplace harassment by a supervisor notwithstanding the presence and enforcement of a comprehensive workplace anti-harassment program.

The Statutory Framework Prohibiting Gender-based Treatment

Congress and the courts have long tried to discern between "boorish" workplace behavior and actionable behavior under the civil rights acts designed to end discriminatory workplace treatment. But, often, the courts have not intervened until proof of relatively high standards of outrage and longstanding conduct have been established. Further, courts have wrestled with defining the nature and quantum of proof required to support such claims.

For example, the Title VII standard for a sexually hostile environment requires proof of intimidating, offensive, abusive and/or otherwise offensive conduct going beyond rudeness or casual joking. This includes proof elements of intent, a recurring wrong, and a degree of pervasiveness such that the conduct interfered with the employee's ability to perform his or her job. This was typically coupled with a requirement of a showing of some "longstanding" duration. The rationale is that, for the "terms, conditions or privileges" of employment to be affected, and thus actionable under Title VII to the 1964 Civil Rights Act, it must not be a passing or mildly offensive intrusion. Rather, what is required is proof of conduct so pervasive that it infects the daily workplace.

According to the U.S. Supreme Court, a hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[2] (This is typically the standard for

1 For several articles on the congressional machinations surrounding how women came to be included in the 1964 Civil Rights Act, see Louis Menand, How Women Got In On The Civil Rights Act, The New Yorker, July 21, 2014, https://www.newyorker.com/magazine/2014/07/21/sex-amendment; Linda Napikoski, How Women Became Part of the Civil Rights Act, ThoughtCo, March 25, 2017, https://www.thoughtco.com/women-and-the-civil-rights-act-3529477; Martha Burk, 50 Years After the Civil Rights Act, Is the Joke on Women?, HuffPost, December 6, 2017, https://www.huffingtonpost.com/martha-burk/50-years-after-the-civil_b_5497034.html.

2 Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

environmental type hostile environment claims. Tort-type touching and assault/sexual assault falls under different standards, where single incidents can impose liability.) Thus, to prove a hostile work environment claim under Title VII, the plaintiff must show (1) that the conduct in question was unwelcome, (2) that the harassment was based on gender, (3) that the harassment was sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment, and (4) that some basis exists for imputing liability to the employer.[3]

Further, an employer's liability under Title VII for workplace harassment depends on the status of the harasser.

> If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. [Citation omitted.] Under this framework, therefore, it matters whether a harasser is a "supervisor" or simply a co-worker. [4]

An employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.[5] A "tangible employment action" typically is associated with "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." "Supervisor" does not extend so broadly as to encompass all persons having the ability to exercise significant direction over another's daily work.[6]

The affirmative defense against imposition of vicarious liability upon an employer for a supervisor's harassing conduct is commonly known as the Faragher-Ellerth defense, named after the two cases decided by the U.S. Supreme Court in 1998 in which it recognized the defense.[7] Recognizing that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character,"[8] the Supreme Court required that the employer undertake reasonable preventative and corrective measures, e.g., a comprehensive anti-harassment policy, periodic training of personnel on its operation, and prompt investigation and remedial action in response to a harassment complaint.

In turn, the employee is required to use the harassment policy protections by reporting harassment to the employer and thereby avoiding further harm. This requirement seemingly is based on a contributory negligence concept – "If the plaintiff unreasonably failed to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so…. [I]f damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."[9]

Understandably then, under the Faragher-Ellerth defense, courts have routinely found that the passage of time since the alleged incident coupled with the employee's failure to take advantage of the employer's anti-harassment policy is unreasonable, thereby entitling an employer to exoneration from vicarious liability. Further, juries traditionally have been skeptical, at best, of charges of sexual harassment made years after the onset of the offensive conduct.

#MeToo, and all that preceded and has followed the Movement, may have changed all of this.

The Origins Of The #MeToo Movement and Associated Events

The cultural tsunami that we have come to know as #MeToo did not arise in isolation. Instead, #MeToo was fueled by earlier events that cultivated increasing social consciousness and encouraged public opposition to the reported prevalence of sexual assault and harassment in the workplace and other social settings.

- In 2006, a community organizer and civil rights activist, Tarana Burke, began using the term "Me Too" on a MySpace social networking platform to promote "empowerment though empathy" to address sexual and domestic abuse against women and girls, particularly in underprivileged communities.
- In 2008, President Barack Obama took office at a time when college and university administrations had suffered longstanding criticism for mishandling or otherwise disregarding students' complaints of

3 See, e.g., EEOC v. Central Wholesalers, Inc. 573 F.3d 167, 175 (4th Cir. 2009).

4 Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

5 Id.

6 Id. at 430–31.

7 Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

8 Ellerth, 524 U.S. at 763.

9 Faragher, 524 U.S. at 806–807; see also Ellerth, 524 U.S. at 765.

sexual violence on university campuses.

- In response, the Obama Administration issued in 2011 a "Dear Colleague Letter" in which the U.S. Department of Education's Office of Civil Rights ("OCR") outlined mandatory procedures to be followed by private and public universities in investigating and adjudicating claims of sexual violence or harassment on campus. On April 19, 2014, OCR published a series of Q&As intended to clarify the legal requirements under Title IX for campus investigations of sexual violence and associated procedures, including burden and standard of proof. The Q&As addressed specifically the fact-finding process and any hearing and decision-making protocol used to determine (1) whether or not the conduct occurred, and (2) if the conduct occurred, what actions would be undertaken to end the sexual violence, eliminate the hostile environment, and prevent its recurrence. Failure to address the problems identified by OCR would result in the institution's loss of federal funding or the referral of the matter to the U.S. Department of Justice for enforcement proceedings against the institution.[10]
- On October 7, 2016, The Washington Post published a video that captured then-presidential candidate Donald Trump speaking in lewd terms of his unwelcome contact with and behavior toward two female associates. One month later, the nation elected him President. As one commentator has observed:

  > The election of Donald Trump redefined the politics of publicly claiming sexual victimization. Now it's an unpopular president whose legitimacy is in question, one who has been caught on tape explicitly asserting that he could grab any woman by the genitals because he is a star. He did not repent. Many women were outraged by this and by the fact that charges of sexual abuse leveled against him by 22 women did not matter enough to even jar, less even derail, his candidacy or his election.[11]

- The spark that ignited the fire was Harvey Weinstein. On October 5, 2017, the New York Times published an article, entitled Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, wherein the journalists Jodi Kantor and Megan Twohey documented Weinstein's 20-year history of sexual assaults and harassment of co-workers and actresses who worked for the Weinstein Company. The article proclaimed, "[a]n investigation by The New York Times found previously undisclosed allegations against Mr. Weinstein stretching over nearly three decades, documented through interviews with current and former employees and film industry workers, as well as legal records, emails and internal documents from the businesses he has run, Miramax and the Weinstein Company."[12]
- On October 15, 2017, Alyssa Milano, a victim of sexual abuse by Weinstein, reported her experience on a Twitter hashtag she created, #MeToo. She invited victims of sexual violence to respond if they had experienced sexual violence or harassment. The tweet went viral, and the response was overwhelming,
- Organizational/employer responses to charges of sexual violence or misconduct prompted by the #MeToo movement have resulted in the resignation or firing of many celebrities, including the following notables – U.S. Senator Al Franken, U.S. Representative John Conyers, Conductor James Levine, Political Columnist Mark Halperin, Charlie Rose, Matt Lauer, Kevin Spacey, Mario Batali, Steve Wynn, Garrison Keillor, and CBS's Leslie Moonves.[13]

Admissibility of "Me-Too" Evidence

In 2008, shortly after Tarana Burke created the "Me Too" social network, but unrelated to that initiative, the "Me Too" moniker was employed by critics of the U.S. Supreme Court's ruling in Sprint/United Management Co. v Mendelsohn.[14] In Mendelsohn, the Court addressed whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Court observed that such evidence is not per se admissible or per se inadmissible, and held that admissibility depended on "how closely the related evidence is to the plaintiff's circumstances and theory of the case."[15] Critics derided such evidence as "me too" evidence, suggesting that the "piling on" of similar circumstances in the workplace going to workplace culture was not relevant to an individual claim or was somehow less credible or worthy of belief.

Following Mendelsohn, federal courts adopted tests for "Me Too" evidence that were roughly equivalent: (1) whether the past discriminatory or retaliatory behavior

10 American College of Trial Lawyers, White Paper On Campus Sexual Assault Investigations, at 3–4, March 2017, https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf.

11 Catherine A. MacKinnon, Where #MeToo Came From, and Where It's Going, The Atlantic, March 24, 2019, https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/.

12 Jodi Kantor & Megan Twohey, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, N.Y. TIMES, Oct. 5, 2017, https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?searchResultPosition=40.

13 Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel and Zach Wichter, #MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women, N.Y. TIMES, updated October 29, 2018, https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

14 552 U.S. 379 (2008).

15 Id. at 388.

is close in time to the events at issue in the case; (2) whether the same decisionmaker was involved; (3) whether the witness and plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated.[16] However, many jurisdictions have been hesitant to admit such evidence for a myriad of reasons, the most prevalent being a belief that each alleged instance of similar conduct will require the defendant to respond to each witness's claims, thereby create numerous mini-trials within the primary trial, and ultimately distract and confuse the jury.[17]

Resistance to the admissibility of "Me Too" evidence may be waning. For example, in 2016, the U.S. Fourth Circuit Court of Appeals reversed a trial court's grant of summary judgment to an employer defendant in a sex and age discrimination-based case following the district court's rejection of "Me-Too" evidence proffered by the plaintiff.[18] Despite an exhaustive analysis by the district court of why the proffered "Me Too" evidence did not meet the factors outlined above, the appeals court nonetheless reversed, explaining that the trial court "did not individually analyze each piece of other employee evidence," or "determine the relationship between the evidence and the circumstances and theory of the plaintiff's case." The appellate court also concluded that the trial court had "placed too much emphasis on its concerns with 'mini-trials,'" explaining that accommodating this "legitimate" concern in every case would tend always to result in the exclusion of such evidence.[19]

Generally, when deemed admissible in an employment discrimination case, "Me Too" evidence of the treatment by a defendant employer of employees other than the plaintiff is powerful proof of an employer's discriminatory intent. This is particularly supportive of a plaintiff's proof that the employer's proffered nondiscriminatory reason for any action against the employee is a pretext for unlawful discrimination based on the employee's protected status. Now, a recent decision by the U.S. Third Circuit Court of Appeals may broaden substantially the admissibility of "Me Too" evidence in sexual harassment cases to eviscerate effectively the Faragher-Ellerth affirmative defense.

Minarsky, #MeToo, And The Future of Faragher-Ellerth

In July of 2018, a panel of the Third Circuit rendered its decision in Minarsky v. Susquehanna County.[20] Minarsky was a part-time employee who worked alone every Friday with the alleged harasser, Yadlosky. She alleged that Yadlosky regularly attempted to kiss her on the lips, engaged in unwelcome embraces, groping, fondling, and massaging, and transmitted sexually explicit messages to Minarsky by email. However, this conduct had continued for four years unreported by Minarsky, despite her knowledge of her employer's comprehensive harassment policy that she had read and signed at the outset of her employment.

During this period, Minarsky learned that Yadlosky had engaged in similar conduct toward other female employees. Further, she learned that the employer had reprimanded Yadlosky for at least one instance of similar conduct, and that Yadlosky thereafter joked about the incident to a fellow female employee. Minarsky was unaware that Yadlosky had received a second reprimand for similar conduct. After both incidents, there was no further action or follow-up by the employer, nor were these incidents noted or reported in Yadlosky's personnel file.

Yadlosky repeatedly told Minarsky that she could not trust County administrators, or other supervisors, and warned her that she should always appear busy in their presence, or otherwise risk termination. Further, he responded harshly in response to any complaints that Minarsky made regarding her work or working conditions. Minarsky never reported Yadlosky's conduct to his supervisors or County administrators, explaining that Yadlosky's warnings, his harsh responses to her other complaints, and his past unsuccessful reprimands for his inappropriate advances toward others prevented her from reporting his misconduct.

Yadlosky was terminated ultimately for his conduct toward Minarsky after an administrator overheard Minarsky confiding to a co-employee. Minarsky resigned from employment several years later, explaining that she was uncomfortable in her role after Yadlosky was fired because her workload increased, and because her new supervisor inquired on more than one occasion about what had transpired with Yadlosky and who else she had caused to be fired.[21]

The district court awarded summary judgment to the employer against Minarsky's sexual harassment claims,

16 See, e.g., Griffin v. Finkbeiner, 689 F.3d 584, 599 (6th Cir. 2012); Hayes v. Sebelius, 806 F. Supp. 2d 141, 144–45 (D.D.C. 2011).

17 See, e.g., Hall v. Mid-State Mach. Prods., 895 F. Supp. 2d 243, 271 (D. Me. 2012) ("me too" evidence is "'too attenuated' to justify admission"); Bell v. Crowne Mgmt., LLC, 844 F. Supp. 2d 1222, 1236 (S.D. Ala. 2012); Jones v. St. Jude Med. S.C., 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011) ("me too" evidence is unwelcome because it is only slightly relevant and is always highly prejudicial).

18 Calobrisi v. Booz Hamilton, Inc., 660 Fed. Appx. 207 (4th Cir. 2016).

19 Id. at 210. See also Emami v. Bolden, 241 F. Supp. 3d 673, 690 (E.D. Va. 2017).

20 895 F.3d 303 (3d Cir. 2018).

21 Id. at 306–309.

reasoning under the Faragher-Ellerth affirmative defense that Minarsky's employer had acted reasonably by maintaining an anti-harassment policy, reprimanding Yadlosky for his inappropriate conduct twice, and promptly terminating Yadlosky once his misconduct against Minarsky became known. Further, the district court found that Minarsky had acted unreasonably as a result of her "refusal or unwillingness to avail herself of the County's anti-harassment policy to bring Yadlosky's conduct to the attention of County officials."[22]

The court of appeals reversed. As to the first prong of the Faragher-Ellerth defense, the court held that a jury should have been allowed to determine whether the County's policies and actions were reasonable under the circumstances of the case. Noting that the County had knowledge that Yadlosky's behavior formed a pattern of conduct, as opposed to mere stray incidents, and that Minarsky worked alone with Yadlosky, the court questioned whether someone should have ensured that Minarsky was not being victimized. Further, the court posited that a jury could conclude Yadlosky's termination could likely be viewed as evidence of the County's exasperation with Yadlosky, rather than a reflection of the effectiveness of its harassment policies.[23]

As to the second prong of Faragher-Ellerth defense, the court noted the recent firestorm of the #MeToo movement, and how it had presented plausible explanations for why victims had plausible fear of serious adverse consequences from disclosing inappropriate sexual conduct by persons of authority exploiting their power over a victim:

> While the policy underlying Faragher-Ellerth places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.[24]

The court identified countervailing factors in the evidence that required the jury to decide the reasonableness of Minarsky's failure to report Yadlosky's misconduct – the particular isolated working arrangement with Yadlosky, Yadlosky's aggressive response to Minarsky when she attempted to assert herself in the workplace, Yadlosky's cultivation of mistrust in County officials, the persons to whom she would report Yadlosky's misconduct, the County's prior ineffective efforts to punish Yadlosky's behavior, and the pernicious nature of Yadlosky's conduct, and its frequency and duration.[25]

In light of Minarsky, the scope of admissible evidence under the "Me Too" analysis of Mendelsohn has expanded considerably. The reasonableness of an employer's harassment policies and its associated responses arguably may be challenged by presenting evidence of how the employer has administered such policies in response to all complaints. Further, the infrequency of harassment complaints in comparison to the size of an employer's workforce may as likely demonstrate the ineffectiveness of the employer's policies as prove that the employer has been extremely effective in policing inappropriate workplace conduct.

In 2016, the EEOC Select Task Force on the Study of Harassment in the Workplace cited in its report findings by researchers comparing multiple studies of sexual harassment and workplace-based responses to such conduct. The findings were troubling.

> Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%). In many cases, therefore, targets of harassment do not complain or confront the harasser, although some certainly do.
>
> The most common response taken by women generally is to turn to family members, friends, and colleagues. One study found that 27% to 37% of women who experienced harassment discussed the situation with family members, while approximately 50% to 70% sought support from friends or trusted others.
>
> The least common response of either men or women to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint. Two studies found that approximately 30% of individuals who experienced harassment talked with a supervisor, manager, or union representative. In other words, based on those studies, approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.[26]

22 Id. at 311.

23 Id. at 312–13.

24 Id. at 313, n.12.

25 Id. at 314–17.

26 Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016, https://www.eeoc

If these findings remotely correspond to the actual frequency of reporting of sexual harassment in the workplace, the corresponding assessment of the effectiveness of an employer's anti-harassment programs will be rigorous.

Further, under Minarsky, an employer's historical response to prior misconduct complaints, actions by a supervisor or a work culture that cultivates bona fide fear of reprisals, and the employee's subjective response to such circumstances will be relevant to assessing the reasonableness of the employee's conduct in addressing or reporting sexual misconduct.

Conclusion

The Faragher-Ellerth affirmative defense has served for more than twenty years as an effective shield to an employer's vicarious liability for a supervisor's sexual misconduct in the workplace. The Supreme Court has explained that the rationale for the defense is that a victim of unwelcome sexual misconduct will promptly complain of such conduct and seek the employer's protection to avoid further harm.

However, #MeToo, and the events occurring before and since that movement's origin in 2017, have undermined this rationale. Our society and courts are disregarding the traditional judgment that the credibility of a sexual misconduct claim is undermined by the victim's failure to report, or significant delay in reporting, such misconduct. Instead, they are advancing the presumption that a victim will not submit to the personal embarrassment, emotional strain, and ridicule associated with an inquiry into such claims unless the allegations of sexual misconduct are, in fact, true. As a result of this shift and the trend of courts to admit "Me Too" evidence from other similarly situated employees, juries increasingly will be permitted to resolve sexual harassment claims, and summary judgment will be unavailable to an employer, notwithstanding the employer's anti-harassment efforts or the employee's failure to report, or promptly report, such harassment.

Women and the Civil Rights Movement

Title VII of the Civil Rights Act of 1964

Early Developments

- 1970's: "Sexual harassment"
- 1986: *Meritor Savings Bank*
  - Title VII violation
  - "Hostile environment"
  - Employer liability

Sexual Harassment

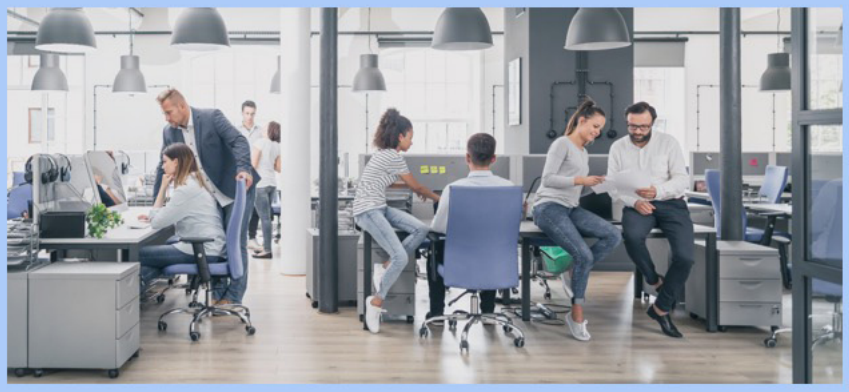
Prima Facie case:

- Unwelcome;
- Because of sex;
- Severe and/or Pervasive; and
- Employer liability.

When is the employer liable?

Vicarious Liability

Supervisor or Coworker?



The *Faragher/Ellerth* Defense for Supervisor Harassment

Was there a tangible employment action?

Yes ⇩

Strict liability

No ⇩

If Employer took reasonable care to prevent and correct harassment; ***and***

Employee unreasonably failed to take advantage; ***then***

Employer may escape liability

Faragher: "Reasonable Care"

Employer Measures:

- Published policy;
- Training/education;
- Clear reporting structure;
- Mandatory reporting;
- Investigation;
- Swift action; and
- Anti-retaliation.

How Do Victims Respond?

Victims of sexual harassment typically *do not report* harassment.

Sexual Harassment in Politics and Culture

2017-2018: The #MeToo Movement

"Yes, I did offer them acting jobs in exchange for sex, but so did and still does everyone. But I never, ever forced myself on a single woman."
– Harvey Weinstein (since retracted)

Is "Me Too" Evidence Admissible?

Sprint/United Management Co. v. Mendleson, 552 U.S. 379 (2008)

Key questions:

- Is the evidence relevant; and
- What is the *purpose* of the evidence?

Case Law Developments

Test for admissibility of "Me Too" evidence:

- Close in time;
- Same bad actor or decision-maker;
- Same treatment; and
- Similarly situated.

If #MeToo Evidence is in, is the *Faragher* Defense Out?

Minarsky v. Susquehanna County
895 F.3d 303 (3d Cir. 2018)

What is an Employer to Do?

1. Encourage reporting *and* listen to whispers;
2. Conduct trainings, *then* conduct thorough and meaningful investigations; and
3. Take "prompt and effective remedial action."

#MeToo Defamation Lawsuits

Jay Asher / Larry D. Moore CC BY-SA 3.0

Confidentiality of Sexual Harassment Settlements

2018 Tax Cuts and Jobs Act

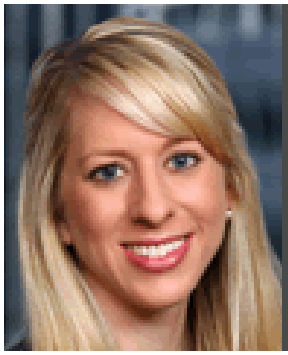
No longer business expenses:

- Settlement amount; and
- Attorneys' fees.

Executive Summary

- Sexual harassment is un(der)reported;
- In the #MeToo era, employers cannot rely on policies alone;
- #MeToo defamation lawsuits are a real possibility; and
- Confidentiality can be expensive.

Thank you!



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Lauren Fisher White is an associate in the firm's Labor and Employment and Litigation practice groups. She assists clients with employment and personnel matters including implementation and adherence to state and federal laws governing the workplace, and the investigation and response to harassment, discrimination, and retaliation complaints. She counsels clients on the enforceability of restrictive covenants, disciplinary decisions, and employee handbooks, and prepares employment agreements and independent contractor agreements. As part of the Litigation practice group, Mrs. Fisher White assists clients with contract and business tort disputes as well as general litigation issues.

Practice Areas

- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Trials/Appeals/Alternative Dispute Resolution

Representative Matters

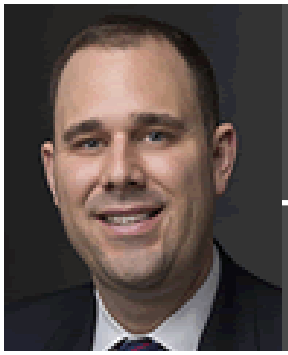
- Served as lead counsel in federal court litigation arising under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Employee Retirement Income Security Act (ERISA).
- Represented employers before the Equal Employment Opportunity Commission, the Virginia Employment Commission, the Department of Health and Human Services Office of Civil Rights, the Department of Labor, the Office of Federal Contract Compliance Programs, and the National Labor Relations Board.
- Mediated employment law disputes before the Equal Employment Opportunity Commission, private mediators and federal magistrate judges.
- Counseled clients on the enforceability of restrictive covenants, such as non-competition, non-solicitation, confidentiality, and trade secret clauses, and represented clients in negotiation and litigation involving such covenants.
- Prepared employment agreements, independent contractor agreements, severance agreements, settlement agreements, and employment handbooks.
- Assisted clients with creation and implementation of social media and Bring Your Own Device (BYOD) policies.
- Regularly advises institutions of higher education regarding faculty, student, administrative and compliance matters, including Title IX compliance and university and faculty policies and procedures.
- Advised employers concerning the investigation of and response to data breaches.

Select Presentations

- Presenter, "Employment Law in Health Care Transactions," Virginia Bar Association's 14th Annual Health Care Practitioners' Roundtable, October 2018
- Panelist, "EEOC Investigations," Virginia Bar Association's 48th Annual Conference on Labor and Employment Law, October 2018

Education

- Washington & Lee University, J.D., 2010 - Cum Laude; Managing Editor, Journal of Civil Rights and Social Justice; Roger D. Groot Scholarship Recipient
- Vanderbilt University, B.A., English and Psychology, 2006 - Magna Cum Laude



PANEL DISCUSSION: CONDUCTING INTERNAL INVESTIGATIONS - BEST PRACTICES AND CURRENT TRENDS

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Internal Investigations: The Impact of DOJ's Recently Announced Compliance Program Evaluation Guidance

James Melendres, Brett Johnson and Aloke Chakravarty

Recent Department of Justice ("DOJ") guidance regarding its evaluation of corporate compliance programs has important implications for the conduct of internal investigations. In particular, in April 2019, DOJ issued updated guidance to DOJ prosecutors on how to assess corporate compliance programs when conducting an investigation, in making charging decisions and in negotiating resolutions. Understanding this updated guidance, entitled "Evaluation of Corporate Compliance Programs," is essential for implementing an effective compliance program and conducting internal investigations as part of such program.

This article will discuss DOJ recent corporate compliance program evaluation guidance, the practical consequences for internal investigations, and factors senior executives and in-house counsel may want to consider before and during an investigation based on DOJ's renewed focus on internal compliance controls.

Evaluation of Corporate Compliance Programs: DOJ's Updated Guidance

The updated guidance poses three basic questions for the evaluation of a compliance program: Is the program well designed? Is the program being implemented effectively? Does the program work in practice? These basic elements have long been considered by DOJ and the courts. For example, the Justice Manual states that the adequacy and effectiveness of the corporation's compliance program is one of the factors to be considered in making a charging decision, and it may be one of the most significant influencers to avoid punitive decisions. And U.S. Sentencing Guidelines Section 8C2.5(f) provides that an effective compliance program significantly reduces a corporate entity's culpability score, potentially reducing a fine by millions of dollars.

DOJ's guidance answers these three core questions and provides a template for compliance. Specifically, compliance programs will be measured first by how thoughtfully a company designs:

- Risk assessment processes
- Adequate policies and procedures
- Training and communications
- Confidential reporting and investigations conduits
- Third-party relationship management
- Due diligence for merger activity

Implementation will be measured by the:

- Commitment of management
- Autonomy and adequate resourcing of compliance
- Appropriate incentives and discipline

Whether a compliance system actually works will be measured by its:

- Improvement, testing and feedback systems
- Investigations of misconduct
- Analysis and response to misconduct

Several of the components described above have a direct bearing on the triggers for, and conduct of internal

investigations.

Effective design empowers the right people to make policies work on the ground, not just on paper. An effective compliance program empowers corporate actors to take remedial action without over-inclusively flooding a reporting system with noise. Companies should ask "where do the problems occur and who should be empowered to stop them?" In the areas of heightened risk, reporting protocols are expected to be more robust—police officers are expected to focus their resources on high-crime areas. Effective design can thus be both economical and minimally invasive to regular operations. Conversely, relying on stringent controls in a low-risk area provides little counterweight to significant failures in a high-risk one.

Design should consider the importance of tailoring palatable conduits for reporting. The corollary to empowering those close to the action is the difficulty in identifying errors of people you know. The updated guidance emphasizes that "an efficient and trusted mechanism by which employees can anonymously or confidentially report" misconduct is a "hallmark of a well-designed compliance program" and "highly probative" of an effective program. The updated guidance places a greater emphasis on culture and easy, anonymous reporting. One way to overcome human nature is to routinize, anonymize and normalize the process. This is why algorithmic compliance measures have made compliance efforts so much more effective to overcome the natural human hesitance to report misconduct or the "fear of retaliation." An effective compliance program must make it easy for people at all levels to do the right thing.

To implement a program effectively, you must learn from mistakes. The updated guidance emphasizes that past violations and the company's reaction to them is critical. Virtually every company will face the specter of some kind of regulatory violation given enough time. The guidance acknowledges this reality and does not equate every offense as a proxy for a deficient compliance program. Acknowledging the inevitability of wrongdoing means that an effective compliance program must also have a robust protocol for self-reporting.

Self-reporting is a sensitive task, but a thorough internal investigation followed by prompt and full disclosure can reap large rewards. For example, the Foreign Corrupt Practice Act Corporate Enforcement Policy states that prosecutors place "a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters." In particular, when a company cooperates and remediates, and also voluntarily self-discloses misconduct, it is eligible for a full range of potential mitigation credit. The DOJ provided guidance criteria for a company to qualify for credit in three different categories: (a) voluntary self-disclosure; (b) cooperation; and (c) remediation.[1]

More specifically, to receive credit for self-reporting, a company must make the disclosure within a reasonably prompt time after becoming aware of the offense and before there is a threat of disclosure by someone else or a government investigation relating to the conduct.

To qualify for cooperation credit the DOJ has set forth a number of requirements that must be met. For example, some of the prerequisites include: (a) "disclosure on a timely basis of all facts relevant to the wrongdoing at issue;" (b) "[p]roactive cooperation, rather than reactive; that is, the company must disclose facts that are relevant to the investigation, even when not specifically asked to do so;" (c) "[p]reservation, collection, and disclosure of relevant documents and information relating to their provenance;" (d) "where requested, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that [DOJ] intends to take as part of its investigation;" and (e) "where requested, making available for interviews by the Department those company officers and employees who possess relevant information."

A company seeking leniency under the FCPA Corporate Enforcement Program must also undertake appropriate remediation consistent with DOJ guidelines.

Moreover, at the ABA's March 2018 White Collar Conference, DOJ expanded its corporate leniency program beyond FCPA violations. In particular, DOJ officials announced that they will use the FCPA Corporate Enforcement Policy as nonbinding guidance in other criminal cases. In particular, John Cronan, the acting head of DOJ's Criminal Division stated, "We intend to embrace, where appropriate, a similar approach and similar principles — rewarding voluntary self-disclosure, full cooperation, timely and appropriate remediation — in other contexts."

Consistent with DOJ's corporate leniency policy, the updated guidance regarding DOJ's evaluation of compliance programs states, "[I]f a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively."

1 U.S. Attorney's Manual, § 9-47.120 – FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download

Proactively examining a business' vulnerabilities and investigating and reporting errors when they do occur is consistent with upholding a culture of compliance, but also helps negate intent, and allows companies to craft their own investigations instead of conceding to the government.

Proving the negative is often worth the effort. While prosecutors may be cynical, data helps make cases. In monitoring a program's efficacy, steps that show positive feedback complement those that show when errors occur. The guidance asks prosecutors to consider whether the program has "collected, tracked, analyzed, and used information from its reporting mechanism." An effective compliance program will flag many instances where there is no wrongdoing but shows that a conscientious observer felt comfortable reporting a possible issue. A company's reaction to the absence of a violation can demonstrate sincerity just as a reaction to actual wrongdoing might. Citing examples where a company undertook a thorough and well-documented investigation and concluded there was no wrongdoing is preferable to the alternative. Determining where false positives occur can also aid in the fine tuning of a program's design and could save time and money by implementing tweaks that will avoid such results.

What this Means for Corporate Executives and In-House Counsel

Senior executives and in-house counsel may want to prepare now for future investigations based on how government attorneys will evaluate their company's compliance program pursuant to the April guidance.

The DOJ's updated guidance is helpful and more detailed than its prior iteration, but it is complementary to other sources as well, such as the Benczkowski Memorandum from October 2018. Ultimately, the focus in the updated guidance is on results; whether the program is actually effective. There is no magic number of resources to allocate to compliance, and efforts that emphasize uncontextualized spending or top-level inputs will not be as persuasive as those that show that a company has thought through its operations and compliance risks, and that it has taken proactive steps to maintain an effective and adapting program. It bears reminding that one of the principle goals of prosecutors is to deter wrongdoing—by a specific company, but also by other companies generally. The guidance emphasizes that effective compliance requires preparation, vigilant oversight, commitment of culture and resources, and adaptability to changing landscapes. The updated guidance can be an effective tool to secure buy-in from operational executives for implementing measures that may help weather the inevitable storms ahead.

Snell & Wilmer

Conducting Internal Investigations: Best Practices and Current Trends

Panelists

James Melendres, Moderator
Snell & Wilmer
Chair, White Collar Defense and Investigations

Brett Johnson
Snell & Wilmer

Additional Panelist(s) TBD

DOJ Evaluation of Corporate Compliance Programs: April 2019

- The updated guidance poses three basic questions for the evaluation of a compliance program:
  - Is the program well designed?
    - Confidential reporting and investigations conduits
  - Is the program being implemented effectively?
  - Does the program work in practice?
    - Investigations of misconduct
    - Analysis and response to misconduct
    - Self-reporting

FCPA Corporate Enforcement Policy

- Full range of mitigation credit based on following criteria:
  - Voluntary self-disclosure
  - Cooperation*
  - Remediation
- Presumption of declination (assuming absence of a non-exclusive list of "aggravating factors")

FCPA Corporate Enforcement Policy

- Cooperation*
  - Disclosure on a timely basis of all relevant facts
  - Proactive cooperation, rather than reactive
  - Preservation, collection, and disclosure of relevant documents and information relating to their provenance
  - De-confliction of witness interviews and other investigative steps
  - Officer and employee interviews

FCPA Corporate Enforcement Policy

- Expansion announced by DOJ at March 2018 ABA White Collar Conference
- Nonbinding guidance in other criminal cases
- John Cronan, the acting head of DOJ's Criminal Division stated, "We intend to embrace, where appropriate, a similar approach and similar principles — rewarding voluntary self-disclosure, full cooperation, timely and appropriate remediation — in other contexts."

What Prompts an Investigation?

- Whistleblower / Hotline complaint
- An inquiry or investigation by a governmental agency, such as DOJ, a State Attorney General or the Securities and Exchange Commission
- Notice from outside auditors
- News articles
- A shareholder lawsuit or demand

Investigative Process

- Document preservation
- Preliminary "document interviews"
- Document collection
- Document review
- Witness interviews
- Conclusions

Witness Interviews

- **"Corporate Miranda"/Upjohn disclosure**
  - Counsel is representing the company or board
  - The attorney does not represent the employee personally
  - Although the conversation is protected by the attorney-client privilege, the company may choose to disclose information to third parties

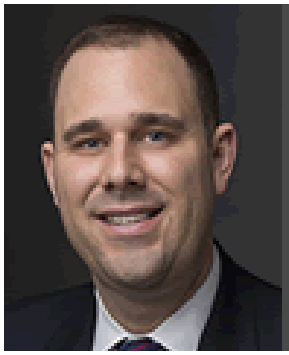
Conclusions

- Prepare findings
- Share conclusions with client
- Form of report
  - Written report or outline
  - Oral presentation
  - Combination of oral and written report

Conclusions

- Presentation to any other appropriate audiences
  - –Auditors
  - –Regulators
  - –Shareholders
- Be cautious about privileged information

Questions?



JAMES P. MELENDRES

Partner

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James Melendres co-chairs the Investigations, Government Enforcement and White Collar Protection practice and the Cybersecurity, Data Protection and Privacy practice. He regularly conducts internal investigations and represents companies in a wide variety of matters relating to federal and state criminal, civil and regulatory enforcement. James also advises companies regarding the full life cycle of enterprise risks associated with cybersecurity, including before, during and after a data breach or other cyber-attack.

James further assists clients in developing and implementing crisis management and public relations strategies. He has appeared on CBS, CNBC and MSNBC and been quoted in The Wall Street Journal and Bloomberg, among other publications.

Prior to joining Snell & Wilmer, James served as a federal prosecutor and led high-profile and complex matters, including the prosecutions of former Central Intelligence Agency Director David Petraeus and the leader of the Tijuana Cartel. He also served in the leadership offices at the Department of Justice in Washington, D.C., and in his role as counsel to the Assistant Attorney General for National Security, James helped manage the DOJ National Security Division and counseled senior DOJ officials on a wide variety of matters - from high-profile cyber investigations and related litigation to the strategic use of trade sanctions to counter cyber-related national security threats.

Related Services

- Cybersecurity, Data Protection and Privacy
- Investigations, Government Enforcement and White Collar Protection

Representive Experience

- Conducted internal investigation for university in connection with Department of Justice “Varsity Blues” college admissions prosecution
- Conducted internal investigation and defended company in parallel investigations by Inter-American Development Bank and Department of Justice Foreign Corrupt Practices Act Unit
- Conducted internal investigation for company regarding civil and criminal False Claim Act allegations
- Defended company in investigation by Securities and Exchange Commission regarding fraud allegations
- Represented public company in prosecution by U.S. Attorney’s Office for the Southern District of New York regarding indictment charging individuals with fraud and kickback scheme
- Represented public company in prosecution by U.S. Attorney’s Office for the Middle District of Florida regarding indictment charging individual with obstruction of justice and material support for terrorism
- Represented non-profit organization in prosecution by Department of Justice Fraud Section regarding indictment charging individuals with fraud, money laundering, and false statements
- Represented venture capital firm in investigation by Securities and Exchange Commission regarding material misstatement allegations

Professional Recognition and Awards

- The Best Lawyers in America®, Criminal Defense: White Collar (2019-2020)

Education

- Stanford Law School (J.D., 2003)
- Dartmouth College (A.B., cum laude, with high honors, 2000)

THE EXPERT-WITNESS IMPACT OF JUDICIAL APPOINTMENTS BY ELECTED OFFICIALS

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Elections Matter: The Impact of Judicial appointments by elected officials on expert testimony
Nicole Walsh and Bob Fulton

Most people remember the Presidential election of 2000 between Al Gore and George W. Bush and the impact the State of Florida had on the outcome of that contest. Hanging chads, recount monitors, lawyers for the candidates and a court battle that went all the way to the United States Supreme Court are etched in the minds of Floridians and many across the country when they think about Florida politics. However, this is not the first time (or sadly the last) that Florida has influenced national elections. Florida has long been at the epicenter of election politics. Court battles and recounts are par for the course when it comes to elections in the Sunshine State. One can venture all the way back to the presidential election between Rutherford B. Hayes and Samuel Tilden in 1876 where twenty votes from four states – including Florida – were disputed. The quarrel led to the formation of a commission who met for nine days and submitted their election results for Florida first, which virtually settled the election. A painting of the scene by artist Cornelia Fassett, "The Florida Case Before the Electoral Commission", hangs in the U.S. Capitol Building to this day.[1]

Then, of course, the infamous 2000 presidential election and the resulting Supreme Court case that declared George W. Bush the 43rd president. One of the main problems with that election was the punch card ballot design, which resulted in many ballots being invalidated due to "hanging chads," in which a voter's selections were not clearly punched through.[2]

Florida made history yet again in 2018 after Secretary of State Ken Detzner ordered a manual recount in the races for Senate and state agriculture commissioner and a machine recount for governor.[3] Under Florida state law, a machine recount is triggered if the margin of victory is equal or less than 0.5 percent, while a manual recount is triggered if it is less than 0.25 percent[4] Ultimately, Ron DeSantis, the Republican nominee supported by President Trump, was elected Governor.[5]

While these narrowly decided political elections matter for many reasons, they also matter because they have a significant impact on the judiciary that in turn significantly affect litigants and trial attorneys. This is especially true in a state like Florida. In 2001, the Florida Legislature placed the authority to select who sits on Judicial Nominating Commissions entirely in the hands of the governor. The Judicial Nominating Commission is then responsible for providing names of judges to the governor for consideration as county, circuit and appellate judges. As a result, Judicial Nominating Commissions have become more political.[6]

The appointment of judges became a topic of discussion in Florida's 2018 gubernatorial race, as three Florida Supreme Court Justices had reached

1 https://www.senate.gov/artandhistory/art/artifact/Painting_33_00006.htm

2 https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting

3 https://www.tampabay.com/florida-politics/buzz/2018/11/15/florida-orders-first-ever-statewide-hand-recounts-as-legal-fights-continue/

4 See Fla. Stat. §102.141(7) and §102.166. See also Fla. Admin. Code Rules 1S-2.027; 1S-2.031; and 1S-2.051.

5 https://www.nbcnews.com/politics/elections/gillum-officially-concedes-florida-governor-race-congratulates-desantis-winning-n936786

6 https://progressfloridainstitute.org/sites/all/files/fajp-recs.pdf

their mandatory retirement. Thus, the new governor, whoever that turned out to be, would be appointing three new justices to the Court that could cause the Florida Supreme Court to lose its liberal majority.[7] If he won the election, Ron DeSantis' appointments were expected to make the bench the most conservative it had been in decades.[8] If Andrew Gillum won the election, it was expected that the court would not only keep but also expand its liberal majority. Ron DeSantis narrowly won the election and he ultimately appointed three new Justices that shifted the ideology of the Florida Supreme Court.

The impact of these three new Justices was seen clearly early in their terms when they sua sponte addressed the standard for the admissibility of expert testimony in Florida state courts. For decades, courts have evaluated the admissibility of expert testimony under either a Daubert standard[9] or a Frye standard.[10] Prior to 1993, the Frye standard for admitting expert testimony was the prevailing standard used to guide federal and state courts regarding the admissibility of scientific expert testimony at trial. The Frye standard required that the proponent of the evidence establish the general acceptance of the underlying scientific principle and the testing procedures. However, in 1993, following a revision to the Federal Rules of Evidence, the Supreme Court of the United States set forth a new standard governing admissibility of expert testimony in Daubert v. Merrell Dow Pharmaceuticals, Inc. that was intended to be more focused on scientific principles and methodology rather than on conclusions. Under the Daubert test, when there is a proffer of expert testimony, the judge, acting as a gatekeeper, must make a preliminary assessment of whether the reasoning or methodology properly can be applied to the underlying facts at issue. Under Daubert, an expert witness can only testify if the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case. Since 1993, federal courts and the majority of state courts have adopted and followed Daubert, but Florida remained in a state of flux, moving between the Frye and Daubert standards.

Ten years after the United States Supreme Court rendered its decision on expert testimony, Florida passed legislation in 2013 to adopt Daubert.[11] That standard remained in effect until 2018 when the then-Florida Supreme Court disagreed with the legislature and reverted to Frye.[12]

In October 2018, the Florida Supreme Court's narrow 4-3 opinion in DeLisle v. Crane proclaimed to have settled this long-standing debate by concluding the Frye standard governed in Florida state courts.[13] A year prior to DeLisle, the Florida Supreme Court had declined to adopt the legislature's 2013 revisions to the Florida Evidence Code codifying Daubert, citing constitutional concerns raised by the Florida Bar's Code and Rules of Evidence Committee members and commenters who opposed the amendments.[14] The return to the "generally accepted" standard was seen as a significant win for the Plaintiffs' bar as that standard was viewed as an easier standard to meet, especially in personal injury and product liability cases.

