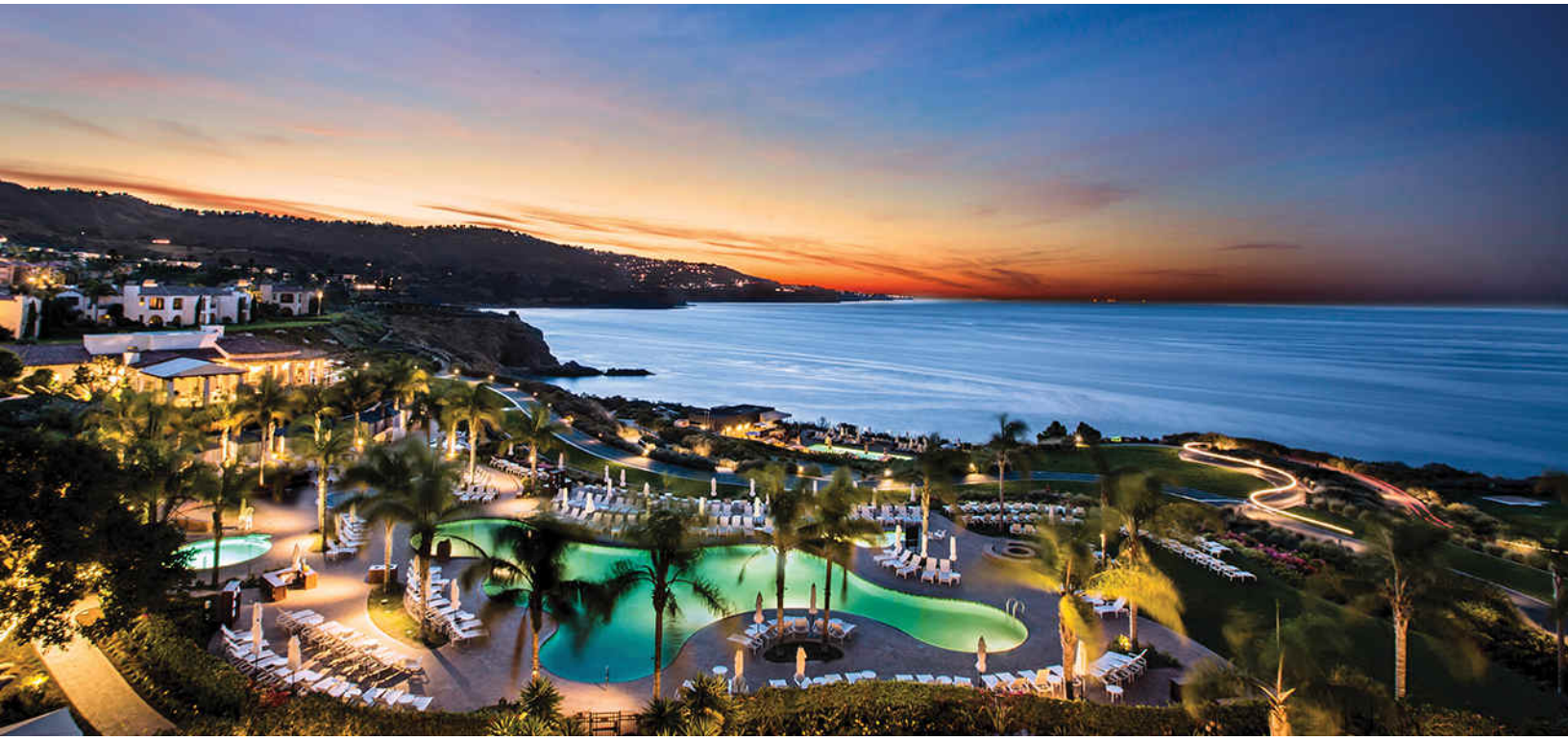
Corporate Litigation: Never Face the Music Alone

