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INTELLECTUAL PROPERTY: WHAT TO REVEAL, AND WHAT TO KEEP SECRET

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Intellectual Property: What to Reveal, and What to Keep Secret

Terrance C. Newby

Introduction

American law provides several tools for inventors, creators and authors to protect their intellectual property. Trademarks and trade dress protect brands and brand names. Copyrights protect written works of literature, art, music, theater, and some creative designs. And patents and trade secrets can both be used to protect proprietary inventions. In some cases, an invention could be protected by both a patent and a trade secret.

But although patents and trade secrets can both be used to protect inventions, there are critical differences between the two forms of protection. This article discusses the key differences between the two, and how recent developments in federal law and Supreme Court jurisprudence will affect the scope of protection offered by both tools. For some companies, patents are the best way of protecting intellectual property. For others, trade secrets are the only available tool. But in most cases, whether to use patents or trade secrets to protect critical intellectual property will depend on many factors. Whether you manage litigation for a multi-billion dollar conglomerate, or a smaller family-owned business, understanding the differences between patents and trade secrets, as well as new developments in the law is critical to managing your company's or client's intellectual property.

Elements of patentability: patentable subject matter is governed by federal law.

There are two federal statutes that determine whether an invention is patentable – 35 USC Section 101 and 35 USC Section 103.

Section 101 reads in part as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Section 103 reads in part as follows:

> A patent for a claimed invention may not be obtained . . . if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.

Taken together, these two provisions sum up the scope of what is patentable – the claimed invention must be novel, useful, and non-obvious, more commonly known as the "new, useful, and non-obvious" test.

Patentable subject matter can include any process, machine, manufacture, composition of matter or improvement. Congress intended the scope of patentable statutory subject matter to "include anything under the sun that is made by man." Diamond v. Chakrabarty, 447 U.S. 303 (1980) (man-made bacterium is patentable subject matter).

The first two elements of the "new, useful, and non-obvious" test are easy to establish, and rarely controversial. The third element, "non-obvious," is more complicated. Determining what "would have been obvious to a person having ordinary skill in the art" is a question courts have struggled to define. In 1966, the Supreme Court offered this somewhat circular definition of what is obvious:

> An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent.
> Graham v. John Deere Co., 383 U.S. 1 (1966).

The Graham court found a patent for a plow obvious when that patent did nothing more than incorporate known mechanical elements in a predictable way.

Although the Graham Court's definition has been criticized as being unhelpful – "the difference between the new thing and what was known before is not considered sufficiently great" – it is still recognized as the test for obviousness.

Laws of nature, natural phenomena and abstract ideas are not patentable.

Although the scope of patentable subject matter is broad, it is not unlimited. Laws of nature, natural phenomena, and abstract ideas have never been patentable, as explained by the Supreme Court:

> A new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that E=mc2; nor could Newton have patented the law of gravity. Such discoveries are manifestations of . . . nature, free to all men and reserved exclusively to none.
> Diamond v. Chakrabarty, 447 U.S. 303 (1980).

Elements of a trade secret.

The scope of inventions that can be protected by trade secret law is also broad. The Uniform Trade Secrets Act defines a trade secret as follows:

> Information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use
>
> Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Uniform Trade Secret Act (UTSA) was created in 1985 by the National Conference of Commissioners on Uniform State Laws. It has since been codified into law by most states.

There is no subject matter limit for trade secrets. Technical information can include formulas, recipes, patterns, compilations, databases, programs, source code, devices, research, prototypes, algorithms, methods, techniques, processes, know how, etc.

Non-technical information can include market analyses, strategic information, business plans, financial information, pricing, customer information, etc.

Like patents, the scope of trade secrets is broad, but not unlimited. Information that is typically not considered a trade secret includes the following:

Customer lists, unless they include payment or sales history; generally known industry principles; information that is readily ascertainable by proper means; or information that comprises general skills and knowledge acquired in the course of employment.

For example in Harley Auto. Group, Inc. v. AP Supply, Inc. (D. Minn. Dec. 23, 2013), a federal district court in Minnesota found that a list of car dealerships, account numbers, addresses, telephone numbers, and sometimes the name of a contact person were not considered trade secrets.

The trade secret owner bears the burden of maintaining the trade secret.

As discussed above, trade secrets must not be generally known to the public or in the relevant industry. In addition, trade secrets must not be readily ascertainable by proper (legal) means, i.e, the trade secret technology cannot be easily reverse-engineered. And the trade secret must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy. If the trade secret owner does not maintain the secrecy of the technology or invention, trade secret protection disappears.

Famous trade secrets include the Coca-Cola Formula; the "special sauce" used in the McDonald's Big Mac; the Krispy Kreme donut recipe; the formula for WD-40; and KFC's recipe for the Colonel's 11 secret herbs and spices. The companies who hold each of these trade secrets go to extraordinary lengths to protect and maintain these trade secrets. For example, KFC's blend of 11 herbs

and spices is widely considered one of the biggest trade secrets in the world. KFC says that the original recipe of 11 secret herbs and spices was handwritten in 1940 by Harland "Colonel" Sanders. Today, KFC keeps the handwritten original recipe locked in a digital safe that is allegedly surrounded by two feet of concrete and monitored 24 hours a day by a video and motion detection surveillance system.

Length of Protection for Patents and Trade Secrets.

Utility and plant patents are valid for 20 years from the date of the patent application (not the issue date). Design patents last 15 years from the date the patent is granted. Regardless of the date of grant or application, patent protection ends when the patent is invalidated or rendered unenforceable.

Unlike patents, there is no expiration date for trade secrets. A trade secret can potentially last forever, if the secret is maintained, as remains the case with Coca-Cola and Krispy Kreme. However, trade secret protection ends immediately when the secret becomes public, or if someone legally reverse-engineers or otherwise breaks down or discovers the secret.

Benefits and Advantages of Patents.

There are several advantages that patents have over trade secrets. First, a valid patent provides a guaranteed monopoly for the patent term. Patents can be sold or licensed, and can generate revenue throughout the life of the patent. Moreover, the scope of the invention is clear, because a patentee is obligated to explain in great detail what the invention is. And because patents are public, competitors are aware of your invention, which deters competition.

Patents also allow owners to protect their core innovations and technology against independent development or invention from third parties. Finally, patents help create space in crowded markets.

Disadvantages of Patents.

Although patents have some clear advantages, many experts believe the disadvantages of patents outweigh the benefits. First, patents are extremely expensive to obtain and maintain – applicants will have to pay attorneys' fees to prepare the application, and respond to USPTO office actions. Extremely complicated or contested patents can cost more than $20,000 from application to issuance. And because they are public, anyone can make the invention after the patent expires – the monopoly and protection end the day the patent expires. Moreover, the patent owner must pay to enforce the patent by suing infringers. Litigation costs through trial can be over $5 million for extremely complicated technology patents.

In addition to cost, the Supreme Court has issued several decisions within the last ten years that have restricted patent owners' rights. These include Bilski v. Kappos, 561 U.S. 593 (2010), which made it more difficult to enforce patent claims involving business methods and abstract ideas; Alice Corp. v. CLS Bank International, 134 S. Ct. 2347 (2014), which made it more difficult to enforce patent claims involving computer implemented business methods; Nautilus, Inc. v. Biosig Instruments, 134 S. Ct. 2120 (2014), which made it easier for defendants to argue patent claims are indefinite under Section 112 of the patent code; and Limelight Networks, Inc. v. Akamai Technologies, Inc., 134 S. Ct. 2111 (2014), which made it harder to prove infringement when more than one actor has infringed, but no actor has performed all the steps of a patent claim.

Finally, there are the many statutory defenses to a patent infringement claim. Patent lawsuits are often described as a Defendant's paradise, due to the large number of statutory defenses to a patent infringement claim. These defenses include anticipation based on a single prior art source, 35 USC Section 102; obviousness based on multiple prior art sources, 35 USC Section 103; indefiniteness due to failure to provide a clear written description of the invention, 35 USC Section 112; and inequitable conduct for omitting material information, or committing fraud on the USPTO, 37 CFR Section 1.56. A defendant who can prove any one of these defenses can get the asserted patent claim thrown out.

Benefits and Advantages of Trade Secrets.

Trade secrets have no expiration date, if the trade secret owner can keep them secret. There are no filing fees or costs, because trade secrets are not filed with any government agency. And trade secrets can be easier to enforce, if the scope of the trade secret is limited to a small manageable universe of individuals.

Disadvantages of Trade Secrets.

Unlike patents, trade secrets offer no protection if the secret is independently developed by others. Thus, someone toiling in a lab who happens to create the same formula WD-40 uses for its secret lubricant product can use that formula without fear of a lawsuit from WD-40. Independent creation by a third party eliminates the trade secret.

And the owner of the trade secret must protect the secret

at all times. Failure to do so eliminates protection.

Finally, as shown with the saga of KFC's now not-so-secret recipe, third parties can reveal the trade secret, without the trade secret owner's knowledge or consent.

In 2016, a Chicago Tribune reporter named Jay Jones was assigned to visit the Harland Sanders Cafe and Museum, the first fried chicken restaurant opened by Harland "Colonel" Sanders, in Corbin, Kentucky. Jones planned to write a piece about the museum for a feature entitled "Fork in the Road," a regular column in the Chicago Tribune's Travel section.

While in Corbin, he met long-time Corbin resident Joe Ledington, who as a boy worked in the original Harland Sanders restaurant. Ledington was Harland "Colonel" Sanders' nephew, and had worked for many years in the restaurant under his uncle's tutelage.

While giving Jones a tour of the restaurant, Ledington retrieved the last will and testament of Claudia Sanders, Harland Sanders's second wife and Joe Ledington's aunt. Inside the last and will testament was a crisply hand-written list of 11 herbs and spices, written in blue ink on a smooth piece of white paper. Ledington handed the list to Jones, who snapped a picture of the list with his cell phone camera. Jones then e-mailed the photo to his editors at the Chicago Tribune.

"That is the original 11 herbs and spices that were supposed to be so secretive," Ledington told reporter Jones about the piece of paper he had given Jones. At some point during the interview, Ledington began to realize the consequences of sharing the list with a newspaper reporter. Ledington later walked back his statement, saying the handwriting was not his uncle's and he did not know who wrote the list. "It could be; I don't know for sure," said Ledington, who acknowledged he had never shown the list to a reporter.

In August 2016, the Chicago Tribune made fried chicken in the newspaper's test kitchen, using the recipe from Ledington's hand-written list. After tinkering with the recipe for several hours, the Tribune's taste testers determined their chicken was "virtually indistinguishable from the batch bought at KFC." Based on this test, the Chicago Tribune concluded that it had indeed found and reproduced the Colonel's Secret Recipe, which KFC continues to keep in a locked vault.

KFC denies that Ledington's handwritten list is "The Colonel's Secret Recipe."

Whether Ledington's list really is the secret recipe is immaterial. Because the list was publicly obtained, anyone can now attempt to make the recipe shown, and determine for themselves whether the recipe is the secret recipe. This example highlights the principle danger of trade secrets – no matter what steps a company takes to secure its trade secrets – locked vaults, motion detectors, guard dogs – a third party can reveal the secret, and it will vanish instantly.

How to Protect Trade Secrets.

Although there is no fool-proof way to protect trade secrets, there are some best practices. For example, trade secret owners should insist on non-disclosure agreements for potential investors and buyers. Trade secret owners should also insist on non-compete and non-disclosure agreements for current employees and company principals. In most states, non-compete agreements are considered restrictive covenants, with limitations on enforcement. Trade secret owners should also limit access to trade secrets solely to those in the company who need to know the secrets.

Finally, trade secret owners should use password protection and encryption for those secrets that are kept in company databases.

When to Use Trade Secrets.

Trade secrets are most applicable in industries where the invention is not likely to be independently developed by others. Trade secrets are also ideal for inventions that are not easily reverse engineered to precision, for example chemical formulations (WD-40), or food or beverage recipes (Krispy Kreme donuts, KFC, Coca-Cola).

Trade secrets are not ideal for mechanical or electrical inventions, which can be easily disassembled, for example cell phones.

Remedies for Trade Secret Violations.

The Uniform Trade Secrets Act (UTSA) provides the following remedies:

Injunctive relief; damages for misappropriation, which can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation; attorney's fees, if willful and malicious misappropriation is found.

When to Use Patents.

Patents are ideal for innovations that are improvements on existing technology, but are easily reverse-engineered, such as electrical or mechanical inventions.

Patents protect against reverse engineering, and against subsequent independent invention by third parties.

In addition, patents are used as currency and defense in highly competitive industries, such as high technology and cell phones. The following list shows the companies that were awarded the most patents in 2018.

International Business Machines Corp	9100
Samsung Electronics Co Ltd	5850
Canon Inc	3056
Intel Corp	2735
LG Electronics Inc	2474
Taiwan Semiconductor Manufacturing Co (TSMC) Ltd	2465
Microsoft Technology Licensing LLC	2353
Qualcomm Inc	2300
Apple Inc	2160
Ford Global Technologies LLC	2123

The companies that were awarded the most patents are primarily in tech, notably cell phone companies.

Remedies for Patent Infringement.

A court can award damages adequate to compensate for the infringement, but in no event less than a reasonable royalty. Damages can also include lost profits. And the court may increase the damages up to three times the amount found or assessed (35 USC Sec. 284).

In addition, a court can award reasonable attorney fees to the prevailing party in exceptional cases. The "prevailing party" can be plaintiff or defendant (35 USC Sec. 285).

Finally, a court can award injunctive relief, 35 USC Sec. 283.

Effect of the federal Defend Trade Secrets Act.

An owner of a trade secret that is misappropriated may now bring a civil action under federal law if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce. 18 U.S.C. Sec. 1836 (b)(1). The DTSA was enacted into law by President Obama on May 11, 2016. Prior to the enactment of the DTSA, a trade secret owner's only remedies were under state law.

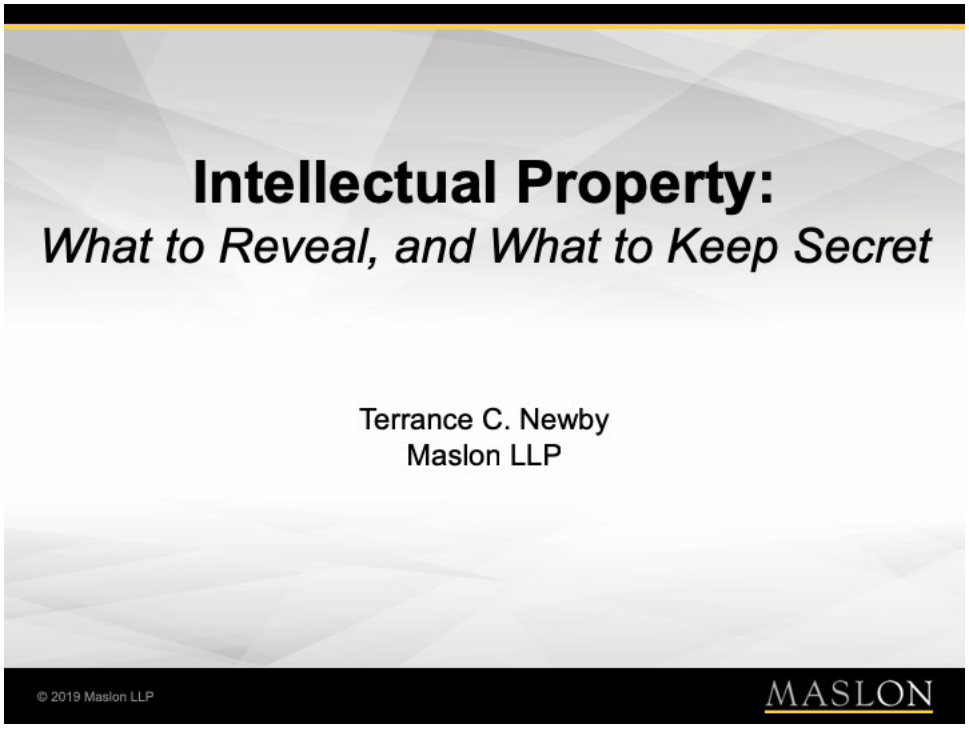
The DTSA contains several significant federal remedies for trade secret theft. A court can issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action. 18 U.S.C. Sec. 1836 (b)(2)(A).

And the DTSA can extend to conduct that occurs outside the United States, if the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or an act in furtherance of the offense was committed in the United States. 18 U.S.C. Sec. 1837.

Like its state counterpart the UTSA, the federal DTSA allows for injunctive relief, 18 USC Sec.1836(b)(3)(A); damages, 18 USC Sec.1836(b)(3)(B); exemplary damages in an amount not more than two times the amount of the damages awarded for willful and malicious misappropriation, 18 USC Sec.1836(b)(3)(C); and reasonable attorney's fees if the trade secret was willfully and maliciously misappropriated, 18 USC Sec.1836(b)(3)(D).

Conclusion

The DTSA gives trade secret holders a new and powerful weapon against theft of trade secrets. Contrast this new weapon with recent Supreme Court decisions, which have almost all limited or weakened patent holder's rights. And the DTSA expressly provides that it does not preempt state law, which means that state remedies under the Uniform Trade Secrets Act (UTSA) will continue to have the full force and effect of law. Trade secret owners can now use DTSA and MUTSA to protect trade secrets, which will have a profound impact on whether companies should use patents or trade secrets to protect valuable intellectual property.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Should you get a patent on that new invention, or keep it a trade secret?
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Elements of Patentability: Section 101

- **Patentable subject matter is governed by federal law:**
  - "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." (35 U.S.C. § 101)

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Elements of Patentability: Section 103

- "A patent for a claimed invention may not be obtained . . . if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains." (35 U.S.C. § 103)

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What is Patentable?

- Novel, useful, non-obvious, more commonly known as "new, useful, and non-obvious"
- Congress intended patentable statutory subject matter to "include anything under the sun that is made by man."
- *Diamond v. Chakrabarty*, 447 U.S. 303 (1980)

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What is Non-Obvious?

- "An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent." *Graham v. John Deere Co.*, 383 U.S. 1 (1966)

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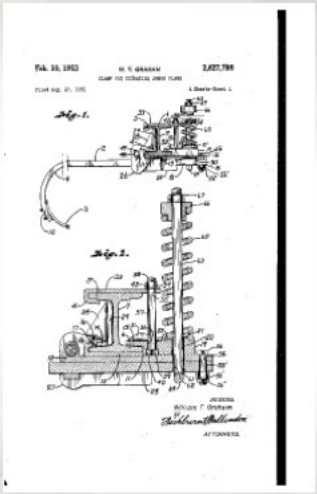
This Was Obvious



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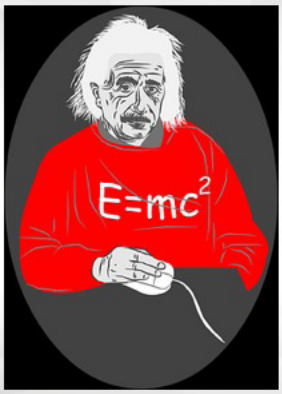
Laws of nature, natural phenomena or abstract ideas are not patentable.



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What is A Trade Secret?

- Information that:
  - Derives independent economic value from not being generally known or ascertainable to the public.
  - Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- (Uniform Trade Secrets Act with 1985 Amendments).

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Scope of Trade Secrets

- There is no subject matter limit.
- Virtually all technical information could qualify.
- Some categories of non-technical information can also be trade secrets:
  - Market analyses, strategic information, business plans, financial information, pricing, customer information, etc.

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What is *not* a Trade Secret?

- Customer lists - unless they include payment or sales history.
- Generally known industry principles.
- Information that is readily ascertainable by proper means, or information that comprises general skills and knowledge acquired in the course of employment.

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How are Trade Secrets Maintained?

- Must not be generally known
- Must not be readily ascertainable by proper (legal) means
  - *i.e*, it cannot be easily reverse-engineered
- Must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy

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Famous Trade Secrets

- The Coca-Cola Formula, known by the code name "Merchandise 7X." The formula dates back to 1886.

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Famous Trade Secrets

- McDonald's "Special Sauce" used in the Big Mac. Some have speculated that the "Special Sauce" is simply Thousand Island dressing. McDonald's denies this.

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Famous Trade Secrets

- Krispy Kreme opened in North Carolina in 1937. The donut recipe is locked in a vault in Winston-Salem.

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Famous Trade Secrets

- WD-40 was made in 1953 by chemists who were attempting to create a product to protect the Atlas missile from rust and corrosion.

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Famous Trade Secrets

Founded 1930, Louisville Kentucky, United States

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Trade Secret: KFC Original Recipe

- The original recipe of 11 secret herbs and spices was handwritten in 1940 by Harland "Colonel" Sanders.
- Today, KFC keeps the handwritten original recipe locked in a digital safe that is allegedly surrounded by two feet of concrete and monitored 24 hours a day by a video and motion detection surveillance system.

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Length of Protection for Patents

- Utility and plant patents are valid for 20 years from the date of the patent application (not the issue date).
- Design patents last 15 years from the date the patent is granted.
- Patent protection ends when the patent is invalidated or rendered unenforceable.

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Length of Protection for Trade Secrets

- There is no expiration date for trade secrets. A trade secret can potentially last forever, if the secret is maintained.

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Benefits and Advantages of Patents

- Guaranteed monopoly for the patent term.
- Patents can be sold or licensed, and generate revenue.
- The scope of the invention is clear.
- Patents are public which can deter competition.
- Protect core innovations.
- Defense against independent invention.

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Disadvantages of Patents: Cost

- Expensive to obtain and maintain. Extremely complicated or contested patents can cost more than $20,000.
- Because they are public, anyone can make the invention after the patent expires.
- Litigation costs through trial can be over $5 million.

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Disadvantages of Patents: Supreme Court Limits Some Patents

- Bilski v. Kappos, 561 U.S. 593 (2010)
- Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014)
- Nautilus, Inc. v. Biosig Instr., 134 S. Ct. 2120 (2014)
- Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111 (2014)

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Disadvantages of Patents: Many Statutory Defenses

- Patent lawsuits are often described as a "Defendant's paradise."
- Anticipation – 35 USC Section 102
- Obviousness – 35 USC Section 103
- Indefiniteness – 35 USC Section 112
- Inequitable conduct for omitting material information, or committing fraud on the USPTO – 37 CFR Section 1.56

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Benefits and Advantages of Trade Secrets

- No expiration date, if kept secret.
- No filing fees or costs – trade secrets are not filed with any government agency.
- Can be easier to enforce, if the scope of the trade secret is limited to a small universe of individuals.

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Disadvantages of Trade Secrets

- Unlike patents, trade secrets offer no protection if the secret is independently developed by others.
- The owner of the trade secret must protect the secret -- failure to do so eliminates protection.
- Third parties can reveal the trade secret without the trade secret owner's knowledge or consent.

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Difficulty of Protecting Trade Secrets

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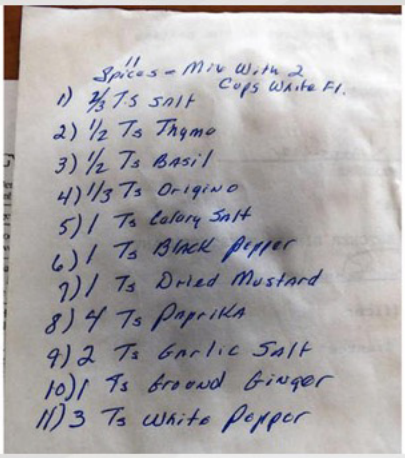
This Was In the Will



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Was the Secret Revealed?

- "That is the original 11 herbs and spices that were supposed to be so secretive," Ledington told reporter Jones.
- KFC denies that Ledington's handwritten list is "The Colonel's Secret Recipe."

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Was the Secret Revealed?

- In August 2016, the Chicago Tribune made fried chicken in the newspaper's test kitchen, using the recipe from Ledington's hand-written list.
- After trying several different mixes, the Tribune's taste testers determined their chicken was "virtually indistinguishable from the batch bought at KFC."

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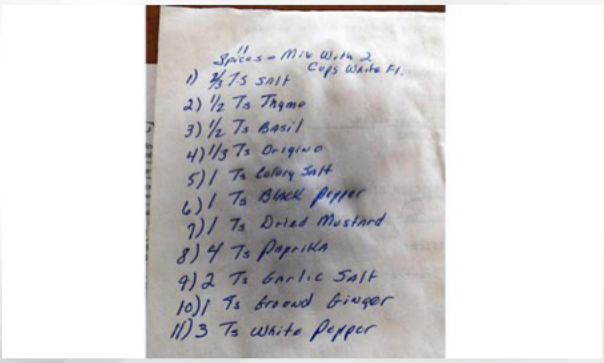
Was the Secret Revealed?

- KFC continues to deny Ledington's list is the Colonel's secret recipe.



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How to Protect Trade Secrets?

- Non-disclosure agreements for potential investors and buyers. Non-compete and non-disclosure agreements for current employees and principals.
- Limiting access to trade secrets solely to those who need to know.
- Password protection and encryption.

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How to Protect Trade Secrets?

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When to Use Trade Secrets?

- Industries where the invention is not likely to be independently developed by others.
- Trade secrets are not ideal for mechanical or electrical inventions, which can be easily disassembled.

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Remedies for Trade Secret Violations

- **1985 Uniform Trade Secrets Act Remedies.**

- Injunctive Relief.
- Damages, which can include both actual loss and unjust enrichment.
- Attorney's fees, if willful and malicious misappropriation is found.

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When to Use Patents?

- Patents are used for innovations that are improvements on existing technology, but are easily reverse-engineered, such as electrical or mechanical inventions.

- Patents protect against reverse engineering, and against subsequent independent invention.

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When to Use Patents

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Remedies for Patent Infringement

- Damages can include a reasonable royalty, or lost profits. The court may increase the damages up to three times the amount found or assessed (35 USC Sec. 284).
- Reasonable attorney fees to the prevailing party in exceptional cases (35 USC Sec. 285).
- Injunctive Relief (35 USC Sec. 283).

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Federal Defend Trade Secrets Act

- An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce (18 U.S.C. Sec. 1836 (b)(1)).
- Enacted into law by President Obama on May 11, 2016.

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Key Provisions Under the DTSA

- Court can order seizure of property; injunctive relief; and damages.
- DTSA can apply to conduct that occurs outside the U.S.
- Exemplary damages twice the amount of actual damages for willful and malicious conduct.
- Attorney's fees for willful and malicious conduct.

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DTSA Provides a New and Powerful Weapon Against Trade Secret Theft
Recent Supreme Court decisions have almost all limited or weakened patent holder's rights.
The DTSA expressly provides that it does not preempt state law. 18 USC Section 1838.
Trade secret owners can now use DTSA and UTSA to protect trade secrets in states that have enacted UTSA.
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Terry Newby has extensive experience assisting clients with their intellectual property, e-commerce, and complex commercial litigation needs. He has successfully represented clients in state and federal courts throughout the country in a broad range of infringement matters involving patent, trademark, copyright, and trade dress as well as licensing disputes. In addition, Terry has taken intellectual property matters to trial, including federal jury trials in patent infringement, trademark infringement, and false advertising cases under the Lanham Act. His clients include software companies, consumer products companies, e-commerce and emerging technology companies, and medical device companies.

With a relentless focus on practical solutions to difficult problems, Terry regularly helps his clients navigate complex intellectual property matters. He devotes a large part of his practice to proactively drafting IP licenses, including confidentiality and non-disclosure agreements and software license agreements, so his clients can avoid litigation. When litigation is the only remaining option, Terry has the litigation and trial experience necessary to protect his client's intellectual property. Counseling clients and providing practical, common sense solutions are the core of Terry's practice.

Terry has significant appellate experience and has briefed and argued appeals involving complex commercial disputes, patents, and trademarks in various jurisdictions, including the Federal Circuit Court of Appeals and appellate courts in Minnesota, Iowa, and Illinois. He is also licensed to appear before the United States Supreme Court.

Areas of Practice

- Appeals
- Business Litigation
- Competitive Practices/Unfair Competition
- Intellectual Property Litigation

Representative Jury Trial Cases

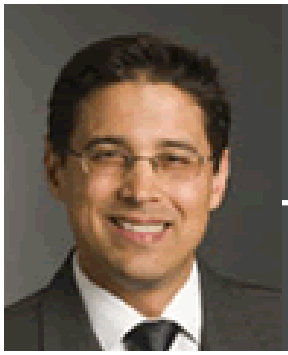
- GTT v. Emtrac, et. al, U.S. District Court, District of Minnesota. Trial counsel for defendants in a patent infringement case. Case was tried before a jury in 2013.
- National Products, Inc. v. Gamber Johnson, U.S. District Court, Western District of Washington. Trial counsel for defendants in a false advertising case under the Lanham Act. Case was tried before a jury in 2010.
- Carpad, Inc. v. Brookstone, Inc., U.S. District Court, District of Nevada. Trial counsel for defendants in a trademark infringement case under the Lanham Act. Case was tried before a jury in 2003.

Recognition

- Professor of the Year Award, William Mitchell College of Law, 2009-2010
- Pro Bono Attorney of the Year, Minnesota Legal Services Coalition, 1999 (Award for "extraordinary service" in providing fair access to justice.)
- Adult Achiever Recognition, YMCA of St. Paul Black Achievers Program (Responsible for preparation of materials and coordinating annual Mock Trial program for inner city youth of St. Paul from 1997-2000.)

Education

- William Mitchell College of Law - J.D., 1995
- University of Wisconsin, Madison - B.A., 1989



BREAKING BAD: CREATIVE SOLUTIONS FOR LITIGATING IN CHALLENGING JURISDICTIONS

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Breaking Bad – Creative Solutions for Litigating in Challenging Jurisdictions

Greg Marshall

Defending businesses in unfamiliar and challenging jurisdictions – like New Mexico – can present unique obstacles and unusual challenges. Greg Marshall will discuss creative solutions to defending problematic consumer litigation in places where the chips seem stacked against the company.

Every year the American Tort Reform Association ("ATRA") compiles its infamous list of "judicial hellholes" in which that organization attempts to identify where throughout the United States judges in civil cases seem to apply laws and court procedures unfairly, generally to the disadvantage of corporate defendants.[1] While the report attempts to single out the most unfavorable venues – California, Florida, and New York among the top – the list is by no means all-inclusive.

Real or perceived, unfairness in the civil justice system translates into big dollars in the aggregate. It drives up defense costs and verdicts, and consequently drives up settlements. To illustrate, the latest "judicial hellhole" report cited an October 2018 study by the U.S. Chamber Institute for Legal Reform, which estimated payments of $244 billion to injured claimants during calendar year 2016 (the most recent year such data was available for analysis), and another $135 billion paid to the attorneys prosecuting and defending those cases.[2] These are enormous sums.

But we hardly need to cite studies or statistics, as experienced counsel are acutely aware of the impact of venue on litigation costs, settlement values, and the size of judgments. Regardless of whether you agree with the methodologies employed by ATRA, experienced counsel know the warning signs of an unfriendly venue: courts who require only the barest of pleading standards; courts who rarely grant dispositive motions; courts with little or no proportionality in discovery matters; jurisdictions with generous consumer protection laws; and courts with a long history of head-line grabbing, eye-popping civil judgments.

My primary practice area is consumer financial services litigation, which means most of my clients are banks and lenders. Even with the height of the mortgage crises ten (10) years over, the political environment and public sentiment remains starkly negative, amplifying the effect of being sued in one of these challenging jurisdictions. This article discusses litigation strategies that can be employed when you find yourself in one of them.

Get out of Dodge (if you can)!

While it is axiomatic that you should raise personal jurisdiction challenges when you have them, the U.S. Supreme Court gave corporate defendants a powerful new argument in the personal jurisdiction area to limit the reach of multi-state putative class actions when they are filed in unfavorable jurisdictions, through the Bristol-Myers decision.[3] In-house counsel defending class and mass actions need to be aware of Bristol-Myers, and the brewing circuit split on whether it applies to class actions. To set the stage, we'll briefly review the law of personal

1 www.judicialhellholes.org

2 www.instituteforlegalreform.com

3 Bristol-Myers Squibb Co. v. Superior Court, 137 S.Ct. 1773 (2017).

jurisdiction.[4] Personal jurisdiction over a defendant must exist in one of two variants—general or specific.[5] General jurisdiction exists against a corporate defendant where that defendant is "at home"—not everywhere it does business.[6] "With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction'."[7] In contrast, specific personal jurisdiction is available only when the particular claim in suit "arise[s] out of or relate[s] to" the "defendant's contacts with the forum."[8]

Bristol-Myers — a company incorporated in Delaware and headquartered in New York — was sued in California state court by hundreds of plaintiffs from around the country over its blood-thinning medication, Plavix, in a "mass action."[9] Bristol-Myers argued that the court lacked jurisdiction over non-residents' claims. The California courts ruled against it, but the U.S. Supreme Court reversed. Applying settled specific jurisdiction principles, the Court held that because the non-residents were not prescribed, did not purchase, did not ingest, nor were injured by Plavix in California, there was no "connection between the forum and the specific claims at issue." The Court explained that "[t]he mere fact that [some] plaintiffs were prescribed, obtained, and ingested Plavix in California — and allegedly sustained the same injuries as did the nonresidents — does not allow the State to assert specific jurisdiction over the non-residents' claims." In sum, in Bristol-Myers, the Supreme Court mandated that each plaintiff must establish personal jurisdiction regardless whether it is established for another claimant in the action.

Because Bristol-Myers was decided in the mass action context, it doesn't expressly apply to class actions, as Justice Sotomayor observed in her dissent. While there may be reasons to distinguish mass and class actions,[10] the question has continued to percolate in the lower courts since, resulting in a notable split between the Northern District of Illinois (whose judges have consistently held that Bristol-Meyers applies to class actions)[11] and the Northern District of California (whose judges have generally disagreed).[12] None of the circuit courts have yet decided the issue. While the lower courts go both ways on the question, there is strong momentum in favor of applying Bristol-Meyers to class actions.[13]

If you are hit with a multi-state class action – and certainly a multi-state mass action – take a careful look at the developing law on Bristol-Myers and consider moving to dismiss (or moving to strike) non-resident claims as a means of removing the bulk of the claims (and the company's exposure) from an otherwise unfavorable jurisdiction.

Don't give up too easily on removal.

If you are stuck in a challenging jurisdiction, usually your next best option is removal to federal court. Federal judges are appointed for life, so they don't feel the pressures of appealing to constituents or campaign donors, as some of their state court counterparts. They tend to have more experience, better resources, and published rulings, making their decisions more predictable. Federal courts typically have a higher pleading threshold, a more rigorous expert admissibility threshold, better proportionality in

4 The need for personal jurisdiction over an out-of-state defendant stems from the Due Process Clause, which "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 268, 269, 100 S. Ct. 559, 567 (1980).

5 See Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

6 See Daimler AG v. Bauman, 571 U.S. 117, 139, 134 S. Ct. 746, 762 (2014) (error to conclude that defendant doing extensive business in California and having multiple facilities in California was "at home" in California).

7 Daimler AG, 571 U.S. at 137 (citations omitted); see also BNSF Ry. Co. v. Tyrrell, 137 S.Ct. 1549, 1558 (2017) ("The 'paradigm' forums in which a corporate defendant is 'at home,' . . . are the corporation's place of incorporation and its principal place of business."). See also, e.g., Cahen v. Toyota Motor Corp., 147 F. Supp. 3d 955, 964 (N.D. Cal. 2015), aff'd, 2017 WL 6525501 (9th Cir. Dec. 21, 2017) (no general jurisdiction over Delaware corporation with its principal place of business in Michigan).

8 Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty., 137 S. Ct. 1773, 1780 (2017) (quoting Daimler, 134 S. Ct. at 754).

9 A "mass action" is a civil action involving numerous plaintiffs against one or a few defendants.

10 Fitzhenry-Russell v. Dr. Pepper Snapple Group, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017) (noting that unlike class actions, each plaintiff in mass actions like Bristol-Myers was a real party-in-interest); but see Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F.Supp.3d 840, 861 (N.D. Ill. 2018) (noting that Rule 23 "must be interpreted in keeping with Article III constraints, and the Rules Enabling Act, which instructs that the federal court rules of procedure shall not abridge, enlarge, or modify any substantive right.") (citations and internal quotation marks omitted).

11 Anderson v. Logitech Inc., 2018 WL 1184729 (N.D. Ill. March 7, 2018) (striking nationwide class claims); DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (dismissing counts seeking to recover on behalf of out-of-state class members, noting "The Court believes that it is more likely than not based on the Supreme Court's comments about federalism that the courts will apply Bristol-Myers Squibb to outlaw nationwide class actions in a form, such as in this case, where there is no general jurisdiction over the Defendants."); McDonnell v. Nature's Way Products, LLC, 2017 WL 4864910 (N.D. Ill. October 26, 2017) (one of the first decisions to apply the reasoning of Bristol-Myers to class actions) ("a state may not assert specific jurisdiction over a nonresident's claim where the connection to the state is based on the defendant's conduct in relation to a resident plaintiff."); Practice Mgmt. Support Servs., Inc., No. 14 C 2032, 2018 WL 1255021, at *18 ("Because these nonresidents' claims do not relate to defendants' contacts with Illinois, exercising specific personal jurisdiction over defendants with respect to them would violate defendants' due process rights. Thus, . . . the Court finds it appropriate to dismiss the claims of the non-Illinois-resident class members.").

12 Fitzhenry-Russell, 2017 WL 4224723; see also Broomfield v. Craft Brew Alliance, 2017 WL 3838453 (N.D. Cal. Sept. 1, 2017) (deferring consideration of personal jurisdiction arguments under Bristol-Myers until class certification).

13 See, e.g., Roy v. FedEx Ground Package System, Inc., No. 3:17-CV-30116-KAR, WL 6179504, at *4 (D. Mass. Nov. 27, 2018) ("Bristol-Myers requires that the defendant be subject to specific jurisdiction as to the claims of FLSA opt-in plaintiffs in putative collective actions. Similarity of claims, alone, is not sufficient to extend personal jurisdiction to out-of-state opt-in plaintiffs."); Maclin v. Reliable Reports of Texas, Inc., 314 F. Supp. 3d 845, 850 (S.D. Ohio Oct. 31, 2018) (dismissing non-Ohio plaintiffs where the court lacked general jurisdiction over the corporate defendant); Chavez v. Church & Dwight Co., 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018) ("The Court therefore concludes that Bristol-Myers extends to class actions, and that Chavez is therefore foreclosed from representing either a nationwide and multistate class comprising non-Illinois residents in this suit."); Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc., No. 16 C 9281, 2018 WL 3474444, at *2 (N.D. Ill. July 19, 2018) ("The Court lacks jurisdiction over the Defendants as to the claims of the nonresident, proposed class members. As such …those class members who are not Illinois residents and who allegedly received the fax outside of this state's borders may not be part of this case."); McDonnell v. Nature's Way Prod., LLC, No. 16 C 5011, 2017 WL 4864910, *5 (N.D. Ill. Oct. 26, 2017)(dismissing, for lack of personal jurisdiction, the portions of plaintiff's class action complaint that encompassed claims on behalf of out-of-state putative class members); Spratley v. FCA US LLC, 2017 U.S. Dist. LEXIS 147492 at * 18 (N.D.N.Y. September 12, 2017) (same). See also Wenokur v. AXA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916 at* 4, n. 4 (D. Arizona October 2, 2017) (determining, during a dispute over venue, the impact of Bristol-Myers: "[t]he Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.").

discovery disputes, and other benefits.[14] While there may not be any empirical studies that show a clear pro-plaintiff bias in state courts, at least one study has shown that plaintiffs suffer a significant drop in win rates after removal.[15]

Savvy plaintiff lawyers know this, and they structure their complaints in ways that resist removal. While they may bury federal questions in state common law claims of general application – muddying the waters on whether they are state or removable federal claims – they will almost invariably attempt to join some nominal, local defendant against whom they have no intention of pursuing a judgment, just to defeat removal.

Concerned with this sort of jurisdictional manipulation, the U.S. Supreme Court recognized the fraudulent joinder doctrine in 1907, ignoring the citizenship of a resident defendant who had no real connection to the lawsuit, thereby enforcing limits on a plaintiff's right to determine the removability of a case.[16] But the Court hasn't spoken to the issue of fraudulent joinder in almost 100 years,[17] resulting in different standards employed by the circuit courts. For example, the Third Circuit's standard is very high and requires that the claim against the resident defendant be "wholly insubstantial and frivolous," akin to a Rule 11 standard.[18] Other circuit courts, like the Ninth, find that fraudulent joinder exists "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure to is obvious according to the settled rules of the state."[19]

Defendants usually only have one shot at removal, and one narrow window in which to remove (generally, 30 days after service). As the basis for removal must be set forth in the removal notice, and Defendants bear the burden of proof, there can be a lot of work to do in a limited amount of time. In fact, in light of the lag time between service and outside counsel retention, the window can be very narrow. Adding to the time crunch, defendants must secure consents from all defendants[20] to remove (except the fraudulently-joined defendant).

When you are stuck in a challenging jurisdiction, have your outside counsel expedite review of the claims against any diversity defeating defendants, even at the expense of delaying their assessment of the claims against the company. Consider taking an aggressive stance on removal too. There is little downside risk to making an aggressive removal argument other than the expense of briefing a motion to remand (and possibly paying your opponents' fees occasioned by a wrongful removal). In the meantime, the prospect of a federal court venue may help facilitate a pragmatic settlement, or provide much needed time to investigate and assess the claims.

Remember, Article 3, section 2, of the U.S. Constitution provides original, federal jurisdiction of controversies between citizens of different states, and right of removal has been enjoyed by defendants since the Judiciary Act of 1789. Defendants should not be shy about enforcing it.

There's gold in them bankruptcies.

Whether defending a consumer class action or individual claim, you can find powerful defenses when consumers emerging from bankruptcy file lawsuits that accrued before their bankruptcy discharge orders were entered. Consider including on your new case intake checklist a bankruptcy search regarding the plaintiff.

Individuals filing for bankruptcy under Chapters 7[21], 11[22], or 13[23] are required to disclose their income and assets in their schedules or disclosure statements, and expressly among assets are legal claims. Courts have held that by not disclosing legal claims, the debtors are taking the position that they do not have any.[24] The position is "accepted" by the bankruptcy court when it grants the discharge or plan confirmation. By later filing a lawsuit based on a pre-petition claim, the plaintiff is taking an inconsistent position in an unfair manner, having already received the benefit of the bankruptcy stay and discharge based on an incomplete disclosure of assets.

There is a legal doctrine that prevents this injustice – the judicial estoppel doctrine.[25] The doctrine generally

14 See Paul Rosenthal, Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction, 59 Am. U. L. Rev. 49, 50 (2009); Thomas A. Mauet, The New World of Experts in Federal and State Courts, 25 Am. J. Trial Advoc. 223, 234 – 35 (2001).

15 See Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction, 83 Cornell L. Rev. 581, 593 (1998) (concluding that, generally, a plaintiff had a 71% chance of winning a case brought in state court, and if the case was removed to federal court, that rate decreased to 34%.).

16 Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1907).

17 The last case where the Supreme Court addressed allegations of fraudulent joinder was Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921).

18 Batoff v. State Farm Ins., Co., 997 F.2d 848, 852 (3d Cir. 1992).

19 McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).

20 Some courts only require the consent of other served defendants.

21 Hamilton, 270 F.3d at 783; Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555, 557 (9th Cir. 1992).

22 11 U.S.C. § 1125(a)(1) (Chapter 11).

23 Because a chapter 13 bankruptcy estate includes property acquired by a debtor after the filing of the petition but before the case is closed, the debtor may be judicially estopped from asserting claims arising post-petition that debtor never disclosed in a supplemental or amended schedule of assets and liabilities. See, e.g. In re Kemp, Case No. 03-52422, 2011 Bankr. LEXIS 3197, at *9-11 (W.D. La. Aug. 19, 2011) ("[T]he weight of authority imposes a continuing obligation on Chapter 13 debtors to disclose post-petition causes of action, and a debtor's failure to disclose such causes of action may result in application of judicial estoppel.").

24 Hamilton, 270 F.3d at 784 ("[A] debtor who failed to disclose a pending claims as an asset in a bankruptcy proceeding where debts were permanently discharged was estopped from pursuing such claim in a subsequent proceeding." (citing Hay, 978 F.2d at 557)); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 416 (3d Cir. 1988); Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc., 989 F.2d 570, 571 (1st Cir. 1993).

25 Whaley v. Belleque, 520 F.3d 997, 1002 (9th Cir. 2008); New Hampshire v. Maine, 532 U.S.

requires the following: (1) that the party's positions must be clearly inconsistent; (2) that the party must have succeeded in persuading a court to accept the earlier position; and (3) the party seeking to assert the inconsistent position must stand to derive an unfair advantage if the court adopts the new position.[26]

Even if in response the plaintiff petitions to reopen the bankruptcy and amend the schedules to include the legal claim, in a Chapter 7 bankruptcy proceeding the legal claim would then be the property of the bankruptcy estate, and therefore belong to the bankruptcy trustee, not the plaintiff.[27] In that situation, the plaintiff would lack standing to prosecute the claim.[28] While the bankruptcy trustee is motivated to collect money for the creditors of the bankruptcy estate, and thus motivated to pursue a valid legal claim, dealing with a level-headed, unemotionally-involved bankruptcy trustee is far more likely to result in a resolution favorable to the company.

Don't give up on pick-off strategies just yet.

In 2016, the U.S. Supreme Court decided Campbell-Ewald Co. v. Gomez – a case arising under the Telephone Consumer Protection Act – and concluded that a defendant's unaccepted offer to fully satisfy the plaintiff's clam does not moot the plaintiff's case. In other words, a defendant may not "pick off" individually-named plaintiffs merely by offering to settle their individual claims at full value.

But the Court's decision left open the possibility that a defendant may achieve the same result by actually paying, rather than merely offering to pay, the plaintiff the full amount of the individual claim. Specifically, the majority opinion did not decide whether a plaintiff's claim would become moot where "a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff."[29] As Justice Roberts noted in his dissent, "the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court,"[30] and Justice Thomas' opinion suggests that he might have reached a different conclusion had Campbell just paid Gomez's claims or taken other "further steps" beyond an offer to pay.[31]

Accordingly, in appropriate cases, consider employing pick-off strategies to moot litigation when it starts, particularly when the amount in dispute is nominal and certain, and when the company has an existing account with the plaintiff such that it can simply credit the account for the disputed amount.

Don't take nominal damages claims for granted.

Individual consumer cases with nominal damages can be deceptively dangerous because companies are not motivated to devote a lot of resources to defending them. Many of the challenging jurisdictions that are the focus of this article provide for consumer-friendly claims of wide application and generous remedies, like treble damages and attorneys' fees. For example, New Mexico provides a statutory cause of action called "Unfair Practices," which provides for treble damages and attorneys' fees to the prevailing consumer.[32] The application of that tort is as wide as the name suggests.

In these cases, attorneys' fees are the real concern, which is easy to overlook until they have eclipsed actual damages. They can turn a small damages case into a relatively high one. The risk is compounded if punitive damages are alleged. While there are certainly due process limitations as to what a punitive damages award can be in relation to actual damages (typically no more than 10 to 1),[33] there's no definitive authority prohibiting the use of an attorney fee award as a multiplier for punitive damages.[34]

When you're hailed into an unfriendly venue, don't take nominal damages cases for granted when the law provides for attorneys' fees to the prevailing consumer. If you can't settle them quickly, spend the resources needed to determine your liability exposure. If your investigation reveals a significant risk of exposure – even if actual damages are nominal – put in place an aggressive resolution strategy before the consumer's attorneys' fees drive settlement, including seeking an early settlement conference or mediation.

742, 749-50 (2001); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001).

26 Maine, 532 U.S. at 750-51; Hamilton, 270 F.3d at 782-83.

27 11 U.S.C. § 541(a)(1). Note, the lack of standing argument usually does not apply where the debtor filed a proceeding under Chapter 13, because under a Chapter 13, the debtor remains in possession of all property of the estate preconfirmation. 11 U.S.C. § 1306(b). And, unless otherwise provided for in the plan, property of the estate vests in the debtor post-confirmation. 11 U.S.C. § 1327(b).

28 11 U.S.C. §§ 323(b); Estate of Thelma v. Spirtos, 443 F.3d 1172, 1176 (9th Cir. 2006); Moneymaker v. CoBen, 31 F.3d 1147, 1451 n.2 (9th Cir. 1994); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004).

29 Majority Op. at 11-12.

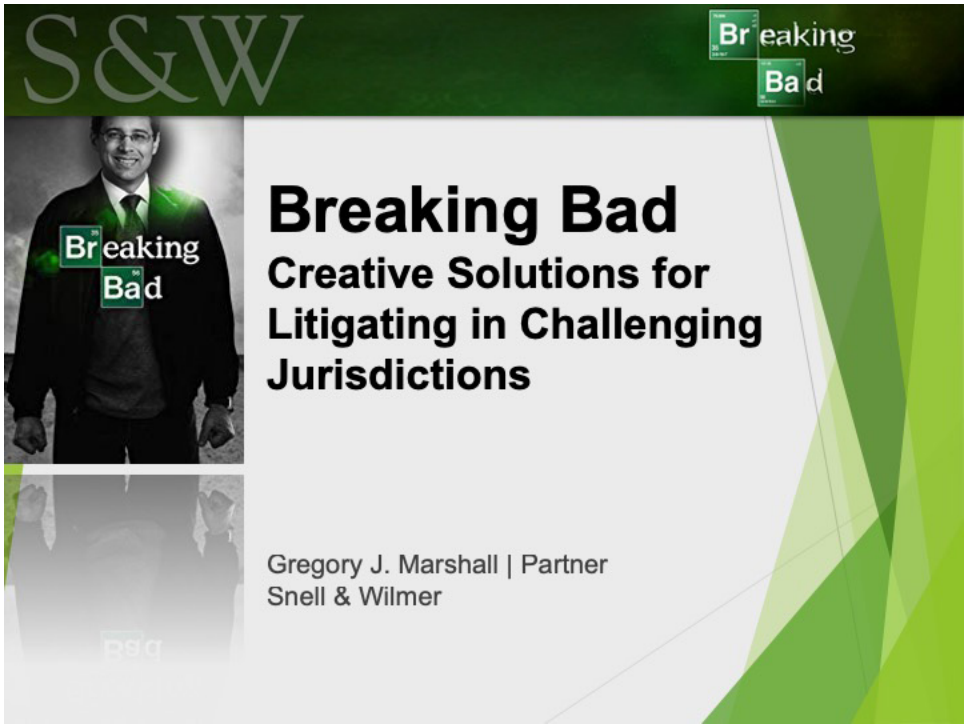
30 But see Radha Geismann, M.D., P.C. v. ZocDoc, Inc., 909 F.3d 534, 542 (2nd Cir. 2018) (Defendant deposited $20,000, pursuant to Rule 67, to resolve all individual claims for a plaintiff seeking class action. The district court entered judgment in favor of the plaintiff and ordered the plaintiff's class action claims moot. The Second Circuit reversed, finding that a Rule 67 deposit cannot render an individual's claims moot.)