However, in May 2019, the Florida Supreme Court, with the three new Justices appointed by Governor DeSantis, agreed with Justice Polston's prior rebuke of the purported "grave constitutional concerns" surrounding the adoption of the Daubert standard.[15] In 2017, Justice Polston observed: "Has the entire federal court system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to courts? Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not."[16] The Supreme Court also explained that the Daubert amendments remedy deficiencies of the Frye standard: "Whereas the Frye standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, Daubert provides that 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" Daubert, 509 U.S. at 589. The Court also noted that the Daubert amendments would "create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping."[17]

Thus, the Florida Supreme Court, which had turned over in January 2019 with the appointment of three new judges, ruled in May 2019 to replace the previously used Frye standard with the Daubert standard.[18] The decision was sharply criticized by the plaintiffs' bar while simultaneously being cheered by the defense bar. The

7 https://www.orlandosentinel.com/politics/os-ne-scott-appoint-justices-20181015-story.html

8 https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20190122-story.html

9 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

10 Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

11 https://www.flsenate.gov/Committees/billsummaries/2013/html/489

12 https://www.insidemedicaldevices.com/2013/06/florida-adopts-daubert-standard-for-expert-testimony/

13 DeLisle v. Crane Co., 258 So. 3d 1221, 1229 (Fla. 2018).

14 https://www.floridabar.org/the-florida-bar-news/court-declines-to-adopt-daubert/

15 https://www.insurancejournal.com/news/southeast/2019/06/05/528418.htm

16 In re Amendments to Florida Evidence Code, 210 So. 3d 1231, 1239 (Fla. 2017).

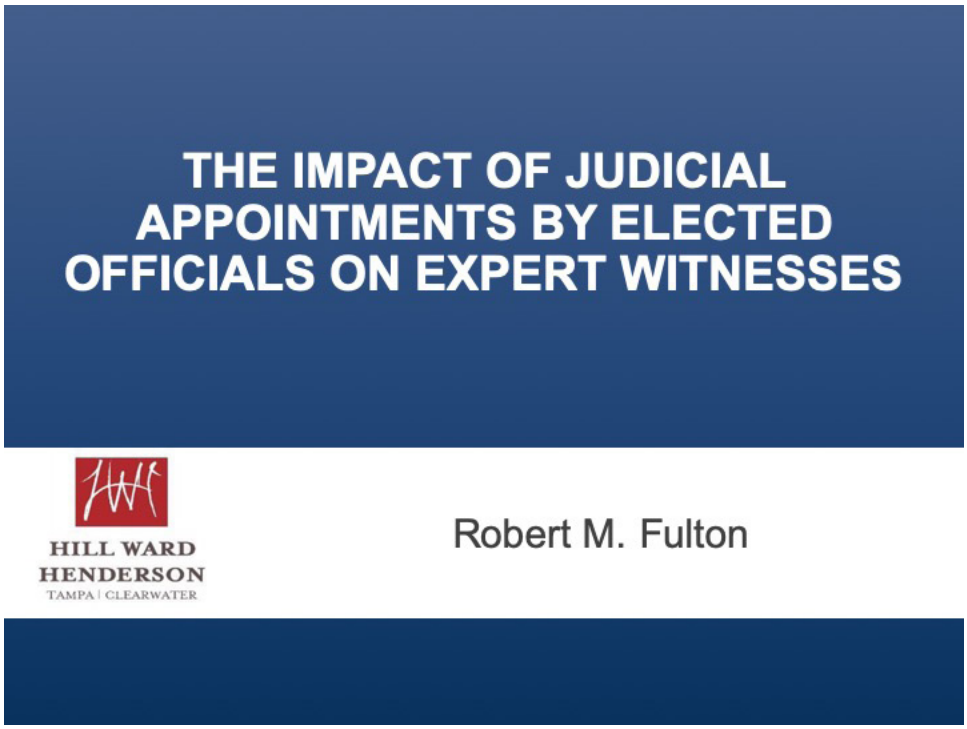
17 In re Amendments to the Florida Evidence Code, No. SC19-107, May 23, 2019

18 https://www.jdsupra.com/legalnews/florida-adopts-daubert-standard-for-56896/

Court's new structure, created because of the results of the gubernatorial election, changed, on its own accord, the Florida standard for admissibility of expert testimony and did so in a matter of only about seven months from when the court had reverted to the "generally accepted" standard.[19]

The amendments to sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts) of the Florida Evidence Code became effective immediately with the Court's decision on May 23, 2019. Litigants on both sides of a case must again be guarded against experts who do not have strong credentials or who do not use proper methodologies and analysis to support their opinions. Testimony by experts will be challenged and judges will be expected to act as gatekeepers so that juries only receive testimony that is well-founded and reliable. While there were issues that were certainly more controversial between the two Florida gubernatorial candidates, and judicial appointments likely did not decide the race, the result to litigants and attorneys reinforced yet again that elections matter for all involved in the judicial system.

19 https://www.druganddevicelawblog.com/2019/05/florida-finally-does-daubert.html



Florida's History of Close Elections

HEADLINES

A look at Florida, the 'Always-Close-Election State'

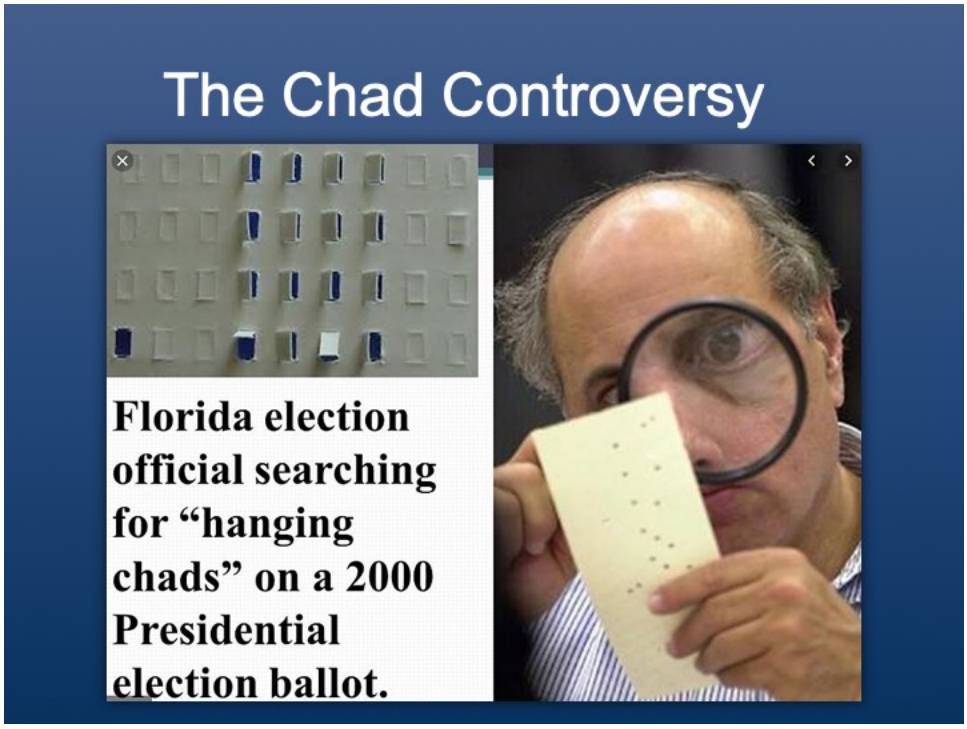
AP By Associated Press on November 7, 2016

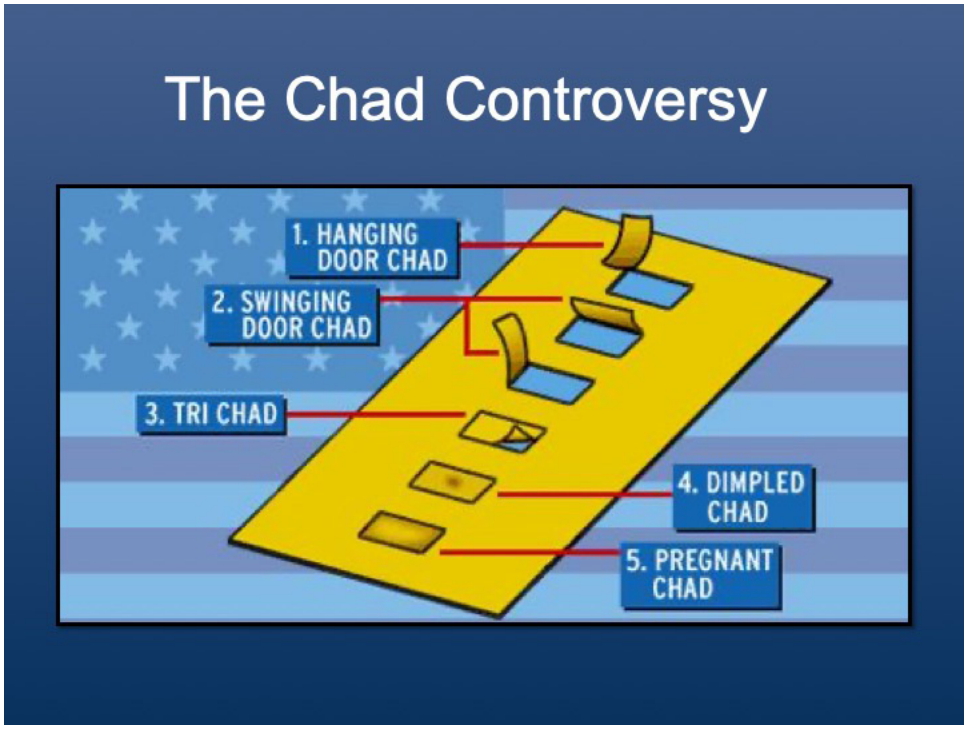
The Chad Controversy

Hanging Chads: As the Florida Recount Implodes, the Supreme Court Decides Bush v. Gore

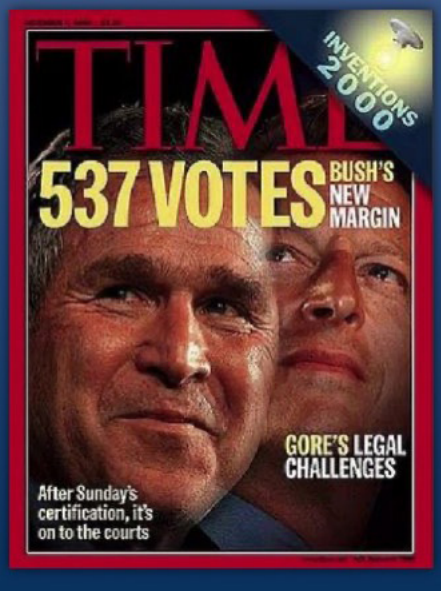
As the Florida recount implodes, the high court decides Bush v. Gore

By Samantha Levine, Staff Writer Jan. 17, 2008, at 5:00 p.m.


The Chad Controversy
Florida election official searching for "hanging chads" on a 2000 Presidential election ballot.


The Chad Controversy
1. HANGING DOOR CHAD
2. SWINGING DOOR CHAD
3. TRI CHAD
4. DIMPLED CHAD
5. PREGNANT CHAD

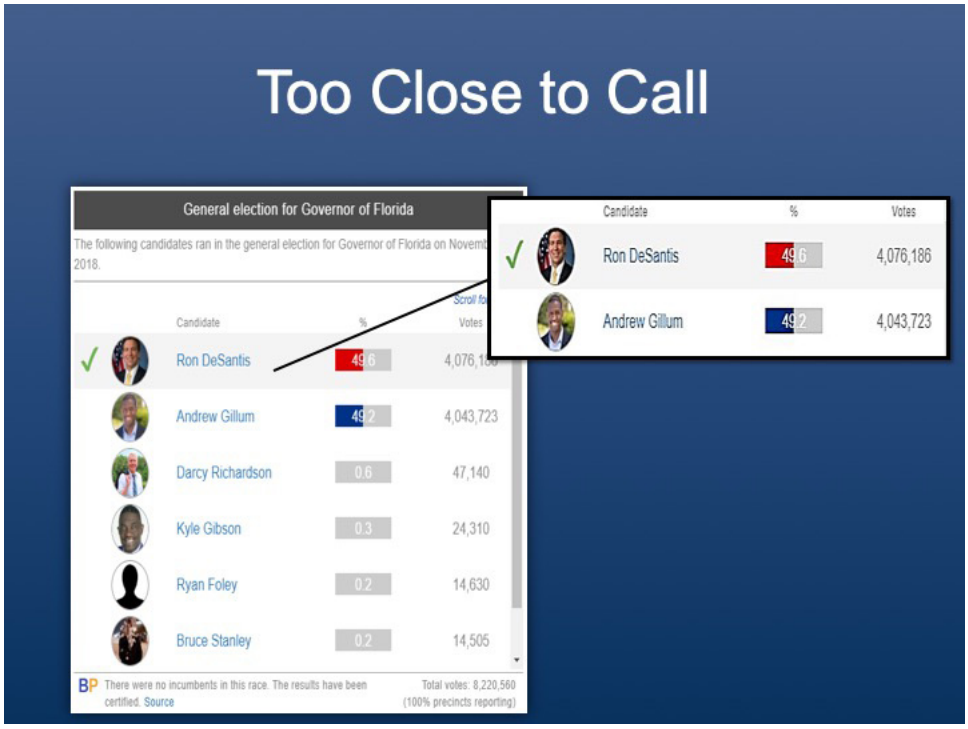
Bush v. Gore (2000)



Bush v. Gore (2000)

Supreme Court's Intervention

2018 Florida Governor's Race: Ron DeSantis (R) vs. Andrew Gillum (D)


Too Close to Call
General election for Governor of Florida
The following candidates ran in the general election for Governor of Florida on Novemb
2018.
Candidate
%
Votes
Ron DeSantis
4,076,186
Andrew Gillum
4,043,723
Darcy Richardson
0.6
47,140
Kyle Gibson
0.3
24,310
Ryan Foley
0.2
14,630
Bruce Stanley
0.2
14,505
There were no incumbents in this race. The results have been certified. Source
Total votes: 8,220,560
(100% precincts reporting)


Elections Matter
With Florida recount over, Andrew Gillum's last chance to become governor rests with the courts
Ledyard King, USA TODAY
Published 5:09 p.m. ET Nov. 15, 2018 | Updated 9:43 p.m. ET Nov. 15, 2018
Florida's secretary of state has ordered a manual recount in the state's hotly contested U.S. Senate race. (Nov. 15) AP
The final tally, headed to certification next week, was 4,075,445 for DeSantis and 4,041,762 for Gillum.


Elections Matter
NEWS
DeSantis wins Florida governor's race, defeating progressive Andrew Gillum
Down in the polls, the Republican hopeful followed President Trump's blueprint to a surprise victory.


Elections Matter
Miami Herald
ELECTIONS
DeSantis (and Trump) wins the race for Florida governor as Republicans stay in power
BY DAVID SMILEY AND EMILY MAHONEY
NOVEMBER 06, 2018 11:01 PM, UPDATED NOVEMBER 07, 2018 11:55 AM

Judicial Nominating Commission

- Appointed by the governor
- Nominees:
  - Justice Barbara Lagoa
  - Justice Robert J. Luck
  - Justice Carlos G. Muniz

Appointments

Justice Barbara Lagoa

Justice Barbara Lagoa is the 87th Justice on the Supreme Court and the first Cuban American woman to serve. She was appointed in 2019 and faces a merit retention vote in 2020.

Justice Robert J. Luck

Justice Robert J. Luck is the 88th Justice on the Supreme Court. He was appointed in 2019 at an event held at Scheck Hillel Community School, where he attended classes as a child. He faces a merit retention vote in 2020.

Justice Carlos G. Muñiz

Justice Carlos G. Muñiz is the 89th Justice on the Supreme Court and now has worked in all three branches of state government as well as the U.S. Department of Education. He was appointed in 2019 and faces a merit retention vote in 2020.

Judicial Appointments

FLORIDA CHAMBER of Commerce

Governor Ron DeSantis Appoints New Supreme Court Justices

Justice Barbara Lagoa

- Appointed on January 9, 2019
- Received J.D. from Columbia University
- First Cuban-American woman to serve on FL 3rd DCA; appointed by Governor Jeb Bush in 2006
- First Hispanic female justice to serve in the Supreme Court of Florida

Judicial Appointments

FLORIDA CHAMBER of Commerce

Governor Ron DeSantis Appoints New Supreme Court Justices

Justice Robert J. Luck

- Appointed on January 14, 2019
- Received B.A. and J.D. from the University of Florida
- Previously served on FL 3rd DCA; appointed by Governor Rick Scott
- Former federal prosecutor assigned to the Appeals, Major Crimes, and Economic Crimes Sections of U.S. Attorney's Office

Judicial Appointments

FLORIDA CHAMBER of Commerce

Governor Ron DeSantis Appoints New Supreme Court Justices

Justice Carlos G. Muniz

- Appointed on January 22, 2019
- Received B.A. from the University of Virginia and J.D. from Yale Law School
- Previously served as general counsel to US DOE
- Deputy general counsel for Jeb Bush
- Deputy attorney general for Pam Bondi

Daubert or Frye?

OCTOBER 19, 2018

Florida Supreme Court Rejects Daubert Expert Standard, Returns to Frye

by Leland Garvin

Daubert or Frye?

OCTOBER 19, 2018

Florida Supreme Court Rejects Daubert Expert Standard, Returns to Frye

by Leland Garvin

UPDATE: Since this writing, the Florida Supreme Court has done an about-face, deciding the more rigorous *Daubert* analysis will in fact be the new evidentiary standard in Florida cases, both civil and criminal. This will mean the bar to bring – and prevail – in Florida injury lawsuits is raised. In its May 23, 2019 decision *In re: Amendments to the Florida Evidence Code*, No. SC19-107, the court (now with three new governor-appointed justices since the last ruling) held Florida's evidence standard should align with that used by federal courts and most other states. The court previously rejected adoption of *Daubert* following a 2013 legislative amendment, citing procedural issues and "grave constitutional concerns." In this 5-2 ruling, the court now says those concerns are unfounded.

Daubert or Frye?

Timeline:

- **2013** – Florida passes legislation to adopt *Daubert* standard
- **2017** – Florida Supreme Court declined to adopt legislature's 2013 revisions to FL Evidence Code
- **2018** – Florida Supreme Court ruled that *Frye* standard governs
- **2019** – Florida Supreme Court ruled that *Daubert* standard governs

Daubert or Frye?

Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony

by *Anjelica Cappellino* - July 17, 2018

THE EXPERT INSTITUTE

- Frye – Novel issue only; general accepted standard
- Daubert – All scientific issue; judge as gate keeper
- Frye – Plaintiff friendly
- Daubert – Defense friendly

Daubert or Frye?

LAW.COM | dbr DAILY BUSINESS REVIEW

News

'Daubert' Evidence Standard Takes Immediate Effect in Florida After High Court Turnaround

In a case that attracted many onlookers, the Florida Supreme Court Thursday adopted the "Daubert" standard for expert testimony.

By **Raychel Lean** | May 23, 2019 at 05:55 PM

- Sua Sponte
- Revived Daubert Motion practice
- Defense cheered
- Plaintiffs cried foul

Daubert or Frye?

Florida Finally Does Daubert

By Bexis on May 24, 2019

Court composition matters.

Yesterday, the Florida Supreme Court reversed a ruling from only last year and decided that the legislature was right (or at least within its authority) after all – henceforth the standards created in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), will govern the admissibility of expert testimony in the Sunshine State. Specifically:

> **The Court, according to its exclusive rulemaking authority . . . adopts chapter 2013-107, sections 1 and 2, Laws of Florida (Daubert amendments) . . . to replace the Frye standard for admitting certain expert testimony with the Daubert standard.**

Daubert or Frye?

How Daubert Standard Could Impact Florida Industry, Judicial Climate

By Amy O'Connor | June 5, 2019

INSURANCE JOURNAL

Daubert* vs. *Frye

The *Daubert* standard was adopted by the U.S. Supreme Court in 1993 from the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* It replaced the *Frye* standard adopted federally after the 1923 case of *Frye v. United States*.


Elections Matter
FLORIDA POLITICS / THE BUZZ
Two Florida Supreme Court justices appointed by Trump to federal appeals court
Justices Barbara Lagoa and Robert Luck have been serving on Florida's highest court since January.
Florida Supreme Court Justices Barbara Lagoa, left, and Robert Luck, right, were appointed to the 11th U.S. Circuit Court of Appeals in Atlanta by President Trump. [Florida Supreme Court]

ROBERT M. FULTON

Shareholder

HILL WARD HENDERSON (Tampa, FL)

813.227.8491 | bob.fulton@hwhlaw.com

Bob is a Shareholder in the firm's Litigation Group and the Practice Co-Chair for the Products Liability and Personal Injury Litigation Groups. His practice primarily involves the defense of products liability and complex tort claims. For the past several years, Bob has defended national and international clients in numerous automotive, aviation, trucking, consumer products and power tool products liability cases throughout Florida.

Bob also represents clients in the pharmaceutical and medical device industries. He has also represented commercial carriers, automobile dealerships, and other entities in automotive and trucking accident cases.

Bob is active in both professional and Bar-related activities. He is a member of Product Liability Advisory Council (PLAC), Federation of Defense and Corporate Counsel (FDCC), Defense Research Institute (DRI), and Florida Defense Lawyers Association (FDLA).

Active in the community, Bob remains involved with the University of Florida Alumni Association. He was Outstanding Alumnus in 2002 for the Department of Criminology at the University of Florida and for the College of Liberal Arts and Sciences in 2003. Bob was Project Care Volunteer of the Year for Big Brothers/Big Sisters in Hillsborough County for 2001. Bob is active with the American Heart Association, Lawyers with Heart.

Practice Areas

- Products Liability
- Consumer Products
- Industrial/Commercial Products
- Drug & Medical Device
- Personal Injury
- Automotive Liability Litigation
- Commercial Litigation

Honors and Recognitions

- AV Preemiment - Martindale Hubbel Lawyer Rankings
- Florida Legal Elite 2017
- Best Lawyers 2018
- Super Lawyers 2018

Education

- University of Florida, B.A., 1991 - Phi Beta Kappa
- Duke University School of Law, J.D., 1994, Honors - Moot Court Board

ANTISOCIAL MEDIA: INTERNET DEFAMATION, ONLINE LIBEL AND FREE SPEECH IN THE FACEBOOK ERA

Stuart McMillan
Bowles Rice (Charleston, WV)
304.347.1110 | smcmillan@bowlesrice.com

Antisocial Media: Internet Defamation, Online Libel and Free Speech in the Social Networking Era
Stuart A. McMillan

The phenomenon of social media touches the lives of nearly everyone in the world. From elementary school children, college kids and parents to business owners, movie stars and world leaders, billions of people all around the globe have access to this digital medium. In a matter of seconds, information can be shared, liked and linked across state lines, national borders and beyond. Different nations with varying laws of expression treat the use of social media by its people in differing ways. The United States has the First Amendment, but most countries have nothing remotely close to the venerable concept of protecting free speech. Even so, the U.S. currently has no federal regulations in place to address all the myriad issues with social media (e.g., hate speech, blocking, censorship, search engine results, etc.).

Former United States Supreme Court Justice Anthony Kennedy wrote that social media was among the most important places for the common exchange of views. He even compared the Internet to the public forum, akin to a public street or park. Indeed, commentators seek to analogize social media giants as public squares. That assessment seems a bit too generalized and not such a seamless analogy.

The greater access to a vast online forum introduces many virtues that did not exist in other more traditional arenas. On the one hand, a forum exists so that the average person can engage in robust debate or rectify damaging opinions or commentary. But in the modern age, an individual can simply express his or her view in mere seconds, so long as bandwidth exists. At the same time, the amount of hate speech and utter lack of accountability raises genuine concern of how to forge ahead in this digital world. Should the government enact more regulation? Should we rely on the social media giants to be the final arbiter? Or, better yet, can basic common law defamation remedy the situation? Unfortunately, there is no clear answer or path. The law is still evolving, and it certainly must.

Undoubtedly, social media has assumed the predominant means for the exchange of views and ideas. As a completely different vehicle from traditional newspaper, radio and other forms of mass communications, issues arise about the impact of defamation actions in this new "social" world in which we live.

Elelments of Defamation

While the digital world thrives on constant change and permutations, the elements of defamation remain the same. The elements are: 1) a false/derogatory statement asserting to be fact; 2) published to a third person; and 3) resulting in actual harm to the defamed person. The cause of action is fairly straightforward at first blush. However, a certain amount of nuance in the handling of these types of actions has evolved over time. For instance, a heightened pleading standard exists because courts are inclined to accept the public policy underpinning that litigation has "a chilling effect" on reporting the news and expressions of free speech. Therefore, motions to dismiss have a predominant role in defamation actions.

Similarly, if you are a public figure, then the plaintiff must prove actual malice. The public policy rationale in this

scenario presumes a public figure has 24/7 access to media, be it a television talk show, radio broadcast or print journalism, and can therefore swiftly address alleged defamatory comments. As expected, proving actual malice is not easy. And as is often the case, a plaintiff must use circumstantial evidence and argue inferences. The plaintiff must also explore motives and attempt to piece evidence together to withstand summary judgment or even motions to dismiss.

In addition to the public figure exception, there are also a host of jurisdictions which have adopted certain qualified privileges (e.g., the fair reporter privilege). These privileges germinate from the public policy that news organizations are tasked with reporting on matters in the community, including crime, and should be provided ample latitude to do so.

Defamation is Harder and Harder to Define

There is a wealth of case law touching all the issues with a defamation case, whether it is libel (written) or slander (oral). Considerations for what constitutes defamatory statements are dynamic and certainly not static. A defamatory statement in one area may not be in another. As a society, we arguably have become more desensitized to the impact of belittling comments or false assertions.

While false, defaming statements exist and are actionable, the defenses are equally at play. Opinions are excluded. Even those belittling comments – if in the form of an opinion – are protected speech. Hyperbolic language, sales pitches and satire are also not considered defamatory for the purposes of an actionable case. Examples abound. Our Commander-in-Chief provides prime, frequent fodder in this arena. His tweets of "major loser" and "begged for a job" are merely hyperbolic language.[1] Or when addressing the Stormy Daniels story, President Trump's response on Twitter included the phrases "total con job" and "playing fake news media for fools." The language in this tweet was protected rhetorical hyperbole.[2]

Issues with Defamation in the Digital Medium

The developing case law with the digital medium comes in all forms. Some are less obvious than others, like when a public official "blocks" someone or removes critical comments from either their Facebook or Twitter account. This act of blocking may seem fairly harmless, but in some circumstances, it can be a violation of the First Amendment. The First Amendment prohibits the government from limiting one's speech. So, if a public official who does not like criticism blocks a citizen from having access to their social media content, this can prove problematic. The public official can argue that it is a personal account. The obvious counter to that argument is that since the account is tied to a public figure, the page should be considered a public – not private – forum. Thus, the First Amendment comes into play. There is a host of lawsuits of this nature pending.[3] The inquiry is whether the private account has a sufficiently close nexus with the state to be fairly treated as that of the state itself.

There is no objective or subjective test, but the courts are to review the totality of circumstances that might bear on the question of the nexus between the challenged action and the state.[4] The questions to vet: Were the posts on behalf of the public body? Did he or she list their address as that of an official of the state or government? Did he or she not categorize their social media account as government official? There are several other pivotal questions.

The leading case on this issue is Davison v. Randall.[5] The Fourth Circuit held that an individual did have First Amendment rights to not be restricted from a Facebook page that was held out to be an official county page. In making this finding, the court noted that the page was identified as a government official page.[6] The court explained that the Facebook page was created to perform actual or apparent duties of the office.[7]

Certainly, if the sole intention of the public official is to suppress speech that is critical of his or her conduct, of official duties or fitness for public office, their actions are more fairly attributable to the state.[8] The public official with the private account argues that he or she is merely curating the content and audience of his personal promotional account – not carrying a function of the state.

The Conundrum with Policing Anonymous Speech

Another predominate issue is how the law deals with all the anonymous hate speech on social media. Censorship today is not from the government or nation states, but rather from the likes of Google and other online technology titans. Social media companies police the content pursuant to their own terms of service

1 Jacobus v. Trump, et al., 2017 NY Slip Op 08625

2 Clifford v. Trump, 339 F.Supp. 3d 915 (C.D Cal. 2018). Ms. Daniel's real name is Stephanie Clifford.

3 Attached is a brief prepared by our firm in a pending action, the style of which is Windom v. Harshbarger, (N.D. W.Va.. 249), C.A. 1:19-cv-00024.

4 Rossignol v. Voorhaar, 316 F.3rd 516 (4th Cir.), cert. denied, 540 U.S. 822 (2003).

5 Davison v. Randall, 912 F.3d 666 (4th Cir. 2019).

6 Id.

7 Id. at 679.

8 Woolsey vs. Ojeda, No. 2:18-CV-00745, 2019 384956 at 2 (S.D. W.Va. an.30,2019)(quoting Rossignol, 316 F.3d at 524).

agreements. Facebook and YouTube, for example, have removed a newspaper's online postings as well as a radio personality from their services.[9] Commentators note a disturbing trend with social media companies applying their service agreements where media giants have chosen to move away from their initial First Amendment inclinations. Commentators suspect this move is triggered by the European Union employing more censorship. In other words, countries tend to be more inclined to restrict expression and not view comments as protected speech.

Indeed, the censor today is social media, which uses certain A.I. algorithms to filter a whole host of online language trends, including hate speech. Meanwhile, censorship continues to rise as these media companies operate in a multitude of nation states with widely differing laws. As such, social media companies tend to adopt the strictest regime and thus prove to be a legitimate threat to truly free expression.

Available Means to Address Social Media as Censors

One option is to hold online platforms to First Amendment standards. By applying First Amendment standards, this would reduce the censorial action of private companies. As simple as it sounds, this approach raises another problem.

The State Action Doctrine, a venerable concept in Constitutional law, limits state action, not individual invasion of an individual's rights. The Constitution limits government actors, not private actors like media companies. In Nyabwa v. Facebook, the district court in Texas aptly explained the problem with applying the First Amendment to private companies. In dismissing a lawsuit by a private individual against Facebook, the district court stated: "…the First Amendment governs only governmental limitations on speech."[10]

Litigants have attempted to use dicta from the leading Supreme Court case involving free speech and the right to regulate it through quasi-government action in Marsh v. Alabama.[11] In Marsh, the Supreme Court in 1946 found that a private town was not technically private and thus allowed for First Amendment protection. The court reasoned ownership does not always mean absolute dominion. The more the owner opens his property for use by the public in general, the more do his rights become circumscribed by the Constitutional rights of those who use it.[12] In response, the Supreme Court adopted the "public function" test where litigants attempt to cloak otherwise private companies with pubic government characteristics to curtail and control their action.

The holding in Marsh, however, has not been successfully transferred to social media companies. Facebook, Instagram, Twitter and the like are not stepping in the shoes of the state, and thus are not held to First Amendment standards. Accordingly, we must presently rely on the social media companies to filter, manage and take down hate speech. Even so, there are large swaths of the web that are completely unfiltered and unrestricted.

Recourse Against Social Media Companies

So, the question is, what recourse does one have against these social media giants? You lose on First Amendment grounds because, for the most part, these companies are private. What about the harmful false and offensive content that remains in the digital world? What about the political bias that may exist with certain platforms?

First Amendment and Communication Decency Act

In general, as noted, lawsuits against social media companies have been unsuccessful for two primary reasons: first, doctrines that prevent the First Amendment from being applied to private companies; and second, Section 230 of the CDA (Communications Decency Act of 1996), which protects media companies from being held liable under federal or state laws. The Marsh decision, which created the "public function" test under which the First Amendment, would apply if a private entity exercises powers traditionally reserved exclusively for the state.

In several cases, the argument has been that social media companies act or possess qualities more akin to a government or state. Courts are apt to reject such arguments because, while these companies provide access, they are not performing any municipal power or essential public service. In other words, there is not sufficient nexus and entwinement for state action. To support this finding, the courts point out that the government did not participate in the operation or management of the website.[13] Instead, courts tend to see these media giants as simply providing a forum for the expression of diverse points of views.

The Communications Decency Act of 1996

The other obstacle with addressing recourse against

9 Alex Jones, an American radio show host, was removed from Facebook, YouTube, Spotify, and Apple.

10 Nyabwa v. Facebook, 2018 WL 585467 (S.D. Tex. Jan 26, 2018).

11 Marsh v. Alabama, 326 U.S. 501 (1946).

12 Id.

13 Quigley, 2017 U.S. Dist. LEXIS 103771, at *5-7; Estavillo v. Sony Comput. Entm't Am. Inc., No. C-09-03007 RMW, 2009 U.S. Dist. LEXIS 86821, at *5 (N.D. Cal. Sept 22, 2009); Cyber Promotions, 948 F. Supp. At 444-45. See also Fehrenbach v. Zeldin, No. 17-CV-5282, 2018 U.S. Dist. LEXIS 132992, at *7-8 (E.D.N.Y. Aug. 6, 2018) ("[N]o reasonable person could infer from the pleading that the state 'encouraged' or 'coerced' the Facebook defendants to enable users to delete posts or to 'look away' if and when they do.")

social media companies is 47 USC 230. The government made a public policy decision to protect social media companies. 47 U.S.C. §230(c) provides:

> (1) TREATMENT OF PUBLISHER OR SPEAKER – No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) CIVIL LIABILITY – No provider or user of an interactive computer service shall be held liable on account of ---
>
> (A) any action voluntarily taken in good faith to restrict access to or availability, of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph(1).

Clearly, the United States Congress chose to grant broad immunity. The statute expressly states that an entity which provides access is not a publisher. As noted, without a publisher finding, then there is a glaring missing element of any lawsuit based upon defamation. This statutory immunity applies beyond just common law defamation cases. Indeed, the theory of liability makes no difference in the application of immunity. In fact, courts applying Section 230 tend not to be impacted by the theory of liability (i.e., breach of contract, breach of privacy or defamation). Instead, courts focus on whether the media company is publishing other content. If so, then immunity applies, and the lawsuit is dismissed at the Rule 12(b)(6) stage.[14]

It bears observing that Section 230 distinguishes between interactive computer services and information content providers. Google,[15] Twitter[16] and Craigslist[17] are interactive providers. These companies enjoy statutory immunity. Information content providers do not enjoy immunity and are subject to common law defamation lawsuits. Whether a media company falls into the latter distinction depends on whether the media company materially contributed to the allegedly disputed content or specifically encouraged the development of the offensive content.

A case in point involved the website Roommates.com.[18] There, the court concluded that Roommates.com could be subject to a suit for discrimination because the site required all users to respond to questions about their sex, family status and sexual orientation by selecting preset questions. With these preset questions, the court reasoned that Roommates.com was more than a "passive transmitter of information provided by others; it became the developer of some of the information."[19]

The remaining part of Section 230 provides immunity to media companies that restrict access to content which it believes, in good faith, to be obscene. This section applies to those instances where the social media company restricts access or otherwise blocks a user. This immunity requires a threshold finding of good faith and, thus, cases here have a better chance to proceed to the summary judgment stage. While, Section 230 (c)(2) seems to focus on the removal of content rather than the publishing of content, it is unclear as to the interplay with the two sections. Arguably, there is broad immunity under Section (c)(1) which may encompass Section (c)(2). The end effect, no matter the interplay between the two sections, is that most lawsuits have failed as immunity applies no matter the theory of liability.

Conclusion

Lawyers can be and will certainly need to be creative in this space. Efforts to circumvent the statutory immunity and/or apply the First Amendment will continue to be aggressively pursued. While regulations seem difficult to implement, theories are percolating about ways to ensure accountability. Such theories include treating social media companies or platforms as common carriers or even cable companies. That said, defamation cases in the social networking era will definitely play an active role in court dockets across the country. But the stage as it is currently set significantly reduces the efficacy of that role.

14 47 U.S.C. §230. See also Universal Commc'n Sys., Inc., 478 F.3d at 418 ("The other courts that have addressed these issues have generally interpreted Section 230 immunity broadly . . ."); id. at 419 ("[W]e too find that Section 230 immunity should be broadly construed.").

15 E.g., Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

16 E.g., Fields v. Twitter, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016).

17 E.g., Chicago Lawyers' Comm. For Civil Rights under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008).

18 Fair Housing Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

19 Id.


Antisocial Media
Internet Defamation, Online Libel and Free Speech in the Social Networking Era
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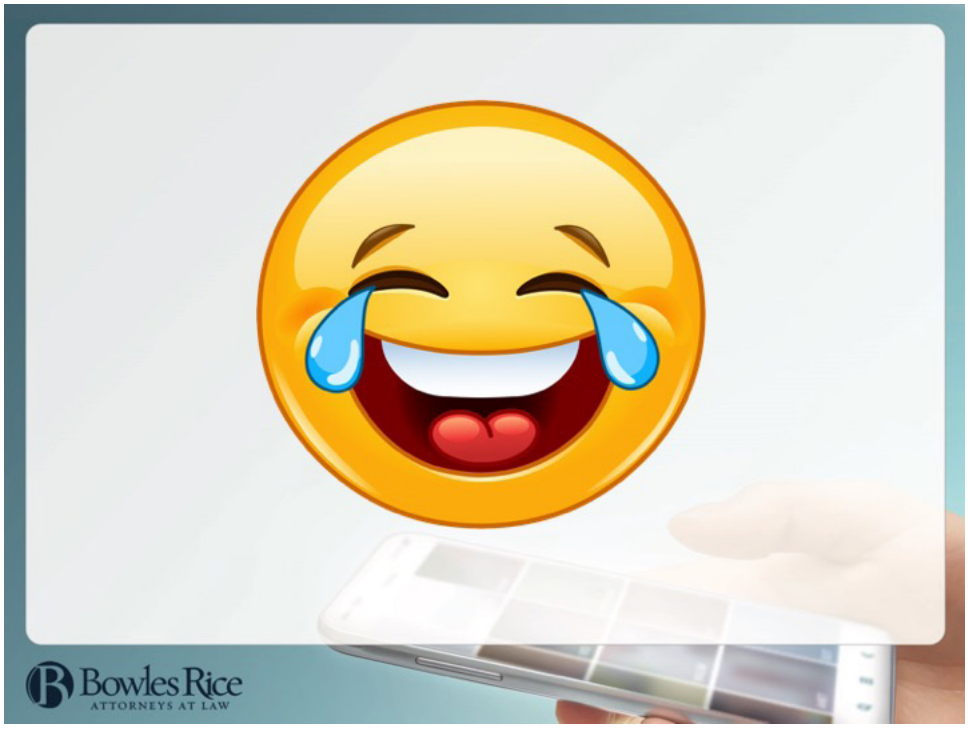
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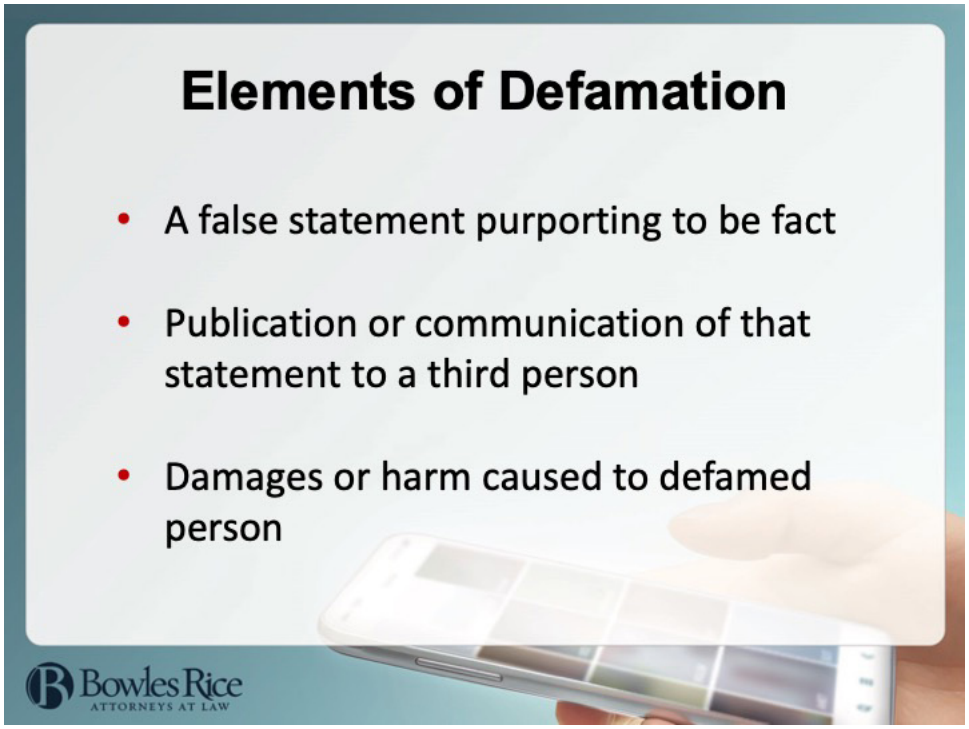
Elements of Defamation
• A false statement purporting to be fact
• Publication or communication of that statement to a third person
• Damages or harm caused to defamed person
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Defamation or Intimidation?
Donald J. Trump
@realDonaldTrump
Follow
Really dumb @CheriJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!
Donald J. Trump
@realDonaldTrump
Following
A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!
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First Amendment
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
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Blocking Free Speech?
Chair Phyllis J. Randall
The Honorable Phyllis A. Randall
Dulles Corridor Metrorail Project
Phase 1 & Phase 2 Updates
DULLES CORRIDOR ADVISORY COMMITTEE
SEPTEMBER 2019
Davison v. Randall
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Anonymous Hate Speech
Facebook Terms and Policies
SELF-CENSORSHIP
Data Policy
Community Standards
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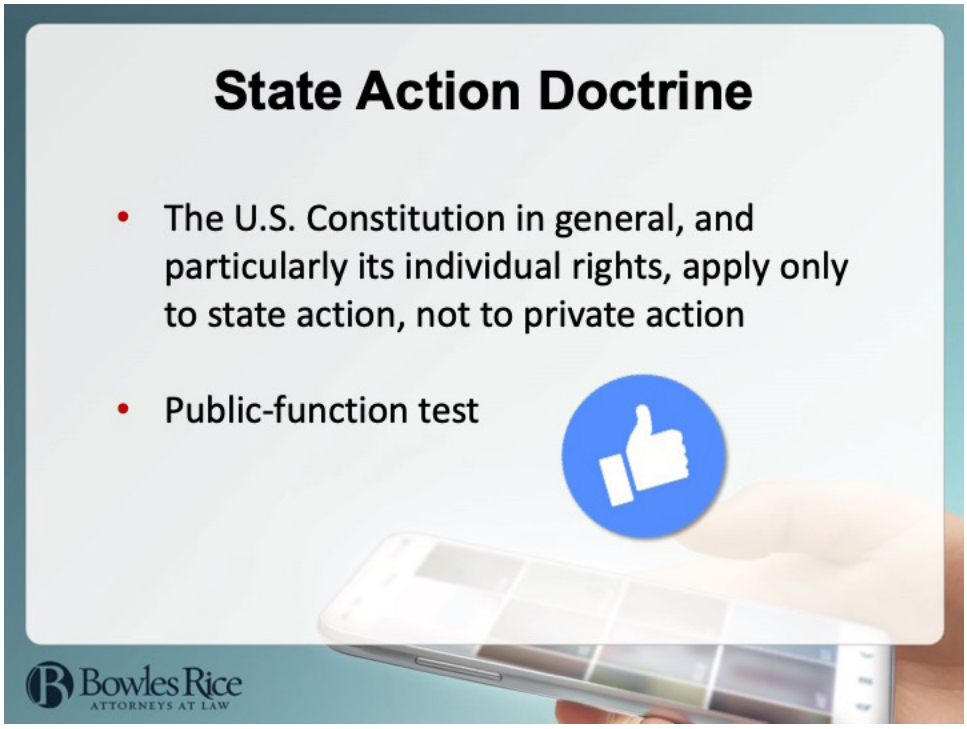
State Action Doctrine
The U.S. Constitution in general, and particularly its individual rights, apply only to state action, not to private action
Public-function test
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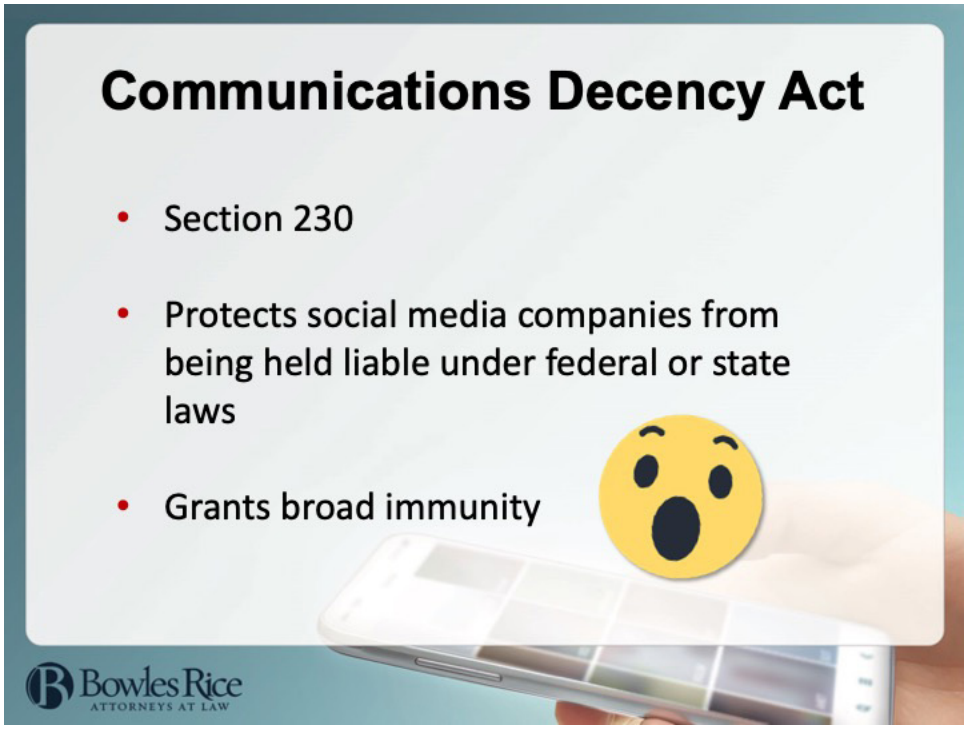
Communications Decency Act
Section 230
Protects social media companies from being held liable under federal or state laws
Grants broad immunity
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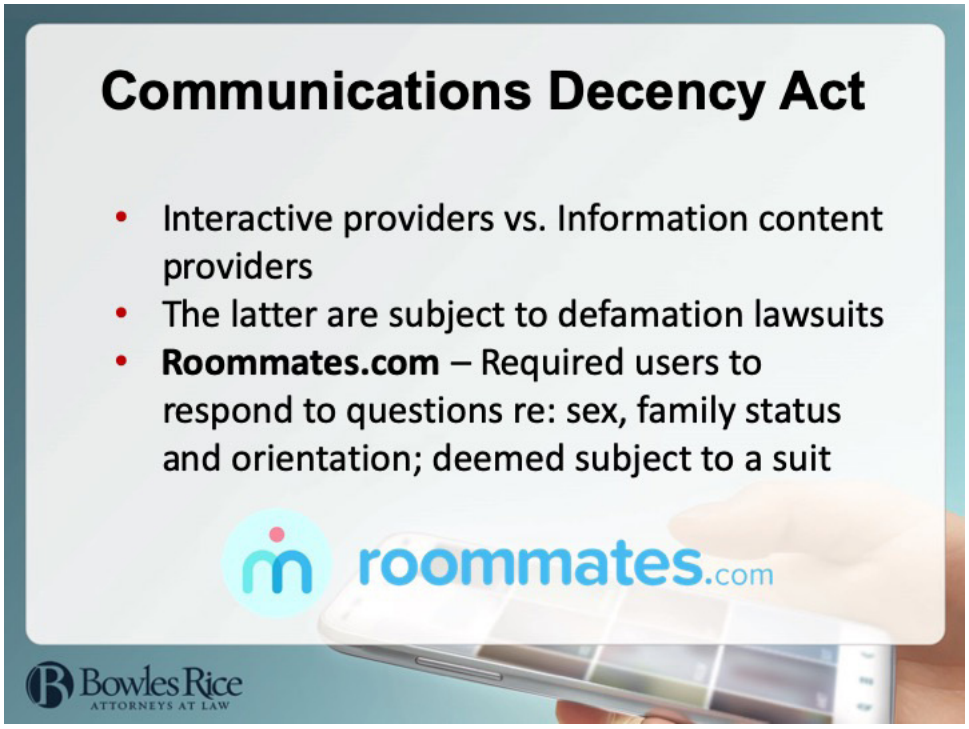
Communications Decency Act
• Interactive providers vs. Information content providers
• The latter are subject to defamation lawsuits
• Roommates.com – Required users to respond to questions re: sex, family status and orientation; deemed subject to a suit
roommates.com
Bowles Rice
ATTORNEYS AT LAW


Communications Decency Act
• Provides immunity to social media companies that restrict access to obscene content
ACCESS DENIED
Bowles Rice
ATTORNEYS AT LAW


The Greatest Battleground
Former Justice Anthony Kennedy called social media the "greatest battleground for free expression"
The law will establish boundaries to define acceptable forms of online expression.
Lawyers... it's time to be creative!
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Stuart McMillan is chairman of the Bowles Rice Litigation Department. He practices with a focus on civil and appellate litigation, and he represents clients in both federal and state courts throughout West Virginia. He has tried numerous cases to verdict, including libel, defamation, trespass and bodily injury lawsuits.