Litigation CLE SuperCourse



November 3-6, 2022 **The Terranea Resort**

THE TRIAL Network

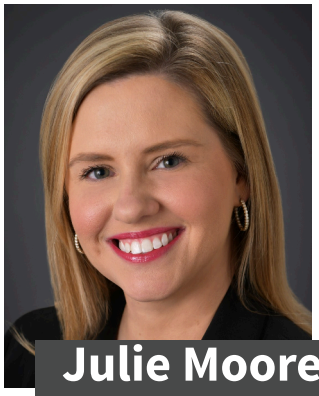
The Trial Network

@NetworkFirmNews

Corporate Litigation: Never Face the Music Alone

A Litigation CLE SuperCourse

November 3-6, 2022 **The Terranea Resort**



The New Frontier: Artificial Intelligence in the Workplace

Julie Moore
Bowles Rice (Morgantown, WV)

The New Frontier: Artificial Intelligence in the Workplace
Julie A. Moore

When we think of artificial intelligence ("AI") in the workplace, most peoples' minds likely jump to the image of robots roaming the production floor of a manufacturing operation. Most people, however, do not think about robots sitting behind a desk in the HR department or across the table during a job interview, but that is exactly what is happening in the new frontier.

It is estimated that more than 80% of companies in the United States use AI in some way for human resources functions, including decision-making regarding employment actions, particularly those related to recruiting and hiring. For example, some employers are using virtual assistants or "chat-bots" to engage with candidates during the recruitment stage by asking or answering questions about preliminary job qualifications, salary ranges, and potentially rejecting candidates lacking certain defined requirements. Others are using AI to review, screen, and rank applications, résumés, cover letters, and even social media profiles of candidates. Some companies are going so far to use facial analysis software during video and recorded interviews to scan a candidate's facial expressions and analyze their body language, word choice, rate of speech, and tone of voice to assess qualities like disposition, motivation, charisma, attention span, and engagement as a predictor for success in a role.

The Pros and Cons of Using AI
Proponents of AI in the recruiting process say that it saves time and money and allows for increased speed and efficiency during the recruitment process, which are often essential. For a single job posting, an employer might receive a voluminous number of applications that would normally take days or even weeks for a recruiter to manually review. By using AI, the employer can weed out unqualified applicants and cull the pool down to the top candidates quickly. Proponents of AI also assert that it eliminates the risk of human bias and subjectivity. For example, a hiring manager may unconsciously form a negative impression of a candidate whose name suggests a certain gender, age, race, ethnicity, or religion. An AI-powered algorithm can be programmed to entirely disregard the candidate's name in the selection process and focus instead on the skills and experience needed to perform the job.

On the other hand, opponents say that AI tools eliminate the essential "human" element from the "human resources" process. Critics also say that AI software is only as reliable as the humans who create the underlying algorithms and is only as unbiased as the data that is fed into the machine to "train" the algorithm. Many AI tools search for the best candidates by examining the characteristics of the employer's past successful candidates and seeking individuals with similar qualities. If, based upon the employer's historical data, the AI tool "learns" that certain traits such as whiteness and/or maleness are common amongst successful employees, this could cause the algorithm to exclude candidates whose application materials contain words or phrases that are not found within the benchmark data set, such as "women's" (as in Women's Bar Association, etc.), "mother," "Black," or "LGBTQ." Indeed, there is concern that algorithms can unintentionally lead to systematic discrimination and disparate impact by using training data to "learn" a bias.

The Legalities of Using AI in Employment Decisions

Currently, there is no federal law or regulations that prohibit or regulate the use of AI in employment decisions; however, at least two federal agencies have recently promulgated guidance on the topic, and many states and cities are beginning to enact legislation designed to prevent unintentional, algorithmic-based bias in employment decisions.

Actions by Administrative Agencies Regarding AI:

On October 28, 2021, U.S. Equal Employment Opportunity Commission ("EEOC") Chair Charlotte A. Burrows formally launched a new agency-wide initiative to ensure that the use AI, machine learning, and other emerging technologies used in hiring and other employment decisions comply with the federal civil rights laws enforced by the EEOC.[1] Although this initiative has been described as being a "new" endeavor, the EEOC indicated that it has been closely examining "the issue of AI, people analytics, and big data in hiring and other employment decisions" since 2016.[2]

Regarding her reasoning for making AI and "algorithmic fairness" a top priority of the EEOC, Burrows has made the following statement:

> Artificial intelligence and algorithmic decision-making tools have great potential to improve our lives, including in the area of employment. At the same time, the EEOC is keenly aware that these tools may mask and perpetuate bias or create new discriminatory barriers to jobs. We must work to ensure that these new technologies do not become a high-tech pathway to discrimination.
>
> Bias in employment arising from the use of algorithms and AI falls squarely within the Commission's priority to address systemic discrimination. While the technology may be evolving, anti-discrimination laws still apply. The EEOC will address workplace bias that violates federal civil rights laws regardless of the form it takes, and the agency is committed to helping employers understand how to benefit from these new technologies while also complying with employment laws.[3]

Burrows also outlined the five key components of her AI and algorithmic fairness initiative: (1) establish an internal working group to coordinate the agency's work on the initiative; (2) launch a series of listening sessions with key stakeholders about algorithmic tools and their employment ramifications; (3) gather information about the adoption, design, and impact of hiring and other employment-related technologies; (4) identify promising practices; and (5) issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions.

Consistent with the items identified in (5) and (6) above, six months later, the EEOC released technical assistance guidance on May 12, 2022, entitled, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.[4] That very same day, the Civil Rights Division of the United States Department of Justice ("DOJ") issued its own guidance entitled, Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring, intended for assisting state and local government employers with ADA compliance in the context of AI.[5]

A. EEOC's Guidance on AI

The EEOC's technical assistance outlines how employers' use of software that relies on algorithmic decision-making may violate the ADA by disadvantaging job applicants and employees with disabilities.

According to the EEOC, one of the most common ways that an employer's use of AI or other algorithmic decision-making tools might violate the ADA is if the employer does not provide a reasonable accommodation that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm.[6] The EEOC guidance

1 Press Release, "EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness" (October 28, 2021) available at https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness (last visited September 29, 2022).

2 Id.

3 Id.

4 The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022) available at https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence (last visited September 29, 2022).

5 Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring (May 12, 2022) available at https://beta.ada.gov/resources/ai-guidance/ (last visited September 29, 2022).

6 See supra note 4.

provides the example of a job applicant who has limited manual dexterity because of a disability, which may cause difficulty taking a knowledge test that requires the use of a keyboard, trackpad, or other manual input device, and if the responses are timed, this kind of test will not accurately measure this particular applicant's knowledge. The EEOC notes that in this situation, the employer would need to provide an accessible version of the test, such as one in which the applicant is able to provide responses orally, rather than manually, as a reasonable accommodation, unless doing so would cause undue hardship. If it is not possible to make the test accessible, the ADA requires the employer to consider providing an alternative test of the applicant's knowledge as a reasonable accommodation, barring undue hardship.

Second, the EEOC states that ADA violations may arise if an employer relies on an algorithmic decision-making tool that intentionally or unintentionally "screens out" an individual with a disability, even though that individual is able to do the job with a reasonable accommodation.[7] To establish a "screen out" claim, an individual alleging discrimination must show that the challenged selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities.[8] To establish a defense, the employer must demonstrate that the challenged application of the criterion is "job related and consistent with business necessity," as that term is defined under the ADA, and that "such performance cannot be accomplished by reasonable accommodation."[9] A different defense is available when the challenged selection criterion is safety-based.[10]

Third, the EEOC states that employers may violate the ADA if they adopt an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA's restrictions on disability-related inquiries and medical examinations.[11] The guidance explains that an assessment includes "disability-related inquiries" if it asks job applicants or employees questions that are likely to elicit information about a disability or directly asks whether an applicant or employee is an individual with disability. It qualifies as a "medical examination" if it seeks information about an individual's physical or mental impairments or health. An algorithmic decision-making tool that could be used to identify an applicant's medical conditions would violate these ADA restrictions if it were administered prior to a conditional offer of employment. The EEOC notes that this type of violation may occur even if the individual does not have a disability.