31 Concurring Op. at 5 (Thomas, J.)

32 NMSA § 57-12-2(D).

33 BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (noting that "[s]ingle digit multipliers are more likely to comport with due process," except in "egregious cases.") (quoting Campbell, 538 U.S. at 425).

34 See Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 235 (3d Cir. 2005) (affirming punitive damage award with 75:1 ratio to compensatories but 1:1 with respect to fees).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Creative Solutions for Litigating in Challenging Jurisdictions
Gregory J. Marshall | Partner
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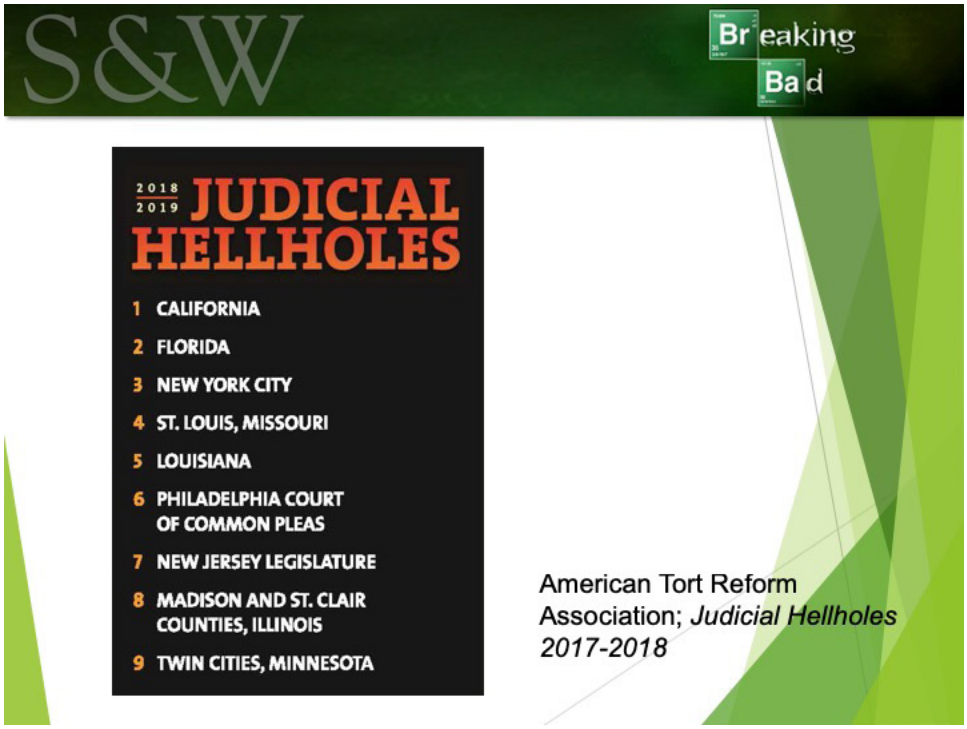
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2018 2019 JUDICIAL HELLHOLES
1 CALIFORNIA
2 FLORIDA
3 NEW YORK CITY
4 ST. LOUIS, MISSOURI
5 LOUISIANA
6 PHILADELPHIA COURT OF COMMON PLEAS
7 NEW JERSEY LEGISLATURE
8 MADISON AND ST. CLAIR COUNTIES, ILLINOIS
9 TWIN CITIES, MINNESOTA
American Tort Reform Association; *Judicial Hellholes 2017-2018*

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U.S. Chamber Institute for Legal Reform; *Costs and Compensation o the U.S. Tort System*

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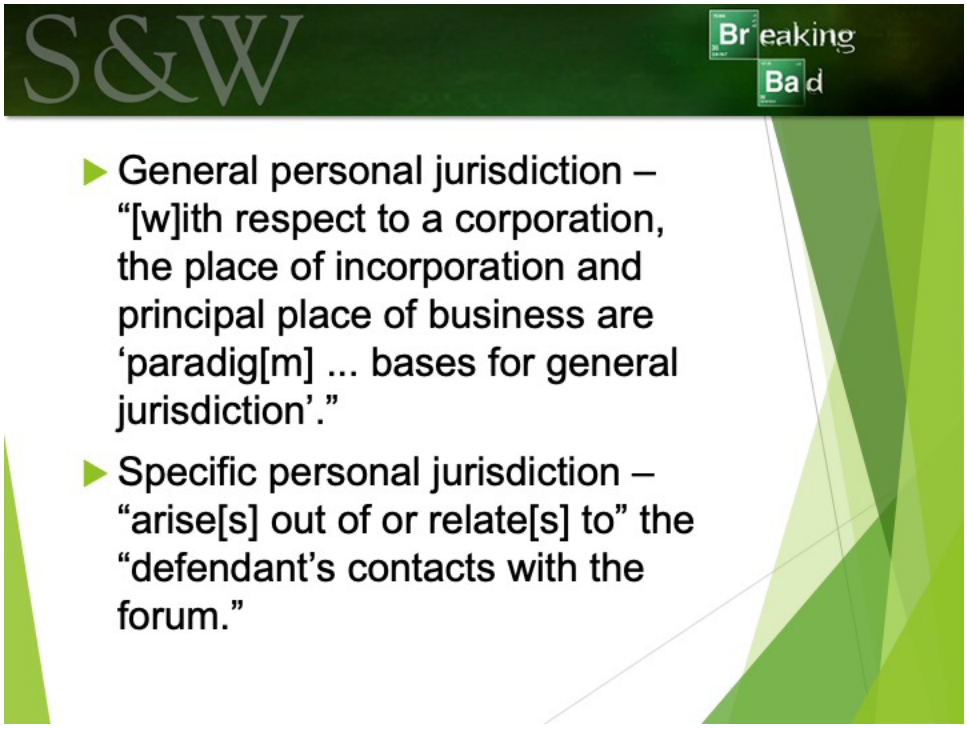
1 – Get out of Dodge (if you can)!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General personal jurisdiction – "[w]ith respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction'."
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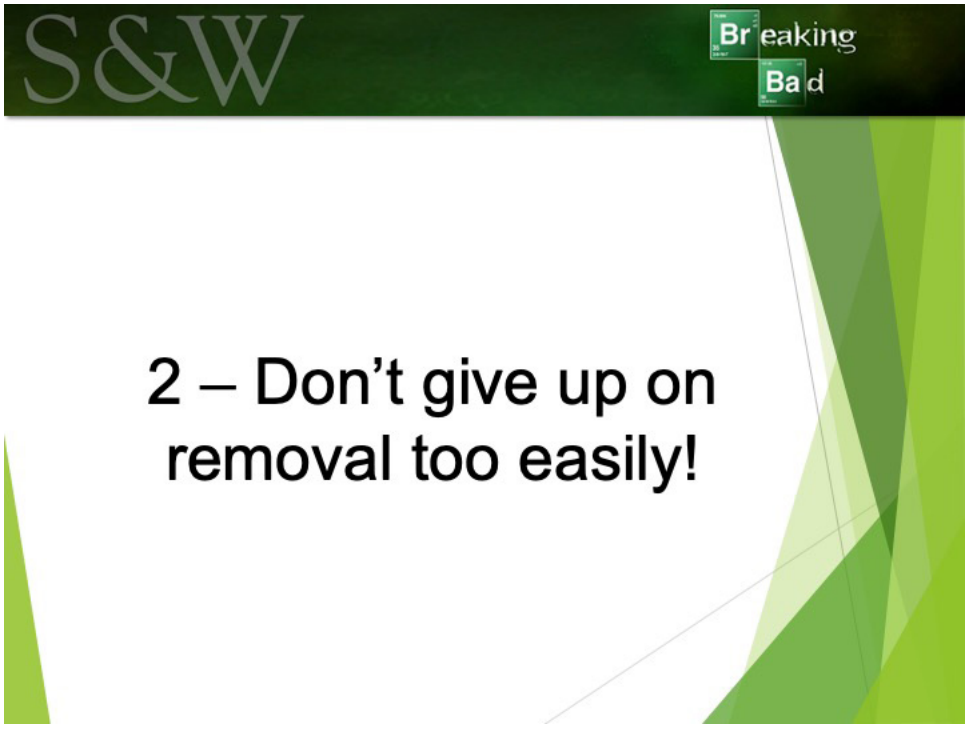
Bristol-Myers Squibb Co. v. Superior Court, 137 S.Ct. 1773 (2017)
Northern District of California
Northern District of Illinois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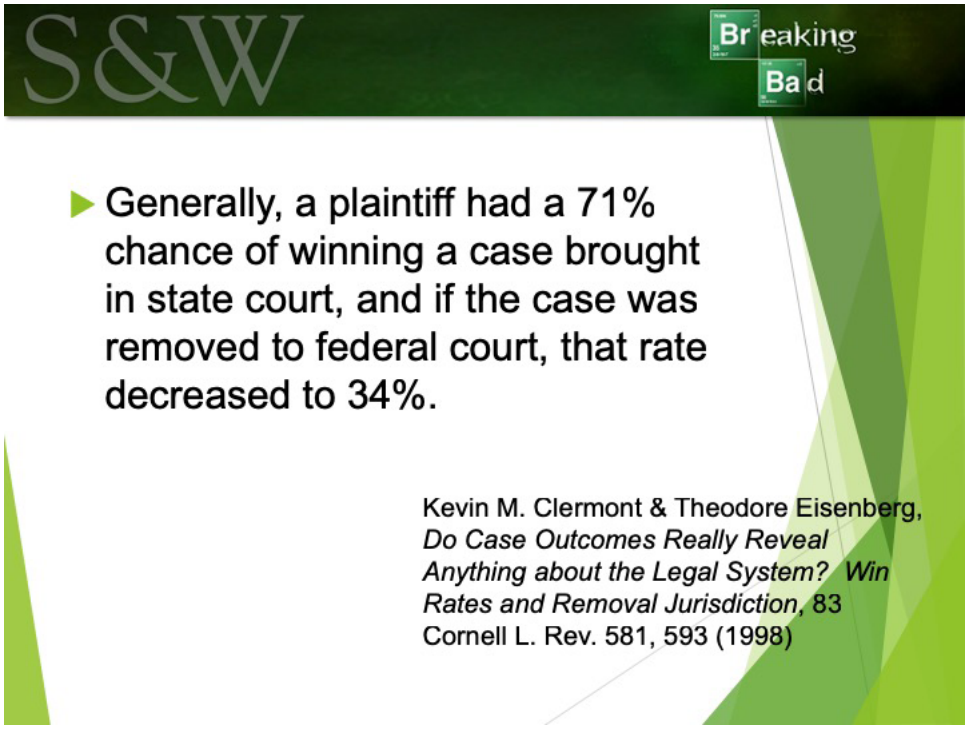
2 – Don't give up on removal too easily!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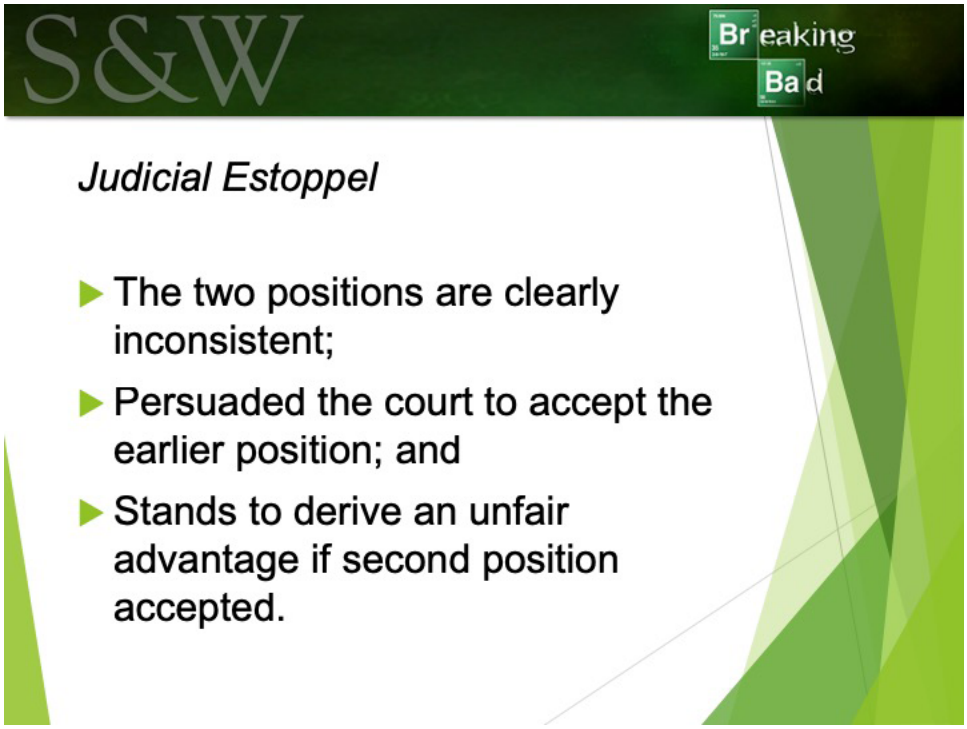
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Judicial Estoppel
The two positions are clearly inconsistent;
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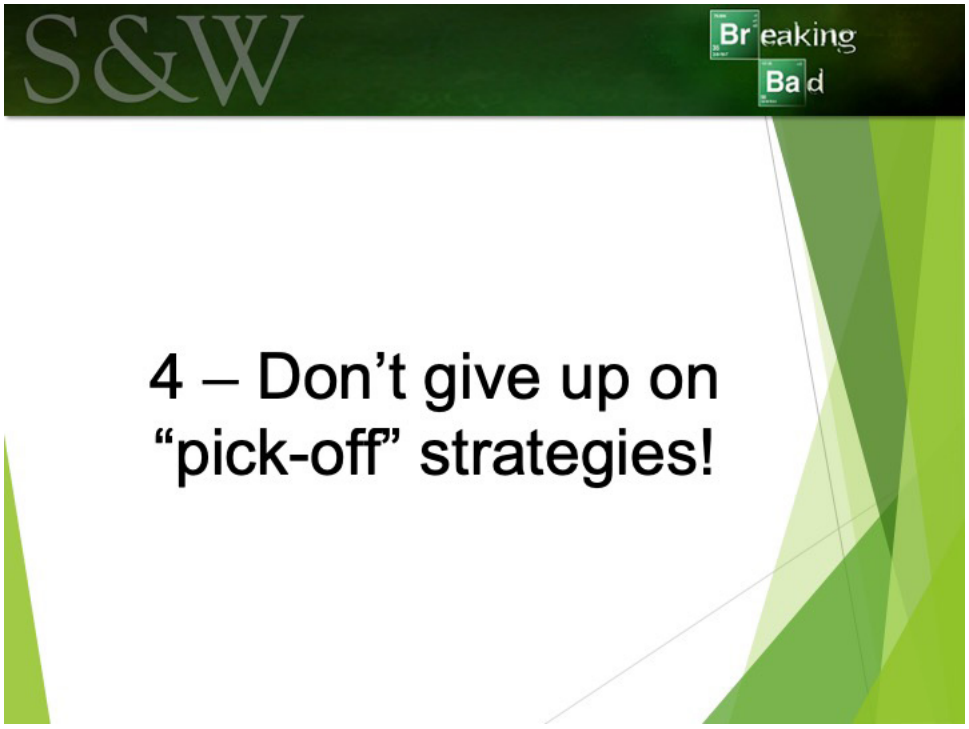
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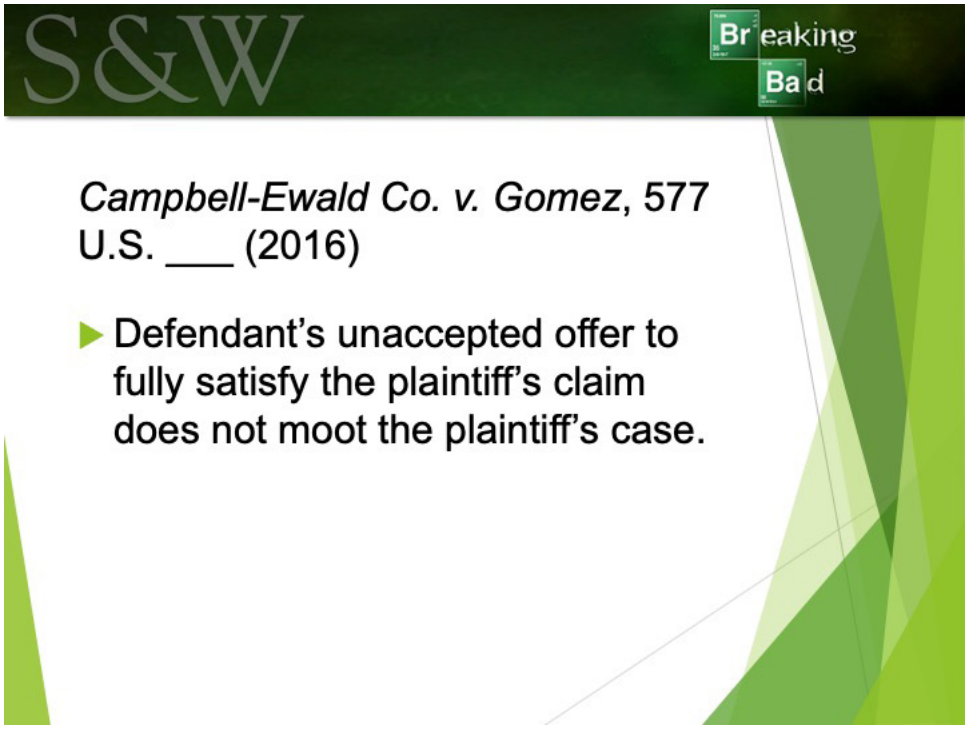
4 – Don't give up on "pick-off" strategies!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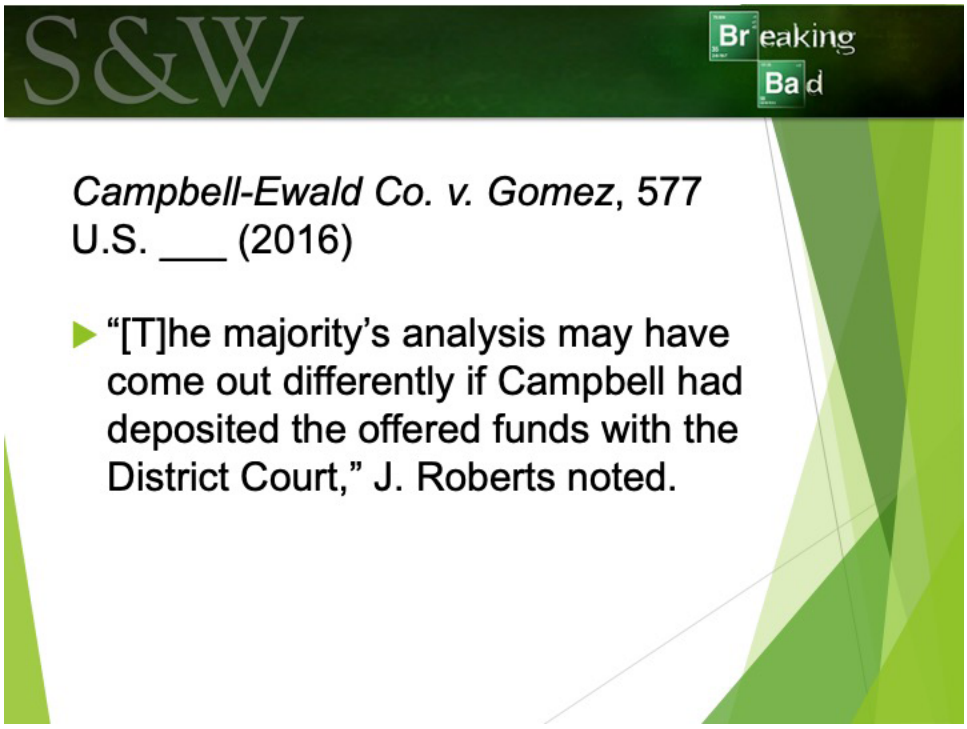
Defendant's unaccepted offer to fully satisfy the plaintiff's claim does not moot the plaintiff's case.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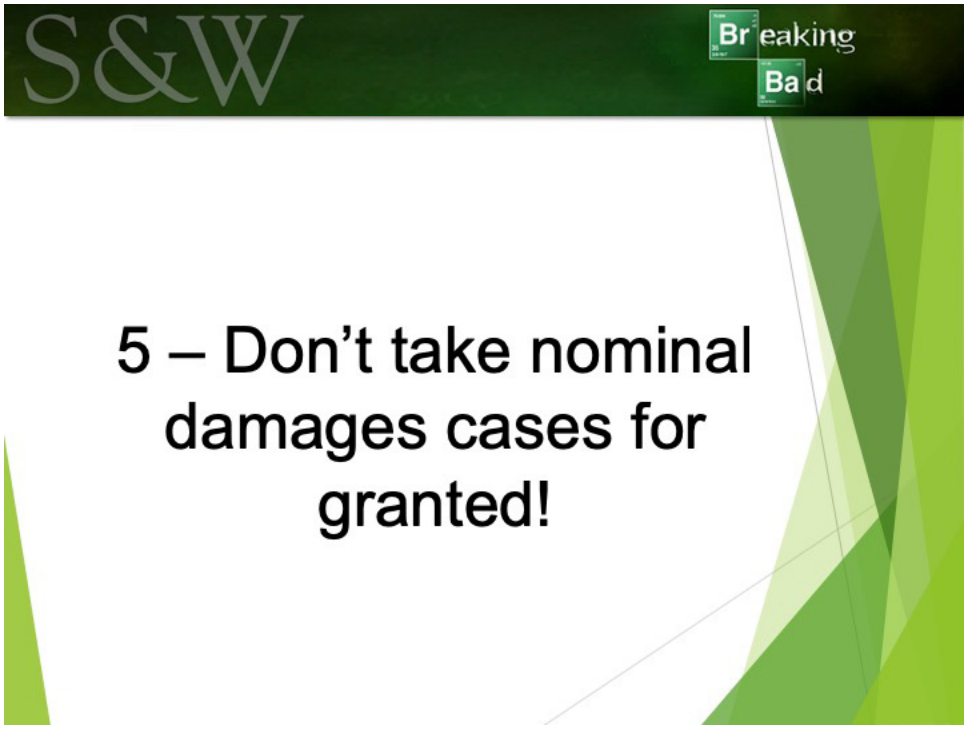
Campbell-Ewald Co. v. Gomez, 577 U.S. ___ (2016)
"[T]he majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court," J. Roberts noted.


S&W
Breaking Bad
5 – Don't take nominal damages cases for granted!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AMC


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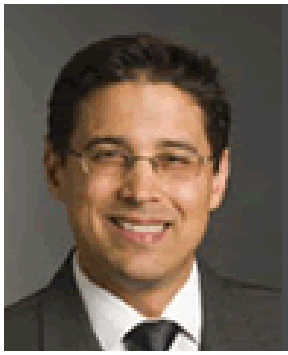
Breaking Bad



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Related Services

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

Representative Experience

- Defended and tried bellwether case involving Fair Credit Reporting Act claims against secondary mortgage market participant.
- Defended national mortgage servicer against putative class action claims challenging servicing fees.
- Defended national banks in pattern qui tam litigation regarding unpaid transfer taxes.
- Defended several national mortgage lenders and servicers in MDL litigation involving mortgage origination claims.
- Defended mortgage originators and servicers in actions filed by government officials and entities involving mortgage origination practices.
- Defended national bank in appeal of precedent setting putative damages award.
- Defended and tried case for mortgage lender involving construction loan and allegations of deceptive practices.
- Defended and tried bad faith claims on behalf of mortgage servicer and credit life insurer.
- Managed regional defense program for mortgage servicer in consumer mortgage cases.
- Defended national mortgage lender in putative nationwide class action involving payoff fees.

Professional Recognition and Awards

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

Education

- Emory University School of Law (J.D., 1999) -- Dean's Fellow; Order of the Barristers; Order of the Advocates
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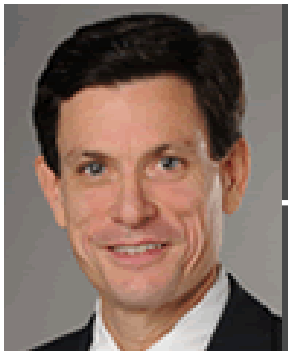

PANEL DISCUSSION: THE CLIENT RELATIONSHIP - BEYOND THE CASE

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The Client Relationship – Beyond the Case

C. Bradford Marsh, Joseph J. Angersola, & Rebecca M. Beane

The Personal Touch of Outside Counsel

In 2015, BTI Consulting estimated that 60 percent of corporate counsels' primary outside law firms had been replaced in the prior 18 months.[1] The belief that better service could be attained elsewhere was cited as the number one reason for changing outside counsel.[2] According to a different survey, outside counsels' lack of responsiveness was cited as the culprit.[3] In yet another survey, respondents reported dissatisfaction with both communication and responsiveness from outside counsel.[4] Likewise, refusal to take direction has also been reported as a reason for termination.[5]

Notwithstanding the foregoing, many in-house counsel have forged successful relationships with outside counsel. As with most relationships, trust is where a strong partnership begins and ends.[6] In-house counsel seek outside lawyers that will be "inclined and positioned" to provide responsive legal assistance.[7] Indeed, responsiveness is often cited "as one of the most important and valued qualities in outside counsel."[8] Effective and ongoing communication of expectations and case developments is also key.[9]

In-house counsel want to feel confident in their outside counsel's skill, expertise, and advice. The"advice must be tailored to the personality of the client."[10] This requires outside counsel to "understand the client's needs and preferences" and learn "the client's business, how it generally operates within its larger industry, and the hierarchy within the company."[11] Spending a day on site with the client and observing firsthand the corporation's business and personnel can be an invaluable and meaningful experience.[12] It "humanizes" the corporation and creates an environment for personal connections.[13] Building a foundation of trust also means developing a personal relationship with corporate counsel.[14]

Recognizing and Assisting with In-House Counsel's Corporate Responsibilities

Typically in-house counsel are responsible for managing all legal work performed for the corporation, including litigation.[15] In this management role, they are ultimately responsible for supervising the litigation, containing costs, and communicating exposure to senior management.[16]

1 Amy B. Alderfer & Melinda Lackey, *Keys to Creating a Successful Relationship with Outside Counsel*, Corporate Counsel, Dec. 11, 2018, https://www.law.com/corpcounsel/2018/12/11/keys-to-creating-a-successful-relationship-with-outside-counsel/.

2 Id.

3 C1 Business Law Monographs § 7.05 (2019).

4 Id.

5 Id.

6 Forging Strong Relationships Between In-House and Outside Counsel, Corporate Counsel Business Journal, May 1, 2004, https://ccbjournal.com/articles/forging-strong-relationships-between-house-and-outside-counsel.

7 C1 Business Law Monographs § 7.01 (2019).

8 C1 Business Law Monographs § 7.05 (2019).

9 See Amy B. Alderfer & Melinda Lackey, *supra* note 1.

10 Forging Strong Relationships Between In-House and Outside Counsel, supra note 6.

11 Amy B. Alderfer & Melinda Lackey, *supra* note 1.

12 See id.

13 See Amy B. Alderfer & Melinda Lackey, *supra* note 1.

14 Forging Strong Relationships Between In-House and Outside Counsel, supra note 6.

15 C1 Business Law Monographs § 7.01 (2019).

16 Id.

Outside counsel's success is largely dependent upon the ability to develop an understanding of the corporate responsibilities, and thus the needs, of in-house counsel.

"The heart of an effective relationship with outside counsel is early communication, on as professional a level as the respective training and knowledge of the outside lawyer and inside lawyer-client permit. . . . This communication, to be effective, demands careful preliminary analysis of issues, some appraisal of alternative strategies, and an approach to the manner in which the work will be staffed and is likely to develop."[17] Outside counsel should recognize the value in proposing a litigation plan early and identify the anticipated timetable for recommended discovery, motion practice, and other litigation activity. The timely development of such a plan promotes consideration of alternative strategies, initiates in-house counsel's involvement, provides thoughtful and strategic direction for future handling, and avoids unnecessary costs. This assists in-house counsel in "evaluating the costs, duration and potential exposure of the corporation."[18] Moreover, an agreed litigation plan allows for outside counsel to prepare an accurate budget, which promotes efficiency and transparency.[19]

Corporate counsel often are required to provide periodic litigation reports to senior management and/or the board of directors, particularly in public corporations where the directors owe a fiduciary duty to the shareholders.[20] Financial exposure, setting appropriate reserves, and disclosure of pending litigation in financial statements are the primary concerns drive these reporting requirements.[21] For this reason, outside counsel's ability to engage in risk analysis, assess potential liability exposure, and predict the value the case is paramount.[22]

For these reasons, many corporations have begun to prepare and implement litigation guidelines articulating expectations of outside counsel, budgetary controls, and reporting requirements. Therefore, it is critical for outside counsel to adhere to such guidelines.

The Business Aspects Behind Litigation

Understanding the "quantitative dollar trade-offs" for a corporation involved in litigation is a vital component to outside counsel's success.[23] This usually requires a shift from a legal-centric approach focused on the merits of the litigation to a business-centric perspective. Each case should be approached within the context of the company's overall business objective and risk tolerance within the broader implications of the suit on the business operations of the company.[24]

Litigation is expensive. It is not uncommon for the projected legal costs of litigation to exceed the estimated value of the case.[25] Similarly, legal fees can drive litigation strategy and settlement negotiations. Nevertheless, the impact of legal fees on the case cannot be considered in a vacuum, particularly when outside counsel is defending the corporation in a lawsuit.[26]

The potential long-term consequences of the suit should also be duly considered.[27] "For example, if a corporation develops a reputation for 'buying peace' by paying up to settle lawsuits, that reputation may remove a deterrent to—and may even encourage—further suits filed by other parties."[28] Likewise, "[a] suit may present important issues, both for the reputation of the business, and for the future operational handling of the matter that gave rise to the litigation."[29]

Similarly, the impact of the litigation on the corporation's business function should be assessed. When the corporation's opposing party is a strategic business partner, employee, or governmental entity, salvaging the relationship or employee morale may take priority over the merits of the litigation.[30]Litigation is often a drain on the business, as discovery obligations, document production, depositions, and trial divert the company's personnel, senior management, and resources from their revenue-generating functions.

As demonstrated, litigation can affect the client in a variety of ways. Outside counsel will be well served by visiting with their in-house counterparts early and often to undertake a cost-benefit analysis of the litigation and assess the risks involved.[31]

Diversity Efforts and Planning for the Future

It is apparent that corporate counsel view diversity as a critical criterion in selecting and evaluating outside counsel. In 2004, Sara Lee General Counsel Roderick

17 C1 Business Law Monographs § 7.03 (2019).

18 Id.

19 Id.

20 C1 Business Law Monographs § 7.08 (2019).

21 Id.

22 See C1 Business Law Monographs § 7.07 (2019).

23 C1 Business Law Monographs § 7.08 (2019).

24 See Jill Schachner Chanen, *The Strategic Lawyer*, ABA Journal (July 2005).

25 C1 Business Law Monographs § 7.08 (2019).

26 See id.

27 Id.

28 Id.

29 Id.

30 See Jill Schachner Chanen, supra note 24.

31 C1 Business Law Monographs § 7.08 (2019).

Palmore published "A Call to Action: Diversity in the Legal Profession," which built upon the earlier 1999 initiative, "Diversity in the Workplace: A Statement of Principle."[32] More recently, in January 2019, more than 170 general counsel signed an open letter indicating that they plan to give more business to law firms committed to retaining and promoting diversity.[33]

Such companies view diversity as not only the right thing to do, but the smart thing to do from a business perspective. Those that share the commitment to diversity believe that the benefit of various ideas results in a better work product. As indicated by American Airlines, "[o]nly by having a rich blend of cultures and viewpoints in our workplace can we achieve the understanding and spark the innovation that will keep us a strong competitor." Similarly, Shell Oil Co. president and country chair stated in years past, "I've seen firsthand how diversity and business success go hand-in-hand."[34] Moreover, advocates of diversity emphasize the importance of outside counsel to reflect the diversity that exists within a corporation, its customers, and the community.[35]

Given the perceived value and importance of diversity, some companies are asking partners for periodic demographic billing reports to assess outside counsel's commitment to diversity and to ensure the company's expectations are being satisfied.[36] It is those firms who have embraced and demonstrated a commitment to diversity that are winning and retaining business.

Earlier this year, AdvanceLaw, a network of approximately 250 general counsel that helps find and retain outside counsel, announced a new mentoring program.[37] Through this program, general counsel and other senior lawyers from Fortune 500 companies will mentor diverse mid-level and senior associates at large law firms by providing guidance on building client relationships, client service, and career advice while developing relationships that may lead to future work.[38] The concept of mentoring or fellowship programs hosted by corporations for their outside counsel is not new. Such programs serve as an onboarding programs designed to train and educate attorneys; provide an insider's view into the corporation's business, operations, and culture; and develop next generation relationship partners. These programs benefit not only outside counsel, but also in-house counsel who want to ensure "the availability of excellent lawyers when needed, and the ability to assemble as large a team as an urgent situation might require."[39]

32 Morgan Morrison, In-House Counsel: Embracing Diversity: Your Business Depends on It, 68 Tex. B. J. 928, 929 (Nov. 2005).

33 Debra Cassens Weiss, 170 Top In-House Lawyers Warn They Will Direct Their Dollars to Law Firms Promoting Diversity, ABA Journal (Jan. 28, 2019).

34 Morgan Morrison, supra note 32.

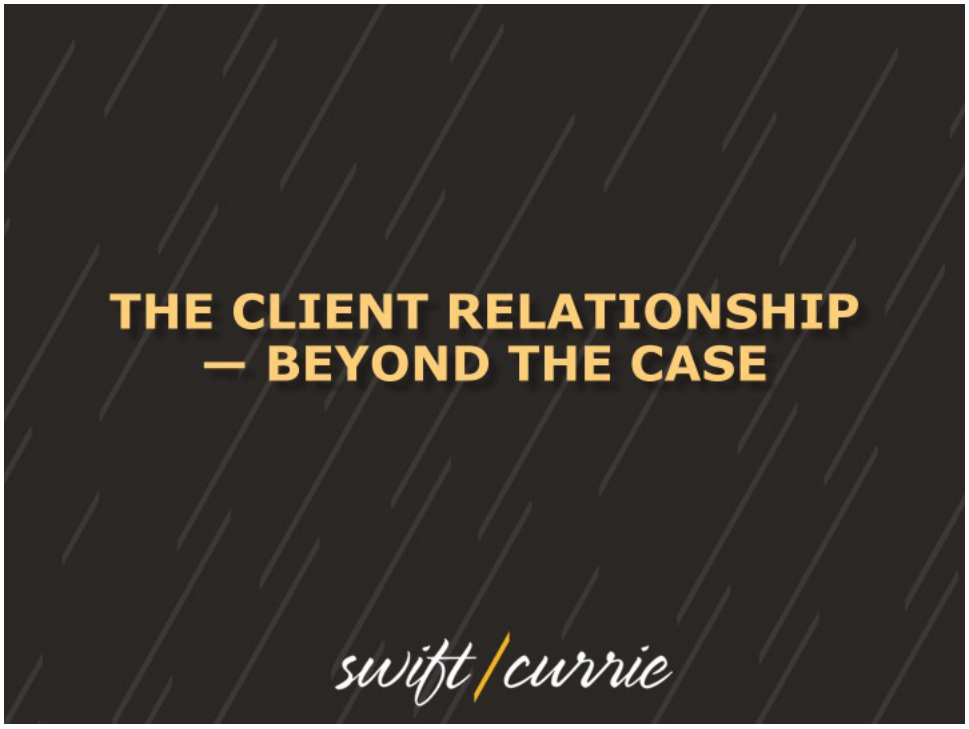
35 See Debra Cassens Weiss, supra note 26; Morgan Morrison, supra note 33.

36 Morgan Morrison, supra note 32.

37 Christine Simmons, Big Company GCs Sign On as Mentors to Foster Big Law Diversity, The American Lawyer, Feb. 25, 2019, https://www.law.com/americanlawyer/2019/02/25/big-company-gcs-sign-on-as-mentors-to-foster-big-law-diversity/.

38 Id.

39 C1 Business Law Monographs Chapter C1-7.syn (2019).


THE CLIENT RELATIONSHIP
— BEYOND THE CASE
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Ken Diamond | Aimco
swift/currie

From a Client Perspective:

Areas Where Outside Counsel Can Set Themselves Apart

S/C The Client Relationship - Beyond The Case

1. The Personal Touch of Outside Counsel

S/C The Client Relationship - Beyond The Case

2. Recognizing and Assisting with In-House Corporate Responsibilities

S/C The Client Relationship - Beyond The Case

3. The Business Aspects Behind Litigation

S/C The Client Relationship - Beyond The Case

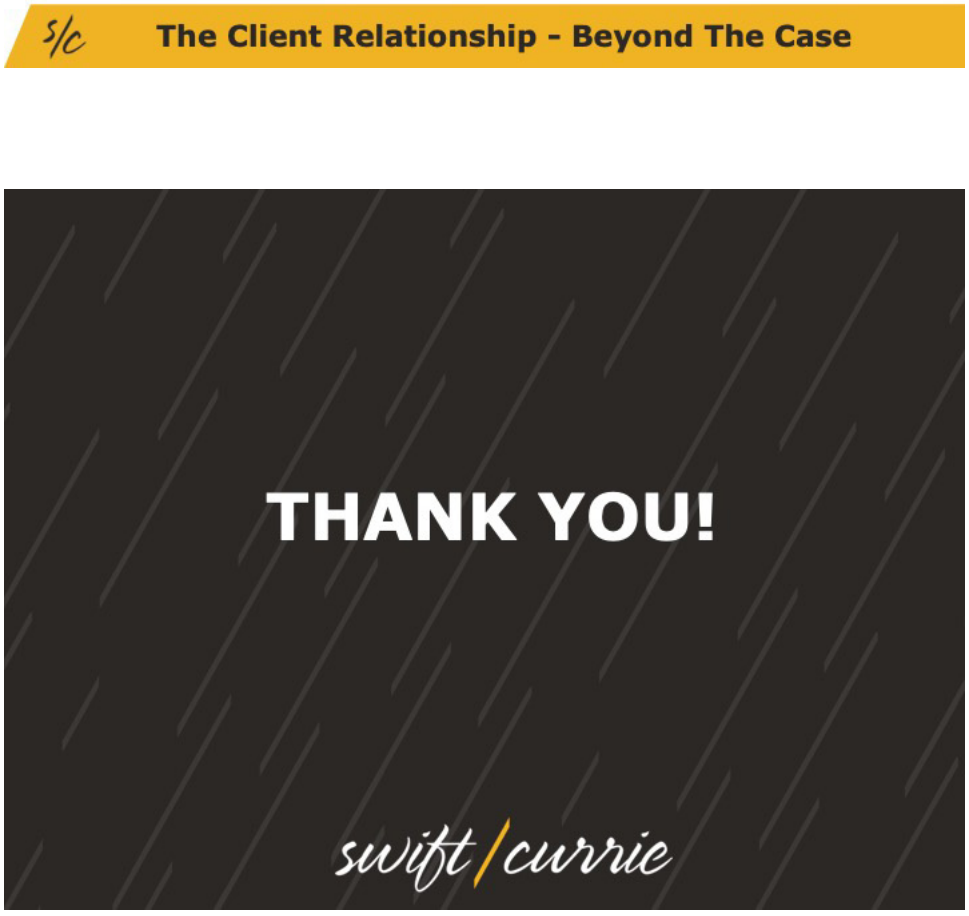
4. Diversity Efforts

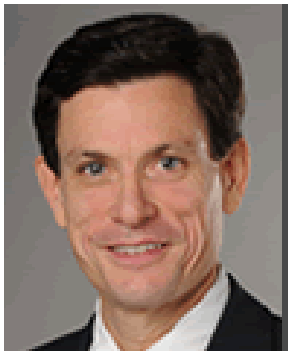
S/C The Client Relationship - Beyond The Case

5. Planning for the Future: Mentoring and Succession Planning

S/C The Client Relationship - Beyond The Case

6. Other Differentiators





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As demonstrated by representative work, Mr. Marsh is an accomplished trial lawyer who has successfully tried to verdict dozens of cases. He has handled a variety of cases in different venues, including both state and federal courts. Much of his work has been in the areas of products liability and other complex, large-exposure matters. Experience and success in court enable Mr. Marsh to be wise counsel who, if the situation warrants, can negotiate favorable resolutions short of trial. Mr. Marsh has also been able to validate his opinions and results on appeal.

Over the years, he has been a frequent lecturer to client, industry and legal groups, presenting in the areas of products liability and trial techniques. Mr. Marsh is an appointee of the Review Panel of the State Disciplinary Board of the State Bar of Georgia, serving as chairman in 2004. Mr. Marsh is also a member of the Formal Advisory Opinion Board of the State Bar of Georgia and was elected chairman in 2014.

Mr. Marsh has been favored with an “AV” rating since early in his practice. He has been consistently named by his peers as a Georgia Super Lawyer by Atlanta Magazine. He also served on the board of a community hospice, taught Sunday School and sings in the church choir. He is happily married and the father of two daughters.

Practice Areas

- Automobile Litigation
- Professional Liability
- Products Liability
- Premises Liability
- Medical Malpractice
- Environmental Law
- Employment Counseling & Litigation
- Commercial Litigation
- Catastrophic Injury & Wrongful Death
- Trucking Litigation

Awards and Recognition

- Georgia Super Lawyer, 2005-present
- The Best Lawyers in America©, 2016-present
- “Lawyer of the Year,” Best Lawyers, 2017
- AV Preeminent® Rating, Martindale-Hubbell Peer Review

Education

- University of Georgia School of Law (J.D., 1984)
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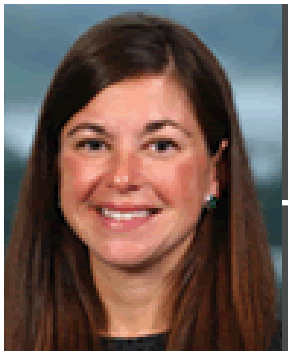

DEFENDING MANAGED CARE DECISIONS: UNDERSTANDING PATIENT DISPUTES OVER COVERAGE DENIALS

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Are We Out of the Woods Yet?: An ERISA Case Study of Wilderness Therapy

Belinda Jones

Recent disputes have arisen over insurance coverage of what is generally described as wilderness therapy. This therapy consists of treatment for behavioral health conditions using an outdoor-based model, with elements of nature, contact with horticulture and animals, and camping, similar to a NOLS or Outward Bound program. To set the stage, what often occurs is a parental decision to separate a "troubled" adolescent from the home and enroll him or her in a wilderness program. Often parents hire educational or healthcare consultants to assist in the process. In many circumstances, parents enroll first and then, with the assistance of the consultant or the program, seek insurance coverage later. This is critical because many programs last for months and come with a price tag of hundreds of thousands of dollars. As reported in a number of federal court cases in recent years, many insurance plans deny coverage for a myriad of reasons, including, but not limited to, specific exclusions under the plan, a determination that wilderness therapy is experimental, a finding that the adolescent does not meet the clinical criteria for the program, or because components of the program do not meet accreditation requirements.

Using the wilderness therapy case study, this article will discuss three strategic approaches throughout the stages of benefit disputes under the Employment Retirement Income Security Act ("ERISA").

[1] Pre-litigation: Best Defense is Offense

As litigators, the usual modus operandi is clean up duty. Like most litigation, this familiar premise exists in ERISA denial of benefits claims. Indeed, by the time a Complaint hits a litigator's desk, the playing field has been set by the terms of the insurance plan itself and the communications between the plaintiff beneficiary and the plan administrator, culminating in the denial of the claim. More often than not, the litigator had no role in drafting the plan language or the communications denying the requested benefit.

Whether representing insurers or administrators, or both, the best advice given to clients is to get advice, specifically on plan design and adverse benefit determination letters. For insurers, crafting plan language that defines plan administrators and fiduciaries and grants discretion to those defined roles is critical to the standard of review the court will apply to a claim for benefits. Alternatively, for third party administrators, understanding all defined roles and the discretion provided by the plan is necessary to evaluate litigation risk and exposure. The same holds true for adverse benefit determination letters. ERISA regulations govern the minimum requirements of adverse benefit determinations and a failure to satisfy those requirements could result in the court forgoing a deferential standard of review in favor of a de novo review.

In a claim for recovery of benefits under 29 U.S.C. § 1132(a)(1)(B), the language of the applicable insurance plan determines the standard of review. Following the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), courts in ERISA claim

for benefits matters will apply one of two standards of review: abuse of discretion or de novo review. Under a de novo review, the court is at liberty to review the claim without any deference or presumption of reasonableness to the plan administrator's determination of benefits. Alternatively, an abuse of discretion standard of review is deferential to the plan administrator's determination. In this case, in order for a plaintiff to succeed, the court must find that the plan's ultimate decision was "arbitrary and capricious."

Pre-litigation drafting of the plan directly impacts which standard of review will apply. As the Supreme Court held in Firestone, the determining factor is whether the plan language "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[1] The type of language required to vest the necessary discretion with a plan fiduciary has been the subject of a number of federal district and appellate court decisions. One such example presented to a number of Circuits is whether plan language that requires a beneficiary to submit proof "satisfactory" to a plan fiduciary is enough to grant discretion to that plan fiduciary in determining benefits, thereby trigging the abuse of discretion standard. The answer is likely no in the Second, Third, Fourth, Seventh, and Ninth Circuits. In fact, the Third Circuit kindly has provided safe harbor language guaranteed to satisfy Firestone, "[i] f an administrator wishes to insulate its decision to deny benefits from de novo review, we suggest … the following 'safe harbor' language: 'Benefits under this plan will be paid only if the administrator decides in [its] discretion that the applicant is entitled to them.'"[2] Conversely, other Circuits, like the Tenth Circuit, have held that no magical language is required.[3]

The contents of adverse benefit determination letters also may impact the standard of review applied by the court. ERISA requires that beneficiaries be afforded a "full and fair review" of their claims for benefits. ERISA regulations, specifically 29 CFR § 2560.503-1, require that certain minimum contents are included in adverse benefit determination letters. Requirements vary depending on whether the communication is an initial adverse benefit determination (29 CFR § 2560.503-1(g)), or an administrative appeal of an initial adverse benefit determination (29 CFR § 2560.503-1(h)(2)). Additional requirements are placed on group health plans (29 CFR § 2560.503-1(h)(3)). The plan administrator's failure to strictly comply with these ERISA regulatory requirements could result, at least in the Second Circuit and perhaps some districts in the Eleventh Circuit, in a loss of the deferential abuse of discretion standard in favor of a de novo standard of review.[4] The majority of Circuits focus on the overall fairness of the review of the benefit determination and require only that plan administrators substantially comply with ERISA regulations.[5]

Applying these principles to wilderness therapy benefits, the gold standard is to understand the insurer's position of coverage of wilderness therapy and to draft plan language that unambiguously adopts that position. The insurer's position as to coverage must be communicated to any plan administrator and the plan administrator must then refer to specific plan provisions when communicating with beneficiaries.[6] Often times, third party administrators have internal policies and procedures related to levels of care. A collaborative approach ensures communications to beneficiaries are, first, supported by the plan language, and, second, clearly and consistently communicated to the beneficiary.

[2] Defend Aggressively: Rule 12(b)(6) is Alive and Well in ERISA Benefit Litigation

The majority of claims for benefits are decided on cross-motions for summary judgment based exclusively on the administrative record. As a result, potential grounds for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) are often overlooked. In fact, because the nature of the claim for a recovery of benefits requires that the existence and terms of the plans be sufficiently alleged in the Complaint, the summary plan description or plan document itself is fair game when considering whether a basis exists for a motion to dismiss. In every case, counsel should consider whether arguments can be made in support of dismissal. For example:

Named defendant is not a plan fiduciary and therefore not a proper party defendant. When third party administrators are named, consider whether the third party administrator makes final benefit determinations and/or processes claims.

The benefit sought is specifically excluded by the plan. Certain plans excluding wilderness therapy used the following language:

- "health resorts, spas, recreational programs,

1 Id. at 115.

2 Viera v. Life Ins. Co. of N. Am., 642 F. 3d 407 (3rd Cir. 2011).

3 Streeter v. Metro. Life Ins., 2006 WL 2944867 (D. Utah 2006).

4 Halo v. Yale Health Plan, 819 F.3d 42 (2d Cir. 2016); Johnston v. Aetna Life Ins. Co., 282 F. Supp. 3d 1303 (S.D. Fl. 2017).