Stuart represents national corporate clients as well as regional and local businesses across many industries, including oil and gas, financial services and manufacturing. With a diverse practice, he has also tried cases for products liability, contract claims and lender liability claims.

He has been recognized by the nation's major peer review organizations, including Chambers USA, The Best Lawyers in America ® and Super Lawyers. He also holds an AV-preeminent peer-review rating by Martindale-Hubbell.

In addition, Stuart is the firm's General Counsel and Risk Management Chair, handling conflicts, insurance coverage and firm claim avoidance. He is a board member of the Network of Trial Law Firms and a member of the International Association of Defense Counsel (IADC).

Practice Areas
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- Appellate Litigation
- Financial Services Litigation
- Oil & Gas Litigation
- Product Liability Defense
- Health Care Litigation
- Class Action Defense
- Professional Liability Defense

Professional Highlights
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- Chairman, Bowles Rice Litigation Department
- Team Leader, Energy Litigation and Product Liability Defense

Honors
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- Selected as a 2017 Elite Lawyer of the South by Martindale-Hubbell and American Lawyer Media
- Named to The Best Lawyers in America ® (Commercial Litigation; Insurance Law; Litigation - First Amendment; and Media Law)
- Peer-Review Ranked AV by Martindale-Hubbell
- Recognized by Super Lawyers (Business Litigation), 2012-present

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REDISCOVERING E-DISCOVERY: WHAT DO I DO WITH THIS MESS?

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Best Practices for Working in the Ever-Changing World of E-Discovery
Kathryn Hannen Walker

Changes in the world of E-Discovery: E-Discovery grows more complex—and more expensive.

As legal disputes continue to increase, e-discovery demands during the investigation and discovery phases of these disputes continue to grow in parallel. Indeed, the legal demands on businesses, and their in-house legal teams, are rising. While the number of lawsuits was down in 2018, organizations are facing more regulatory proceedings and arbitrations than in the past.[1] It is estimated that for every $1 billion in revenue, a company may spend $1.2 million on disputes.[2] Likewise, it is estimated that the e-discovery industry will grow from $10 billion in 2018 to almost $19 billion in 2023.[3] The increase in legal disputes coupled with growing volume of electronic data continues to necessitate that counsel stay ahead of the curve and employ best practices in managing e-discovery demands to control costs.

These costs are in large part due to the exorbitant amount of data that is now being created by each individual within an organization. It is estimated that by 2020, each person will create 1.7 MB of data every second.[4] This large amount of data is coming from an array of sources, and new sources are created every day. These include typical sources like emails and Word documents created and stored on the employee's computer hard drive or servers of the company, but it also includes cloud-based applications, text and instant messages, data on tablets, social media, websites, electronic calendars, smart phone applications, and even streaming services. When facing a large e-discovery project, it is important to think creatively and capture the necessary data from all of these sources. Unfortunately, most companies are not staying ahead of the curve. Indeed, only 51% of enterprises with over 10,000 employees can collect from social media and instant messaging.[5] Recent case law, however, makes it clear that courts are holding parties to a higher standard, and thus, it is crucial to ensure you are capturing potentially relevant data from these new and ever-changing sources.

The exponential growth of electronic data is driven by the internet of things.[6] For example, courts are holding that text messages are discoverable and, to the extent they are relevant, must be produced. Lawrence v. Rocktenn CP LLC, No. 16-821, 2017 WL 2951624, at *1(W.D. La. Apr. 19, 2017), Walker v. Carter, No. 12-cv-05384, 2017 WL 3668585, at *2 (S.D.N.Y. July 12, 2017), and Dennis v. Red River Entertainment of Shreveport, LLC, No. 14-cv-2495, 2016 WL 8729956, at *1-2 (W.D. La. Jan. 8, 2016). Further the consequences for not appropriately preserving text messages can be serious. A court recently imposed monetary sanctions on defendants who failed to preserve relevant text messages after litigation was

1 Norton Rose Fulbright, 2018 Litigation Trends Annual Survey: Perspectives from Corporate Counsel, p. 3 (available at: https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20181105--2018-litigation-trends-annual-survey-pdf.pdf?la=en&revision=78851eda-508b-4dc5-b9a2-35a430bc45e4).

2 Id. at 4.

3 FTI Consulting + exterro, The State of E-Discovery 2019: A Survey of Industry Trends, Practices, and Challenges, p. 7 (available at: https://www.exterro.com/state-of-e-discovery-2019/).

4 DOMO, Data Never Sleeps 6.0, p. 2 (available at: https://www.domo.com/assets/downloads/18_domo_data-never-sleeps-6+verticals.pdf).

5 The State of E-Discovery 2019, at 10.

6 The Internet of Things refers to the ever-growing network of physical objects that feature an IP address for internet connectivity, and the communication that occurs between these objects and other Internet-enabled devices and systems.

reasonably foreseeable and later wiped and destroyed their phones, leaving no method of obtaining the deleted messages. Paisley Park Enterprises, Inc. v. Boxill, 2019 WL 1036058 (D. Minn. Mar. 5, 2019). Another court imposed an adverse inference instruction and awarded attorney's fees and costs after finding that defendants had intentionally spoliated evidence by, in part, deleting relevant text messages. Experience Hendrix, L.L.C. v. Pitsicalis, 2018 WL 6191039 (S.D.N.Y. Nov. 28, 2018). Relatedly, employers are expected to preserve and produce relevant data from instant messages sent by employees. Franklin v. Howard Brown Health Ctr., No. 17 C 8376, 2018 WL 4784668, at *1 (N.D. Ill. Oct. 4, 2018), report and recommendation adopted, No. 1:17 C 8376, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018). This is made even more complicated when employees use their personally owned device to conduct business and mingle work and personal data.

Social media is also becoming an increasingly hot topic in discovery disputes. In Locke v. Swift Transportation Co., 2019 WL 430930 (W.D. Ky. Feb. 4, 2019), the magistrate allowed the defendants to obtain limited, relevant information from the plaintiff's social media accounts. The magistrate stated, "Social networking site content ("SNS") is subject to discovery under Rule 34. To fall within the scope of discovery, SNS information must meet the relevance standard, and the burden of discovering the information must be proportional to the needs of the case. Put simply, social media information is treated just as any other type of information would be in the discovery process." Id. at *2. See also Gordon v. T.G.R. Logistics, Inc., 321 F.R.D. 401, 406 (D. Wyo. 2017); Smith v. Hillshire Brands, No. 13-2605-CM, 2014 WL 2804188 (D. Kan. June 20, 2014.

Finally, parties may even be required to produce non-communicative data from applications on smart phones and other technology. For example, the court in Cory v. George Carden International Circus, found that "a mobile app that indicates a Plaintiff performs strenuous activities may be relevant to claims of injury or disability." 2016 WL 3460781, AT *2 (E.D. Tex. Feb. 5, 2016). The court also ordered that the defendant be given access to the plaintiff's fitness monitoring accessories, such as a Fit Bit. Id. at *3.

In this ever-evolving landscape, it may seem impossible—and costly—to keep up with the exorbitant amount of data that may be relevant to a dispute. However, there are some best practices that can make any e-discovery project more efficient and (hopefully) less expensive.

Best Practices: How to be efficient and cost-sensitive in today's world.

When engaging in e-discovery, it is important to think creatively and capture the necessary data from all of the types of sources—including those mentioned above. However, it is also important to collect this data in the most efficient and cost-effective manner. Whether you are in-house counsel or advising a business client, there are a few ways to efficiently manage your ESI projects by employing proactive measures to limit the amount of data a company stores and best practices to limit the scope of ESI being culled and reviewed after a legal dispute arises:

1. Create and implement reasonable data deletion policies.

In the course of running a business, employees' personal purging practices vary vastly from one to another. Some may routinely clear out their inboxes, while others keep emails forever. In order to avoid having to collect and review decade-old emails from multiple custodians, entities should implement organization-wide policies where unnecessary data is routinely purged. Furthermore, if a policy is implemented is important that the company not only enforce the policy, but also give employees time to do so.

2. Control employees' use of mobile and electronic devices and the types of applications available on those devices.

There are several policies that can be implemented that will control the amount and sources of data that employees regularly create. For example, an organization can limit the number of devices employees may use for business activities. Additionally, an organization can control what applications employees are allowed to use for work purposes. For example, providing employees with instant messaging applications on their work computer may create a large amount of additional data to collect and produce. By not allowing such applications, a company can limit at least one channel of communications that may later have to be produced.

With respect to mobile phone usage, many companies prefer a "bring your own" device scheme because it saves the company money; however, if employees regularly conduct business using their own mobile phones and co-mingle business and personal data, your entity might consider instituting a policy where the company provides its employees with mobile devices and prohibits using company phones for personal use.

3. Identify key custodians and their particular data practices early on in the process.

At the beginning of any discovery project, it is crucial to identify the key players in the dispute so you can immediately begin preserving their data. By identifying the specific individuals who possess and control the relevant data early on in the matter, you can begin to understand the data landscape for the matter and make a defensible and efficient plan. After identifying these individuals, it is important to talk to them about how they communicate, what they create, and how they store it. For example, one custodian may save all of his relevant notes within one running Word document and only communicate with other relevant individuals via email. However, a second custodian may communicate with relevant individuals via several smart phone applications and save all of his notes on an application on his tablet. By identifying the types of data and communication habits of your custodians, you can execute targeted collections that will save you time and money while avoiding missing relevant data or learning about it for the first time in a deposition.

4. Establish applicable date ranges, available data types, and search terms early on in the process, but test them before agreeing to any protocol.

Many lawyers agree to data protocols with custodians, search terms and date limitations without testing them first. While it may seem like it wouldn't be a big deal to make such an agreement without any diligence, this is a mistake and in many instances, it can substantially increase your ESI spend. While some custodians are essential regardless of their data volumes, some secondary custodians may give you more flexibility. If you know that custodian A and custodian B are essentially in the same position, but one has far more data than the other, you can suggest the one with the smaller data universe. However, if you agree without having the data to analyze, you might unnecessarily agree to something that only serves to increase your cost.

The same is true with search terms. One wrong search term can mean collecting and reviewing tens of thousands of unnecessary documents. You can avoid this by testing your terms and even reviewing sample sets of data before settling on a final agreed upon search.

5. Think outside the box (or outside the office) for your document review.

One of the largest expenditures for a document review project is attorney review; however, there are options available to reduce these costs. One option is foregoing a document-by-document linear review altogether. Instead, the parties agree to a protocol where the parties first apply search terms to the data and then apply privilege screens prior to production. To the extent a document contains a search term, but does not fall within the privilege screen, it gets produced without further review. Those documents that were captured by a privilege screen are withheld from production. While the producing attorneys might review small samples of the production set, this can be a cost effective way to produce a large volume of data in a short period of time. To the extent a privileged document is produced, the parties rely upon a clawback provision to retrieve any privileged documents.
Another option is to consider relying upon an international review team, which is supervised by trial counsel. The benefit of an offshore review team is not only a lower cost review, but also the benefit of a 24 hour review cycle. To the extent your team is in Asia, while the U.S.-based trial team is sleeping, the review team is working. When the trial team arrives at work, they can respond to questions and quality check the overnight review. In order for this type of review to be successful, it is essential that the trial and review teams are in close contact with one another.

6. Create a unique and dispute-specific plan for each new dispute.

Just because a certain process or protocol worked in one case, does not mean it makes sense for all cases. ESI discovery is ever-changing and lessons learned in one matter inform those that follow. It is important to start each new e-discovery project with fresh eyes and to always analyze the bigger picture before creating a specific plan. While several of these suggested practices may delay the actual collection and processing of data, you will save both time and money by making a creative, tailored plan to your dispute.

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Kathryn serves as assistant chair for the Litigation & Dispute Resolution Practice Group. Her practice focuses on complex commercial litigation and internal investigations, including international investigations. Kathryn has represented U.S. and foreign clients in jury and bench trials, mediations and arbitrations. She has extensive experience in data management and e-discovery, leading massive electronic data analysis projects in high-stakes litigation and investigations.

- Intellectual Property and Technology – Kathryn regularly advises clients on efficiently and effectively managing their data and has exceptional experience leading major discovery projects in complex litigation and investigations. Kathryn has litigated multiple intellectual property rights disputes involving copyright and trademark infringement, and counsels clients on IP issues, including contests and sweepstakes.

- Commercial – Kathryn represents businesses in complicated commercial litigation matters in a wide variety of industries, including insurance and healthcare. She has experience litigating substantial contract and insurance coverage disputes—with an extensive experience in both federal and state courts. She has successfully negotiated sophisticated and creative settlements in a variety of contract disputes and business transactions.

- Investigations and Foreign Corrupt Practices Act (FCPA) – Kathryn has extensive experience conducting internal investigations. She has led multiple document collection and data review teams in high-stakes domestic and international investigations, including multiple FCPA matters. She has significant experience with foreign data privacy laws and delivering cost effective, time-sensitive data-based fact-finding.

Related Services
- Litigation & Dispute Resolution
- Business Disputes
- Foreign Corrupt Practices Act (FCPA)
- Intellectual Property & Technology
- Compliance & Government Investigations
- Electronic Data & Technology
- Intellectual Property Litigation
- Privacy & Data Security
- Healthcare Disputes
- Corporate Governance

Accolades
- The Best Lawyers in America© — Commercial Litigation (2015-2020)
- Leadership Council on Legal Diversity (LCLD) — Fellow (2013)
- Nashville Business Journal “Best of the Bar” (2008)

Education
- Vanderbilt Law School - J.D., 2000 - Order of the Coif
- Vanderbilt University - M.A., 1995
- Augustana College - B.A., 1993

THE TRIAL LAWYER'S ROLE IN MEDIATION ADVOCACY

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Opening Statements in Mediation? Go or No-Go Considerations
Anthony (Tony) Rospert

A critical decision in preparing for mediation is whether to give an opening statement. Opinions on the utility of opening statements are mixed, ranging from "a complete waste of time and counterproductive" to "essential to the process, as it is your one and only opportunity to talk directly to the other side." I have worked with a number of mediators recently who have encouraged their use. And while opening statements are not always appropriate in mediation, there are times when presenting one can add value and make settlement more likely. Following are factors to take into account as you consider whether to make an opening statement or skip to private caucus sessions in the mediation process.

Educating the Mediator

An opening statement offers the most efficient means to educate the mediator on the nature of the dispute and the issues that need to be addressed to achieve settlement. Exchanging information through the mediator during a series of caucus sessions by slowly dribbling out critical facts and theories may require too much time and create a risk of miscommunication. Making an opening statement helps "cut to the chase" and arms the mediator with arguments he or she can use in the caucus sessions with the other party. Likewise, an opening statement can bring to life for the mediator issues that may not have been clear during the premediation conferences or in written submissions.

Yet you should consider if the information the mediator needs to resolve the case can just as effectively be conveyed through written submissions. For example, issues in the case may already have been thoroughly briefed in the litigation, and the briefs can be submitted to the mediator. The mediator may also allow briefing prior to the mediation session, including ex parte mediation statements. Well-prepared briefs and mediation statements may be sufficient to give the mediator enough information to understand the issues and impediments to settlement in advance of the mediation session. An opening statement, however, will not be educational nor worth the cost incurred if it is simply a regurgitation of what is presented in mediation statements or other submissions.

Educating the Opposing Party

An opening statement also provides an opportunity to advocate your position directly to the opposing party, who may be hearing the strengths of your client's position for the first time. This is particularly germane where you sense that the opposing lawyer is failing to communicate both the pros and cons of the case to their client. Or worse yet, he or she is embellishing and exaggerating the strength of the client's case, and thus has created unrealistic expectations for what is a fair settlement. In any event, it is rare for any lawyer to be as effective in articulating the opposing party's case, and it is often beneficial for a party to observe the strength of the opposing party's advocacy. An opening statement at the mediation will allow you to present the issues directly to the other side and, likewise, to expose your client to the other party's lawyer and his or her presentation.

This approach, however, can fail if the opening statement

is constructed with the sole purpose of trying to persuade the opposition of the correctness of your position rather than to educate them about the evidence in the case, the differing legal theories and the risks of further litigation. You need to get the right balance between making an effective presentation as an advocate for your client's position while, at the same time, communicating an openness to discussion and settlement. Done right, an opening statement can ensure that both sides are educated on the issues and starting the negotiations based on a common understanding.

Personalizing Your Client

In many cases, the mediation may be the first and only time the parties have the opportunity to meet face-to-face. The opening statement can be an opportunity to personalize your client and demonstrate that your client has a rational view of the dispute and is not out to destroy the other side—that there are real concerns involving real people at stake in the mediation. The type of case can impact this consideration. But even in a business dispute it may be important to show that your client representative has a rational view and empathy for the other side's position.

One method of using the opening statement is to have your client take part in the presentation. This could give your client the opportunity to speak directly to the other party without the opposing lawyer or the mediator filtering the message. You should decide whether your client will speak on his or her own behalf during the opening statement and, if so, if the client will present all or only a portion of the statement. Both strategies can help humanize your client, but it must be done effectively or will it be counterproductive in the joint session setting.

Recognizing the Parties' Feelings

An opening statement likely will be ineffective if emotions are running high and personality conflicts exist between the parties and/or lawyers. Indeed, if the underlying litigation has been particularly hostile and having the parties in the same room is nearly impossible, then the costs of giving opening statements far outweigh any benefits. In those cases, the goal of resolving the dispute is probably better served by the mediator, not the attorneys, explaining the parties' respective strengths and weaknesses as a neutral observer during the private caucuses.

But in certain instances, opening statements can be used to assuage the parties' negative emotions. For example, mediation provides an opportunity for parties to be heard and air their grievances, which may be therapeutic and more important to achieving resolution than the magnitude of a settlement payment. Likewise, it may be advantageous to address negative emotions—distrust, anger, resentment, jealousy—head-on in the opening statement to clear the air. It can demonstrate to the other side that your client recognizes that emotional scars need to be healed as part of the mediation process and that it is in the parties' best interests not to let these feelings cloud their ability to resolve the case. Thus, an effective opening statement can defuse negative emotions and start the mediation on a positive note.

Setting the Tone

Finding the right tone for the mediation is beneficial to achieving settlement by making it clear to the other side that your client is not at the mediation to fight but to resolve the case. Recognizing the differing viewpoints in the case establishes an atmosphere for cooperative negotiation. The best way to set the tone in the opening statement is to make conciliatory statements and focus on areas of agreement between the parties. Likewise, if there are weaknesses in your client's case, acknowledging them develops credibility with both the mediator and the opposing party. An opening statement during the joint session may provide great value if it can be used constructively to get the other side to lower its guard and listen.

But be sure your rationale is sound. An opening statement should not be used if it is impossible to strike the right tone. A hostile statement utilizing courtroom theatrics will not get the parties on a path to settlement, but will back the other side into a corner and polarize the proceedings. Indeed, an opening statement is pointless if your client firmly believes the case is frivolous or without evidence or merit. In such circumstances, it is nearly impossible to give an opening that is not going to inflame the opposition. However, candidly showing the other side what you will present at trial if the case is not resolved and utilizing a matter-of-fact tone and soft words can be effective.

Considering the Timing

One factor in determining the utility of an opening statement is when the mediation occurs relative to the stage of the underlying litigation. An opening statement may be more valuable when the mediation occurs early in the case. If the mediation occurs before the case is even filed, an opening statement is almost essential. If, however, mediation is being conducted after or near the close of discovery, there may be little new information gleaned from an opening statement. At that point in the litigation, the mediation is focused more on arriving at a monetary settlement. This is not to say that because a mediation

comes later in the judicial process, an opening statement is not of value because in certain circumstances it may still make sense. Thus, a key consideration is whether the mediation is being conducted as part of an attempt at an early resolution or after the parties' positions have been communicated via pleadings, motions, and discovery in the litigation.

Conclusion

Whether to present opening statements at a mediation is an important decision that the parties should not take lightly. There is no bright-line test for when to give an opening statement; it can set the stage for a successful resolution of the dispute or it can backfire and spoil the possibility of settlement. Addressing the factors discussed above on a case-by-case basis can help you determine whether there is value in presenting an opening statement.

Opening Statements in Mediation: Balancing Between a Throwdown and a Group Hug
Anthony (Tony) Rospert

Presenting a powerful opening statement at mediation plays an important role in achieving success, but you need to reach into your toolbox for more than just a hammer. As American psychologist Abraham Maslow famously said, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." Seeing a mediation opening statement as a nail and an opportunity to hammer the opposing side is an unproductive strategy for obtaining a resolution. To be an effective advocate at mediation, use subtlety and finesse in making your opening statement to help foster a constructive conversation with the other side and begin to build an atmosphere of trust and a willingness to compromise.

Mediation is not litigation and making an opening statement at mediation is not the same as delivering an opening statement at trial. Your role in giving a mediation opening statement is to show strong advocacy without creating resentment. Use the opening remarks in a joint session to begin the mediation on a positive note rather than advocating why your client will win at trial. To reach this goal, you need to strike a balance between promoting your client's position and proceeding in a conciliatory manner consistent with the goal of settlement.

But while using an adversarial approach in mediation is generally counterproductive, the skills necessary to be an effective advocate in your mediation opening are similar to those used in the trial context. This article outlines best practices for giving an opening statement in a joint mediation session and illustrates how the same approaches and skills you use to deliver a great opening statement at trial also apply in the mediation context.

Know and Educate Your Audience

The goal of an opening statement, whether in the trial or mediation context, is to use your advocacy skills to begin laying the groundwork for persuading the decision-maker. A skilled trial lawyer giving an opening statement knows the audience, identifies who he or she seeks to persuade and fashions a message that best resonates with the audience. By recognizing who you are trying to convince, you can craft and share the message compellingly.

An opening statement in litigation seeks to persuade the judge or jury. The focus of your opening remarks in mediation should be on the opposing party, who is the real decision-maker, not the mediator or the other party's lawyer. You are trying to convince the opposing party that your client has the better case and that the risk of continued litigation necessitates settlement.

Like a trial opening, an opening statement in mediation should educate the decision-maker on the facts of the case and help persuade them to settle. Too many lawyers decline the opportunity to explain the key evidence and their client's position during opening statements, focusing instead on rebutting the other side's arguments. But this is your best – and perhaps only – chance to educate the opposing party, who may be hearing some of the evidence for the first time.

For example, I have seen lawyers make strong monetary demands in mediation opening statements. They use the opening statement to profess, in an antagonistic manner, that their client will only settle for X, an approach that sabotages the mediation process. Instead of making incendiary and argumentative declarations about damages, the opening statement should clarify for the opposing party the framework your client used to arrive at its settlement position and its method for calculating damages. It may even be appropriate to acknowledge

the other party's injury, followed by a statement that your client should not be responsible for the full amount of damages demanded.

But be aware that using your opening to educate the opposing party can fail if its sole purpose is to persuade the opposition of the correctness of your client's position rather than to inform them about the evidence in the case, the differing legal theories and the risks of further litigation. You need to strike the right balance between effectively advocating for your client's position and communicating a willingness to compromise. Done right, an opening statement educates both sides on the issues and starts the negotiations based on a common understanding.

Preparation Is Key

As in a jury trial, preparing to give an opening statement at mediation is critical to the overall success of the process. Like a trial opening, an effective mediation opening statement takes significant time and effort; you can't wing it. A well-crafted and confidently delivered opening statement goes a long way toward achieving a favorable settlement for your client.

Not only must you prepare, but your opening statement should communicate your readiness to the opposing party. A statement suggesting that you are in command of the case's facts and law and can explain how the case will unfold if the parties do not settle conveys preparedness. This is particularly germane in a case where the opposing side's position is weak; a powerful, evidence-based opening can persuade the party to settle on more favorable terms.

Effectively using visual tools, such as PowerPoint, underscores your command of the facts and that your client is prepared to litigate if the case is not resolved. Your presentation should highlight the key evidence by showing snippets of deposition testimony and documents you will use at trial. Using PowerPoint can help you convince the decision-maker that you are prepared and ready to go to trial if the case is not settled at the mediation. If you approach mediation seriously with your eye on a trial, you will increase your chances for settlement.

A word of caution: Using case citations in a PowerPoint presentation can backfire. Relying on citations can alienate your primary audience – the opposing party – who is unlikely to understand the nuances of case law or appreciate the significance of precedent. Instead, focus on the facts and evidence, which is more likely to resonate. Also, be selective in using PowerPoint. If your slide deck is not concise and the presentation drags on, it can antagonize the other side rather than educate them and show that you are prepared.

Finally, you should explicitly state in your opening that you and your client have spent significant time preparing for the mediation and that you have a desire to act in good faith to resolve the case.

Coming to mediation with a carefully crafted opening statement can help you impress the other side by illustrating that you are a skilled and talented trial attorney who will make an even more compelling argument for your client in the courtroom, which can greatly increase your chance of reaching a settlement.

Set the Right Tone

Tone is critical when delivering an opening statement for litigation or mediation, and it's important to understand the difference. An opening statement at mediation should be a conversation, not a trial argument you would deliver to a jury. A mediation opening statement requires a level of refinement and measured temperament. You fail as an advocate in your mediation opening if you set an adversarial tone by trying to convince the participants of the absolute correctness of your client's position and the baselessness of the opposition's. No one likes to be told that they are wrong or that a court will never accept their legal position. Such an approach will not encourage compromise.

Rather, your opening statement should encourage the opposing party to lower its guard and avoid provoking an aggressive response. You can accomplish this by setting a positive tone and avoiding statements that will elicit a strong negative reaction. A good trial lawyer has the skills necessary to make an effective presentation without creating resentment and the ability to foster an atmosphere of trust and willingness to compromise.

How do you do this? It is important to avoid exaggerating and using tactics that convey the impression that you are merely engaging in chest beating and table pounding. Instead, speak with conviction and emphasize the strengths of your client's case, but avoid melodrama and theatrics.

To set the right tone, you also need to be careful about how you characterize the other side's position. Show the opposing party that you understand their position and arguments by referring to key points in their mediation statement or filed pleadings. And if possible, emphasize in your opening statement areas of agreement between the parties before highlighting points of disagreement.

When discussing areas of disagreement, it is important to concede that the other side makes some valid points to consider and state that you hope they will recognize that some of your arguments have merit as well. The goal is to confront your weaknesses and be conciliatory where appropriate by acknowledging the other side's strengths, then weigh the uncertainties of those strengths against the law and facts of the case.

Be explicit about your purpose. Stress that you and your client are not at the mediation to be adversarial, but to work with the opposing party to resolve the dispute. It may also be appropriate in the opening statement to address any negative emotions, known resentments and/or levels of distrust between the parties. By personalizing each side and emphasizing that the case involves real people, you can help defuse tension and encourage the parties to work toward a resolution.

Conclusion

Avoid the urge to use a hammer at mediation. While the advocacy skills necessary to give an effective mediation opening statement are similar to those used in the trial context, you need to have the right touch to engage the opposing party in a civil discussion about the merits of the case. Your mediation opening statement should not be used as a dress rehearsal of your trial opening. It can be forceful and show conviction by suggesting what will happen if the case does not settle and stressing the risks of further litigation, but it also needs to foster a tone of cooperation and express your hope to resolve the dispute. Like a trial lawyer, an effective mediation advocate uses an opening statement to communicate preparedness, conviction and a desire for justice, but refrains from overselling their case and creating atmosphere of adversity by using a hard-driving approach.

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

Tony has a passion for helping his clients succeed by treating them like his best friends by being loyal, well-connected and honest with them about the strengths and weaknesses of their legal positions. As a result, clients rely on him as a "go-to" litigator for their most significant matters.

Tony focuses his practice on complex business and corporate litigation involving financial services institutions, private equity firms, real estate development and management companies, commercial and contract disputes, indemnification claims, post-closing disputes in mergers and acquisitions, shareholder actions, business transactions, class actions, and directors and officers (D&O) litigation.

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

Outside the courtroom, Tony is a certified BBQ judge and judges 7-10 sanctioned competitions per year.

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

Presentations
- "Maturing Market for R&W Insurance: Transaction and Claims Experience," Association of Corporate Counsel, October 3, 2019
- "Is Mediation the New Jury Trial? Approaches and Strategies to Effective Mediation," Celesq, May 21, 2019 – Audio I PDF
- "The Art of Argument: Using the Pixar Storytelling Formula to Persuade Judges and Jurors," Celesq, December 14, 2018

Distinctions
- Benchmark Litigation 40 & Under Litigation Hot List, 2019
- Crain's Cleveland Business Forty Under 40 Class of 2013
- Listed as an Ohio Super Lawyers® Rising Star in Business Litigation, 2009, 2010, 2013, 2016 and 2017

Education
- Vermont Law School, J.D., magna cum laude, senior editorial board, business manager, Vermont Law Review
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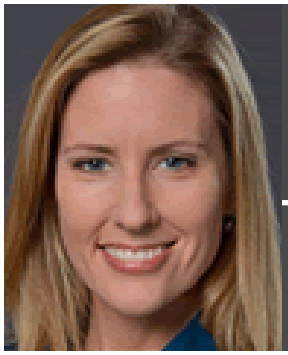

TOOLS FOR INVESTIGATING MEDICARE CLAIMS

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Tools for Investigating Medicare Claims
K. Nichole Nesbitt

Medicare, Medicaid, Medicare Advantage Organizations, and other government-sponsored payors have statutory rights to recover for conditional payments already made on behalf of an injured beneficiary following a final settlement with or judgment from a third-party insurer (including self-insurers). In some instances, the government-sponsored payor may also have the right to recover for future care costs.

Due to these statutory rights of Medicare and other government-sponsored payors, it is critical for everyone involved in a settlement -- including the defendant -- to investigate whether a Medicare or other form of "super lien" exists and ensure that the interests of the government-sponsored plan are protected. In addition, if a patient was a Medicare beneficiary, settlements above a reporting threshold must be reported to the Centers for Medicaid and Medicare Services (CMS). Penalties for noncompliance can be severe, including double damages for failing to reimburse Medicare or fines for non-reporting of settlements.

Fortunately, several tools can assist defense counsel and risk management professionals in investigating Medicare liens and other super liens. This paper discusses how practitioners can identify Medicare and other types of super liens and how to analyze those liens and prepare to address them at mediation or settlement.

I. Medicare and Other Super Liens

Medicare

Per 42 U.S.C. § 1395y(b), Medicare is considered a "secondary payer" when a third-party "primary payer" may ultimately be held liable for payment. Medicare can make "conditional" payments for services for an injured beneficiary for which a primary payer may ultimately be responsible. The Medicare Benefits Coordination & Recovery Center (BCRC) is responsible for recovering conditional payments for Medicare.

Under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007, all settlements, judgments, awards, or other payments from liability insurance (including self-insurance) must be reported to BCRC. A claimant can face fines of up to $1,000/day for failure to report.

If the injured party fails to reimburse Medicare within 60 days of receipt of the settlement funds, Medicare may pursue recovery directly from the insurer. See 42 C.F.R. § 411.24. Federal law also permits plaintiffs to seek double damages in a private cause of action if Medicare is not reimbursed. See 42 U.S.C. § 1395y(b)(3)(A).

Medicare Advantage Organizations (MAOs)

A Medicare Advantage Plan, sometimes called "Part C" or "MA Plans," are offered by private companies approved by Medicare. Approximately 25% of all Medicare beneficiaries (roughly 12,000,000 people), are enrolled in an MA plan. By statute, 42 U.S.C. § 1395w-22(a)(4), MAOs may charge a primary plan for medical expenses paid on behalf of a participant.

Medicaid

Federal law requires states to "take all reasonable

measures to ascertain the legal liability of third parties ... to pay for care and services available under [Medicaid]," and, "in any case where such liability is found to exist after medical assistance has been made available[,] ... seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. § 1396a (a)(25). Many states have enacted statutes pursuant to this requirement to effectuate reimbursement from third-parties in the event of a judgment or settlement in a personal injury case. See, e.g., Md. Code Ann., Health-Gen. § 15-120 and D.C. Code Ann. § 4-602.

Tricare/VA

Military families covered under Tricare also have super lien considerations. 42 U.S.C. § 2651 provides the government with the statutory right to recovery "under circumstances creating a tort liability upon some third person."

II. Identifying Medicare and Other Super Liens in Your Claim or Case

Internal Investigation

It is usually straightforward to identify whether Medicare, Medicaid, or a similar payer was billed for allegedly negligent care provided by your defendant/institution. But it is more challenging to determine whether care received at other institutions was caused by the alleged negligence of your client. Still, a defendant is responsible for ensuring Medicare's and Medicaid's lien interests are covered for all care related to the injury, not just the defendant's own care. Accordingly, defendants need to request and obtain billing records from any later-in-time care claimed as damages so that this can be investigated. Another challenge is identifying whether an insurer listed on medical or billing records is an MAO as opposed to an ordinary private insurer. Many MAO plans have "Medicare" or "Advantage" in the plan name, but some do not. Look out for HumanaChoice (in Maryland) and Cigna-Health Spring (in D.C.), which offer MAO plans without "Medicare" or "Advantage" in the plan name.

Discovery/Requests to Claimant

For cases already in litigation, formal written discovery to the plaintiff should request key paperwork for Medicare or other super liens, such as:

- Conditional Payment Letter ("CPL")
- All correspondence received from Medicaid, Medicare, CMS, the Coordination of Benefits Contractor (COBC) or any Medicare or Medicaid third party administrator
- A print-out or print screen shot from the claimant's account on www.mymedicare.gov if any exists, showing the amount of any conditional payments made by Medicare.

Some vendors can help obtain data. One of the Network's sponsors, Berkeley Research Group, LLC, has one of the largest and broadest healthcare practice groups in the world and warehouses years of Medicare claims data on their servers.

MSP Recovery Portal - for use by the defense

In the event a defendant faces a pro se claimant or a plaintiff's attorney who is non-cooperative or not diligent, there is another option to investigate whether Medicare has made conditional payments. Any lawyer or law firm or institution can create an account on the Medicare Secondary Payment Recovery Portal. This is a lengthy process due to federal government IT security protocols, but once it is set up (using the claimant name, address, and SSN), defense counsel can search for whether Medicare has a recovery case for that claimant. If a match is found, the attorney can request a copy of a Conditional Payment Letter or an updated Conditional Payment Letter directly instead of waiting on the plaintiff's attorney.

Note that this portal only covers traditional Medicare liens in the BCRC process. It does not apply to Medicaid or MAO liens.

III. Analyzing Medicare and Other Super Liens with an Eye Towards Settlement

Step One: Request an Updated CPL

Even if defense counsel has received a Medicare CPL earlier in discovery, they should request an updated CPL prior to mediation or settlement talks, as CPL amounts are updated by Medicare contractors over time.

Step Two: Review the Lien and Consider Disputing It

Defense counsel should carefully review the CPL/lien information. The information should include a "Payment Summary Form" listing DRG/ICD codes for the care that Medicare, Medicaid, or other protected payer is claiming was caused or necessitated by the alleged negligence. Frequently, the lien will include costs for care that is NOT causally associated with the claim or injury. Liens may also reflect prices for services that are greater than what was actually paid.

Medicare and all other super liens have a lien dispute process. Typically, this process can only be used by

the beneficiary or his/her counsel, and they have every interest in doing so. For cases with large liens where the care at issue in the case is mixed in with other care such that the lien needs to be "scrubbed," consider proposing to the plaintiff's counsel that a Medicare claims specialist review the lien, identify care not causally associated with the claim, and negotiate reduction of the lien.[1]

Step Three: Use the MSP Recovery Portal to Confirm the Final Conditional Payment Process

The MSP Recovery Portal has some functions available only to plaintiffs' firms who have validated that they are representing the beneficiary (or vendors acting on a plaintiff's counsel's behalf). The portal allows plaintiffs to: (1) submit notification of potential settlement within 120 days in advance of the anticipated date of settlement; (2) dispute lien amounts (and if the Medicare contractor does not respond within 11 business days, the dispute is automatically granted in their favor); and (3) within 120 days, make a one-time request for a Final Conditional Payment Letter, which constitutes the Final Conditional Payment amount.

Going through this process avoids the danger of reaching a settlement based on an earlier CPL amount to the extent the Medicare Final Demand Letter is substantially higher. See Mayo v NYU Langone Medical Center, No. 805036/12, 2018 WL 1335262, at *1 (N.Y. Sup. Ct. Mar. 15, 2018) (in which the case settled based on CPL of $2,824.50, but Final Demand was $145,764.08; the plaintiff ultimately succeeded in vacating the settlement as based on an incorrect assumption).

Step Four: Have Points Ready on Liens at Mediation/ Settlement

For Medicare liens, a Medicare Final Demand Letter typically will reflect a reduction in the lien to reflect the plaintiff's attorneys' costs and fees. If the cost of the Medicare lien is less than the settlement amount, Medicare will reduce the amount of the lien by the ratio of the plaintiff's procurement costs (attorney's fees and case expenses) to the total amount of settlement. 42 CFR 411.37(c). If Medicare payments equal or exceed the judgment or settlement amount, the recovery amount is the total judgment or settlement payment minus the total procurement costs. 42 CFR 411.37(d). Some states also include automatic reductions for fees. In Maryland, for instance, Medicaid liens are automatically reduced by one-third for attorneys' fees in any settlement in which a plaintiff is represented by counsel. COMAR 10.09.83.02. For Medicaid liens, there are several additional points that may impact settlement and should be considered prior to mediation. For instance, defense counsel should consider whether a Medicaid Special Needs Trust may be appropriate. Federal Supreme Court cases[2] have limited the right of state Medicaid agencies to recover solely the portion of settlement reflecting past medical expenses, so future care needs are important to consider. It is also important to note that states do not have a right to recover against the parts of a settlement representing pain and suffering, lost wages, and other economic, non-medical damages.

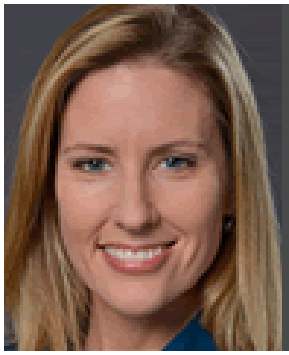
The upshot of these cases is that there is an option of including language in the settlement agreement explicitly breaking down the settlement amount into categories (i.e. past medicals, future medicals, non-economic damages). Medicaid's recovery would be limited under law to the past medical category. This may be a good option in cases where the plaintiff has received significant medical care for a variety of illnesses, and there is a large Medicaid lien, but the parties agree that the negligence at issue caused only a small fraction of that care.

IV. Conclusion

Tools are available that take some of the mystery out of protecting Medicare's interests, and defense counsel should take advantage of these tools before determining the settlement value of a case.

1 Our firm has had success with Verisk ISO Claims Partners. In one instance, they were able to reduce substantial Medicare and DHMH liens in the six figures by more than 90%. This company's fees are reasonable: as of 2018, it cost $500/individual lien for claim dispute services. Another specialist is Synergy Settlement Services.