Throughout its guidance, the EEOC provides examples of technology/AI that might be potentially discriminatory, including:

- Facial and voice analysis technologies that evaluate applicants' speech patterns in order to reach conclusions about their ability to solve problems may adversely affect people with autism or speech impediments.
- Computer-based assessments that require applicants to complete a "gamified" memory test may adversely affect people with vision impairments who would still be able to do the job
- Chat-bots that automatically screen out applicants with significant gaps in employment history without giving the applicant a chance to explain that the gap may have been due to a disability that required the individual to be absent from the workforce to undergo medical treatment.

In the second part of its guidance, the EEOC sets forth a number of tips, which are described as "promising practices," for employers to ensure ADA compliance when using AI decision-making tools.

First, the EEOC recommends that employers train staff to: (1) recognize and process requests for reasonable accommodation as quickly as possible, including requests to retake a test in an alternative format, or for the candidate to be assessed in an alternative way, after the individual has already received poor results; and (2) develop or obtain alternative means of rating job applicants and employees when the current evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable

7 Id.

8 See 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a).

9 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. §§ 1630.10(a), 1630.15(b); 29 C.F.R. pt. 1630 app. §§ 1630.10, 1630.15 (b) and (c).

10 See 2 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

11 Id.

accommodation because of a disability. If the algorithmic decision-making tool is administered by an entity with authority to act on the employer's behalf, such as a testing company, the EEOC recommends that employers ask the entity to send all requests for accommodation promptly to be processed by the employer in accordance with ADA requirements. In the alternative, the EEOC suggests that employers enter into an agreement with the third party requiring it to provide reasonable accommodations on the employer's behalf, in accordance with the employer's obligations under the ADA.

Second, the EEOC urges employers to implement measures to minimize the chances that algorithmic decision-making tools will disadvantage individuals with disabilities. "Promising practices" geared toward this recommendation include: (1) using algorithmic decision-making tools that have been designed to be accessible to individuals with as many different kinds of disabilities as possible, thereby minimizing the chances that individuals with different kinds of disabilities will be unfairly disadvantaged in the assessments. User testing is a promising practice; (2) informing all job applicants and employees who are being rated that reasonable accommodations are available for individuals with disabilities and providing clear and accessible instructions for requesting such accommodations; and (3) describing, in plain language and in accessible formats, the traits that the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating.

Third, the EEOC encourages employers to minimize the chances that algorithmic decision-making tools will assign poor ratings to individuals who are able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. Employers may accomplish this goal by implementing the "promising practices" of: (1) ensuring that the algorithmic decision-making tools only measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation; and (2) ensuring that necessary abilities or qualifications are measured directly, rather than by way of characteristics or scores that are correlated with those abilities or qualifications.

Finally, the EEOC recommends that before adopting an algorithmic decision-making tool, employers should ask the vendor to confirm that the tool does not ask job applicants or employees questions that are likely to elicit information about a disability or seek information about an individual's physical or mental impairments or health, unless such inquiries are related to a request for a reasonable accommodation.

At the conclusion of its technical guidance, the EEOC makes clear that it is not new policy and is, instead, merely intended to apply principles that are already established in the ADA's statutory and regulatory provisions. Further, the EEOC acknowledged that the contents of its publication do not have the force and effect of law and are not meant to bind the public in any way and are only intended to provide clarity to the public regarding existing requirements under the law.

B. DOJ's Guidance on AI

As mentioned above, the same day the EEOC issued its guidance on algorithmic fairness and the use of AI in employment decisions, the DOJ issued its own guidance on the topic. The DOJ's guidance gives similar direction to employers as the EEOC's guidance. The DOJ cautions that, while software programs that use algorithms or artificial intelligence, may be useful tools for some employers, they may also result in unlawful discrimination against certain groups of applicants, including people with disabilities.[12]

First, the DOJ's guidance notes that some hiring technologies try to predict who will be a good employee by comparing applicants to current successful employees; however, because people with disabilities have historically been excluded from many jobs and may not be a part of the employer's current staff, this may result in discrimination.[13] The DOJ cautions employers to carefully evaluate the information used to build their algorithms to avoid this type of disparate impact.