5 L.M. v. Metro. Life Ins. Co., 2016 WL 8193159 (D. N.J. 2016); Lacy v. Fulbright & Jaworski LLP, 405 F. 3d 254 (5th Cir. 2005); Van Bael v. United HealthCare Servs., 2019 WL 142298 (E.D. La. 2019); Zack v. McLaren Health Advantage, Inc., 340 F. Supp. 3d 648 (E.D. Mich. 2018); Dardick v. Unum Life. Ins. Co. of Am., 739 Fed. App'x 481 (10th Cir. 2018); Joel S. v. Cigna, 356 F. Supp. 3d 1305 (D. Utah 2018); Jo H. v. Cigna, 2018 WL 4082275 (D. Utah 2018); Brian C. v. ValueOptions, 2017 WL 4564737 (D. Utah 2018).

6 Stephanie C. v. Blue Cross Blue Shield of Mass. HMO Blue, Inc., 852 F.3d 105 (1st Cir. 2017).

camps, wilderness programs (therapeutic outdoor programs) outdoor skills programs, relaxation or lifestyle programs, including any services provided in conjunction with, or as part of such types of programs."[7]

- "Wilderness Programs, Boot Camps, and/or Outward Bound Programs: These programs may provide therapeutic alternatives for troubles [sic] and struggling youth, teens and adults, offering experiential learning and personal growth through outdoor and adventure-based programming. However, they do not utilize a multidisciplinary team that includes psychologists, psychiatrists, pediatricians, and licensed therapists who are consistently involved in the care of the child or adolescent. These programs nearly universally do not meet standards for certification as psychiatric residential treatment programs or the quality of care standards for medically supervised care provided by licensed mental health professionals."[8]

Plaintiff failed to exhaust the administrative appeals afforded by the plan.

The claim is untimely and therefore barred by a contractual limitation period. Although there is no statute of limitations specified in ERISA, insurers may and often do state in the plan how quickly a lawsuit must be filed following the exhaustion of administrative appeals. One note of warning—certain district courts have held that defendants may not rely on the contractual limitation period unless the beneficiary was notified of the contractual limitation period during the administrative appeal.[9]

[3] Be Creative (To a Point): Doctoring with the Mind of a Lawyer

If there is no legal support for a motion to dismiss, the next step is to get your hands dirty and dive into the administrative record. If you ever wished you had gone to medical school, now is your opportunity. Appreciate that while ERISA defense lawyers are not doctors, neither are district court judges. What resonates with counsel may well be persuasive to the judge. Importantly, if the case is proceeding under an abuse of discretion standard, the task of defense counsel is to establish that the benefit determination was reasonable and supported by evidence in the administrative record. As previously discussed, the playing field is set and the pieces are in place. Armed with the plan language, the benefit determination correspondence, and the administrative record, the job of defense counsel is to put those pieces together in a narrative the court can understand. By way of example, consider a denial based on a failure to meet medical necessity criteria for residential wilderness therapy and a recommendation for a lower level of care such as outpatient therapy. Using the pieces in play:

Define the medical necessity standard using the plan language:

- A medically necessary service must "be of demonstrated value for treatment of the medical condition, consistent with diagnosis and no more than required to meet the basic health needs of the patient."

Define any additional clinical criteria applied at the discretion of the plan administrator:

- "The child/adolescent is experiencing emotional or behavioral problems in the home, community and/or treatment setting and is not sufficiently stable either emotionally or behaviorally, to be treated outside of a highly structured 24-hour therapeutic environment."

Tie the clinical decision as stated in the correspondence denying the benefit to the plan language and any clinical criteria:

- "You are a _____admitted to RTC for treatment of _____. Your medications were _____, you were in full compliance with your prescribed medication regime. You exhibited no behavior such as aggression or self-harm which required 24 hour monitoring. You were safe and appropriate for outpatient care (5 days per week for 5-7 hours per day) as of _____."

Scour the record for clinical notes supporting the benefit determination, keeping in mind that any clinical notes prior to admission suggesting an alternative level of care or success at a current level of care are ideal:

- When discussing placement, her clinician stated, "She is begging her parents to send her to an all-girls RTC with horses."
- Residential Progress Note: "Student seemed upbeat and excited and also nervous for the dance. Student went to the dance and seemed to have fun. Student ate dinner and attended the dance."
- Residential Progress Note: "Student seemed to

7 Vorpahl v. Harvard Pilgrim Health Ins. Co., 2018 WL 3518511, at *2 (D. Mass. 2018).

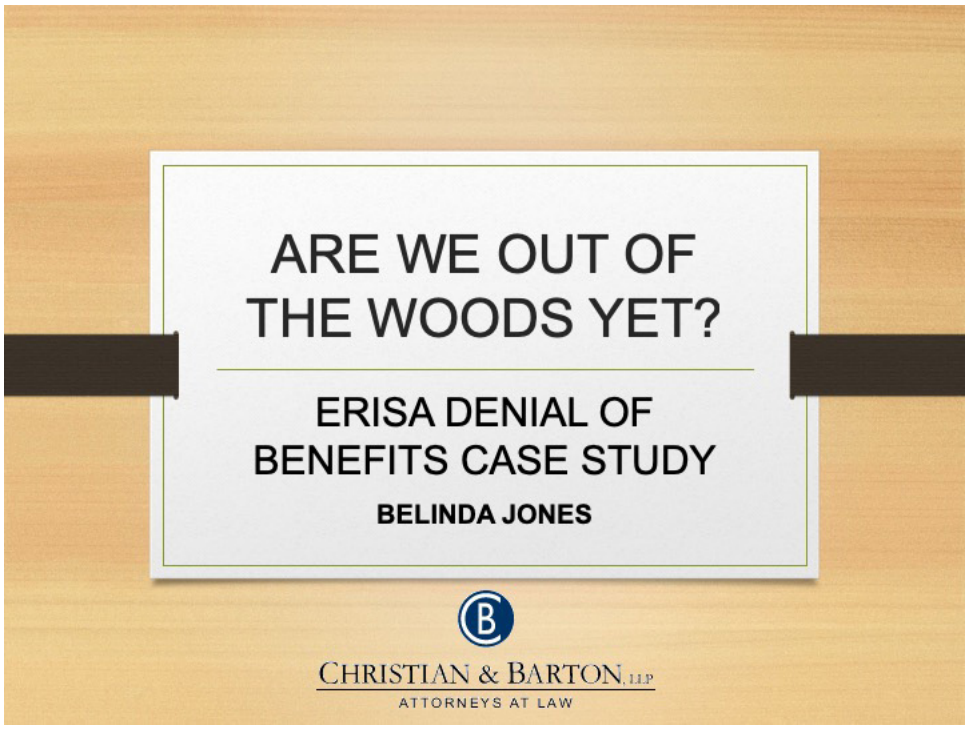
8 Welp v. Cigna Health & Life Ins. Co., 2017 WL 3263138, at *2 (S.D. Fl. 2017).

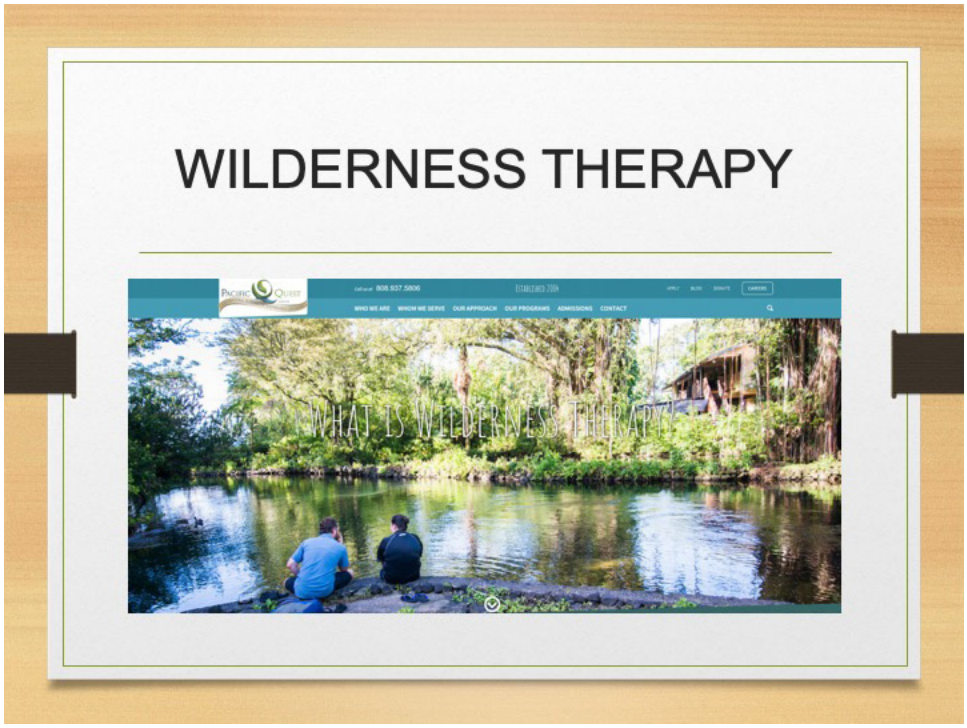
9 Stacy S. v. Boeing Co. Emp. Health Benefit Plan (Plan 626), 344 F. Supp. 3d 1324 (D. Utah 2018).

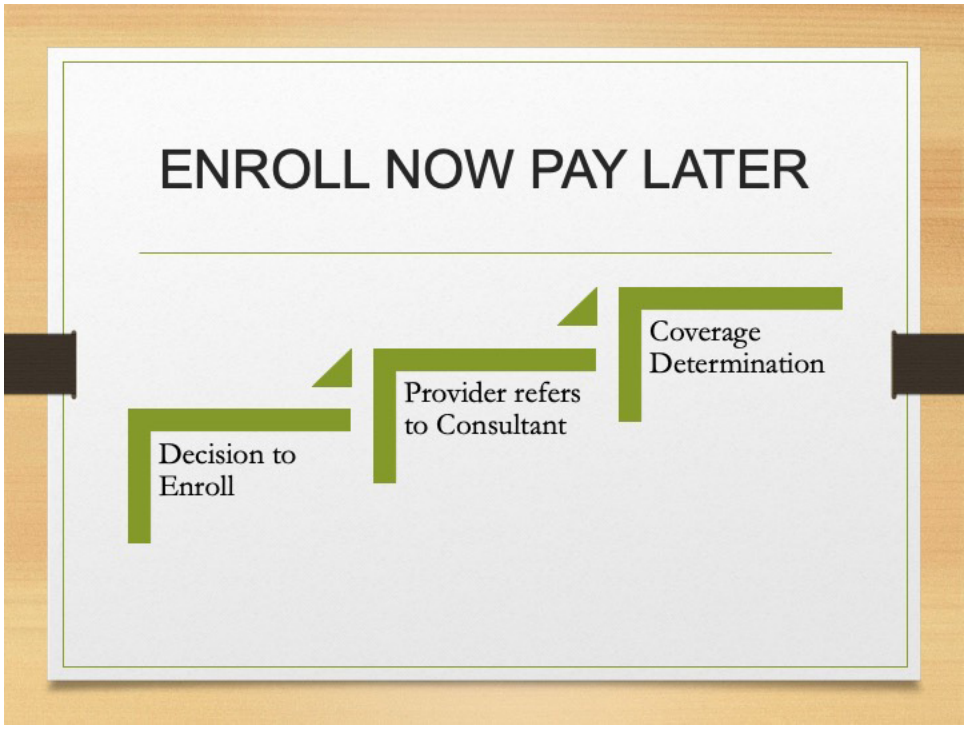
keep peers accountable to their chores. Student seemed to enjoy movie night, as well as going outside to watch fireworks with the community."

Conclude the narrative by focusing on the standard of review and the reasonableness of the decision.

While the insignia of M.D. over J.D. has its moments and creativity is one key to a successful defense, remember that some cases should be settled. Reviewing clinicians at times get it wrong. Judges are patients themselves and have loved ones that have needed clinical care. If, after reviewing the administrative record, your tally sheet contains more facts that make you flinch than not, take off your stethoscope, pick up the phone, and call your client. The ultimate exposure for your client is not just the benefit amount, but more likely than not plaintiff's costs and attorneys' fees.




WILDERNESS THERAPY
WHAT IS WILDERNESS THERAPY?


ENROLL NOW PAY LATER
Decision to Enroll
Provider refers to Consultant
Coverage Determination

THREE STRATEGIC APPROACHES

- BEST OFFENSE IS DEFENSE
- DEFEND AGGRESSIVELY
- BE CREATIVE (TO A POINT)

DENIAL OF BENEFITS LITIGATION

PRE-LITIGATION: BEST OFFENSE IS DEFENSE

- Plan language
- Communication of benefit denial
- Administrative record

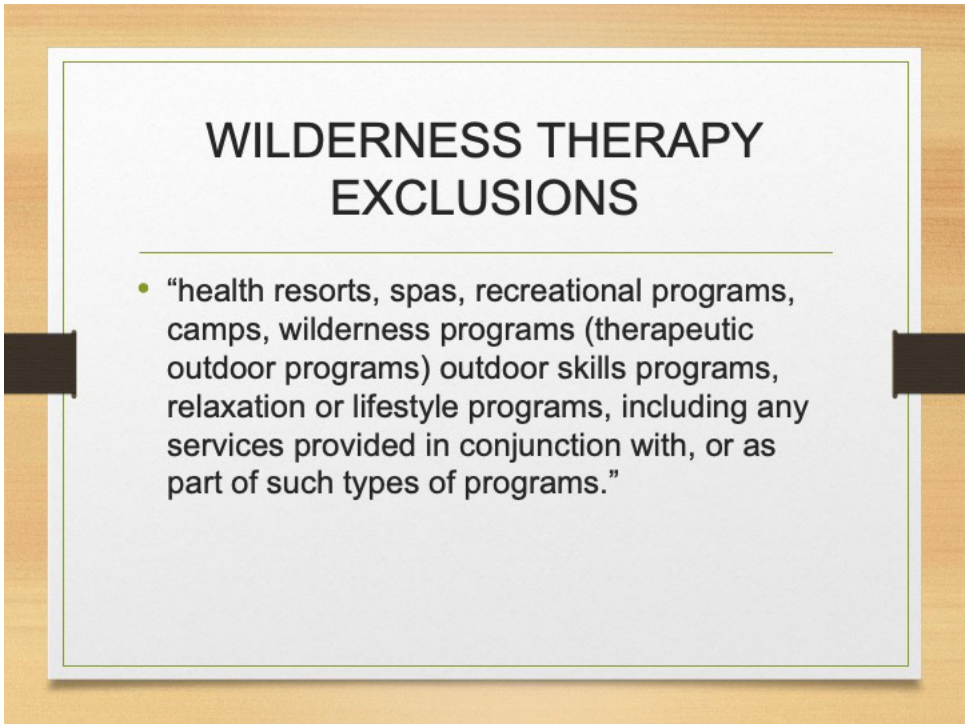

PLAN LANGUAGE
Determines Standard of Review
Abuse of Discretion
De Novo
Defines Covered Benefits

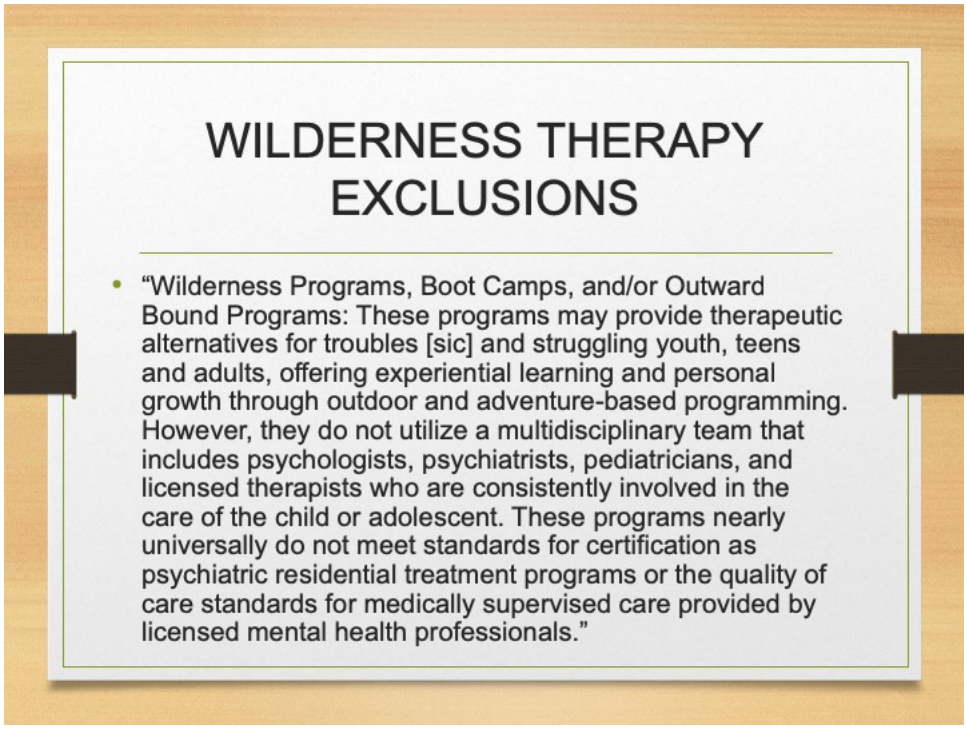

COMMUNICATION OF BENEFIT DENIAL
ERISA Regulations
Standard of Review
Coverage Determination
Consistency
Supported by Plan and Record

DEFEND AGGRESSIVELY

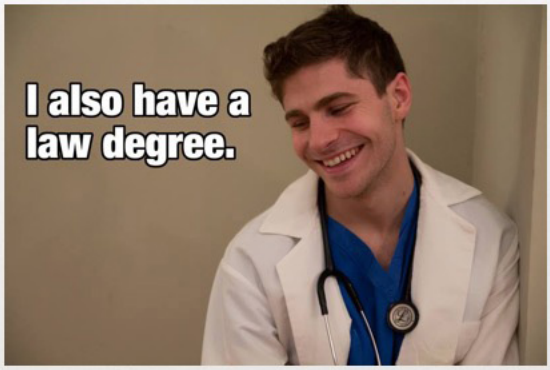
RULE 12(b)(6)

- Not a proper party defendant
- Benefit is excluded by the Plan
- Failure to exhaust administrative remedies
- Contractual limitation period


WILDERNESS THERAPY EXCLUSIONS
• "health resorts, spas, recreational programs, camps, wilderness programs (therapeutic outdoor programs) outdoor skills programs, relaxation or lifestyle programs, including any services provided in conjunction with, or as part of such types of programs."

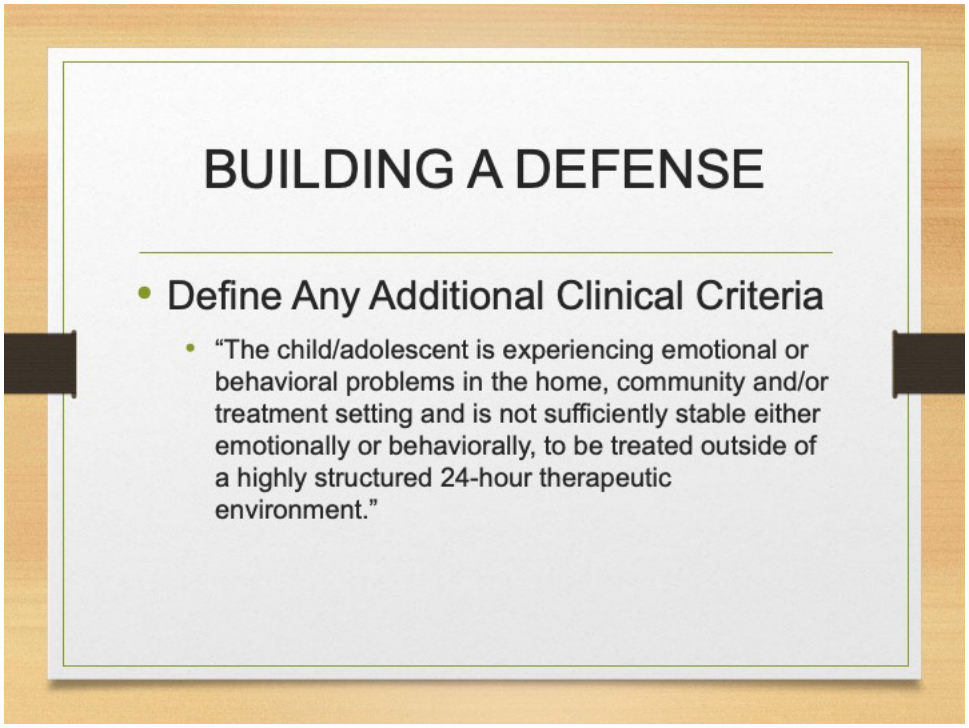

WILDERNESS THERAPY EXCLUSIONS
• "Wilderness Programs, Boot Camps, and/or Outward Bound Programs: These programs may provide therapeutic alternatives for troubles [sic] and struggling youth, teens and adults, offering experiential learning and personal growth through outdoor and adventure-based programming. However, they do not utilize a multidisciplinary team that includes psychologists, psychiatrists, pediatricians, and licensed therapists who are consistently involved in the care of the child or adolescent. These programs nearly universally do not meet standards for certification as psychiatric residential treatment programs or the quality of care standards for medically supervised care provided by licensed mental health professionals."

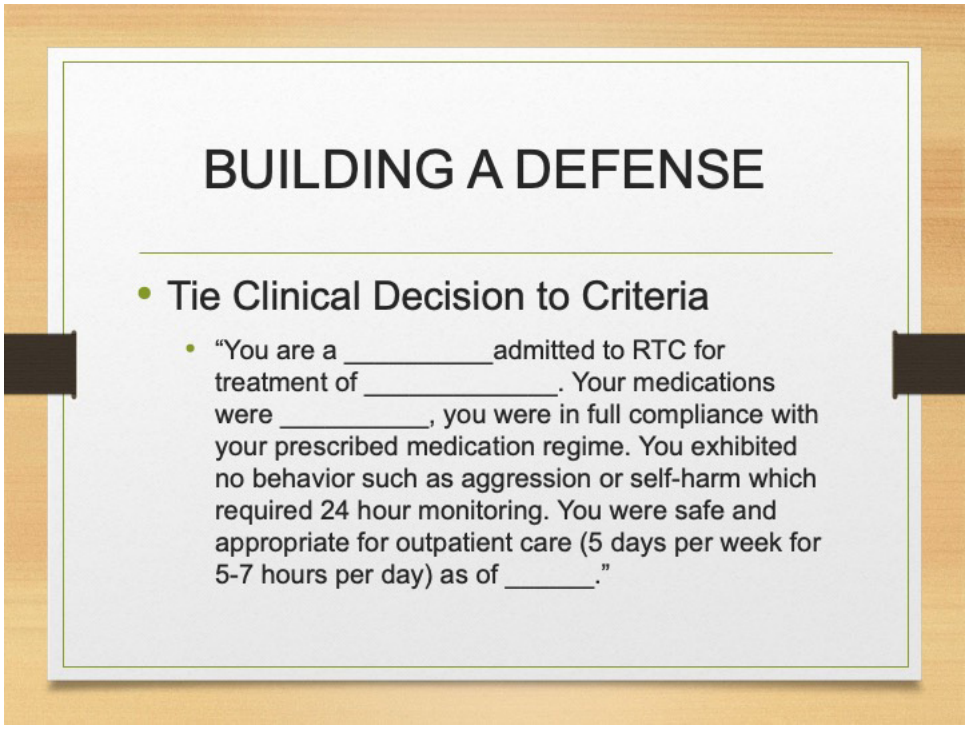
BE CREATIVE (TO A POINT)

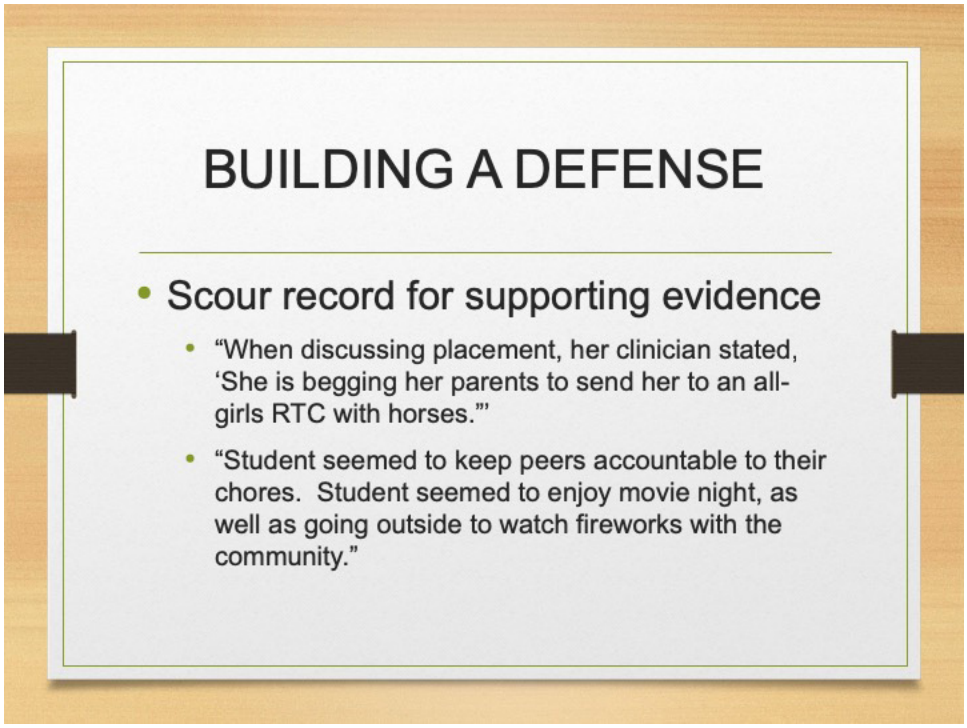


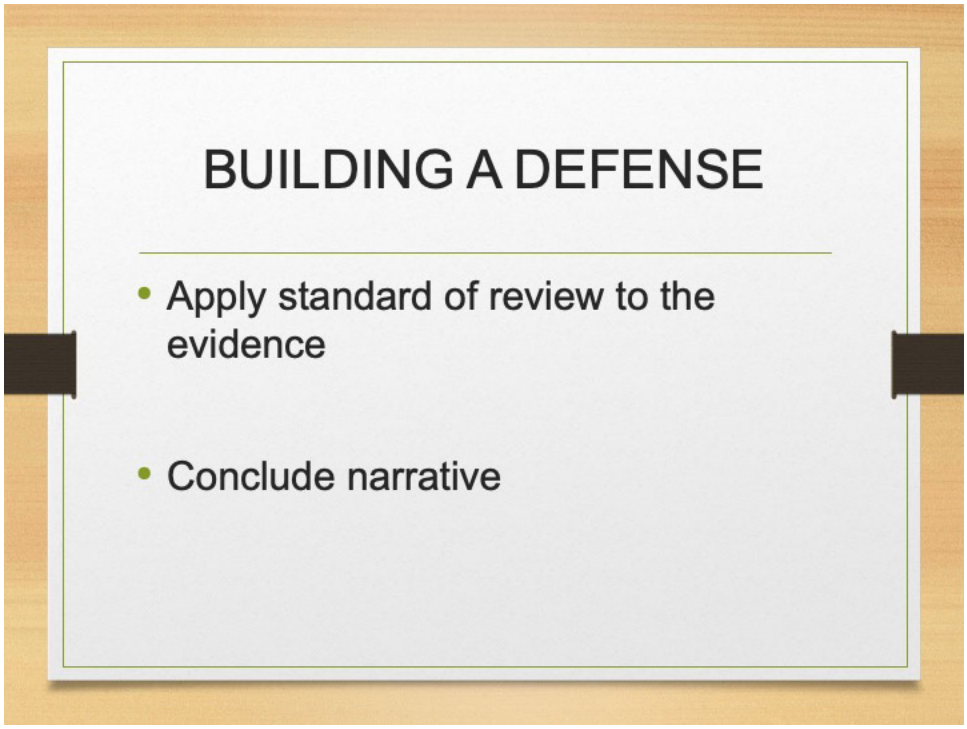
BUILDING A DEFENSE

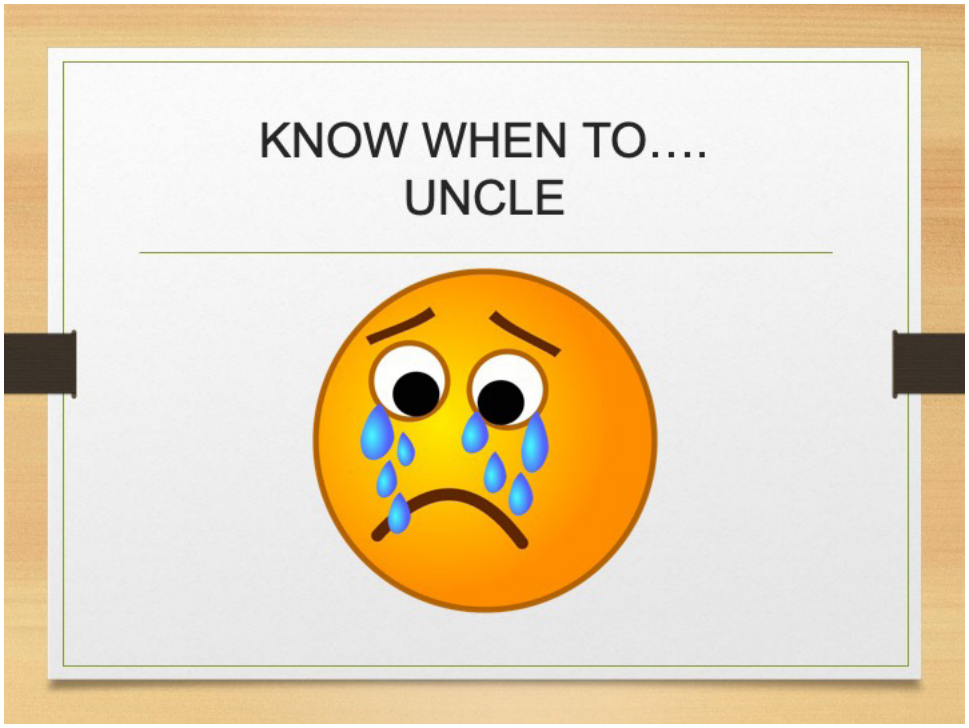
- Define Medical Necessity
  - A medically necessary service must "be of demonstrated value for treatment of the medical condition, consistent with diagnosis and no more than required to meet the basic health needs of the patient."

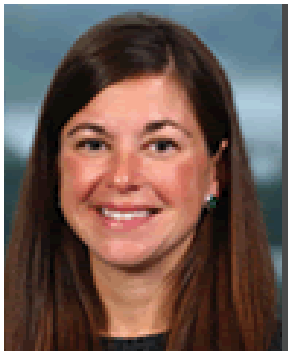

BUILDING A DEFENSE
Define Any Additional Clinical Criteria
"The child/adolescent is experiencing emotional or behavioral problems in the home, community and/or treatment setting and is not sufficiently stable either emotionally or behaviorally, to be treated outside of a highly structured 24-hour therapeutic environment."


BUILDING A DEFENSE
Tie Clinical Decision to Criteria
"You are a _____admitted to RTC for treatment of _____. Your medications were _____, you were in full compliance with your prescribed medication regime. You exhibited no behavior such as aggression or self-harm which required 24 hour monitoring. You were safe and appropriate for outpatient care (5 days per week for 5-7 hours per day) as of _____."


BUILDING A DEFENSE
Scour record for supporting evidence
"When discussing placement, her clinician stated, 'She is begging her parents to send her to an all-girls RTC with horses.'"
"Student seemed to keep peers accountable to their chores. Student seemed to enjoy movie night, as well as going outside to watch fireworks with the community."


BUILDING A DEFENSE
Apply standard of review to the evidence
Conclude narrative


KNOW WHEN TO....
UNCLE



BELINDA D. JONES

Partner

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Belinda Jones is a partner in the firm's Intellectual Property, Health Care and Litigation departments. She represents clients in intellectual property matters before the United States Patent and Trademark Office, federal courts and the Trademark Trial and Appeal Board. Mrs. Jones' commercial litigation practice focuses on health care matters, transportation and financial services disputes. She regularly practices before state and federal courts and has arbitrated commercial matters before FINRA Dispute Resolution and the American Arbitration Association.

Mrs. Jones is a member of the firm's Executive Committee and the Associate Training and Evaluation Committee, and she is an active member of the Virginia Bar Association and the Bar Association of the City of Richmond.

Practice Areas

- Intellectual Property Litigation
- Health Care Litigation
- Trials/Appeals/Alternative Dispute Resolution
- Products Liability and Torts
- Non-Competition and Trade Secrets
- Financial Services Litigation

Representative Litigation

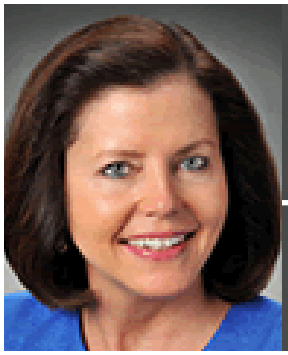
- Representation of a national mental health care management company in commercial and contract disputes, and benefit claims under ERISA.
- Representation of hospital providers in commercial contract negotiations and disputes.
- Representation of insurers in plan design and benefit claims.
- Representation of various providers in Virginia Medicaid appeals.
- Representation of railroad in various commercial disputes including breach of contract and antitrust claims.
- Representation of international accounting firm in business tort action.
- Representation of regional airport authority in constitutional challenge and other tort actions.
- Representation of citizens group in water rate litigation.
- Representation of insurers in commercial and coverage disputes.
- Representation of an avionics manufacturer in the Eastern District of Virginia.
- Representation of a third party administrator of substance abuse testing programs.

Recognition

- Virginia Rising Stars - Civil Litigation Defense, 2013-2017; Intellectual Property Litigation, 2012

Education

- Georgia State University, J.D., 2004 - Magna Cum Laude
- University of Virginia, B.A., Government, 1999



DRUG ABUSE OR DISABILITY: ARE EMPLOYEES WHO TAKE PRESCRIPTION DRUGS IN A PROTECTED CLASS?

Ronda Harvey
Bowles Rice (Charleston, WV)
304.347.1701 | rharvey@bowlesrice.com

Addiction in the Workplace: Employers' Legal Obligations and Other Considerations When Confronting Employee Drug Habits

Ronda L. Harvey and Gabriele Wohl

It is a rare day when even the smallest of news sources does not run a story on drug-related problems or substance abuse issues that stem from the nationwide opioid crisis. That is likely because addiction is as local an issue as it is national—the overall statistics are staggering, but zooming in on those statistics reveals devastated communities, broken families, and struggling individuals.

Workplaces and employers have felt the burden of a workforce that is increasingly afflicted by addiction. Those who are themselves addicted, recovering addicts, or have family abusing substances—most of these people have jobs. Employers are more frequently facing these issues head on as their employees and prospective employees are failing drug tests, self-reporting drug use, and abusing substances on the job. The adverse effects that substance abuse and addiction can have on an employer range from the obvious, like decreased job performance and threats to employee and public safety, to the less obvious, like running afoul of labor laws and regulations and risking litigation. This article lays out the current legal landscape with respect to operating a drug-free workplace and managing employees who suffer from addiction.

I. When is addiction a disability under the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., prohibits an employer from discriminating against a "qualified individual with a disability" because of that individual's disability. See 42 U.S.C. § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

> The definition of a disability is "with respect to an individual— "
>
> (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (ii) A record of such an impairment; or
>
> (iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

29 C.F.R. § 1630.2. Applying this definition to addiction, only individuals who have a substantially limiting addiction, have a history of such an addiction (as opposed to just a history of drug use), or who are regarded as having such an addiction have an impairment under the law.

The first prong of the definition requires a substantial limitation of one or more major life activities. There is a long string of regulatory nuances constructing the term "substantial limitation," but suffice it to say for this article that the term is meant to be "construed broadly

in favor of expansive coverage" and "is not meant to be a demanding standard." 29 C.F.R. § 1630.2. Major life activities include basic physical tasks as well as mental and emotional functions such as concentrating and interacting with others. See 29 C.F.R. § 1630.2.

It is worth making explicit at this point that there is no protection under the ADA for an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114. As explained in more detail below, an employer has a valid and legally defensible right to terminate or discipline an employee for engaging in unlawful drug use.

A safe harbor is embedded in that exclusion for an employee who (1) "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use," (2) "is participating in a supervised rehabilitation program and is no longer engaging in such use," or (3) "is erroneously regarded as engaging in such use, but is not engaging in such use." 42 U.S.C. § 12114(b).

At present, no bright-line test exists for determining whether someone is a "current" drug user. Courts have found that "an employee illegally using drugs in a periodic fashion during the weeks and months prior to discharge is 'currently engaging in the illegal use of drugs,'" and an employee who has only abstained from drugs for six days is also considered a current user. See Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997), abrogated on other grounds by Baird ex rel. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th Cir. 2001). In other words, the employee does not have to be using drugs on the day in question to be deemed a current user. See also Baustian v. Louisiana, 910 F. Supp. 274 (E.D. La. 1996) (current user after seven weeks drug-free); Vedernikov v. West Virginia University, 55 F. Supp. 2d 518, 523 (N.D. W. Va. 1999) (current user after two months drug-free); Quinones v. University of Puerto Rico, 2015 WL 631327, at *5 (D. Puerto Rico 2015) (current user after three months drug-free); Lyons v. Johns Hopkins Hosp., No. CV CCB-15-0232, 2016 WL 7188441, at *4 (D. Md. Dec. 12, 2016), aff'd as modified, 712 F. App'x 287 (4th Cir. 2018) (current user after four months drug-free); cf. United States v. Southern Management Corp., 955 F.2d 914, 919-23 (4th Cir. 1992) (one year of abstinence not considered current use).

The District Court for the Eastern District of Pennsylvania recently offered this useful guidance:

> An employee's drug use is "current" if it occurred recently enough to justify the employer's reasonable belief that the employee's involvement with drugs is an ongoing problem. . . . In order for an employee to be "substantially limited" by her status as a recovering drug addict, she must be addicted to drugs but no longer "currently engaging" in illegal use. . . . Whether an employee is "recovering" or "currently engaging" in illegal drug use is determined on a case-by-case basis.

Suarez v. Pennsylvania Hosp. of Univ. of Pennsylvania Health Sys., No. CV 18-1596, 2018 WL 6249711 at *6 (E.D. Pa. Nov. 29, 2018) (citing EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA § 8.3, § 8.5 (1992), and Salley v. Circuit City Stores, 160 F.3d 977, 980 n.2 (3d Cir. 1998)).

Recalling the safe harbor provision, this guidance on "current use" must be read with the caveat that an employee with an addiction who is participating in or has completed drug rehabilitation and is not continuing to engage in drug use may still be protected under the ADA, even if his or her most recent drug use falls within one of these "current" time limitations. "Current use" was an issue in Lyons v. Johns Hopkins Hosp., where Mr. Lyons, a social worker employed at a hospital, admitted to a cocaine addiction following a positive drug screen in December 2008. See 2016 WL 7188441, at *1. The hospital placed Mr. Lyons on a leave of absence until February 2013 and referred him to two drug treatment facilities. See id. Mr. Lyons began drug treatment but failed to complete the program. See id. When the hospital learned that he had not complied with the drug treatment program, it terminated Mr. Lyons in April 2013. See id. at *2.

Mr. Lyons pursued relief for discrimination under the ADA on the basis of his addiction. The court agreed with the hospital that, assuming Mr. Lyons had abstained from drug use from December 2012 to April 2013, he was still a "current user," and thus exempt from the protection he sought. Had Mr. Lyons completed the recommended drug treatment program, the court's analysis might have been different. Participation and completion of such a program is not dispositive of safe harbor eligibility, but it is a factor in the analysis. See id. at *5 (recognizing that "eligibility for the safe harbor 'must be determined on a case-by-case basis, examining whether the circumstances of the plaintiff's drug use and recovery justify a reasonable belief that drug use is no longer a problem.'" (quoting Mauerhan v. Wagner Corp., 649 F.3d 1180, 1188 (10th Cir. 2011))).

Determining who falls under the disability protections for

addiction requires synthesis of the definition of disability, the exclusion for current users, and the safe harbor provision. Generally, an employee who is not currently using illicit drugs, but can demonstrate a current, substantial limitation on one or more life activities due to addiction, will be protected. This could include past drug users whose addiction can satisfy the disability definition, as well as recovering drug addicts in methadone programs or other medication-assisted therapies.

II. What actions can and must an employer take with respect to an employee addicted to illegal substances?

If an employee falls into the definition of disability based on drug addiction, his or her employer must provide reasonable accommodations under the ADA. There is no precise guidance of accommodations for an addiction, but the employer must engage in the interactive process with the employee. Depending on the individual's needs, accommodations can include offering counseling where available, or providing leave for treatment. Adjustment of job duties may also be an appropriate accommodation, such as restricting a hospital or pharmacy employee's access to narcotics where the employee is a recovering addict with a demonstrated disability. See, e.g., Wallace v. Veterans Admin., 683 F. Supp. 758, 760 (D. Kan. 1988) (accommodating a nurse with a narcotics restriction in the context of a federal employer).[1]

If an employee's disability poses such a threat to others that any reasonable accommodation would not eliminate the threat, an employer can rely on the "safety of others" defense to a disability discrimination claim based on termination. The ADA does not require an employer "to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of [an] entity where such individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3). A "direct threat" is a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." Id. This defense relates particularly to jobs where an employee may have to operate machinery, vehicles, or firearms.

Regardless of the public safety threat and the nature of the job, an individualized assessment of the employee's impairments must be made before termination. This is key where an employee is protected due to his or her drug addiction, since the employee would not, by definition, currently be abusing illegal substances. Where an employee is participating in a medication-based drug treatment program, an individualized assessment must be made to determine the medications' effect on the job. This requirement also applies to employees who may be using narcotics lawfully, by prescription. See, e.g., EEOC v. Foothills Child Development Center, Inc., Civil Action No. 6:18-cv-01255 (D. S.C. May 7, 2018) (where EEOC settled with employer in lawsuit based on termination of employee participating in suboxone clinic) (see EEOC Press Release, Foothills Child Development Center Agrees to Settle EEOC Disability Discrimination Lawsuit, May 15, 2018 ("Employers should make employment decisions based on an applicant's qualifications and an employee's performance, not based on disability or participation in a medically-assisted treatment program.")).

If an employer becomes aware of an employee using opioids, either by drug test or otherwise, the employer must take care to follow up as to whether the opioids are lawfully prescribed, and, if so, conduct an individualized assessment of whether the medication will negatively impact the job or public safety. Before questioning employees about prescription opioids, an employer must have a business necessity for the question. As explained by ¶ 230 of the ADA Compliance Guide (2019),

> While drug testing does not have to be job-related or consistent with business necessity, requiring employees to answer questions about prescription drugs does. An employer that asked employees to disclose all prescription drugs they took before drug testing violated the ADA, according to a federal appeals court that found there was no business necessity for asking the question[.] It is a matter of timing. Questions after a test to provide a defense against positive results are acceptable. Questions before are not.

ADA Compliance Guide ¶230, "Examinations and Testing," 2008 WL 4817022 (citing Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1230 (10th Cir. 1997) (finding that blanket "prescription drug disclosure provisions of [employer's drug] Policy violated the ADA")).

Employers must be mindful of the potential for lawful use of medically-prescribed opioids and the impact such use may have on the performance of the job or to public safety. If an employee is using opioids pursuant to a valid prescription, the employer should weigh the effects of the drug against the job duties, and collaborate with the employee (using the interactive accommodation process) to figure out if there is a reasonable accommodation

1 Currently, medical marijuana use is not protected under the ADA, inasmuch as marijuana is still an illegal controlled substance under federal law. However, state legalization of marijuana impacts application of state human rights laws in determining whether an employer has to accommodate medical marijuana use. Employers should be familiar with their states' medical marijuana laws and refrain from inquiries that may elicit information about a disability underlying a person's medical marijuana use.

that lessen the risks to job performance or safety. If an employee is using prescription opioids without a valid prescription, under the law, the employers may take certain actions against the employees without providing accommodation.

The ADA contains a specific provision stating that employers may hold drug users "to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. § 12114(c)(4). Courts have recognized that, although the ADA protects an employee's status as a disabled addict, being addicted to drugs or alcohol "does not insulate one from the consequences of one's actions." Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1182-1183 (6th Cir.1997) (internal quotation marks omitted).

Any action taken on the basis of an employee's illegal drug use must be based on the actual drug use, and not an addiction or perceived addiction. An employer can refuse to hire someone, can discipline or fire a current employee, and can refuse to rehire a former employee because of illegal drug use, as long as the employer would do so across the board—with respect to employees who are addicted or who are one-time or recreational users. See Raytheon Co. v. Hernandez, 540 U.S. 44, 53-54 (2003) (policy of refusing to rehire worker who had engaged in drug-related misconduct was neutral and non-discriminatory).

The Court of Appeals for the Ninth Circuit explained in Lopez v. Pac. Mar. Association, that a one-strike rule against drug users did not discriminate against recovering addicts because,

> The rule eliminates all candidates who test positive for drug use, whether they test positive because of a disabling drug addiction or because of an untimely decision to try drugs for the first time, recreationally, on the day before the drug test.

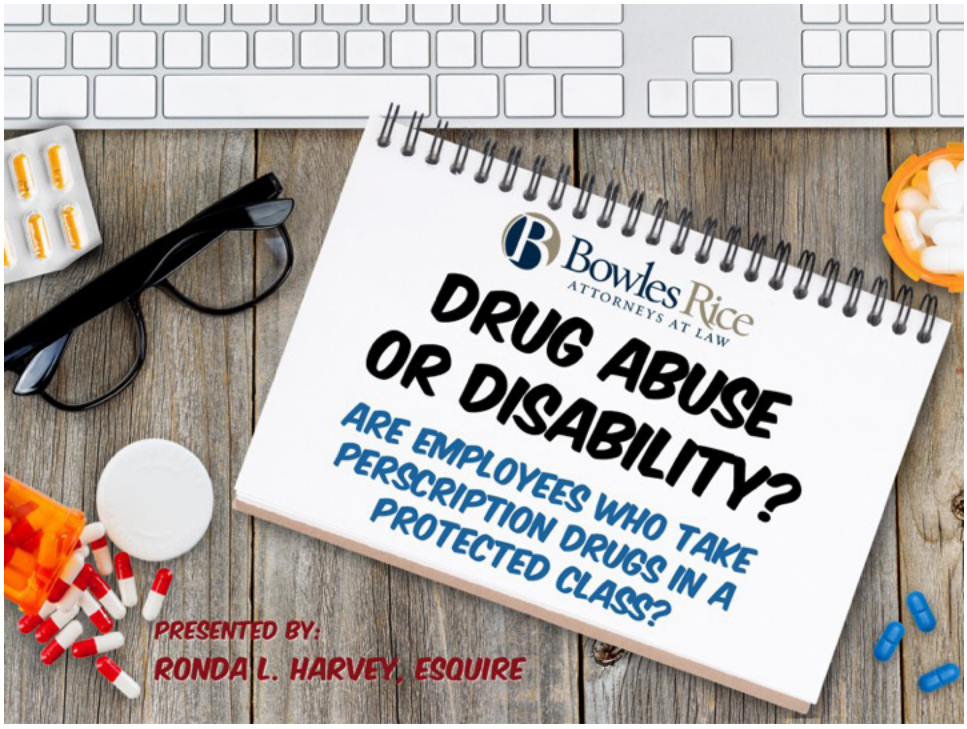
657 F.3d 762, 764 (9th Cir. 2011). See also Pernice v. City of Chicago, 237 F.3d 783, 785 (7th Cir. 2001) ("It is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability." (citing Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351, 352 (7th Cir.1997) (upholding termination of employee whose threats against co-workers were triggered by mental illness)).
Employers may (and should, for a variety of reasons) prohibit illegal drug use at work. Employers may also require that employees not be under the influence of or engage in the illegal use of drugs at work, require that employees comply with standards set forth in the Drug-Free Workforce Act, or other federal law relating to drug use, or require on-the-job or pre-employment drug tests. 42 U.S.C. § 12114(c). It is not discriminatory under the ADA to require employees who are former substance abusers to submit to more frequent drug tests than other employees. See Buckley v. Consolid. Edison Co. of New York, Inc., 155 F.3d 150, 155 (2d Cir.1998).

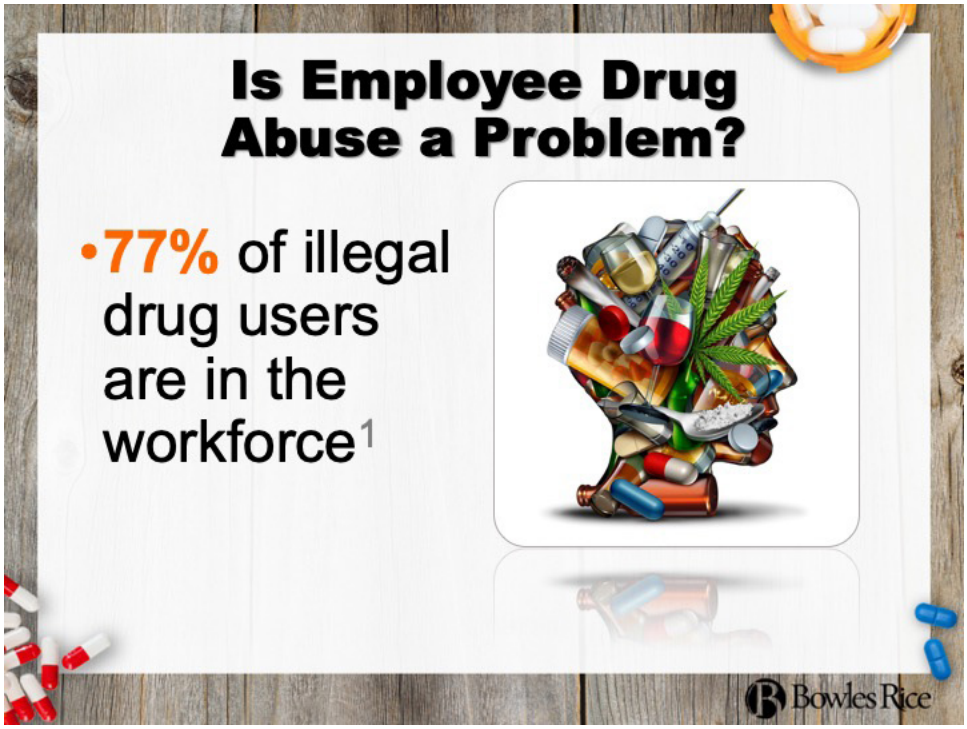
It is, however, unlawful to ask potential employees whether they are drug abusers or addicts, or if they've ever been to rehab, as that might be considered a disability-related inquiry. Those questions may have some justification with respect to an employee who has already been hired if the questions relate to the job and the information is not used to discriminate on the basis of disability. It is also not unlawful under the ADA to inquire about employees' and potential employees' current drug use.