2 The relevant cases are Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006) and Wos v. E.M.A., 568 U.S., 133 S.Ct. 1391 (2013). In 2013, a federal Budget Resolution Act reversed these cases and allowed state Medicaid agencies to recover up to the entire settlement amount, mirroring Medicare's full recovery rights. But, more recently, the holdings in Ahlborn and Wos were restored in Section 53102 of the 2018 Budget Act, which repealed Medicaid's expanded rights provided by subsection 202 the 2013 Bipartisan Budget Act



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Nikki Nesbitt is a partner with Goodell DeVries. Her current practice concentrates on medical malpractice defense and complex commercial litigation, as well as cases that combine the two fields. She represents several health systems in Maryland and the District of Columbia, handling complicated malpractice cases as well as credentialing, employment, and compliance-related matters. Ms. Nesbitt also handles employment matters outside of the healthcare context for employers in this region and beyond. Ms. Nesbitt's experience as a litigator provides her with insight to counsel her employment clients on drafting guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation. For the entirety of her 18 years at the bar, Ms. Nesbitt has worked for Goodell DeVries and has moved through the ranks from summer associate to partner. Likewise, she has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, and in non-legal organizations such as JDRF.

Practice Areas

- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Hospitality Law

Representative Matters

- Wilds v. MedStar Washington Hospital Center (2018), Superior Court for the District of Columbia. Obtained defense verdict for hospital and its special police officers in connection with an excessive force claim brought by a visitor. The plaintiff claimed she was wrongfully taken to the ground and handcuffed following an altercation with two special police officers, resulting in injury to her shoulders. The jury returned a verdict in favor of the hospital and the officers after a four-day trial.
- Wood v. MedStar Harbor Hospital (2017), Circuit Court for Baltimore City. Obtained defense verdict for physician accused of injuring another physician in the course of performing surgery on a patient. The plaintiff, an orthopedic surgeon, accused the defendant, also an orthopedic surgeon, of negligently striking him in the elbow with a drill while both surgeons were performing a knee replacement. The plaintiff claimed the injury was career-ending. After an eight-day trial, the jury returned with a verdict in favor of Ms. Nesbitt's client.
- Al-Ameri v. The Johns Hopkins Health System (2017), United States District Court for the District of Maryland. Obtained summary judgment on claims for more than $1M in medical expenses on the grounds that all expenses were paid by the government of the plaintiff's home country, the United Arab Emirates.

Honors and Awards

- Best Lawyers in America, Commerical Litigation (2016 - Present)
- Chambers- Healthcare, Maryland (2017)
- Leading Women Award from The Daily Record (2011)
- Super Lawyers Rising Stars (2009-2014)

Education

- University of Maryland (B.A., cum laude, 1996)
- University of Maryland, School of Law (J.D., 1999) - Order of the Coif

TRO'S / PRELIMINARY INJUNCTIONS WINNING STRATEGIES

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Maximizing Your Likelihood of Success in Obtaining or Opposing Temporary Restraining Orders and Preliminary Injunctions
David C. Gustman

I.General Principles

There are two types of injunctive relief:

i) Prohibitory, which prohibits a party from continuing certain conduct; and

ii) Mandatory, which requires a party to act affirmatively.

Prohibitory injunctions are much easier to obtain and are the most common type of injunctive relief sought in most cases. Mandatory injunctions are very difficult to obtain from most courts and often require a greater showing of need for preliminary relief. See Liebhart v. SPX Corp., 917 F.3d 952, 963 (explaining consideration of the intrusiveness of the ordered act, as well as the difficulties that may be encountered in supervising the enjoined party's compliance). If you can phrase the type of relief as prohibitory, rather than mandatory, the likelihood of obtaining the relief you seek will increase.

There are three types of injunctions:

i) Temporary Restraining Order ("TRO");
ii) Preliminary Injunction ("PI"); and
iii) Permanent Injunction.

We will discuss each of these in more detail below.

Temporary Restraining Orders

Temporary restraining orders ("TRO's) are usually sought on an expedited basis to preserve the "status quo" of the subject matter litigation and prevent irreparable harm until a hearing can take place on a preliminary injunction. IPS Steel LLC, v. Hennepin Industrial Development, LLC, Case No. 17-cv-1451, 2018 WL 3093959, at *2 (Feb. 23, 2018); Crue v. Aiken, 137 F.Supp.2d 1076, 1083 (C.D. Ill. 2001). "Status quo" is generally defined as the last actual, peaceable, uncontested status that preceded the controversy. Westinghouse Elec. Corp. v. Free Sewing Mach. Co., 256 F.2d 806, 808 (7th Cir. 1958).

Preliminary Injunction Orders

Preliminary injunction orders ("PI") are entered to preserve the status quo pending a final determination on the merits of the case. Indiana Civ. Liberties Union v. O'Bannon, 259 F.3d 766, 770 (7th Cir. 2001). They prohibit or require future action until a court can reach a final determination of the merits at trial.

Permanent Injunction Orders

Permanent injunctions are only granted after a final ruling by the trial court on the merits of the case. Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc., 420 F.Supp.2d 866, 872 (N.D.Ill. 2006). Although it seems obvious, they are permanent in nature, and last forever, unless reversed on appeal. During oral argument on appeal, I was asked by an appellate judge how long a permanent injunction entered by the trial court would last; after a pause, I said I thought forever or until circumstances changed. I was not surprised when the

appellate court shortly thereafter reversed the injunction.

II. TROs and PI's Are Extraordinary Remedies and Require Unique Showings

TROs and PIs are extraordinary and drastic remedies that should only be sought and issued in exceptional circumstances. Goodman v. Ill. Dep't of Fin. and Prof'l Regulation, 430 F.3d 432, 437 (7th Cir. 2005). Their purpose is not to determine controverted rights or to decide the merits of the case; rather, they are designed to prevent a threatened wrong or continued injury and preserve the status quo with the least injury to the parties concerned.

Under federal law, one must demonstrate i) a "clear showing" of irreparable injury in the absence of an injunction; ii) no adequate remedy at law; iii) a likelihood of success on the merits; iv) balance of hardships favors the party seeking the injunction; and v) the effect on public interest favors injunctive relief. Turnell v. Centimark Corp., 796 F.3d 656, 661 (7th Cir. 2015); Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir. 1999).

Irreparable Injury

Irreparable injury is imminent harm that is not speculative or merely possible. It is harm that will likely occur before the court or jury rules on the merits of the case. Irreparable injury is usually defined as (i) harm that cannot be prevented or fully rectified by a final judgment following trial; (ii) harm that cannot be undone by award of money damages; or (iii) harm that cannot be accurately measured in money damages. Roland Machinery Co. v. Dresser Indus., Inc. 749 F.2d 380, 386 (7th Cir. 1984).

No Adequate Remedy at Law

The requirement of no adequate remedy at law often merges with the irreparable injury factor. Kreg Therapeutics, Inc. v. VitalGo, Inc. No. 11-cv-6771, 2011 WL 5325545, at *5 (N.D. Ill. Nov. 3, 2011); Roland Machine Co., 749 F2d at 386. It means, in essence, a legal remedy would be merely illusory. Unless the status quo is preserved no legal remedy entered later will fully compensate or protect the plaintiff.

A Likelihood of Success

In proving a likelihood of success on the merits, the plaintiff does not have to prove it will ultimately prevail on the merits, but must show only a "better than negligible" chance of succeeding on the merits. Meridian Mutual Ins. Co. v. Meridian Insurance Group, Inc., 128 F.3d 1111, 1114 (7th Cir. 1997). However, the greater likelihood of success that can be shown, the greater the likelihood that the court will enter the TRO or PI. Turnell, 796 F.3d at 662; Roland, 749 F.2d at 387-388. Some courts have even said that as the likelihood of success increases, less irreparable harm is required. Id.

Balancing Hardships

Balance of hardships means plaintiff's injury, if no TRO/PI is granted, outweighs defendant's injury if the TRO/PI is granted. Turnell, 796 F.3d at 662.

Public Policy Considerations

The TRO/PI must not adversely affect public policy or the public's interest. Id.

III. TROs and PI Orders Must be Specific And Are Generally Immediately Appealable

All injunction (TRO, PI or Permanent) orders must (i) state reasons why it was issued; (ii) state its terms specifically; and (iii) describe in reasonable detail the act or acts restrained or required (cannot simply refer to complaint or other document). This is required for several reasons. If an immediate appeal is sought, the appellate court will have the trial court's reasons and rationale. In addition, parties need specific direction for what they can and cannot do while the injunction is in place.

Federal Rule of Civil Procedure 65 governs injunctions in Federal Court. This rule allows for TROs to be issued without written or oral notice, if specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition, and the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required. Fed. R. Civ. P. 65(b). These are very rare.

Temporary Restraining Orders must:

(i) state the date and hour issued; Fed. R. Civ. P. 65(b)(2)
(ii) describe the injury; Id.
(iii) state why it is irreparable; Id.
(iv) state why the order was issued without notice; Id.
(v) state the date the order expires (under federal law, TROs expire after 14 days – the court can extend an order for another 14 days for good cause or the adverse party can agree to extend it longer); Id.
(vi) state the date of the PI hearing (if the TRO hearing was granted ex parte, the PI hearing must be set for hearing at the earliest possible time); Fed. R. Civ. P. 65(b)(3)

(vii) fix the amount of the TRO bond; Fed. R. Civ. P. 65(c), and
(viii) be promptly filed with the clerk's office and entered in the record Fed. R. Civ. P. 65(b)(2).

Preliminary Injunctions Require Notice and the Opportunity for a Hearing

Notice is required for preliminary injunctions and if requested, an evidentiary hearing, usually referred to as a PI hearing. Fed.R.Civ.P. 65(a)(1). Evidence presented at a PI hearing becomes part of the record for trial purposes. Fed.R.Civ.P. 65(a)(2).

The court can advance the trial on the merits and consolidate it with the PI hearing. Id.

Bond

A party seeking a TRO or PI is required to post a bond. Fed. R. Civ. P. 65(c). Under Rule 65(c), a TRO or PI can only be issued if movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc., 912 F.3d 1054, 1057 (7th Cir. 2019). It is reversible error if the order is silent as to the bond. Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 (4th Cir. 1999).

The court needs to consider the bond issue even if it decides to waive the bond. The amount of the bond, however, is within the court's discretion. The court can set a nominal bond, or no bond, if the bond would effectively deny judicial review or if defendant is unlikely to be harmed. BankDirect, 912 F.3d at 1059. The court can also deny bond if plaintiff will likely succeed based on the strength of the case or if the bond would place the plaintiff at financial risk. Arkansas Best Corp., v. Carolina Freight Corp., 60 F.Supp.2d 517, 521 (W.D.N.C. 1999) (ordering only a nominal bond where plaintiff showed a strong likelihood of success on the merits); Collick v. Weeks Marine, Inc., 680 F.Supp.2d 642, (D.N.J. 2009) (imposing on a nominal bond because plaintiff was struggling to pay past due bills.)

Parties Bound by a TRO/PI

Provided the enjoined party receives actual notice of the order by personal service or some other method, are bound by a TRO or PI. Fed.R.Civ.P. (d) (2). In addition, the parties' officers, agents, servants, employees and attorneys and other persons who are in active concert or participation with the above are bound by a TRO or PI. Id.

IV. Things You Must Do to Maximize your Success in Seeking or Defending Against TROs and PIs

A. Seeking A TRO or PI

1. Prepare a Verified Complaint. The verified complaint should request compensatory and equitable relief and temporary, preliminary and permanent injunctive relief. In addition, a Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum of Law in Support of Motion should be filed with the Verified Complaint, as well as Declarations or Affidavits Supporting the Motion if not include in the Verified Complaint.
2. Draft and Submit a Proposed Order. Include in the Order the exact relief you seek and who is subject to the requested TRO or PI as required by Rule 65 of the Federal Rules of Civil Procedure.
3. Prepare a Motion for Expedited Discovery. Attach draft discovery, including production requests, interrogatories, deposition notices and possible third-party subpoenas.
4. Be Prepared to Post a Bond. Arrange for a bond in an amount you think the court will order. Also, be prepared to argue why a bond is not required or the amount sought by the defendant is excessive.
5. Make sure you have witnesses available and prepare them well in advance of the PI hearing.
6. Remember when you launch a TRO/PI, you have the advantage of the first strike, but your opposition will quickly catch up and will likely be demanding pre-hearing depositions and document productions.
7. Arrange your personal and professional affairs to account for the fact for the next several weeks or months you will be consumed with seeking the TRO and PI relief you request, and defending against any possible interim appeals.
8. Most importantly make sure you have a litigation team that is experienced in seeking and defending against TROs and PIs.

B. Opposing TROs or PI Motions

1. When opposing motions for TRO and PI, at a minimum, prior to the hearing, prepare and file a Verified Answer.
2. Prepare a written opposition brief and opposition affidavits, if possible. Request a short period of additional time to do so if you have only a few hours' notice.
3. Ask for an evidentiary hearing and expedited discovery and be prepared to articulate what discovery you need and why. If you limit your discovery requests to only what is absolutely needed, you have a better chance that court will allow expedited discovery.

4. Consider and articulate why a significant bond is required given the harm any TRO or PI will cause your client.
5. Recognize that while you are opposing the TRO/PI you will have to set aside your regular schedule and personal affairs in order to successfully oppose the relief sought.
6. Consider having your client agree to stop the conduct sought to be enjoined pending a full opportunity to prepare adequately for the PI evidentiary hearing. Courts will generally appreciate this courtesy because it gives everyone, including the court, the opportunity to consider the facts, study the law and make an informed decision. Remember TROs are designed to preserve the status quo—the last peaceable act before the conduct sought to be enjoined. Courts will often enter TROs to do so, while the parties have time to more fully inform the court of their respective positions.
7. As when seeking TROs and PIs, you want an experienced team that has been through this drill many times.

DAVID C. GUSTMAN

Partner

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David Gustman is Head of the Firm's Litigation Practice Group, Co-head of the Firm's Antitrust Practice Group and a member and former Chairman of the Firm's Executive Committee.

David has handled and served as lead trial counsel on a variety of complex business litigation matters involving antitrust, accounting, banking, bankruptcy, construction, finance, insurance coverage and broker disputes, real estate and securities. He is a "go to" lawyer for the Firm's most challenging and difficult cases, and is often called upon by clients to take over cases that have been previously handled by other counsel.

Areas of Focus

- Antitrust
- Appellate Litigation
- Class Actions
- Fiduciary and Partnership
- Insurance Coverage Disputes
- Litigation and Dispute Resolution
- Securities Litigation
- Successor Counsel

Professional Activities

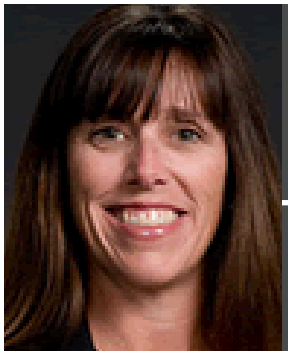
- Fellow, Litigation Counsel of America
- Board of Advisors of the BNA Antitrust and Trade Regulation Report in Washington, D.C. (a group of nationally recognized antitrust law practitioners, which meets quarterly in Washington, D.C.)
- The Trial Law Institute
- Chairman of the Illinois Finance Authority (2004-2007)

Honors and Awards

- Illinois Super Lawyers - Business Litigation, Antitrust Litigation, Securities Litigation - 2019 (cited in multiple years)
- Leading Lawyers - Antitrust Law, Commercial Litigation, and Corporation Law
- Chambers-USA Guide to America's Leading Lawyers for Business - General Litigation Recognized Practitioner - 2019 (cited in multiple years)
- The Best Lawyers in America® - Antitrust - 2017 (cited in multiple years)
- The Legal 500 - Leading Individual - Antitrust – Midwest for his work with Mergers, Acquisitions and Buyouts
- Who's Who Legal International, the Official Research Partner of the International Bar Association - One of the top 12 Illinois lawyers practicing Antitrust and Competition Law
- Martindale-Hubbell legal ability/ethical standards rating ("A-V") - Highest possible rating - 2019 (cited in multiple years)
- Illinois Leading Lawyers - 2019 (cited in multiple years)
- America's Top 100 High Stakes Litigators®

Education

- J.D. George Washington University Law School - Editor, The George Washington International Law Review
- B.A. University of Michigan - with distinction, Economics



LESSONS LEARNED (OR TO BE LEARNED) FROM THE MICHAEL COHEN FIASCO

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Forced with a Hobson's Choice - It Shouldn't Be That Hard
Tammy Westerberg

He sat closer to more of his client's personal and business dealings than many in history, shielding the most sensitive parts of his client's life. And then, when faced with his own demise, spilled most, if not, all of it – some say he violated his duty of confidentiality and perhaps, the attorney-client privilege. At best, he chose not to keep his mouth shut in what amounts to a very gray area. Guess who?

Michael Cohen's fiasco is an extreme but cautionary tale to all lawyers, everywhere, but particularly to in-house lawyers who have a single client and one group of professionals they guide and advise. Because they generally report to a single person in the C-Suite whose focus is on the bottom line – and who most often does not have a law degree or legal training – strategic differences, professional ambition and ethical conduct, often clash. While Cohen's plight played out under the public watch, there are real, not often so public, consequences to that kind of unethical conduct.

Every day, in-house/corporate counsel works hard to ensure the organization's success and plays a part in shaping its image and reputation. Not only does what counsel do matters, but also how he/she overcomes challenges, contribute to success. Therefore, the organization and its constituents – all of them - need to bear in mind that it and they are judged by the means employed to achieve results. In that vein, in-house counsel's client needs to consciously and continuously balance economic, industry, social and other considerations when making business decisions, and to do so with a high level of integrity and trustworthiness.

So what can you do when your client directs you to violate the law, commit fraud, or cross ethical lines? And when are you ethically required or permitted to resign? This problem arises most often when corporate counsel has advised the entity against misconduct (or has counseled strongly that there are serious risks and that the company may want to consider it), and the corporate client (or its constituent(s)) still intends to proceed.[1]

Consider these examples:

- Your client manufacturers and sells $500,000 of a product line in a particular state. To do so, it should have a contractor's license – but that licensing costs $350,000 annually and your client has chosen to take the risk of a fine because the reward is not high enough.
- Company A, your employer, has an affiliate in a jurisdiction in which corporate officers and management can be held criminally liable for certain safety violations. Your client has considered, but ultimately rejected for cost reasons, a new safety program that would substantially reduce the risk of a

1 Do not confuse that situation with that in which you are asked to analyze the limits of lawful conduct as that is clearly permissible, even if your client later decides against your advice to proceed. See Model Rules of Professional Conduct (ABA) Rule 1.2(d): "[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Of course, if the client then decides to take an action that the lawyer "knows" is criminal, fraudulent or a violation of law, then he/she cannot counsel or assist the client any further on that matter. Rule 1.2(c) and 1.2(d). Separately, the prohibition on assisting a client in the perpetration of a crime or fraud does not extend to past conduct. Model Rules of Professional Conduct 1.13(d) ("Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.") Nevertheless, the lawyer and client cannot engage in activity that could be construed as covering up the criminal conduct.

particularly awful injury.

- Your chief executive officer schedules a meeting with just the two of you. At that meeting, he tells you that he has accepted a monetary gift from a foreign company in exchange for reduced pricing on a significant product line. He tells you to "keep it between us."

While the best place to start a discussion about how to deal with any of those situations is with the Model Rules of Professional Conduct, they aren't always the model of clarity, and leave open judgment calls. Indeed, harmonizing Model Rules 1.2, 1.6, 1.13 and 1.16 is a difficult task. But before we even get there, who is the in-house lawyer's client in those, and every situation?

While it should be obvious, Model Rule 1.13(a) makes it clear that a "lawyer employed . . . by an organization represents the organization acting through its duly authorized constituents." Ethical Consideration 5-18 likewise provides that "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder director, officer, employee, representative or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization." Said otherwise, your client is the organization itself, not its constituents. But, because the entity is a legal fiction, it can only act through its constituents. In practice, that distinction is more theoretical than actual, particularly from management's perspective who naturally consider corporate counsel as one of their own. Consequently, in-house counsel serves the organization through interaction with, and directives from, individuals who are not his actual client. You know it, your leadership knows it, and yet, that line gets blurred and crossed all the time, which is problematic when the attorney believes that decisions of corporate management are not in the company's best interest, or when the organization's' interest becomes adverse to those of a constituent.

When that conflict of interest (or the potential for one) arises, the in-house lawyer must expressly advise the constituent of the conflict, that the lawyer is counsel for the organization, not the individual, that such individual may want independent counsel, and that discussions between the lawyer and the individual may not be privileged. Model Rules of Professional Conduct (ABA) 1.13(f) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.")[2]

Once the identity of your client has been made clear, the starting place for the analysis of the entity's potential misconduct is Rule 1.2(d), which expressly prohibits a lawyer from assisting a client in the perpetration of a crime or fraud.[3] While it is an exaggeration to conclude that any violation of law constitutes criminal conduct, counsel must carefully examine the broad reach of criminal sanctions before dismissing that option. As well, because Rule 1.2 prohibits a lawyer's assistance or counsel only if he or she "knows" that the conduct is criminal or fraudulent, a high level of certainty of the facts is required. In that vein, the lawyer is not generally required to investigate the accuracy of the client's report of the relevant facts, which ordinarily may be accepted as true. However if the lawyer is aware of facts or evidence that indicates that such corporate representative's rendition is inaccurate, he/she cannot turn a blind eye and must investigate further (i.e., contacting other officers with no reason to provide false information).

The next step in the analysis, then, is Model Rule of Professional Conduct (ABA) 1.13, which states, in relevant part:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if

2 Your primary role is to provide your client with the legal risks and alternatives, not to make the business decision, nor to be the fixer. So make it somewhat easier on yourself and the entity. Prepare, circulate and have all employees and executives review and sign a robust Code of Conduct. It should be substantial and comprehensive – and certainly, not just a check-the-box exercise, but one that is embraced by everyone all the way through the C-Suite. The Code should set out clearly what is expected from employees and people acting on behalf of your client, and set clear standards for what is acceptable behavior from its employees and people acting on its behalf. The Code of Conduct describes how the company should behave in uncomfortable situations or moral dilemmas which call for support and clarification. It also sets out the framework for discretionary decisions. And as a result, it provides you, as the legal advisor to the entity, the fall back protection you need when you are in the gray area.

3 "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is fraudulent or criminal…." Model Rules of Professional Conduct (ABA) Rule 1.2(d).

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization. . . .
>
> Model Rules of Professional Conduct (ABA) 1.13.

Counsel is cautioned that there are corporate decisions and conduct that, although they may subject the entity to risk, and even though they may not be in the best interests of the corporate client, do not implicate corporate counsel's ethical obligations. In fact, the comments to Model Rule 1.13 states that, "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not such in the lawyer's province." Comment 3, Model Rule 1.13.

Different considerations arise, of course, when the organization has engaged, or is contemplating engaging, in illegal or fraudulent conduct. In that case, in-house counsel has few choices, none of which are palatable, but all of which may be required, after giving strong consideration to the following: (1) the seriousness of the violation of law and the possible consequences; (2) the scope and nature of the lawyer's representation; (3) the responsibility of the organization and the apparent motivation of the person involved; and (4) the policies of the organization concerning such matters. Model Rules of Professional Conduct (ABA) 1.13(b).

If you conclude that action is required to comply with your ethical obligations, generally speaking, you have four options. First, you must urge those individuals with control over the decision or activity to reconsider their actions. Second, you should obtain a separate, independent legal opinion from outside counsel to present to the appropriate constituent in the organization. Third, if the constituents will not reconsider their decision, you should elevate the matter up the corporate ladder to "higher authority within the organization," in all likelihood, the CEO or board of directors.

As well, in this brave new world, in-house lawyers no longer fit the traditional mold of acting as a conduit between the entity and outside counsel. Instead, most in-house attorneys are not only doing significant legal work, but also taking on a larger advisory and compliance role, anticipating potential legal problems, advising on possible solutions, and generally assisting in achieving their clients' business goals. Because of the various hats they wear, then, in-house counsel may, and often do, have a duty to make disclosures that are not imposed on other non-lawyer corporate representatives – and may be forced to resign if the company acts illegally or fraudulently, or in a manner that violates the lawyers' professional responsibilities and oath under the Model Rules. So when do you have to resign?

While Model Rules of Professional Conduct (ABA) Rule 1.2(d) applies to the client's conduct, Rule 1.16(a) addresses whether the continued representation will cause the lawyer to violate the law. It goes without saying that, confronted with ongoing or intended criminal or fraudulent conduct that the entity's "highest authority" has refused to abandon, corporate counsel is in a pickle and may have no choice but to resign: "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law." Said otherwise, a lawyer is required to withdraw from representation when his/her services further criminal or fraudulent conduct if continued participation could be deemed to be engaging in illegal conduct.

On the other hand, a lawyer may withdraw from representing a client if, among other things: "(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud. . . ." Model Rules of Professional Conduct (ABA) Rule 1.16(b). In other words, permissive withdrawal under (b)(1) requires only that the client's illegal or fraudulent actions involve the lawyer's services, even if it does not further the unlawful or fraudulent conduct.

And then, if corporate counsel does in fact, resign or withdraw, should he do so quietly or with a bang? Of course, there is real social value in the attorney-client privilege in order to allow full candor and honest disclosure and discourse, without fear that others will learn their secrets, their strategies, their mistakes. Clients have a right to expect and rely on confidentiality, even if their ideas are stupid or even borderline fraudulent or criminal,

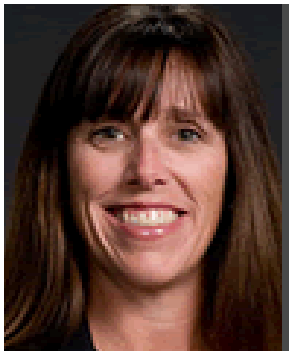
so long as they adhere to their lawyers' rejection of those ideas.

On the other hand, under Model Rule of Professional Conduct (ABA) 1.13(e), "[a] lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal."[4]

That decision requires a very careful balancing of the duty of confidentiality and the prohibitions against furthering a crime or fraud – with the overall goal favoring withdrawal without adversely affecting the client. Specifically, counsel is bound to protect his client's (the entity) confidences, "not to reveal information relating to the representation of a client, Model Rules of Professional Conduct (ABA) 1.6(a), unless the lawyer "reasonably believes necessary: . . . (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. . . ." Model Rules of Professional Conduct (ABA) 1.6. In the end, in-house counsel who is faced with his client's misconduct may not really have a choice but to disclose confidential information in order to avoid personal liability, notwithstanding the lawyer's ethical obligations to the contrary.

In conclusion, while glamourous at times, in-house counsel can be placed in the unenviable position of making a Hobson's choice between the lesser of two evils: comply with the client/employer's wishes and risk both the loss of your professional license and exposure to civil and criminal penalties and sanctions, or refuse to comply and risk the loss of employment. Said otherwise, corporate counsel may be tempted to refrain from challenging unethical or illegal conduct by management for fear of placing his livelihood at risk. That choice should not be so difficult – you do not have a choice of whether to follow your ethical obligations as attorneys licensed to practice law, or comply with the unethical demands of your clients. While in the past, a lawyer's obligation to blow the whistle on his corporate client's misconduct was more often viewed as a matter of ethics and professional conduct, today, a failure to speak out in the face of such misconduct may also be viewed as a basis of personal civil and/or criminal liability. The bottom line is this: the stakes are high. Do the right thing, ethically and legally, to advise your client, and to protect the organization, but also your law license. Anything less, well, just ask Michael.

4 While the issue is beyond the scope of this article, in-house counsel who must withdraw or resign in order to comply with his or her ethical obligations - -and to avoid the potential for personal culpability – may rightfully believe that it is not a voluntary act, and was instead, compelled by his or her employer, amounting to a wrongful or constructive discharge in violation of public policy. Presently, the prevailing view is that a lawyer's employment is at will and therefore, there is no recourse. Nevertheless, an emerging line of cases hold that the loss of employment as a result of compliance with ethical obligations can result in damages.



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Tammy Westerberg has nearly 20 years of experience helping clients resolve complex commercial litigation through trials, arbitrations, and negotiations. Tammy represents Fortune 500 companies, small businesses, and individuals in complex commercial litigation, including employment, construction defect, securities, and class action matters in federal and state courts. Her industry experience includes oil and gas, consumer goods, construction and engineering, and financial services.

Early in her career, Tammy spent several years handling M&A and other corporate matters. Clients appreciate her first-hand experience and familiarity with the transactional and related issues that lie at the heart of many commercial and professional malpractice lawsuits.

Additionally, Tammy's experience includes corporate governance matters, contract and partnership disputes, internal investigations, and litigation and counseling related to consumer protection issues. In this capacity, she advises clients on quasi criminal litigation and investigations with an eye toward potential civil litigation that could follow.

Practice Areas
- Commercial Litigation
- Appellate
- Employment
- Investigations & Compliance
- Professional Liability

Industries
- Energy
- Financial Services
- Construction & Engineering
- Professional Services
- Oil & Gas
- Consumer Products & Services
- Legal Services
- Real Estate

Honors and Awards
- The Best Lawyers in America - Commercial Litigation, 2017-2020; Legal Malpractice Law - Defendants, 2020
- Colorado Super Lawyers - Business Litigation, 2017-2019; Top 50 Women, 2015-2019; Top 100, 2018-2019; Professional Liability Defense, 2013-2016
- Benchmark Litigation - Future Star - Colorado, 2015-2018
- Colorado Rising Stars - Business Litigation, 2009-2011
- Law Week Colorado - One of Six Top Women Lawyers of 2015

Education
- University of Denver Sturm College of Law, J.D., 1998 - Law Review, General Editor; American Jurisprudence Award, Constitutional Law I & II
- Whittier College, B.A., 1992, Major in Political Science; Minors in Music Performance and Psychology

BRISTOL-MYERS SQUIBB TWO YEARS LATER: THE EVOLVING LEGACY OF A LANDMARK DECISION

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Bristol-Myers Squibb Two Years Later: The Evolving Legacy of a Landmark Decision and Potential Impact on Class Actions
Mark A. Prost, Casey Wong and Tosha Childs

The Circuit Court for the City of St. Louis, Missouri. June 19, 2017. About 9:30 a.m. Refresh … refresh … refresh …

That was the setting for author Mark Prost when the landmark decision of Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S. Ct. 1773 (2017) [BMS] was passed down like manna from heaven by the United States Supreme Court. Two weeks into a lengthy, multi-plaintiff, talcum powder/ovarian cancer trial in the #1 Judicial Hell Hole in the country, our defense team was at the trial table constantly hitting the "refresh" button on our iPhones, hoping the Supreme Court would do the right thing. It had been a long three-year battle, briefing and arguing that the Missouri state court did not have personal jurisdiction over our talc defendant with respect to the non-Missouri resident plaintiffs that had been joined with a Missouri resident. We had been denied at every turn in the Missouri courts and our final hope was the Supreme Court would end the forum shopping and uphold the limitations on state court jurisdiction that the high court had expressed a few years earlier in Daimler AG v. Bauman. Fortunately, the Supreme Court did the right thing, and we immediately called for a sidebar and mistrial, which the trial court had no choice but to grant.

But, the jurisdiction revolution that was supposed to follow Bristol-Myers is still being played out. As expected, there have been adjustments in case filing trends following the decision with respect to mass tort filings. At the same time, there has not been the "parade of horribles" predicted by the plaintiff lawyers in BMS by the application of BMS's straightforward principle that a court should have general or specific jurisdiction over defendant with respect to each plaintiff.

Following Bristol-Myers, courts across the United States have battled with the proper application of the Supreme Court's holding that California lacked specific personal jurisdiction over the out-of-state defendants sued in the mass tort action. This article discusses the looming controversy regarding the ruling's reach with respect to federal class actions and outlines various federal court decisions that resulted in conflicting conclusions as to whether Bristol-Myers Squibb applied in such cases. During the two years since the Supreme Court's decision, the trend has been towards applying the Court's ruling to federal class actions.[1]

Brief Recap of Bristol-Myers

In Bristol-Myers Squibb¸ a group of several hundred plaintiffs consisting of both California and non-California citizens, sued Bristol-Myers Squibb (BMS) in a mass tort action in a California State court, alleging injuries from the company's drug, Plavix.[2] BMS, a citizen of both Delaware and New York, engaged in business activities in California and sold Plavix there.[3] Consequently, the California Superior Court concluded that BMS's activities

1 Christine Skoczylas and Amy Michelau, District Courts Remain Divided Over Supreme Court Decision in Bristol-Myers Squibb's Applicability to Class Action Claims, THE NATIONAL LAW REVIEW (Sept. 26, 2018), https://www.natlawreview.com/article/district-courts-remain-divided-over-supreme-court-decision-bristol-myers-squibb-s.

2 Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S. Ct. 1773, 1775 (2017).

3 Id.

in the forum provided the court with general jurisdiction over it.[4] Normally, a court has general jurisdiction over an entity that is incorporated in the forum State or has its principal place of business in the State.[5] A court may also exercise general jurisdiction over a party, however, when its activities within the State "'are so continuous and systematic as to render it essentially at home in the forum State,' meaning any claims against the party can be brought there."[6] The California Court of Appeals, however, determined that there was only specific jurisdiction over the out-of-state citizen's claims, finding that the claims arose out of BMS's contacts with the forum.[7] A court has specific jurisdiction over an out-of-state defendant when it "purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws."[8] The California Supreme Court affirmed the existence of specific personal jurisdiction after applying a 'sliding scale approach' based on BMS's 'wide ranging' contacts with the forum.[9]

Things took a drastic turn for the non-resident plaintiffs, however, when the United States Supreme Court granted certiorari. The Court did not focus on whether it would constitute an undue burden for BMS to litigate the out-of-state claims in California.[10] In all likelihood, it would not. Instead, "the Court's analysis focused exclusively on the unfairness of submitting BMS to the jurisdiction of a foreign sovereign . . . with respect to claims having no independent connection to that sovereign."[11] According to the Supreme Court, the fundamental issue with the California court's sliding scale approach "was the insufficient link between California and the non-resident plaintiffs."[12] The Court noted that "the nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.[13] Moreover, the contract between BMS and the California company McKesson to market and distribute Plavix nationally was alone insufficient to justify the exercise of personal jurisdiction.[14]

In sum, without an "affiliation between the forum and the underlying controversy [or] an . . . occurrence that [took] place in the forum," BMS lacked minimum contacts with California sufficient to satisfy the Fourteenth Amendment's Due Process Clause.[15] Under the Due Process Clause, a non-resident defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[16] To say the least, this was a monumental win for the non-resident defendants with respect to their ability to assert lack of personal jurisdiction against out-of-state plaintiffs. This pivotal decision would impact the future of federal class actions across the country. The Court alluded to this impending controversy in its conclusion that a question remained as to "whether the Fifth Amendment imposes the same restriction on the exercise of personal jurisdiction by a federal court."[17]

While Bristol-Myers closed the California courts' doors to the out-of-state plaintiffs' claims and, thereby, restrained the use of mass tort actions in State courts, the Court explained that the plaintiffs were, nevertheless, entitled to either assert their claims in States with general jurisdiction over BMS or to sue in their respective home States.[18] But how would the ruling impact class actions in federal court? Unlike a mass tort action which involves the joinder of many plaintiffs who are named in their individual capacities[19], a class action consists of a class representative who initiates a lawsuit on behalf of a class of injured persons.[20] The members of the class are unnamed, and so long as at least one member "is a citizen of a state different from any defendant," a federal court may exercise jurisdiction.[21] A class must meet the requirements of Rule 23 of the Federal Rules of Civil Procedure in order to be certified.[22]

Cases Rejecting Bristol-Myers

Interestingly, federal courts have not agreed on whether Bristol-Myers applies to federal class actions.[23] Indeed, there are compelling arguments on both sides. For

4 Id. at 1775-76.

5 Allen v. ConAgra Foods, Inc., No. 3:13-cv-01279-WHO, 2018 WL 6460451, at *3 (N.D. Ca. Dec. 10, 2018).

6 Id., quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014).

7 Bristol-Myers Squibb Co. at 1775-76.

8 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

9 Bristol-Myers Squibb Co. at 1775-76.

10 Sloan v. General Motors, LLC, 287 F.Supp.3d 840, 858 (N.D. Ca. 2018).

11 Id.

12 Fitzhenry-Russel v. Dr. Pepper Snapple Group, Inc., No. 17-cv-00564 NC, 2017 WL 4224723, at *3 (N.D. Ca. Sept. 22, 2017).

13 Bristol-Myers Squibb Co. at 1775.

14 Id. at 1777.

15 Id. at 1776, quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

16 International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement 326 U.S. 310, 316 (1945), quoting Milliken v. Meyer, 311 U.S. 457,463 (1940).

17 Bristol at 1777.

18 Ronald Mann, Opinion analysis: Justices reject California courts' jurisdiction over claims by out-of-state litigants against out-of-state defendants, SCOTUSblog (Jun. 19, 2017, 2:56 PM), https://www.scotusblog.com/2017/06/opinion-analysis-justices-reject-california-courts-jurisdiction-claims-state-litigants-state-defendants/.

19 Mississippi ex rel. Hood v. AU Optronics Corp., 134 S. Ct. 736, 740 (2014).

20 Tanoh v. Dow Chemical Co., 561 F3d. 945, 952 (U.S. Ct. App. 2009).

21 Mississippi ex rel. Hood at 740.

22 See F.R.C.P. 23 (requiring that the class representative(s) have questions of law or fact common to the class, assert typical claims and defenses of the class, adequately protect the interests of the class members, and that the class be so numerous that joinder is impractical).

23 Chavez v. Church & Dwight Co., Inc., No. 17 C 1948, 2018 WL 2238191, at *10 (N.D. Il. May 16, 2018).

example, some courts have rejected Bristol-Myers by distinguishing class actions from "mass tort actions, where all plaintiffs are named . . . and are thus considered real parties-in-interest."[24] The court for the Northern District of California, for instance, held that it had personal jurisdiction over Dr. Pepper Snapple Group Inc. (Dr. Pepper), which was sued by a nationwide class for false advertising among other things.[25] The plaintiffs argued that Bristol-Myers applied only to mass actions in state courts. In agreement with the plaintiffs, the California court denied Dr. Pepper's motion to dismiss for lack of personal jurisdiction, finding that the Supreme Court's holding did apply in federal court but not to class actions.[26] The California court explained that, because Bristol-Myers "did not involve a federal court, there was no reason for the Supreme Court to confront that issue."[27] The Supreme Court never expressly stated that Bristol-Myers would not apply to federal courts but merely left the question open to be resolved on another day.[28]

The California court also agreed with plaintiffs that Bristol-Myers did not apply to class actions like the one before the court since "the citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes."[29] Although eighty-eight percent of the class members were out-of-state residents, all of the named plaintiffs were California citizens.[30] The court distinguished the mass tort action in Bristol-Myers, in which all the plaintiffs were named, and concluded that the Supreme Court did not affirmatively extend its holding to bar nonresident plaintiffs' claims.[31] Thus, the California court was unpersuaded and declined to apply Bristol-Myers to the federal class action, particularly since the Supreme Court has found that unnamed class members may be parties for some purposes, such as tolling a statute of limitations, being bound by a judgment, or appealing an adverse judgment, and not others, such as establishing specific personal jurisdiction over a party.[32]

Approximately one year later, again, the court for "the Northern District of California reasoned that functional differences set class actions apart [from mass actions] (i.e. plaintiffs must meet Rule 23 requirements) such that the fairness required by due process is satisfied."[33] A plaintiff filed a lawsuit seeking certification of a nationwide putative class of individuals who bought Parkay Spray from a defendant under the impression that it was a fat-and-calorie-free alternative to butter.[34] The defendant averred that the court lacked personal jurisdiction over the nonresident, named plaintiffs' claims, as well as the unnamed class members' claims since they did not arise out the defendant's contacts with California.[35] The court reasoned that "the Supreme Court [did] not . . . intend[] to severely narrow the forum choices available to class action plaintiffs when it decided a case involving a mass action" and concluded that it could properly exercise "personal jurisdiction over the claims brought by nonresidents under the doctrine of pendant jurisdiction."[36]

Pendant personal jurisdiction permits a district court to exercise jurisdiction "with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction."[37] Thus, the California court determined that it was appropriate to assert jurisdiction over the nonresident, named plaintiffs' claims as doing so would promote "'judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties' by preventing the need for multiple such actions . . . and potentially subjecting [the defendant] to inconsistent obligations."[38] Moreover, the court concluded that the added burden on the defendant was de minimis.[39]

Still, other courts have avoided Bristol-Myers by holding that it does, in fact, only apply to State court claims.[40] In a 2018 Georgia district court case, the plaintiff sued his defendant employer on behalf of himself and a class of similarly-situated individuals for violations of the Fair Credit Reporting Act.[41] After the defendant moved to dismiss the non-Georgia citizens' claims, the plaintiff contended "that Bristol–Myers [did] not apply to bar the claims because Bristol–Myers concerned a mass action asserting state claims in state court and [was] therefore inapposite to the federal class-action claims asserted

24 Joan R. Camagong, Applying Bristol-Myers Squibb to Class Actions, AMERICAN BAR ASSOCIATION (February 5, 2019), https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2019/applying-bristol-myers-squibb-to-class-actions/; See also Sotomayor v. Bank of America, N.A., 377 F. Supp. 3d 1034, 1037-38 (C.D. Ca. 2019).

25 Fitzhenry-Russel at 1-2.

26 Id. at 3-4.

27 Id. at 4.

28 Id.

29 Id. at 5.

30 Id.

31 Id.

32 Id.; Sanchez v. Launch Technical Workforce Solutions, LLC, 297 F.Supp.3d 1360, 1368 (N.D. Ga. 2018).

33 Allen at 7; See also In re Chinese-Manufactured Drywall Products Liability Litigation, MDL NO. 09-2047, 2017 WL 5971622, at *13-16 (E.D. La. Nov. 30, 2017) (finding Bristol-Myers to be inapplicable to class actions, in part, because class actions have due process safeguards under Rule 23 that mass actions lack).

34 Allen at 1.

35 Id. at 3.

36 Id. at 4.

37 Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1180 (U.S. Ct. App. 2004).