Second, the DOJ's guidance warns employers that

12 See supra note at 5.

13 Id.

they might violate the ADA if their hiring technologies unfairly screen out a qualified individual with a disability. The DOJ explains that employers can use qualification standards that are job-related and consistent with business necessity; however, employers must provide requested reasonable accommodations that will allow applicants or employees with disabilities to meet those standards, unless doing so would be an undue hardship. Applying this concept to AI, when designing or choosing technologies to assess whether applicants or employees have required skills, employers must evaluate whether those technologies unlawfully screen out individuals with disabilities who can perform the essential functions of the job with or without required reasonable accommodations. The DOJ provides the example of an employer that uses facial and voice analysis technologies to evaluate applicants' skills and abilities impermissibly screening out people with disabilities like autism or speech impairments, even if they are qualified for the job.[14]

Third, the DOJ highlights the potential for discrimination in instances where employers use hiring technologies that require an applicant to take a test that includes an algorithm, such as an online interactive "game" or personality assessment.[15] The DOJ reminds employers that they must ensure that any such tests or "games" measure only the relevant job-related skills and abilities of an applicant, rather than reflecting the applicant's impaired sensory, manual, or speaking skills that the tests do not seek to measure. The DOJ's guidance instructs that if a test or technology eliminates someone because of disability when that person can actually do the job, an employer must instead use an accessible test that measures the applicant's job skills, not their disability, or make other adjustments to the hiring process so that a qualified person is not eliminated because of a disability.

Finally, the DOJ's guidance, like the EEOC's guidance reminds employers that the duty to accommodate extends to the hiring process. According to the DOJ, if an employer uses hiring technologies that cause an impediment to applicants with disabilities, they may be required to provide accommodations, including a modification of the screening and interview process, such as an alternative process that does not use the AI. The DOJ provides several recommendations to employers to ensure that their hiring process is accessible, including: (1) telling applicants about the type of technology being used and how the applicants will be evaluated; (2) providing enough information to applicants so that they may decide whether to seek a reasonable accommodation; and (3) providing and implementing clear procedures for requesting reasonable accommodations and making sure that asking for one does not hurt the applicant's chance of getting the job.[16]

Conclusion

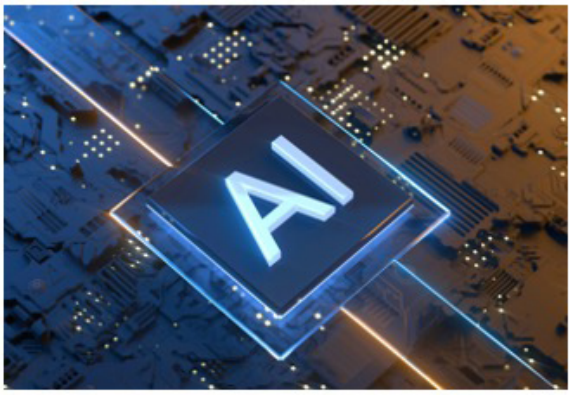
As new technologies continue to emerge and evolve and the use of AI in employment decision-making becomes even more prevalent, we can expect to see more legislation enacted in this area, and in turn, see the floodgates of litigation open. Moreover, it is anticipated that, if discrimination claims are filed against employers regarding the use of AI in employment decisions, such claims may take the form of class actions, which can dramatically increase an employer's exposure. Thus, employers who currently use AI to make employment decisions or are contemplating implementing AI into their recruitment and hiring process must keep their finger on the pulse of this rapidly evolving area of employment law to ensure compliance and avoid litigation.

14 Id.

15 Id.

16 Id.

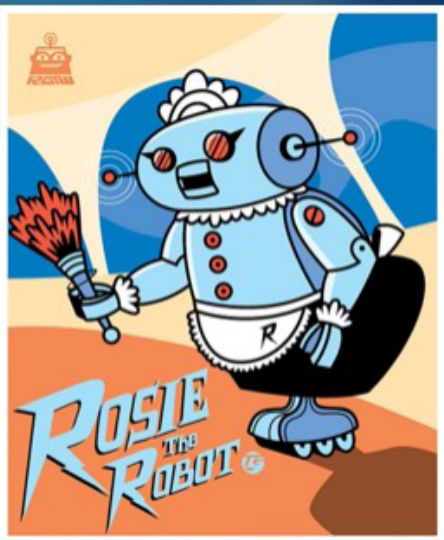
THE TRIAL NETWORK:



THE NEW FRONTIER: USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT

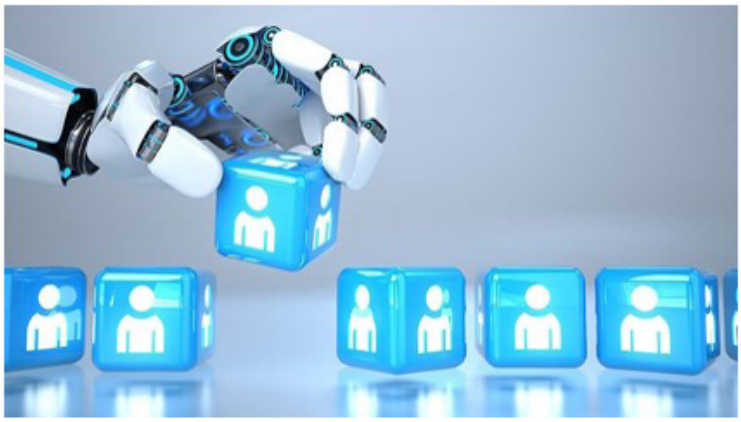
Julie A. Moore, Esq.

Bowles Rice



Bowles Rice

Use of AI in Recruitment & Hiring



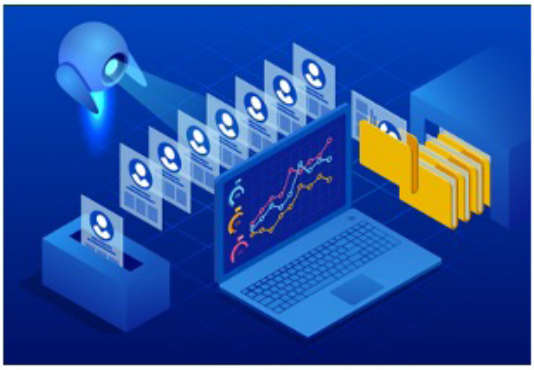
Bowles Rice

Use of AI in Recruitment & Hiring

- Virtual assistants or "chat-bots"
- Engage candidates in virtual conversation
- Asking or answering questions about preliminary job qualifications, salary ranges, and the hiring process
- Rejecting candidates lacking certain defined requirements

Bowles Rice

Use of AI in Recruitment & Hiring



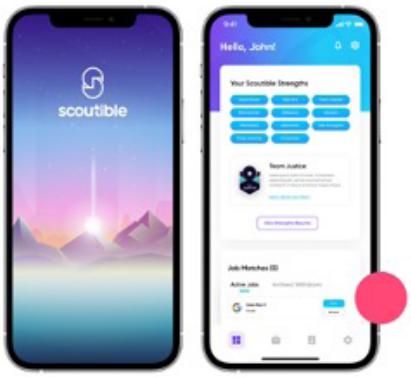
- AI-based scanning tools
  - Cover letters
  - Applications
  - Résumé
  - Social media

Bowles Rice

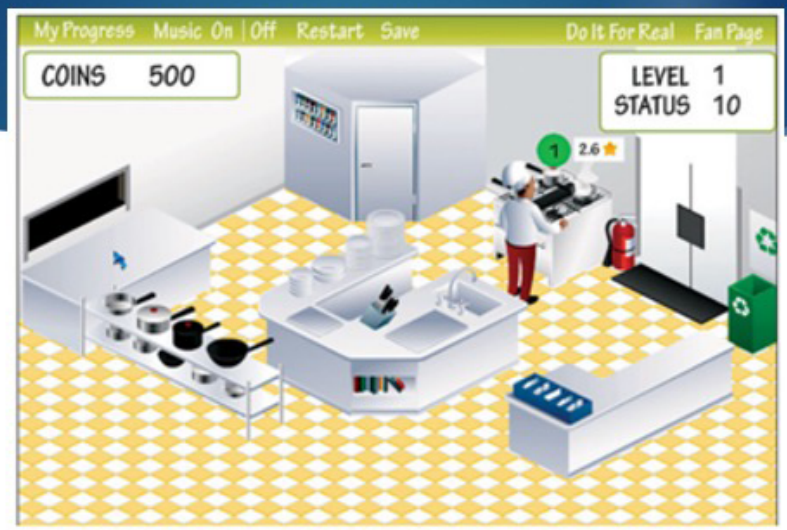
Use of AI in Recruitment & Hiring

scoutible

- Gamification + AI
- Immersive video games



Bowles Rice



Corporate recruiting via games. 'My Marriott Hotel,' soon on Facebook.
ILLUSTRATION: MARRIOTT