With or without these policies, illegal drug use will always be unlawful and a valid reason for disciplinary action. Being up-front about the level of tolerance for such activity—particularly when the use is done outside of the workplace but the effects are observed on the job—will put employees on notice that drug use will be taken seriously, and help insulate the employer from any potential exposure for associating with or enabling criminal behavior. Having policies in place about substance abuse also provides a strong basis for termination when an employee violates the policies.

Employers need to know their duties and options when it comes to handling addiction in the workplace. The safest approach to addiction and drug use for employers is to focus on job performance. If an employee's job performance is declining and the employer suspects—but does not know—that it is due to narcotics abuse, then the employer can take action based on performance issues, as he or she would with any other employee. An employer may not, however, take the same action against an employee on the basis of his or her addiction, when the addiction satisfies the definition of a disability.

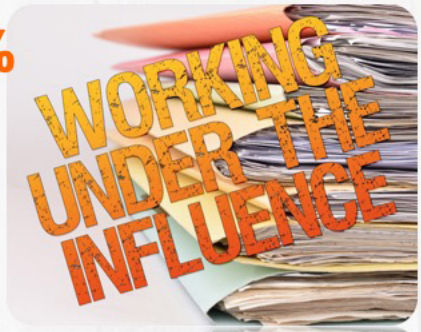
In addition to the policies and actions set out above, employers may consider providing avenues for addicts to get help, even if they are current drug users. Employee assistance programs and leaves of absence for self-disclosure, followed by agreed-upon monitoring, are not required accommodations under the law, but may be worthwhile in the long-term goal of preventing turnover and maintaining a healthy and able workforce.


Bowles Rice
ATTORNEYS AT LAW
DRUG ABUSE OR DISABILITY?
ARE EMPLOYEES WHO TAKE PERSCRIPTION DRUGS IN A PROTECTED CLASS?
PRESENTED BY:
RONDA L. HARVEY, ESQUIRE


Is Employee Drug Abuse a Problem?
•77% of illegal drug users are in the workforce[1]
Bowles Rice

Is Employee Drug Abuse a Problem?

- **More than 60%** of adults know someone who has worked under the influence[2]



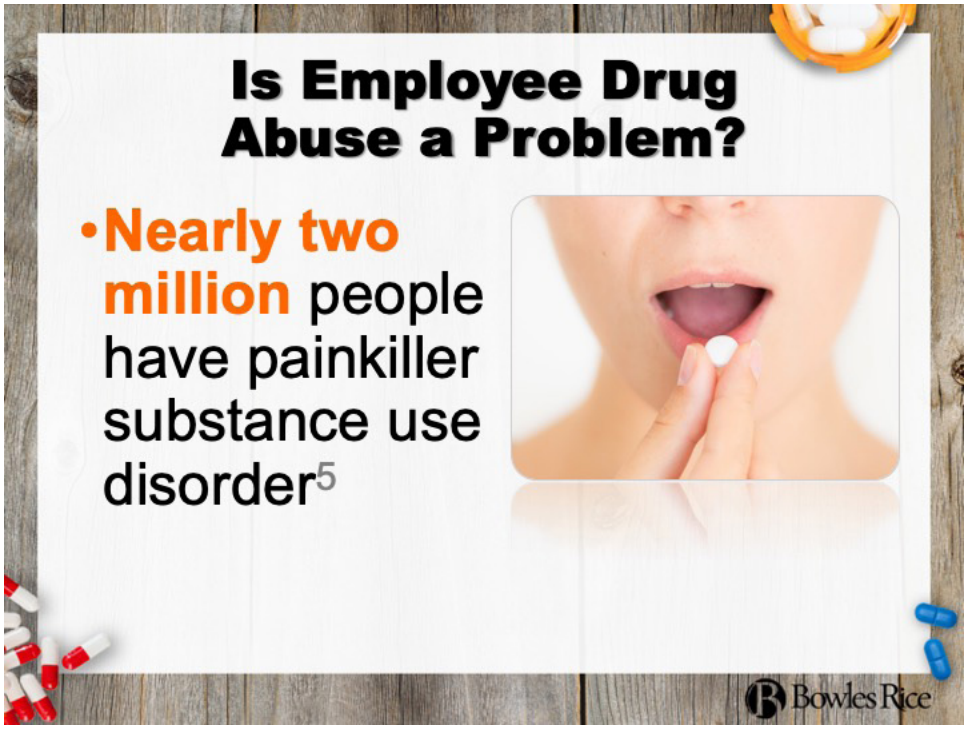
Bowles Rice

Is Employee Drug Abuse a Problem?

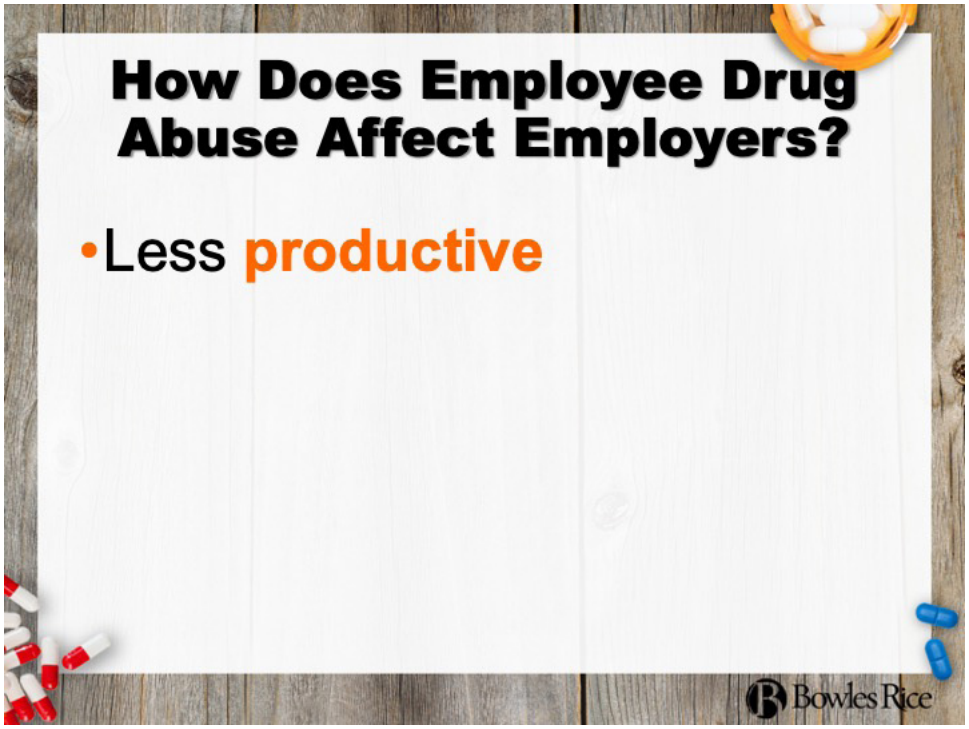
- Addiction costs the economy **$190 billion** annually[3]

Bowles Rice


Is Employee Drug Abuse a Problem?
•Nearly 16 million employees abuse drugs[4]
Bowles Rice


Is Employee Drug Abuse a Problem?
•Nearly two million people have painkiller substance use disorder[5]
Bowles Rice


How Does Employee Drug Abuse Affect Employers?
•More absenteeism
Bowles Rice


How Does Employee Drug Abuse Affect Employers?
•Less productive
Bowles Rice


How Does Employee Drug Abuse Affect Employers?
•More likely to have a workplace accident
Bowles Rice


How Does Employee Drug Abuse Affect Employers?
•More likely to make mistakes
OOPS!
Bowles Rice

How Does Employee Drug Abuse Affect Employers?

- Increase in **workers' compensation claims**

Bowles Rice

Are Drug Users Protected?

- Americans with Disabilities Act – "ADA"

Bowles Rice

Are Drug Users Protected?

- State Human Rights provisions

Bowles Rice

Are Drug Users Protected?

- Employment contract and policies

Bowles Rice

Is Drug Abuse a Disability?

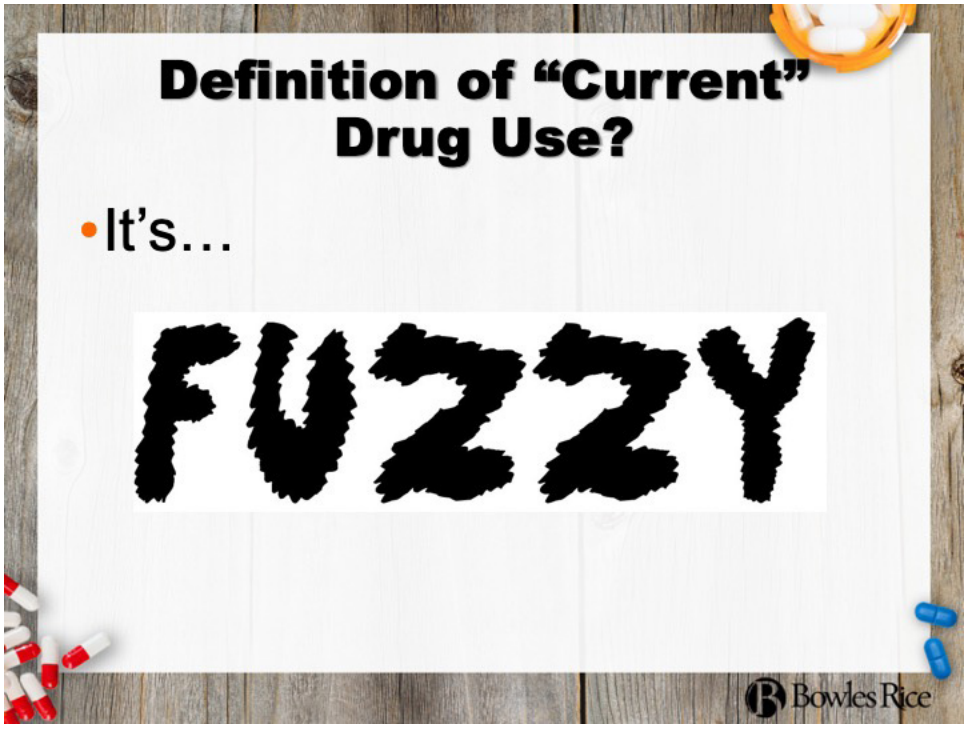
- ADA definition – 29 CFR 1630.2

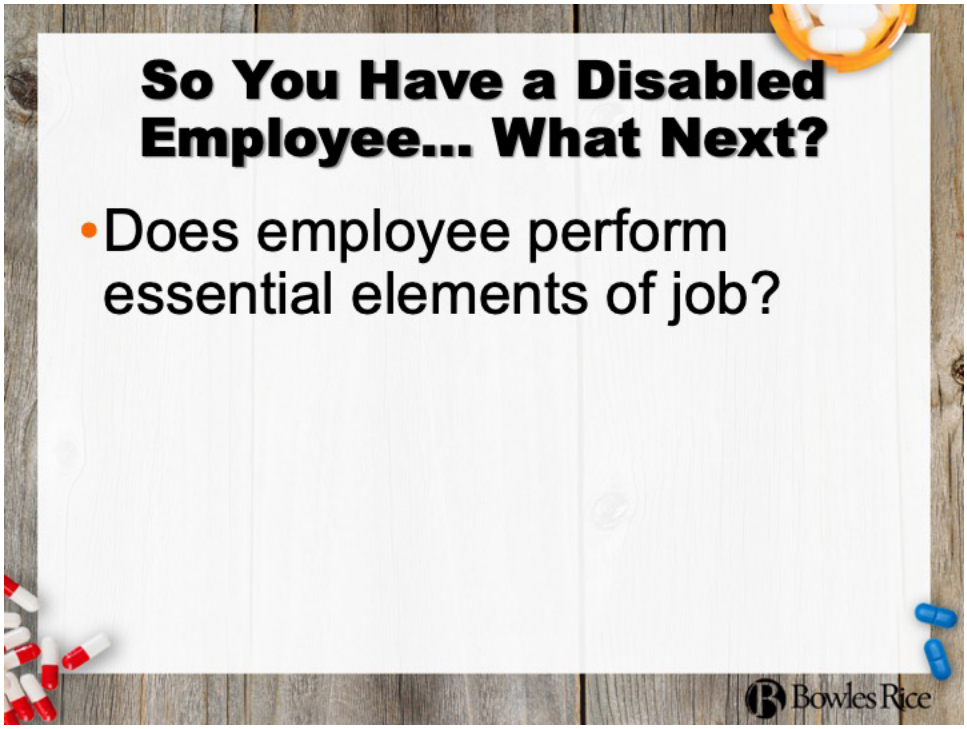
Bowles Rice

Is Drug Abuse a Disability?

- No ADA protection for those "currently" engaging in illegal drug use.

Bowles Rice


Definition of "Current" Drug Use?
•It's…
FUZZY
Bowles Rice


So You Have a Disabled Employee… What Next?
•Does employee perform essential elements of job?
Bowles Rice

So You Have a Disabled Employee... What Next?

- Can employer reasonably accommodate employee's disability?

Bowles Rice

So You Have a Disabled Employee... What Next?

- Is disability a threat to public safety?

Bowles Rice

Discipline / Termination?

- Follow employment policies

Bowles Rice

Discipline / Termination?

- Engage in interactive process

Bowles Rice


Is Illegal Drug Use Protected?
NO
Bowles Rice


Is Illegal Drug Use Protected?
•WARNING:
Employer must make sure employee is not taking legally prescribed drugs
ADDRESS:
Rx
Valium 10 mg
30
ke 1 tablet
fills: 1
Bowles Rice


What About Rehab?
REHAB
Bowles Rice


References
1. The Council on Alcohol and Drugs, Inc., 2018
2. Figment Group, Inc., 2017
3. National Council on Alcoholism and Drug Dependency, 2018
4. National Safety Council, 2019
5. National Safety Council, 2019
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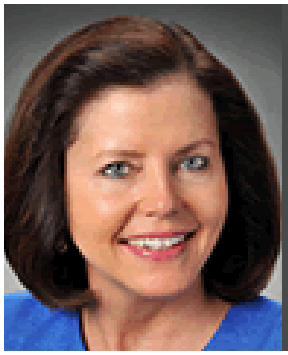

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Ronda Harvey is the leader of the Bowles Rice Labor & Employment Team. She focuses her practice on employment litigation and also advises clients on human resources issues.

A significant part of Ronda's practice for the past 25 years has been defending employers in lawsuits brought by employees in both state and federal courts. She has successfully tried cases to verdict for employers, and represents them in administrative proceedings. She has successfully argued appeals to the West Virginia Human Rights Commission on behalf of employers. She currently provides representation to a state agency in claims involving retirement benefits.

Ronda works with employers in a variety of industries, including manufacturing, health care and energy. She understands that each client is unique, and works in partnership with her clients to fully understand their business and help them manage the regulatory minefield of employment issues. She frequently provides training to managers and supervisors on both human resource and safety issues.

Her experience and successful representation of employers, including Fortune 500 companies, has earned her a preeminent AV rating from Martindale Hubbell, long considered the gold standard in the legal profession. Based on feedback from her peers and clients, she also is recognized by the leading peer review organizations in the legal industry, including Chambers USA's Leading Lawyers for Business; Best Lawyers in America; and Super Lawyers for her litigation practice.

Ronda's most recent achievements include defending a large West Virginia employer in a deliberate intent trial and winning a complete defense verdict. She also has represented defendants in mass tort and complex products liability civil actions.

Practice Areas

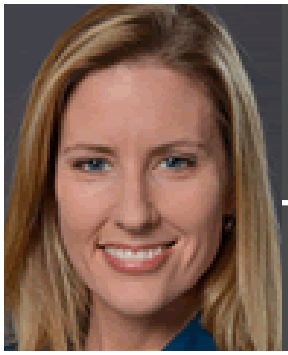
- Labor and Employment
- Deliberate Intent and Workplace Safety
- Product Liability Defense
- Litigation
- Appellate Litigation
- Mass Tort and Toxic Tort Defense

Honors

- Recognized by 2015-2018 editions of Chambers USA: America's Leading Lawyers for Business among "Leaders in their Field" for Litigation: General Commercial
- Named to The Best Lawyers in America ® (Product Liability Litigation - Defendants), 2013-present
- Peer-Review Rated AV by Martindale-Hubbell
- Named as Super Lawyer in General Litigation
- National Academy of Jurisprudence Premier 100 Trial Attorneys of West Virginia

Education

- J.D., West Virginia University College of Law (1993)
- B.S., West Virginia University (1984)



DISCOVERY SANCTIONS: A CLOSER LOOK

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Discovery Sanctions: Defendants Can Use This Tool Too

K. Nichole Nesbitt

Introduction

Most civil defense counsel are aware of their evidence preservation obligations and have experienced cases in which plaintiffs have used those obligations as leverage for negotiating an early (or more costly) resolution. In some cases, however, a plaintiff's failure to preserve evidence can drive a favorable outcome for the defense. Defense counsel should consider taking an aggressive approach to discovery – especially by requesting the plaintiff's electronically stored evidence – from the start of the case. This paper will discuss the obligations that form the basis for this approach and how it can be utilized to achieve a favorable outcome in the right case.

Parties' Obligations to Preserve Evidence

Utilizing sanctions as a tool in litigation only works if a plaintiff has violated his or her obligation to preserve evidence, so a brief review of that obligation is warranted. Jurisdictions differ in their approach to discovery obligations. See Paul W. Grimm, et al., Advanced Issues in Electronic Discovery: The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules, 37 U. BALT. L. REV. 381, 389, n.36 (Spring 2008) ("Preservation obligations arise from independent sources of law and are dependent on the substantive law of each jurisdiction."). And questions like whether the issue is a procedural one or a substantive one, as well as whether spoliation of evidence gives rise to an independent tort or just sanctions differ from one jurisdiction to another. See The Duty to Preserve Evidence, American Bar Association, https://apps.americanbar.org/abastore/products/books/abstracts/ 5190497_chap1_abs.pdf. But there is consensus that a duty to preserve evidence – including electronically stored evidence – exists once litigation is filed, threatened, or reasonably foreseeable. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

Discovery may be necessary on this point alone. In some cases, such as when a known injury occurs, the trigger for the preservation obligation will be obvious. In others, though, there may be a dispute as to when the plaintiff first realized he or she had a claim. Defendants should ensure that they have nailed down the parameters of the preservation obligation from the beginning of the litigation, as that will shape the remaining discovery strategy. A plaintiff's failure to preserve at the right time constitutes spoliation of evidence and is one basis for a motion for sanctions.

Strategies for Ensuring Plaintiffs are Meeting Their Discovery Obligations

Too often, defendants play a reactive, rather than proactive, role in the discovery process. Because the plaintiff's side has a head start in litigation, the plaintiff will already have a careful and thorough plan for discovery, and may already have crafted discovery requests, before the case is filed. Defendants find themselves having to answer discovery before propounding their own, and the process of strategizing about what is needed is skipped. Defendants should resist this and make the time to think through what they will need and how they are going to ask for it.

Step One: Create a Checklist of Information to Seek

As soon as possible in the litigation, defendants should create a list of information – and sources of information – that they will need to establish their defenses. While boilerplate discovery requests capture some of the information needed, targeted discovery requests get better results, not just because they are more likely to produce useful information, but because it is easier to establish spoliation or a discovery violation to the court if a plaintiff has failed to produce information in response to a targeted request.

In developing their list, defendants should consider each element of each claim and affirmative defense as well as each known or likely source of information. If a defendant plans to assert an assumption of risk defense, for example, then the defendant should note on the checklist that discovery requests should include all of the information the plaintiff knew in advance about the event at issue – research done, conversations had, documents read, etc. Likewise, if a defendant knows how a plaintiff keeps information (in paper, on a mobile device, or some other way) all such locations will need to be searched, and that should go on the checklist as well.

Remember that relevant discovery is not limited to just the claims and defenses; it should also extend to the plaintiff's credibility and background. Thus, any discovery checklist should include information about the plaintiff him- or herself. Defendants should make sure to ask about the plaintiff's criminal background, history of civil or bankruptcy matters, social media accounts (including user names and passwords), employment history, and other factors that might be relevant to his or her character and trustworthiness. While the defendants will make independent efforts to obtain this information, there are some facts that can be discovered only by asking the plaintiff directly, so this should go on the checklist.

This checklist will be utilized for the remaining steps – especially establishing prejudice if a motion for sanctions is ultimately filed – so it is critical that it be devised at the earliest point in the litigation and updated as the case proceeds.

Step Two: Send Out Meaningful Litigation Hold Letters

Defendants need not wait until discovery commences to instruct a plaintiff to preserve evidence. As soon as they are aware of a potential claim, defendants should – with the use of their checklist – develop a comprehensive litigation hold notice and serve it on the plaintiff.

Some defendants issue broad and general litigation hold notices that instruct a plaintiff simply to preserve "all relevant information" without being more specific. While this is better than nothing, it does not optimize their position in discovery. When a defendant seeks sanctions for a plaintiff's failure to preserve or produce relevant evidence, a court is much more likely to grant that motion if the plaintiff was requested specifically to preserve that evidence, rather than "relevant evidence" in general. The instruction to preserve "relevant evidence" should be supplementary to specific requests; it should not be the only request in a litigation hold notice.

Once defendants create a checklist of information needed, putting together a comprehensive litigation hold becomes simpler. Specific items and specific sources of information have already been identified, and the litigation hold should specify all of them while keeping the "all other relevant evidence" catch-all.

Step Three: Maximize the Rule 26(f) Conference

In federal cases, unless waived by the court, the parties are required by Federal Rule of Civil Procedure 26(f) to meet and confer about the scope of discovery and how information will be exchanged. In many cases, because this meeting occurs at the outset of litigation, neither party is prepared to develop a meaningful set of parameters. Here again, it can be helpful to have a checklist. When defendants have already considered the information and sources they plan to pursue, there is no reason they cannot think through the means of production. If sought-after information is in electronic form, how will the defendant best be able to review it? Should a vendor make a forensic image of any electronic data, and if so, who should the vendor be? Are hard copy documents, static images, or PDFs sufficient? Is an original document or a native file the better means? Does the defendant want the plaintiff to make electronic data searchable, or would that be better done by the defense team?

It is true that defendants often possess more physical documents and electronically-stored information than a plaintiff, so the goose-gander rule ought to be considered: Whatever burdens the defendants wish to impose on the plaintiff will likely be imposed right back on them. But a plaintiff may have a particular intolerance for – or inability to – preserve, search for, and produce relevant documents and electronically-stored information as compared with defendants who have resources for doing this. It is appropriate to put pressure on a plaintiff early and often to comply with his or her discovery obligations, and the failure to do so can create leverage later in the case.

Additionally, the Rule 26(f) conference may provide insight into what information the plaintiff may already have spoliated. Recall that the duty to preserve likely occurred well prior to the filing of the plaintiff's complaint. If defendants are alerted to the fact that some relevant evidence has already been lost, the process of setting up a motion for sanctions can begin here.

Step Four: Serve Discovery Requests Early

Formal discovery requests should be tailored to the needs of the case and should be served as soon as permitted. In all cases, defendants should have responses to written discovery before they start deposing witnesses, because obviously documents and written responses will shape the questioning. But beyond this, if the case might devolve into discovery violations and motions practice, defendants need to be good actors. Most courts will not grant motions to compel (or motions for sanctions) if the defendants were delinquent in serving their requests and the plaintiff did not have time to respond adequately.

The key to a winning motion for sanctions is setting it up the right way. That means clearly identifying the information needed, giving the plaintiff every chance to make sure the information is preserved, consulting with the plaintiff's counsel about how it should be produced, and requesting the production in a timely manner.

Utilizing Motions for Sanctions When Plaintiffs Fail to Meet Their Discovery Obligations

If a plaintiff complies with his or her preservation obligations and responds timely to discovery responses, then the defendants are properly equipped to defend, and that is better for all concerned. But if the plaintiff fails at any point along the way, it is time to start considering whether a motion for sanctions is appropriate. That involves a separate planning process.

Step One: Send Discovery Deficiency Letters

Most courts have local rules that require the parties to work out any discovery issues prior to seeking court intervention. This means that the discovery deficiency must be identified with particularity and the non-compliant party be given an opportunity to cure. As with the discovery requests themselves, defendants should be specific about what still needs to be produced and put it in writing with a deadline for compliance and a clear statement that court intervention will be obtained if the plaintiff fails to fully respond.

Significantly, when a party fails to give any timely response at all to a set of discovery requests, the requesting party has the ability under Rule 37 to seek sanctions without first sending a discovery deficiency letter and moving to compel. This is especially true when the reason the plaintiff failed to respond is that the evidence has already been spoliated. But most courts are loathe to impose sanctions right off the bat; they want to ensure that all efforts to obtain the information are exhausted before consequences are imposed. Sending the discovery deficiency letter is the first step toward doing that.

Defendants should also refuse to move to the next phase of discovery until the plaintiff's deficiencies are rectified. This will be important later when sanctions are sought, because it helps establish that prejudice occurred. Thus, for example, if a plaintiff produces requested emails but does not produce them in the format requested, it would be important for the defendants to insist that they be produced in the proper (and, if the Rule 26(f) conference went right, the agreed-upon) format before the plaintiff can be deposed. As another example, if a plaintiff produces documents or information that identify additional responsive information that has not yet produced, the defendants ought to include in their discovery deficiency letter a demand that the additional information be produced. Inevitably, that information was responsive to one of the targeted requests and, at a minimum, one of the catch-all requests. Be exhaustive here, and be sure to allow sufficient time for the plaintiff to discuss the matters and cure them before moving on to step two.

Step Two: Move to Compel

In many cases, courts have not allowed a party to seek sanctions for a discovery failure unless the party first filed a timely motion to compel. As stated earlier, spoliation or a complete failure to respond might obviate the need for a motion to compel, but that is the exception and not the rule. See, e.g., U.S v. Certain Real Property Located at Route 1, 126 F.3d 1314 (11th Cir. 1997) ("[W]e have consistently found Rule 37 sanctions such as dismissal or entry of default judgment to be appropriate . . . only where the party's conduct amounts to flagrant disregard and willful disobedience of discovery orders.") (emphasis in original).

The best way to set up a motion for sanctions, then, is to obtain an order compelling the discovery that the plaintiff will not or cannot provide. Again, this should be done timely; motions to compel made close to or after the close of discovery can be considered delinquent and may be denied, which would not be helpful to a motion for sanctions later. While Rule 37 does not itself provide a deadline for filing a motion to compel, many courts require that all discovery – to include compelled discovery

– be done prior to the discovery deadline. Thus, if a party fails to seek an order compelling discovery before the deadline, the entitlement to that discovery may be deemed waived. See, e.g., Packman v. Chicago Tribune Co., 267 F.3d 628 (7th Cir. 2001).

The more specific the order compelling discovery, the more persuasive a motion for sanctions may be if the plaintiff does not comply. Accordingly, the motion to compel ideally would enumerate specific categories of information sought. This is particularly true when the defendants have learned that there is information the plaintiff did not adequately preserve. While it might be tempting to jump straight to a motion for sanctions due to the plaintiff's spoliation, obtaining a court order to provide that information is an important step in obtaining sanctions.

Step Three: Move for Sanctions

"Federal courts have inherent discretionary power 'to fashion an appropriate sanction' for conduct like spoliation that 'abuses the judicial process.'" Gentex Corp. v. Sutter, 827 F. Supp. 2d 384, 390 (M.D. Pa. 2011) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991)). Spoliation is defined as "the intentional destruction, mutilation, alteration, or concealment of evidence." Gentex Corp. v. Sutter, 827 F. Supp. 2d 384, 390 (M.D. Pa. 2011) (citing Blacks Law Dictionary and Byrnie v. Town of Cromwell, 243 F.3d 93, 108 (2d Cir. 2011)).

Unless the failure to provide or supplement discovery was "substantially justified or is harmless," a court may impose various sanctions, including (a) an order prohibiting the non-producing party from using the requested information on a motion, at a hearing, or at trial; (b) an order requiring the non-producing party to pay reasonable expenses, including attorney's fees, caused by his failure; (c) an instruction to the jury of the non-producing party's failure; and (d) "other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(iv). The sanctions set forth in that provision include the following:

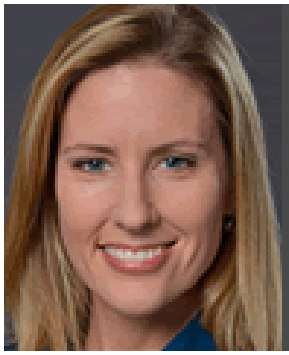
1. Directing that the matters embraced in [an order compelling discovery] or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
2. Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
3. Striking pleadings in whole or in part;
4. Staying further proceedings until the order [to compel] is obeyed;
5. Dismissing the action or proceeding in whole or in part;
6. Rendering a default judgment against the disobedient party; or
7. Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Furthermore, Rule 37(e) provides that if "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery," the Court may "dismiss the action or enter a default judgment" if it finds that "the party acted with the intent to deprive another party of the information's use in the litigation."

It will be important to establish to the court not only that the information was requested and opportunities to cure were given, but also that the defendants were prejudiced in not obtaining the information. See Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010). This is the most challenging aspect of obtaining sanctions, because, as the saying goes, "you don't know what you don't know." If evidence was not produced at all, it is difficult to articulate how that evidence, if produced, would impact the case. But the goal is to establish that the failure to produce information – or the spoliation of that information – prevents the defendants from establishing an essential aspect of their defense. Id. The efforts in creating a checklist, issuing a litigation hold, making detailed requests for information and moving to compel all support the prejudice argument, because they show a consistent effort by the defense and a repeated failure by the plaintiff to obtain the requested information.
If defendants do their homework, an order sanctioning the plaintiff for losing evidence or failing to produce it will follow. Given the spectrum of sanctions available – up to and including the dismissal of the case – the efforts to set up the motion are well worth the energy.

Conclusion

A motion for sanctions for a party's failure to preserve evidence is not just for plaintiffs. Defendants have the same tool available to them, and counsel should consider the benefit of this tool at the outset of the litigation, particularly if it becomes clear that the plaintiff might have lost evidence that he or she should have preserved. A thoughtful and methodical approach to discovery provides one more opportunity to win the case.



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Ms. Nesbitt is a partner with the firm. 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.

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, 2018)
- 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

DOING BUSINESS ABROAD: RISK ASSESSMENTS AS PART OF AN EFFECTIVE FCPA COMPLIANCE PROGRAM

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Cutting off the Bad Seed: How Recent Sanctions Could Expose International Businesses to Cash Flow Problems

Isabelle De Smedt and Alexandra Lopez-Casero

Recent sanctions could affect your business in unexpected ways. This alert discusses how Executive Order 13818 could be used to block transactions with foreign third parties if credible evidence of corruption is uncovered.

On December 20, 2017, President Trump issued Executive Order 13818 (the "Order"), implementing the Global Magnitsky Human Rights Accountability Act (the "Global Magnitsky Act" or "Act"). The Act, which was enacted by Congress with bipartisan support in 2016, provided the President with broad powers to target foreign individuals and entities believed to be engaged, directly or indirectly, in corruption and human rights violations. At first glance, the Order appears to target only foreign companies and nationals. But can the Order—and the blocking powers—be read so broadly that they enable the Secretary of the Treasury to block the assets of a domestic person or company? We think so.

The Global Magnitsky Act

The Global Magnitsky Act authorizes the President to impose sanctions—including the blocking of property—on any "foreign person" that he determines, by credible evidence, has materially assisted, sponsored or provided financial, material, or technological support for a government official (or a senior associate thereof) who is responsible for or complicit in significant corruption. For purposes of the Act, a "foreign person" is defined at 31 C.F.R. 595.304 and includes "any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States), or any entity not organized solely under the laws of the United States or existing solely in the United States, but does not include a foreign state." The term is thus broader than it might immediately appear. The Act defines corruption to include "the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery," as well as "the transfer or the facilitation of the transfer of the proceeds of corruption." To carry out its purpose, the Act gives the President the power to block transactions involving the property of persons and entities that fall under the above definitions.

The Order and its interplay with anti-bribery enforcement In the Order, the President exercises the powers granted to him under the Act and imposes sanctions on several individuals and entities. After kicking off the first round of sanctions related to the Global Magnitsky Act, the President delegated his powers to the Secretary of the Treasury. Now, the Secretary of the Treasury may, without prior notice, impose sanctions on any foreign person that he determines has materially assisted a government official to engage in acts of significant corruption.

There is significance to the broad definition of "foreign person" as used in the Act. Because a business must exist solely in the United States to avoid falling under the definition, many international businesses are at risk of having their assets blocked by the Secretary of the Treasury if "credible evidence" of corruption is uncovered. As a result, businesses that become involved in investigations into potential violations of the Foreign

Corrupt Practices Act ("FCPA") or foreign anti-bribery laws may, without warning, find themselves with limited cash flow. For example, a New York company doing business in London could lose the ability to finance its operations through a New York bank if the Secretary of the Treasury becomes aware of credible evidence that the company violated the FCPA. Similarly, an international franchisor may be blocked from receiving foreign franchisee royalties if credible evidence of corruption exists. In either case, great harm could be done regardless of how the investigation unfolds.

Those and other challenges may arise from the introduction of the Global Magnitsky Act into the government's anti-corruption toolbox.

Potential for more diverse targets

While the FCPA criminalizes corrupt actors that have an adequate nexus to the United States, the Global Magnitsky Act can be enforced against any "foreign person" even in the absence of a jurisdictional connection. As a result, overseas companies such as distributors could cause businesses extreme financial harm even if any corrupt behavior occurred entirely without their knowledge and entirely overseas. Proper due diligence on foreign third-parties could help companies avoid seeing their business operations interrupted.

Alternative anti-corruption enforcement option

Because of its looser enforcement standard, the Global Magnitsky Act may be applied where criminal liability under the FCPA is weak or absent. As a result, the Act may provide an alternative mechanism to punish corrupt parties selectively, quickly and without needing to establish a criminal enforcement case.

Given the broad scope of the Global Magnitsky Act, companies doing business abroad are at risk of financial harm each time a new anti-corruption operation unfolds. Companies should be aware of the possible ramifications that sanctions under the Global Magnitsky Act could have on their daily business operations.

DOJ Releases New FCPA Corporate Enforcement Policy

Brian T. Kelly and Isabelle De Smedt

The Department of Justice (DOJ) has incorporated a new FCPA Corporate Enforcement Policy ("Policy") into the United States Attorneys' Manual. The new Policy builds upon the FCPA Pilot Program, which was implemented in April 2016. The Pilot Program urged companies to self-disclose bribery in exchange for vastly reduced criminal fines and federal oversight. The Policy, which can be found here, builds upon the Pilot Program. Perhaps most importantly, it enables companies to better predict when self-disclosure will be rewarded with a declination.
Key takeaways from the Policy include:

- A presumption that the DOJ should decline to prosecute companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate wrongdoing unless aggravating circumstances exist, such as involvement by executive management, significant profit to the company, pervasiveness of the misconduct, or criminal recidivism;
- Even if aggravating circumstances exist, the DOJ will agree to resolve the matter for a 50% reduction off of the low end of the Sentencing Guidelines' fine range for companies that voluntarily self-disclose, fully cooperate, and remediate wrongdoing, unless the company involved is a repeat offender. Companies that have in place an effective compliance program will generally avoid the appointment of a compliance monitor as well;
- The DOJ will agree to resolve the matter for up to a 25% reduction off of the low end of the Sentencing Guidelines' fine range even if the company involved does not self-disclose the misconduct, so long as it fully cooperates and appropriately remediates its wrongdoing;
- A company may still receive cooperation credit under the Principles of Federal Prosecution of Business Organizations if it attempts but fails to meet the requirements for full cooperation credit under the Policy;
- A company's size and resources will be taken into consideration in assessing the appropriateness of the company's anti-bribery and anti-corruption compliance program; and;
- Declinations under the Policy will be made public.

Because a declination is appropriate for first-time offenders that uncover an isolated incident of bribery by a low-level employee, the Policy may affect how companies approach an internal investigation. Facts may exist that enable an investigator to quickly rule out the involvement of executive management, or to quantify the profits of the alleged misconduct. By answering those questions in the early stages of an investigation, a company will be better positioned to make an informed decision concerning the

possible benefits of self-disclosure within the time allotted by the Policy to receive full cooperation credit, including a declination.

The Policy's effect on cooperation and self-disclosure decisions remains to be seen, and will be driven largely by how the DOJ implements the Policy in specific cases going forward. We will continue to monitor developments.

Tips for international franchisors establishing FCPA compliance programs

As a new year begins, franchisors and others eagerly await likely changes to U.S. laws and regulations. President-elect Trump has vowed to make unprecedented changes to U.S. trade and minimum wage laws. Although in the past he characterized enforcement of the Foreign Corrupt Practices Act (FCPA) as "absolutely crazy" and "horrible,"[Interview of Donald Trump, Chairman & President, Trump Organization (May 15, 2012)] most practitioners agree that vigorous enforcement is here to stay. Accordingly, below we offer tips to international franchisors as they implement or revisit their FCPA compliance programs.

The Foreign Corrupt Practices Act

The FCPA criminalizes the corrupt giving of "anything of value" to foreign officials by domestic and publicly traded companies or their agents for the purpose of getting or keeping business. Prosecutors define "anything of value" very broadly. Recently, unpaid internships, hiring preferences and some charitable donations have satisfied this element. Bribes offered by third-party vendors and agents are often attributed to domestic and publicly traded companies to establish FCPA violations. Thus, international franchisors may be accountable for bribes paid by master and / or regional franchisees and their employees. Finally, the vagueness inherent in the FCPA's "business" prong also lends itself to broad interpretation. Prosecutors will closely examine any transaction that may influence a foreign official to support the franchisor's business.

Tips for international franchisors

FCPA enforcement actions often result in prison time for company officials or employees, criminal and civil penalties and severe reputational damage to a company. Comprehensive compliance programs establish a company-wide culture of compliance by instituting protocols and procedures specifically tailored to reduce the risks of corruption. In order to narrowly tailor compliance efforts, an international franchisor must first understand where corrupt foreign officials will interact with its system. To that end, we offer a few tips to keep in mind when focusing your compliance efforts.

Know your current and target areas of operation

Not every international opportunity bears equal risks. China, India and Brazil offer international franchisors huge populations and virtually unlimited potential for brand growth within a single country. At the same time, those countries account for approximately half of all FCPA enforcement actions. Meanwhile, international franchisors seeking to serve similar populations in Western Europe may be forced to enter a dozen or more countries, each having unique franchise laws and regulations. While the burden of entering multiple markets may be considerable, Western European markets account for only a handful of FCPA investigations. Your risks will vary depending on the territories you seek to operate in. Focus compliance efforts in countries with the greatest corruption risks.

Know your master/regional franchisees and their partners and vendors

Politically exposed third-parties should be avoided. Master/regional franchisees are a valuable tool when establishing an international brand, but any bribes paid to further the franchisor's business will be attributed to the franchisor. At times, bribes are considered a cost of doing business in those markets. As a result, international franchisors are at an increased risk that master/regional franchisees will unwittingly violate the FCPA by making illicit payments that they consider normal business transactions.

Know your system

Each brand is different, and each system bears its own risks. Some systems rely on supply arrangements or trade-secret ingredients that require the import of goods from the U.S. and interaction with corrupt customs officials. Others require storefronts that comply with the international franchisor's design standards, thus necessitating interactions with officials involved in the construction and permitting process. Still others encourage franchisees to win public contracts. Having a thorough understanding of your system's requirements is vital to designing a compliance system that addresses your high-risk operations.

Know how to respond

International franchisors who become aware of potential FCPA violations must investigate the circumstances.

Oftentimes, it is more cost effective and time efficient to vet the credibility of an internal whistle-blower or substantiate suspicious circumstances using in-house counsel and your compliance team, if one exists. Once allegations and suspicions are corroborated, outside counsel should be hired to direct any further investigation.

As the Trump presidency looms on the horizon, international franchisors should implement or revisit their FCPA compliance programs with the above tips in mind.

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Scott O'Connell is chair of the Litigation Department and a member of the firm's Management Committee. He is a trial lawyer known for his perseverance, strategic thinking and value driven service for clients. Scott focuses on trial work, class action and aggregate litigation, parallel proceeding and health service reimbursement litigation. He is currently representing financial services, life sciences, manufacturers and health care companies in high exposure disputes with associated significant reputational harm in parallel civil, criminal and regulatory proceedings.

Practice Areas

- Trials, Arbitrations and Evidentiary Proceedings
- Class Action, Mass Torts and Aggregate Litigation
- Crisis Intervention, Internal Investigations and Parallel Proceedings
- Health Service Reimbursement Litigation
- Constitutional Claims
- Domestic Violence Protection (Pro Bono)

Recognition

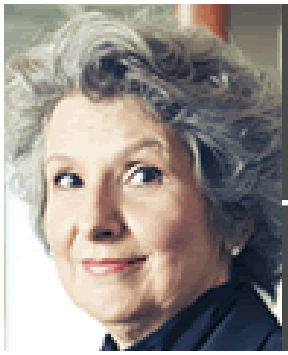
- Named "Lawyer of the Year" by Best Lawyers® for Appellate Practice, Boston (2019); Litigation-Health Care, Manchester (2018); Litigation-Securities, Boston (2016); Litigation-Banking and Finance, Boston (2014); Litigation-Securities, Boston (2013)
- Recognized in The Best Lawyers in America© for work 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) Clients rate Scott O'Connell as an "expert on class actions." He is commended for his "well-thought arguments," his ability to "think on his feet" and his strong command of technical legal points.
- "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)

Pro Bono

- As part of a commitment to give back to the community, Scott has dedicated substantial time to pro bono matters. He founded the Nixon Peabody Domestic Protection Team, which assists victims of domestic violence secure protective orders against their abusers. Scott also worked to secure the release of a client, who had been detained at Guantanamo Bay. For his work on this matter, Scott received the Frederick Douglass Human Rights Award from the Law Office of the Southern Center for Human Rights.
- In addition, Scott is a recipient of the New Hampshire Bar Association's 2011 Award for Dedicated Pro Bono Service for his exceptional work with the Domestic Violence Emergency Project (DOVE), a program that provides victims of domestic violence with emergency legal service.

Education

- Cornell Law School, J.D., 1991, (Editor, Law Review, Chancellor, Moot Court Board)
- St. Lawrence University, B.A., 1987, cum laude
- Harvard Business School, 2008, "Leading Professional Service Firms"



WIN OR LOSE: HOW WELL DID YOUR COMPANY WITNESS DO IN DEPOSITION?

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Getting to Uneventful: How to Avoid Fireworks in Company-Witness Depositions

Cheryl Bush

The tactics in company-witness depositions are simple. Likely buried among many innocent-enough sounding questions, plaintiff is looking for sound bites to be introduced as admissions during plaintiff's case—which will make the jury despise the company. Among the company lawyer's goals is to present a witness who fairly and truthfully answers those questions that are asked, without allowing reality-distorting sound bites to go unaddressed during the deposition. This paper offers practical tips to achieve those defense-side goals.

Company Witness Testimony can Make or Break a Case.

Ask potential jurors what they think about ginormous international companies and their interest in safety, and many will answer quite negatively. Ask what those same jurors think about the group of eight engineers primarily involved in a project and their interest in safety, and many will be less likely to make a snap judgment and willing to wait to hear the evidence. Companies act, decide, and speak through the testimony of their employees. Employees do the real work in humanizing the company. Employees who testify accurately, convincingly, and passionately about what they do will lead to more favorable settlements and jury verdicts. Your goal in preparing your witness is to get them to a place of comfort, so that the stress of the deposition doesn't smother those feelings at the outset.

Answering Yes or No.

One traditional deposition preparation strategy – "Answer 'yes' or 'no' if you can"– can lead to an adverse jury verdict. Deposition testimony must be more than just truthful; it must also be complete. The words "yes" and "no" are sometimes truthful, but they rarely constitute complete answers to the difficult questions faced in depositions. Worse, with a skillful opposing questioner, repeated one-word answers can lead to the rollercoaster ride of "yes." Those "yeses" can then form the foundation for a "Reptile-style" plaintiff friendly theory of the case.

Perhaps most importantly, no company is humanized by cryptic "yes" or "no" answers. And it's no solution to have an employee say "yes" or "no" to the plaintiff's lawyer asking questions, only to have the same witness be forthcoming and fulsome when "helping" the company team. Jurors will put that sort of one-sided cheerleading aside, leaving the company with no credible witness to carry the company mantle.

The Most Important Question to Ask Employees: Why?

So many trials are won or lost because the jury thinks one party behaved unreasonably or unfairly. A conclusion of unfairness or unreasonableness happens even in trials where neither of those two words appears in the jury instructions. An expert can opine that what the company did was appropriate, but only an employee can answer "why" by describing the options that were available when a particular decision was made and how the decision was weighed.

Thoughtfully preparing the company witness means constantly asking, at every step, two basic questions:

- Why did you do this?
- Why didn't you do that?

Repeatedly asking "Why" during depo prep does more than prepare a witness for questions Plaintiff may ask. It does more than provide needed, repeated Q and A practice, but also . Carefully listening to and watching an employee confronted with the "Why" question provides valuable clues about where this witness is emotionally about decisions that were made by the company. Few witnesses will voluntarily offer up those sentiments in response to a direct question. But if an employee is second-guessing or even regretting past decisions, it needs to be addressed prior to the deposition—and before plaintiff makes that discovery for you.

How Long Should the Employee's Answers Be?

A quiet-as-churchmouse witness has no appeal, but neither does a witness who can't stop talking. (Worse, damaging admissions can sometimes be found among the dross when a witness begins monologuing.) The witness should therefore imagine that their mother is sitting next to plaintiff's attorney during the deposition. When the employee says "It depends" in response to a question, ask them "did your mom just roll her eyes?" If your mom didn't think you were sufficiently responsive, the jury won't either. On the other hand, if it's mom losing focus, then maybe it's time to stop talking.

Don't Guess or Speculate.

All lawyers tell their clients not to guess or speculate during a deposition. But for a company witness, what does that really mean? Many company employees have college degrees in subjects quite different from the job they perform. Some employees believe they have a good idea, accurate or not, of what company policy is on a host of subjects.

When the employee is asked a question in a deposition, have them imagine that tomorrow, the CEO passes them in the hall and asks the same question. Does the employee answer it on the spot? Or does the employee say: "Let me get right back to you"?

If the employee answers the question on the spot, then the employee can go ahead and answer it in the deposition.

When Plaintiff is Done, Ask Your Witness Questions.

Unless so designated, depositions of company witnesses are not discovery. They are trial testimony. So, during the deposition, listen to the employee's testimony just as you would in a real courtroom with a real jury. Listen for the two-sentence sound bite that may be the only part of the deposition that plaintiff will admit at trial. Indeed, the sound bite might later become the demonstrative that plaintiff uses to sharpen his closing argument with.

Just as importantly, trial counsel for the company must be prepared – with trial exhibits – to conduct a thoughtful, complete re-direct examination at the deposition. Put the sound bites in context. Explain them. In this regard, Federal Rule of Evidence 106 is a gift:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

When a quality re-direct is taken in a deposition, it can be offered in the midst of Plaintiff's case-in-chief. This allows the defense to respond – immediately—to whatever part of the deposition plaintiff proposes to read to the jury during Plaintiff's case. Meanwhile, the jury isn't waiting two weeks to learn what that company response is.

What Kind of Company Witness Deposition Has Been Noticed?

Remember: there are two types of company witness depositions: one, where the employee is named individually, and the other, where the company is responding to a request under Federal Rule of Civil Procedure 30(b)(6) (or some analogous state provision). Though the above concepts hold true for both types of witnesses, how a witness is prepared under each context does differ in some key ways.

Special Challenges of the Company Witness Noticed by Name.

Company witnesses are noticed by name because the Plaintiff believes they have, or should have, personal knowledge. The company is not obligated to show the witness documents. If documents are requested as part of the deposition notice, only documents in the possession of the witness need be produced by the witness. The company is not obligated to search for those records.

An employee noticed for deposition by name can say a lot of things a 30(b)(6) witness should not, most notably

"I don't know" and "I don't remember." This greater permissiveness reflects that a single human's knowledge is more limited—and sometimes fallible. In contrast, many jurors expect a corporation—and the corporate 30(b)(6) acting as the company's voice—to have near complete and perfect knowledge.

Use the flexibility. Outside of the 30(b)(6) context, it's easy for a witness who has been otherwise thoroughly prepared to feel defensive if asked a question that they do not know the answer to. Encourage witnesses to take a step back: Should they know the answer to the question? Frequently, it's appropriate to respond: "I've never worked in that area of the Company. I cannot answer for the people who have, and they should answer that question."