38 Allen at 8.

39 Id.

40 Pascal v. Concentra, Inc., No. 19-cv-02559-JCS, 2019 WL 3934936, at * 5 (N.D. Ca. Aug. 20, 2019).

41 Sanchez at 1362.

here in federal court."[42] The Georgia court decided that federalism concerns expressed in Bristol-Myers did not apply and cited to the reasoning of a sister district court:

> Bristol–Myers is about limiting a state court's jurisdiction when it tried to reach out-of-state defendants on behalf of out-of-state plaintiffs in a mass action suit. This scenario is inapplicable to nationwide class actions in federal court . . . . Congress . . . enabled class actions because Congress recognizes the need for efficiency . . . in managing such mass filings. Therefore, a nationwide class action in federal court is not about a state's overreaching, but rather relates to the judicial system's handling of mass claims involving numerous . . . parties.[43]

Cases Applying Bristol-Myers

On the other hand, "federal courts in Illinois have rejected the exercise of personal jurisdiction over claims of unnamed, non-resident class members" and emphasized "that a sufficient nexus between the defendant, the forum and the underlying claims is required."[44] For instance, a plaintiff, who filed a lawsuit on behalf of himself as well as nationwide and multistate classes, alleged that a defendant's Vitafusion Adult Vitamin Gummies were potentially dangerous as they contained three times the amount of folic acid per serving than the amount indicated on the label.[45] The defendant proffered to the court that the proposed class representative could not represent the out-of-state class members due to a lack of personal jurisdiction[46] because, like the non-resident plaintiffs in Bristol-Myers, the claims did not arise out of the defendant's contacts with Illinois.[47] The absent class members neither purchased nor consumed Vitafusion in the forum.[48]

The Illinois court was unmoved by the plaintiff's argument that the citizenship of unnamed class members is ignored when assessing subject matter jurisdiction based on diversity.[49] The court bluntly stated that the disregard for absent plaintiffs' citizenship for diversity purposes is simply irrelevant to the question of whether a nonresident plaintiffs' claims arise from the defendant's contacts with the forum.[50] In addition, despite the plaintiff's attempt to distinguish the present case on the grounds that Bristol-Myers involved a mass tort action rather than a class action, the Illinois court reasoned that "nothing in Bristol-Myers suggests that its basic holding is inapplicable to class actions."[51] By contrast, the Court merely reiterated well-settled law—"that due process requires a 'connection between the forum and the specific claims at issue.'"[52] Thus, the Illinois court contended that due process rights should be the same in an individual, mass, or class action pursuant to the Rules Enabling Act.[53] Several federal courts across the country agree with this reasoning and continue to apply Bristol-Myers to class actions.[54]

Similarly, a plaintiff filed a putative class action against a defendant after learning that its energy supplements contained ingredients that were not made in the U.S. as advertised.[55] Because the defendant purposely chose[] to market mislabeled products in Illinois, the plaintiff averred that specific personal jurisdiction existed.[56] The court ultimately agreed with the defendant's contention, however, that it could not exercise personal jurisdiction with respect to the claims of non-Illinois residents regarding the product sales outside of Illinois.[57] The court noted that "[a]lthough these individuals are not named plaintiffs, the analysis used in Bristol-Myers Squibb Co. is instructive in considering whether the Court has personal jurisdiction over the claims [the plaintiff] asserts on their behalf against [the defendant]."[58] The court pointed out that there were no allegations connecting the defendant's activities in Illinois to purchasers of the products outside of Illinois to provide the court with specific jurisdiction over the claims.[59] The non-resident purchasers demonstrated no injury arising from the defendant's forum-related activities in Illinois.[60] By contrast, "any injury they suffered occurred in the state where they purchased the products." Because the only connection to Illinois was the named plaintiff's purchase of the energy supplement, which could not provide a basis to exercise personal jurisdiction over the claims of nonresidents where the defendant had no other contacts to the forum, the court dismissed all claims brought on behalf of non-Illinois residents without prejudice.[61]

42 Id. at 1363.

43 Id. at 1367, quoting In re Chinese-Manufactured Drywall Products Liability Litigation, MDL NO. 09-2047, 2017 WL 5971622, at *20 (E.D. La. Nov. 30, 2017).

44 Camagong, supra note 24.

45 Chavez at *1.

46 Id.

47 Id. at 10.

48 Id.

49 Id. at 11

50 *Id*.

51 Id. at 10.

52 Id., quoting Greene v. Mizuho Bank, Ltd., No. 14 C 1437, 2017 WL 7410565, at *2 (N.D. Il. Dec. 11, 2017).

53 Id.

54 Camagong, supra note 24.

55 McDonnell v. Nature's Way Products, LLC, No. 16 C 5011, 2017 WL 4864910, at *1 (N.D. Il. Oct. 26, 2017).

56 Id. at 3.

57 Id. at 3-4.

58 Id. at 4.

59 Id.

60 Id.

61 Id.

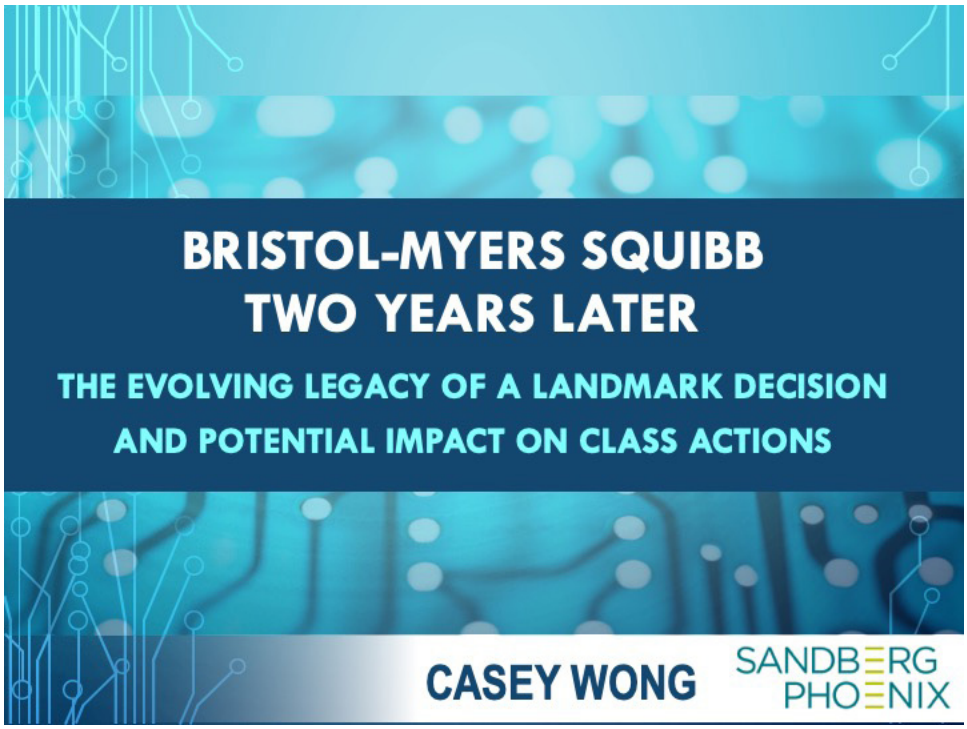
Conclusion

In sum, several "district courts have concluded that the distinction between mass and class actions limits the reach of the Supreme Court's holding in Bristol-Myers. . . [and] other district courts have concluded that the distinction is irrelevant and have applied Bristol-Myers to class actions."[62] While Bristol-Myers may prompt "more plaintiffs to bring numerous state-specific class action cases . . . that a defendant may be forced to litigate," the decision "should be encouraging to companies . . . seeking to evade nationwide class actions claims brought in plaintiff-friendly forums."[63] It is yet to be revealed how the controversy will settle. In the meantime, as one writer advised, "defendants should continue to raise and preserve their personal jurisdiction arguments."[64]

62 Chavez at 10.

63 Skoczylas and Michelau, supra note 1.

64 Camagong, supra note 24.



BRIEF RECAP OF *BRISTOL-MYERS*

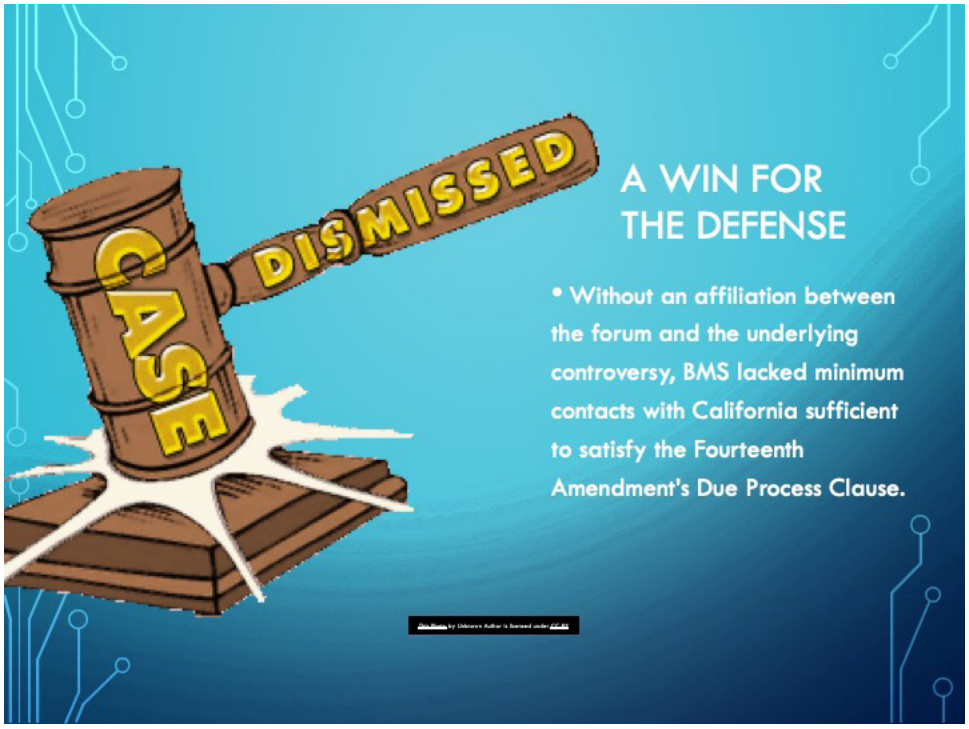
- Plaintiffs from California and other States sued Bristol-Myers Squibb in a mass action.
- BMS, a citizen of both Delaware and New York, engaged in business activities in California and sold its drug Plavix there.

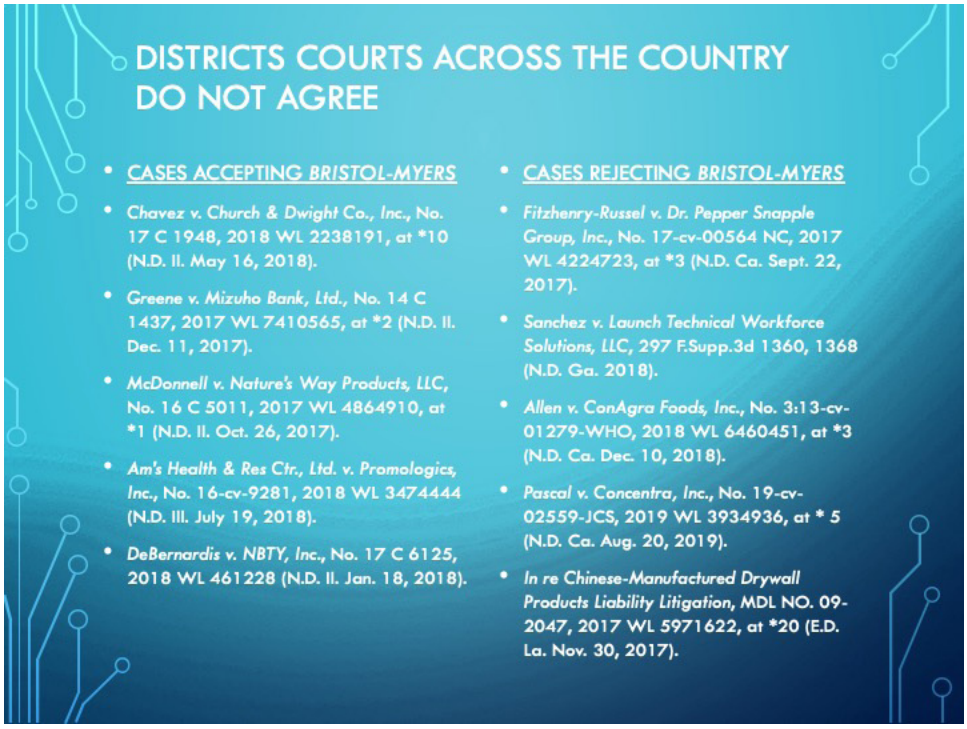
THE OUT-OF-STATE PLAINTIFFS…

- Did not obtain Plavix from a California source.
- Were not injured by Plavix in California.
- Were never treated for their injuries in California.
- SO WHAT DOES THIS MEAN WITH RESPECT TO THEIR CLAIMS???


PROCEDURAL HISTORY
CALIFORNIA SUPERIOR COURT
Finds General Jurisdiction Over the Non-California Residents' Claims: BMS's activities are so continuous and systematic as to render it essentially at home in CA, meaning any claims against it could be brought there.
CALIFORNIA COURT OF APPEALS
Finds Specific Jurisdiction Over the Non-Residents' Claims: The claims arose out of BMS's contacts with CA since BMS purposefully availed itself of the privilege of conducting activities in the forum.
CALIFORNIA SUPREME COURT
Finds Specific Jurisdiction over the Non-Residents' Claims: The Court applied a "sliding scale approach" based on BMS's wide ranging contacts with CA.


THE U.S. SUPREME COURT GRANTS CERTIORARI
FINDS NO JURISDICTION AND DISMISSES ALL NON-RESIDENTS' CLAIMS
The Court did not focus on whether it would constitute an undue burden for BMS to litigate the out-of-state claims in California.
Instead, the Court focused on the unfairness of submitting BMS to the jurisdiction of a foreign sovereign with respect to claims having no independent connection to that sovereign.
The Court rejected the California Supreme Court's sliding scale approach, noting the insufficient link between California and the non-resident plaintiffs.
The contract between BMS and the California company McKesson to market and distribute Plavix nationally was insufficient, alone, to justify the exercise of personal jurisdiction.


CASE
DISMISSED
A WIN FOR THE DEFENSE
• Without an affiliation between the forum and the underlying controversy, BMS lacked minimum contacts with California sufficient to satisfy the Fourteenth Amendment's Due Process Clause.


DISTRICTS COURTS ACROSS THE COUNTRY DO NOT AGREE
CASES ACCEPTING BRISTOL-MYERS
Chavez v. Church & Dwight Co., Inc., No. 17 C 1948, 2018 WL 2238191, at *10 (N.D. Il. May 16, 2018).
Greene v. Mizuho Bank, Ltd., No. 14 C 1437, 2017 WL 7410565, at *2 (N.D. Il. Dec. 11, 2017).
McDonnell v. Nature's Way Products, LLC, No. 16 C 5011, 2017 WL 4864910, at *1 (N.D. Il. Oct. 26, 2017).
Am's Health & Res Ctr., Ltd. v. Promologics, Inc., No. 16-cv-9281, 2018 WL 3474444 (N.D. Ill. July 19, 2018).
DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228 (N.D. Il. Jan. 18, 2018).
CASES REJECTING BRISTOL-MYERS
Fitzhenry-Russel v. Dr. Pepper Snapple Group, Inc., No. 17-cv-00564 NC, 2017 WL 4224723, at *3 (N.D. Ca. Sept. 22, 2017).
Sanchez v. Launch Technical Workforce Solutions, LLC, 297 F.Supp.3d 1360, 1368 (N.D. Ga. 2018).
Allen v. ConAgra Foods, Inc., No. 3:13-cv-01279-WHO, 2018 WL 6460451, at *3 (N.D. Ca. Dec. 10, 2018).
Pascal v. Concentra, Inc., No. 19-cv-02559-JCS, 2019 WL 3934936, at * 5 (N.D. Ca. Aug. 20, 2019).
In re Chinese-Manufactured Drywall Products Liability Litigation, MDL NO. 09-2047, 2017 WL 5971622, at *20 (E.D. La. Nov. 30, 2017).


ACCEPTED
COMMON THEMES FOR ACCEPTANCE
A sufficient nexus between the defendant, the forum and the underlying claims is required.
Bristol-Myers is inapplicable to class actions, in part, because class actions have due process safeguards under Rule 23 that mass actions lack (i.e. requiring numerosity, typicality, commonality, and adequate protection of unnamed class members).
Bristol-Myers is distinguishable as it concerned a mass tort action, in which each plaintiff was a named plaintiff.

COMMON THEMES FOR REJECTION

- Courts apply *Bristol-Myers* to outlaw nationwide class actions where there is no general jurisdiction over the defendants.
- Defendants cannot distinguish the Supreme Court's basic holding in *Bristol-Myers* simply because it concerned a mass action and not a class action.
- Promote judicial economy and avoid piecemeal litigation.
- Pendant personal jurisdiction permits a district court to exercise jurisdiction over a claim for which there is no independent basis of personal jurisdiction.

WHAT DOES THIS MEAN FOR DEFENDANTS?

- Increased litigation for defendants as a result of increased state-specific class action cases.
- Opportunity for forum-shopping plaintiffs.
- Defendants should continue to raise and preserve their personal jurisdiction arguments.

CASEY WONG

Shareholder

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Casey Wong is an experienced, aggressive litigator in the firm's Products Liability and Business Litigation practice groups defending companies and representing clients in a variety of industries.

Casey is also a trusted advisor to businesses understanding that owners and executives want straight, objective advice and practical recommendations that make economic sense.

A leader within the firm, Casey is a member of the firm's Recruiting Committee, Diversity Committee and Appellate Practice Team.

Casey enjoys spending time with his wife and two young children, playing basketball, running, traveling and watching Notre Dame football.

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- Hospitality & Restaurants
- Insurance
- Manufacturing & Distribution
- Transportation
- Wholesale & Retail Services

Recognition

- 2018 / Missouri Lawyers Weekly - Up & Coming Lawyer
- 2014 - 2018 / Missouri and Kansas SuperLawyers - Rising Star

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ETHICS: LEGAL MARIJUANA SALES AND THE RESULTING ETHICAL MORASS

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What a long, strange trip it's been: Ethical Issues for Attorneys Providing Services to the Cannabis Industry
W. Scott O'Connell

It is estimated that in 2018, the legal cannabis industry generated more than $10 billion and employed more than a quarter of a million people.[1] Industry research indicates that marijuana companies raised $13.8 billion in funding. Fueling that investment is the reality that a wide swath of industries are preparing for a future in the cannabis economy. Soft drink and alcohol manufactures are considering future products with this now legal substance. Congress is considering legislation to provide banks with a safe harbor for providing services to those in the Industries from financial services to soft drink manufactures are actively assessing how the explosion of this product will impact their products and services.

Federalism and the current conflict between federal and state law

As of October 1, 2019, 34 states have legalized the medical the use of marijuana. Thirteen additional states have legalized the medical use of low THC marijuana. Also, thirteen states have legalized the recreational use of marijuana. Yet, it remains a federal criminal violation to possess, use, sell or distribute it. This conflict between state and federal law on the legal status of marijuana creates special problems for attorneys who must comply with the applicable rules of professional responsibility. Model Rule of Professional Responsibility 1.2(d) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope meaning or application of the law.

Given this ethical restriction, how can an attorney provide counsel on business activities that violate federal law? With no meaningful efforts to change the criminal federal criminal implications, in 2013, the Department of Justice developed a policy intended to address this conflict. The so-called Cole Memorandum announced a new federal policy limiting the enforcement priorities of prosecutors to limited areas of state cannabis operations were legalized (i.e., distribution to minors, preventing revenue from going to criminal enterprises, diversion to non-legalized states, cover for trafficking in other illegal activity).[2] With this in place, DOJ provided some assurance that commercial and recreational cannabis activity legal under state law would not be prosecuted under federal law.

On the basis of the Cole Memorandum, many states issued ethical opinions, orders and/or rule changes to affirm, in substance, that compliance with state cannabis law would not violate Model Rule 1.2(d). These opinions can be found here:

- Arizona Ethics Opinion 11-01, Scope of Representation
- California Proposed Formal Opinion 17-0001, Advising a Cannabis Business, is accepting comment until October 18, 2019
- Colorado Ethics Opinion 124, a Lawyer's Use of

1 New Frontier Data. [Is there more to this citation?]

2 The Cole Memorandum is available here: https://justice.gov/iso/opa/resources/3052013829132756857467.pdf

Marijuana
- Colorado Ethics Opinion 125, The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (WITHDRAWN)
- Connecticut Bar Association Informal Opinion 2013-02, Providing Legal Services to Clients Seeking Licenses under the CT Medical Marijuana Law
- Maine Ethics Opinion 199, Advising Clients concerning Maine's Medical Marijuana Law
- Maine Ethics Opinion 215, Attorneys' Assistance to clients under Rule 1.2
- Maryland Bar Ethics Docket 2016-10, Advising clients
- Minnesota Lawyer's Professional Responsibility Board Opinion 23, Advising Client regarding Minnesota Medical Marijuana Law
- New York State Bar Ethics Opinion 1024, Counseling clients in illegal conduct; medical marijuana law
- State Bar Association of North Dakota Ethics Opinion 14-02, marijuana use by attorneys living in MN
- Ohio Board of Professional Conduct Advisory Opinion 16-006, Ethical Implications for Lawyers under Ohio's Medical Marijuana Law – use in conjunction with rule 1.2
- Rhode Island Supreme Court Ethics Advisory Panel Opinion 2017-01, Legal Services Medical Marijuana
- Washington Bar Association Advisory Opinion 201501, Providing Legal Advice and Assistance to Clients Under WA State Retail Marijuana Law

While the Cole Memorandum provided some needed guidance, it was not the same as a repeal of the applicable federal law. That distinction, and the fragility of this situation, came into sharp focus on January 14, 2018 when then Attorney General William Sessions rescinded in large measure the Cole Memorandum guidance. The stated rationale for this action was that pre-existing and well-established general principles of prosecutorial and investigative discretion provide sufficient guidance for marijuana enforcement. As a result, US Attorneys were advised to consider, generally, federal law enforcement priorities, including the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.[3] This action added confusion and uncertainly on what would be prosecuted and whether Model Rule 1.2(d) applied once again was a barrier for lawyers to provide legal services to cannabis related activities legal under state law.

Congress is contemplating several pending bills that may once again address how to reconcile the continued conflict on the legality of cannabis between and among the states and the federal government.

Suggested best practices to manage risk until the conflict is resolved

1. Stay current on the law. The legal landscape is changing quickly. Information is getting stale very quickly. If your business touches the cannabis industry, getting regular updates about material development is necessary. Many law firms, including Nixon Peabody, provide these Alerts. See Exhibit 1 attached.
2. Require state ethics opinion on Model Rule 1.2(d). Because attorneys must not only comply with the law, but conform conduct to the applicable ethical rules, obtaining clarity on what legal cannabis related activity will not provoke a Model Rule 1.2(d) violation is critical. Without such an opinion, any legal services to the cannabis industry is performed at high risk to maintaining professional standing.
3. Due diligence on client. Whether you are an in-house or outside lawyer, perform and document due diligence on the parties involved with the cannabis-related activity. Bad actors or unworthy clients acting beyond the scope of what is legal creates material risk. Manage that risk by learning who is involved, how they are complying with the applicable limitations, and not otherwise using legal counsel in ways that break the law.
4. Policy on permissible activity. Being clear with all stakeholders on what is permissible activity and what is not is crucial. In-house and outside counsel need to educate and inform their clients on the limitations on permissible activity in each state.
5. Compliance program. Implementing a compliance program that actively and reliably assesses conformance with the permissible activity is very valuable. Clients that actively work to ensure compliance and self-correction always fair better in government enforcement activities than those who do not. Plans that exist on paper and are not actively worked provide virtually no value.
6. Employee consent. An important risk management consideration is making sure that in-house or outside attorneys are not working on cannabis-related matters without their knowing consent. Providing a waiver that lays out the permissible activities, the reliance on state law and related ethics opinions as well as identifying the risks of an unexpected but possible exercise of federal prosecutorial discretion is important. Considering what to do with those who do not consent is also important to mitigate any retaliation claim for refusal to work on matters that

3 The DOJ's January 14, 2018 Memorandum on Marijuana Enforcement can be found here: https://www.justice.gov/opa/press-release/file/1022196/download

may violate federal law. See Exhibit 2.
7. Insurance review. Ensure that any cannabis-related activity in which you engage is covered by your applicable insurance tower. The presence of potential federal criminal activity could be a basis to disclaim coverage.

House of Representatives pass the SAFE Banking Act with an eye toward a more secure financially regulated cannabis industry
Robert Fisher, Scott Seitz, Henry J. Caldwell

Recently, the House of Representatives passed the Secure and Fair Enforcement (SAFE) Banking Act ("SAFE Act" or "Act"), which provides much needed regulatory and legal clarity for how the cannabis industry interacts with the U.S. financial sector. The goal of the SAFE Act is two-fold. First, it seeks to provide cannabis-related businesses ("CRBs") greater access to financial services by safeguarding federally chartered depository institutions from exposure to a wide range of risks and liabilities. Second, by providing CRBs greater access to financial services, the Act strives to promote a safer and more secure operation of CRBs that, at least up until this point, have largely been reliant on cash.

Because marijuana is a Schedule I drug under the Controlled Substances Act, federally chartered depository institutions have been and still remain wary of taking on CRB clients or pursuing cannabis-related opportunities. The SAFE Act, however, is designed to taper those concerns. For example, the Act provides depository institutions a number of safeguards that prohibit federal banking regulators from:

- limiting or terminating deposit or share insurance solely because a depository institution provides financial services to a cannabis-related business;
- prohibiting or discouraging the provision of financial services to a cannabis-related business;
- recommending or encouraging depository institutions not to offer financial services to an account holder solely because the account holder is affiliated with a cannabis-related business; or
- taking any adverse or corrective supervisory action on a loan made to a person solely because the person either owns such a business or owns real estate or equipment leased or sold to such a business.

Notably, the Act also provides broad protections against violations of federal anti-money-laundering laws, if the money in question stems from state-authorized cannabis sales. If passed, CRBs looking to shift gears from operating exclusively on a cash-only basis would likely gain crucial access to financial services necessary to enable business growth and stability. For example, the SAFE Act would offer business owners in the cannabis space access to FDIC-insured bank accounts, small business loans, electronic-payment processing, and employee benefit plans—privileges that other non-cannabis businesses currently enjoy. The SAFE Act would also allow CRBs to reduce the amount of liquid cash flowing through their businesses, which will reduce security and insurance costs.

It is important to note that the passing of the SAFE Act in the House has no immediate impact on the status quo of the cannabis and banking industries. The Act still needs to pass through the Senate, where it is likely to face heavier opposition. The Senate Banking Committee is expected to hold a vote by the end of this year. Nixon Peabody will continue to track the legislative progress of the SAFE Act as well as other developments related to cannabis reform and provide updates to our clients and readers.

House Financial Services Committee advances legislation that would permit banks to provide financial services to legal cannabis businesses
Lori B. Green, Rudy S. Salo

Last week, the House Financial Services Committee voted to advance the SAFE (Secure and Fair Enforcement) Banking Act, which would permit banks and other institutions to provide financial services to the current primarily cash-based state-legal cannabis industry, such as dispensaries, growers and other cannabis-touching businesses. The SAFE Banking Act was introduced by Representatives Ed Perlmutter (D-CO) and Denny Heck (D-WA) with 132 Democratic and 12 Republican co-sponsors. The Act has also found support from major financial services industry associations, such as the American Land Title Association and the Council of Insurance Agents and Brokers.

Because cannabis is still a Schedule 1 drug, many

federal institutions have refused to accept funds from businesses involved in cannabis, including relatively rudimentary financial services such as holding deposits and transmitting funds. This refusal has made the legal cannabis industry a primarily cash-based business, meaning that market participants may only accept cash from their customers, and must pay their suppliers, employees and even their taxes in cash. Legal cannabis businesses also routinely have large amounts of cash on hand: a busy retail dispensary may realize over a million dollars per month in revenue, which has led many to rely on private security and armed guards to help safeguard their cash hoard and protect their businesses from robbery and other crimes.

Many supporters of the SAFE Banking Act, including an organization representing banks, are not directly supporting the legalization of cannabis, but rather recognize the conflict between state and federal law exposes the everyday public safety concerns of cannabis-businesses that are forced to deal with large amounts of cash.

Although many observers expect the SAFE Banking Act to ultimately pass the House, it is unclear whether and when the Republican-controlled Senate may act on the bill. A spokesperson for Senate Banking Committee Chairman Mike Crapo (R-ID) has previously declined to comment when asked whether the Senate committee would take up the bill.

Among other concerns, many conservatives in the Senate have taken issue with the SAFE Banking Act's definition of "financial services" to be provided to cannabis businesses, finding that the definition is aimed at providing services to consumers and not to commercial enterprises, which seems to defeat the purpose of the bill. Michael Williams, founder of the Williams Group, a public policy consulting firm, also noted that the SAFE Banking Act faces opposition from certain Democrats for not taking sufficient steps toward federal cannabis legalization, while certain Republicans oppose the bill based on their historic resistance to cannabis legalization. "It's a weird juxtaposition because you've got Democrats who are making the argument that Republicans usually make on the states' rights and you've got Republicans who say well no, the federal government should be the decider in this because either [cannabis is] legal or it's not" said Mr. Williams.

Nixon Peabody will continue to monitor the SAFE Banking Act as it progresses through the House and Senate and will provide subsequent alerts as developments in the cannabis industry continue.

"What a long, strange trip it has been"

Ethical issues for attorneys providing services to the Cannabis Industry

NIXON PEABODY

W. Scott O'Connell

The Growing Legal Cannabis Industry

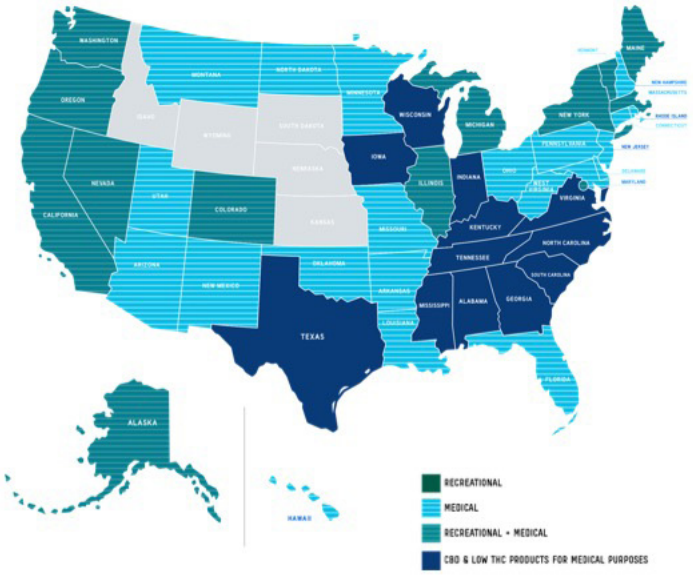
Medical – 34 states

Medical (Low THC) – 13 states

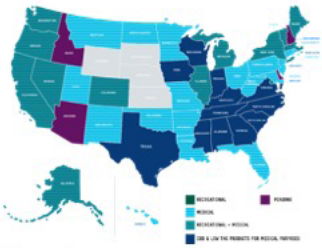
Recreational – 13 states

Where Cannabis is Legal…

and NOT



Pending Legislation / Ballot Measures



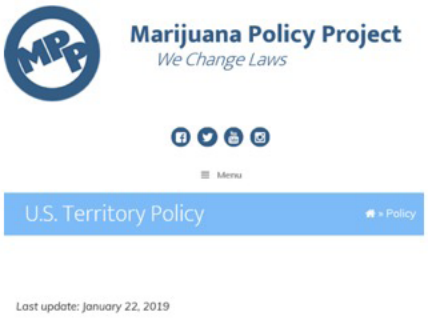
- **Arizona:** voter referendum for recreational use submitted to state legislative council for review; if approved will appear on 2020 ballot.
- **Delaware:** HB 110 to legalize recreational use is pending in the state legislature.
- **Idaho:** petition for medical use approved and circulating to collect signatures; if approved, will appear on 2020 ballot.
- **New Hampshire:** HB 481 delayed in senate. Action expected in January 2020.

US Territories

For an overview, see the Marijuana Policy Project

- Northern Mariana Islands
- Guam
- Puerto Rico
- Virgin Islands
- American Samoa

Source: mpp.org



Federal Law

Federal Law

21 U.S.C. § 811—Federal Controlled Substances Act

- Possession, use, sale and distribution are federal crimes
- Marijuana is a Schedule 1 drug deemed to have no medical value (as is heroin), which has a high potential for abuse and cannot be safely proscribed
- Cocaine and methamphetamines are Schedule 2 drugs deemed to have some medical use
-

18 U.S.C. § 371—

- Conspiring to violate federal criminal law is a crime

18 U.S.C. § § 1956 and 1957

Anti-money laundering

Supremacy Clause

- Preemption of inconsistent state laws

Impacted Market Actors

Primary Cannabis Businesses

- Plant cultivation
- Product production
- Distribution
- Sales
- Dispensaries
- Transportation
- Storage facilities

Secondary Businesses that Support the Legal Cannabis Industry

- Legal services
- Banking
- Insurance
- Accounting and taxes
- Management consulting
- Finance and investment
- Human relations
- Real estate
- Public relations and marketing
- Technology
- Logistics

Special Issues for Attorneys

Model Rule of Professional Responsibility 1.2(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope meaning or application of the law.

Application of Federal law

Cole Memorandum | August 2013

Announced new federal policy limiting the enforcement priorities of prosecutors to limited areas of state cannabis operations were legalized (i.e., distribution to minors, preventing revenue from going to criminal enterprises, diversion to non-legalized states, cover for trafficking in other illegal activity).

AG Sessions Reversal of the Cole Memorandum | January 4, 2018

The DOJ rescinded in large measure the Cole Memo guidance. Its stated rationale is that pre-existing and well-established general principles of prosecutorial and investigative discretion provide sufficient enough guidance for marijuana enforcement. As a result, US Attorneys are advised to consider, generally, federal law enforcement priorities, including the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community. See Dep't of Justice, Memorandum on Marijuana Enforcement (Jan. 14, 2018).

AG Barr's Statements Supporting STATES Act

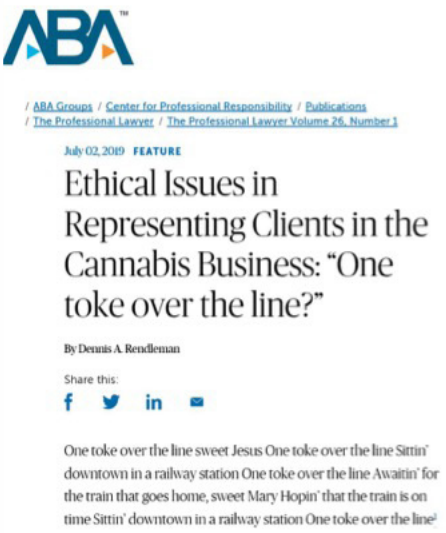
Take away

Exercising discretion not to prosecute is not the same as legalization. The decision could change at a moment's notice.

Ethics Opinions

The ABA recently published a good overview of ethics opinions, rules of professional conduct, and similar guidance.

Source: American Bar Association



/ ABA Groups / Center for Professional Responsibility / Publications / The Professional Lawyer / The Professional Lawyer Volume 26, Number 1

July 02, 2019 FEATURE

Ethical Issues in Representing Clients in the Cannabis Business: "One toke over the line?"

By Dennis A. Rendleman

Share this:

One toke over the line sweet Jesus One toke over the line Sittin' downtown in a railway station One toke over the line Awaitin' for the train that goes home, sweet Mary Hopin' that the train is on time Sittin' downtown in a railway station One toke over the line[1]

For state opinions, please follow these links:

- Arizona Ethics Opinion 11-01, Scope of Representation
- California Proposed Formal Opinion 17-0001, Advising a Cannabis Business, is accepting comment until October 18, 2019
- Colorado Ethics Opinion 124, a Lawyer's Use of Marijuana
- Colorado Ethics Opinion 125, The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (WITHDRAWN)
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- Rhode Island Supreme Court Ethics Advisory Panel Opinion 2017-01, Legal Services Medical Marijuana
- Washington Bar Association Advisory Opinion 201501, Providing Legal Advice and Assistance to Clients Under WA State Retail Marijuana Law

Take Aways

Stay current on law

Require state ethics opinion

Due diligence on client

Policy on permissible activity

Compliance program

Employee consent

Insurance review

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Scott O'Connell is a trial attorney and litigation strategist focused on complex commercial disputes involving high financial and reputational exposure. He has considerable experience leading class action and aggregate litigation as well as parallel government enforcement and regulatory proceedings, most notably involving health service, financial service, energy or manufacturing companies. He has been lead counsel on more than 60 trials, arbitrations, evidentiary injunction proceedings and related appeals in federal and state courts around the country. Scott provides clients with customized and value-driven strategies for resolving cases on their terms.

In addition to an active practice, Scott serves as chair of Nixon Peabody's 300+ person Litigation Department. He is also a member of the firm's management and compensation committees. He maintains an active docket of pro bono cases specifically related to the prevention of domestic violence and providing needed access to justice. Scott received the Frederick Douglass Human Rights Award from the Law Office of the Southern Center for Human Rights for successful representation of a Guantanamo Bay detainee in the case Rimi v. George W. Bush, United States District Court for the District of Columbia, No. 1:05-CV-02427.

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- Recognized in The Best Lawyers in America© for work in: Appellate Practice; Bet-the-Company Litigation; Commercial Litigation; Litigation—Banking and Finance; Litigation—Health Care; Litigation—Municipal; Litigation—Securities; Mass Tort Litigation/Class Actions—Defendants; Product Liability Litigation—Defendants
- Chambers USA: America's Leading Lawyers for Business (2008 to present)
- "New England Super Lawyer" in Securities Litigation and/or Class Action-Mass Torts (2007 to present)
- Litigation Star in Benchmark Litigation (MA and NH) (2008 to present)
- AV peer rating from Martindale-Hubbell (2004 to present)

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- St. Lawrence University, B.A., 1987, cum laude
- Harvard Business School, 2008, "Leading Professional Service Firms"

ETHICS: MORE MONEY, MORE PROBLEMS? THE USE OF LITIGATION FINANCE IN COMPLEX LITIGATION

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More Money, More Problems? The Use of Litigation Finance in Complex Litigation
Jason Lien and Bob Koneck

In the recent past, third-party litigation finance ("TPLF") was a resource used only by the occasional personal injury plaintiff. But TPLF has rapidly transformed into an industry with the capacity to affect nearly any party on any civil case. It is thus increasingly important to understand the role and risks of TPLF. To that end, this article chronicles (1) the evolution of TPLF, (2) the prevalence of TPLF, (3) the enforceability of contracts for TPLF, (4) the debate over TPLF, and (5) the ethical and discovery issues implicated by TPLF.

The Evolution of Third-Party Litigation Finance

Third-party litigation finance "refers to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer."[1] TPLF "first emerged as an industry in the United States in the early 1990s, when a handful of small lenders began providing cash advances to plaintiffs involved in contingency fee litigation."[2] "These activities have become increasingly prominent in recent years, leading to significant attention in the legal and popular press, scrutiny by state bar ethics committees, and scholarly commentary."[3]

There are two main types of litigation funding: consumer funding and commercial funding. Consumer funding "typically involve[s] an individual person as the plaintiff, such as in personal injury or divorce proceedings."[4] The plaintiff "may urgently need funds or have another reason that makes contingency-fee arrangements untenable."[5] Consumer funding predates commercial funding, which started in the United States in the mid-2000s.[6]

"Commercial funding arrangements cover business-to-business disputes, class actions, and mass tort litigation."[7] Funded cases involve "areas like intellectual property, antitrust, business contracts, and commercial arbitration."[8] Commercial funders also sometimes finance a portfolio of suits, providing a "law firm[] with a large chunk of money in exchange for returns tied to a pool of cases."[9] Commercial funders tend to be sophisticated "hedge funds, banks, and other financial investors."[10] They conduct "extensive due diligence on individual cases and make sizeable financial investments"[11] in between "5 to 10 percent of the opportunities presented to them."[12]

1 ABA Comm'n on Ethics 20/20, Informational Report to the House of Delegates 1 (Feb. 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

2 New York City Bar Prof'l Ethics Comm., Formal Opinion 2011-2: Third Party Litigation Funding (June 1, 2011), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2011-2-third-party-litigation-financing.

3 ABA Comm'n on Ethics 20/20, supra note 1, at 1.

4 Jayme Herschkopf, Third-Party Litigation Finance 3, Federal Judicial Center (2017), https://www.fjc.gov/sites/default/files/materials/34/Third-Party_Litigation_Finance.pdf.

5 Id.

6 Id.; Mary Ellen Egan, Other People's Money: Rise of litigation finance companies raises legal and ethical concerns, ABA Journal (Dec. 1, 2018), http://www.abajournal.com/magazine/article/litigation_finance_legal_ethic al_concerns.

7 Herschkopf, supra note 4, at 3.

8 Id. at 1.

9 Egan, supra note 6.

10 Victoria A. Shannon, Harmonizing Third-Party Litigation Funding Regulation, 36 Cardozo L. Rev. 861, 869 (2015).

11 ABA Comm'n on Ethics 20/20, supra note 1, at 6.

12 David Lat, A Peek Inside The Pipeline: How A Litigation Finance Deal Comes Together, Above the Law (Sept. 21, 2018), https://abovethelaw.com/2018/09/a-peek-inside-the-pipeline-how-a-litigation-finance-deal-comes-together/

Funders provide funds to both plaintiffs and defendants. In the former context, funders typically "pay a given amount of money to the plaintiff in exchange for a promise by the plaintiff to pay the [funder] that amount plus an additional amount (sometimes referred to as a 'fee') specified in the event of a positive outcome in the suit."[13] These funds are usually provided on a nonrecourse basis, meaning repayment is required only if the recipient prevails in the suit.[14]

TPLF for defendants is a newer and less common phenomenon.[15] Burford Capital, a large commercial funder whose stock is traded on the London Stock Exchange,[16] explains its funding of defendants as follows: "the litigation finance firm will pay the entire [or a substantial portion of the] cost of defending against a weak claim in exchange for some kind of multiplier or uplift based on predefined success."[17]

The Prevalence of Third-Party Litigation Finance

TPLF is currently estimated to be a $9 billion industry.[18] According to a 2019 survey from third-party funder Lake Whillans, 41% of lawyers have firsthand experience with a litigation finance firm and, of those who have used litigation finance, 81% said they would use it again.[19] In a 2018 survey by Burford of lawyers from the United States, the United Kingdom, and Australia, 77% of respondents agreed that litigation finance is growing. More telling, however, is that 72% of respondents who had not yet used litigation financing expected to do so in the future.[20]

A combination of factors is responsible for the growth of TPLF. First, fears about and experience with "worldwide market turmoil" have "inspired hedge funds, banks, and other financial investors to seek investments that are not directly tied to or affect by the volatile and unpredictable financial markets."[21] "As a new asset class, legal claims provide just that."[22] In fact, litigation can increase during a recession, making litigation funds a particularly desirable investment.[23] A second reason for the expansion of TPLF "is the public policy ideal of increasing access to justice for plaintiffs who otherwise could not afford to pursue a meritorious claim individually or through class actions."[24] Third, many "companies [are] seeking a means to pursue a claim or defense against a claim while also maintaining enough cash flow to continue conducting business as usual."[25] TPLF creates this option. And fourth, "companies facing bankruptcy or insolvency [are] seeking funding to pursue claims that may generate cash flow for their business or mitigate the risk of losing a 'bet-the-company' dispute."[26]

The Enforceability of Contracts for Third-Party Litigation Finance

Courts sometimes invalidate contracts for TPLF. In doing so, they typically rely on the doctrines of maintenance and champerty.

"Maintenance involves a party without a bona fide interest in a lawsuit nonetheless encouraging its litigation."[27] "Champerty" is a form maintenance.[28] It is defined as an "agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim."[29]

"The doctrines of maintenance and champerty originated in the ancient Greek and Roman legal systems, evolved in the common law system of England during feudal times, and spread to other jurisdictions largely through the far-reaching British Empire."[30] During feudal times, "[t]he wealthy and powerful would 'buy up claims, and, by means of their exalted and influential positions, overawe the courts, secure unjust and unmerited judgments, and oppress those against whom their anger might be directed.''[31] This facilitated "bribery, corruption, and intimidation of judges and justices of the peace." In other words, champerty was "a 'means by which powerful men aggrandized their estates and the background was unquestionably that of private war."[32]

Maintenance and champerty were therefore outlawed to prevent "excessive litigation and frivolous claims" and to "safeguard against the extortion and oppression of

13 ABA Comm'n on Ethics 20/20, supra note 1, at 6-7.

14 Id.

15 Maya Steinitz, Whose Claim Is This Anyway? Third-Party Litigation Funding, 95 Minn. L. Rev. 1268, 1278 (2011); Herschkopf, supra note 4, at 1.