Bowles Rice

Use of AI in Recruitment & Hiring

- Facial analysis technology
  - Facial expressions
  - Body language and movement
  - Eye contact
  - Word choice, tone, pace

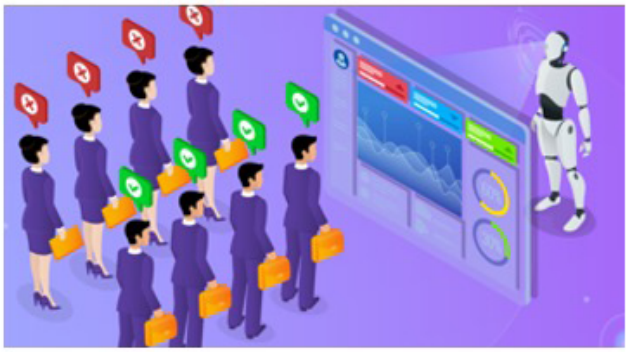
Bowles Rice

Use of AI in Recruitment & Hiring

- Artificial Intelligence
  - Supervised machine learning
    - Algorithms
      - Historical data sets = training data
      - Make predictions when presented with new data

Bowles Rice

Use of AI in Recruitment & Hiring



- Algorithm learns from training data set
- Algorithmic bias
- Disparate impact

Bowles Rice

amazon

Bowles Rice

Use of AI in Recruitment & Hiring

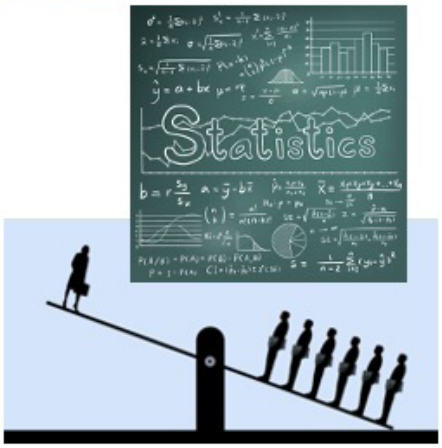
Disparate Treatment vs Disparate Impact

Disparate Treatment	Disparate Impact
Direct discrimination	Indirect discrimination
Unequal treatment	Unequal consequences or results
Intentional	Usually unintentional
Prejudiced actions	Neutral actions
Different standards	Same standards but different consequences

Bowles Rice

Use of AI in Recruitment & Hiring

- Illegal *motive* vs. discriminatory *effect.*
- The plaintiff bears the burden of: (1) demonstrating that the employer uses a particular employment practice or policy and (2) establishing that it causes a disparate impact on a protected class.
- Often proven by statistical evidence.
- The practice is job related and is consistent with business necessity.
- An alternative practice exists which the employer refuses to adopt.



Administrative Agencies

- **October 28, 2021: Artificial Intelligence and Algorithmic Fairness Initiative**
- **May 12, 2022: Technical Guidance –** *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*

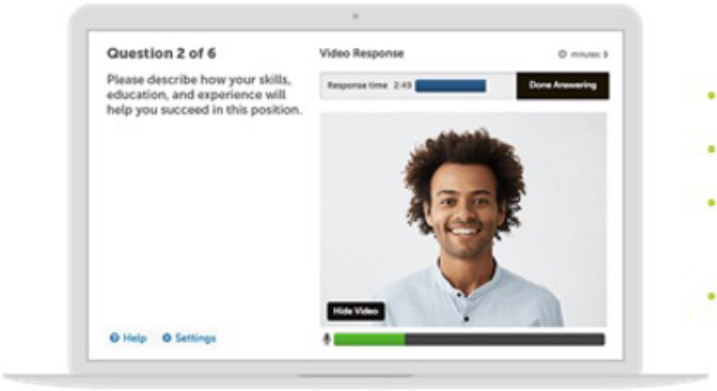
Bowles Rice

Administrative Agencies

- **May 12, 2022: Civil Rights Division Guidance** – *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*