Special Challenges of 30(b)(6) Company Witness Testimony

The 30(b)(6) company witness deposition process starts with the notice: A party names the company as the deponent, and must describe with reasonable particularity the matters for examination. The company must then designate one or more persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. The persons designated must testify about information known or reasonably available to the company. Fed. R. Civ. P. 30(b)(6), modified.

The witness is the company. And because the witness is the company, some courts hold that 30(b)(6) testimony survives the case in which it is taken, living on forever in future cases. At the very least, Federal Rule of Civil Procedure 32(a)(8) allows for the admission of prior 30(b)(6) deposition testimony in a subsequent action involving substantially identical issues and parties. CWC Builders, Inc. v. United Specialty Ins. Co., 134 F. Supp. 3d 589, 593 n.2 (D. Mass. 2015). Likewise, Federal Rule of Evidence 804(b)(1) creates a hearsay exception for an unavailable witness's deposition testimony from a prior action if the opposing party in the prior action had similar motives and an adequate opportunity for cross-examination. Dykes v. Raymark Industries, Inc., 801 F.2d 810 (6th Cir. 1986). What does this understated exception really mean? In Dykes, it meant that a deposition taken ten years earlier in a different case was admissible evidence in a present-day trial. It also means that a 30(b)(6) deposition taken in a relatively small exposure case next week could be admitted into evidence at a future trial with catastrophic exposure. So, defense counsel needs to be cautious before shortening a witness's deposition preparation because of low-to-moderate case value of the current matter.

It is pretty well settled that an attorney who has noticed a deposition under 30(b)(6) is not limited to the designated topics in the deposition. See, e.g., Cabot Corp. v. Yamulla Enterprises, Inc., 194 F.R.D. 499, 500 (M.D. Pa. 2000); But see Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727 (D. Mass. 1985). It is equally well settled, however, that ANSWERS to questions outside the scope of the 30(b)(6) notice do not bind the company in the same way as those within the scope. See, e.g., McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Ins. Co., 241 F. Supp. 3d 737, 752 (N.D. Tex. 2017) (questions and answers beyond the scope of a Rule 30(b)(6) notice "are merely treated as the answers of the individual deponent") (internal quotation omitted).

So, to protect the client in this case and future cases, the wise defense attorney will serve formal objections to the 30(b)(6) notice. Then, attach the objections to the deposition as an exhibit, make a statement on the record at the beginning of the deposition about precisely what this witness has been designated to testify about (as described in the objections), and object to questions outside the scope of what the objections stated. Only by policing the boundaries of the notice can one hope to make a clear record of precisely which testimony the company designated this witness to testify about.

Generally, in a Rule 30(b)(6) deposition, "I don't know" is not a good practice. For example, imagine an employee who answers "I don't know" 37 times in a deposition. A savvy plaintiff's attorney will read (or worse – play the video of) those 37 answers – and no more – to the jury at trial. What will the jury conclude? That the company witness did not make good decisions. That the company wasn't informed. And, perhaps, that the company still doesn't care enough about the issue to bother putting up a knowledgeable witness.

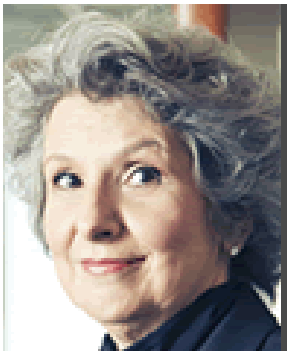
Rule 30(b)(6) says that the person designated by the Company "must" testify about information known or reasonably available to the Company. 30(b)(6) witness cannot answer "I don't know." If the deponent is asked a question that they do not know the answer to, an appropriate response is an apology for not anticipating that particular question, with a promise to obtain that information as soon as possible. The potentially inflammatory words "I don't know" should never to be spoken by a 30(b)(6) witness.

It also helps employees to have a visual aid to refer to that shows the types of questions that fall into their 30(b)(6) designation, as opposed to another designee's. During a preparation meeting, have the witness prepare their own visual aid to help them understand during the deposition when they have personal knowledge or when they can

defer to another designee. All the witness's answers should be shown inside this "witness box." Inside the "box" is the employee's educational and occupational background, what the employee has seen or heard, and the topics on which they have been designated. Outside the "box" are areas about which they lack sufficient personal knowledge or expertise. Feedback on this visual aid by real, live employees has been very positive.

Conclusion.

The steps laid out in this article have a specific purpose: to put your designated company witnesses in the best position possible to avoid fireworks and generating sound bites in their depositions. Always keep in mind that they are merely processes. It is ultimately the diligence with which you approach witness designation and preparation that dictates whether you achieve those goals. Ample preparation should equip you to fight back against even the craftiest plaintiff tactics.



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Cheryl A. Bush has extensive first-chair trial experience and has obtained exceptionally positive results for her clients, including Fortune 500 companies, by winning 95.97% of her jury trials. She serves as National Counsel for a major automotive manufacturer, handling catastrophic air bag trials and coordinating discovery throughout the country. Her cases, which have spanned 30 states, often involve high-level nationwide media exposure.

Cheryl teaches regularly on trial advocacy, particularly in the area of automotive product liability. She is a Fellow in both the American College of Trial Lawyers and the International Society of Barristers. She is a member of the Product Liability Advisory Council and is engaged in the National Association of Minority & Women Owned Law Firms.

Related Services

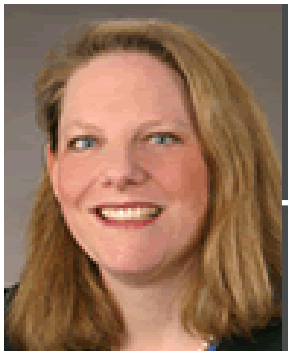
- Advanced Technologies
- Business and Commercial
- Class Actions
- Product Liability
- Securities / Finance

Representative Matters

- Won summary disposition in a multi-million dollar employment suit brought by an executive of a major automotive manufacturer and then successfully defended the win on appeal.
- Secured settlement shortly before trial for pharmaceutical manufacturer.
- Obtained numerous favorable settlements in high-exposure product liability actions across the country against a major automotive manufacturer, including cases involving alleged traumatic brain injury, paraplegia, and other serious alleged injuries.
- Represented a major automotive manufacturer in wrongful death action and secured favorable settlement through strategic motions in limine.
- Obtained no cause following one-week jury trial in case involving negligence allegations related to the death of a truck driver.
- Obtained no cause following two-week jury trial in product-liability action relating to severe upper body injuries suffered in high-speed crash.
- Obtained no cause following three-week jury trial in product liability action arising from accident in which eight-year-old was rendered a ventilator-dependent quadriplegic.
- Obtained no cause following two-week trial involving closed head injuries and broken bones sustained teacher in accident in which vehicle went over a cliff.
- Obtained no cause in highly publicized four-week trial involving seven-year-old child purportedly killed by passenger airbag in a 1995 minivan.
- Obtained no cause following one-week trial in which a 17-year-old attempted to pass another car on a two-lane road.

Education

- University of Michigan Law School, J.D., cum laude, 1984
- Wayne State University, B.A., magna cum laude, 1981



CAUTIONARY TALES: LESSONS LITIGATORS LEARNED THE HARD WAY

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Cautionary Tales: Lessons Litigators Leasrned the Hard Way

Jennifer Fitzgerald

"Those who cannot remember the past are condemned to repeat it." - George Santayana

As trial lawyers, we've all been there, and thought to ourselves, "I'll never make that mistake again." This is your opportunity to come and discuss your life lessons and to learn from others as well. We will discuss tricks of the trade ranging from approaching a difficult judge to training associates and interacting with clients.

In 1728 The Attorneys and Solicitors Act in England established that if a person wanted to become a solicitor in England, that person was obligated to spend five years as a "Clerk Under Articles" where they would train directly with established lawyers. Trainees were called "articled clerks" (even as late as 1990). Somewhere along the line, however, it was decided that more could be taught in a classroom than in practice and hence the rise of law schools. Now, with increasing dissatisfaction with law-school graduates and with burgeoning college and law school debt, England is ushering in a new dawn of the apprentice. So long as the potential apprentice has completed his or her high school equivalent, they can begin working in a firm – first as a paralegal and then have the option to progress to the solicitor path in about the same amount of time that a solicitor trainee would – without all the debt. England is providing a path to restore what we all know – we can learn more by doing than we can through classroom study.

Think about it. Whether or not we loved or hated, excelled in or merely survived law school, when we graduated we were called Juris Doctors. That alone, however, did not fully prepare us for our careers as practicing lawyers either in-house or at a law firm. Law school did not teach the art of answering discovery or culling data from voluminous sets of ESI. Instead, we learned that on the job. Truly, whether entitled apprenticeship or not, our jobs actually are apprenticeships whether we are first year associates or are learning a new skill as we close in on the end of our career. That's part of why we call it the "practice" of law. We can and must continue to learn new things whether it be new mandatory discovery procedures, new areas of law, or judges' quirks.

In our quest to be lifelong learners, some lessons are learned the hard way and some we get to learn by watching our opposing counsel. There is no shortage of lessons that we can all benefit from. The following is just the tip of the iceberg:

Client Relationships

Communication is key to establishing a strong attorney-client relationship. Communication runs both ways. Outside counsel is often hired because of their expertise in a particular area. However, when looking for the most skilled attorney in a particular field, in-house counsel often assumes a high-quality lawyer is also a high-quality communicator. Not so. If communication matters to you, it is imperative to make that clear upfront, demand a free, timely flow of up-to-date information, and to formalize expectations about the frequency of communications. How often do we, as outside counsel, walk out of court and call our client with the great news of the victory on a motion? Do we provide that same service when we lose?

Sometimes, no. Instead, we tell ourselves that we will deliver the bad news when we are back in the office. The client deserves the news – good or bad – in the same format and with the same expectations as to timing.

Billing and budgeting is often an issue clients identify as frustrating their relationships with their outside attorneys. That probably comes as no surprise. While our Juris Doctorate may be hanging on the wall, only a small percentage of attorneys have any business or accounting acumen. When a client asks for a budget it is unlikely only for the in-house counsel's use. Generally it is for someone else within the client's company or organization. The attorney-client relationship will be strengthened as soon as outside counsel recognizes that their direct in-house contact often has their own internal "clients" with expectations about efficiency and cost control. If budgeting and billing is difficult, find someone who can assist you, take a class – there are a lot of on line courses available – or delegate the job to someone else. No matter how much one prefers to avoid budgeting and billing, it can't avoid it. It is imperative that outside counsel practice financial hygiene and that they do it well. Outside counsel also needs to timely deliver their bills to the client. A bill of any size, but particularly one that is over-budget, does not look any better a month or two after the charges were incurred.

Engagement letters should not be treated as something a managing partner or in house counsel requires. Instead, outside counsel and in-house counsel need to carefully review any standard engagement letter to ensure it properly reflects the scope of the actual engagement. First, it should clearly identify who the client is – also is outside counsel also representing the company's subsidiaries that are parties to the suit? Next, clearly define the scope of the services to be provided. This may help avoid any issues down the road for work that was not performed. Further, defining the scope is important for identifying potential conflicts of interest. Additionally, it is important to set expectations – on both sides of the relationship. Clients should expect to see and outside counsel should expect to include in the engagement letter a requirement that the client will be truthful, helpful and available to assist in the litigation of the matter. Similarly, the client should be able to set requirements for counsel. Of course, events of termination should also be outlined in the engagement letter. This may include the right of the lawyer to withdraw for any reason including the unusual instance where a client fails to pay, or any other reason that could be envisioned at the outset of the attorney-client relationship. It is also useful to address when the engagement ends. Finally, it is important to cover unique aspects of the engagement. If, for example, your new matter is a contingency case, you must consider what happens if: (1) the client and outside counsel do not agree on settlement and/or (2) what happens if the client wants to change counsel. Similarly, if outside counsel is replacing a previous counsel, the engagement letter should address the rights and position of the previous counsel vis a via your engagement.

Court

If a judge has a specific quirk – observe it. For example, in California state court, there is a judge that refuses to allow any attorney to move from the podium once their case has been called. Quirky, yes, but the court is the judge's domain. Follow the rules.

Do not make faces, roll your eyes, nod your head or click a pen. From the judge's vantage point, these mannerisms are not only noticeable, but distracting. One judge was quoted as saying: "Many counsel would do well to receive Botox injections to their face. I say that because an overly expressive face is a distracting liability to one's courtroom conduct." He then footnoted this statement with: "For long trials, I am prepared to personally fund these treatments." (A Judge's View). Not surprisingly, this same judge believes that nodding of the head belongs on "the dashboard of one of those motor vehicles with oversized tires and a loud muffler."

Never ask a judge if he or she has read the materials. Assume the judge has not read anything and proceed. Asking only invites embarrassment of the judge. If the judge is familiar with the matter, or wants to speed things along, the judge will so advise.

Use only one descriptor for the parties in briefs and use the same one consistently – particularly in reply briefs or other related pleadings. If the court has to translate who the parties are, it builds irritation and can lead to mistakes.

Do not lie, or misstate facts or law. Judges see thousands of attorneys each year. They are likely not to remember a particular attorney, the specific facts of a prior case, or in whose favor he previously ruled. However, if counsel has seriously misstated the facts or law – and the judge relies upon this misstatement - the judge will be embarrassed and will remember that attorney forever. That attorney will have lost the court's confidence. Conversely, should an attorney candidly concede an issue, the judge is likely to consider that attorney more trustworthy.

Read the rules. The number of cases that make reference to attorney's not reading the court's rules is staggering. The court writes rules, it publishes the rules, it references its rules in the first order in the case and yet attorneys

do not read the rules. Why are judges frustrated with attorneys? This is pretty obvious.

Listen to local counsel. Different judges do things differently. The purpose in hiring local counsel is to become advised of these differences. If local counsel provides advice, the attorney is well advised to listen – if you are not going to listen to the local counsel you engaged, you clearly do not trust your local counsel and it may be time to select a different one.

Opposing counsel

Make sure there are teeth to any protective order. Many of the court-suggested protective orders do not include penalties for intentional breaches (or undisclosed breaches). That said, most courts will permit suggested protective orders to be modified. In the Northern District of Illinois there is precedent for awarding damages for an intentional breach of a protective order. Those damages can be set at the amount of attorneys' fees incurred in filing the motion for breach of the protective order. When dealing with highly sensitive information this is not very reassuring to a client, but it helps them deal with the pain.

When negotiating a settlement agreement, do not lose your perspective as a trial attorney. Do not assume the other side is making the same assumptions you are. For example, often a matter is settled and a term sheet is prepared. One of the terms often used is that "the parties will sign a standard release." It's not surprising that very few people agree what the terms are to a standard release. Negotiate them up front.

During settlement discussions, many attorneys rely on FRE 408 to bar the admission of statements made during settlement talks "when offered to prove liability for, invalidity of or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction." However, the rule does not necessarily stop a party from having to disclose relevant data discovered during settlement negotiations, particularly with other parties in other cases. Therefore, consider entering into a confidentiality agreement or nondisclosure agreement before entering into settlement discussions.

Within The Firm or Office

Ask questions, keep your door open, and be a mentor. Know and remember people's names.

Keep an eye on new attorneys. Malpractice claims arising from work performed by new attorneys are increasingly due to inadequate training and conflicts of interest.

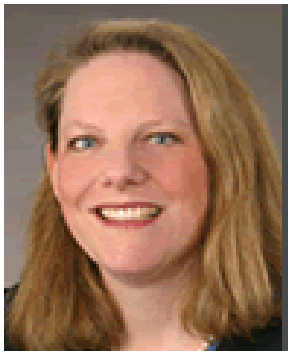
Learn how to change the toner in the copier and printer – and remain current on this technology. Just because an attorney could change the toner in last year's model does not mean the same technology applies to the newest model. Similarly, know how to load paper into the printer, fax, copier and scanner.

Learn how to file papers with your local courts on your own – both electronically and by making a journey to the clerk's office. You'll find this an invaluable skill when you have that last-minute filing due on the Friday after Thanksgiving.

Areas of Law

There are of course an unlimited number of areas where there are tips and tricks of the trade. One of the goals of this panel discussion is to discuss your experiences. What led to appeals, what was that "a-ha" or 'duh" moment. To start the conversation on this point, here are a few tricks I've uncovered:

- If you have a trade secret case and you want to disclose the trade secret in your opening argument, seal the courtroom. In theory, once the trade secret is revealed it is lost.
- Watch for claim splitting res judicata arguments. Sure, when you go in for that TRO you are trying to get immediate relief. However, you are potentially setting yourself up for a claim splitting argument from your opponent. You may only get one bite at the apple. A TRO need not cover all of your claims, but all your claims should be in your complaint when you file.
- In a patent case, if you grant a license to a minor user, you may lose your opportunity to gain lost profits from other infringers because you no longer have exclusivity. Potentially void this by granting a limited license to the minor user in a specific field of use. Remember too that established royalty rates can be used by other infringers to establish the "going rate." Therefore, be sure to include a nonmonetary component in your settlement agreement.



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Partner

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

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

Jennifer has represented multiple clients before the International Trade Commission, both as respondent and complainant. With first chair trial experience in the infamous Wiper Wars, Jennifer appeared in no less than 7 Section 337 cases, several of which were tried to determination.

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

Practice Areas

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

Honors and Awards

- Illinois Leading Lawyers - 2019 (cited in multiple years)

Education

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

CONTROLLING THE BATTLEFIELD: HOW TO PICK A WINNING JURY

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Picking a Winning Jury

Sawnie A. McEntire

There are many elements that go into a successful jury trial: good lawyering, good facts, good law, a fair judge and an appealing client. However, it goes without saying a good jury is always important. Voir dire – the first stage of every trial – provides trial advocates with valuable opportunities to strike the first blow and pick a winning jury. This paper describes techniques to achieve this result -- picking a good jury in a way that starts winning the case at the start of the case.

Voir dire—which means to see, to speak—is used to expose bias that may render a potential juror unfit to serve in a particular case. However, voir dire is so much more. It is the first of only three occasions when a trial lawyer talks directly to jurors. This means it is an invaluable opportunity to make favorable first impressions and begin cultivating jury rapport. It is also an opportunity to present the client and case facts in a favorable light. The goal is to open strongly and seize momentum.

The Typical Panel

The venire panel may be large or small depending upon the number of parties, pre-trial publicity, and issues in the case. Regardless of size, however, a majority of panel members are likely stepping into a courtroom for the first time. Although there may be some panel members who have had prior jury service, it will be a new experience for most. Many panel members will be uncomfortable or anxious about the process because they dread the unknown. Accordingly, they may be hesitant, shy, or defensive. Efforts should be made to make these newcomers more comfortable. They will appreciate the effort, and favorable rapport will be fostered.

Life teaches us that every panel member will have personality traits or quirks different from others – at least in some respects. An important purpose of voir dire is to identify and explore these differences, and then determine whether these special traits may adversely or positively impact your case. This is done by watching, observing, asking and listening.

Every juror will bring unique attitudes to the courtroom springing from widely divergent backgrounds and experiences. There will be both extroverts and introverts; there will be liberals and conservatives; there will be wealthy and not wealthy; there will be leaders and those with guarded personalities who follow the lead of others. There also will be those who are highly educated, and those with minimal education. Ultimately, a jury will consist of a combination of people of varying backgrounds and personalities. The goal is to empanel a jury with backgrounds and experiences most favorable to your case. Thus, it is important to understand and identify the attributes of a “favorable” juror and those of an “unfavorable” juror before voir dire begins. This process should start well in advance of trial, so the objectives are clearly defined when voir dire begins.

Every panel will typically include at least one person who is an eager “talker” or “volunteer”, i.e., those who answer questions at every opportunity. They always stand out. And, predictably, they are frequently struck because they share too much information. Invariably, one side of the case or the other will perceive these juror types as either favorable or unfavorable to their case. Thus, one effective

strategy is to identify a favorable "talker", and ask him or her a number of questions to generate favorable answers for the entire panel to hear. This forces the opponent to use peremptory strikes.

Every panel also will include "quiet" jurors. They appear reticent when responding to questions, and they may avoid eye contact. There is a necessary warning here: some quiet panel members may be disguised time bombs. It is important to know what lies beneath the surface, and whether these seemingly quiet jurors are potentially hostile towards your case or your client. This means the trial lawyer should "leave no stone left unturned." Every juror must be questioned to eliminate any surprises so their biases are fully unveiled before they are selected.

Striking a Jury

Simply put, voir dire involves a process of elimination. Some veteran trial lawyers describe the process as "striking" a jury. That is, jurors are not selected because of their positive attributes or responses, but de-selected through a process of exclusion—using strikes for cause and peremptory strikes. Some view this negatively, and argue that the result is a jury of least common denominators. There is some truth to this perception; however, every party has a right to explore and identify hostility and bias. Every party has a right to exclude jurors who are partial. De-selection is simply a legitimate, natural by-product of voir dire.

Information Needed Before Voir Dire

There will be differences in how and when jurisdictions provide juror information before voir dire begins. A first step is to always determine what the jurisdiction allows, and when the information can be obtained.

Most jurisdictions provide jury information sheets to the attorneys, including basic information relating to a juror's address, marital status, employment status, education, age, and prior jury service. Other jurisdictions provide more detailed information, such as prior accident history and involvements in lawsuits. Juror information sheets are sometimes provided just moments before the panel arrives in the courtroom, and there is little time to evaluate the information. Some jurisdictions, however, make jury information sheets available well before voir dire.

Depending upon the complexity of your case, the court may allow a joint jury questionnaire to the panel before voir dire begins.[1] Clearly, a more detailed understanding of each panel member's background and experience is invaluable as part of the selection process. Undoubtedly, decision-making is always better informed with good, relevant information. Armed with detailed questionnaire responses, trial lawyers' can better focus their questions to individual jurors and be more effective.

Local Procedures and Preferences

The trial lawyer should be familiar with local practices and procedures regarding the mechanics of voir dire. This includes an understanding of any time limits imposed by the court for jury selection and whether the court bifurcates the examination process—that is, whether general questions to the entire panel precede questions to individual jurors, or whether they are combined.

Some federal courts severely limit an attorney's involvement; other federal judges have a more relaxed approach. Every effort should be made to fully understand the local rules or preferences of the court.

Similarly, every trial lawyer should be familiar with the number of allotted strikes, legal standards to establish cause, and legal standards for rehabilitating a favorable panel member from being struck for cause. The opposition will seek to exclude for cause as many jurors as possible who have displayed any favoritism or leanings to your case. In doing so, they preserve their peremptory strikes. It is important to know how to effectively rehabilitate these jurors.

Before voir dire begins, it is also useful to understand how the jury will be seated so appropriate charts for information gathering can be prepared. Another important variable is when strikes for cause will be exercised—whether at the end of voir dire or during the examination of the entire venire panel. The timing of such strikes will directly impact strategy during voir dire questioning. By way of example, most trial lawyers avoid questioning potentially volatile, hostile jurors who are likely struck for cause at the end.

Developing Jury Rapport

Every voir dire begins by educating potential panel members about positive aspects of your case. Your client should always be introduced. If the client is a business entity, some brief background concerning the company's business and community involvement is helpful. Every client, including corporate clients, should be personalized.

If possible, avoid using the term "client," and instead use

1 Some jurisdictions define the commencement of voir dire with the submission (and not the completion) of the jury questionnaires. This could be procedurally important for determining rights to shuffle a jury. Many jurisdictions allow one shuffle of the panel before voir dire begins. The decision to shuffle is made based upon the visual observation of the venire panel as it is seated in the courtroom before the voir dire begins.

first and last names. If representing a corporation or other business entity, make sure to have a real person in the courtroom to serve as the company's representative. The panel will relate more positively to a real person. If your individual client or client representative is missing from the courtroom, the panel will likely form negative impressions. Members of the panel are being asked to sacrifice time away from their homes and jobs. Common sense suggests that the parties to a lawsuit should be expected to do the same.

Trial lawyers should use voir dire to present key facts of their case in a positive, credible, and empathetic manner. A presentation of key facts is needed to provide context from which more detailed questions are framed – it provides the relevance for the questions asked of individual jurors. To the extent the court allows, this factual presentation should be presented by the trial lawyer as an advocate. After all, a trial is nothing but a staged process of persuasion. Voir dire is the opening curtain to the drama.

It is important for panel members to like the client, the client's case, and the lawyer. Thus, trial lawyers should present themselves with confidence, sincerity, and credibility. The goal should be a mastery of the facts, and a straight forward presentation of the facts with confidence.

Jury Behavior and Body Language

Simple observations will yield valuable information. Every lawyer should watch jurors as they come and go from the courtroom, and as they are seated both before and during voir dire. They may be carrying magazines, books, or iPads that telegraph their interests and personalities. A juror may be reading The Wall Street Journal; another may be holding a romance novel. Yet another may be playing games on an iPad. Simple observations can lead to important data points concerning sophistication, education, and political leanings.

Another important signal is grooming and dress. Is the juror wearing sandals and dirty jeans, or is the witness more appropriately dressed? Does the juror appear unkempt? Personal grooming can reflect attitudes that may impact how they will perceive the facts of the case.

Another valuable observation is whether panel members group together in the hallway before or during intermissions. If allowed, some experienced lawyers visit the jury assembly room before voir dire to get a first look at prospective jurors and how they group together. As jurors socialize and become more familiar with each other, alliances and friendships will form, and some jurors may hold sway over others. This may become very important in the jury deliberation room. Groupings can be very helpful or very dangerous depending upon the orientation of the group and its leader.

Some panel members will be loners, standing to the side and not interacting with others. They may be mavericks or they may be shy. Again, every juror should be examined to identify important personality traits that may impact jury deliberations. Are they leaders and potential forepersons? Are they followers? Are they extroverted or shy? Simple observations of behavior can generate valuable information.

Body language also is important.[2] Observation of simple body signals may yield significant insights. Does the juror avoid eye contact when you speak, and then make eye contact when your opposing counsel speaks? Does the juror have his or her arms crossed when you talk, but is more open or inviting when your adversary speaks? Does a juror appear comfortable or uncomfortable when answering your questions? Each of these observations will lead to conclusions about the juror, and how he or she perceives the lawyers, the facts, or the clients.

Jury Questionnaires

Jury questionnaires provide valuable information to a trial lawyer, who should use questionnaire responses to craft specific, targeted questions to individual panel members. Typically, jury questionnaires are prepared jointly by all parties to a case. Therefore, both the plaintiff and defendant will have the opportunity to design their own questions, but every effort should be made to keep the questions neutral. Ultimately, the questions should be tailored to determine if jurors have backgrounds or experiences that could influence how they perceive the witnesses and facts in the case.

Jury questionnaires can be either short or long, simple or detailed. This depends upon the nature and complexity of the case. Both direct questions and open-ended questions are used for different purposes. Open-ended questions seeking narrative responses tend to generate honest, candid answers reflecting the subtleties of a juror's biases or attitudes. When used in a jury questionnaire, there is no risk of embarrassment in front of the balance of the panel. As such, a panel member may be more at ease when disclosing personal information in response to a more private questionnaire.

Jury questionnaires also can include creative ways to

2 There is scientific debate concerning the significance of body language as a means of detecting the differences between truthful and false answers. See. e.g., John Tierney, At Airports, A Misplaced Faith in Body Language, N.Y. Times, March 23, 2004.

better understand a panel member's background, likes, and dislikes. Here are some examples:

- What is the last book you read?
- When did you last read a book?
- What is your favorite magazine?
- What do you do to have fun?
- How much TV do you watch each week?
- What is your favorite TV show? Do you watch the news?
- Do you read the newspaper? If so, which one?
- Who are the three people in history you admire most, and why?
- Who are the three people in history you admire least, and why?

Clearly, there are differences between individuals who read Reader's Digest and those who watch reality shows, in comparison to those who watch Fox News and/or read The Economist. Indeed, dramatic differences can be gleaned by whether they watch Fox News or MSNBC. Such basic information is important information.

Looking for Leaders

An important objective in voir dire is identification of potential leaders. These are the people who are candidates to serve as a foreperson. They may be either favorable or unfavorable to your case. Identifying each is equally important.

On the one hand, you should identify and seek to strike any panel member with a strong personality who is potentially adverse to your client or your case. On the other hand, you want to protect favorable leaders from being struck. That is one reason why it is important to fully understand the legal basis and burdens to exercise a strike for cause and the basis for rehabilitating a juror to prevent a successful strike for cause.

Leaders are identified in a variety of ways. A successful businessman or businesswoman are easily identified through a series of simple questions. Their job experience is another clue. Less educated individuals may be more deferential to more highly educated individuals. Jury information sheets and questionnaire responses also can facilitate identification of these individuals.

Most jurisdictions will indicate whether a juror has prior jury experience. In that instance, the juror can be asked whether he or she served as a foreperson and whether a verdict was reached during their prior jury service. Prior service as a foreperson is a quick indicator of leadership.

Using Favorable Jurors as Teaching Assistants

An often-used strategy involves identification of a favorable panel member who is then cultivated as an "assistant" to teach the balance of the panel. A panel member may have a unique job or experience particularly relevant to your case. Once you determine a juror is favorably inclined to your position, this juror can be asked a series of questions that elicit responses favorable to your side of the case thereby pre-conditioning other panel members. Here are some examples:

- A panel member with a medical background (doctor, nurse, physician assistant, etc.) can help explain the purpose and importance of warnings in a drug liability case;
- A CPA or bookkeeper can be used to describe the importance of accounting standards and principles in a financial fraud case involving balance sheets and other financial statements;
- An engineer can be used to explain a failure tree analysis and why certain products fail under stress; and
- A lawyer on the panel can be examined about the differences in the burden of proof in a civil case and how it differs from a criminal case; a plaintiff in a civil case may wish to exploit the opportunity to discuss the relaxed burden of proof in a civil case; the criminal defense lawyer may do the same and discuss the presumption of innocence and a heightened burden of proof in a criminal case.

Panel members who are elevated to the role of "teachers" are invariably struck by the opposing side. The opponent will sense the favoritism shown to your case, and will be forced to exclude that member from the jury box. Thus, two objectives are achieved - the entire panel is favorably educated by another panel member, and the other side is forced to use a peremptory strike.

Responding to Questions from the Panel

Some jurors will raise their hands and ask permission to ask questions. This is always a dangerous exercise. If indulged, the panel member may ask a difficult question that goes to the heart of your case. There is a risk that the answer could backfire and hurt your case in front of the entire panel. Clearly, incorrect answers or incomplete answers may come back to haunt you during the trial.

On the other hand, a question from a panel member may be benign. An obvious attempt to ignore or avoid the question may alienate the specific juror or alienate others on the panel. Here, the best advice is, "wade into the water slowly". A few qualifying questions are typically

used in these instances: the panel member can be asked if the question is about procedure or about facts. If procedural, then the risks are typically low. If substantive, then the panel member can be invited to the bench to ask his/her question depending upon the procedural rules of the court.

Using Jury Consultants and Jury Studies

Depending upon the complexity and financial stakes involved in a case, the use of jury consultants may be a prudent investment. Jury consultants are used to conduct focus groups and jury studies for several purposes, but one primary goal is to identify preferred juror types and unfavorable juror types for a specific case. Armed with this information, the trial lawyer is in a better position to hone his or her questions depending upon previously defined juror profiles. The voir dire is more efficient because questions are targeted to specific panel members. The trial advocate is better able to identify panel members who are more likely to provide favorable answers and, once this is confirmed, use these panel members as teachers for the entire panel. The trial lawyer is also better able to avoid questions with certain jurors who may be primed to provide inflammatory or harmful answers in the presence of the entire panel.

Jury consultants also provide an extra set of eyes and ears during voir dire. They are in an excellent position to observe juror behavior and reactions during the voir dire examination by all of the lawyers. They can observe body language, juror groupings and assist in interpreting specific responses to targeted questions. The net result is a better-informed decision when striking the jury.

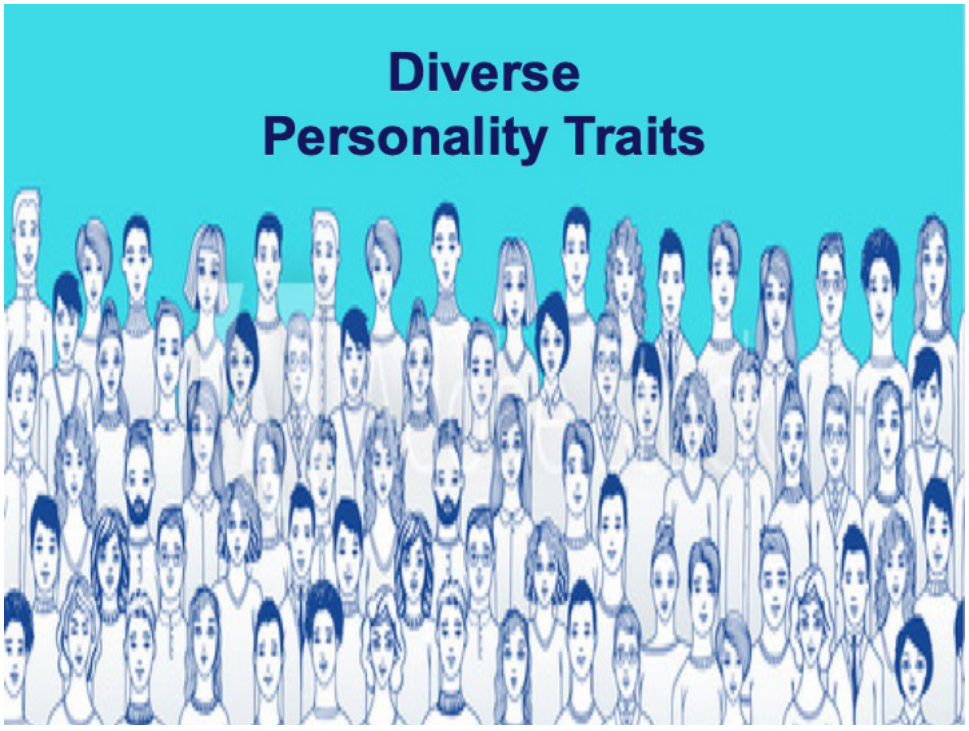
Commitment Questions

Unveiling a panel member's bias or pre-disposition requires a reasonable introduction and discussion of the key facts, claims and defenses in the case. Questions to the panel require relevance, and a factual background is needed to provide this context. Since bias and predisposition are sometimes not readily apparent, many jurisdictions recognize that a trial advocate should be provided reasonably broad discretion in how the factual presentation is made and used as a foundation for specific voir dire questions. However, some lawyers take advantage of this opportunity and seek unqualified commitments from jurors based upon a set of highly selective, distorted facts in favor of their client. Many jurisdictions discourage this practice and will sustain objections to this tactic.

In one case, a court noted that an examining lawyer should have "the right to ascertain from the jury panel any bias or prejudice … which would render it impossible or difficult for them to render a fair and impartial verdict based upon the evidence and the instructions of the court," but counsel does not have the right to "commit or pledge the jury to a certain verdict or amount thereof in advance of hearing all of the evidence." Wright v. Chicago, Burlington & Quincy Railroad Co., 392 S.W..2d 401, 408 (Mo. 1965).

The lesson here is simple: listen carefully, and make sure these types of improper questions are not presented by the opposition without objection. No attorney wants a jury already committed to vote a certain way before the first piece evidence is introduced at trial.


Picking a Winning Jury
Sawnie McEntire
Parsons McEntire McCleary, PLLC


Diverse
Personality Traits

Striking a Jury

Strikes for Cause

Inability to follow the law

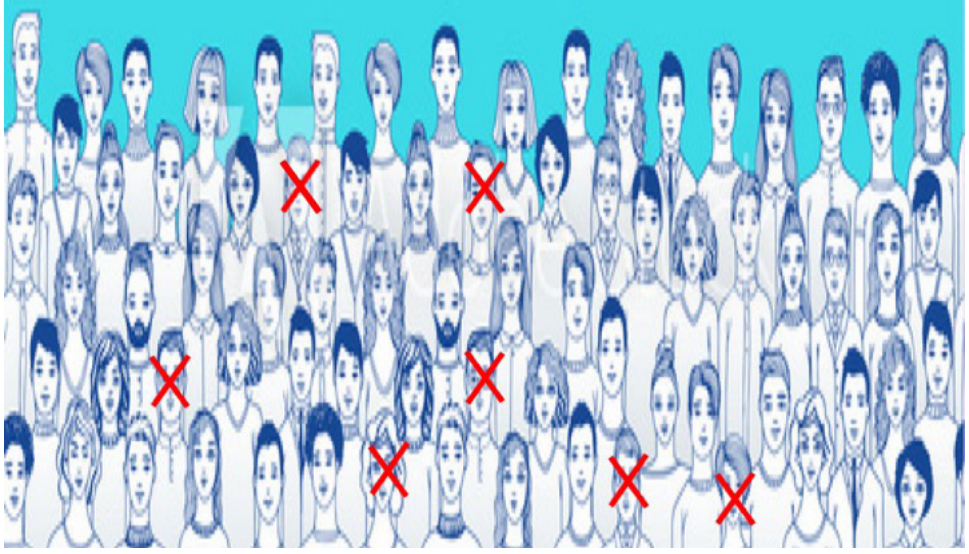
Peremptory Strikes

Discretionary

Key Objectives

- Strike jurors who may be unfavorable
- Strike jurors who present ***risks*** due to familiarity with the issues or similar issues
- Identify leaders who are favorable
- Identify "quiet" jurors who may be time bombs

Striking the Jury




"The first thing we do, let's kill all the lawyers".
Henry VI, Act IV, Scene ii


"YOU WILL NEVER GET A SECOND CHANCE TO MAKE A FIRST IMPRESSION."
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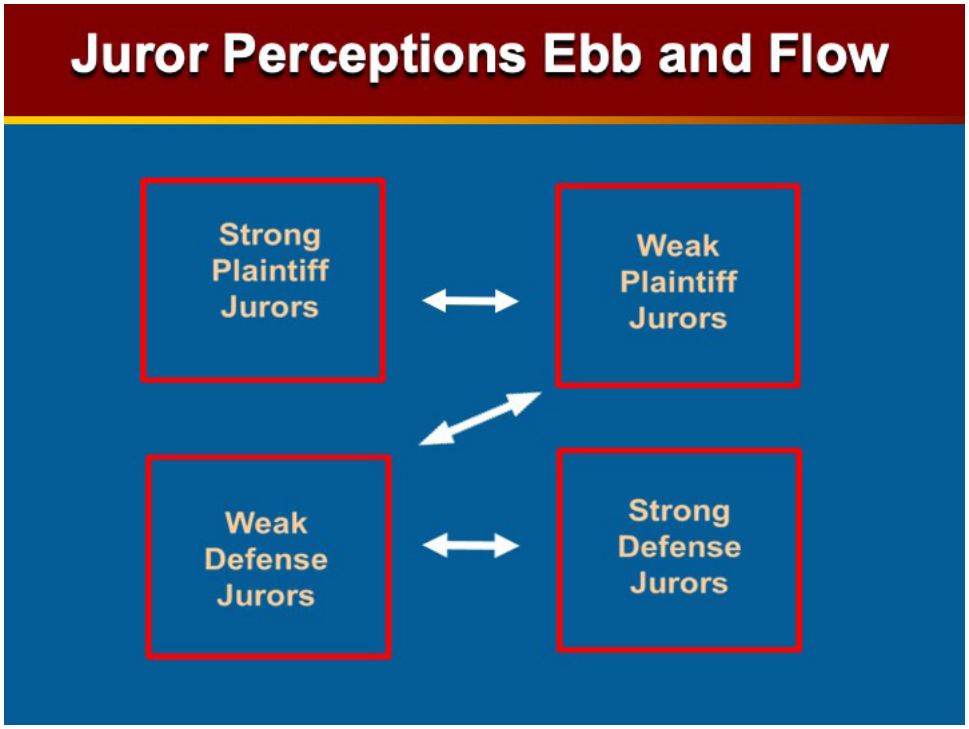
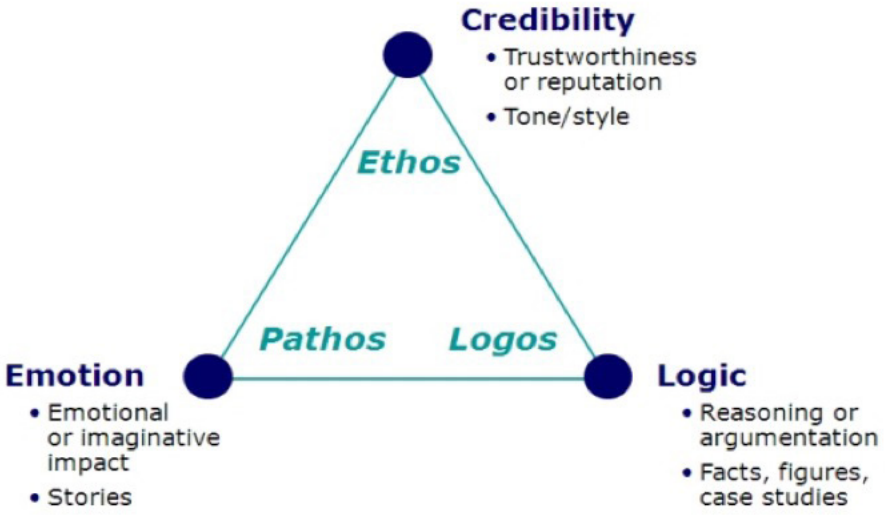

Juror Perceptions Ebb and Flow
Strong Plaintiff Jurors
Weak Plaintiff Jurors
Weak Defense Jurors
Strong Defense Jurors

Factual Presentation

- Introductions
- Clients
- Lawyers
- Witnesses
- Explain purpose of Voir Dire
- Explain purpose of factual presentation
- Advocate trial themes

Aristotle's 3 Cornerstones of Victory




Introvert
Extravert
personality
sensation
feeling
thinking
intuition
types


#82245694

Basic Techniques

- Watch, observe, listen
- Create effective data map
- Learn juror names
- Advocate your case
- Talk to all panel members
- Be aware of body language / attitude signals
- Use favorable jurors to teach the panel
- Avoid hostile jurors

Basic Topic Areas

- Knowledge of the parties / issues
- Prior experience with issues / facts
- Familiarity with lawyers
- Familiarity with witnesses
- Familiarity with other panel members
- Familiarity with witnesses
- Prior lawsuits / claims
- Prior jury service
- Prior service as foreman
- Zip Code / Residence
- Employment status
- Job experiences
- Consumer experiences
- Special areas of expertise

Case Specific Inquiries

- Nursing / medical backgrounds
- Accounting backgrounds
- Engineering backgrounds
- Finance / investment expertise
- Product usage backgrounds
- Bad evidence inquiries

Medical cases / drug cases

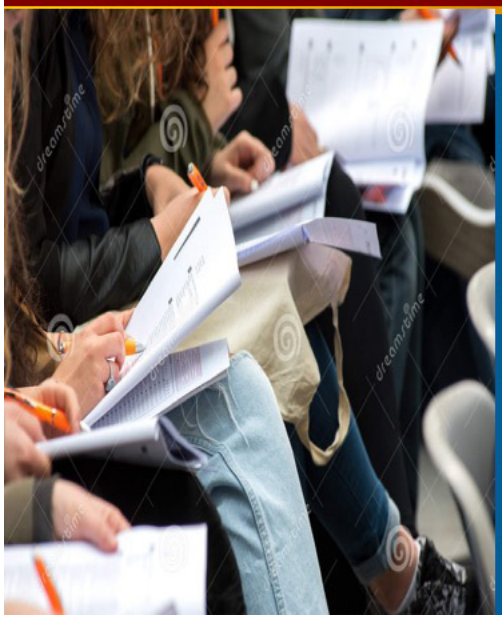
Financial or accounting fraud

Product liability cases / failures

Business or investment disputes

Familiarity with products / risks

Jury Questionnaires



- What is the last book you read?
- What newspapers do you read?
- Do you watch CNN, Fox News or MSNBC?
- How much TV do you watch per week? What do you watch?
- Who are 3 people in history you most admire?
- Who are 3 people in history you least admire?
- Do you have any bumper stickers on your car?
- Are you on Facebook, Twitter, etc.?

Jury Map

1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
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1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3

Real Case Examples

Prior Experience – Raised Hands

Beware

Answering questions from the panel …

Avoid harmful questions ….

Prior Experience – Knowledge of the Facts

Train derailment, explosion and fire

Observation – What are they reading?

Pharmaceutical case

Juror reading the PDR

Importance of warnings

Using Favorable Juror to "Teach"

Pharmaceutical Case

Risks of all medicines

Penicillin allergy is rare with the estimated frequency of anaphylaxis at 1 to 5 per 10,000

Knowledge of Other Panel Members

Husband and wife on the same panel

Knowledge of the Facts

Vehicle Rollover

Warning Label

SAWNIE A. MCENTIRE

Director and Shareholder

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Sawnie McEntire has over 40 years of experience handling complex civil matters in federal and state courts throughout Texas and across the United States. Sawnie has tried dozens of difficult cases to jury verdict on a variety of subject matters, such as commercial, products liability, pharmaceutical, and real estate claims. Sawnie has served as national, state-wide, and regional counsel for many of his clients, has received many national and local accolades for his advocacy accomplishments, and has authored several publications on advocacy skills.

Admission to Practice

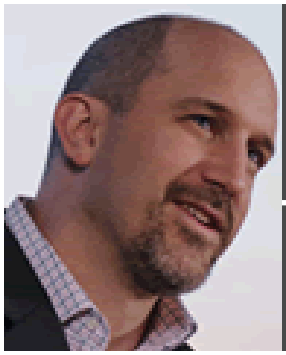
- Texas, 1980
- U.S. District Courts for the Northern, Southern, Eastern, and Western Districts of Texas
- U.S. Courts of Appeals for the Fifth and Ninth Circuits

Memberships and Affliliations

- State Bar of Texas
- Texas General Counsel Forum (Dallas Chapter) – Director
- American, Dallas, and Houston Bar Associations
- Texas and Dallas Bar Foundations
- Federation of Defense and Corporate Counsel
- Dartmouth Lawyers Association – Life Member

Education

- Southern Methodist University Dedman School of Law; Dallas, Texas - J.D., 1980
- Dartmouth College; Hanover, New Hampshire - B.A., magna cum laude, 1976



THINK INSIDE THE BOX: WHEN TO ENLIST JURY CONSULTANTS AND CONDUCT PRETRIAL RESEARCH

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Think Inside the Box: When to Enlist Jury Consultants and Conduct Pretrial Research

Joshua Metcalf and Taylor White

Mock trials and focus groups can be powerful tools in helping trial lawyers and their clients evaluate cases and prepare for trial. From narrowly-tailored presentations of specific issues to full-blown mini-trials, jury research services can help attorneys identify the strengths and weaknesses in their cases, see how potential jurors react to key witnesses, facts and themes, and gauge potential damages. This article will address two relatively modern litigation tools: focus groups and mock trials. When utilized properly, these tools can inform attorneys how to best prepare for trial. After highlighting the advantages of these jury research tools, this article will explain how to maximize the effectiveness of both focus groups and mock trials, based on: (1) the types of information the attorney wants to glean from the jury research data; and (2) which stage of the litigation cycle a case is in. Finally, this article will discuss the costs associated with conducting jury research by taking into account the relationship between the client's budget and the potential risk of exposure.

Selecting a Style: Jury Focus Group vs. Mock Trial

When considering whether to conduct jury research, attorneys and litigants usually have two major questions: (1) "what type of research design would best serve our needs;" and (2) "how much is this going to cost?" Almost invariably, these questions can be answered with a question in return: "what do you want to learn from the process?" Depending on the scope of information a trial team hopes to gather from the process – ranging from simple brainstorming over effective case themes to predicting the persuasiveness of certain witnesses and demonstrative evidence – most litigators choose to employ one of two types of jury research: focus groups and mock trials.

Jury Focus Groups

With a wide range of applicable uses, focus groups are the first and most common type of jury research. Dr. Richard Krueger, an academic marketing researcher and expert of systematic data analysis, defines a focus group as: "(1) people, (2) assembled in a series of groups, (3) possess[ing] certain characteristics, … (4) provid[ing] data, (5) of a qualitative nature, (6) in a focused discussion."[1] Borrowing Dr. Krueger's "focus group" definition from the marketing context, his description can also be used to describe a civil jury. In the context of civil litigation, however, focus groups are not intended to predict how individuals on a particular jury might vote (given the limited sample size), nor are they necessarily useful in predicting a future damages award. Instead, focus groups are used to develop qualitative information by giving attorneys insight into "big picture" data – like how a particular case theme might resonate with the venire of an unfamiliar trial venue – along with more nuanced, sometimes-overlooked details – like how to use the jurors' colloquial language persuasively.

Focus groups, usually consisting of 8-10 people, differ from mock trials in that they present information in a brief and non-adversarial manner, not intended to simulate trial results. They are often used as an informal brainstorming exercise while the case is still in its infancy.

1 Richard A. Krueger & Mary Anne Casey, Focus Groups: A Practical Guide for Applied Research (5th Ed. 2015).

When employed early in the litigation process, focus groups allow attorneys to better understand the jury pool, to use the information they gain to develop an effective theme, and to formulate a smooth presentation once trial begins.

There are two key advantages to using a jury focus group. First, focus groups are effective in helping to tailor messages to an audience. Even given the small sample size, a focus group can be an ideal environment to test potential themes – allowing advocates to frame their case in a way that maximizes central facts and neutralizes seeds of doubt. As an instrument for developing a trial narrative, focus groups can help encapsulate evidence into presentation form that jurors will find memorable and engaging.

Second, using a jury focus group permits more flexibility than a mock trial. Because focus groups are generally directed toward evaluating a few key issues or key themes in the case, a presentation can easily be altered to test a variety of scenarios that could arise at trial. Because focus groups are usually less cost-intensive than mock trials, advocates can also use this approach multiple times throughout the course of litigation to obtain more reliable feedback about the perceived merits of their case. Moreover, there are a variety of ways to conduct jury focus groups, depending on the budget of the case – from quick and informal roundtable discussions to in-depth comparative analyses of multiple deliberating groups.