16 Egan, supra note 6.

17 Christopher P. Bogart, The reality of financing litigation defense, Burford (May 28, 2015), https://www.burfordcapital.com/blog/reality-financing-litigation-defense/.

18 Michael McDonald, Harvard Invests in Litigation Strategy That Has Posted Big Gains, Bloomberg (June 26, 2019), https://www.bloomberg.com/news/articles/2019-06-26/harvard-invests-in-litigation-strategy-that-has-posted-big-gains.

19 Lake Whillans & Above the Law, 2019 Litigation Finance Survey Report, https://lakewhillans.com/research/2019-litigation-finance-survey-report/.

20 Burford, 2018 Litigation Finance Survey, https://www.burfordcapital.com/2018-litigation-finance-survey/.

21 Shannon, supra note 10, at 869.

22 Steinitz, supra note 15, at 1283.

23 McDonald, supra note 18.

24 Shannon, supra note 10, at 869.

25 Id.

26 Id.

27 Herschkopf, supra note 4, at 7.

28 Id.

29 Steinitz, supra note 15, at 1286.

30 Shannon, supra note 10, at 874.

31 ABA Comm'n on Ethics 20/20, supra note 1, at 9 (citation omitted).

32 Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 274 (S.C. 2000) (citation omitted).

indigent clients by wealthy funders."[33] Those responsible for maintenance or champerty could face both tort and criminal liability.[34]

Today, the use of these doctrines varies considerably by jurisdiction, but they "are 'most visible' as a contract defense."[35] A number of states, however, have limited or outright abandoned these doctrines. The ABA Commission on Ethics 20/20 explains why:

> [T]he modern doctrines of abuse of process, malicious prosecution, and wrongful initiation of litigation deal more directly with the problems that may have originally motivated the common law doctrine of champerty, since they provide victims of third-party interference a remedy when a third party promotes litigation that is based on fraudulent allegations or baseless legal theories. Given that existing ethical and legal obligations of lawyers and their clients are already supposed to ensure that litigation be conducted in good faith and non-frivolously, it is unclear why the historical concerns of the common law would justify today placing special burdens on litigation funded by third parties.[36]

As of 2012, "27 out of 51 jurisdictions" "permit[ted] some form of champerty."[37] In Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997), for example, the Massachusetts Supreme Judicial Court refused to invalidate a contract for TPLF, concluding that the state would no longer recognize the doctrines of champerty and maintenance. The court reasoned that "the champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining power."[38] "[O]ther devices . . . [now] more effectively accomplish these ends."[39]

Similarly, in Osprey, Inc. v. Cabana Ltd. P'Ship, 532 S.E.2d 269, 277 (S.C. 2000), the Supreme Court of South Carolina "abolish[ed] champerty as a defense" to a contract for TPLF. It concluded that "other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits than dated notions of champerty."[40] These principles include sanctions under the rules of civil procedure, state law remedies for the filing of frivolous claims, and the doctrines of unconscionability, duress, and good faith.[41] Yet the court further explained that "abolition of champerty as a defense does not mean that all such agreements are enforceable as written."[42] Rather, courts should "enforce, modify, or set aside the financing agreement" after examining, among other factors:

> (1) whether the respective bargaining position of the parties at the time the agreement was made was relatively equal, (2) whether both parties were aware of the terms and consequences of the agreement, (3) whether the borrowing party may have been unable to pursue the lawsuit at all without the financier's help, (4) whether the financier would retain a disproportionate share of the recovery, and (5) whether the financier . . . offers unwanted advice or otherwise attempts to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit.[43]

Allowing TPLF funding is not a universal trend. Minnesota, for example, "represents those states which continue to rigorously apply" "champerty restrictions."[44] Indeed, as recent as 2019, the Minnesota Court of Appeals upheld the invalidation of a TPLF agreement after finding that the agreement violated public policy prohibitions against champerty and maintenance.[45] The court maintained that "champertous agreements have untoward economic effects on the legal system that can provide both improper incentives and disincentives to pursue and settle litigation."[46] Prohibiting these agreements thus "prevent[s] officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law."[47] See also Maslowski v. Prospect Funding Partners, LLC, 890 N.W.2d 756, 764 (Minn. Ct. App. 2017) (refusing to enforce a forum selection clause in favor of New York in a TPLF agreement because the clause was "an attempt to avoid Minnesota's long-established policy that agreements for champerty are unenforceable").

Apart from maintenance and champerty, "[t]he other primary way that parties may attack the enforceability of a litigation finance agreement is by labeling it usurious. Like the champerty inquiry, this inquiry will vary significantly

33 Shannon, supra note 10, at 874.

34 Herschkopf, supra note 4, at 7; Shannon, supra note 10, at 874.

35 Del Web Communities v. Partington, 652 F.3d 1145, 1154 (9th Cir. 2011) (citation omitted).

36 ABA Comm'n on Ethics 20/20, supra note 1, at 9.

37 Id.

38 Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997).

39 Id. at 1226-27.

40 Osprey, 532 S.E.2d at 277.

41 Id. at 277-78.

42 Id. at 278.

43 Id.

44 Steinitz, supra note 15, at 1289.

45 Maslowski v. Prospect Funding Partners, LLC, 27-CV-15-15143, 2019 WL 3000747 (Minn. Ct. App. July 8, 2019).

46 Id. at *4.

47 Id. at *5 (citation omitted).

from state to state."[48]

Moreover, some "states have begun to pass legislation relating to litigation finance."[49] State legislatures generally enact these regulations "for consumer funding situations, but depending on the language of the statutes, they may apply to commercial funding situations as well."[50] The regulations may, for example, require "funders to obtain licenses or post bonds," require certain disclosures in TPLF agreements, place "caps on financing amounts," require "rights of cancellation," and limit "how much control an investor may have over the court of the litigation."[51]

In short, the law governing TPLF is diverse and unsettled. Lawyers with cases involving TPLF and lawyers advising clients on the possibility of TPLF must always research the relevant jurisdiction's law on the enforceability of TPLF agreements.

The Debate Over Third-Party Litigation Finance

TPLF is a contentious topic, and the arguments for and against TPLF will likely influence a court's decision to enforce or invalidate a TPLF agreement. Below is a summary of the primary arguments of proponents and opponents of TPLF.

Opponents claim that TPLF "increases the number of cases brought, particularly weak ones," and "prolong[s] litigation [by] discouraging settlement or alternative dispute resolution."[52] TPLF discourages settlement because "[a] plaintiff who must pay a TPLF investor out of the proceeds of any recovery can be expected to reject what may otherwise be a fair settlement offer, hoping for a larger sum of money."[53] Opponents also argue that TPLF "direct[s] money away from the injured," "undercut[s] plaintiff and lawyer control over litigation," "constitute[s] champerty," "compromise[es] the attorney-client relationship," and "diminish[es] the professional independence of attorneys."[54]

The U.S. Chamber of Commerce argues that a "notorious example" demonstrating the harmful effects of TPLF "was the investment by a fund associated with Burford Capital Limited in a lawsuit against Chevron filed in Ecuadorian court alleging environmental contamination in Lago Agrio, Ecuador."[55] "In exchange for a percentage of any award to the plaintiffs," "Burford made a $4 million investment."[56] In 2011, the trial court in Ecuador "awarded the plaintiffs an $18 billion judgment."[57] Shortly thereafter, "Judge Lewis Kaplan of the Southern District of New York issued an injunction against the plaintiffs trying to collect on their judgment because of what he called 'ample' evidence of fraud on the part of the plaintiffs' lawyers."[58] Burford later abandoned the case. "Nevertheless, its year-long involvement . . . powerfully demonstrate[s] that TPLF investors have high risk appetites and are willing to back claims of questionable merit."[59]

For their part, proponents of TPLF insist that it "level[s] the playing field with resource-laden defendants" and "address[es] the staggering costs of litigation, which could prevent litigants with meritorious claims from bringing suit."[60] Through TPLF, litigants can "off-load risk, because the [funding] is non-recourse, which means parties owe nothing for unfavorable outcomes."[61] Proponents further maintain that TPLF "improve[s] the quality of litigation" and "lower[s] barriers to entry for qualified, but new, attorneys seeking to obtain leadership positions in class action or aggregate litigation."[62] Companies likewise benefit from TPLF, proponents argue, because TPLF allows "companies to [use their resources] to focus on their core business and leave the pursuit of their claims to others."[63] At any rate, proponents emphasize that TPLF is neither new nor revolutionary, given that "[c]ontingency fees and liability insurance" are universally accepted as, similar to TPLF, "models of shared ownership of legal claims."[64]

Burford, the funding company mentioned above, cites its decision to fund a defendant as an example of the benefits of TPLF in commercial litigation. In 2015, Gillette Company, "the world's largest razor company," filed suit against a startup founded by former Gillette employees.[65] The startup, ShaveLogic, "develops razor and shaving

48 Herschkopf, supra note 4, at 8; see also Formal Opinion 2011-2: Third Party Litigation Funding, supra note 2 (explaining that "courts have found that non-recourse litigation financing agreements violate usury laws").

49 Herschkopf, supra note 4, at 5.

50 Id.

51 Id. (citing as support Tenn. Code Ann. § 47-16-104; Me. Rev. Stat. tit. 9-A, § 12-104; Ind. Code Ann. § 24-12-3-1; and Vt. Stat. Ann. tit. 8, § 2254).

52 Herschkopf, supra note 4, at 1-2.

53 John H. Beisner & Gary A. Rubin, Stopping the Sale on Lawsuits: A Proposal To Regulate Third-Party Investments in Litigation 5, U.S. Chambers Institute for Legal Reform (Oct. 2012), https://www.instituteforlegalr eform.com/uploads/sites/1/TPLF_Solutions.pdf.

54 Herschkopf, supra note 4, at 1-2.

55 Beisner & Rubin, supra note 53, at 4.

56 Id.

57 Id.

58 Id.

59 Id.

60 Herschkopf, supra note 4, at 1-2.

61 Id.

62 Id.

63 Id.

64 Id. at 2.

65 Joshua Harris, Dispelling legal finance myths: A defense funding case study, Burford (Sept. 20, 2018), https://www.burfordcapital.com/blog/dispelling-legal-finance-myths-defense-funding-case-study/.

technology" for which it received a patent in 2014.[66] Gillette claimed that ShaveLogic and the former Gillette employees (collectively, "defendants") "misappropriated Gillette trade secrets," "engaged in unfair competition," and "breached their non-disclosure agreements with Gillette."[67] The defendants denied these claims and counterclaimed "that [Gillette] had intentionally interfered with ShaveLogic's business relations and engaged in unfair trade practices."[68]

But Gillette had deep pockets and ShaveLogic was a new company with little financial resources. Plus, ShaveLogic needed to devote those limited resources to developing its business. So Burford agreed to finance ShaveLogic's defense and counterclaims "on a non-recourse basis."[69] "If ShaveLogic prevailed in the litigation and maintained control of its patent and applications[,] Burford would earn its investment back and a return, to be paid from a combination of a settlement, if any, and/or future razor sales."[70] The court eventually issued a ruling favorable to the defendants, after which the parties reached an undisclosed settlement.

Burford contends that this case shows (1) that "litigation finance works for the defense as well as the pursuit of claims," (2) that "access to capital can support just outcomes when resources are asymmetrical," and (3) that TPLF is just as likely to stop frivolous litigation as it is further frivolous litigation.[71]

Ethical and Discovery Issues Involving Third-Party Litigation Finance

TPLF presents many possible ethical and discovery problems. These problems are considered in turn below.

A. Model Rule of Professional Conduct 1.7

Rule 1.7 provides that a lawyer has a conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer." A lawyer with such a conflict may continue representing a client only if the client gives informed consent in writing.

A lawyer with a practice of referring clients to third-party litigation funders "may have an interest in keeping the [funder] content, which would create a conflict under Rule 1.7."[72] What is more, a lawyer's mere "involvement in negotiating a [TPLF] contract" could create a conflict under Rule 1.7, as "the terms of the [TPLF contract] may have an impact on the lawyer's own interests."[73] Informed consent may therefore be necessary to continue the representation.

B. Model Rules of Professional Conduct 1.8, 2.1, and 5.4(c)

Rule 1.8 prohibits a lawyer from accepting "compensation for representing a client from one other than the client unless," in relevant part, "the client gives informed consent" and "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Rule 2.1 obligates a lawyer to "exercise independent professional judgment and render candid advice." Similarly, Rule 5.4(c) states that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such services."

Funds from third-party litigation funders often pay a lawyer's fees, thereby triggering the mandates of Rules 1.8, 2.1, and 5.4(c). Further, "to protect their investments and to maximize the expected value of claims," third-party litigation funders "may seek to exercise some measure of control over the litigation, including the identity of lawyers pursing the claims, litigation strategy to be employed, and whether to accept a settlement offer or refuse it and continue to trial."[74]

Lawyers faced with meddling funders "may reasonably believe that the funder's second-guessing of decisions made in the representation of the client is an unreasonable interference with the lawyer's professional judgment."[75]

On that basis, the lawyer may choose to withdraw from representation.

C. Model Rule of Professional Conduct 5.4(a)

Rule 5.4(a) bars a lawyer from "shar[ing] legal fees with a nonlawyer," subject to a few exceptions irrelevant here. A lawyer likely cannot, therefore, accept TPLF if repayment is contingent on the recovery of legal fees. For this reason, third-party litigation funders generally contract directly with the lawyer's client.[76] See also New York City Bar Prof'l Ethics Comm, Formal Opinion 2018-

66 Id.

67 Id.

68 Id.

69 Id.

70 Id.

71 Id.

72 ABA Comm'n on Ethics 20/20, supra note 1, at 16-17.

73 Id. at 17.

74 Id. at 22.

75 Id. at 23.

76 Steinitz, supra note 15, at 1292.

5: Litigation Funders' Contingent Interest in Legal Fees, (July 30, 2018) (concluding that it is unethical for a law firm to receive funding on a portfolio of cases if the results of cases within the portfolio determine the amount the law firm must repay the funder).

D. Confidentiality and Privilege

"As part of their underwriting process, [third-party litigation funders] . . . often require the lawyer to release information or to provide a litigation assessment referencing such information."[77] Responding to such inquiries from funders may involve the disclosure of confidential information, which Rule 1.6 allows only with informed consent or implied authorization. More importantly, attorneys must take precautions to avoid the disclosure of privilege communications. The failure to do so could result in a waiver of the attorney-client privilege.[78]

Attorneys involved with funders may argue that the disclosure of privileged communications is permissible under the common interest doctrine, "which functions as an exception to the rule of waiver by voluntary disclosure."[79] If applicable, the common interest doctrine would allow attorneys to share privileged communications with funders. But the law on the applicability of the doctrine to third-party funders is unsettled.[80] As a result, attorneys must research the law in the relevant jurisdiction. Attorneys should also predicate a client's informed consent to share information with a funder on "full disclosure of the risk of a loss of privilege."[81]

E. Mandatory Disclosure and Work Product Protection

"Because of the relative newness of litigation finance in federal courts and the lack of regulation surrounding it, it can sometimes be unclear how much information about the financing arrangement is discoverable and how much the judge might need to know in order to manage the case effectively."[82]

Opponents of TPLF support legislation or rules requiring the automatic disclosure of TPLF agreements.83 But few jurisdictions have created these rules. In 2018 Wisconsin became the first state to enact a law requiring automatic disclosure.[84] A standing order in the Northern District of California requires the disclosure of third-party funding in class actions.[85] And three United States senators recently introduced a bill that would require disclosure of details of third-party litigation funding in MDLs and class actions.[86] To date, however, no universal rules exist on the topic.

"Those in favor of disclosure point out that under the Federal Rules of Civil Procedure, defendants are required to disclose information about their insurance coverage at the outset of their case."[87] The same rationale could justify the disclosure of TPLF agreements. Even some proponents of TPLF favor mandatory disclosure, as it "let[s] the defendant know that the plaintiff has financial backing and can't be ground down through a war of attrition—and this can trigger faster settlements."[88]

Opponents of mandatory disclosure insist that "disclosure of litigation funding prejudices claimants and will result in costly 'discovery sideshows' that unnecessarily burden claimants and courts in a way that rarely arises in insurance coverage disclosures."[89]

For now, parties seeking or opposing disclosure of materials regarding TPLF are likely to dispute whether (1) the materials are relevant and (2) whether the materials are protected as work product. "Information about litigation funders may . . . be relevant," among other times, "when assessing fiduciary duties, calculating attorneys' fees," "ensuring effective case management," determining the appropriateness of class certification, or assessing a judge's own potential conflicts of interest.[90] Those opposing disclosure of relevant TPLF materials may argue that the TPLF materials were "prepared in anticipation of litigation" and are, therefore, protected as work product pursuant to Federal Rule of Civil Procedure 26(b)(3).[91]

In the end, it is incumbent upon attorneys seeking or opposing disclosure of materials regarding TPLF to research the relevant jurisdiction's laws on disclosure and protection of work product.

77 ABA Comm'n on Ethics 20/20, supra note 1, at 30.

78 Id. at 30-35.

79 Id. at 33.

80 Id. at 30-35; Herschkopf, supra note 4, at 23 n.35 (explaining that "federal courts have ruled on both sides of the issue" and providing list of cases).

81 ABA Comm'n on Ethics 20/20, supra note 1, at 32.

82 Herschkopf, supra note 4, at 9.

83 Jamie Hwang, Wisconsin law requires all litigation funding arrangements to be disclosed, ABA Journal (Apr. 10, 2018), http://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrange ments_to_be_disclosed

84 Id.

85 Standing Order for All Judges of the Northern District of California ¶ 19, https://www.cand.uscourts.gov/siorders.

86 Republican Senators Reintroduce Litigation Funding Disclosure Bill, Litigation Finance Journal (Feb. 15, 2019), https://litigationfinancejournal.com/republican-senators-reintroduce-litigation-funding-disclosure-bill/.

87 Egan, supra note 6.

88 David Lat, Current And Future Issues In Litigation Finance, Above the Law (Mar. 15, 2019), https://abovethelaw .com/2019/03/current-and-future-issues-in-litigation-finance/.

89 Egan, supra note 6.

90 Herschkopf, supra note 4, at 9.

91 Id. at 12 n.26 (collecting cases); ABA Comm'n on Ethics 20/20, supra note 1, at 35-36.

More Money, More Problems? The Use of Litigation Finance in Complex Litigation

Jason A. Lien
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MASLON

Agenda

- Evolution and types of third-party litigation finance ("TPLF")
- Expansion of TPLF
- Enforceability of TPLF agreements
- The debate over TPLF
- Ethical and discovery issues

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Evolution and Types of TPLF

- Consumer funding started first
- Commercial funding followed
- Today, both plaintiffs and defendants receive TPLF

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Prevalence of TPLF

- Bloomberg estimates TPLF to be $9 billion industry
- 41% of lawyers have firsthand experience with TPLF according to 2019 Lake Whillans survey
- 72% of lawyers who have not used TPLF expect to do so in near future

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Some Reasons for Growth of TPLF

- Asset class not tied to economy
- Increases access to lawyers and courts
- Allows companies to maintain cash flow despite costly litigation

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Enforceability of TPLF Agreements

- Common law prohibitions on champerty and maintenance may invalidate TPLF agreements
- Many jurisdictions are relaxing or abolishing these prohibitions
- Usury laws may apply
- Law is diverse and unsettled

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Enforceability of TPLF Agreements

- *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)
  - "[T]he champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining power."

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Enforceability of TPLF Agreements

- *Maslowski v. Prospect Funding Partners, LLC*, 27-CV-15-15143, 2019 WL 3000747 (Minn. Ct. App. July 8, 2019)
  - "[C]hampertous agreements have untoward economic effects on the legal system that can provide both improper incentives and disincentives to pursue and settle litigation."

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The Debate over TPLF

Opponents	Proponents
• Frivolous cases	• Levels playing field
• Discourages settlement	• Transfers risk
• Harms attorney-client relationship	• Facilitates meritorious claims
• Deprives plaintiffs of recovery	• Allows companies to focus on business

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Ethical and Discovery Issues

Rule 1.7 on Conflicts of Interest

- Referrals to funders
- Involvement in negotiating TPLF agreements

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Ethical and Discovery Issues

Rules 1.8, 2.1, 5.4(c)

- Funder involvement in the case
- Obligation of lawyers to exercise independent professional judgment

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Ethical and Discovery Issues

Rule 5.4(a)

- Prohibition on sharing legal fees with nonlawyers
- Some funders seek to fund law firm portfolios

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Ethical and Discovery Issues

Confidentiality and Privilege

- Funders need information to make investment decisions
- Rule 1.6 requires client consent to disclose
- Disclosure of privileged communication likely waives privilege
- Possible exception: common interest doctrine

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Ethical and Discovery Issues

Disclosure of TPLF Materials

- New rules requiring mandatory disclosure of TPLF agreements
- Federal Rule of Civil Procedure 26(b)(3)
  - Materials involving TPLF may receive work product protection

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Jason Lien focuses his litigation practice on representing clients from the construction, real estate, financial services, food, and railroad industries. He regularly appears in federal and state court on behalf of design-build firms, general contractors, architects, engineers, specialty contractors, property management companies, real estate owners, and lenders. A portion of Jason's practice also involves representing a major U.S. railroad in disputes throughout Minnesota and North Dakota.

Recognized by Chambers USA for construction law in 2016-2019, he is described as "an esteemed trial lawyer with a wealth of experience assisting with litigation mandates relating to construction defects and insurance coverage issues." Prior to joining Maslon in 2002, Jason honed his trial and appellate skills as a Naval Officer with the United States Navy Judge Advocate General's Corps, where he led hundreds of courts-martial, administrative hearings, and military appeals.

In addition to his litigation practice, Jason served as a member of Maslon's Governance Committee from 2017-2019 and as the committee's vice chair from 2018-2019. Jason was selected for inclusion on the 2015-2019 Minnesota Super Lawyers® lists and prior to that was recognized on the Minnesota Rising Stars lists.

Outside of the office, Jason is an avid triathlete and a two-time Ironman finisher.

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- Business Litigation
- Competitive Practices/Unfair Competition
- Construction & Real Estate Litigation
- Insurance Coverage Litigation
- Tort & Product Liability
- Real Estate Condemnation & Eminent Domain

Honors

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- Recognised Practitioner in Minnesota for Construction, Chambers USA, 2016-2017
- Recognized on Minnesota Super Lawyers® list, 2015-2019 (Minnesota Super Lawyers® is a designation given to only 5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
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- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2006-2009, 2011-2012 (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.)

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ETHICS: MAKING THE MISSION POSSIBLE THROUGH MENTORSHIP

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Making the Mission Possible Through Mentorship
Joseph Angersola

> "Show me a successful individual and I'll show you someone who had real positive influences in his or her life. I don't care what you do for a living—if you do it well I'm sure there was someone cheering you on or showing the way. A mentor." — Denzel Washington

Many law firms and businesses have some type of mentorship program. Mentoring is commonly mentioned by management as a requirement or, at the very least, a renewed initiative. What is less frequently discussed is why mentoring is good for both the employees and the business, how to be an effective mentor, and how mentorship differs from sponsorship.

The Statistics – Mentorship Makes a Difference

Dr. Lauren Bidwell[1] wrote a short article summarizing 30 years of research regarding mentorship. While some of the outcomes were not terribly surprising, her points reinforce the positive impact good mentoring can have on individuals and businesses. She identified five reasons why mentors matter: (1) improved career outcomes, (2) employee engagement, (3) employee retention, (4) employee inclusion (formal mentorship mitigated sexual tension related to cross-gender mentoring and also provided access across racial and ethnic lines), and (5) benefits to the mentor (greater job satisfaction, career success, and work-related fulfillment).[2]

When comparing career outcomes of mentored and non-mentored employees, the mentored employees: received higher compensation, received a greater number of promotions, felt more satisfied with their career, felt more committed to their career, and were more likely to believe they will advance in their career.[3]

Employees who had been mentored: were more positive about their organization, were more positive about senior leadership for their organization, believed they had been provided opportunities for career growth by their organization, and reported they felt informed about their future course within their organization.[4]

Effective mentoring has positive results beyond the mentees. Studies showed mentoring reduced people looking for other positions as well as actual turnover. A survey of over 5,000 recently hired sales representatives revealed that those having a mentor/mentee relationship reported "significantly higher organizational commitment and lower intentions to leave their organization."[5] A study of officers within the United States Army found that mentoring decreased turnover by 38%.[6]

Effective Mentoring Is Not Easy

Tom Hanks' character Jimmy Dugan said it best in A League of Their Own: "It's supposed to be hard, if it wasn't hard everyone would do it. The hard makes it great." Well-known leadership author and speaker John

1 Dr. Bidwell identifies herself as "a Research Scientist with the Human Capital Management Research team at SAP SuccessFactors, a team that studies how technology can be used to positively transform workforce productivity and organizational culture." https://www.linkedin.com/in/laurenbidwell.

2 Lauren Bidwell, Why Mentors Matter: A summary of 30 years of research, SAP SuccessFactors (2016), https://www.success-factors.com/resources/knowledge-hub/why-mentors-matter.html.

3 Id.

4 Id.

5 Id.

6 Id.

C. Maxwell sheds light on why good mentoring is hard.

In his book, Mentoring 101, Chapter Two is titled, "How do I adopt a Mentor's Mind-set?"[7] Mr. Maxwell has identified the following: (1) make people development your top priority, (2) limit who you take along, (3) develop relationships before starting out, (4) give help unconditionally, (5) let them fly with you for a while, (6) put fuel in their tank, (7) stay with them until they can solo successfully, (8) clear the flight path, and (9) help them repeat the process.[8]

These points, while informative, reinforce that good mentoring is not quick or easy. For many, the top priority in their daily job is to get the work done well and make sure the client or customer is happy. However, taking the time to develop people can result not only in work being done well, but it can also lead to personal and business growth. Mr. Maxwell's book goes into detail on why a mentor cannot over extend themselves and has to be selective in who he or she is mentoring. Selecting a mentee requires developing a relationship before diving into the mentorship. Being a mentor is more than just cheering on the mentee, it involves having tough and honest conversations that provide critical feedback. Therefore, having a relationship with the mentee based upon a level of trust allows those tough conversations to take place where the mentee is receiving the feedback in a constructive way.

At the same time, despite devoting time and energy, a mentor cannot expect to receive something in return. In today's fast-paced world where everyone wants an immediate response, carving out time to develop others can easily be pushed aside until another day. It is the underlying relationship with the mentee that can make it a little easier to step back from the daily grind to be a mentor.

In the legal world, Mr. Maxwell's fifth point has become more and more difficult. It used to be that clients were willing to pay for associate development. As a young lawyer it was common to accompany the senior attorney or partner to meetings, hearings, or depositions. The legal market has changed. Clients paying for associate development has become the exception rather than the rule. It is incumbent upon the partner or firm to prioritize development and mentorship even if it means that time expended is not always fully compensated. At the same time, clients must recognize the value of having trained and seasoned attorneys working on their matters to reach the desired outcome. As this process plays itself out, it will shift from the mentee observing and learning from the mentor to the mentor observing the mentee and sharing feedback on how the mentee can further perfect his or her craft. Mr. Maxwell points out most learning models in the United States is the classroom approach derived from the Greeks.[9] A leader stands and lectures, asking questions, while the student sits and listens, with the goal being to understand the ideas of the leader.[10] However, Mr. Maxwell also points out the Hebrews used the on-the-job training method that was "built on relationships and common experience."[11]

Similarly, as lawyers become more senior they many times take for granted what they learned over the course of 10, 15, or 20 years of practice. As a mentor it is important to provide resources to the mentee so they can be prepared to take that next step on their own. In the corporate world it may be providing context to how the legal process interplays with business decisions and corporate realities. Those resources could also be something more tangible, such as an effective article or book that provides insight to the mentee on situations they are likely to face as they progress in their career. When a successful person sits back and really thinks about all the assistance they received over the years, however big or small, they will recognize the importance of passing down similar assistance to others. In today's terminology this would be the apprenticeship model, with the apprentice working alongside until he or she has mastered the craft.[12]

Perhaps nothing is more rewarding than seeing the mentee really take off following successful mentorship. From the mentor's perspective, they have taken the time to guide, train, and support the mentee to the point that the mentee is ready to take on their own client, matter, or case. Mr. Maxwell analogizes this situation to the difference between a flight instructor and travel agent. "The one stays with you, guiding you through the entire process until you're ready to fly. The other hands you a ticket and says, 'I hope you have a good flight.'"[13]

One component of being an effective mentor is often times overlooked, "there is no success without a successor."[14] Not only should good mentoring involve guiding the mentee's path to personal growth and success, but giving the mentee tools to identify and effectively mentor someone else.

7 John C. Maxwell, Mentoring 101, 11 (2008).

8 *Id.* at 12-22.

9 Id. at 16.

10 Id. at 17.

11 Id.

12 Id.

13 Id. at 19-20.

14 Id. at 22.

Attract Other Leaders

In his book, Mr. Maxwell distinguishes between two different kinds of leaders, those who attract followers and those who attract leaders.[15] For those leaders who attract followers, "they're influencing only one person – a follower."[16] On the other hand, "people who attract leaders are influencing many other people through their interaction."[17]

One of the best examples of leaders attracting leaders is legendary University of Iowa Hawkeye football coach Hayden Fry. In 1979 he became the head coach of an Iowa Hawkeye football program that had a losing record for 17 straight seasons dating back to 1962. Coach Fry would go on to lead Iowa to three Big Ten Titles, three Rose Bowl games, and thirteen winning seasons. Despite all the deserved accolades, Coach Fry became known for his unrivaled coaching tree. He had, in essence, taken a moribund football program and injected life into it by finding assistant coaches that he believed could be head coaches. He was quoted as saying, "I don't want guys on this staff who don't want to be head coaches." Thirteen of his assistant coaches at Iowa would go on to become Division I-A football head coaches.[18] The Wall Street Journal published, Iowa: The Harvard of Coaching in 2011.[19] Some of Coach Fry's most well-known mentees include four current or future Hall of Fame coaches: Barry Alvarez (Wisconsin), Bill Snyder (Kansas State), Bob Stoops (Oklahoma), and Kirk Ferentz (Iowa). Each of these coaches became a national coach of the year award winner as well as their schools all-time leader in wins.

The Hayden Fry coaching tree example reflects Mr. Maxwell's conclusion that leaders who attract leaders: want to be succeeded, want to reproduce themselves, focus on others' strengths, want to share power, invest their time in others, are great leaders, and experience incredible success.[20]

Good People is Good Business

In his book, Good People, author and entrepreneur Anthony Tjan argues that the only leadership decision that matters is choosing to work with good people.[21] Mr. Tjan states, "Good people purposely and proactively put people first in their decision making."[22] He has developed a "Good People Mantra[23]," which is:

BE People First

HELP Others Become the Fullest Version of Themselves

COMMIT Beyond Competency to the Values of Goodness

BALANCE The Realities and tensions of Goodness

PRACTICE Goodness whenever possible, not just when tested

Throughout his book Mr. Tjan makes the case for goodness in people and business. His ideas and interviews are too numerous for this article. He highlights that while competency is important, character and values matter more.[24] Mr. Tjan recognizes that "goodness is something we all intuitively sense but nonetheless have trouble describing clearly or tangibly."[25]

Goodness also emphasizes that at the core of great leaders is truth, humility, self-awareness, and integrity.[26] Mr. Tjan's ideas overlap those of John C. Maxwell, in that being a leader and mentor has traits of openness, empathy, and generosity.[27]

Mr. Tjan identifies five critical questions of mentorship[28]:

(1) What are you truly trying to achieve?
(2) What are you doing well that is helping you get there?
(3) What is slowing you down?
(4) What will change tomorrow to help get you there faster?
(5) How can I be of help?

His discussion of mentorship has some familiar thoughts along with new ideas.[29] Mr. Tjan advocates for allowing the mentee to "control the volume dial."[30] While a "nudge," can be effective, a mentee should turn up or down the level of mentoring.[31] Incorporating this compassionate

15 Id. at 35-36.

16 Id.

17 Id.

18 Tyler Strand, Legend of the Fall: Hayden Fry, Iowa Alumni Magazine, September 2017, https://magazine.for-iowa.org/archive/archive-story.php?ed=true&storyid=1677.

19 Jared Diamond, Iowa: The Harvard of Coaching, The Wall Street Journal, December 21, 2011.

20 See John C. Maxwell, supra note 7.

21 Anthony Tjan, Good People (2017).

22 Id. at 17.

23 Id. at 18.

24 Id. at 21-23.

25 Id. at 39.

26 Id. at 41-66.

27 Id.

28 Id. at 224-226.

29 Id. at 209-236.

30 Id. at 230.

31 Id.

approach advocated by Mr. Tjan reinforces the initial idea that good mentoring is about relationships. Goodness provides though provoking ideas on how those relationships are developed and effectively grown.

Mentorship – A Professional Responsibility

For lawyers, mentorship goes beyond personal fulfillment and business success. Many states have professional responsibility rules that mirror that of American Bar Association Model Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

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

Model Rule 5.1 places the onus on the partner to train up the associate and avoid or mitigate the consequences of the associate's known conduct. Through effective mentorship, an associate can be placed in a position to learn professional responsibility thereby avoiding any violations by either the firm, partner, or associate. Mr. Maxwell refers to this as communicating the fundamentals. "For people to be productive and satisfied professionally, they have to know what their fundamental responsibilities are."[32]

According to Mr. Maxwell, people remember 10 percent of what they hear, 50 percent of what they see, 70 percent of what they say, and 90 percent of what they hear, see, say, and do.[33] Using these statistics, Mr. Maxwell developed a five-step process: (1) model, (2) mentor, (3) monitor, (4) motivate, and (5) multiply.[34]

Correlating these statistics to lawyers, if an associate is going to remember 90 percent of what he or she hears, sees, says or does, then providing good mentoring and training is essential to having an associate that is a positive reflection on the partner and the law firm.

Mentorship is not Sponsorship

Seven or eight years ago Michele Coleman Mayes[35], then serving as General Counsel for All State Corporation, attended a small gathering of young lawyers in Atlanta, Georgia. After a brief reception, Ms. Mays gathered the group of attorneys around her and talked for maybe ten to twelve minutes. Her talk was simple, straightforward, and effective. She touched upon her own career path and used the twists and turns she encountered to demonstrate the importance and differences of mentorship and sponsorship.

Too often these terms are used interchangeably. At the time it appeared that many of those young attorneys did not know the difference or why it mattered. She mentioned that a mentor and sponsor can be the same person, but are commonly different individuals.

Mentorship is helping professionals learn about their field and roles from a senior attorney. They do not need to be within the same firm or business as the mentee. A mentor serves as an advisor, helping to shape a mentees career goals and plans. A person becomes a mentor based upon their own experiences and general expertise that can be shared with a mentee. A mentor can help to build-up the confidence of a mentee and be a sounding board, but they also provide constructive and at times blunt criticism. Mentors are not a mentee's ticket to a promotion or partnership.

Sponsors on the other hand do help individuals with promotions and partnership. A sponsor works within the same firm or business as his or her protégé. A sponsor takes a direct role in the career advancement of the protégé, advocating for the protégé and helping them to earn a raise, promotion or otherwise have success in the shared firm or business environment. A sponsor expends his or her political capital to assist another person with career advancement. As Ms. Mayes told her small, but captured audience, having a sponsor is having a career champion. A sponsor is a career-changing asset.

Ms. Mayes closed her talk by looking around the room

32 See John C. Maxwell, supra at 63-64.

33 Id. at 64-65.

34 Id. at 65-66.

35 https://www.nypl.org/help/about-nypl/leadership/mayes

and commenting, if you do not know who your mentor or sponsor is, then you do not have one. The takeaway was not for the small audience to rush out and find a mentor or sponsor. Rather Ms. Mayes advocated that the young attorneys in that room needed to work on perfecting their craft, identify individuals that were willing to expend the time and energy in that endeavor, and understand the practical reality that the vast majority of people have achieved career success through guidance and feedback from a mentor along with having a sponsor or advocate in their corner.

Developing People Leads to Sound Lawyers, Good Business, and Growth

The literature regarding developing young professionals is plentiful. In fact, it is at times overwhelming. Despite the abundance of resources, mentoring is commonly taken for granted and misunderstood. Perhaps it is a result of too many ideas combined with the fact pace nature of the legal environment. However, at its core mentoring can be simple. It is about people. It is being selfless. Effective mentoring is identifying an aspiring young professional who is willing to listen, learn, and be pushed to new heights. All the authors, speakers and leadership experts agree, good mentoring is good business.

"Show me a successful individual and I'll show you someone who had real positive influences in his or her life. I don't care what you do for a living—if you do it well I'm sure there was someone cheering you on or showing the way. A mentor." — Denzel Washington

s/c

Mentoring: 30 Years of Research

- Improved Career Outcomes
- Employee Engagement
- Employee Retention
- Employee Inclusion
- Fulfillment to the Mentor

s/c

Comparison of Mentored and Non-Mentored

- Higher Compensation
- Greater Number of Promotions
- Career Satisfaction
- Committed to Career
- More optimistic

s/c

U.S. Army Study

Study of officers in the U.S. Army found that mentoring decreased turnover by 38%

s/c

It's Not Easy

(1) make it your top priority,
(2) limit who you take along,
(3) develop relationships before starting,
(4) give help unconditionally,
(5) let them fly with you for a while,
(6) put fuel in their tank,
(7) co-pilot,
(8) clear the flight path, and
(9) help them repeat the process.

s/c

Understand the Practical Realities

- Clients paying for development is the exception, not the rule.
- Firms need to prioritize development.
- Clients need to recognize the value of having seasoned counsel and succession planning.

s/c

People Remember . . .

- 10 percent of what they hear
- 50 percent of what they see
- 70 percent of what they say
- 90 percent of what they hear, see, say, and do.

s/c

Apprenticeship v. Classroom

- Greeks gave us the classroom model.
- Hebrews gave us the apprenticeship model.
- Statistically, on the job training built on relationships and common experience has a better outcome for lawyers.

s/c

Attract Other Leaders

There is no success without a successor.

s/c

Iowa: The Harvard of Coaching

- 17 losing seasons from 1962-1979
- Moribund program transformed, 13 winning seasons, 3 Big Ten Titles, 3 Rose Bowl games.
- 13 assistant coaches would become Division I-A head football coaches.

s/c

Hayden Fry

"I don't want guys on this staff who don't want to be head coaches."

s/c

Hayden Fry: 1983 Coaching Staff

s/c

Hayden Fry: 1983 Coaching Staff

- Barry Alvarez - Hall of Fame, winningest coach in Wisconsin Football history.

s/c

Hayden Fry: 1983 Coaching Staff

- Bill Snyder - Hall of Fame, winningest coach in Kansas State Football history.

s/c

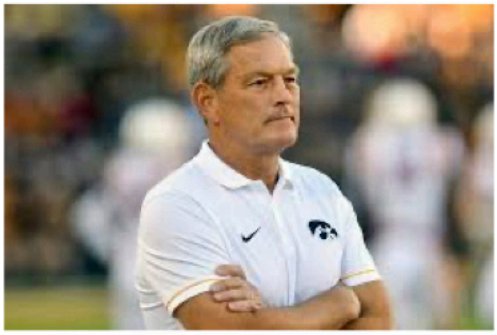
Hayden Fry: 1983 Coaching Staff

- Bob Stoops - Winningest coach in Oklahoma Football history, national title, future Hall of Fame inductee.

s/c

Hayden Fry: 1983 Coaching Staff

- Kirk Ferentz - Winningest coach in Iowa Football history, future Hall of Fame inductee.



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Good People is Good Business

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COMMIT
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BALANCE
THE REALITIES AND TENSIONS OF GOODNESS

PRACTICE
GOODNESS WHENEVER POSSIBLE, NOT JUST WHEN TESTED

s/c

Five Critical Questions

1. What are you truly trying to achieve?
2. What are you doing well that is helping you get there?
3. What is slowing you down?
4. What will change tomorrow to help get you there faster?
5. How can I be of help?

s/c

Mentorship: A Professional Responsibility

- ABA Model Rule 5.1
- A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

s/c

Mentorship is Not Sponsorship

- Do not need to work together.
- Serves as an advisor, helping to shape career goals and plans.
- General expertise that can be shared.
- Help to build-up the confidence of a mentee and be a sounding board.
- Provide constructive and at times blunt criticism.
- Mentors are not a mentee's ticket to a promotion or partnership.

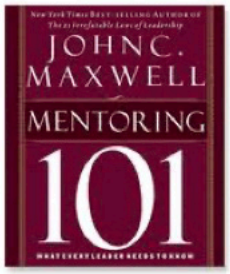
s/c

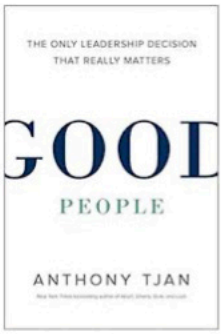
Sponsorship

- Sponsors help with promotions and partnership.
- Works within the same firm or business.
- Takes a direct role with the protégé.
- Advocates and helps to earn raises, promotions or otherwise have success.
- Expends political capital to assist another.
- Having a sponsor is having a career champion.
- A sponsor is a career changing asset.

s/c

Resources





Michele Coleman Mayes

Dr. Lauren Bidwell

s/c

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Joseph Angersola defends clients in a variety of disputes, with an emphasis on product liability, personal injury and commercial litigation. In addition to representing clients in Georgia, Joe has defended clients as regional and national counsel in Arizona, Florida, Kentucky, Mississippi, Nevada, North Carolina, Oklahoma and Tennessee.

Joe understands that each client, whether it is a large corporation, local business or an individual, has specific objectives and challenges in litigation. His experience in a variety of cases and jurisdictions allows him to tailor his approach to address those considerations.

Originally from Iowa, Joe practiced in Chicago for 5 years before moving to Georgia. He is active in various professional organizations along with his children's youth activities.

Practice Areas

- Automobile Litigation
- Catastrophic Injury & Wrongful Death
- Commercial Litigation
- Environmental Law
- Premises Liability
- Products Liability

Experience

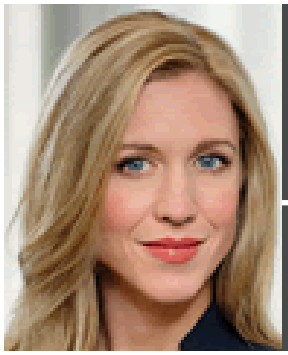
- Defended electrical manufacturer in product liability cases alleging defects in electrical equipment and components, including switch-gear, circuit breakers, surge arrestors and disconnect boxes.
- Defended automated-door manufacturer in a lawsuit alleging improper maintenance.
- Defended forklift manufacturer in a lawsuit alleging improper service.
- Defended skid-steer loader manufacturer in product liability suit alleging design and manufacturing defects.
- Defended hose manufacturer in product liability suit alleging design and manufacturing defects.
- Defended tool manufacturer in a product liability lawsuit alleging catastrophic head injury.
- Defended boat manufacturer and dealer in a product liability lawsuit alleging defect in stair design.
- Defended boat manufacturers and dealers in warranty and recall lawsuits.
- Defended individuals in lawsuits involving recreational boats and jet skis asserting wrongful death claims and personal injury.
- Defended importer and distributor of fireworks in product liability lawsuit alleging defective design and manufacturing.
- Defended homeowners and businesses in lawsuits asserting water runoff claims.

Awrds/Recognitions

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Martindale-Hubbell Top Rated Lawyer, 2016
- Georgia Super Lawyers Rising Star, 2016 - 2018

Education

- Syracuse University College of Law (J.D., 2005)
- Loyola University of Chicago (B.A., 2001)



PANEL DISCUSSION: CHALLENGES IN MANAGING LITIGATION IN MULTIPLE JURISDICTIONS

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An Ongoing Mission: Consistency, For Consistency's—and the Client's—Sake in National Litigation
Haley A. Cox and Amaobi J. Enyinnia

It goes without saying that lawyers are trained to strike whenever the opposition makes inconsistent statements in pleading, papers, depositions, or on the witness stand. The chance of inconsistent responses or statements only increases when a client is involved in litigation nationwide, especially where that litigation tends to concern similar or repeatedly occurring types of issues. Inconsistency may occur not only as the result of differing answers to the same or similar discovery requests in or between cases, but also as the result of discrepancies between discovery responses and deposition testimony in cases across the country.

While danger underlies any lawsuit for a client, the danger of inconsistent discovery responses, or witness testimony, to the same or similar questions in multiple jurisdictions or venues is sometimes understated. In more benign cases, inconsistencies between types of testimony, such as a deposition testimony and a given interrogatory response, may be overlooked. But, in some instances, those discrepancies or contradictions may be used by opposing counsel to curry not only judicial favor, but penalize the other side via sanctions, whether monetary or in the form of the imposition of adverse jury instructions. Additionally, these inconsistencies, and the judicial opinions that lay them bare, may raise ethical concerns and lead to bad publicity for the client, and in some cases, their counsel too.

Inconsistency Has Derailed Past Missions

A recent opinion issued in AKH Co., Inc. v. Universal Underwriters Ins. Co., No. 13-2003-JAR-KGG, 2019 WL 1261986 (D. Kan. Mar. 19, 2019) highlights the minefield and dangers created by inconsistency in discovery responses and in witness testimony. In this case, for years, the counterclaim defendant maintained in both its discovery responses and in its deposition testimony that certain financial documents covering relevant years, such as check registers and deposit lists, did not exist. The counterclaimant sought these documents in attempts to determine the counterclaim defendant's net worth and find evidence supporting its fraudulent transfer claims. However, several years into the litigation, the counterclaim defendant produced documents that in fact referred to the existence of those financial documents that the counterclaim defendant had denied existed. After being confronted with the references to the existence of the financial documents, the counterclaim defendant produced them. But, at that point, discovery had closed, and because the counterclaimant was unable to further pursue new questions that arose from those documents, it pursued sanctions under Rule 37 of the Federal Rules of Civil Procedure.

In its order, the trial court found that the counterclaim defendant had indeed led the counterclaimant on a "goose chase" for those documents over three years. The court shot down each of the counterclaim defendant's attempts to argue the counterclaimant never specifically requested those documents, noting how the counterclaimants had sought the information informally over three years and how the counterclaim defendant had repeatedly insisted that they did not exist. The court

sanctioned the counterclaim defendant by granting the counterclaimant several adverse inference instructions, including an inference that the documents produced would be favorable to the counterclaimant's position. The court also awarded the counterclaimant its reasonable attorneys' fees spent on its sanctions motion, along with the expert's fees spent in attempting to decipher the desired information from thousands of other financial documents previously produced, as the counterclaim defendant had insisted the counterclaimant would have to do.

But that is not all. In addition to withholding financial documents, the trial court also found the counterclaim defendant surreptitiously withheld information about a domain name that constituted a valuable asset. Specifically, during his Rule 30(b)(6) deposition, one of the counterclaim defendant's corporate representatives testified that the counterclaim defendant no longer owned a valuable domain name and had transferred it to another company. This was consistent with the counterclaim defendant's interrogatory responses that it was not a financially viable company and could not cover a judgment that may be entered against it.

Years later, the counterclaim defendant amended its interrogatory responses and admitted it was in possession of the domain name the entire time, which was estimated to be worth millions and sufficient to satisfy the potential judgment. Once again, the counterclaim defendant had not supplemented its inconsistent discovery responses or corrected its inconsistent deposition testimony from years ago. As a result, the court found that the counterclaim defendant's claims of an honest mistake were not credible, and the court sanctioned the counterclaim defendant by green-lighting evidence of the counterclaim defendant's net worth at trial. As a result of this transgression, and the transgression regarding the late-produced financial information discussed earlier, the court granted the counterclaimant numerous adverse inference instructions about the counterclaim defendant's behavior, including an instruction that the jury could infer that the counterclaim defendant sought to conceal assets in order to avoid a judgment for the purposes of determining punitive damages.

Such blatant deception is not the benchmark for sanctions; simple discovery inconsistencies may also lead to sanctions. In other cases, courts have sanctioned trial counsel for failing to produce the latest version of a document and failing to make sure that the information produced was actually accurate. For example, in Hightower v. Heritage Academy of Tulsa, Inc. No. 07-CV-602-GKF-FHM, 2008 WL 4858269, (N.D. Okla. Nov. 10, 2008), counsel for the defendant failed to produce the correct copies of their client's bylaws until after depositions of their client's representative in the case revealed that counsel had overlooked a set of more recent bylaws. While counsel immediately produced the bylaws identified in the deposition, the trial court there found that counsel failed to take appropriate steps to verify that the information originally produced was accurate. The court penalized the defendant by awarding the plaintiff reasonable expenses and attorneys' fees incurred with the plaintiff's motion for sanctions and granted the plaintiff the opportunity to conduct an additional deposition of another corporate representative regarding the bylaws, with all reasonable expenses and attorneys' fees for the deposition to be paid by the defendant.

On a different, but related note, national counsel must avoid the blind use of cookie-cutter discovery responses. In recent years, national counsel in Georgia were chastised and punished on two separate occasions by the Georgia appellate courts for failing to serve full and complete discovery responses. Specifically, in Ford Motor Co. v. Young, 745 S.E.2d 299 (Ga. Ct. App. 2013), trial counsel did not disclose the existence of their client's excess insurance carriers until the proverbial last minute before trial began, after the jury was selected. Rather than disclose the existence of the excess carriers, the discovery responses simply stated the client was able to cover any reasonable judgment. When confronted with the same questions from the trial court seeking confirmation regarding the client's excess carriers, they provided the same answer. The client's national discovery strategy was to resist disclosing insurance information.

Yet, such information was particularly important in Georgia because it was statutorily required to be disclosed in order to qualify jurors. As a result, the national counsel's admission pro hac vice was revoked. The failure to disclose excess insurance carriers until the last minute also affected the defendant in more than just the Young case. Plaintiffs in a prior case against the same defendant in Georgia used that information to challenge a defense verdict rendered nearly two years before the Young case. They filed a motion for a new trial for failing to disclose the insurance information in response to that plaintiff's discovery requests seeking that same information. Fully aware of the Young case, the Georgia Supreme Court overturned the defense verdict and ordered a new trial. Ford Motor Co. v. Conley, 757 S.E.2d 20 (Ga. 2014).

The Ethical Obligation to Provide Consistent and Complete Discovery Responses

In addition to litigation-related incentives to keep discovery responses and witness testimony consistent, ethical rules come into play when discovery responses

are seen as inconsistent, contradictory, or misleading. In particular, Rule 3.3 of the Model Rules of Professional Conduct—and similar rules in virtually all jurisdictions—calls for candor towards the tribunal. State and federal courts consider incomplete, and likely inconsistent responses to discovery requests, to violate that rule. At least one court has stated that "[n]owhere is an attorney's representation of the facts more important than in discovery. For the discovery process to function, the Court and counsel must be able to rely on the accuracy of discovery responses." Thompson v. Haynes, 36 F. Supp. 2d 936, 940 (N.D. Okla. 1999). Indeed, in the Young case, counsel were found to have violated Georgia's Rule 3.3 of Professional Conduct for failing to disclose the client's insurance carriers until the eve of trial, which formed the basis for the trial court's decision to revoke the pro hac vice admissions. Young, 745 S.E.2d at 351.

Further, the above cases reaffirm the potential impact of the doctrine of imputed knowledge. To briefly explain, by all accounts, a lawyer is an agent of their client. The implication of this relationship is tremendous. By the laws of agency, clients are bound by what their counsel know or have reason to know, minus some exceptions related to criminal liability. Restatement (Third) of Law Governing Lawyers § 5 cmt. d, §28(1) (2000). This tenet particularly comes into play in discovery, as it is well-established that "[a] party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." Hickman v. Taylor, 329 U.S. 495, 504 (1947). Courts have recognized that attorneys cannot refuse to educate client witnesses regarding relevant facts, even if they were first learned by counsel, and have punished parties where their counsel failed to disclose relevant knowledge and potential witnesses that the party or their counsel should have been aware of due to previous engagements in discovery. See Guzman v. Bridgepoint Educ., Inc., 305 F.R.D. 594 (S.D. Cal. 2015).

Even an inadvertent failure to disclose information that counsel, but not necessarily the client, is aware of can trigger not only ethical inquiries, but also call into question whether a party is in violation of Rules 26(e) and 26(g) of the Federal Rules of Civil Procedure for failing to conduct a reasonable inquiry. Violations of Rule 26, of course, may lead to Rule 37 sanctions. See Oklahoma v. Tyson Foods, Inc., 262 F.R.D. 617 (N.D. Okla. 2009). Relatedly, counsel cannot—and should not—attempt to shield themselves from the implications of knowing certain facts by avoiding inquiry, as a client can be charged with information that their counsel has reason to know. Restatement (Third) Of Agency § 5.03 (2006); Restatement (Third) of Law Governing Lawyers §28(1). In some situations, counsel's reckless or intentional failure to know material information could give rise to a cause of action against counsel by the client for breach of fiduciary duty. George M. Cohen, "The State of Lawyer Knowledge Under the Model Rules of Professional Conduct," American University Business L. Rev. 115, 140 (2018).

Tips to Use in Practice

National litigation presents many perils, but national counsel have a number of methods and tools at their disposal to combat inconsistency and its potential dangers:

Communicate. There must be a commitment to open lines of communication with the client. This includes a consistent and deliberate practice of getting the client materials with sufficient time to review them so they may point out any issues or items needing further discussion. Cookie-cutter responses should be avoided. Rather, an open discussion about the collection of documents and the specific response to given discovery request should take place. Importantly, for both ethical reasons and consistency reasons, counsel should simply keep their client updated on the development of a case, which gives the client a chance to also speak up and alert counsel to potential issues they may foresee. When the client and national counsel work together and have an open line of communication, the pitfalls of inconsistency can be avoided.

Develop Standard Procedures. National counsel must be intimately familiar with the internal systems and procedures the client has in place to vet discovery responses, including the process for searching, identifying and gathering responsive documents. Most clients have developed systems to ensure consistent and complete discovery responses. If not, processes should be put in place to avoid inconsistent positions. In that same vein, national counsel should have team members in place who, through their experience, are familiar with the client's business, documents, and discovery practices. It is of course imperative that in any established procedure, counsel provide the client sufficient time to review and vet the proposed discovery responses.

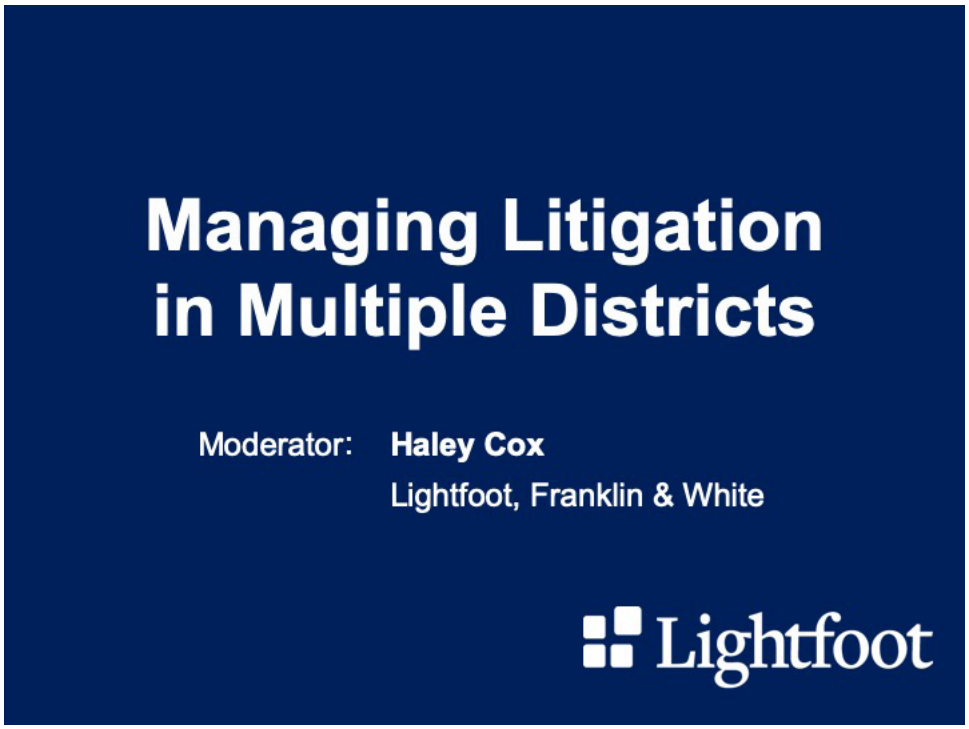
Develop Subject-Matter Expertise. National counsel should not only be subject-matter experts on the topics at issue in a given lawsuit, but also have an understanding of their client's business as a whole. Those efforts help streamline identifying information, witnesses and potential responsive documents. The more you can know about your client's business, the

more you can assist them in developing litigation strategies, including managing nationwide discovery requests. National counsel should also coordinate with other national counsel for their client about reoccurring issues to address them in a coordinated fashion.

Prepare, Prepare and Prepare. National counsel should plan to spend substantial time preparing corporate representatives. If national counsel knows the client's business, the client's available documents and information, past deposition testimony and the scope of documents produced in the underlying lawsuit, they are better equipped to assist in ensuring that a corporate representative does not inadvertently contradict past positions the client has taken. National counsel can be invaluable in streamlining witness preparation.

Utilize and Review History. For consistency's sake, especially with respect to witness preparation, national counsel should endeavor to review prior transcripts of the witness, or other corporate representatives, in similar cases. For certain discovery requests, reviewing how the client has responded to similar requests in the past can be useful to determine the potential scope of information available. Of course, knowing the history does not always result in complete and accurate discovery responses. It is national counsel's role to look at the past with a critical eye to ensure that the client (or counsel) has not become complacent in their response to specific discovery requests because that has simply been the way it has been done in the past.

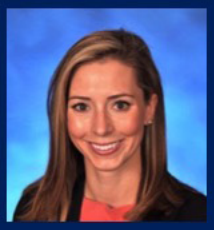
Ultimately, national counsel's mission of representation, which they have chosen to accept, involves many responsibilities and many challenges. Avoiding inconsistency with discovery and witness testimony is one responsibility and challenge that should never be minimized.



Panelists

Tim Casey
Numotion

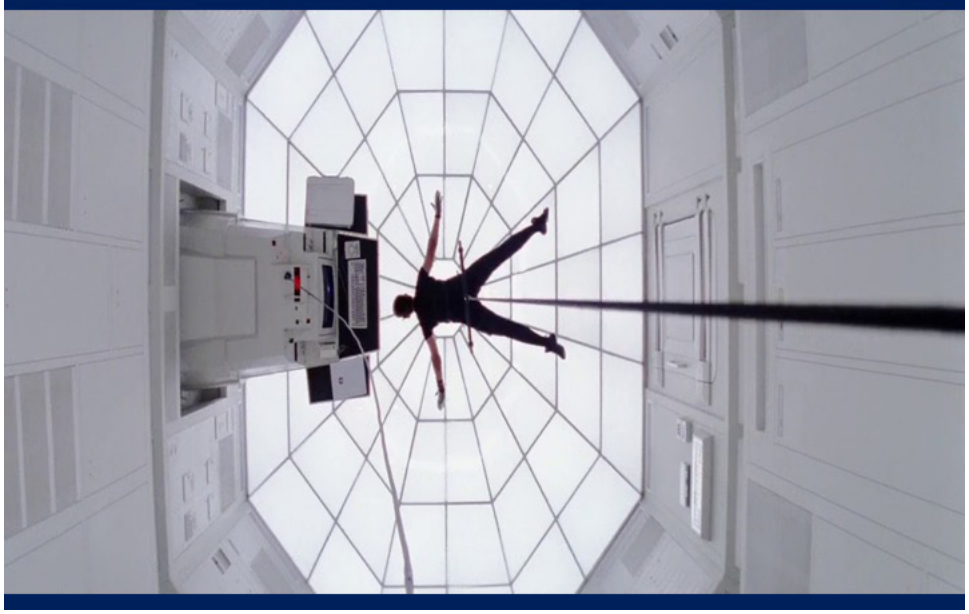
Kristine Campbell
U-Haul



Sarah McAfee
General Motors

A Need for Consistency in Discovery

Internal Approaches For Consistency

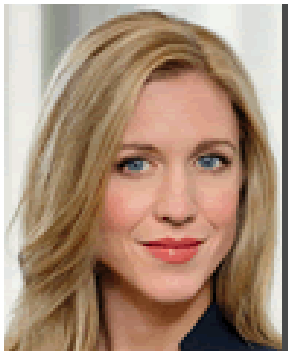


Making Outside Counsel Subject Matter Experts


Balancing National Counsel with Local Counsel


How to Use Experts


What Can We Do to Help You?



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Haley tries cases and leads defense teams in a wide range of high-stakes cases, including claims of product defect, medical malpractice and serious personal injuries. She is admitted to the Alabama and Texas bars, and she has litigated in more than a dozen states.

Haley understands what it takes to win: the truth, hard work and delivering the client's story so it resonates with judges and juries. She also understands that winning is different to every client and in every case. A win may be a fair and swift resolution, or it may mean fighting all the way to a verdict. Either way, opponents know that Haley – like every Lightfoot lawyer – is prepared to take the case as far as it needs to go.

For more than 10 years, Haley has been instrumental in recruiting the next generation of Lightfoot lawyers to serve the firm's clients. She is committed to carrying out Lightfoot's mission of hiring only the most talented, driven and diverse lawyers, and then training them the right way.

Benchmark Litigation recognized Haley as a 2018 "Local Litigation Star." Since 2014, she has been named annually by Mid-South Super Lawyers as a "Rising Star" and, in 2018, was named a "Rising Star of Law" by the Birmingham Business Journal. She has also been selected for the Alabama State Bar's Leadership Forum.

Outside of work, Haley's true loves are her family, Alabama football, running and good wine.

Practice Areas

- Automotive
- Commercial Transportation
- Product Liability
- Medical Malpractice
- Catastrophic Injury
- Consumer Fraud & Bad Faith
- Professional Liability

Awards/Recognitions

- Alabama State Bar Leadership Forum (Class 11)
- Alabama Super Lawyers, "Rising Star" —Civil Litigation: Defense (2014-15)
- Benchmark Litigation, "Future Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability, Top 10 Boutiques (2018-19)
- Birmingham Business Journal, "Rising Star of Law" (2018)
- Mid-South Super Lawyers, "Rising Star" (2016-18)

Education

- Samford University, Cumberland School of Law (J.D., magna cum laude, 2006)
- University of Alabama (B.S., summa cum laude, 2003)

WINNING THE APPEAL WHILE STILL AT TRIAL COURT

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Winning Your Appeal While You Are Still at the Trial Court
Carly Alameda

Every trial lawyer knows an appeal is a critical part of a case. Regardless of the years spent litigating a case, the successes or failures, the money spent, the hours invested – it might all be reversed on appeal. For that reason, working through a case mindful of a future appeal is important.

While a case is active at the trial court level, there are a number of things to keep in mind from an appellate perspective. This article and discussion will not be comprehensive, but some key considerations will be addressed, primarily with regard to creating the record that will be needed on appeal. A trial lawyer needs to ensure the record is sufficient to either demonstrate error and prejudice on appeal after a loss, or dispute any error, or demonstrate it was harmless, after a win.

Evidence

One of the most fundamental parts of a case is to ensure you are providing, and admitting, admissible evidence to support a finding in your client's favor. Whether on summary judgment or at trial, be sure all material facts necessary to sustain a finding in your client's favor are in the record. For evidence submitted on the papers, be sure personal knowledge and a proper foundation is established for every fact or exhibit. At trial, be sure your exhibits are actually admitted by the trial court. This may include checking with the court clerk to confirm what his or her record shows in terms of what evidence has actually been admitted, as the court's version will become the official record of evidence.

You should also be mindful of ensuring the record includes or at least addresses demonstrative evidence, including any visual aids or presentations that may provide helpful context or additional information along with the testimony. For example, if an expert presents a PowerPoint deck or handwritten charts, you can seek to admit their work into evidence if possible, or at least be sure the testimony or follow up questions clarify what is being referred to, to avoid confusing the appellate court down the road.

Objections

To preserve your objection for an appeal, you must be sure you make the objection below – for example as part of your summary judgment papers, in a motion in limine, or while objectionable evidence is being offered during trial – and get the ruling on the record. To the extent possible, put your objections or responses in writing. Getting the reasoning for the ruling is often not required, but it can be useful to make clear what the judge did and why.

Being mindful of getting your objections in the record is especially important in cases where the judge prefers to engage in lengthy discussions off the record, in chambers, or at side bars. The trial lawyer needs to be sure that the party's objection and position are summarized on the record at the next opportunity.

Another pitfall can arise if a judge defers ruling on a motion in limine, or if a motion in limine is denied without prejudice, for example where the judge says he or she will consider objections one at a time during trial. In these instances, you must state your objection again when the

evidence is offered at trial.

Given the consequences of failing to object, many lawyers err on the side of making too many objections. Although the thinking behind this approach is not irrational, making too many objections can also have negative consequences. For example, if you bombard a judge with too many boilerplate objections on summary judgment papers, you can hurt your credibility and diminish the chance that the judge will focus on the best objections to the key evidence. At trial, too many objections can come across as obstructionist or careless, and can impact your effectiveness. For these reasons, you need to use your knowledge of the case and good judgment to be sure you make and preserve the right objections.

Jury instructions

An erroneous jury instruction is a strong issue on appeal because instructions are reviewed de novo. However, claimed errors are often waived if a party consents to, or even appears to consent to, an erroneous instruction. Preserving objections to final jury instructions or verdict forms can be difficult in courts where the trial judge conducts a lengthy jury instruction conference in chambers and many proposed drafts are exchanged.

To best preserve your arguments regarding jury instructions and the verdict form, you want to be sure to lodge your proposed instructions and verdict form with the court, so that it is clear on appeal which instructions your side proposed. You will want to carefully track your objections to the other side's instructions and put these in writing if possible, or if necessary summarize those objections on the record the next time the court reporter is present. If an appellate court cannot tell which side requested an instruction, you risk facing a presumption that your side requested or accepted the instruction, and therefore waived any error.

Orders and Statements of Decision

The order or judgment being appealed from is often the first thing the appellate court will review. For this reason, to the extent possible with your trial judge, you will want to help position that order or judgment as favorably as possible for your client's position on appeal.

For example, if you prevail on summary judgment, you will likely want a robust order that addresses the facts, findings, and conclusions, and resolves all material evidentiary objections. Although not all judges will accept or use your work, you can try to have a hand in crafting the ultimate order by submitting a proposed order with your reply brief, drafting a more formal order consistent with a tentative ruling in your favor to bring to the hearing, or at the hearing, offer to draft the order in light of the judge's discussion on the record.

If you prevail after a bench trial, you should request a statement of decision. If you believe there are missing facts, unaddressed arguments, ambiguities, or omissions, you should raise that with the trial court and give the trial court the opportunity to fix it.

Transcripts

The transcripts are the means by which the appellate court will review the evidence and objections discussed above. A clerk's transcript, appellant's appendix, or other similar compilation, will contain the pleadings, briefs, and other documents from the case; the reporter's transcript will contain the written transcription of hearings and trial. Keep these two critical compilations of "the record" in mind as you proceed in your case.

For the clerk's transcript, be sure you actually file or formally lodge any briefs, proposed jury instructions, or other papers or substantive responses you provide the trial court judge. If a trial judge asks for or allows responses or substantive discussions over email, for example, that may not be included as part of the formal record, so be sure to follow up by filing or lodging the necessary papers.

For the reporter's transcript, be sure you arrange for a court reporter to be present in state courts where a reporter is not provided. At all times, be sure you speak slowly and clearly so that an accurate transcript can be prepared (this is especially important where the transcript may be created later from a tape recording). And pay attention to when the reporter is transcribing or not. For example, reporters often stop transcribing when a video is played during trial. It is helpful to prepare and lodge a transcript of the portions of video that were played to be sure an appellate court has easy access to see what that video contained.

Prejudice

Litigants are entitled to a fair trial, not a perfect trial. On appeal, it is therefore not enough to demonstrate error; a successful appellant must also demonstrate prejudice. This means proving, for example, that an error resulted in a miscarriage of justice or that a different result would have been probable without the error. Therefore, if you believe an error has occurred, in addition to noting your objection, give the trial court a chance to fix it, ask for a remedy, make an offer of proof, and articulate the prejudice. This may include moving to strike testimony

or asking that the jury be admonished, or if evidence is excluded, make an offer of proof so the appellate court can consider the possible impact.

When to appeal?

Although most trial lawyers think about the appeal from the final judgment (and the "one final judgment" rule), appeals can actually come up throughout the life of a case. Appealability is generally controlled by statute. In many cases, if you fail to take an interlocutory appeal from an order that is immediately appealable, you waive your right to challenge the issue. Even if an adverse order is not immediately appealable, you also may petition the court for interlocutory review through a writ. Writs are rarely granted, but worth consideration for a significant and adverse order.

The art and science of post-trial motions and proceeding with an appeal or a writ once you find yourself before the appellate court are beyond the scope of this article, and worthy of their own discussion.

Finally, although all of these details are critically important, it is worth noting the single most important thing you can do at the trial court to improve your chances on appeal: WIN. Reversals in civil appeals are uncommon; in California well over two-thirds of civil cases are affirmed on appeal. With that in mind, a good trial lawyer will balance the long view of a case on appeal with his or her effectiveness, credibility, and rapport with the judge and jury.

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Partner

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Carly O'Halloran Alameda represents clients in a variety of civil litigation and appellate matters with an emphasis on complex breach of contract claims, real property disputes, and California appeals. Her practice includes representing clients in California state and federal courts, as well as in alternative dispute resolution processes, including AAA, JAMS, and ICC arbitrations. Carly's strategic and practical approach to litigation is influenced by her experience as a corporate board member of Mammoth HR. Beyond simply litigating a case, she understands how a dispute fits into a client's business strategy so that she can effectively achieve the most favorable result.

Carly also previously served as clerk to the Hon. Mark B. Simons of the California Court of Appeal (First District). When handling a case on appeal, she understands the importance of selecting the right arguments and framing the issues in a way that will resonate and succeed with an appellate court.

Services

- Appellate Litigation
- Business Litigation
- Private Client
- Real Estate
- Real Estate Litigation

Experience

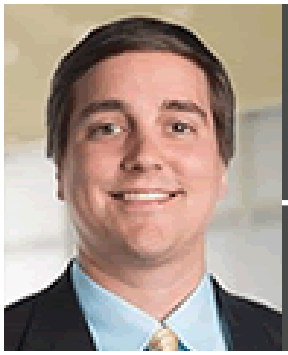
- Representing real estate developer through four week jury trial in San Francisco Superior Court, involving claims of rescission, breach of contract, and fraud.
- Successfully obtaining writ relief to overturn summary adjudication in a real estate dispute.
- Achieving award on behalf of manufacturer in six week ICC arbitration related to failure of components in a nuclear power plant, in which the contractual limitations of liability were successfully enforced, the opposing party's damages claims in excess of $7 billion were rejected, and our client was granted a fee and cost award as the "prevailing party" of over $58 million.
- Obtaining a multi-million dollar settlement on behalf of a solar company days before the AAA arbitration hearing began, in a breach of contract dispute.
- Winning an arbitration award as part of a trial team in a case involving disputed purchase options and a multimillion-dollar real property transaction.
- Successfully resolving a significant dispute regarding a party's right to indemnification that turned on a gross negligence exception.

Distinctions

- Benchmark Litigation "40 & Under Hotlist" (2017-2019)
- Northern California Rising Stars by Super Lawyers (2012-2019)
- The Best Lawyers in America in the area of Real Estate Law (2020)

Education

- University of California, Berkeley, School of Law (J.D., 2006) - Associate Editor, Ecology Law Quarterly; Best Oral Advocate, Moot Court; American Jurisprudence Awards - Real Estate and Trial Advocacy
- California Polytechnic State University (B.S., 2003) - Liberal Studies



IT WASN'T RAINING WHEN NOAH BUILT THE ARK: EFFECTIVE ELEMENTS OF YOUR DISASTER/CRISIS RESPONSE PLAN

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"It Wasn't Raining When Noah Built the Ark" Effective Elements of Your Disaster/Crisis Response Plan
Raymond C. Lewis

We all see in the headlines each day the steady increase in the number and magnitude of disasters and crises that impact companies. Often companies are unprepared and do not have a thorough disaster/crisis plan in place. They believe it will never happen to them. But, what if it does? Benjamin Franklin said it best: "By failing to prepare, you are preparing to fail." If your company lacks a contingency plan that provides continuity or quick recovery in a catastrophic event or crisis, then you, too, are setting your business and potentially your clients up for failure. Before a one strikes, corporate counsel and business owners should think about how a disaster/crisis would impact employees, customers, suppliers, their company's value, and potentially generate litigation.

From weather, fire, utilities outage, human actor, or a security breach, a crisis can strike any company anytime, anywhere. Not having business continuity and disaster/crisis response plan can lead to substantial risks. Depending upon the type of business and particular industry an Emergency Action Plan (EAP) may be required by Occupational Safety and Health Act ("OSHA"). Regulations impacting banks and financial institutions and health care providers either require or strongly suggest that disaster recovery plans be implemented.

An entity's reputation can also take a hit. Clients may accept that an incident happened, but they expect your business to quickly respond. The way an entity responds to a crisis can have a substantial impact on its reputation for years to come. Financial losses may also result from the lack of a disaster or business continuity plan; the longer the downtime, the higher the losses.

Depending on the severity of the incident, your company may also have legal liability that could end up costing even more. Your actions or inactions during an emergency can lead to liability through multiple theories finding legal responsibility. Depending upon the jurisdiction, civil liability grounded in tort is the most likely theory in which liability issues arise in an emergency response. Give the litigious nature of our society, a company should expect lawsuits and claims in the aftermath of a disaster/crisis based on theories of intentional torts, negligence, breach of privacy or confidentiality, premises liability, or medical malpractice.

Notably, tort exposure in disaster and crisis situations is constantly changing. For example, historically, courts have considered the threat created by a mass shooter to be unexpected and remote such that no company should have foreseen the risk and danger.[1] Tragically, as mass shooting incidents become more common, it is possible the foreseeability analysis typically applied by the courts will shift. This shift may have already occurred in Axelrod v. Cinemark Holdings, Inc.[2]—a case that involved the shootings at a movie theater in Aurora, Colorado in July 2012. In Axelrod, the theater's summary judgment was denied on a finding that the plaintiffs had offered enough evidence to create a genuine dispute of fact as to whether the theater knew or should have known of possible security risks. A particular enlightening quote from the

1 See e.g., Lopez v. McDonald's Corp., 193 Cal.App.3d 495 (CA 1987); Sigmund v. Starwood Urban Inv., 475 F. Supp. 2d 36 (D.D.C. 2007); A.H. v. Rocking ham Pub. Co., Inc., 495 S.E.2d 482 (Va. 1998); McKown v. Simon Prop., Grp. Inc., 344 P.3d 661 (Wash. 2015).

2 65 F.Supp.3d 1093 (D. Col. 2014).

Axlerod case suggests that the historical foreseeability bar for these kinds of incidents, which would carry with it possible tort liability, is quickly changing: "what was 'so unlikely to occur within the setting of modern life' as to be unforeseeable in 1984 was not necessarily so unlikely by 2012."

Advanced planning is the key to survival and overcoming adversity and avoiding legal liability. Here are six critical steps to disaster/crisis management that every company should have in place regardless of its size.

Forecast

The first step in any disaster/crises plan should be to predict or forecast the kinds of events that could negatively impact your organization. It is essential to create a set of scenarios that serve to guide planning. This does not have to be an exhaustive list of everything that could happen, but it should represent a broad range of potential emergency situations that the organization could plausibly face. For each scenario or threat you identify, also focus on the potential impact, including: probability the hazard will occur, magnitude/severity of the event, warning time associated with the risk, typical duration of the hazard, and recovery time objectives.

If you can list out your top 5-10 most likely disaster/crisis scenarios, this will go a long way in helping you identifying the aspects of the plan you will need to develop. Some of the issues and hazards to consider when developing your company's plan are:

Geological hazards
- Earthquake
- Tsunami
- Volcano
- Landslide, mudslide, subsidence

Meteorological Hazards
- Flood, flash flood, tidal surge
- Water control structure/dam/levee failure
- Drought
- Snow, ice, hail, sleet, arctic freeze
- Windstorm, tropical cyclone, hurricane, tornado, dust storm
- Extreme temperatures (heat, cold)
- Lightning strikes (wildland fire following)

Biological hazards
- Foodborne illnesses
- Pandemic/Infectious/communicable disease (Avian flu, H1N1, etc.)

Human-caused events
- Product recall
- Management error or omissions
- Hazardous material spill or release
- Nuclear power plant incident (if located in proximity to a nuclear power plant)
- Explosion/Fire
- Transportation accident
- Building/structure collapse
- Entrapment and or rescue (machinery, confined space, high angle, water)
- Transportation Incidents (motor vehicle, railroad, watercraft, aircraft, pipeline)
- Lost person, child abduction, kidnap, extortion, hostage incident, workplace violence
- Demonstrations, civil disturbance
- Bomb threat, suspicious package
- Active shooter
- Terrorism

Technology caused events
- Utility interruption or failure (telecommunications, electrical power, water, gas, steam, HVAC, pollution control system, sewerage system, other critical infrastructure)
- Cyber security (data corruption/theft, loss of electronic data interchange or ecommerce, loss of domain name server, spyware/malware, vulnerability exploitation/botnets/hacking, denial of service)

Use the internet, social media, focus groups, and, if needed, professionals to conduct a business impact analysis to find potential issues that may concern your company. This anticipatory approach should be a regular practice, as should identifying potential scenarios that do not yet exist but could arise because of aspects of your industry.

Prevent

Sometimes, the best defense is a good offense. Every good plan is supported by preventative measures to ensure, as best one can, the scenarios forecasted do not become crises. Identify early warning signs of when an event is maturing or developing into a crisis, develop and implement mitigation strategies tailored to the scenarios you have forecasted or eliminate those scenarios when possible. Get rid of all the low-hanging fruit so your plan can focus on the real disasters and crises.

Position

Not everything is a disaster or crisis nor does it have the potential to escalate to one. Sometimes activating a full-scale crisis response can create an issue out of a scenario that could have been handled discreetly. While

your plan should cover all types of issues and scenarios, your disaster/crisis plan should only be triggered when a scenario escalates to disaster/crisis level. The first part of any adequate plan is to define criteria or benchmarks that provide your team with the information they need to make a determination of when something is or is not a crisis in the heat of the moment.

Sadly, an enormous amount of gray area exists in establishing the tipping point, but some elements you may want to consider are: define what a crisis means whether in the broader sense of the term or by narrowing in and defining certain specific crisis scenarios; internal escalation protocol(s); specific impacts your team should consider when determining the level of an incident; geographic impacts; and whether the issue is attracting traditional media or social media attention. There have to be clear triggers to move the organization from "normal" to "crisis mode" as well as to activate specific responses. Set up a multi-tiered scale, from most to least severe, including trigger points and appropriate actions so that you may properly and swiftly evaluate an incident and act appropriately.

Plan

When the best forecasting and prevention fails, the company must have a plan for dealing with a disaster or crisis. Your action plans are basically a disaster/crisis management check list for your team. They ensure that no important task gets forgotten or overlooked when things get hectic. When creating your action plans, you will want to identify the tasks and action items that each department would need to undertake and accomplish immediately and within the first 24-48 hours of a disaster/crisis occurring. Your action plans can be departmental and should be prioritized in the order you want them completed. Expressly designate an allotted timeframe for completion, try to be as realistic as possible with an understanding of the urgency and hectic nature of the event.

Every plan begins with clear objectives. The objectives during any crisis are to protect any individual (employee or public) who may be endangered by the crisis, keep the key audiences informed, and ensure the company survives. This written plan should include specific actions that will be taken in the event of a crisis. Some of the required elements of a disaster/crisis plan area:

- Includes preparedness and response plans for all relevant emergencies and threats (natural, mechanical, biological, and human);
- Addresses the needs of staff, visitors, structures, and collections;
- Specifies how to protect, evacuate, and recover collections in the event of a disaster;
- Includes evacuation routes and assembly areas for people;
- Assigns individual responsibilities for implementation during emergencies;
- Data and information technologies (IT);
- Lists contact information for relevant emergency and recovery services;
- Includes all needed floorplans, maps, drawings, etc.; and
- Bears date of last revision.

As you develop your crisis management plan, seek advice from the experts that include your leadership team, employees, customers, communications experts, investment bankers, exit planners, lawyers and financial managers. Each of these individuals can provide you valuable insight that could be critical should a crisis strike your company.

Identify chain of command and "owners" of specific tasks.

Crisis demands a fast centralized response and this, in turn, requires a very clear line of command and accountability. A decentralized response is almost always an incoherent response by the organization. The response team should be clearly defined, including backups who would take over if the others were unavailable. You must designate a clear "owner" for each task, preferably someone who is a subject matter expert or holds the most institutional knowledge about that task. Someone needs to own each action plan (for example your department heads may own their respective departmental action plans), as well as each task. Also, create and provide a centralized place for team members to keep notes and document progress for each action item.

If practical and possible, identify the spokesperson that will be the face of the company during the disaster/crisis. If this needs to be a hired public relations professional, so be it. These kinds of situations often require experience in handling the press or local and state officials that the majority of day-to-day employees and officers lack, through no fault of their own. Depending upon the severity or complexity of the situation, there is nothing wrong with getting outside assistance to handle public relations.

Anything you can do beforehand to decrease the risk of scrambling for information while a disaster/crisis is underway will save a lot of headaches during an already stressful time. Make sure contact information of all team members is up-to-date and readily available. Prepare easy to understand checklists of steps of the plan that can be referred to and used by the team.

Communicate with employees, customers, and suppliers.

Who are the people or groups—including the public and the media—related to your company who will need information about a disaster/crisis, and who should information be disseminated to first? When is it appropriate to call in an issue to the C-suite? At what point do you communicate a situation to internal employees and how? These questions should all be answered as part of your plan.

Let employees know where to go in case of disaster or emergency; have a clearly defined backup worksite. Maintaining an informed workforce helps ensure that business continues to flow as smoothly as possible. It also minimizes the internal rumor mill that may lead to employees posting false reports on social media. Easily activated channels for reaching people on site and outside should be utilized. For example, use of text messaging, emergency telephone calls, internal speakers, and TV monitors to make announcements. A shooter on site, for example, triggers facility lockdown and police response but also rapid announcement that everyone should stay where they are, lock doors, hide, etc. To the extent possible there should be redundancy in these channels including backups that are not linked to the telephone system or the Web and the messages should be composed in advance.

The last thing you want is for your customers and suppliers to learn about your disaster/crisis through the media. Information on any crisis pertaining to your organization should come from you first. Part of the crisis communications plan must include the customers and suppliers to notify and how they will be regularly updated during the event. Remember that once the situation returns to normal, you will want to immediately let those same customers and suppliers know you have return to operation. Lastly, make sure your service agreements include clauses that cover disasters/emergencies and define level of service in the event of a disaster.

Pre-approved crisis communication strategy and messaging.

When a disaster/crisis strikes, respond immediately. Have the spokesperson prepared and ready to go. The first few hours are most important in establishing credibility and building public trust and believability. Do not stonewall. Be responsive to the media and inform the people who need to be kept informed, especially employees, shareholders, vendors and customers. Forget the safety blanket of “No comment.” One way or the other, the media will get information, but it may be inaccurate and the sources unreliable. In a crisis, perception is stronger than reality and emotion stronger than fact. As Michael J. Fox’s character correctly noted in The American President: “[I]n the absence of genuine leadership, they’ll listen to anyone who steps up to the microphone. They want leadership. They’re so thirsty for it they’ll crawl through the desert toward a mirage, and when they discover there’s no water, they’ll drink the sand.” Nothing generates more negative media coverage than a lack of honesty and transparency. Therefore, being as open and transparent as possible can help stop rumors and defuse the situation. This transparency must be projected through all communications channels: news interviews, social media, internal announcements, etc. When those responsible do not communicate, the crisis still gets played out in the media and possibly even later in court.

Another secret to successful crisis management is pre-set responses. Timely, consistent and effective communications are critical but quick approvals of communications can be a difficult task. One of your goals should be to pre-define your communications strategy, and to draft your communications and have them pre-approved by all the right members of your team – to the most extent possible. The list of pre-approved communications should include: common talking points/ message points, general communications to employees, communications to clients and suppliers, frequently asked questions (FAQ), preliminary media responses, and responses to local, state, and federal agencies and regulatory bodies.

Leaders should be able to pull combinations of pre-set response “components” off the shelf. Pre-drafting the elements of a crisis response plan provides the organization with speed and uniformity but also flexibility to deal with unexpected scenarios or combinations of scenarios. This is important because real crises rarely directly match planning scenarios. If response options are not flexible, novel events or combinations of events can result in ineffective responses. Response components might include: facility lockdown, police or fire response, evacuation, isolation (preventing people from entering facilities), medical containment (response to significant epidemic), grief management, as well as external communication to media. Matching these components to scenarios enables a response that immediately triggers and accomplishes aspects of the plan. For example, a “shooter on site” event triggers an immediate facility lockdown plus a police response plus preset communication protocols to convene the crisis-response team and warn staff.

While this can often be counterintuitive, it is better to over-communicate than to allow rumors to fill the void.

Issue summary statements, updated action plans and new developments as early and as often as possible. With today's social media and cable news outlets, we live in a time of the 24/7 news cycle. Your crisis plan and communications are expected to and must do the same. Be sure to establish a social media team to monitor, post, and react to social media activity throughout the crisis.

Elements to incorporate into the IT portion of the plan.

Every good, modern-day disaster/crisis plan must include a focus on information technologies and the data your company needs up and running during and after a disaster/crisis. Start by taking inventory of what you have, where it is located, how it is set up, and how vital it is to your operations. A listing and location of any IT resources to be tapped is necessary. Agreements should also be negotiated with external agencies to provide specific resources in time of crisis.

As you create your plan, you will need to explore exactly what your business requires in order to run. You need to understand exactly what your organization needs operationally, financially, with regard to supplies, and with communications. You need to know (1) what you need to restore or initiate to have data services, (2) how long it will take, and (3) who performs each task. Whether you are a large business that needs to fulfill shipments and communicate with customers or a small business to business organization with multiple employees, you should document what your needs are and rank them in order of importance so that you can make the plans for backup, business continuity, and have a full understanding of the needs and logistics surrounding those plans.

Make sure that your data backup is running and include running an additional full local backup on all servers and data in your disaster preparation plan. Run them as far in advance as possible and make sure that they are backed up to a location that will not be impacted by the disaster. If possible, it is also prudent to place that backup on an external hard drive that you can take with you offsite or one that is stored offsite.

Miscellaneous details and objectives.

Other critical aspects of your company plan that should be covered or considered are:

- Plan for your equipment – For geological or weather-related disasters, it is important to plan how to best protect your equipment. For example, in flooding or hurricanes, you will need to get all equipment off the floor, moved into a room with no windows and wrapped securely in plastic so ensure that no water can get to the equipment.
- Detailed asset inventory – In your plan, you should have a detailed inventory of workstations, their components, servers, printers, scanners, phones, tablets and other technologies that you and your employees use on a daily basis. This will give you a quick reference for insurance claims after a major disaster by providing your adjuster with a simple list (with photos) of any inventory you have.
- Command Post – This should be a location that can be rapidly converted to be used by the crisis response team. Requirements include the ability to rapidly connect many lines of communication, to have access to external media (TV coverage), to provide access to crisis management plans, etc. In addition, there should be a backup command post located off-site in the event that evacuation is necessary. This could be located at a home or other location, so long as the necessary IT exists or can be swiftly put in place for communication and other resources.