When it comes to timing, focus groups are often most beneficial in the early stages of litigation. This is because the information gleaned from a focus group can serve as a guide to discovery and to conducting depositions. For example, as a planning tool during case preparation, focus groups can help persuade an advocate who tends to think too theoretically about a case to consider simpler themes that may resonate better with real people. When obtained before the discovery period closes, focus group feedback provides insight into avenues to explore in supplemental discovery and depositions. This can help advocates construct their story from the start, allowing a trial team plenty of time to fill in gaps that may otherwise have been overlooked.

Mock Trials

Mock trials, often referred to as "trial simulations" or "mini-trials," consist of the presentation of evidence to a mock jury panel in a similar format to that of an actual trial. The presentation typically lasts two to three days, and includes all the key components of trial: opening and closing statements, video or actor portrayal of witness testimony, actual and demonstrative evidence, and closed-door jury deliberation. The purpose of a mock trial is to evaluate how well a representative sample of surrogate jurors respond to an advocate's overall trial strategy and style. While jury focus groups are less useful when it comes to predicting jurors' reactions to key witnesses and demonstrative evidence, conducting a mock trial is a particularly effective way to identify and minimize these potential vulnerabilities before it really counts.

A key advantage of conducting a mock trial is that it is the most comprehensive way to test the persuasive value of both evidence and lawyer advocacy. Even the most competent trial attorney typically dreads the "unknowns" of trial, agonizing over things like whether their client was likeable; whether their argument style came off too strong (or not strong enough); what pieces of evidence the jury found most convincing; and so on. Conducting a mock trial can help provide answers to these questions by giving trial attorneys the distinct advantage of having tested the water before diving in.

A second advantage in conducting a mock trial, as opposed to a jury focus group, is the degree to which a mock trial requires attorney involvement. A properly constructed mock trial requires the trial team to: (1) prepare an actual court charge (even if abbreviated); (2) present real exhibits for the mock jury to use during deliberation; (3) prepare direct and cross examinations of key witnesses; and (4) deliver opening statements and closing arguments designed to test mock jurors' receptiveness. By contrast, the trial team plays less of a role in jury focus groups, which are often conducted by an outside facilitator who presents both sides in a neutral (rather than argumentative) manner. The level of attorney involvement in the mock trial process provides more qualitative feedback over how and why jurors reached certain conclusions, what specific evidence influenced their verdict decision, and how they arrived at the damage award (if any).

As for timing, mock trials are ideally conducted closer to trial, after critical witnesses have been identified and prepared. Most consultants agree that it is crucial to afford the trial team three to four weeks prior to trial to incorporate changes and rectify problems that have been revealed through the mock trial exercise. But because mock trials can be used as an effective settlement tool, the proper timing of the simulation could vary from case-to-case. In any event, the key to obtaining the most reliable information from a mock trial is to ensure the case is fully developed – making this type of jury research particularly well-suited for use in the later stages of litigation.

The Cost of Consulting

When it comes to cost, clients typically wonder whether their case is large enough to justify the expense of jury research. As Senior Trial Consultant and CEO of Opveon, April J. Ferguson, explains, the answer is simple: "if there is significant risk and/or exposure to your client, some form of jury research is warranted." The cost of jury consulting can vary depending on the needs of the case, the client's acceptable level of risk, and the degree of potential exposure.

If a client's jury research budget is low ($5,000 or less), most consultants recommend using some variation of the jury focus group. Focus groups are typically more cost effective due to their shorter (and, for lack of a better word, more focused) scope. Many consultants pay participants between $120-$200 for a half-day session, depending on the location. Full-day focus group participants are commonly paid between $150-$300 for eight to nine hours. While some researchers suggest cutting this cost by running classified ads or simply posting on Craigslist, keep in mind that this approach will not yield useful results in all trial venues. In many larger metropolitan areas, jurors in the venire may earn household incomes of over $100,000 per year. These jurors are unlikely to read classified ads for temporary work, and even less likely to participate for a hot meal and $30. Thus, if a client is working with a low research budget, it should be noted up front that their focus group results may not take into account the perspective of higher-income jurors (who often have more influence during jury deliberation). By contrast, if a client has a more substantial research budget ($50,000 to $100,000 or more), a full-scope mock trial is advisable. However, research indicates that the cost of conducting a mock trial is nearly impossible to predict without knowing the client's potential exposure. A case involving a joint defense team of several large law firms, representing clients facing claims worth tens of millions in a multi-week trial should invest much more in litigation consulting efforts than a small firm defending a single-plaintiff claim. Generally speaking, many trial consultants advise that the greater the value of the case, the more clients should expect to invest in conducting jury research.

In sum, there is no "one-size-fits-all" budget for jury research. Given the increasing number of research design options from which clients can choose, consultants have become much better at tailoring project designs to meet the needs of the case. For example, larger trial consulting companies often offer an "initial assessment" of the case, after which they recommend a few options for research designs based on the client's goals. A consultant may offer: (1) a lower-budget option, limited to jury profiling for voir dire; (2) a mid-range option, including a focus group report, mock jury questionnaire, or abbreviated trial simulation; and (3) a higher-budget option, involving some combination of multiple focus group panels, a full-scale mock trial, or shadow juries. Consulting companies typically provide a cost range for each option. However, because the cost of conducting a mock trial varies based individual case factors (the amount at stake, the length of trial, the complexity of the case, the quality of the trial team, etc.), most consultants cannot recommend a trial simulation budget without first understanding the details of the case.

Conclusion

Conducting some form of jury research prior to trial is no longer considered a luxury in civil litigation, but a necessity. To varying degrees, focus groups and mock trials provide advocates with vehicles to better understand the psychology of their potential jury pool by allowing them to test the seaworthiness of their vessel before actually setting sail. When conducted early in the litigation cycle, a focus group can give attorneys insight into effective case themes and new avenues to explore in discovery. Due to the limited scope of focus groups, they are best suited for zeroing in on a handful of particular issues in the case, but can easily be duplicated to cover different topics as litigation progresses.

By contrast, mock trials provide a much more comprehensive prediction of jurors' reactions to both the evidence presented and the advocate's litigation style. Ideal for use as a "dress rehearsal" in the late stages of litigation preceding trial, mock trial simulations can uncover key insights into what pieces of evidence jurors find most persuasive. Regardless of which type of jury research best suits a client's needs, trial consulting is becoming an essential component of trial preparation. From early-stage venue evaluation to strategy development in the weeks leading up to trial, focus groups and mock trials help advocates confidently and effectively communicate with any jury.

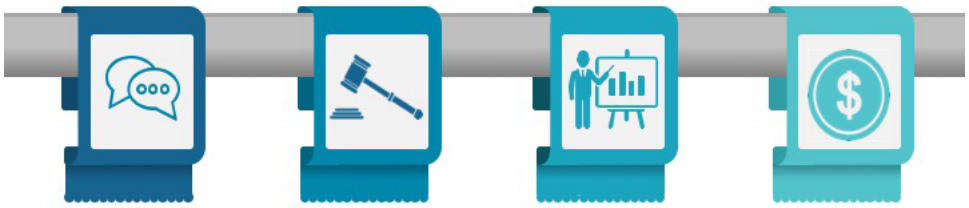
Think Inside the Box:

When to Enlist Jury Consultants and Conduct Pretrial Research

Joshua Metcalf

FormanWatkins
Forman Watkins & Krutz LLP

Knowing when to invest in a mock trial or focus group



Focus Group

A group of people who participate in a guided discussion to help develop a qualitative understanding of specific aspects of a case (e.g. themes).

Mock Trial

A type of group research that allows lawyers to evaluate the potential reactions of jurors to attorneys, evidence, and arguments by simulating all or part of a trial.

Examples

The depth and value of the insights gleaned from these types of group research sometimes surprise attorneys who have not used them previously.

Costs/Savings

Because of the expense of these types of research, attorneys must understand the cost/benefit of mock trials and focus groups.

Benefits of Group Trial Research

Objective Look 01
Focus groups and mock trials allow attorneys to evaluate how potential jurors react to the facts and law.

Try Out Themes 02
These types of research groups allow attorneys to test out different themes in front of a group of people with similar characteristics to a future jury.

Probe Key Points 03
Often, one of the most surprising aspects of reviewing the data from a mock trial or a focus group is which facts made the difference with the group. Identifying key points in advance allows attorneys to focus on the most crucial parts of the story.

Two Main Formats

Focus Groups
A group of people who participate in a guided discussion to help develop a qualitative understanding of specific aspects of a case (e.g. themes).

Mock Trial
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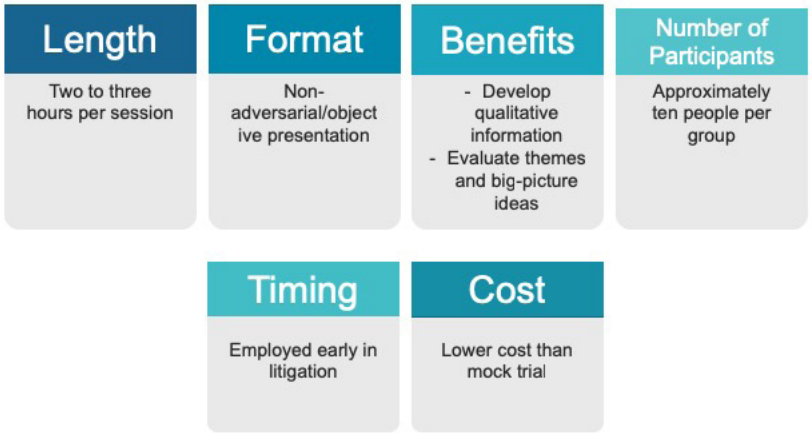
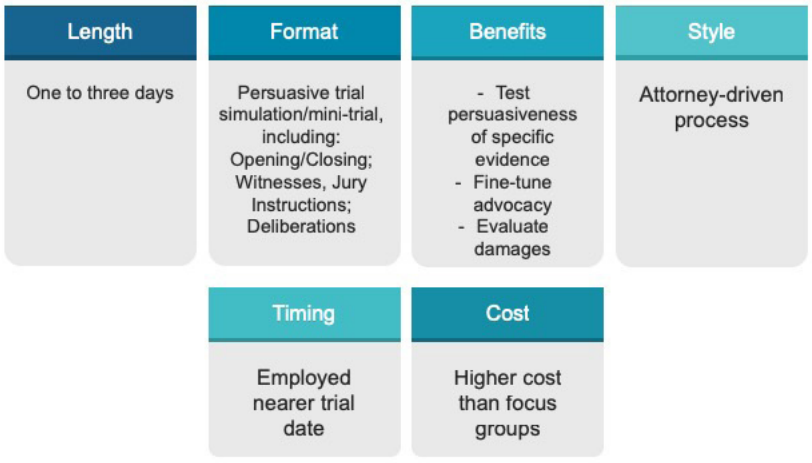
Focus Groups



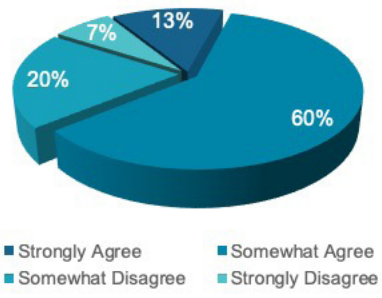
Mock Trial



Results from a Recent Mock Trial

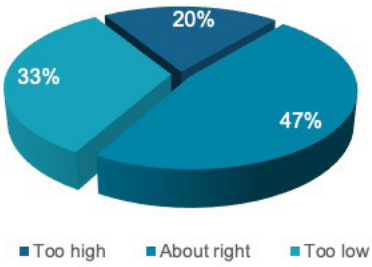
A lawsuit would not get to trial unless it had some merit.

- Strongly Agree (13%)
- Somewhat Agree (60%)
- Somewhat Disagree (20%)
- Strongly Disagree (7%)



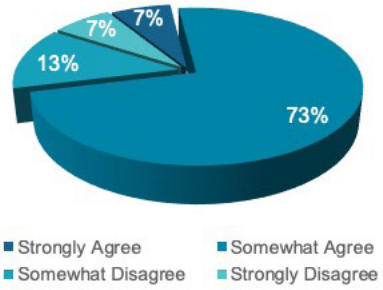
Do you believe that damages awarded in lawsuits are generally:

- Too high (20%)
- About right (47%)
- Too low (33%)



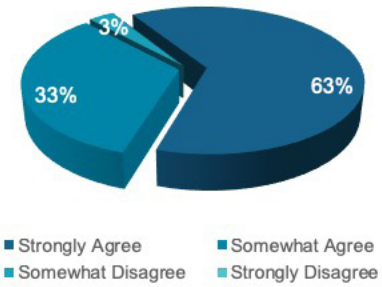
Awarding punitive damages is the best way to get large companies to behave more responsibly.

- Strongly Agree (7%)
- Somewhat Agree (73%)
- Somewhat Disagree (13%)
- Strongly Disagree (7%)



Corporations have a huge, unfair advantage over individuals in lawsuits and trials.

- Strongly Agree (63%)
- Somewhat Agree (33%)
- Somewhat Disagree (3%)
- Strongly Disagree (0%)



Costs and how to control them

Focus Groups
- From free to thousands of dollars

Mock Trial
- The sky is the limit
- Varies according to complexity, technology, and goals

Tips for controlling cost
- Identify key issues on the front end
- Tailor to potential risk
- Be creative
- Shop around
- Don't forget to account for attorney time

Mock Jury Deliberations

If you were a fly on the wall...

Never Enough

Ends Justify the Means

You Can't Deny Witness Testimony

Conclusion

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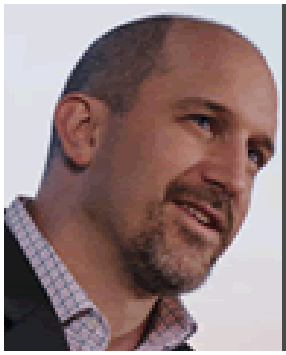

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Devoted and driven, Joshua Metcalf never slows down. Always giving 100% of his effort to his work, Joshua has been organizing the defense of complex cases nationwide for fifteen years, building a respected reputation in that time. Having learned the need for attention to detail during his tenure at the Virginia Military Institute, Joshua uses his strong desire to serve and his relentless work ethic to offer his clients a detail-focused but efficient representation, which emphasizes creative strategies and a thorough deconstruction of his opponent's case.

Vowing never to be outworked or out-prepared, Joshua offers clients a strong legal voice and an organized defense to help them identify the issues that really matter to them and to their cases, and to implement appropriate plans to ensure success from both a legal and business perspective. With an insatiable intellectual curiosity,

Joshua loves digging into complex medical and scientific issues, and enjoys collaborating with the talented members of his team to produce a consistently excellent product for his clients. For Joshua, business is personal and, as his clients can attest, a close working relationship and regular communication is at the heart of any engagement with Joshua and his team. Joshua carries this same focused intensity with him away from work, which is reflected in his commitment to his community and his dedication to his wife and four children. If he is not in his office or on the road for a client, chances are you will find him with his wife and kids - at a gymnastics meet or baseball game, on a campout, or doing tractor therapy at the family's tree farm.

Practice Areas

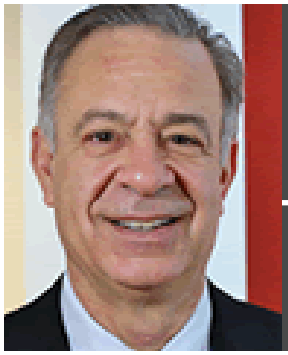
- Appellate
- Asbestos
- Chemical & Mold Exposure
- Commercial Litigation
- Construction
- Environmental Litigation
- Hearing Loss
- Personal Injury
- Product Liability

Recognition

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

Education

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



PANEL DISCUSSION: UNDERSTANDING CHANGING JUROR DYNAMICS

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Understanding Changing Juror Dynamics – Diving into the Deep End of the Jury Pool

Joseph J. Ortego and Christine Shang

After prolonged marital discord and alleged infidelities, Gwendolyn Hoyt decided she had enough. The Hoyts' collective troubles ended with a swing of a baseball bat, and in their place stood a defining moment in this country's history. During Gwendolyn's prosecution for murder, she argued for a representative sample of her peers – namely, that women be included on her jury panel as it was her belief that women would add a necessary and diverse viewpoint that would otherwise be lacking. Ultimately, it was a panel of six men that decided her fate. On November 20, 1961, a unanimous Supreme Court upheld Gwendolyn's conviction, ruling that it was constitutionally permissible for women to be relieved from jury service.[1]

It would take almost 15 years for the Supreme Court to reverse its prior decision and conclude that women could not be excluded from jury service as it was within the realm of possibility that the factors which tend to influence the actions of women may differ from those that influence men, including those based on personality, background, and economic status.[2]

Afterwards, more than 10 years would pass before the Supreme Court would hold that racial discrimination in the selection of jurors was unconstitutional as it deprives the accused of important rights during a trial and serves to "undermine public confidence in the fairness of our system of justice."[3]

In the present day, one is qualified to serve on the jury as long as seven requirements are met, none of which distinguish based on gender or race.[4] However, in an "equal" society where a jury may be comprised of a "representative" sample of the community, how does diversity actually affect jury decisions? Is it true, as the Supreme Court speculated, that individuals from different backgrounds may be influenced by different factors? Finally, are there any specific considerations when presenting a diverse trial team to the jury?

The Effects of a Diverse Jury.

Samuel R. Sommers is an American social psychologist best known for his research on implicit racial stereotyping and color-blind racism. In 2006, Sommers conducted a study which found that racially diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements when discussing the evidence than did all-white juries.

As Justice Thurgood Marshall articulated in an often overlooked Supreme Court opinion:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we

1 Hoyt v. Florida, 368 U.S.57 (1961).

2 Taylor v. Louisiana, 419 U.S. 522, 531-32 (1975).

3 Batson v. Kentucky, 476 U.S. 79, 87 (1986).

4 https://www.uscourts.gov/services-forms/jury-service/juror-qualifications.

> do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[5]

If it is clear that there is value in a diverse jury, the next question is how does one's background actually impact one's decisions?

A Conscious Evaluation of an Unconscious Thought.

Take a moment and step into the slightly worn out loafers of a member of the jury, and what do you see? The clock on the wall strikes 9:00am, and once again you're seated in a corralled off box in a drafty room filled with mahogany tables and mahogany chairs. One judge sits stationary upon the bench, a court reporter is furiously typing, and the person on your left appears to be sleeping. With little else as stimulation, you focus entirely on the active members in the room – the trial team who will spend the next several days seeking to validate months of hard work and the witnesses who will try to convince you to believe their story. What extraneous information have you taken with you into the courtroom that day? What have you concealed so well that even the metal detectors couldn't discover?

Gender Bias in the Courtroom.

When a juror becomes unmotivated, or in the alternative, overloaded with information, it is common for the juror to then base his or her decision on superficial or peripheral cues, such as the attractiveness of the source and presentation style. This results in an attorney's gender ultimately having an effect on a juror's perception of credibility and likeability.

A female attorney must tread lightly between societal stereotypes regarding feminine and masculine traits. For example, there have been many studies which have demonstrated that male jurors respond less favorably to aggressive female attorneys. As such, a female attorney may not gain the same advantages from a forthright witness examination as her male counterparts, especially if there are, and likely will be, male jurors on the panel. However, if a female attorney is too soft-spoken, she risks being perceived as weak. Additionally, women are often viewed as more competent in litigation involving family issues and less competent in litigation involving more technical issues. Therefore, in cases such as patent or asbestos litigation, even a minor mistake will undermine a female attorney's credibility with the jury.

Male attorneys are also subject to various negative stereotypes, though seemingly less so. For instance, attractive male attorneys are particularly successful as they are perceived as "generally good" by jurors, which often leads to other positive associations. However, attractiveness may not be a positive attribute where a male attorney is examining a female witness, as jurors may believe that the male attorney is attempting to manipulate the witness.

Undoubtedly, while our justice system is constructed in a way where fairness is meant to be achieved regardless of an attorney's gender, it is clear that gender biases have consequences in the courtroom. As such, it is advised that a trial team maintain these considerations when devising their litigation strategy and presentation tactics.

Connections Between Implicit Biases and Race.

Social studies have also recently shed light on the impact of diversity in connection with jury dynamics. Extensive research shows a somewhat concerning result - we, as people, are not always fully aware of our biases and beliefs. Therefore, the concept of voir dire is an imperfect practice that is incapable of truly exposing whether any potential juror is biased and/or cannot fairly judge the issues in a given case.

Recent studies have shown there are implicit biases involving an attorney's race. For instance, in 2018, the American Bar Association published a paper containing empirical findings from an original study which tested mock jurors' views of attorneys. When choosing an attorney, Asian mock jurors preferred a Caucasian male attorney (followed by an Asian male attorney), while all other races preferred an attorney from their own race – almost irrespective of gender.[6]

Implicit biases may be attributed to social upbringing, as well as cultural stereotypes. These biases may also affect how a juror views the plaintiff or defendant. For instance, it has been found that African Americans and Hispanics are more likely to believe that conspiracies are prevalent in the United States, whereas Asians and Caucasians are more likely to believe that people search for opportunities to sue corporations and cities. Additionally, jurors are more likely to render guilty verdicts and recommend harsher sentences when defendants are accused of committing crimes that are stereotypically associated with their racial or ethnic group – i.e. white collar crimes for Caucasians and theft for African Americans.

There is also a phenomenon called the similarity-leniency effect or leniency bias whereby jurors make more favorable judgments for defendants from the same

5 Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

6 Cynthia Cohen, Implicit Bias and Explicit Views of Lawyers' Race and Gender, ABA Section of Litigation Annual Conference: Beating Bias in Hiring Lawyers and in Jury Trials (2018).

racial group and harsher judgments for defendants from different racial groups.

"Voir dire" is a French phrase, which means "to speak the truth." However, it may be the case that the "truth" is not even explicitly known to the believer. Therefore, it may be beneficial to have a general understanding of the results from the numerous studies seeking to understand human nature from a scientific point of view.

Tokens – Not Just an Arcade Coin.

Merriam-Webster defines "tokenism" as "the policy or practice of making only a symbolic effort (as to desegregate)." This social concept existed as early as the 1960's and is even mentioned in Why We Can't Wait, a book by Martin Luther King Jr. on the nonviolent movement against racial segregation in the United States. This practice is still prevalent in today's society and can be found in television, in the media, in politics, and relevant to this piece, in the courtroom.

In the last several years, minority enrollment in law schools has seen a significant increase, which has led to a more diverse representation in private practice. But even with the recent efforts of law firms to promote diversity, there remains a noticeable disparity in the number of minority and female attorneys practicing in larger law firms, which only becomes even more prominent at the partner level.[7]

While gender and racial diversity is optimal for many reasons, it is not enough to simply add a woman or a diverse attorney to the trial team in an effort to exemplify a well-rounded team. The numbers for the sake of numbers tactic is overtly transparent, and counterproductive. Indeed, jurors will view a woman or a minority attorney who sits at a counsel table during trial, without a substantial role, as a token. Furthermore, a trial team must be conscious about the responsibilities assigned to each member of its team. For example, if a woman is only assigned to examine one witness while a male controls every other aspect of the trial, the primary message sent to the jury is that the one witness it not critical to the case.

A team will be the most successful when there are multiple members, diverse and non-diverse, who actively participate during the trial. While jurors may generally understand that more senior attorneys occupy a more principal role, they may still look unfavorably upon a composition that includes only one junior associate – a female or a diverse attorney.

Remember to take a moment to view the room from the jury box and be mindful of what you see.

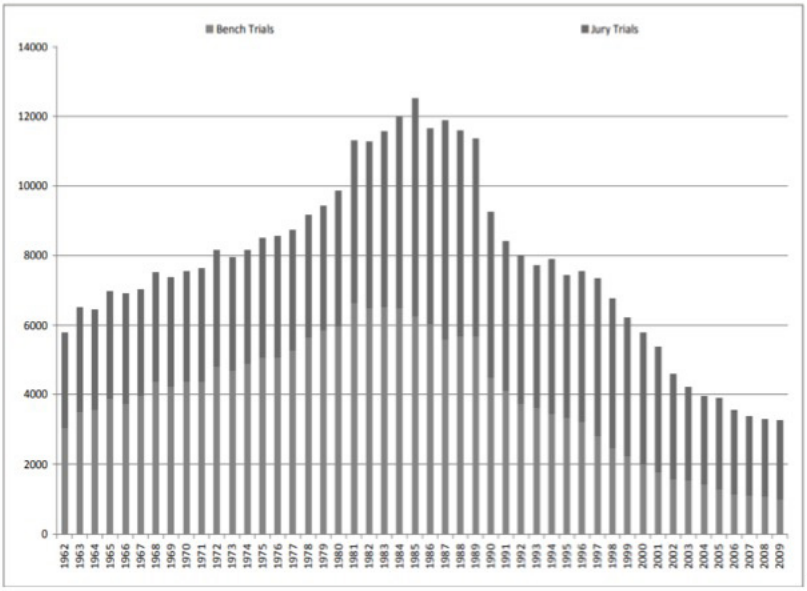
7 In late-2018, an international law firm posted a photo of its new partner class in a now-deleted post on LinkedIn. The image was dominated by white men, with only one white woman in the lower right-hand corner, sparking criticism on social media and generating negative publicity surrounding promotions at large firms.

Understanding Changing Juror Dynamics

NIXON PEABODY

Presenters:
Joe Ortego | Terry Newby
Jessie Zeigler | Jerry Hashimura

The Majority of Cases Settle: Civil Trials in the U.S. District Courts (1962 - 2009)



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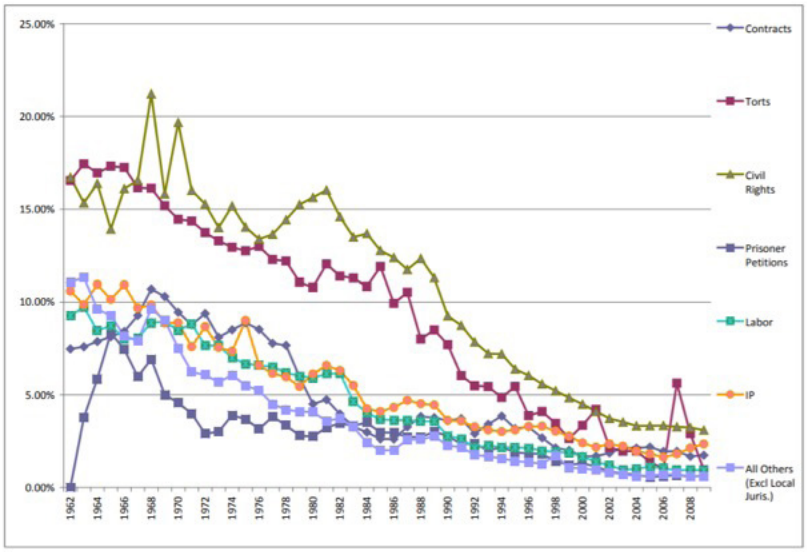
Percentage of Civil Cases that Reach Trial by Case Category



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Why Do Changing Jury Demographics Matter Then?

Population by Race and Ethnicity: Projections 2030 to 2060

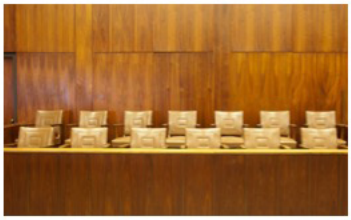
The non-Hispanic White population is projected to shrink by 19 million people by 2060.
(In thousands)

Characteristics	Population					
	2016		2030		2060	
	Number	Percent	Number	Percent	Number	Percent
Total population	**323,128**	**100.0**	**354,840**	**100.0**	**403,697**	**100.0**
One race						
White	248,503	76.9	263,302	74.2	274,576	68.0
Non-Hispanic White	197,970	61.3	197,888	55.8	178,884	44.3
Black or African American	43,001	13.3	48,934	13.8	60,471	15.0
American Indian and Alaska Native	4,055	1.3	4,657	1.3	5,567	1.4
Asian	18,319	5.7	24,382	6.9	36,778	9.1
Native Hawaiian and Other Pacific Islander	771	0.2	912	0.3	1,124	0.3
Two or More Races	8,480	2.6	12,652	3.6	25,181	6.2
Hispanic	57,470	17.8	74,751	21.1	111,022	27.5

www.census.gov

12 Angry Men (and Women?)

Taylor v. Louisiana, 419 U.S. 522 (1975)
Precluded systematic exclusion of women from jury service



Batson v. Kentucky, 476 U.S. 79 (1986)
Precluded the use of peremptory challenges to dismiss jurors based on their race

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)
Precluded the use of peremptory challenges to dismiss jurors based on their sex

SmithKline Beecham Corporation v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014)
Precluded the use of peremptory challenges to dismiss jurors based on their sexual orientation

McCaleb v. Daher-Socata, et al.

Case No. 2015-014561(02)
Seventeenth Judicial Circuit,
Broward County, FL

NIXON PEABODY

DAHER-SOCATA

Producer of general aviation aircrafts

Headquartered in France

The Facts

Single-engine, propeller aircraft

Accident occurred in Fayetteville, Georgia

Plaintiffs: husband (pilot) & wife (passenger)

Claims against Socata:
Negligence & products liability

The Crash

The Crash

Damages

Mr. McCaleb
— Broken leg
— Head injury

Dr. McCaleb
— Traumatic brain injury
— Loss of future earning capacity

Punitive Damages
— Three prior similar incidents

Issues

1. Strict liability

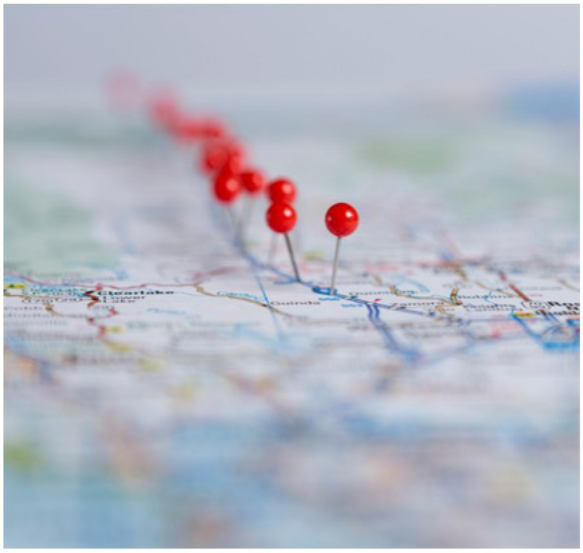
2. Crash-worthiness of aircraft

Does Venue Matter?

Venue determines the jurors that will ultimately decide a case

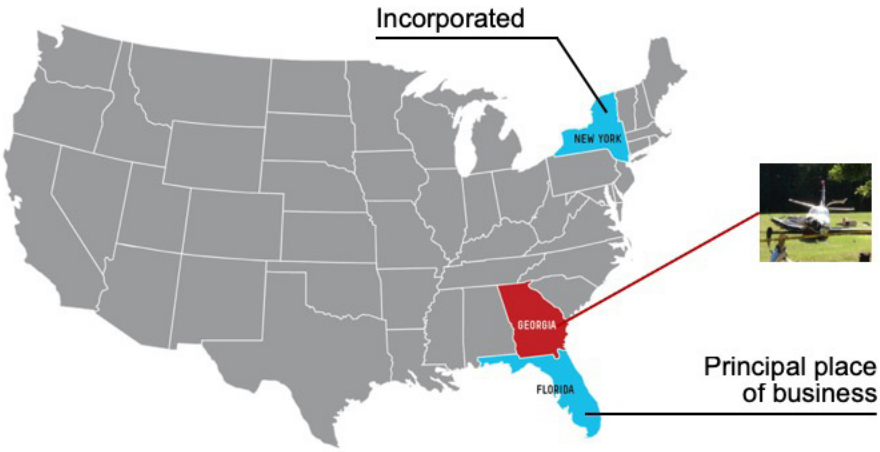
Venue Considerations

- Whether potential jurors in one area may view your case more favorably
- Whether a particular court seems "hostile" to claims such as yours



Potential Venues

SOCATA North America, Inc.
(American subsidiary of Daher-Socata)

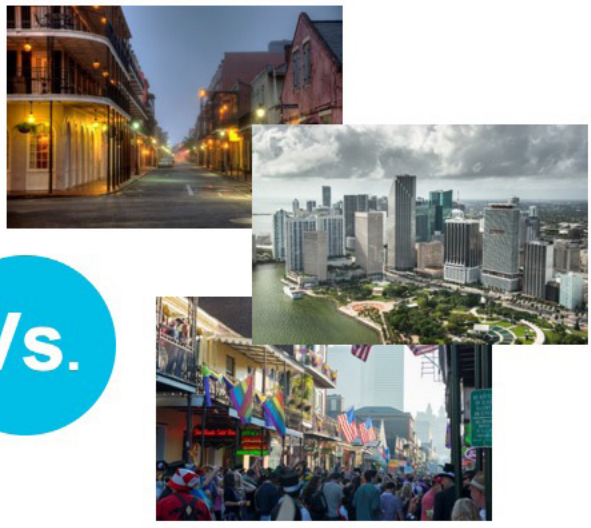


Differences in Juror Demographics

Would you see a different jury group in:

- California
- New Mexico
- New York
- Minnesota
- Tennessee
- Texas

Vs.



You've Chosen Your Venue

Now what ?

Your Jury Has Been Selected

What will your jury focus on during the trial?

The Room?

The Judge?

The Attorneys?

The Witnesses?

Hiring a Jury Consultant

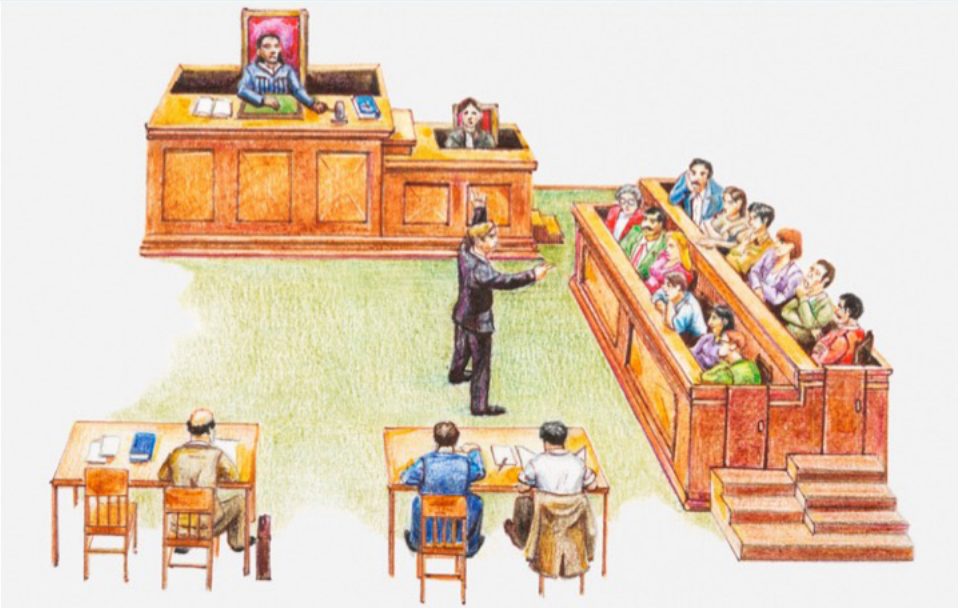
Is Justice Actually Blind?

Gender bias

Implicit biases

Racial stereotypes

What Will Your Jury See?



Studies On Biases and Stereotypes

If an attractive male attorney is examining a female witness, jurors believe that the male attorney is attempting to manipulate the witness

If a female attorney is too soft-spoken, she is perceived as weak

What Are Your Immediate Impressions?

How Would A Jury View…

A Male Pilot?

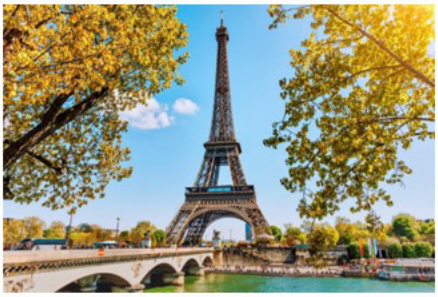
A Female Doctor?

Studies On Biases and Stereotypes

Similarity-Leniency Effect: jurors make more favorable judgments for defendants from the same racial group

Jurors are more likely to recommend harsher sentences when defendants are accused of crimes stereotypically associated with their racial or ethnic group

Views on Foreign Defendants and Witnesses



Trust In Government Organizations

National Transportation Safety Board

Federal Aviation Administration

NHTSA
www.nhtsa.gov
National Highway Traffic Safety Administration

Other Factors

Wealth

Education

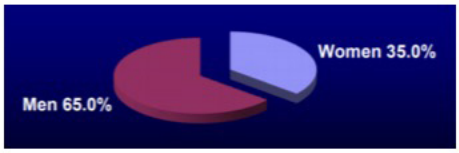
Age

Women in the Law

Representation of United States Federal Court Women Judges

Type of Court	Total # of Seats	Women	% of Women
United States Supreme Court	9	3	33.3%
Circuit Court of Appeals (Active)[1]	160 (active)	59	36.8%[2]
Federal District Court Judges (Active) in the U.S.[3]	570 (active)	194	34%[4]

Women in the Legal Profession



Representation of U.S. State Court Women Judges

% Women	% Women of Color
22	8

www.americanbar.org

Socata Trial: Female Judge

Judge
Patti Englander Henning

- Civil Division Judge of the 17th Judicial Circuit Court in Florida
- Elected on September 4, 1984
- Cornell University, B.A.
- University of Florida School of Law, J.D.

Tokenism In Your Trial Team

The policy or practice of making only a symbolic effort (as to desegregate)

The Socata Trial Team

Socata Jury Composition:

1/3 Caucasian

1/3 African American

1/3 Hispanic

50 % male

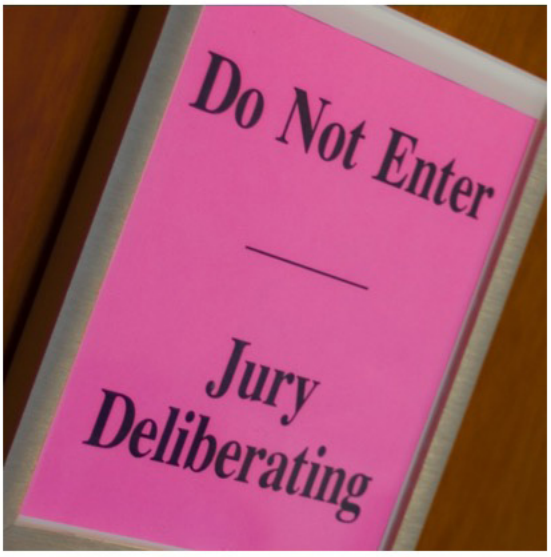
50 % female

Jury Consultant: Mock Trial Research

TrialPartnersinc

	Pro-Plaintiff Jurors	Pro-Defense Jurors
Age	18-29 y.o.	50 y.o.+
Education	High school graduate or less	Master's degree or higher
Race/Ethnicity	Black/African-American	White/Caucasian
Political Views	Would not vote for Hillary Clinton or Donald Trump	Would vote for Donald Trump
Experience	Have never flown in a privately-owned small aircraft	Have flown in a privately-owned small aircraft
Attitudes	French companies are not as safety-conscious as U.S. companies People do not seek to blame others for their problems	Relied more on gut instinct than statistical proof when making major decisions Belief in what a document says over a witness

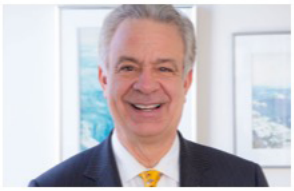
How Do We Use This Information?



Lessons Learned

THANK YOU!

QUESTIONS?



Joe Ortego

Partner, Complex
Commercial Disputes

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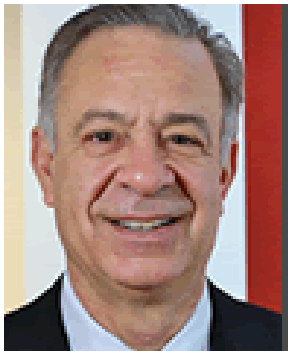
jortego@nixonpeabody.com

NIXON PEABODY



JOSEPH J. ORTEGO

Partner, Chief Diversity Officer, Vice-Chair of Litigation Department
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212.940.3045 | jortego@nixonpeabody.com

Joseph Ortego is Nixon Peabody's chief diversity officer, overseeing the firm's strategy to attract, retain and promote talented people with exceptional ability from a broad range of backgrounds. Joseph also serves as the vice-chair of the firm's litigation department, chair of NP Trial®, an international team of the firm's most successful and experienced trial lawyers and chair of the firm's aviation practice. Representing major private and public corporations and their executives, he has tried over 100 cases to verdict in both federal and state courts throughout the country and has successfully represented clients before arbitration tribunals around the world.

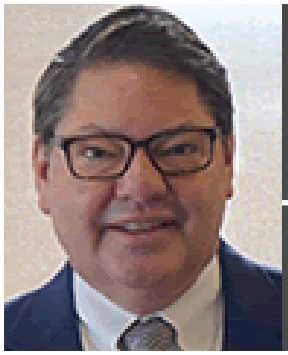
With over thirty-five years of litigation and business experience, I help my clients, from Fortune 500 to startups, resolve their matters early, on their terms.

Areas of Practice
- Commercial Litigation
- Products Liability
- Insurance
- Class Actions

Publications and Presentations
- "Litigation's Unsung Hero: Glory to the Direct Examination of the Expert Witness," The Brief, Winter 2019, Vol. 48 No. 2, American Bar Association (Co-author)
- "Statistical Sampling: Latest on Using Statistical Techniques that Presume All Class Members are Identical; Proving Liability; and Damage Models, Calculations and Theories Used in Class Cases," American Conference Institute's Cross-Industry Interdisciplinary Summit on Defending and Managing Class Actions, New York, NY, April 2016
- "Direct and Cross-Examination of Expert Witnesses in Food Cases," ABA Food & Supplements Fifth Annual Workshop, Omaha, NE, June 9, 2015

Recognition
- Joe was selected by his peers for inclusion in The Best Lawyers in America© 2019 in the field of Product Liability Litigation - Defendants. Joe has been listed in Best Lawyers since 2012.
- Joe is also recognized by The Legal 500 United States 2017 editorial in the areas of Dispute resolution - Product liability, mass tort and class action: Toxic tort - Defense, and Industry focus - Transport: aviation and air travel; by Benchmark Litigation as a New York local litigation star; and by Martindale-Hubbell Peer Review Ratings in its highest category, AV Preeminent.
- Additionally, Joe is recognized by New York Metro Super Lawyers, LMG Life Sciences as a "Life Sciences Star" and Who's Who Legal in Life Sciences. In the New York Metro Super Lawyers' 2015 and 2017 edition, Joe was amongst the top 100 lawyers.

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



DO YOU BELIEVE IN MIRACLES?: THE ROAD TO PRE-SUIT RESOLUTION OF A HIGH-EXPOSURE CLAIM

Lyndon Sommer
Sandberg Phoenix & von Gontard (St. Louis, MO)
314.446.4264 | lsommer@sandbergphoenix.com

The Road to Pre-Suit Resolution of a High-Exposure Claim - Do You Believe in Miracles?

Lyndon Sommer

Wouldn't it be nice if the claim against your client, Widgets & Things, for substantial damages could be resolved before a lawsuit is filed? Widgets & Things receives a letter from an attorney representing a potential Plaintiff, Mr. Greedy, who alleges the company was grossly negligent. Mr. Greedy seeks substantial damages which, if recovered, would threaten the existence of your client. Widgets & Things will want strict proof to support the allegations and will expect Mr. Greedy to provide convincing evidence that it did anything wrong.

Widgets & Things also wants strict proof its alleged negligence caused financial damage, and will likely take a hard line even if some damages could be proved. Widgets & Things believes damages to be far less than anything Mr. Greedy will claim.

Despite this, Widgets & Things would like to settle the case before it is exposed to significant negative publicity. The company believes a lawsuit could cause it to lose significant future business and may threaten the company's existence.

It is understandable Widgets & Things would like to have the case settled as soon as possible. Yet, no written discovery has been conducted. Depositions of Mr. Greedy and fact witnesses have not been taken. Widgets & Things does not have the benefit of a report by an opposing expert which specifies the alleged negligent actions or inactions. There is also no expert report (on either side) to quantify or refute damages and explain how they may be related to the alleged negligence. If the case was being litigated, Widgets & Things would be able to consult with in-house and outside experts to critique the position of the opposing expert. Because suit is not filed, there are no Court rules or orders requiring Mr. Greedy to produce all information – good or bad – which he has concerning the claim.

Even with these limitations, a pre-suit resolution should be considered. A large majority of cases settle sometime prior to trial. This is particularly true in high exposure cases. In the majority of litigated cases, there is significant time and expense incurred - often with an uncertain outcome.

There are many benefits to pre-litigation settlement which can occur through mediation.[1]

First, Widgets & Things may be able to avoid negative publicity if suit is not filed. The settlement should contain confidentiality and non-disparagement clauses. This can significantly decrease the chance a competitor will use the claim to its advantage. Lawsuit publicity is a significant concern among accounting, architecture, engineering, and law firms. After a lawsuit is filed, counsel frequently hears complaints that a competitor was able to receive work because they told the potential client about the lawsuit. In the client's mind, this shows they are somehow not competent because of litigation, regardless of whether the claims have merit.

Second, a pre-suit resolution will significantly reduce

1 See generally, Tony Rospert, Keeping the Floodgates Closed: Benefits of Pre-Litigation Mediation. Tony Rospert is a Partner of Thompson Hine which is a member of the Network of Trial Law Firms, https://www.linkedin.com/pulse/keeping-floodgates-closed-benefits-pre-litigation-tony-rospert/.

the amount of time Widgets & Things' employees would spend in the discovery process, much less preparation for and attendance at trial. For many high exposure cases, the amount of time a company devotes to gathering discoverable information can be staggering. This is especially true with high volume electronic discovery.

Third, the legal fees and expenses associated with pre-suit resolution will be significantly lower than engaging in full blown discovery, motion practice and trial. The work needed to prepare for a pre-suit mediation should be considered an investment. Even if the case is not settled, the work that is put in on the front end would be required if the case goes forward to litigation.

There are cases which are good candidates for a pre-suit resolution. Professional liability cases are an example. The professional almost always knows a client or former client is unhappy. Frequently, the source of the displeasure is discussed and a lawsuit is threatened and counsel representing the former client makes a demand on the professional firm. The professional then obtains counsel and an investigation begins.

In our example, Mr. Greedy's counsel is interested in settling the case before suit is filed. It will significantly reduce the time Mr. Greedy's counsel will need to engage in discovery and prepare for trial, which is attractive to plaintiff's lawyers who frequently take cases on a contingency. So, there can be substantial benefit to both parties to resolve the case early. The defendant saves money, since experts who analyze the breach of a professional's standard of care and alleged damages represent a significant cost and because attorneys' fees are predictably high once litigation commences.

However, there are claims which are not good candidates for pre-suit resolution. Product liability claims fall under this category. In general, manufacturers do not want to voluntarily produce any product information. If suit is not filed, the company cannot rely on an enforceable court order to limit future disclosure of its documents. While the parties can reach an agreement on document production, those contracts do not have the teeth of court orders precluding future use of the documents. Manufacturers are justifiably concerned attorneys would use information learned to file future lawsuits on similar fact patterns. They are also concerned the information would be shared with other lawyers who have potential lawsuits.

In addition, many product cases involve substantial fault of the operator who may have misused the equipment. Obtaining depositions of the product operator and key fact witnesses is often at the core of product liability cases, and suit must typically be filed to obtain this information under oath.

Another issue is that it can be difficult to engineer a pre-suit settlement for multi-party cases. The alleged tortfeasors are often not on the same page, and some parties may not have the same commitment to the negotiation process. All parties need to be fully engaged for significant exposure cases to be resolved pre-suit. For instance, defense parties often disagree about the allocation of fault and it is difficult pre-suit to force a party to articulate what evidence supports their claim or that other parties have more responsibility for the accident.

What is Required to Settle a Catastrophic Claim

The first step is to consult with your client and walk them through the process which could lead to a pre-suit settlement. Your client may need conditioning on the benefits of early settlement. Some clients presume settlement is an admission of fault. Obviously, settlement agreements contain a no admission of liability clause. It will be useful to explain the high percentage of litigated cases which settle. Consequently, the fact that a claim is settled and the presumed implications of that will not change whether the claim is settled pre suit or after litigation occurs. One could argue a settlement after years of litigation could be perceived as worse than early resolution of the claim.

Your client will be required to voluntarily provide substantial information, which can be a significant issue. Again using professional liability cases as an example, your client will be required to produce its entire file. The logistics and costs of the production should be discussed, and your client should understand there are no absolute assurances the other side will provide all information. Understandably, this can be a deal breaker or at least cause serious heartburn for many clients.

If there are other potential parties, then you will need to tell your clients the chances of success will be decreased if other parties are not committed to getting the case settled before suit is filed. It is certainly possible to settle the case solely on behalf of your client but the client may then be subject to future discovery. In some states, settling parties can be subpoenaed to obtain documentation or give a deposition. This would result in additional time and money, but it is unlikely it would be as substantial as if a lawsuit was filed.

Almost all high exposure cases settle prior to trial through mediation. You need to advise your client on the mediation process and what is involved in preparing.

For the process to be successful, the decision makers must be involved. The executives of a company who are responsible for making the final decision should be involved in the process from the beginning, and should attend the mediation. If there is insurance coverage then it should be communicated to the insurer at an early stage that the personal attendance of the insurance company's decision maker at mediation is required.