An electronic copy of this plan should be stored on a secure and accessible website that would allow team member access even when company servers are down. It is also a good idea to provide a copy of the plan to the local law enforcement and public emergency services that would respond to your facility and others with responsibility for building management and security.

Train

The best plans are worthless if they exist only on paper. There needs to be regular, at least biannual, exercises conducted by the crisis response team, and regular testing of channels, inventorying of resources, etc. These tests should be done regularly, but not scheduled in order to test speed of response.

Training personnel so they are familiar with detection, duties, processes, communications, and warnings is vital. Review plans with staff to ensure they are familiar with their role and can carry out assigned responsibilities. Make sure training occurs within the entire team any time one its critical members or leaders is changes or when someone leaves the company. Do new employees know about the plan and what it entails? What about remote employees? Are they adequately identified, aware and informed? As a guide, general training for employees must cover: individual roles and responsibilities; threats, hazards, and protective actions; notification, warning, and communications procedures; means for locating family members in an emergency; emergency response procedures; evacuation, shelter, and accountability procedures; location and use of common emergency equipment; and emergency shutdown procedures.

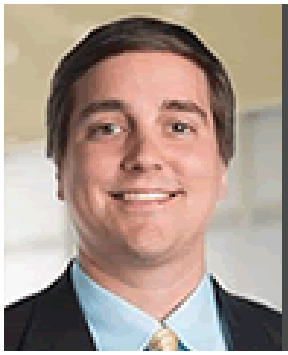
Conduct evacuation, sheltering, sheltering-in-place, and lockdown drills so employees will recognize the sound used to warn them and they will know what to do. Facilitate real world exercises and simulations to practice the plan, familiarize personnel with the plan, and identify any gaps or deficiencies in the plan.

Evaluate

Each crisis provides an opportunity for organizational learning to occur and plans to be revised. After each and every crisis, review the company's performance and focus on continuous improvement. Thoroughly and critically assess how each individual performed and how each layer or level of the plan was implemented and appropriately tailored to the particular crises. Identify where improvements can be made and identify what aspects need further training. The guiding questions should be: What went well and what went poorly? What are the key lessons learned? What changes do we need to make to our organization, procedures, and support resources? Whether your plan was a success can be judged through a number of considerations: (1) protection of your employees, customers, and the public; (2) protection of your reputation and brands; (3) protection of your market share and profitability; (4) reduction of financial loss and litigation exposure; (5) continuation of a commercially viable business; and (6) compliance with all the relevant government and legal requirements.

Do not miss the opportunity to learn from others' successes and failures. Take notice of how other businesses respond to crises or disasters. When the response is a positive example, reach out to the principals of that business and exchange information and ideas. Learn what they did right (or wrong). Determine if anything learned in their experience can be implemented or added to your company's plan. Perhaps they learned along the way that parts of their plan were useless given the realities they were facing. If your plan has similar features, reassess and rethink about changes you may make based on their experience.

There will be little-to-no time for planning and strategizing as a disaster/crisis unfolds. An unplanned disaster/crisis throws a company into panic and survival mode. A disaster/crisis that is not managed well can wipe out decades of hard work and company value in a matter of hours. A well-managed disaster/crisis confirms that your company has the processes and procedures in place to address almost any issue that may develop. The absolute first step towards managing the unexpected situation is to have an organized, well-thought out disaster/crisis plan in place long before your company is faced with adversity.



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Raymond C. Lewis knows that an attorney with courtroom experience is a valuable asset to a client and has developed the skills necessary to get through the unexpected hurdles of a courtroom.

His practice centers primarily in the areas of complex commercial and business litigation, insurance defense, and appellate work. He has successfully litigated complex commercial disputes for local and national clients involving multi-million dollar claims for breach of contract, product liability, oil and gas disputes, and transportation casualty. In his appellate practice, Ray has handled numerous appeals before the Louisiana Supreme Court, Circuit Courts of Appeals, and the U.S. Fifth Circuit, many resulting in published decisions favorable to his clients.

Ray has appeared multiple times as a “Ones to Watch” in the legal industry by New Orleans CityBusiness. He has also been voted to the Louisiana Super Lawyers “Rising Star” List, 2014-2017. He has written and lectured on trial and appellate practice and environmental law topics.

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

Industries
- Transportation
- Insurance
- Manufacturing

Sucesses
- Robert Sensat v. R360 Environmental Solutions, et al., 31st Jud. Dist. Ct., Parish of Jefferson Davis, NO. C-24-13
- Matrimonial Regimes – Termination of Community
- Johnson v. Transwood Inc., Tuthill Corp., et al, No. 14-102 (M.D. LA)
- Solstice v. OBES, Inc., et al., U.S. EDLA No. 12-2417.
- Construction Defect - Salinger v. Diamond B Construction
- Premises Liability - Miles v. City of Kenner, et al.
- Insurance Coverage - Summary Judgement

Accolades
- The Best Lawyers in America©, 2019-2020
- New Orleans CityBusiness Ones to Watch: Law, 2015, 2017
- Louisiana Rising Stars List, 2014-2019

Education
- J.D., B.C.L., Louisiana State University, 2007
- B.A., Baylor University, 2004

EFFICIENCY, VALUE AND COLLABORATION: NEW APPROACHES FOR IN-HOUSE AND OUTSIDE COUNSEL

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Driving Value and Efficiency While Managing Outside Litigation Teams: A Dual Perspective from an Outside General Counsel
Eric L. Probst

Effective in-house counsel management of outside counsel starts and ends with collaboration—a teamwork approach to defending and resolving lawsuits. Like all relationships, the in-house and outside counsel one thrives on communication. In-house counsel must communicate expectations to their outside counterparts, their corporate reporting responsibilities, and the company's approach to and tolerance levels for litigation. They should demand that their outside attorneys provide the information they want and need, but understand that outside factors often influence the legal advice they receive, and these factors, unfortunately, are sometimes immutable. The relationship has, as one of its goals, cost efficient and reliable legal service, and the goal can be achieved if the in-house attorney sets the company's agenda for the litigation at the outset when assigning the claim.

This article shares the experience of the author who has litigated and managed a nationwide portfolio of lawsuits as an outside counsel and outside general counsel.

"Mia San Mia[1]"

Relationships are built on understanding. Outside counsel must know the client, its culture, and the business unit involved in the lawsuit. In-house counsel must direct, shape, and manage outside counsel. The inside lawyer must instruct the outside lawyer on who the client is beyond its name, the products it sells and the services it offers. To effectively represent the client, the outside counsel must understand the client and its business units at their most base level—the people. Outside lawyers represent multiple clients, and some even in the same industry, but each is different. Moreover, different business units within a company can have different cultures and approaches to litigation. An outside attorney must almost become an employee in understanding and identifying with the client in order to most effectively advocate for it in court.

1. The Client: Outside attorneys rarely spend enough—or no—time learning who the client is beyond what they must understand to defend the lawsuit. More is required because no two clients are the same. Product manufacturers, for example, are "product proud," and their pride extends from the factory floor, to the engineering unit, to the office of the general counsel. The in-house attorney must share this "corporate pride" with the trial lawyer so the lawyer can relate to company witnesses during investigations and deposition preparation, and ultimately share this feeling and convey the company's position to opposing counsel, the court and the jury. The outside lawyer cannot fully obtain the client's ethos from its website, its mission

1 Mia San Mia is a Bavarian phrase that loosely translates to "We Are Who We Are."

statement, or its code of ethics and conducts. While these documents shed light on who company is and what it stands for, only the employees can communicate to the trial attorney what it means to work for the company. The in-house lawyer can start the dialogue, but should consider introducing the outside legal team to employees who represent what it means to work for the company.

2. The Client's Culture: Every company, small and large, has a unique culture. Some small companies operate as "Mom and Pops", as do some larger companies; yet some other small companies are quiet structured. While larger companies tend to be more organized, with updated policies and procedures, some business units can be less organized, more prone to lawsuits and have "skeletons" in the closet that require extra attention. In closely-held companies, where Board members actively manage and oversee litigation decisions, the outside attorney must know the players, who the player is, and what issues most plague the majority shareholders about the company's litigation portfolio. For example, is the majority shareholder concerned about the impact of legacy litigation on the future market value of the company for the shareholder's heirs? While the outside attorney strives to provide legal counsel divorced from these potentially complicating influences, the attorney must appreciate them. Insight into such corporate subtleties can only come from the in-house counterpart.

The corporate approach to risk is arguably the most important aspect of the culture the in-house attorney must share with the trial lawyer. No two companies approach litigation the same. Tied to corporate pride, risk aversion is critical information for the outside attorney. It guides not only how the attorney approaches the litigation, deals with adversaries, mediators and judges, but is the undercurrent for corporate communications. The outside lawyer wants to know how the client's decision makers will approach the lawsuit and litigation is general. Outside lawyers are sensitive to how their recommendations are received. If the client desires early case resolution, or is generally litigation averse, the in-house must share this apprehension to allow the outside lawyer to consider the apprehension when providing legal advice.

Further, clients often litigate aggressively to send a message to plaintiff's counsel and the plaintiffs' bar. Because the message to the plaintiff is communicated at the outset, and sometimes before the complaint is answered, in-house and outside counsel design the response, with in-house counsel outlining the client's general approach, before the complaint is answered. "Sending a message" through litigation is most apparent in discovery—answering written discovery, corporate witness depositions, and discovery disputes—and ultimately influences the client's trial decision. The collaboration takes on added importance when the client defends a portfolio of similar or related litigation. If business unit leaders are driving the message, the outside legal team should meet them to appreciate how the company will fight the lawsuit.

3. The Client's Product or Service: Before serving as the outside general counsel for a national construction company, I served as its outside counsel in New Jersey, handling construction defect, breach of contract, product liability, and consumer fraud disputes for over 15 years. Defending these matters involved working with operations personnel as much as the legal department. Over time, as a young associate, I learned how it constructed the home improvement it sold, to the point where I could have served on one of its crews. When I assumed the outside general counsel role, it surprised me that none of the outside attorneys took the time to understand the client's business, construction practices and methods, and sales strategies, unless prompted. Legal department personnel should connect outside attorneys to operations personnel so outside lawyers can "talk the talk and walk the walk;" outside lawyers should also undertake their own study. If they do not, or if their course of study is not rigorous to the company's standards, the in-house attorney should not be shy about addressing the learning curve—and, if it cannot be corrected, finding new counsel. Educating outside counsel applies no matter if the client manufactures automobiles or medical devices, operates a trucking company, designs and sells computer software, or runs a restaurant in Manhattan.

"So tell me what you want, what you really really want…."[2]

Outside law firms serve in-house legal departments. Like all service providers, the counsel provided is only good if the lawyers know and understand what the in-house lawyers need, want and expect. Sometimes general counsel wants an answer to a specific question. To get that answer, the in-house attorney must frame the question with specificity, so the outside attorneys know which question to answer and why. Appreciating the "why" allows the outside litigator to grasp the pressure points affecting the client's request, and how the answer might fit into the corporation's global approach to litigation. Effort—and money—are wasted on both sides of the relationship when the in-house lawyer does not explain in concrete detail "the ask," and the outside lawyer does not answer the questions.

These expectations include deadlines. Too often "Wednesday" turns into "Friday" or "early next week." If the inside attorneys sets a deadline goal, ensure the outside attorney meets it. If they do not, discuss the reasons why to ensure it will not happen again.

However, the outside lawyer is equally responsible for avoiding communication breakdowns. Whether receiving a new case or discrete research assignment, or managing a portfolio of matters in a mass tort litigation, the lawyer must ask the inside counterpart: "what do you need?" The more effective outside attorneys I worked with as outside general counsel asked this question and then delivered a response tailored to that request. Outside counsel sometimes do not appreciate that their deliverable might be turned into a Board report or submission to an insurance carrier for coverage. In-house attorneys can promote the effectiveness of the deliverable by defining, up front, for the outside lawyer what written product they need.

With in-house budgets tight, cost saving measures are at the forefront of every assignment. Outside counsel can better assist attempts to manage legal spend when inside legal department personnel communicate the form of the deliverable they need. Are brief e-mail summaries sufficient compared to full blown reports? Does the client want to pursue limited, strategically-targeted discovery instead of traditional, overbroad discovery requests that often result in little to any relevant information. What role will in-house attorneys play defending the case? Billing guidelines do not cover these more subtle issues so the in-house attorney should set the parameters of the representation from Day One.

"Who are you?"[3]

The famous lyrics, screamed by Roger Daltry, lead singer for The Who, are illustrative for the in-house and outside attorneys trying to establish a solid working relationship between themselves. Not only should the outside lawyer ask "Who Are You," the follow up question, as contained in the song—"Because I really want to know"[4] also should be asked. But the in-house attorney needs to break the ice—and engage the outside attorney personally—to promote an effective working relationship. From beginning to end, the inside lawyer and outside lawyer are in a relationship. They have to know who each other is to make it work.

Until I served as outside general counsel, I did not fully appreciate the many roles general counsel play. Their job responsibilities extend beyond litigation management, and often include budgeting, operations, compliance, safety, risk management, insurance, licensing, contract review, and Board reporting. Of course, the size and business type of the company influence the in-house lawyer's day-to-day obligations. When the outside legal team—partners, associates and paralegals—understand the hats the in-house counsel wears, and when they wear the hats, they can better provide legal advice and service to the client.

An important aspect of the in-house and outside counsel relationship is understanding the dynamics of the in-house attorneys' relationship with the company's business units and the Board. Though certain information cannot be shared with outside legal personnel, the more information the outside lawyer has access to, especially pressure points related to litigation, the more effective the attorney's legal counsel will be. Discovery, settlement, and trial decisions cannot be made in a vacuum because these corporate background issues play a significant

2 Lyrics from Wannabe, Spice Girls (Virgin – EMI Records, 1996).

3 "Who Are You" off of the album Who Are You, The Who (Polydor Records, 1978).

4 Id.

role in shaping decision making.

Conclusion

Building a solid relationship between in-house and outside attorneys—becoming partners in defending the lawsuit—is key to managing litigation, whether the claim involves a defective product, a commercial motor carrier crash, or business-to-business contract dispute. Trust is the core of the relationship, which has to be earned on both sides. Varied factors impact the management of the lawsuit—the industry involved, the availability of insurance coverage, and the potential ramifications of an adverse result—requiring in-house and outside counsel to collaborate and flexibly approach and evaluate the case's strengths and weaknesses to achieve the client's litigation goals.

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Diane Averell is a member of the firm's Management Committee. Diane strives to serve the best interests of her clients by understanding their business, products, and long-term goals. She works to understand the business environment behind the case in order to define what will constitute a "win" for her clients. Armed with this insight, Diane is a fearless advocate and works tirelessly to defend her clients while respecting their business objectives.

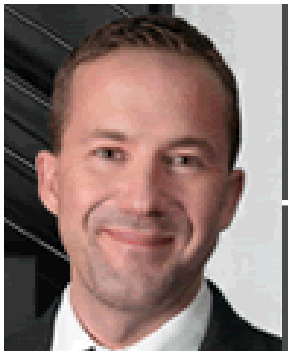
Diane has handled business-to-business disputes and defended personal injury claims on behalf of publicly traded companies, privately held corporations, and family-owned enterprises. Representing manufacturing companies, she has also defended failure-to-warn product liability claims related to prescription and over-the-counter drugs, industrial chemicals and minerals, petroleum products, automotive parts, trucking equipment, industrial machinery, construction equipment, power tools, and tobacco products. Although she handles all aspects of complex litigation, her passion is working with toxicologists, epidemiologists, and physicians to defend her clients' products on the issues of general and specific causation. Diane has tackled medical and scientific literature related to a wide range of human cancers (bladder, liver, kidney, prostate, breast, ovarian, uterine, lung, leukemia and non-Hodgkin's lymphoma) as well as stroke and cardiac disease. The culmination of her careful research and preparation is the strategic and surgical depositions of the plaintiffs and their experts, always with an eye towards summary judgment or eliminating the claims remaining for trial.

Practice
- Litigation
- Life Sciences Litigation
- Product Liability
- Toxic and Environmental Tort
- Business Disputes and Counseling

Industries
- Chemical
- Life Sciences
- Manufacturing

Honors and Awards
- Mass Tort Litigation / Class Actions - Defendants (2020)
- Recognized on the New Jersey Super Lawyers List, Personal Injury-Products: Defense, 2016 - 2019.
- Recognized by New Jersey Law Journal in their annual "40 Under 40" list of attorneys, 2011.
- Recognized on the New Jersey Super Lawyers "Rising Stars" List, 2009 -2010, 2013.

Education
- Villanova University School of Law, Villanova, PA, J.D., 2000 - Champion, 1999 National Family Law Appellate Moot Court Competition; Best Brief, 2000 National First Amendment Appellate Moot Court Competition
- Villanova University, Villanova, PA, B.A., cum laude, 1997 - Phi Kappa Phi National Honor Society; Phi Sigma Alpha National Political Science Honor Society



HOW TO LOSE AT TRIAL: A TUTORIAL

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How To Lose a Jury: Mistakes of Trust
Josh Lanning

Among the legions of research papers, blogs, columns, and testimonials about how to win over juries, one of the most critical concepts is also one of the simplest by far; juries listen to people they trust. A trial lawyer can give a Shakespearean opening, have every objection sustained, devastate key witnesses on cross, and deliver an Academy Award-worthy closing argument. But if the jury does not trust her, she will lose; or, if she wins, it will be in spite of her performance not because of it (despite what we often tell ourselves, the lawyers are only one of many influences on a final verdict).

Given the importance of a lawyer's credibility in the courtroom, it is a little shocking how few trial advocacy courses give much attention to the issue. As a baby trial lawyer (many eons ago on the plaintiffs' side), I was not particularly focused on it. I knew not to lie, and just by dint of natural temperament I have never been overly antagonistic. But if I am honest about what was really going on in my head back then: I was excited to use all my new trial tools; I wanted to rack up wins; and I wanted to impress all of my jurors with eloquent rhetoric and an astonishing command of law and facts. What I actually did was lose my first three jury trials. In fairness, given the same facts and witnesses, I do not think I would win any of them today. I do, however, think I might be able to keep the juries deliberating for more than 9 minutes – which is literally the time it took one those three to come back and shatter my dreams.

We win or we learn, however, and my winless record made me question whether I was focused on the right things. I was not. And over the next several trials, I began to realize that the trial was not about me at all. My job was honestly, clearly, and efficiently to deliver my client's story to the jury – and my vain goal of amazing jurors was actually getting in the way. This all really hit home after I trial I thought I would lose, but miraculously did not. It was a wrongful death case. The decedent was a father and his three kids all testified, along with his mother. Plaintiffs' expert was impressive and Plaintiffs' counsel was coming off a $5 million verdict in another county the month prior. A few days after the verdict came back in our favor, I received an e-mail with the subject line: "A message from juror # 4." It read:

> I wanted to write to let you know what a good job I felt you did in court for the past couple of weeks. I especially appreciated that you were respectful to all the witnesses and to opposing counsel. You came over as genuine and nice. I recognize that "niceness" may not be a description that attorneys yearn for, but, believe me, it wears well and is very refreshing. In this trial, [opposing counsel] illustrated the more adversarial style which I found rude, distasteful, and ultimately harmful to their case.
>
> I was impressed that you told the truth in your closing argument and did not attempt to correct testimony or sway our memories about evidence. I also noticed that you didn't have to stoop to these tactics because you prepared your case so well. Finally, I appreciated the fact that you took no cheap shots, and maintained integrity throughout the long and tedious process.

Just to be clear – this is not a humble brag. Apart from saying I was prepared, Juror #4 did not say a thing about

my stellar oratory or dazzling legal argument or really anything that trial lawyers think of as "talent." She said I was "nice" and "genuine" and "respectful" and that Plaintiffs' counsel was not. I re-read this e-mail before every trial because, after weeks of immersing myself in all the exhaustive details and most important arguments, it helps to remind me that all of that work might be for nothing if the jury doesn't believe I am worth trusting.

There are a million ways to lose credibility with the jury, but here are a three of the most effective:

Unearned Incredulity

As a lawyer walks into a courtroom deliver an opening statement, her mindset is about as distant as it will ever get from the folks sitting in the jury box. She has worked on the matter for many months if not years; she has culled all of the key facts to make her case; in some cases she may have a well-earned dislike of opposing counsel for bad behavior in discovery; and she has a client watching her every move expecting a return on value for his investment in her.

Jurors don't know or care about any of that. They are hearing everything for the first time. In fact it is their job at that stage to have no preconceived notions about who is right. Jurors have no way of knowing that the opposing party lied at his deposition, or that opposing counsel was sanctioned for withholding key documents in discovery. They just want to know what the case is about; and a heavy dose of righteous indignation out of the gate does not answer any of their questions. Picking early fights with opposing counsel, or voicing angry objections during openings statements are rarely a good idea. Once I watched a young lawyer quickly lose a jury during openings by, before even laying out the basics of the case, saying "I don't know what kind of fools the defendant thinks we are!!!!" Hit out of the gate with a wound up lawyer, jurors will begin to have serious reservations about your ability and commitment to be objective and honest when delivering facts to them. And if you can't tone it down to explain your case, their concerns are probably justified.

Lack of Humility

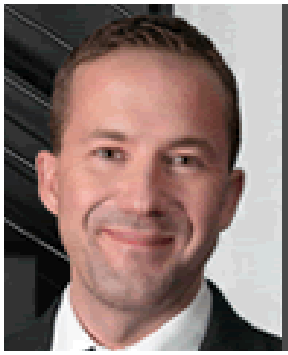
The perception that lawyers are arrogant, know-it-alls is not uncommon – and plenty of lawyers are less than helpful in dispelling the stereotype. Thus, consciously or unconsciously, many jurors will be waiting for signs of arrogance and, when they find them, will be more than happy to place you in a bucket with other egomaniacs. Moreover, they will resent that the law requires them to sit and listen to you. The advice blogs tend to focus on the lawyer's language in making this point (e.g. don't use "legalese", don't "we lawyers know"). But in my experience the best barometer of humility is how you treat the other people in the courtroom. Most lawyers are respectful to the judge because she is the boss – but jurors do not typically identify with the judge, who sits up on her throne with a big robe and calls all the shots. They identify with the court reporter (who has to simply listen to everything and be quiet like they do). They identify with the judge's clerk. They may identify with the junior associate on your trial team. If you're lucky, they'll identify with your client, and watch closely how you treat him during the trial. Jurors are smart enough to know that people who are humble and respectful only part of the time are not really humble or respectful at all.

Hiding the Ball

This one should be obvious. If jurors think you are trying to keep information from them, they will not trust you. The vast majority of jurors I've experienced are conscientious and want to get to the right result. They listen, if permitted take notes, and have vigorous discussions once the deliberation room doors close. They don't particularly care about technical rules of evidence, and their trust is lost if they believe you are working to prevent them from having the facts to do their job. Even the perception that you do not trust them with all of the facts can be game changing. Everyone knows about "picking your objections" so the jury doesn't think you are afraid of the facts. But the issue can arise in surprising ways. In one devastating example (fortunately from a mock jury exercise prior to trial) my trial partner was going through a PowerPoint presentation and began to run out of time. Realizing this, he flashed through a couple of slides that were not critical, and wrapped up his presentation. Frankly, I did not think anything of it. Some of our "jurors" however, were incensed. As we watched them deliberate, we heard comments like: "Did you see him quickly put the slide up and take it down?" "Yep. He definitely did not want us to know what it said!" "He's hiding something for sure." We were a bit stunned, but in retrospect probably should not have been. Our mistake was in failing to include the jury in the process – a simple, self-deprecating comment about time-management would have gone a long way toward preventing the inference of deceit.

There are of course plenty more, and they are all important. The critical thing about mistakes that hurt a lawyer's credibility with the jury is that they are so hard to fix. Once trust is gone, it is virtually impossible to get it back in the short time span of a trial. Further, while other trial mistakes are self-contained (the jury might be annoyed that your deposition clips did not have working

audio but they'll likely realize it was an honest mistake), a mistake of trust keeps giving, and everything you tell the jury afterward will be suspect. The good news is that preventing mistakes of trust is not complicated – simply be nice, be genuine, and be respectful.



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Josh Lanning brings considerable trial and litigation experience to his cases with a wide-ranging background in complex commercial disputes. Lanning has tried numerous cases to court decision or jury verdict and has successfully argued state and federal appeals in areas ranging from constitutional law to securities entitlements. Lanning focuses his practice on antitrust and commercial litigation, including matters involving state and federal antitrust laws; complex contractual disputes; fraud and other business torts; Civil RICO; unfair commercial practices; securities fraud; intellectual property; and fiduciary duties. In addition, Lanning has managed multiple internal investigations for clients including Fortune 500 companies and local government bodies.

Lanning has represented plaintiffs and defendants in state and federal courts throughout North Carolina as well as in a number of other jurisdictions, having litigated significant disputes on behalf of his clients in Connecticut, Massachusetts, New York, New Jersey, Florida, Maine, Georgia, Utah, Nebraska, Texas, and Louisiana. His clients are a diverse set of people and businesses ranging from individuals and families to large national banking institutions.

In addition, Lanning has made pro bono matters an important part of his litigation practice. His experience includes representing prisoners in need of adequate medical care; advocating for special needs children requesting special education services under the federal Individuals with Disabilities Education Act; helping battered spouses obtain protective orders; representing families facing eviction; and assisting in obtaining debt relief for low-income families who were victims of a nationwide fraud ring.

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- Employment & ERISA Litigation
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- Financial Services Litigation
- International Dispute Resolution
- Litigation
- Mediation and Arbitration Services
- Securities Litigation
- White Collar, Regulatory Defense, and Investigations

Representative Matters

- Defending large financial institution in multiple class actions asserting anti-competitive practices arising from alleged manipulation of foreign exchange markets;
- Represented large financial institution in class action arising from an independent investment advisor's Ponzi scheme;
- Defended several prominent construction companies against competitors' Civil RICO claims alleging public bid-rigging scheme;
- Represented a family business in action for securities fraud to recoup multi-million dollar investment funds obtained by material misrepresentation;

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- B.A., University of North Carolina, 1995 (Distinction, Highest Honors)
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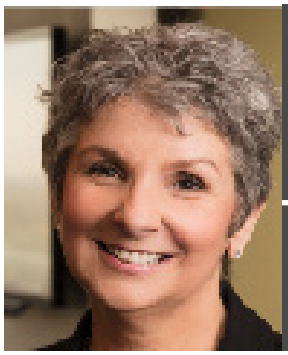

CRACKING THE CODE: RISK MITIGATION AND LITIGATION CONSIDERATIONS FOR THE SMART PRODUCT

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Cracking The Code: Risk Mitigation and Litigation Concerns for the Smart Product
Patrick G. Seyferth

Americans are increasingly reliant on Internet-equipped technology to perform a variety of tasks. Commonplace devices such as Amazon Echo, Google Home, and Apple HomePod allow the user to control a plethora of other devices in the house by voice. This is made possible by Apple and other electronics retailers whose devices connect not only to the Internet but also to one another. Traditional appliances have been overhauled and released to the public as digitally connected devices – baby monitors, ovens, even washers and dryers. Many homes are now integrated even more fully with the Internet through the proliferation of remote security systems, which typically take the form of cameras and microphones throughout the home that can be monitored anywhere from phones, tablets, or computers. Transportation has seen major leaps in connectivity, as well; from personal automobiles to passenger airliners, internet-connected technology is being leveraged to enhance safety and functionality. Innovations such as these provide benefits to the consumer. But they also introduce potential problems – such as hacking and malfunctions – that companies must manage to mitigate risk.

New Technological Horizons

The single biggest product liability story of this year has unquestionably been the saga of the Boeing 737 MAX, claimed to have been rushed through production to compete with chief rival Airbus' 320neo. It is alleged that the MAX was intentionally designed within the scope of the 737's original FAA certification to keep costs and turnaround time at a minimum. Reportedly, during testing Boeing found that under certain circumstances – albeit circumstances no passenger pilot would likely enter – the MAX was prone to stall where its predecessors were not. To avoid a lengthy and expensive re-certification, Boeing is alleged to have opted to add the Maneuvering Characteristics Augmentation System (MCAS), an automated stabilizer. MCAS worked so well in testing Boeing opted not to specify the program's existence to either the FAA or prospective MAX pilots. In the fatal crashes in Indonesia and Ethiopia, the ghost system allegedly activated to prevent a stall that was not there. MCAS could be counteracted by a skilled pilot familiar with the 737's systems and aerodynamics more generally. The night before the first crash in Indonesia, MCAS deployed on the same plane but was eventually deactivated by an unnamed person in the cockpit.[1] [2]

One fact often not emphasized is that these crashes also occurred in developing nations with a fraction of the flying hours required by the United States.[3] Smart products, as MCAS sadly shows, are only as smart as the users trained to handle them. The Boeing 737 was initially certified in 1968, fifty-one years ago. The U.S. Office of Special Counsel has recently aired allegations that the FAA itself was "misleading" in aspects of its reporting on pilot training and competency.[4] Whatever the eventual outcome of the Boeing investigation, and

1 https://www.nytimes.com/2019/09/18/magazine/boeing-737-max-crashes.html

2 https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing-doomed-the-737-max-11565966629

3 https://www.usatoday.com/story/news/nation/2019/07/06/boeing-737-max-crash-grounded-problems-flight-training-pilots-faa/1641781001/

4 https://www.msn.com/en-au/money/company-news/faa-chief-invites-boeing-737-max-feedback-from-divided-world-regulators/ar-AAHJZzp

its import for the future of connected devices, it is clear that manufacturers, users, and regulators are susceptible to underestimating the import of today's boom in smart products.

Hackers are targeting similar connected devices faster than cybersecurity and legal professionals can keep up with. While some instances of hacking have involved relatively harmless gadgets such as virtual assistants, others have attacked machines with life-or-death implications such as automobiles and pacemakers. In one troubling instance, researchers were able to infiltrate an Amazon Echo with custom spyware and take full control of the device, including critical functions such as its microphone.[5] While this attack was executed by so-called "white-hat" hackers – those who race to find potential Achilles' heels before malicious, criminal hackers do – and the flaw was quickly patched by Amazon, in other instances "black-hat" hackers have beat the good guys to the punch. In South Carolina, one family found itself at the mercy of an unknown hacker who was controlling their baby monitor from afar – despite researchers agreeing that the infant's mother adhered to basic cybersecurity best practices.[6] Even more unsettling is the potential for hackers to literally stop a heartbeat at a keystroke. White-hat hackers last year engineered a way to place malware onto life-saving devices such as insulin pumps and pacemakers, raising a whole host of chilling possibilities.[7]

Another example is that of "connected vehicles" – an umbrella term for an array of features, one, some, or all of which may be in a particular vehicle – linked to the Internet and consequently vulnerable to Internet hacking. Starting with the advent of blind spot warnings in 2004, automakers have gradually instituted a raft of safety and convenience features administered by a computer. Automatic braking first found its way into cars as early as 2010; many technologies even more common in cars, like live traffic feeds on navigation systems such as have been around for much of the decade, create further openings for hackers. Mirroring the proliferation of virtual assistants in the home and in mobile phones, many cars now come equipped with not only Bluetooth but Siri, Alexa, or the like. Functions previously carried out by a physical key in proximity to the car – remote start, the panic button, even simple locking and unlocking – can often be activated from a mobile phone app.[8] Parking-assist cameras have been in cars a relatively long time; but now cameras have migrated from the exterior to the interior, enabling drivers to monitor their passengers and valets.[9] Cameras are also used to track head and eye placement and alert those who fail to keep their eyes on the road.[10] Some automakers are pushing past mere connectivity – new technologies like Nissan's "ProPILOT" and Volvo's "Pilot Assist" are being used to assess road conditions and drive the car accordingly.[11] [12] All these innovations, control-based and warning-based alike, are being incorporated into vehicles at unprecedented levels. Automakers totaling nearly 60% of U.S. market share have promised full-fleet connectivity by 2022 or earlier, to the point that the number of connected vehicles to be shipped in the year 2021 is projected at a staggering 94 million.[13] [14]

In recent years white-hat hackers have staged a number of successful intrusions into connected cars sold by a number of different companies. Tesla, for example, has encouraged white-hats to hack its vehicles and has to date paid out hundreds of thousands of dollars to those able to uncover vulnerabilities. The latest hack came at a Vancouver hacking conference in March 2019, following previous hacks of Tesla cars in 2016 and 2017.[15] Perhaps as a result of these and other high-profile incidents, a July 2019 survey found that only 36% of consumers expressed confidence in the future of self-driving vehicles. And this problem isn't even confined to connected automobiles, either; in that same month the Department of Homeland Security issued a warning explaining that connected systems also create a hacking vulnerability in small planes. Given physical access to the aircraft, a hacker could use a special device to gain access and manipulate flight instruments.[16] And NYU's Tandon School of Engineering has shown that "a data-driven attack strategy" has the near-future potential to use connected electric vehicle charging stations to bring down the entire power grid of Manhattan.[17]

Cyber-Litigation

Perhaps owing to cybersecurity's growing presence on governmental radar, investigation and/or legal action following hacking incidents or even suspicions of such

5 https://www.tomsguide.com/us/amazon-echo-spy-bug-defcon,news-27788.html

6 https://www.npr.org/sections/thetwo-way/2018/06/05/617196788/s-c-mom-says-baby-monitor-was-hacked-experts-say-many-devices-are-vulnerable

7 https://www.wired.com/story/pacemaker-hack-malware-black-hat/

8 https://www.theguardian.com/technology/2017/jul/31/tesla-model-3-electric-car-doesnt-have-key-things-we-learned-speedometer-battery-sleep

9 https://www.pcmag.com/news/326494/chevy-valet-mode-is-a-nanny-cam-for-your-car

10 http://www.motortrend.com/news/gm-super-cruise-2018-cadillac-ct6-with-auto-pilot/

11 https://www.sae.org/news/2018/01/nissans-propilot-assist-is-more-than-lane-keeping

12 https://www.autotrader.com/car-info/volvos-vision-2020-and-pilot-assist-254811

13 https://www.businessinsider.com/internet-of-things-connected-smart-cars-2016-10

14 https://www.forbes.com/sites/alanohnsman/2019/07/31/safety-group-says-a-50-cent-kill-switch-curbs-security-risk-of-hackable-cars/#677002fc3af1

15 https://electrek.co/2019/03/23/tesla-model-3-hacker-competition-crack/

16 https://www.bloomberg.com/news/articles/2019-07-30/apnewsbreak-us-issues-hacking-alert-for-small-planes

17 https://www.utilitydive.com/news/simultaneous-hack-of-ev-chargers-could-cause-manhattan-blackout-nyu-resear/560974/

risk to consumers is possible. For example, the FTC sued Wyndham Worldwide Corporation over allegations three of its franchised hotels neglected to secure the personally identifying information and payment data of its guests. The court ruled in the FTC's favor on the basis of a "common enterprise theory" which held the parent was liable for its subsidiaries' mistakes. Wyndham lost its appeal in the Third Circuit, which found that the Federal Trade Commission Act's ban on "unfair or deceptive acts or practices" gave the FTC remit to file suit against Wyndham.[18] The decision gives the FTC and other government agencies precedent to further pursue cybersecurity claims.

Management of cyber risk can be summarized via three main principles: choice, security, and accountability. The first strategy – consumer choice – is mandatory under Europe's General Data Protection Regulation (GDPR), a fact states are becoming more aware of. Consider Skuro v. BMW of North America, LLC, a class action in California in which the plaintiffs alleged that BMW taped its customer service helpline without prior disclosure that it was doing so.[19] Skuro exemplifies the extensive exposure businesses create without providing such notice; BMW was obliged to pay out $50 to every customer affected or to provide them 6 months free service. It is thus paramount that customers are given notice of and opportunity to consent to privacy policies. Security is another key facet of any good risk management strategy. With respect to connected vehicles, one study recommended that the addition of a simple, 50-cent 'kill switch' reduced security risks to a significant degree while consumers await more airtight and permanent cybersecurity precautions.[20] The final cornerstone is accountability. More and more governments are passing legislation aimed in part at holding businesses liable for security lapses in hopes of spurring security improvements; to date the European Union has been the leader on this, but the U.S. is gradually following suit.

Relevant Legislation

Passed in April 2016 and implemented in May 2018, the European Union's GDPR may be the most sweeping change to global privacy law in decades. Intended to synchronize data protection protocols across the EU, the legislation binds not only EU-based businesses but any entities that handle data within the Union. The GDPR endows individuals with an unprecedented package of consent rights; among these are the right to be informed, the right of access, the right of rectification, the right to erasure, the right to restrict processing, the right to data portability, and the right to object. Even more important to affected companies is the sheer robustness with which the law punishes non-compliant businesses; penalties are capped at 4% of global revenues or €20 million, whichever is higher.[21] What's more, China has moved to toughen up its own privacy laws to an extent that the Center for Strategic & International Studies pronounced "more far-reaching" and with "more onerous requirements" than the GDPR, "leading the United States to be more isolated with U.S. companies in reactive mode."[22] The increased rigor of these privacy rules will likely slow automakers' plans to monetize data, especially in the affected regions and with regard to the sale of analytics and information to third parties.

Washington D.C. has demonstrated a growing awareness of the cybersecurity menace – if not a sufficiently urgent one – and has kicked out a corresponding rise in bills drafted to combat it. Congress's first major passage of computer-related legislation occurred as early as 1986, when the Computer Fraud and Abuse Act first declared hacking to be a crime and provided hacking victims the ability to pursue a civil action against the hacker.[23] Interpreting connected vehicles as computers within the scope of the CFAA, it is thus a felony to hack a vehicle without permission. More recently, the Cybersecurity Information Sharing Act, passed in 2015, charges certain Cabinet departments with disclosing cybersecurity threat information to private and public entities under threat, and provides that "private entities may monitor and operate defensive measures on: (1) their own information systems; and (2) with written consent, the information systems of other private or government entities."[24] The Department of Homeland Security followed up the passage of CISA with a February 2016 memo detailing for businesses and other "non-federal entities" how they could benefit from the law's provisions.[25] Further cybersecurity legislation has been mired in committee. Among these is the Internet of Things Cybersecurity Improvement Act, which would prohibit hardcoded login credentials and require vendors to "ensure that their devices are patchable and are free from already known vulnerabilities when sold."[26] Another piece of proposed legislation in the current Congress, the SPY Car Act, aims to address the vulnerabilities of

18 https://harvardlawreview.org/2016/02/ftc-v-wyndham-worldwide-corp/

19 https://classactionlawsuitsinthenews.com/class-action-lawsuit-settlements/bmw-assist-class-action-settlement-of-bmw-assist-call-monitoring-or-recording-class-action-lawsuit/

20 https://www.forbes.com/sites/alanohnsman/2019/07/31/safety-group-says-a-50-cent-kill-switch-curbs-security-risk-of-hackable-cars/#677002fc3af1

21 https://gdpr.eu/what-is-gdpr/

22 https://www.csis.org/analysis/new-china-data-privacy-standard-looks-more-far-reaching-gdpr

23 18 U.S.C. § 1030(a)(2)(C)

24 S. 754; 114th Congress

25 https://www.us-cert.gov/sites/default/files/ais_files/Non-Federal_Entity_Sharing_Guidance_%28Sec%20105%28a%29%29.pdf

26 H.R. 1668, S. 734; 116th Congress

connected vehicles specifically by directing the FTC and NHTSA to establish federal standards for driver privacy and cybersecurity. Under this legislation, any OEM found to have been hacked due to a lack of built-in security controls would face a fine of $5000 per car. Additionally, connected vehicles would be equipped with a "cyber dashboard", designed to provide consumers with an easily digestible overview of the OEM-installed security features.[27]

Certain states have been more successful than the federal government in terms of passing cybersecurity legislation. 2018's California Consumer Privacy Act, "America's GDPR" and the first such law in the nation, endows consumers with many of the same rights as the European original but stops short of a right to correction and defines most rights somewhat more narrowly. However, the CCPA does expand on some facets of the GDPR, most notably in not capping penalties for violators at all.[28] Nevada's even newer privacy law, SB 220, offers a relatively tamer counterpoint to neighboring California's CCPA. Unlike that law, and Europe's GDPR, Nevada does not give its consumers any right to access, portability, deletion, or non-discrimination. Nevada also does not require an "opt-in" to data selling or a "Do Not Sell" button as California mandates. Lastly, SB 220 contains a narrower definition of protected data than the CCPA.[29] Nevada shows, then, the extent to which cybersecurity laws will differ greatly as they are ratified in greater numbers of states. One thing is clear, however; disparities in privacy protections across state lines notwithstanding, there are more packages of legislation like California's and Nevada's on the way. As of 2019, all 50 states, the District of Columbia, Puerto Rico, and Guam had laws requiring consumers be alerted to a security breach of their personal data, and 21 state legislatures weighed action to alter those laws.[30]

Takeaways

There is a surplus of practical strategies businesses can pursue right now to bolster cybersecurity both in regard to connected vehicles and the digital sphere more generally. It is crucial to stay updated on relevant events in the news. Physical harm isn't the sole determinant of cost in a hacking incident; financial harm can alone be crippling. Getting in front of potential claims necessitates a well-trained consumer operations department; security hacks may very well be mistakes or oversights of a business's own making. A plan on dealing with hacks when they do arise is a must; coordinating such best practices will often involve complicated coordination between multiple departments. And when a potential threat does surface - speaking up is always the best policy.

Businesses can further secure their digital presences by exercising due care by design. Designing and building privacy and security protections into products from the outset is critical, as is integrating these same protections into everyday business practices. Companies can cultivate a top-to-bottom emphasis on security with executive-level commitment and employee training sessions. Such a reworking of the company culture creates efficiency, reduces risk, creates a competitive advantage, and reduces costs.

Despite the stringency of the GDPR and other beefed-up privacy standards, such laws are a boon to companies as well as consumers. An overwhelming consensus of consumers prefers to engage with companies which they trust to protect their personal information. 89% of American consumers surveyed said they would steer clear of businesses that they did not trust in this regard, giving businesses not only a legal but a financial incentive to take data protection seriously. What's more, 91% would do more business with those companies with independently verified privacy policies, and 68% of U.S. consumers take privacy into consideration before doing business at all. Regarding connected vehicles, a survey by KPMG found that 82% of respondents would "never" purchase a car from a carmaker affected by a vehicle hacking. [31] The takeaway is clear: requiring and upholding a high standard of privacy protection safeguards businesses and their reputations as well as their customers.

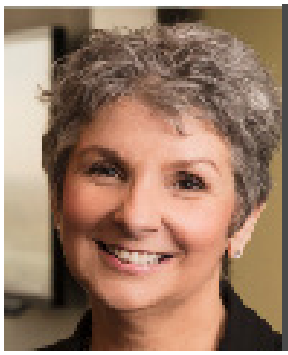
27 S. 2182; 116th Congress

28 https://www.pwc.com/us/en/services/consulting/cybersecurity/california-consumer-privacy-act.html

29 https://www.insideprivacy.com/united-states/state-legislatures/nevadas-new-consumer-privacy-law-departs-significantly-from-the-california-ccpa/

30 www.ncsl.org/research/telecommunications-and-information-technology/2019-security-breach-legislation.aspx

31 http://www.techrepublic.com/article/why-the-age-of-connected-cars-presents-a-very-real-threat-in-cybersecurity/



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