You must assess whether to retain an expert(s) on standard of care and damage issues. There is a significant advantage in having experts investigate the claim and prepare a report -- if the other side agrees to do the same. Unless liability is clear, it may be hard to convince your client that there could be breach of the standard of care (or that the trier of fact could find such a breach).

With a retained expert playing "devil's advocate", it opens the door for your client to consider the benefits of early resolution. But, be sure to let the client know the expense of retaining experts.

Assuming the client is on board with a pre-suit mediation, it is critical to work with opposing counsel to develop a game plan. This process is akin to a mini scheduling order. First, a written agreement covering the production of documents and information exchanged should be reached. It should be understood that the documents produced are subject to confidentiality to prevent use in the future. Second, it is advisable to enter a pre-mediation agreement that the claim, negotiation, and result are confidential. There should be no publication in the press or any local verdict reporting services. There should also be a non-disparagement clause in the eventual settlement agreement.

Third, the parties should jointly make a decision about retaining experts. This is a critical step in the process and there must be deadlines for the parties to exchange expert reports. The parties may want to agree that the expert reports are not subject to discovery if suit is filed. In that case, the parties will not need to worry that if an expert makes assumptions without the benefit of formal discovery that these would be held against him or her at a later date. Because there are many unknowns, it is reasonable that opinions could change in the future. In my experience, however, when pre-suit mediation is not successful, the same experts and substantially same reports are used in the suit. This is an example of an investment at the pre-suit stage that would translate to litigation if suit is filed.

Obviously, the selection of a mediator is key. This is true whether suit has been filed or not.

Hot Tubbing

"Hot Tubbing" is a process whereby two or more opposing experts are in the same room to debate issues while others observe. The procedure is common in Australia and is now being used in other jurisdictions.[2] In Australia, there is a pre-trial joint expert conference which is used to clarify areas of agreement or disagreement followed by a joint report being prepared.[3] The second phase of the process involves concurrent expert evidence being presented at trial. It is during this phase when the experts will sit together at court in a "hot tub" which is, literally, witness boxes.[4] While the experts still provide separate expert opinions, and are cross examined by counsel, the viewpoints are presented concurrently.[5] It is far less adversarial than expert testimony presented at trial in our judicial system. The concept of hot tubbing is very well received in the formal process in Australia. One study reported a 95% satisfaction rate among judges, experts, and attorneys.[6]

Hot tubbing can be effectively used in the mediation process and can be employed before suit is ever filed. While hot tubbing is formally used during trial in Australia, a modified version can be used in extremely high exposure cases before suit is filed. Typically, hot tubbing is used when a mediation is staggered over several weeks. It is often employed when the parties (or the carriers) need additional information to evaluate the case and obtain authority in instances where negotiations have reached a stalemate. It is more commonly used in multi-party suits.

A mediator will typically meet with the parties where opening presentations are made. Settlement negotiations occur but this is a prelude to the parties' experts providing reports and then engage in a hot tub session with the mediator. In advance of the second phase of the mediation, the mediator should impose some ground rules on the number of experts, the format and timing of the presentations which the experts will make to all of the parties, and who is allowed to present questions to the experts. It is recommended these ground rules are put in writing and agreed to by all parties in advance so there is no later claim of "sandbagging" or surprise.

The goal is to identify areas where the experts agree and, if possible, the reason for disagreement. The mediator

2 Adam Butt, "Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for 'Hot Tubbing'", 40 Hous. J. Int'l L. 1, 2(Fall 2017)

3 Id.

4 Id.

5 Id.

6 Expert Opinion: Hot Tubbing as an Alternative to Adversarial Expert Testimony, https://ap-ls.wildapricot.org/resources/EmailTemplates/2018_04%20April%20AP-LS%20Newsletter/ExpertOpinionApril.pdf.

will question the experts and then allow the experts and may solicit questions from the parties for the mediator to ask. Experts may also be allowed to ask questions of each other and sometimes the principals of the parties may ask questions directly. These questions are encouraged to clarify issues rather than to be used as cross examination. For instance, many times experts are asked questions whether if their opinion would change if they knew of a fact that perhaps the expert was not aware. Experts may also be allowed to make some type of closing presentation after the "hot tub" session.

During the hot tubbing process, it is critical to have a protocol which is enforced. Given the magnitude of these cases, all parties need to be prepared and late submissions of expert reports or other failures significantly decrease the likelihood of success. Given the hot tubbing process is voluntary (and often pre-suit) the mediator has little to no authority to enforce the protocol; thus the parties must be willing to proceed in good faith.

After the expert hot tubbing, the parties then meet at a later date in an attempt to settle a case. Even if the case does not settle, this process can be beneficial for all parties. First, both sides should have a better understanding of the adverse parties' claims and the potential risks. Second, there could be a piecemeal resolution of claims or issues which would reduce future discovery costs. Third, the process is beneficial when there are multiple levels of insurance for one or more of the parties. It assists the primary and excess insurers to evaluate their exposure. Finally, it provides the parties an opportunity to evaluate how their respective experts may perform in front of the ultimate trier of fact.

The significant disadvantage of the process is cost. The experts are typically very expensive. For catastrophic cases, the prolonged mediation process is expensive. It also takes substantial commitment by the parties. It is critical to have the principal decision makers present throughout the process. This can result in significant loss to the businesses.

Moreover, the hot tubbing process by its very nature is expected to be a transparent and non-adversarial process. In order to achieve the goals of the process, it means both parties may be exposing weaknesses (or strengths) at an early stage which, if the case does not resolve, gives time to pivot to address those issues during litigation. While the hot tubbing process gives a unique sneak preview of the other side's theories and case, the opposite is true as well. Therefore, parties must be cognizant of this issue and weigh the costs and benefits before entering into the process. Given the adversarial nature of the U.S. legal system, this may be a major reason why "hot tubbing" has yet to become a more standard practice, even in high exposure cases.

Hot tubbing should be considered in complex, high exposure cases where all parties (and their respective insurers) are motivated to settle early or pre-suit. High profile parties involved in the complex matters are more likely to view "hot tubbing" as a valid option in order to avoid the spotlight of public litigation. For instance, two high profile corporate clients in a high value business dispute are more apt to consider "hot tubbing" as opposed to an individual plaintiff which may want the publicity or to leverage a more favorable settlement.

Conclusion

If parties obtain sufficient information to evaluate liability and damages before a lawsuit is filed, then a settlement can be negotiated. This is also true for high exposure cases. If the parties properly plan the process which almost always includes mediation, then there are reasonable chances of success. Engaging experts to evaluate the claim significantly increases the chance a case can be settled. Although hot tubbing is an expensive option for the mediation process, the alleged damages may justify this tactic.

It's not for everyone.

SANDBERG PHOENIX
& VON GONTARD P.C.

When is pre-suit settlement possible?

SANDBERG PHOENIX
& VON GONTARD P.C.

Reality

SANDBERG PHOENIX & VON GONTARD P.C.

Exchanging Information

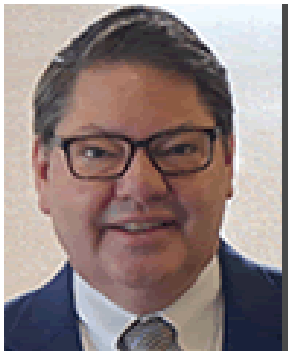
SANDBERG PHOENIX & VON GONTARD P.C.

Expert Reports

SANDBERG PHOENIX & VON GONTARD P.C.

Hot Tubbing


750



LYNDON SOMMER
Shareholder
SANDBERG PHOENIX & VON GONTARD (St. Louis, MO)

314.446.4264 | lsommer@sandbergphoenix.com

Lyndon Sommer, Registered CPA (Ill.) M.Acct., J.D., is a shareholder of Sandberg Phoenix & von Gontard and member of the firm's Business Litigation and Products Liability Practice Groups. He focuses his work in the areas of commercial, product liability and toxic tort litigation, frequently handling cases involving asbestos and benzene.

Having tried cases in federal and state courts in Missouri and southern Illinois, Lyndon has received jury verdicts on behalf of both plaintiffs and defendants. He has also argued multiple cases before the United States Courts of Appeal for the Seventh and Eighth Circuits, as well as the Missouri Courts of Appeal and Illinois Appellate Courts.

Lyndon specializes in professional negligence cases involving certified public accountants, who he has successfully defended at trial and on appeal. He is experienced in defending accountants in federal court and is very familiar with federal procedure and expert requirements. Lyndon has also defended actuaries, architects, attorneys, engineers, financial advisers and insurance brokers. Throughout his career, he has handled more than 100 professional negligence cases.

Lyndon is also experienced in representing shareholders of closely held companies involved in shareholder disputes. He has represented shareholders in trial courts and argued several appeals. These appeals have been argued in both state and federal courts.

Services
- Product and Toxic Tort Liability
- Professional Liability

Professional Activities
- Admitted to practice law in Missouri and Illinois, Lyndon is also a Registered Certified Public Accountant in Illinois.
- He is member of the Missouri Society of CPAs and the American Association of Attorneys/Certified Public Accountants.
- For his outstanding work in the area of Product Liability Litigation – Defendants, Lyndon has been included in the 2017 and 2019 Editions of Best Lawyers in America.

Education
- Attending Southern Illinois University School of Law, Lyndon earned his Juris Doctor in 1992 and served as the Editor in Chief of the Southern Illinois University Law Journal.
- Lyndon earned a master's degree in Accountancy in 1989 and a B.S. in Accounting, in 1987 from Southern Illinois University, Carbondale.

A BRAVE NEW WORLD: ALGORITHMS AND 3-D PRINTING AND THE IMPLICATION ON MEDICAL PRODUCTS LIABILITY LAW

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Emergent Medical Technology and Product Liability Law

Jeffrey Hines and Emmit Kellar

As medical technology pushes faster and faster into the future, regulation and legal authority has remained alarmingly stagnant. Without guidance from legislators or the courts, manufacturers of cutting edge-medical devices are left without guidance or, perhaps more importantly, restrictions. This article looks at 3D printing and medical algorithms, two of the fastest emerging technologies in medicine, and asks where gaps are in the current regulations and what sort of challenges do these gaps present in the context of product liability law.

3D Printing and Redefining the Medical Manufacturer

Three-dimensional printing is one of the most bleeding-edge and quickly emerging technologies in the field of medicine. The applications of 3D printing are limited only by the imagination of the users and have already begun to penetrate various areas of the industry, including custom prosthesis, surgical implants, and even pharmaceuticals. However, each technological leap achieved by 3D printing is accompanied by an almost equal lag in legal precedent. The following discusses the current and upcoming applications for 3D printing and the legal ramifications it will continue to have on the various players in the healthcare market.

3D Printing – The Process, Players, and Pieces.

3D printing is an interesting but complex process that presents incredible possibilities for medicine as well as a critical need for regulation and legal guidance. 3D printing or "additive manufacturing, is a process by which a custom device (or medication) can be made using a patient's individual specifications.

Importantly, the process of 3D printing is unique to the typical medical manufacturing cycle. Typically, the medical 3D printing process begins with a care provider collecting input data either manually or through diagnostic testing, such as an MRI.[1] That data is sent to a computer programmer who creates a "computer aided design" or a "CAD file" that acts as a blueprint for the 3D printer.[2] The actual printing process can be accomplished through various different techniques, including bonding hundreds of small layers or sheets of material to form an object, using a liquid bonding agent to form powdered material into a specific shape, or whittling down larger blocks of material until the desired product is formed.[3] The physical materials used for 3D printing can also vary greatly, which further expands the options for the medical industry.[4] Not only can objects be printed using various plastics and metals, but new materials such as silicone, carbon fiber, graphene and even biomaterials are creating new design opportunities in the already boundless field of 3D printing.[5]

Because of this, the practical applications for 3D printing in the medical field are already revolutionizing the industry. Surgeons are able to use 3D printing to

1 Richard Rubenstein & Juanlin Song, 3-D Printed Implants Pose Challenge for Product Regulators, Law 360 (Jan. 10, 2018), https://www.law360.com/articles/1000475.

2 Id.

3 James A. Beck and Matthew D. Jacobson, 3D Printing: What Could Happen to Products Liability When Users (and Everyone Else In Between) Become Manufacturers, 18 Minn. J.L. Sci. & Tech. 143, 149-50 (2017).

4 Id. at 150-51.

5 Id.

customize surgical implants and create 3D models to prepare and practice for procedures.[6] Care providers can create patient-matched medical devices and prosthesis on demand with 3D printers onsite at hospitals or practices.[7] As mentioned above, the emerging ability to print with biomaterials makes creating replacement organs out of living cells a plausible idea rather than a science fiction fantasy.[8] Overall, the 3D printing niche looks promising and is estimated to grow into a multi-billion dollar marketplace in the near future.[9] However, one of the biggest obstacles for 3D printing is how it will be regulated in the legal community.

FDA Regulation of 3D Printing.

One of the most reliable sources and highest authorities in medicine that courts and litigants look to for legal guidance is the U.S. Food and Drug Administration ("FDA"). However, because 3D Printing is an emergent technology, FDA regulation has not had the opportunity to catch up and is, in fact, falling increasingly further behind.[10] The FDA website is indicative of this. The latest FDA guidance on 3D printed devices comes in the form of the "Technical Considerations for Additive Manufactured Devices," which was published in 2016.[11] The website discusses that, although the FDA is still determining its evaluation criteria for 3D printed products, it plans to continue grouping 3D printed products into the same regulatory classifications used for standard medical devices.[12]

Looking to the Guidelines themselves, the FDA states upfront that the document "represents the current thinking of the [FDA]" and "does not establish any rights for any person and is not binding on FDA or the public."[13] The Guidelines acknowledge that 3D printing is a rapidly growing technology that is finding application in a broad range of areas in the medical field.[14] The FDA also discusses various relevant considerations for 3D printed medical devices, such as interruptions to typical product workflows, design models versus individually patient-matched devices, the critical role of computer software, and the need to regulate printing materials.[15] While the Guidelines adequately apprise the medical industry of what will be regulated in the future, they offer little insight as to what specific benchmarks the medical industry are currently expected to adhere to.

This has led to a unique situation: despite not having binding rules and regulations in place, the FDA has already begun classifying and regulating certain 3D printed medical devices.[16] For instance, the approval of Spiritam, a seizure prevention drug by Aprecia Pharmaceuticals Co., represented the FDA's first approved 3D printed medication.[17] Other devices- such as hearing aids, surgical implants, and bone replacements- have been approved by the 501(k) premarket notification process.[18] While many of 3D printed devices may be considered "custom devices," some have also fallen into the three-tiered FDA classification system, in which the regulatory controls increase according to what class the product falls into.[19] The versatility of 3D printed devices will undoubtedly present new issues for these classifications, given that the system was developed to regulate medical products that are more rigidly defined.[20]

Product Liability of 3D Printing - Novel Products Create Novel Problems.

The lag in the FDA's reaction to 3D printing is mirrored by a lag in product liability law. As product liability law has evolved, the need for privity with a manufacturer has evaporated and the general sentiment has moved towards strict liability theory for manufacturers.[21] Essentially, as seen under the Restatement (Second) of Torts, a product manufacturer may be held liable for selling products in "a defective condition unreasonably dangerous to the user or consumer or to his property."[22]

Although there are differing views on how to prove that a product is "defective," the crux of strict liability theory is to more easily hold manufacturers accountable for the products that they are putting out on the market.[23] Essentially, the theory shifts a plaintiff's burden from proving that a defendant breached a standard of care to merely requiring proof that the defendant was a "seller" of

6 Id. at 151.

7 Id.

8 Eric Lindenfeld, 3D Printing of Medical Devices: CAD Designers as the Most Realistic Target for Strict Product Liability Lawsuits, 85 UMKC L. Rev. 79, 83 (2016).

9 Id.

10 Rubenstein, supra note 1.

11 FDA's Role in 3D Printing, U.S. Food & Drug Administration (Mar. 27, 2019, 3:43 PM), https://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/3DPrintingofMedicalDevices/ucm500548.htm

12 Id.

13 U.S. Food & Drug Admin., Technical Considerations for Additive Manufactured Medical Devices 1 (2017).

14 Id. at 3.

15 Id. at 5, 8-10, 11, 15-17.

16 3D Printing of Medical Devices, U.S. Food & Drug Administration (Mar. 27, 2019, 3:43 PM), https://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/3DPrintingofMedicalDevices/default.htm.

17 Lindsey Adams-Hess, et al., Law and Regulation of 3-D Printed Medical Devices, Law 360 (Mar. 31, 2016).

18 Id.

19 U.S. Food & Drug Administration, supra note 11.

20 Adams-Hess, et al., supra note 17.

21 Beck and Jacobson, supra note 3 at 152-54.

22 Id. at 154 (quoting RESTATMENT (SECOND) OF TORTS § 402A (Am. Law Inst. 1998).

23 Id.

a defective product.[24]

In medical device and pharmaceutical cases, liability is not simply limited to manufacturers. For instance, the learned intermediary theory only obligates manufacturers to "warn a prescribing doctor about the risks [of a product], rather than an end user."[25] Thereby looping prescribing care providers in as potential targets for failure to warn claims.[26] However, this liability calculus becomes more difficult to grasp thanks to the radically new supply chain presented by 3D printing.

As mentioned above, the typical process for 3D printing naturally involves more parties than the standard medical manufacturing lifecycle. In 3D printing, doctors and technicians are often responsible for obtaining the exact specifications for a 3D printed medical product. Next, software programmers will likely be looped in for creating the CAD file on which the printer will base its "image." Obviously, the printer manufacturer could also become a potential new source of liability, as would employees that are tasked with operating the machine.

All of these new potential sources of liability beg the question: who is a "manufacturer" in the 3D printing supply chain? This question does not have a definite answer, but there are certainly indicators for what courts may eventually say. Although 3D printer companies may seem like a logical defendant due to their deep pockets, plaintiffs will need to show a flaw with the printer itself, which will likely be more difficult to prove.[27] Likewise, medical professionals are more prone to negligence liability rather than product liability in the 3D printing context because it will be more difficult to construe them as "sellers" of the products rather than prescribing care providers.[28] This is likely true even where the care providers are operating a 3D printer onsite.[29] In this new supply chain, the most likely source of liability for a defective 3D printed medical device would be the CAD developers given the control they have over the final product and the leeway for plaintiffs to argue a developer's ability to affect the overall manufacturing process.[30]

However, 3D printing also raises novel issues about the definition of a "product" for the purposes of strict liability. In this new supply chain, is the 3D printer output the true product, or is it the CAD file on which the output is based? Can a CAD designer escape liability by arguing he is not a seller of the final output or product? Can a manufacturer argue its exculpation based on the fact that the manufacturer has no control over the CAD file inputs? The key to these inquiries is getting a definitive answer as to whether an electronic CAD file can constitute a "product" for liability purposes. Currently, the Restatement (Third) defines products as "tangible personal property distributed commercially for use or consumption."[31] However, although courts have yet to address CAD files in the product liability context, case law has been gradually expanding the Restatement's narrow definition of a "product."[32] For instance, a 2014 District Court decision grazed the field of 3D printing when it found that the software used to create a patient-matched cutting guide for knee replacement surgery could be lumped into the definition of the product as "a necessary part of the cutting guide."[33] Decisions like these will only become more frequent as the use of 3D printing becomes more prevalent.

On the other hand, Courts have already started to weigh in on a 3D printing's effect on the duty to warn end users or patients. The Northern District of California ruled that CAD developers and 3D printer manufacturers are involved in the customization of 3D printed medical devices.[34] However, the learned intermediary exception expands to these parties so that they need only warn the care providers of the risks associated with 3D printed products.[35] Nonetheless, the Buckley case is a very basic application of 3D printing, and it will be interesting to see where courts assign liability as the practical uses of 3D printing become increasingly complex.[36] At this stage, however, there is still much work to be done for product liability law to catch up to 3D printing technology.

Medical Algorithms and the Challenge of Holding Software Legally Responsible

Like 3D printing, medical algorithms present one of the most promising areas of medicine while also widening the void between medical technology and regulation. Algorithms can already be found in several on-the-market products that are used every day. As algorithmic technology progresses, products will be able to make more decisions autonomously, creating less need for medical provider supervision and greater accessibility

24 Id.

25 Id.

26 Id.

27 Lindenfeld, supra note 8 at 93.

28 Id. at 92.

29 The logic being that, while the care provider is capable of operating the printer, s/he is not in the business of selling 3D printers or 3D printed products. Id. at 92-93.

30 Id.

31 Restatement (Third) of Torts: Prod. Liab. § 19(a)

32 For instance, some courts have recently held that intangible items, such as electricity, can be considered a "product" for liability purposes. Michael D. Scott, Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?, 67 Md. L. Rev. 425, 435-36 (2008).

33 Corley v. Stryker Corp., 2014 WL 3375596 at *4 (W.D. La. May 27, 2014).

34 Buckley v. Align Technology, Inc. 2015 WL 5698751 at *3-4 (N.D. Cal. Sep. 29, 2015).

35 Id.

36 Beck and Jacobson, supra note 3 at 202.

to medical care for consumers. The difficulty lies in regulating this type of smart technology when problems occur. This is another area where the legislature and the judiciary have not made significant headway.

Algorithms in Healthcare – Decisions Through Programming.

Algorithms are emerging as a pivotal and interesting part of the medical industry. The layman's definition of an algorithm is a piece of computer coding that is capable of "machine learning", dynamically learning to solve problems by constantly absorbing external data.[37] Examples of this would include the software behind self-driving cars, search engines like Google that market products based on your queries, and banking algorithms that determine how money markets will trend in the near and long term future.[38]

This sort of self-learning technology has already found its way into the highly-regulated field of medicine. Medical algorithms have found useful applications in a number of fields, including spotting DNA mutations that lead to tumors, getting out in front of heart failure, and predicting changes in ICU patient conditions before they occur.[39] Private companies, like Apple, have begun marketing this type of predictive medical technology directly to end users as a way to maintain health in between visits to the doctor's office.[40] These products typically rely on consumer input data either through interactive questionnaires, separate devices that can be synced with the software, or functionalities of the actual device such as a smartphone camera or a heart rate sensor built into a smartwatch.[41]

Learning algorithms have a near limitless potential in the medical industry. For instance, promising cognitive disease technology is using algorithms to detect conditions like Alzheimer's at their early stages by analyzing speech and language patterns over time. Technology similar to the omnipresent in-home A.I.[42] is being utilized to listen for and detect the human cough in children to help diagnose asthma, tuberculosis, pneumonia, and other lung diseases.[43]

Interestingly, and somewhat alarmingly, the rapid growth and tremendous potential for self-learning medical algorithms has led many companies to avoid the cumbersome approval process of the FDA.[44] The industry's lightning quick development and the legal community's failure to react has resulted in a gap between the traditional liability rules for the medical industry and the evolving practical concerns for patients, practitioners and manufacturers.

FDA Regulation of Healthcare Algorithms or Lack Thereof.

One of the largest potential hazards for healthcare algorithms is that the FDA has yet to properly address them. Currently, algorithms generally are not beholden to any specific regulatory authority.[45] At this point, the FDA maintains a much tighter ability to regulate medical devices in general rather than the software behind them.[46] Ironically, this has allowed the FDA to make more headway towards regulating algorithms in the consumer marketplace by categorizing healthcare apps and software marketed directly to end users as consumer "medical devices."[47] However, even this framework is in its developmental stages.[48]

That is not to say that the FDA has not placed regulations on device algorithms in the past. For example, the FDA technically regulates the algorithms behind "disease detection" devices, including the data referenced by the software, the scoring methods for disease detection, processing mechanics and other intricate details.[49] However, as of now, medical algorithms are being addressed on an ad hoc basis and are seen as a component to a larger product that fits more neatly into the current FDA classification scheme.[50] At current, the FDA has acknowledged that this piecemeal method is not sufficient and is seeking better ways of addressing and regulating healthcare algorithms consistently.[51] Nonetheless, keeping pace may become increasingly difficult as algorithms become more prevalent and more powerful with technological development.

37 Andrew Tutt, An FDA for Algorithms, 69, 85 Admin. L. Rev. 83 (2017).

38 Id.

39 Top Smart Algorithms in Healthcare, The Medical Futurist (Feb. 5, 2019), https://medicalfuturist.com/top-ai-algorithms-healthcare.

40 Nathan G. Cortez, et al., FDA Regulation of Mobile Health Technologies, 4 N. Engl. J. Med. 371, 372 (2014) (discussing the emerging FDA regulation of mHealth).

41 Id.

42 Jonathan Kay, How Do You Regulate a Self-Improving Algorithm?, The Atlantic (Oct. 25, 2017), https://www.theatlantic.com/technology/archive/2017/10/algorithms-future-of-health-care/543825/.

43 Id.

44 Id.

45 See generally, Tutt, supra note 37.

46 Paul A. Mathews, The Next Wave: Federal Regulatory, Intellectual Property, and Tort Liability Considerations for Medical Device Software, 2 J. Marshall Rev. Intell. Prop. L. 259, 265 (2003)

47 Cortez, et al., supra note 40 at 373-74 (discussing the emerging FDA regulation of mHealth).

48 Id.

49 See e.g., U.S. Food & Drug Admin., Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data – Premarket Notification [501(k)] submissions 1 (2012).

50 Id.

51 Dave Muoio, Roundup: 12 healthcare algorithms cleared by the FDA, Mobile Health News (Nov. 15, 2018), https://www.mobihealthnews.com/content/roundup-12-healthcare-algorithms-cleared-fda.

Liability Implications – Who Is to Blame When Skynet Goes Bad?

The lack of regulation on medical algorithms will become a more obvious problem as medical technology becomes increasingly complex. Practically speaking, without regulation, algorithms represent an immensely powerful tool that a very small percentage of people truly understand. Moreover, even now, a single medical device may utilize numerous intertwined algorithms, the failure of which could lead to catastrophic results. Lack of meaningful regulation means a lack of meaningful accountability when a failure occurs.

It is interesting to consider the novel problems presented by imposing liability for a failed algorithm. Initially, although we have well-defined standards for "what it means for a person to act negligently or otherwise act in a legally culpable manner, []we have no similarly well-defined conception of what it means for an algorithm to do so."[52] For instance, in a malpractice setting, we can more easily determine what is a reasonable dose of insulin for a doctor to give a patient under defined circumstances. However, when a machine is dosing the patient using algorithms based on a strict set of data inputs, the law has no baseline for parsing those facts.

Secondly, the legal community is currently ill-equipped to analyze algorithms from a causation standpoint. Because algorithms are essentially making decisions based on input data, tracing an algorithmic failure to its origin may require a master's degree in computer engineering. Identifying whether the algorithm reacted properly to "signal" data or was improperly triggered due to other data "noise" is a key inquiry that is not easily understood by a layperson.[53]

Finally, even though algorithms are built to behave autonomously, the human element of the software will not be easily removed. Keep in mind that programmers often copy and paste code sections from one algorithm to the next, leading to the possibility for human error.[54] To that end, companies also engage in the buying and selling of software and algorithms in the same way that products are made up of components manufactured by several different vendors.[55] How to untangle the software behind these products is something that has not been addressed by either the courts or the FDA.

This creates a new frontier of product liability law that is becoming harsher on product liability plaintiffs by the day. Currently, the Restatement (Third) considers a medical device defective for strict liability purposes if it "provides net benefits to no class of patients."[56] This presents a particularly high standard for plaintiffs to prove that "reasonable, informed health-care providers would not prescribe [the device or drug] to any class of patients." Moreover, while software designers have been named as parties in past product liability suits, courts have consistently held that a software designer who does "not 'substantially participate' in the design of the marketed product is excused from liability."[57] "Substantial participation" is a fact-based inquiry that will likely depend on the algorithm's role in the overall product.[58] However, as mentioned above, parsing this role and assigning responsibility could prove nearly impossible without existing legal guidance.

However, policy also disfavors holding medical care providers liable in lieu of the developers of the algorithms used in medical devices. Notably, even in the current medical device market, healthcare providers have no real choice other than to rely on a manufacturer's word that a product will function the way it is intended.[59] Moreover, it is unreasonable to expect care providers to undergo the extensive training that would be necessary to understand how the software behind a device functions.[60] Normally, practitioners rely on the FDA to "validate" devices for use on their patients but, as discussed supra, the lag in FDA regulation has left practitioners without guidance on medical device software. Therefore, this accelerating area of medical technology has created a blind spot for both the industry and the legal community alike.

Conclusion

Emerging medical technologies such as 3D printing and self-learning algorithms have exposed a tremendous need for courts and legislators to modernize product liability law. As it stands currently, the strict liability model of the Restatement is ill-equipped to define who is ultimately liable as a manufacturer of 3D printed medical devices that cause injuries. Moreover, there are significant blind spots in the law surrounding medical algorithms that are making healthcare decisions autonomously from the care providers and companies who prescribe them. Although the FDA has acknowledged the need to address these types of emerging technologies, the exponential growth in the medical industry presents an ever-present problem for lawmakers to keep up the pace.

52 Tutt, supra note 37 at 105.

53 Id.

54 Id. at 106.

55 Id.

56 Restatement (Third) of Torts: Prod. Liab. § 6 comment f (1998)

57 Mathews, supra note 46 at 293-94.

58 Id.

59 Id. at 296.

60 Id.

A Brave New World

Algorithms and 3-D Printing

And the Implication on Medical Products Liability Law

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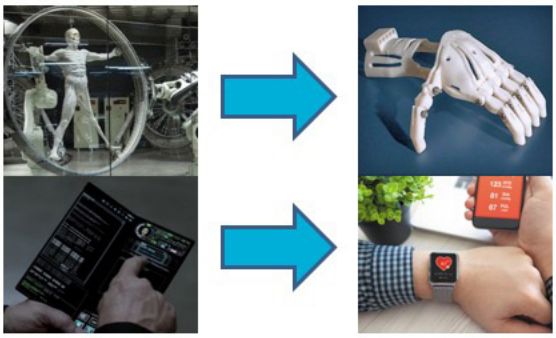
Living In Westworld

Emergent Technologies: Westworld vs. Reality

3D Printing:

Programming Algorithms:



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Product Liability with Emergent Tech

- Both 3D Printing and Algorithms have the potential to significantly advance the medical Field
  - However, both technologies come with new liability risks that are undeveloped legally.

Product Design Issues
- Strict Liability for Design Defects
- Manufacturing Defects

Labeling Issues
- Failure to Warn
- Inadequate Warnings
- Learned Intermediary Doctrine

Issues of Proof
- Standard of Proof w/o Baseline
- Admissibility in Courts
- Use for Impeachment

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3-Dimensional Printing

In Westworld: Hi-Tech robotics are used to assemble indistinguishable copies of people, animals, props, and items.

In Reality: 3D printing AKA "Additive Manufacturing" builds objects *iteratively* by stacking and joining multiple 2-dimensional layer prints.

- Printers build from Computer Aided Design files ("CAD Files")
  - CAD Files: "virtual blueprints" that are customizable
- Currently Available at retail in all shapes and sizes
  - Price Ranges from $300 to upwards of $100,000

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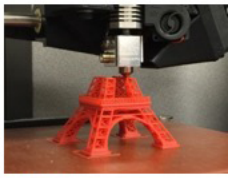
Powder Bed Fusion 3D Printer

3D Printing – Advantages

Printing Materials:

- Range of building applications – Polymers, Plastics, Ceramics, Metals
- Development of new materials as concept continues to progress
- Elimination of waste/biproduct/excess inventory



Design/Manufacturing:

- CAD files allow customized design changes on the fly
- Complex and detailed structures without the need for overly expensive tools
- Designs can be custom-tailored to end user

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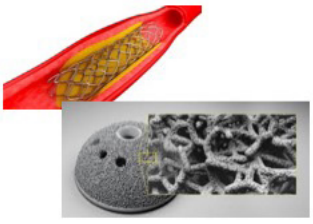
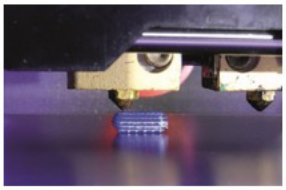
Emerging Applications of 3D Printing in the Medical Industry

Implants and Medical Devices



Custom Casting and Prosthetics

Pharmaceutical Devices



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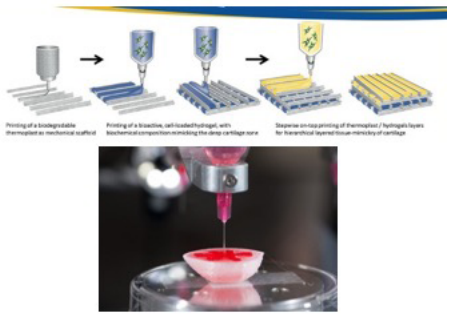
Looking to the Future

Bioprinting: Manufacturing of living organisms using "ink" made of living cells.

- Not addressed by FDA guidance
- Requires more complex concerns for materials and adhesion procedures
- Raises ethical concerns



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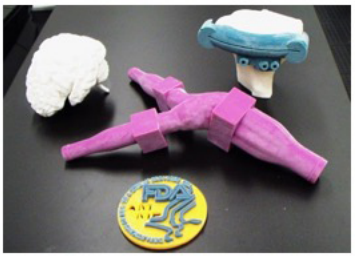
3D Printing

FDA REGULATION

2016 FDA Published Guidelines
– Not Binding

- Manufacturing/Design Regulation
  - Traditional manufacturing regulation applies?
  - "Patient Matched Devices" – Regulation unclear
  - Software Design Workflow Standarization
- Device Testing Considerations
  - Standardization of Materials/Printing Process
    - Factors include: Layering thickness, density, build path/tool type, material ratios
  - Stress Testing Considerations –
    - Material chemistry
    - Dimensions and physical durability



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FDA REGULATION

FDA CHALLENGES:

- Patient Matched Devices
  - Interrupt standardized workflow
  - Require customization on backend
- Diverse Printing Capabilities
  - Not all regulations will apply to all products
  - Impossible to standardize
- Bio Printing – NOT YET
  - FDA punts on this issue entirely

FDA Powder Bed Fusion Printer

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FDA EVALUATION OF 3D PRINTED PRODUCTS

3D PRINTED DEVICES "EXEMPT"

- Dozens already exempt
- Typically "Class II" items
- Approved via 501(k) premarket process
- None approved via "more arduous" Premarket Approval (PMA) process
  - 4 step review that culminates in published FDA "approval"

Date	Product	Manufacturer
5/16/2018	Patient Specific 3d Printed Bone Segments	Additive Orthopedics, LLC
4/25/2018	Unid Patient Specific 3d Printed Cage	Medicrea International S.A.
3/27/2018	Mpact® 3d Metal™ Implants and Augments	Medacta International SA
8/8/2017	Trumatch Cmf Titanium 3d Printed Implant System	Materialise NV
5/4/2017	Foundation 3d Interbody	CoreLink, LLC

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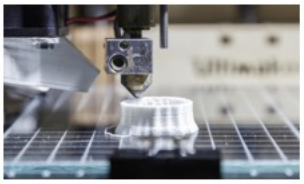
FDA EVALUATION OF 3D PRINTED PRODUCTS

Spritam® (levetiracetam) Tablets for Oral Suspension



- Pharmaceutical Products Are Up and Coming
  - 2015 – FDA approves **Spritam**, the first 3D printed medication to treat epilepsy
  - Created by Aprecia Pharmaceuticals
  - Providers can print using the powdered medication and binding fluid
  - 3D printing allows porous design of pill

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3D Printing – Liability Implications

Current Liability Distribution

- Restatement 402a: strict liability for sellers of defective products
  - Seller: a manufacturer of a product for use or consumption or wholesale or retail distribution
  - Occasional Seller: does *NOT* manufacture or distribute a product as part of its business
- Manufacturers = Strict Liability
- Medical Professionals = Negligence (ie. Malpractice)
  - Policy: place risk on party in best position to bear it.

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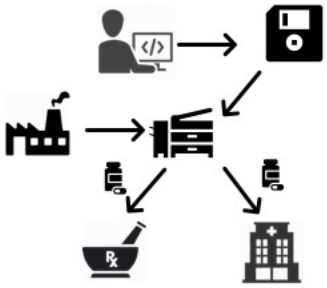
3D Printing – Liability Implications

Supply Chain Shake Up

- The "Manufacturer" Controversy - Are medical providers now liable?
- 3D Printer manufacturer added as liable party?
- What about creators of CAD Files for printing?



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3D Printing – Who is liable?

The Printer Manufacturer?

- Current manufacturers:
  - Stratasys (est. 1989)
  - Arcam AB (est. 1997)
  - Voxeljet AG (est. 2003)
  - SLM Solutions Group AG (est. 2011)
- Disfavored due to countless possible products
- Strict liability – Need to show printer was faulty when sold

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3D Printing – Who is liable?

Hospitals and Healthcare Providers?

- Viewed as **Service** providers
  - Public policy favors protecting Healthcare
- **On-site printing** - Will provider be "in business of" 3DP or "occasional seller" under Rest. 402(a)?
- Trending towards on-site labs where techs/providers can customize designs

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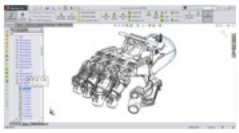
3D Printing – Who is liable?

CAD Designer/Programmers?

- Most likely to become a liable party
- Currently - CAD files not categorized *Goods/Products*
- HOWEVER, new supply chain:
  - Designer = Manufacturer.
- Complicated: What if medical provider has ability/is required to alter?
  - Customization = causation issue?



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Can CAD Files Be Products?

- Restatement: **Unlikely**
  - Restatement Second §402a comment d: "any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate consumer"
    - Drafted in 1965 (examples include a grinding wheel, gas stove, insecticide, etc.)
  - Restatement Third §19: "**tangible** personal property distributed commercially for use or consumption"
- Case Law: **On the Horizon**
  - Courts have held that intangible items (i.e. electricity) can be "products."
  - Has not addressed whether the code for 3D printing designs constitute a "product"
  - Corley v. Stryker Corp., 2014 WL 3375596 (W.D. La. May 27, 2014): "software used in creating each cutting guide was a necessary part of the cutting guide."

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CAD Files: Data Risks

- 3D Printing is an Open Source Industry
  - Can the market place be regulated?
- Patient Specific Devices
  - Customization by end user/provider
- Manufacturer and Patient Info at Stake
  - Piracy of designs
  - Patient medical/personal data breaches

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3D Printing – Duty To Warn?

Current Duty to Warn

- Manufacturer must warn about **risks associated with**:
  - Proper use of the product
  - Improper uses of the product which are *reasonably foreseeable*
- Learned Intermediary Doctrine:
  - Protects manufacturers
  - Need only provide warnings to healthcare professionals.

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3D Printing – Duty To Warn?

Effect of 3D Printers on Duty to Warn

- *Buckley v. Align Technology, Inc.*, 2015 WL 5698751 (N.D. Cal. Sep. 29, 2015)
  - Learned Intermediary applies to 3D manufacturers
  - Involved in customization but no need to warn individual patients about uses/risks.
- End users able to customize products – Duty to Warn?
  - Inherently Safe Product → Customization → Becomes Dangerous
  - Fact based inquiry (Foreseeability)

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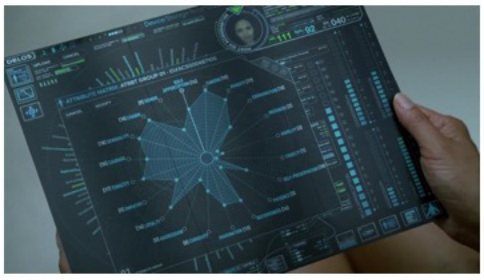
Algorithms

In Westworld: Algorithms allow "Hosts" to react to their environment in real time and adjust their behavior on the fly as they encounter new situations.

In Reality: Algorithms have become an essential part of predictive programming. With a variety of uses, algorithms utilize real time data to make output adjustments automatically.

- Common Examples Include:
  - Trading Algorithms for Financial Institutions
  - SEO Marketing and Online Advertising
  - Safety Features for Automobiles (Self-Parking)



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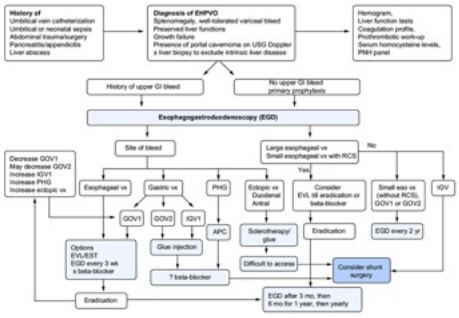
Current Algorithms in the Healthcare Sector

- **Inpatient Management**
  - Diagnosis via Data – Utilizing a patient's symptoms and medical history to render a diagnosis and determine treatment
  - Risk Prediction Analysis – Combining a patient's medical data and provider's historical data to triage patients



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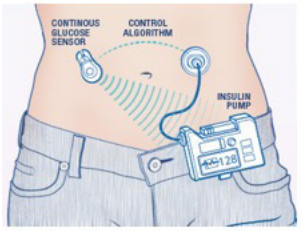
Current Algorithms in the Healthcare Sector



Home Healthcare

- Medication administration
  - ie. Automatic insulin pumps
- AppStore, Md.
  - Apple Watch/Apple Health
  - Third party heart monitoring apps

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Looking to the Future

Self-Learning Algorithms

- As opposed to "static" algorithms, create "new operational products" each time data is added.
  - CloudDX Lung Disease Detection
  - WinterLight Labs Cognitive Diagnosis through Speech Analysis
- Difficult to regulate
  - Parameters are not static or quantifiable
  - Many products fit in between health sector and "general wellness"
- Lack of Acceptance by Medical Community

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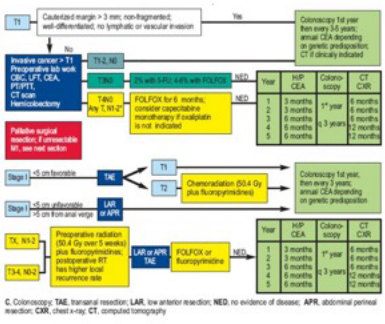
FDA Regulation of Algorithms

Currently **NO** Regulation/Guidance

- Broad application of algorithms has driven away regulators

FDA Offers Commentary on Specific Subjects

- ie. Detection specifications for radiology
- Commentary indicates comprehensive regulation:
  - Algorithm design & function
  - Processing mechanics
  - Databases referenced
  - Reference standards
  - Scoring Methodology



C, Colonoscopy; TAE, transanal resection; LAR, low anterior resection; NED, no evidence of disease; APR, abdominal perineal resection; CXR, chest x-ray; CT, computed tomography

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Medical Algorithms – Liability Implications

The Big Issue: WHAT HAPPENS WHEN THESE PRODUCTS FAIL?

Advances in Technology are helpful, but who is to blame when something goes wrong?

- Can ***non-specialized manufacturers***- like Apple- be blamed for faulty algorithms?
- Are ***medical providers*** at risk for either trusting/distrusting algorithmic health recommendations?
- Can a ***manufacturer*** be liable for a defective/ineffective algorithm that leads to a medical injury?

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Medical Algorithms – Proof Issues

- No current baseline – Cannot gauge effectiveness or determine whether algorithms are "faulty"
  - **Restatement Third** creates high standard – Liability only to devices that provide *NO BENEFIT* to *ANY* identifiable class of patient.
  - **Current FDA Scheme** – Manufacturers must demonstrate that their devices are both safe and effective *before* gaining approval
  - The question on standards remains an open issue in most jurisdictions.
- Practical Concerns
  - Many devices use *MULTIPLE* software systems with intertwined algorithms
  - Medical professionals do not completely understand algorithms involved in products.

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Medical Algorithms – Proof Issues

- Regulating medical algorithms conflicts with FDA policy to not regulate *practice* of medicine.
- Courts have been reluctant to blame software for medical injuries.
  - Although software designers have been named as culpable parties in other contexts, medical products liability remains relatively untouched.
- Current technology still requires some human interaction.
  - Medical Software *helps* decision making process, but ultimate decision still rests with providers
  - What happens when providers rely on technology they do not full comprehend to make decisions?
- Can algorithms be used to impeach experts and standards?

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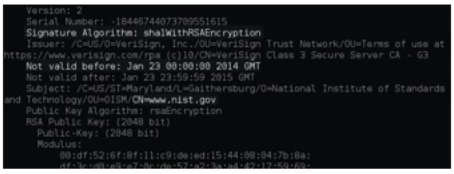
Hacking & Piracy of Medical Algorithms

Hacking and Tampering

- Altering data skews outputs
- Infringement on IP – Can be difficult to distinguish/prove

Data Security Concerns

- Medical Algorithms rely on patient data
  - Could be susceptible to piracy
- Implications with other privacy laws - HIPPA



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Practice Areas

- Product Liability
- Pharmaceutical and Medical Device Litigation
- Toxic Tort and Environmental Litigation
- Professional Liability
- Employment Litigation
- FINRA and Securities
- Accounting Malpractice

Professional Associations

- The Defense Research Institute
- American Bar Association: Section of Litigation, Mass Torts and Litigation Committees
- Maryland State Bar Association
- The Network of Trial Law Firms, Inc.

Honors and Awards

- Best Lawyers in America - "Lawyer of the Year" Award for Baltimore Legal Malpractice Law - Defendants (2014)
- Best Lawyers in America - "Lawyer of the Year" Award for Baltimore Mass Tort Litigation/Class Actions - Defendants (2013)
- Best Lawyers in America - "Lawyer of the Year" Award for Baltimore Legal Malpractice Law - Defendants (2012)
- AV Preeminent Rated, Martindale Hubbell (1994 - 2016)
- Best Lawyers in America - Legal Malpractice Law, Defendants (Baltimore, Maryland 2003 - 2017)
- Best Lawyers in America - Legal Malpractice Law- Defendants - Legal Ethics (Baltimore, Maryland 2011 - 2014)
- Best Lawyers in America - Mass Tort Litigation/Class Actions - Defendants (Baltimore, 2013-2017)
- Best Lawyers in America - Product Liability Litigation - Defendants (Baltimore, Maryland;2011 - 2017)
- Maryland Super Lawyers - Product Liability Defense (2009 - 2011, 2014-2019)

Education

- University of Maryland (B.S., 1981)
- University of Maryland, School of Law (J.D., with Honors, 1985)

PROTECTING CLIENT INFORMATION DURING LITIGATION

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Protecting Business Information During Litigation: the Effective Use of Protective Orders

M. Cabell Clay and D. Jared Nobles, Jr.

The United States is a unique country in many ways, but particularly so in civil litigation. In this country, the First Amendment to the Constitution demands that the public have "open access to the courts" including all of its pleadings, transcripts, and hearings.[1] Relatedly, liberal discovery rules in federal, and most state, courts presumptively mandate that an opposing party in civil litigation will be entitled to view and inspect all information "relevant to any party's claim or defense and proportional to the needs of the case."[2]

So what does a litigant do when information "relevant to any party's claim or defense" contains business information that is confidential, proprietary, or even a trade secret? In many jurisdictions, the answer is to seek a protective order. But special consideration should be given as to how that order is structured, what information it covers, and how the covered information can be used in the litigation.

This article will discuss issues in selecting and implementing various types of protective orders as mechanisms to protect client information in the world of civil litigation.

1 See, e.g., In re Gitto Global Corp., 422 F.3d 1, 6 (1st Cir. 2005) ("[O]nly the most compelling reasons can justify the non-disclosure of judicial records."); Union Oil Co. of California v. Leavell, 220 F.3d 562, 567 (7th Cir. 2000) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

2 Fed. R. Civ. Pro. 26(b)(1).

I. The Trade Secrets Case—the Archetypal Use of Protective Orders.

A trade secrets case presents the classic discovery paradigm—perhaps like no other fact pattern. In trade secret litigation, the plaintiff must disclose the very information it seeks to protect.

In such matters, the plaintiff often asserts that a former employee or her opportunistic new employer has "misappropriated" or "stolen" sensitive business information with the intent to turn the information into a profit. In the initial complaint, the plaintiff may generally describe the types of information that were taken. But soon after, the defendant will successfully argue that more specific information is needed to mount a defense and the plaintiff will be required to provide great specificity regarding the stolen information, its content, and its value. That sensitive business information, including actual documents, if they exist, will be used repeatedly throughout the case – even as exhibits during depositions, to summary judgment motions, and at trial. Basically, in its pursuit to prove that its trade secrets were misappropriated, the plaintiff has to provide that very information to the alleged thief, the court, and potentially, the general public. This paradigm is often understandably infuriating, and concerning, to clients.

However, there are steps that can be taken to protect business information during the course of such litigation. When used strategically, a protective order restricts the use of sensitive business information and mitigates the client's risk.

Rule 26(c) of the Federal Rules of Civil Procedure

provides authority for any federal district court to enter "a protective order" to prevent "annoyance, embarrassment, oppression or undue burden or expenses," including by "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way."[3] Numerous states have similar analogs in their state rules.[4] This article next looks at common features to consider with protective orders and other techniques litigants can seek in order to protect sensitive business information.

II. Types of Protective Orders and Other Protective Tools.

Standard Protective Order—Confidentiality Designations.

In a standard protective order, the parties agree that designated confidential information will not be shared outside of the litigation. Typically, these standard protective orders provide that information designated as "confidential" can only be reviewed and used in the context of the litigation in which it was produced. Often the protective order will include a basic confidentiality acknowledgment as an exhibit to the protective order and have provisions that require any reviewing party, expert, or other third party sign the agreement and consent to be bound by the protective order before viewing the confidential information. Most often, parties will use this basic protective order when their discovery involves production of sensitive information in need of protection, but that does not rise to the level of proprietary business information or a trade secret. For instance, standard protective orders and "confidential" designations work well in employment discrimination cases when personnel files containing private or personal information about third parties are produced.[5]

While protective orders differ based on the terms to which the parties agree, standard protective orders are generally distinguished from the more heightened levels of protection discussed below in that these orders allow the parties themselves—as opposed to just their attorneys—to view the information as long as the information is not used for non-litigation related purposes.[6]

Dual-tier Protective Orders and Attorneys' Eyes Only.

Some factual situations require heightened protection for particularly sensitive business information. Returning to our trade secret paradigm, a plaintiff is hesitant to allow direct access to its sensitive business information to the nefarious former employee or opportunistic new employer. However, the defendant former employee and new employer will need the information in order to defend themselves. In response to such situations, litigants have developed the concept of dual-tier protective orders.

In dual-tier protective orders, certain confidential or low-level proprietary information receives a baseline designation of "confidential." However, a higher tier designation is available for more sensitive business information. Often, this designation is referred to as "Attorneys' Eyes Only" or "AEO". Under most dual-tier protective orders, this AEO designation means what it says: only the attorneys of record can lay eyes on the information and only for purposes of the current litigation. The actual adverse parties to the litigation, the former employee or the new employer in the trade secret example, are not allowed to view the information – just their attorneys.

"AEO" is the most restrictive protective order designation developed in the American litigation system. Because the AEO designation provides cumbersome restraints on the use of such information, litigants should use AEO designation only where the information is highly sensitive and revelation to the adverse party poses a significant threat of harm to the client. If the AEO designation is applied too broadly, the opposing party may challenge the designation before the court, exposing the designating party to the risk of the designation being removed by the court and the additional expense of litigating that issue. Examples of such highly sensitive business information ordinarily include specific non-public product plans, scientific formulas, business strategy documents, and documents reflecting customer product or purchasing preferences.[7]

While an effective tool in protecting sensitive business information, restrictions imposed by the dual-tier protective order can raise some unique issues during the litigation. When drafting a dual-tier protective order, it is important to consider the practical implications of the AEO restrictions, including the nuances of who exactly will need to view the information and in what form, as well as how the information can be used in the litigation.

3 Fed. R. Civ. Pro. 26(c).

4 See, e.g., N.C. R. Civ. Pro. 26(c); N.Y. C.P.L.R. § 3103; Ill. S. Ct. R. 201(c).

5 See Williams v. Art Inst., No. 1:06-CV-0285, 2006 U.S. Dist. LEXIS 62585, *47-49 (N.D. Ga. Sept. 1, 2006) (granting protective order to allow defendant employer to designate as "Confidential" documents or information containing medical information about third-party employees on short term disability); see also Schoenbaum v. E.I. Dupont De Nemours & Co., No. 05-cv-01108, 2008 U.S. Dist. LEXIS 48064 (E.D. Miss. Jun. 23, 2008) (approving of joint motion for protective order providing for basic "confidentiality" designations of documents).

6 See Robert Timothy Reagan, Confidential Discovery: A Pocket Guide on Protective Orders, Federal judicial Center (2012), at 5, 7, https://www.fjc.gov/sites/default/files/2012/ConfidentialDisc.pdf.

7 Global Material Techs., Inc. v. Dazheng Metal Fibre Co., 133 F. Supp. 3d 1079, 1084 (N.D. Ill. 2015) ("[T]he AEO designation should "only be used on a relatively small and select number of documents where a genuine threat of competitive or other injury dictates such extreme measures.").

Three key questions to explore are:

Is it necessary for anyone else to view the AEO information in addition to the attorneys? If the case is complex or involves technical information, it may be necessary to have someone with expertise in the subject matter view the AEO information in order to help the attorneys understand it. Similarly, an expert witness may be needed to help either side prove, or disprove, its case. Each party to the litigation must think through who needs eyes on the AEO information in order to prepare its case and specifically address that access in the protective order.

Can the AEO information be viewed or received in any way by the parties? During litigation, attorneys often need to discuss the information gained in discovery with their clients in order to verify its veracity or importance, prepare for depositions or trial, or respond to motions. Accordingly, without some ability to discuss the information, an AEO designation can be extremely limiting on an attorney's ability to prepare its case. Thus a balance is needed between protecting the sensitive information and allowing the attorneys to litigate the case. In discussing a protective order, parties should consider whether the attorneys can verbally summarize AEO information for a client, or if certain witnesses can view the information in the attorney's office, provided they do not retain the documents or take any notes. Any such allowances should be memorialized in the protective order.

How can the AEO information be used in the litigation? During the litigation, it will be necessary to use the AEO information. For example, deposition testimony regarding the AEO information may be needed or an AEO document may be an essential exhibit to a party's motion for summary judgment. The parties should consider how the AEO information will be treated in those circumstances and specifically spell it out in the protective order. In the protective order, the parties may wish to ask the court for a standing order that such AEO information can be filed with the court under seal without further motion by the parties.

Three-tier Protective Orders, an AEO Alternative.

Sometimes conflicts between litigants over the necessity of AEO designations, or the various nuances discussed above, lead to a desire to find a middle ground. One compromise is to create a third, intermediate tier of confidentiality designation. This designation can take different forms, but one to consider is designating some documents as "attorneys and client representative only." This type of designation allows counsel for the parties to see all marked documents but also allows the parties to designate representatives of each party (perhaps a member of the in-house legal team or an experienced, but non-operational facing employee) to also view the designated information in order to assist with the litigation.

Courts have approved of such agreements when, like with AEO designations, the situation calls for heightened protection beyond an ordinary "confidential" designation.[8] It should be noted that all client representatives appointed to view such information under a three-tier protective order should execute and sign confidentiality acknowledgements making clear their consent to be bound by the protective order. Finally, litigants should be aware that three-tier protective orders are not without their costs. These orders tend to complicate the discovery process as coding and procedures have to be developed for three—as opposed to one or two—designations.

Motions to Seal Filings and the Courtroom.

As stated at the very beginning of this article, in the United States, the default rule is that the general public has "open access to the courts" including all of its pleadings, transcripts, and hearings. Simply put, in most civil litigation, unless there is an order ruling otherwise, anything filed with the court may be viewed by the general public. Similarly, any hearings and trials are presumptively open to the public. In litigation where sensitive business information is at the heart of the matter, such as a trade secret case, it is virtually impossible, throughout the entire course of the litigation, to avoid referring to such sensitive business information in court filings or at trial. A motion to seal is appropriate in these circumstances. Although the content, scope, and remedy will vary by jurisdiction, most state and federal courts have procedures where a litigant can ask for the filing, or the hearing, to be "sealed." These requests, in general, ask the court to make a pleading or hearing inaccessible to the public.[9]

When evaluating motions to seal, courts must weigh the public's right to access the courts with the litigant's need to protect its sensitive business information.[10] Accordingly, it is important that a motion to seal is narrowly tailored to restrict access to only the sensitive business information that is referenced in the filings or attached as an exhibit,

8 Uniroyal Chemical Co., Inc. v. Syngenta Crop Protection, 24 F.R.D. 53, 58 (D. Conn. 2004) (modifying existing consent protective order to allow for an intermediate designation that "restrict[ed] disclosure of documents marked as such to outside counsel, outside experts, and three designated employees of each company").

9 See Robert Timothy Reagan, Sealing Court Records and Proceedings: A Pocket Guide, Federal Judicial Center (2010), at 1, 5, https://www.fjc.gov/sites/default/files/2012/Sealing_Guide.pdf.

10 See, e.g., In re National Broadcasting Co., 653 F.2d 609, 612-13 (D.C. Cir. 1981); Stone v. University of Maryland Medical System Corp., 855 F.2d 178, 180 (4th Cir. 1988) (providing that sealing may be appropriate "if competing interests outweigh the interest in access").

rather than the entire filing itself.[11] Similarly, when asking the court to close its courtroom for a proceeding, consider asking the court to only exclude the public when it is anticipated that particularly sensitive testimony will be solicited from a certain witness.

III. Litigation Tips for Implementing and Using Protective Orders and Other Mechanisms.

Now that the reader has a firm grasp of the types protective orders and other mechanisms to use when protecting information, the remainder of this article considers best practices for implementing these tools.

Early Client Communication. When litigation begins or is even just threatened, counsel should communicate early with the client about the extent of electronic and other documentary discovery. Early communication will allow counsel to determine what, if any, confidential or proprietary information may be discoverable by an opposing party, and conversely what, if any, similar information the client may be seeking from someone else. Getting out in front of these issues allows counsel to telegraph the risks of putting sensitive business information at-issue in civil litigation and outline the steps that can be taken to mitigate any risk.

Protecting Personal-Private Information. Even though counsel's primary worry in trade secrets cases should be the protection of proprietary information, other information deserves protection too. One of the most common types of information produced as a byproduct of the civil-litigation process is personal or private information. For instance, in employment discrimination cases, the defendant-employer often produces personnel files of the plaintiff-employee and of other employees that are similarly situated. The defendant-employer in such a case should seek a standard protective order and stamp all documents with private, personal information as "Confidential." In addition to seeking a protective order, most courts, both state and federal, have strict rules about the redaction of certain kinds of identifying information like social security numbers,[12] dates of birth,[13] or the names of minor children.[14]

Standing Protective Orders. In order for a protective order to have effect, it must be approved, and entered by the Judge. Many courts have standing protective orders that are freely available for litigants to obtain and edit for their specific purposes or factual circumstances.[15] Before spending time (and money) negotiating with opposing counsel regarding a protective order, check to see if your court has a standing protective order that can be adjusted to fit the needs of your case. If the court does not have a standing protective order, look at a judge's prior cases to see what types of protective orders she has previously entered. Using a protective order that is already viewed favorably by the court can save time and money as well as prevent the risk of negotiating with opposing counsel a document that the assigned judge is ultimately unwilling to issue.

IV. Conclusion.

As long as companies continue making cutting-edge products and developing strong relationships with their clients, the need to protect the secrecy of that information will remain. Protective orders, their variants, and other tools discussed in this article will play an ever-growing role in maintaining that secrecy. We hope this article has provided you with an initial glimpse at the basic types of protective orders, how to use them, and what best practices to take when protecting your client's most important information.

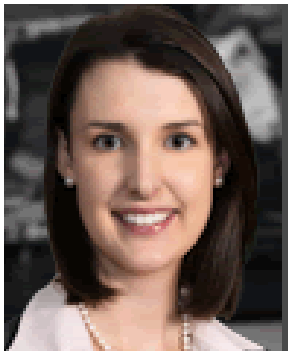
11 See, e.g., Woven Elecs. Corp. v. Advance Group, Inc., No. 89-1580, 1991 U.S. App. LEXIS 6004, at *18-19 (4th Cir. 1991) ("The district court should review the entire record of the trial, including the exhibits and transcripts if any, and seal only those portions necessary to prevent the disclosure of trade secrets."); LifeNet Health v. LifeCell Corp., No. 2:13-cv-486, 2015 U.S. Dist. LEXIS 181256, at *9-11 (E.D. Va. Feb. 11, 2015) (sealing portions of financial records including by redacting "key words and phrases" as partial sealing "balances both the public's and [the protector's] interests").

12 Local Civ. R. 5.2, Western District of North Carolina; Ill. Supr. Ct. R. 15; Tex. R. Civ. Pro. 21(c).

13 Fed. R. Civ. Pro. 5.2 (providing that "[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing" should redact most of the identifying information).

14 Ill. Supr. Ct. R. 138.

15 See, e.g., Stipulated Order Regarding Confidentiality of Discovery Material, Local Civ. R. 104.13, District of Maryland, https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf; Model Protective Order for the Honorable Jed. S. Rakoff, District Judge, United States District Court for the Southern District of New York, http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=737.



M. CABELL CLAY

Member

MOORE & VAN ALLEN (Charlotte, NC)

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Cabell Clay brings to her wide-ranging clients counseling and litigation experience in both employment matters and commercial disputes.

Cabell appreciates that every business is unique and believes that understanding her clients' business model, culture, and needs is crucial to successful attorney-client partnerships. Whether it involves high stakes litigation defense or review of employment practices and policies, Cabell works with clients to develop advice and strategies that align closely with their long-term goals and interests.

Cabell routinely advises clients on a variety of employment matters, including employment agreements, drafting of restrictive covenants, trade secret protections, employee discipline and terminations, severance agreements, employment handbooks and policies, ADA accommodation requests, FMLA compliance, discrimination and harassment issues, and wage & hour compliance and audits.

She also handles wide-ranging employment and commercial litigation, including trade secret misappropriation litigation, DOL investigations, restrictive covenants disputes, management representation in Title VII, ADA, ADEA, and wage & hour litigation, as well as proceedings before the EEOC and corresponding state and local agencies. Additionally, Cabell has substantial experience in handling class action defense, internal investigations, contract claims, securities and mortgage fraud defense, unfair trade practices claims, and civil appeals.

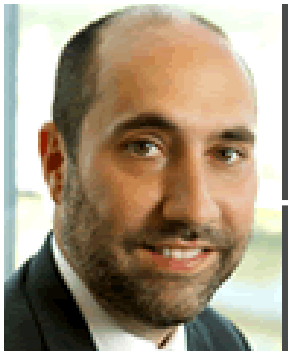
In addition to her extensive civil trial experience, Cabell spent six months on special assignment as an Assistant District Attorney in the Mecklenburg County District Attorney's Office, where she honed her trial skills by successfully prosecuting misdemeanors in both District and Superior Courts.

Practice Areas

- Class Actions & Multi-District Litigation
- Employment & ERISA Litigation
- Employment & Labor
- Employment & Noncompetition Agreements & Trade Secrets Protection
- Financial Services Litigation
- Litigation
- North Carolina Business Court Litigation
- Trade Secrets Litigation
- Wage & Hour Compliance & Litigation
- White Collar, Regulatory Defense, and Investigations

Education

- B.A., University of Virginia, 2005
- J.D., College of William & Mary, 2008, Order of Barristers



MAKING LITIGATION PART OF YOUR COMPLIANCE TOOLBOX

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Making Litigation Part of Your Compliance Toolbox

David Esquivel

No one wants to be sued. Paying lawyers to negotiate a deal adds value to the company, but defending a lawsuit is often viewed as a money pit with no upside. While plaintiffs and their counsel can count on statutory fee-shifting, the burden is often much higher for defendants to expect to get reimbursed for fees. Discovery is costly, especially in class action and other complex litigation. The best outcome in defending a lawsuit is often summary judgment, or maybe a favorable settlement, but it takes a lot of legal fees, and company time and resources, to get there.

It is possible, however, to get a return on investment from legal defense costs in a lawsuit. Defending a lawsuit doesn't have to be just a money pit. It can yield benefits with the right practices. This article examines three strategies to get the most out of your litigation defense dollars.

Use the defense of the lawsuit as a compliance audit.

In the area where I practice—consumer financial services—the laws and regulations can be tedious and hard to apply, particularly in the face of new technologies. Look no further than the Fair Credit Reporting Act (FCRA), which requires that disclosures about pulling credit reports on job applicants be contained in a document "that consists solely of the disclosure."[1] A federal appeals court recently held that this requirement prohibits required, state-law disclosures from being on the same page as the federal disclosures, even though the state-law disclosures are consistent with the FCRA disclosures.[2]

Form over substance? Sure, but that's the often the world of financial services laws and regulations. With fee-shifting and the possibility of class action status, defending cases that involve "gotcha" claims for technical violations of consumer protections statutes can be expensive and frustrating. The defense of these cases, however, can be used as a tool to improve compliance with hard-to-pin-down legal requirements. Think of ways you can use the discovery process as a compliance audit.

The first benefit of this approach is that your audit is done under the umbrella of the attorney-client privilege. The company can be completely transparent with counsel, and counsel can deliver direct, written guidance and remediation without creating bad documents in subsequent litigation.

I have clients who employ non-lawyer consulting firms to conduct compliance and regulatory audits. These can be valuable tools, but have potential drawbacks in subsequent litigation when the results of the audit become potentially discoverable. Using the discovery process in a lawsuit as a compliance audit can deliver the benefits of a standalone compliance audit at a minimal additional cost, and without the drawbacks of the investigation and results potentially being used against you in future litigation.

Another benefit of using defense of the lawsuit as a compliance audit is the ability to better identify potential

1 15 U.S.C. § 1681b(b)(2)(A)

2 Gilberg v. California Check Cashing Stores, LLC, 913 F.3d 1169 (9th Cir. 2019)

problem issues. Obviously, the lawsuit will identify compliance needs for the specific issue raised by the plaintiff's complaint. But the investigation and discovery related to that specific issue will often shed light on similar compliance questions. This is especially true for companies in highly regulated industries that are dealing with rapid changes in technology.

Use discovery to ask a lot of questions, not just about the specific claim at issue, but other potential problem areas. The discovery phase of a lawsuit often brings together a helpful set of eyes—business leaders, line-level employees, compliance personnel, in-house counsel, and outside counsel. Take advantage of the fact people are paying close attention to compliance and make the best use of it. Map questionable policies and procedures to legal and regulatory requirements, as you would in any compliance audit. Track these questions and make a remediation plan, as needed.

Make sure in-house lawyers are involved in the investigation and interviews.

In-house counsel are usually asked to weigh in on compliance issues on a rapid-fire basis brought to them by managers and other business leaders. Rarely do in-house lawyers have time to dig deeply into potential compliance problems, and they often have little contact with employees who make the day-to-day decisions that can result in litigation. When in house-lawyers treat the discovery process and defense of the lawsuit as a compliance tool, they have the chance to review closely the processes and procedures that may pose litigation risk and hear firsthand from company personnel who are on the frontlines of legal compliance.

When I meet with employees in the course of investigating defenses and preparing discovery, my in-house counsel is often also meeting these employees for the first time. Like me, they get to hear directly from people who are making decisions or putting into practice the policies that are at issue in the lawsuit. These conversations also tend to unearth similar or related compliance issues that could pose future litigation risk.

These meetings and interviews are often the first time that employees have direct access to counsel. This is an excellent opportunity for an in-house lawyer to get to know and build a relationship with someone who will be a good compliance troubleshooter in the future. It's also a chance for employees to hear directly from counsel not only about the issues raised in the lawsuit, but to understand what legal red flags to look out for when new questions arise or new products and technologies are rolled out.

Use the lawsuit to strengthen the compliance function itself.

Most of my clients in the highly regulated financial services industry utilize a specialized compliance department. Compliance personnel are a valuable resource, not just to head off litigation or regulatory problems, but also to make the defense of a lawsuit more effective and efficient, particularly in responding to discovery. Involving the compliance department in the discovery process can benefit the defense of the lawsuit, but it also can help strengthen the compliance department itself.

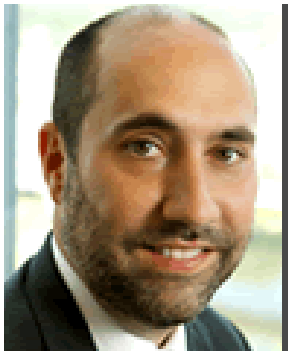
One recent example was a lawsuit I defended for a financial services client against claims brought under the FCRA. In discovery, the plaintiff asked for the set of relevant company procedures going back several years. During that time period, the company's procedures had been modified and amended several times, and we were required to produce each of the different iterations of the procedures.

We asked the compliance department—which was the custodian for the company's procedures and responsible for reviewing and updating them—for the different versions of the procedure. Unfortunately, the compliance department's database did not maintain dates when procedures were updated and did not document the rationale for changes to procedures over time. That caused us to do a lot of additional work to determine when different procedures were in effect, as well as what changes were made over time and for what reasons.

As a result of that experience, the compliance department later invested in a different compliance platform that better tracked changes to procedures and the rationale for those changes, as well as building in required approvals from the business, compliance, and legal departments. By having the compliance department closely tied into the discovery process, the company was able to improve the compliance process itself. This not only improved the compliance function, but will result in more efficient and less costly discovery processes in the future.

Conclusion

Defending a lawsuit does not always have to be a wasted expense. In-house lawyers and outside counsel can work together to get a return on litigation dollars, and make the case to management and business leaders that there can be forward-looking value that comes from defending a lawsuit.



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David Esquivel serves as the firm's Pro Bono Member. In that capacity, he devotes half his practice to leading teams in significant pro bono litigation and managing the firm's overall pro bono efforts.

David has long been active in pro bono and access-to-justice initiatives. He is a founding member of the firm's Pro Bono Committee and has served as chair since 2013. David previously served as chair of the Tennessee Bar Association's Access to Justice Committee and a member of the Tennessee Supreme Court's Access to Justice Commission. David has served as chair of the board of directors of the Tennessee Justice Center, Conexión Américas, and the Maddox Charitable Fund. He currently serves as chair of the board of directors of the Nashville Public Library Foundation.

In addition to his robust pro bono practice, David advises clients on investigations and litigation matters mainly in the financial services sector, with a particular emphasis on matters relating to the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA) and Telephone Consumer Protection Act (TCPA).

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

Related Services

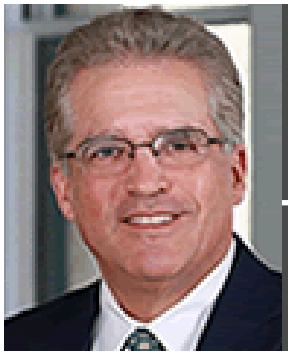
- Litigation & Dispute Resolution
- Consumer Financial Services
- Regulatory & Administrative Proceedings
- Banks & Financial Institutions
- Monitorships
- Managed Care Strategy & Disputes

Accolades

- Mid-South Super Lawyers (2011-2018); "Rising Star" (2010)
- Liberty Bell Award — Nashville Bar Association (2018)
- Leadership Council on Legal Diversity — Fellow (2014)
- Tennessee Bar Association — Harris A. Gilbert Pro Bono Attorney of the Year (2005)
- Tennessee Bar Foundation — Fellow
- Nashville Bar Association — Fellow

Education

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



IDENTIFYING AND PREPARING EXPERT WITNESSES FOR TRIAL

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Working With Experts: A Trial Lawyer's Overview

Sandra Edwards

Experts matter. As any trial lawyer can attest, the selection of, and the ultimate testimony of, expert witnesses is critical to the outcome of most significant lawsuits. This is especially true when the subject matter is complex or technical: experts with specialized knowledge play a pivotal role in discovery and at trial.

The expert is the witness who helps the court, and therefore the jury, sift through dense, often seemingly impenetrable information, and helps the trier of fact to decide critical issues in the case like whether due care was exercised, whether a product was safe, whether the accountant should have spotted a questionable transaction. The expert witness is a translator of sorts, communicating an argument to the trier of fact when the relevant facts are too complex or specialized to speak for themselves.

Behind this seemingly straightforward function, however, is a complex web of additional functions and responsibilities. In a trial, experts play many, often interrelated, roles, sometimes shifting from one to another in the course of a single day. The first steps, then, in maximizing the benefits of experts, is to both appreciate these interrelated roles fully and understand the impact an expert can have on your case.

Effective Experts

Federal Rule of Evidence 702, "Testimony by Expert Witnesses" consists of all of 146 words, and simply characterizes an expert witness as someone who can "help the trier of fact to understand the evidence or to determine a fact in issue." To an experienced litigator, the brevity of that description calls to mind the old joke about speed-reading War and Peace: "It was about Russia."

At trial, an expert witness needs to be able to break down complex technical or scientific concepts into understandable, jury-ready segments, and lucidly and compellingly communicate them to a group of laypeople. But that's only the beginning. An effective expert witness also needs to be experienced in court – skilled not only in their area of expertise, but also good at presenting testimony, and capable of handling aggressive cross-examination and managing the full range of challenges your opposing counsel is unquestionably going to throw at them. Experts also need to be free of conflicts, unimpeachably impartial and strike the correct balance between being professionals in their field and serving as an expert witness.

The Impact of Experts

The financial implications of a good trial expert are significant. Experts can, and frequently have, tipped the balance to one side or the other during a case. Although there are countless examples, going back decades, one of the most recent and illustrative examples of the impact of experts are the series of lawsuits filed against Johnson & Johnson, alleging that the talc used in their baby powders was contaminated with carcinogenic asbestos fibers. With some consistency, the outcome of these cases hinged on the involvement (or lack thereof) of expert witnesses.

In the recent California Superior Court case of Leavitt vs. Johnson and Johnson, venued in Oakland, California, a jury of five men and seven women assessed $29 million in damages against Johnson & Johnson for Teresa Leavitt's injuries. Leavitt suffered from mesothelioma, a cancer linked to asbestos exposure. Her physicians testified that she was unlikely to survive past the year 2020. The jury found that the alleged asbestos-laced baby powder was a "substantial contributing factor" in her illness. Johnson & Johnson was also found to have "fail[ed] to adequately warn" users about the powder's "potential risks."

Plaintiff's expert witnesses testified that not only was the baby powder contaminated with asbestos, but also that the product was the only plausible cause of her illness, despite the fact that Leavitt grew up near two asbestos factories, and was consistently exposed to ambient asbestos. In addition, numerous epidemiological studies have found that talc miners do not have a higher risk of asbestos-related cancers than the general population.
The testimony of expert witnesses for the plaintiffs resulted in a very large verdict despite contradictory scientific foundation for linking talc and asbestos.

Over 10,000 lawsuits have been filed nationwide alleging similar causality, many relying on the testimony of a small group of highly paid experts. When plaintiffs' experts are permitted to testify in these talc cases, the results have been some enormous verdicts, including an award of $4.7 billion to 22 plaintiffs in a suit against Johnson & Johnson in St. Louis, and a New Jersey award of $117 million to another baby powder user. In contrast, when expert testimony against Colgate-Palmolive alleging contamination of Cashmere Bouquet talcum powder with asbestos fibers was excluded by in Philadelphia's Court of Common Pleas, the suit was dismissed soon thereafter.

A strong expert witness can also be an important force multiplier, and vastly increase your leverage during settlement negotiations. When the lawyer sitting across the table believes your expert witness is strong, they tend to develop an increased interest in settlement. Additionally, a good expert not only provides factual testimony, but can also provide powerful, enlightening context, insights and explanations. He or she can illuminate the nuances of your case, and can make a legal conclusion seem not just correct but overwhelmingly so – undeniable, inevitable and in the best examples, obvious.

Exclusion of Expert Testimony

Exclusion of an expert's testimony typically occurs through a Daubert motion (or its state court equivalent). Named after a trio of pivotal Federal cases in the 1990s, the Daubert standard articulates a widely-adopted set of principles for determining the admissibility of science-based evidence and is essentially a nationwide methodology for insuring that expert testimony has an adequate scientific basis. Regrettably, judges often tend to shy away from granting Daubert motions, believing perhaps that the credibility of science-based evidence should be a question for the jury. This, however, means abdicating their assigned role as evidentiary gatekeepers, and often requires juries to make distinctions for which they lack the necessary qualifications or knowledge. The inconsistency with which courts stringently apply the Daubert factors varies widely by jurisdiction, and results in plaintiffs seeking venues they believe may be more "friendly" to their expert.

Daubert requires that admissible evidence provided by expert witnesses:

- Be relevant to the issue at hand and is based on a reliable scientific foundation
- Is the product of a sound scientific methodology, rooted in application of the scientific method
- Utilize the techniques of formulating and testing a hypothesis, as demonstrated by meeting the following criteria:
    - Whether the theory or technique employed by the expert is generally accepted in the scientific community;
    - Whether it has been subjected to peer review and publication;
    - Whether it can be and has been tested;
    - Whether the known or potential rate of error is acceptable; and
    - Whether the research was conducted independent of the particular litigation or dependent on an intention to provide the proposed testimony.

When successful, a Daubert challenge turns the tide in a case. And when properly applied, the Daubert criteria can keep junk science from being introduced into a case. One good example of an effective Daubert challenge was a case in the Southern District of New York, In re Mirena IUS Levonorgestrel-Related Prods. Liability Litigation. In Mirena, the Court excluded seven plaintiffs' experts who had testified that the defendants' contraceptive device caused idiopathic intracranial hypertension ("IIH"), a rare and potentially serious condition marked by increased cerebrospinal pressure in the skull.

In excluding one expert witness, the court wrote that the proposed testimony "fails to meet any of the Daubert reliability factors." The expert's causation conclusion "has not been tested; it has not been subject to peer review; it has no known error rate and there are no standards

controlling its operation; and it has not been generally accepted by the scientific community." Moreover, the expert's "handling of virtually every one of the individual items on which he relies" was "methodologically suspect." The other witnesses fared no better.

In another example, the Third Circuit affirmed a trial court's exclusion of unreliable causation testimony, as well as the resulting summary judgment, in the case of In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig. The essence of the plaintiffs' claim was that the use of Zoloft during pregnancy resulted in cardiac birth defects in their children.

The Court held that the plaintiffs' expert did not reliably apply the methodology or techniques he claimed to, so that "the fact that Dr. Jewell applied these techniques inconsistently, without explanation, to different subsets of the body of evidence raises real issues of reliability. Conclusions drawn from such unreliable application are themselves questionable."

Preparing for the Courtroom

Perhaps the most critical aspect of being an expert witness is the actual live experience of testifying and being subject to both direct and cross examination. Developing a rapport with the jury, and ensuring the expert is believable and does not fall into the trap of becoming an advocate is key – in some ways, more important for the defense experts. All of this highlights the need for significant preparation of your expert.

It is one thing to deliver conclusions during a professional discussion or an academic presentation, or in a written report prepared from the safety and quiet of an office. It is quite another to be in a courtroom, with opposing counsel standing right in front of you, either attacking your testimony, or preparing to. The verbal cut, thrust and parry of the courtroom is often where an otherwise eminently qualified and rock-solid expert witness find themselves covered with cuts.

As in so many other things, an ounce of prevention here is worth a pound of cure. Expert witnesses can ensure solid performance in the courtroom by being well prepared. More specifically, they need to be prepared not just for the technical and legal issues that will arise, but for the emotional and interpersonal experience of testifying. If your expert knows what to expect, and where potential areas of vulnerability lie, they will be much more effective, and your case will be that much stronger. Or, to paraphrase novelist Mark Helprin: "A cat could outrun a racehorse, if it could only understand the idea of a race."

The first lesson of both keeping calm, and answering questions slowly, truthfully, and carefully is of supreme importance. Or, to put it a little more informally, the most important thing any expert witness needs to remember to do is to not take the bait during cross-examination. As litigators, we know this well, but for people who are not trained trial attorneys, it can seem like a profoundly unnatural act.

As a first step in expert preparation, then, litigators need to remind their experts that there will be times, perhaps many, when opposing counsel will actively attempt to elicit emotionally-powered mistakes through aggressive verbal or emotional manipulation. Of course good trial lawyers will object as necessary to help defend against this, but you can't completely prevent it. Expert witnesses need to know that this kind of tactic is not only permissible, but part of the normal trial process.

Your opposing counsel's toolkit includes sarcasm, anger, bullying, cutting off or inaccurately restating answers, deliberate distortions of agreed-upon facts, or simply applying interpersonal pressure. For example, a classic tactic your witness will face is being pressured to answer a question with a "yes" or a "no" when in fact, a simple "yes" or "no" is not appropriate.

Opposing counsel's toolkit also includes the exact opposite kind of manipulation -- subtly flattering an expert into offering damaging testimony by, for example, providing answers outside the scope of the question they're asked, or an absolute answer ("always" or "never") that can easily be impeached later. And preparing experts to give deposition testimony is key, so that your expert offers consistent and reliable testimony at trial.

Another area of vulnerability for experts is often demeanor. This is largely irrelevant, of course, in a deposition (unless it's being videotaped) but in front of a lay jury, it's critical. How a witness presents themselves is often at least as important as the content they are presenting. Without over preparing, which can make an expert witness seem scripted and uncertain, training (or a refresher) on presenting their opinions when testifying can be very helpful. A few basics:

- Dress professionally, but without being too flashy or extravagant. If what the jury remembers is the witness's luxury watch, you have a problem.
- Minimize unnecessary hand motions or repetitive gestures like fiddling with pens, rocking back and forth or nail-biting.
- Maintain eye contact with the jury.
- Speak clearly without a lot of verbal filler – "um", "ah" and the like.

- If you're going to be doing a demonstration, make sure all the technical items (adapters, pointers and so on) are ready and working, and especially make sure you've rehearsed using the equipment. A jury watching an expert fumble their use of equipment can damage their credibility.

It's also important to manage the back-and-forth of actual testimony. The foundation of an expert's testimony is your direct examination. Here are a few ways to make sure that goes as smoothly as possible:

- Instruct your expert to be extremely careful about using professional jargon. Phrases like "distal" and "proximal" will often confuse a lay jury, and should be avoided.
- Remind them also that their responses cannot appear to be biased towards either side of the case. They're expert witnesses, and their testimony should be as factual and neutral as possible.
- Work with them to map out open-ended questions for the points and concepts that are critical to your case. This allows experts to elaborate on important points.
- Also work with them to prepare to ask anticipated cross-examinations questions during your direct. This tactic weakens both the impact and surprise factor in cross-examination, and allows you to at least partially control the way these issues are presented to the trier of fact.

Interaction with counsel, particularly opposing counsel, is where the expert's actual expertise gets entered into the record. It's very important that the expert understand how to avoid getting sidetracked, trapped or badgered by an aggressive attorney for the other side of the case. A few specific recommendations:

Emphasize the importance of answering only the specific question asked, and then stopping. Experts have a tendency to provide more information or opinion than they were asked to provide, with potentially damaging results. Some explanation is appropriate, but the expert needs to feel confident that you can follow up on redirect, and allow them to explain their full testimony.

Similarly, experts have to be prepared not to be pressured into providing a "yes" or "no" answer to a question that isn't actually answerable that way. If opposing counsel doesn't allow them to completely answer a question, they need to say so when they answer the next question. And finally, they have to be extremely cautious about offering final, absolute opinions that close off the opportunity for later clarification without seeming to contradict themselves.

Preparation for trial is akin to teaching someone the rules of etiquette in a very foreign, very unfamiliar country. The best way to prevent mistakes is to slow down, calm down, think and then act carefully. And practice, practice, practice – while the testimony cannot and should feel scripted, ensuring your expert is aware of pitfalls (and confident you will help them if they stumble) is key.

An Expert Witness or a Consulting Expert?

A critical tactical question is whether an expert should testify at all. Not all experts do, and those that simply provide guidance and expertise to a legal team as they assemble and make their cases are considered consultants rather than expert witnesses. It's a critical distinction. The sometimes-fluid difference between a consultant and an expert is a critical part of preparing expert witnesses. By definition, an expert witness is expected to testify at trial. As has been discussed above, this means subjecting them to both direct and cross-examination. It also means disclosing to your opposing counsel ninety days in advance (in Federal court; state court rules vary) the following:

- The opinions your expert intendeds to express
- The basis for those opinions
- The facts used to arrive at the opinions
- Any exhibits you intend to present
- Your expert's qualifications
- A list of cases in which they've testified in the last four years
- An accounting of their compensation

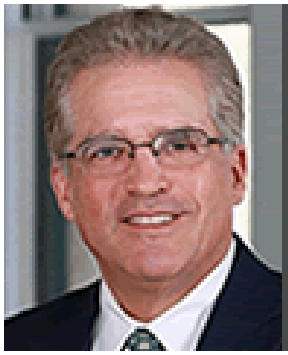
By contrast, a consultant (or consulting expert) does not testify. Accordingly, all work product, correspondence and so on with them is privileged. A consulting expert can be a formidable asset at trial – they can not only help you formulate your own case, but can also help you analyze your opponent's. A good consultant will be immensely valuable in identifying weaknesses and strengths, and can do things like alert you to studies that contradict the opposing expert's assertions, or literature demonstrating that their methodology has been found to be outdated or unreliable. Consultants can also be a vital resource during the trial itself, should something unexpected arise.

If you have already designated them as an expert witness, and as required, you have made the necessary disclosures, you cannot walk back your designation. At the very least, if you choose not to have an expert witness testify, opposing counsel will know exactly why you're not calling on your expert. In some jurisdictions, your opponent may then be able to call them in their case in chief. While it may be possible to withdraw an expert witness, this will create credibility issues with a jury, and you will still have disclosed a great deal of information

about your case and strategy in the service of a witness who won't be testifying.

Conclusion

An expert witness's role, at the most basic level, is to be a source of credible factual knowledge in the midst of an adversarial proceeding. That being said, however, experts are human, and their value at trial hinges on their character, demeanor and perceived veracity at least as much as their sheer technical expertise. While their knowledge can turn the tide in a case, expert witnesses are also subject to challenges, surprises and all the ups and downs of a trial.



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Partner

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As a trial attorney, Steve Lowenthal represents individual and business entities in all forms of trial and arbitration matters throughout the state and country including a variety of complex commercial matters. He has also developed a niche consulting practice, arising from his tenure at the Chairman of Farella (2005-2016), as a counselor to small, closely-held corporations, partnerships, law firms, trusts, or high net worth families dealing with operational issues, fiduciary duty questions, and related matters.

Professional services firms operating in competitive markets often find themselves grappling with complex legal and strategic issues relating to liability, strategic planning, structure, and similar questions. Addressing these issues requires an analysis of both the big picture, and operational details, and advice concerning their business activities.

Steve has a unique set of skills, drawn from the combination of his professional work as a litigator and his management roles at Farella. Whether he is analyzing the financial statements of a law or accounting firm, or meeting with and counseling the principals of an investment management firm, he represents an experienced, analytical, and forward-thinking voice that is a considerable competitive advantage for firms that benefit from a dispassionate, data-driven, and experienced point of view.

This same sense of pragmatism also guides Steve in his work as a litigator. He takes a decidedly businesslike approach to his practice of trial law, leading teams that provide practical advice, solutions, and efficient dispute resolution. His goal, where possible, is to seek a resolution of the dispute on terms favorable to his clients from a business and strategic perspective, but is prepared to handle the dispute through arbitration or trial when that approach is in the clients' best interests.

He has taught trial advocacy at the Stanford University Law School Advocacy Skills Workshop and at the trial advocacy workshop at the University of San Francisco Law School.

Services
- Business Litigation
- Antitrust
- Private Client

Memberships and Affiliations
- Past President of the Board of Governors of the Association of Business Trial Lawyers
- Board member of the Legal Aid Society of San Francisco
- Stanford Law School Center for the Legal Profession Advisory Committee
- Advisory Committee for the Project for Attorney Retention

Education
- Stanford University (J.D., 1982)
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CUTTING IT DOWN TO SIZE: STRATEGIES FOR HANDLING LIFE CARE PLANS

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Cutting it Down to Size: Strategies for Handling Life Care Plans

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There is a difference between the real world and the courtroom world. In the courtroom world, the plaintiff's evidentiary burden of proving future medical costs has given birth to life care plans and created the need for experts in life care planning. Both are children of personal injury litigation. Both have grown into stalwarts of mediation and trial. Both can be influenced by a plaintiff lawyer's desire to inflate the value of a personal injury claim. Neither has any real existence or purpose in the real world. Absent litigation, no orthopedic surgeon or neuropsychologist requires a life care plan or refers a patient to a life care planner. And that may be the real challenge for defendants and defense counsel. How do we explain the rise and role of life care plans and life care planners to the jury who just met them?

Defense lawyers may not be capable of articulating a "brief history of time," but we are more than capable of summarizing the brief history of life care planning. In 1981, one of the first discussions and use of the term "life care plan" appeared in a publication entitled, Damages in Tort Actions (Deutsch & Raffa, 1981). That publication analyzed damages in personal injury cases and provided "lessons" on how to maximize recovery for future medical expenses. By 1985, life care plans were formally introduced to the healthcare industry in Guide to Rehabilitation (Deutsch & Sawyer, 1985). During the 1990s, the profession started developing standards of practice, formal training programs, and subspecialty professional associations. In 1996, the Commission on Disability Examiner Certification (now known as the Commission on Health Care Certification or CHCC) offered the first life care planner certification and the American Association of Nurse Life Care Planners was formed.

Today, the profession created by trial lawyers is organized and experienced. These are not your father's life care planners. They attend CLEs and share their strategies for crafting, explaining, and defending their life care plans. They have more experience being deposed than the lawyers deposing them, and they have more experience in the courtroom than the trial lawyer examining them. They know what questions we are going to ask before we ask them. They are creatures of the courtroom, and every defense attorney needs a plan for cutting their life care plans down to size.

Attorneys should always start by thoroughly investigating the credentialing process itself for an opposing life care planner. Interestingly, life care planners are not limited to the healthcare industry. Virtually anyone can become certified. In the last fifteen years, it has become even easier to do so. In 2001, both the University of Florida and Kaplan Universities successfully launched online certification programs. More are on the way. With easier certification, comes the potential for unqualified experts and opinions. Therefore, it is critically important in every case to fully vet the life care planner's background, education, training, and experience in both life care planning and with respect to his/her knowledge of the underlying injuries and treatment for same.

Attorneys should always ask a life care planner what they "physically" did to become certified. By establishing that a plaintiff's life care planner did nothing more than read

a few books or complete a handful of online classes, you can limit their effect on the jury. Some of the relevant questions that should be asked of any life care planner include:

- Have you authored any articles or peer reviewed studies on life care planning?
- Do you have firsthand knowledge and experience treating a patient with similar injuries to that of the claimant?
- Have you conducted any research in the field of life care planning?
- Do you follow your past clients to ensure they are following your life care plans?

If a life care planner answers "no" to any of these questions, the court may not recognize the life care planner as an expert or the jury may not give the life care planner's testimony much weight.

A physician should be involved in every aspect of the life care plan's medical opinions and recommendations for future treatment. Courts have held that it is not enough for the life care planner to send a "fill in the blank" letter asking the physician for his/her opinions on future treatment. See Fairchild v. United States, 769 F.Supp. 964, 968, (W.D. La. 1991)(recognizing each treatment element recommended by the life care planner must have independent record support.); see also First National Bank v. Kansas City Southern Railway Co., 865 S.W.2d 719, 738 (M.O. App. 1993)(holding that a life care planner's testimony regarding the need for and costs of future attendant care should have been excluded due to the lack of medical doctor's testimony establishing the need for such care on a medical basis.) In every case, life care planners should meet face to face with the claimant's primary treating physician so they can discuss his/her long term healthcare needs. Life care planners should send a draft plan to the treating physician for final comment and revisions before finalizing.

A defense life care planner is always at a disadvantage when it comes to preparing a life care plan. Whereas a plaintiff attorney can always arrange a meeting or a telephone conference between the plaintiff's life care planner and the plaintiff's treating physicians, a defense attorney does not have the same ability. Both the defense attorney and the defense expert are prohibited from speaking to the plaintiff and their treating physicians without a signed HIPAA authorization. That is why a defense attorney should always request (and, if necessary, move the court to compel) the claimant to submit to a physical exam or clinical interview with the defense life care planner. Unless the claimant's condition has plateaued, the timing of that exam/interview can be critical. Jurors are not going to give greater weight to the opinion of a defense life care planner who has not examined/interviewed the plaintiff for three years, especially if the plaintiff's life care planner saw the plaintiff the week before the trial.

Unfortunately, some states do not have statutory or jurisprudential authority requiring claimants to submit to an exam/interview with the defense life care planner. Without that critical meeting, defense life care plans may be susceptible to Daubert motions or (if they survive a Daubert challenge) damning cross-examination. In those states, it is absolutely imperative for the defense attorney well in advance of the deadline for the defense life care plan to: (a) obtain independent medical examinations; (b) complete the depositions of treating physicians; and (c) provide the life care planner with every medical record and receipt. If plaintiff's counsel is going to paint the picture of your life care planner sitting at a desk and writing a life care plan without ever meeting the plaintiff, make sure you piled as much on that desk as possible.

When there is a battle of life care planners, jurors want to know where the two roads diverged in the yellow wood. During cross-examination and direct examination, an attorney should always start by soliciting and highlighting the areas of agreement between the life care plans. Then, after establishing what is not in dispute, an attorney should solicit and address any areas of disagreement.

There are ways for defense life care planners to distinguish themselves from the plaintiff's life care planner, even though they met with the plaintiff fewer times and less recently. One excellent way for defense life care planners to distinguish themselves is to "get in their car and go." For example, in a traumatic brain injury case, a defense life care planner whose life care plan includes a less expensive service or facility, should "get in the car and go" to the facility and speak with the staff. On direct examination, nothing is better than hearing a defense life care planner testifying that "I drove to the facility and met with Sharon who supervises all of the nurses. Their schedule includes…. They provide…. I was impressed by the rooms and the people they had there."

There are also ways for life care planners to lose credibility with the jury. Most life care planners now include a summary of the medical evidence (often in chronological order). Defense attorneys should scour that summary or timeline to determine whether the life care planner:

1. Omitted any important facts (i.e., no loss of consciousness, normal MRI, 15/15 GCS score);
2. Omitted any unfavorable expert testimony (i.e., not diagnosed in ER with concussion);

3. Ignored positive developments (i.e., performed better during defense neuropsychological testing);
4. Ignored or never requested/provided defense expert reports (i.e., no mention of defense neurologist's opinion);
5. Assumed plaintiff's version or plaintiff's expert opinions are true;
6. Cut and paste from another expert's report; or
7. Made an assumption at request or suggestion of counsel.

Defense attorneys can sometimes reduce life care planners to "bargain shoppers." When a life care planner tries to minimize their role in the process by emphasizing that every item in the life care plan was "approved" or "signed off" by a medical doctor or healthcare giver, let them do it. Let them. Let them say that they just "priced" the items, like a discount or bargain shopper. Let them minimize their role like an economist who testifies that they are "just a calculator." That allows you to argue "garbage in, garbage out." It eliminates any chance of the jury concluding that the life care planner's opinion is important. In effect, it reduces the plaintiff's expert witnesses by one. Which is always a very, very good thing.

Defense attorneys should always provide a life care planner with the pre-morbid or pre-accident medical records. Without prior medical records, it will be impossible for the defense life care planner to distinguish which elements of the plan are related to the subject injury versus those that are pre-existing medical conditions. In addition, the defense life care planner should obtain all employment records, tax records and school records if there are vocational issues included in the claimant's life care plan.

For catastrophic injuries, an attorney should either retain a life care planner with independent expertise in the relevant field of medicine or pair their ("non-medical") life care planner with an expert in that field. Often, that means hiring a board-certified physiatrist to prepare a life care plan. A physiatrist primarily deals with patients who suffered serious traumatic injuries. They are trained to anticipate the long-term needs of their patients who suffered life changing injuries. They can address functional problems as well as occupational issues and limitations. For the defense, a physiatrist is equally as useful as an expert or consultant. They can help frame important issues, point out shortcomings in the claimant's life care plan and assist with cross examinations.

Another critical element of the life care plan is life expectancy. All life care plans should consider the long term implications of care, including preventing secondary complications, enhancing functional outcome, reducing suffering and improving quality of life. There is very little in terms of medical literature that projects life expectancy for individuals with catastrophic injuries based on the level of care outlined in a life care plan. For all intents and purposes, the claimant's primary treating physician is in the best position to provide a prediction on life expectancy based on future treatment needs. In doing so, both the planner and the treating physician should consider how the current healthcare provision and technological advances will affect the total value of the plan.

For example, there have been significant improvements in prosthesis, motorized wheelchairs, environmental control systems and other adaptive medical equipment and assistive technology, and replacing medical devices occurs less frequently with the new advancements. With better products comes longer life. Therefore, the total cost of the life care plan could decrease significantly depending on the number of times a piece of durable medical equipment has to be replaced or maintained.

Another issue affecting the bottom line of most life care plans is the availability of alternative funding sources. Life care planners should be intimately familiar with public benefit programs or special needs trusts, Medicare and Medicaid, state rehabilitation services and various waiver programs. Rarely will the plaintiff's expert contact an insurer or public assistance program to determine if the client qualifies for secondary funding. Such a line of inquiry can be most effective where an insurer, public school system or other resource has provided a medical case manager who has not recommended the various therapies or other aspects included in the plaintiff's life care plan. Of course, if a treating physician disagrees with any element of the life care plan, the defense would be best served by fully exposing his/her position on cross examination. But beware. Pointing out all of the potential pitfalls in the claimant's life care plan before trial will likely trigger a supplemental report addressing and revising all of the shortcomings in the original life care plan. Choose wisely when trying to determine whether to depose the plaintiff's life care planner and when that deposition will take place. It may be best to wait until all expert report deadlines have passed.

Finally, defense attorneys should always consider the discoverability of the expert's work and opinions if they hire their own planner. The cost of disclosing materials that outline a defense theory may outweigh the benefit of having the defense life care planner testify at trial. If the defense does not want to validate any portion of the life care plan or turn over any sensitive documents, they can always move forward with a life care planner as a consultant only. Under this arrangement, most

of the documents and materials to and from counsel are protected from disclosure under the attorney work product doctrine/privilege.

Conclusion

Life care plans were born out of and remain an integral part of personal injury litigation. They are no longer reserved for catastrophic injuries only. Claimants submit life care plans for everything from broken arms to minimally invasive back surgeries. In all cases, life care planners do not service patients, they service clients. This is an important distinction. The life care planner is not providing any healthcare services whatsoever. This means the life care plan is not the same as a physician's order. It is also not a formal written contract. At the end of the day, the client does not have to undergo any of the future treatment set forth in the plan. In fact, most claimants never actually see or review their own life care plan!

Special consideration should be given to the method and timing of attacking plans and planners. In most cases, the defense would be best suited by retaining a consultant to help with cross examination. Choose wisely as there are many so-called "certified life care planners" on the market. Make certain that your life care planner has value in the courtroom world and the real world.

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Josh Keller sees everyday as an opportunity to meet new people and learn more about their interests. He enjoys spending time with his clients discussing important details behind tragic accidents and working with them to solve their legal problems.
As a defense litigator, Josh understands the importance of choosing proper experts and preparing thorough cross examinations.

Josh works hard to understand his clients' expectations in litigation. He enjoys learning about different personalities, lifestyles and perspectives. He uses this information to help solve complex legal problems in the most cost effective way possible. His work involves defending individuals and corporations against a wide variety of claims from auto accidents to defamation and business interruption claims, and products liability matters.

As a New Orleans native, Josh is married with three children and devotes his leisure time to reading, coaching youth baseball, playing golf and fishing.

"With my clients, I take pride in being responsive, open-minded and honest. With my colleagues, I try to be honest, deliberate and candid."

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- Louisiana Rising Stars List, 2017, 2018
- New Orleans CityBusiness Ones to Watch: Law, 2015, 2017

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