Bowles Rice

State Laws on AI – video interviews

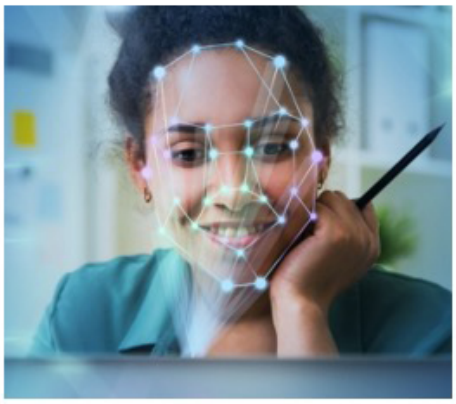


- Provide notice.
- Provide an explanation.
- Maintain confidentiality.
- Destroy copies.

Bowles Rice

State Laws on AI – facial recognition

- Obtain applicant consent.



Bowles Rice

State Laws on AI – algorithmic software

- Bias audit
- Results of audit publicly available on website
- Notice requirement
- Disclosure requirement
- Civil penalties

Bowles Rice

State Laws on AI – algorithmic software

- Unlawful for an employer to use "automated decision systems" that screen out or "tend to screen out" applicants based on protected characteristics unless job-related and are consistent with business necessity.
- Expanded recordkeeping requirements to include machine-learning data.

Bowles Rice

Use of AI in Recruitment & Hiring

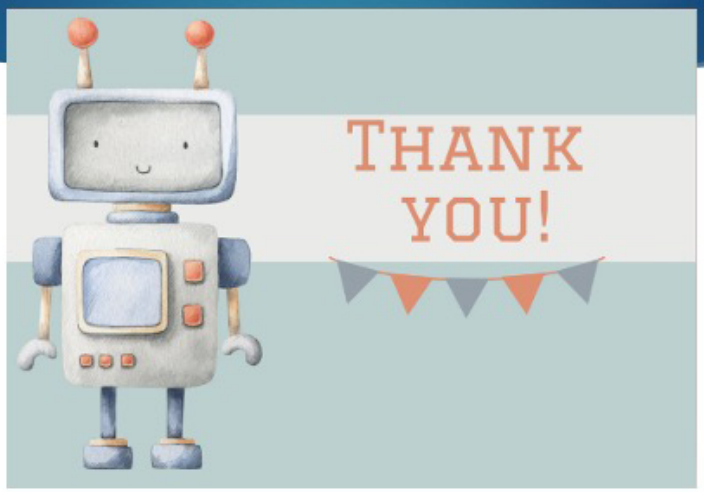
- Potential for increased litigation.
- Disparate impact claims.
- Class actions.

Bowles Rice

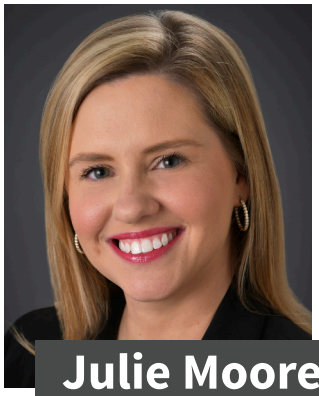
Litigation Avoidance

- Proceed with caution.
- Keep finger on the pulse.
- Due diligence.

Bowles Rice



Bowles Rice



304.285.2524
jamoore@bowlesrice.com

Julie Moore

Partner | Bowles Rice (Morgantown, WV)

Julie A. Moore serves as co-leader of the Bowles Rice Labor and Employment team. She is an experienced and highly-skilled labor and employment attorney whose practice spans the employment law spectrum and consists of advice and counseling, as well as defending litigation involving both single-plaintiff and class action employment disputes. Julie represents employers from a wide variety of industries, including health care, higher education, transportation, banking and financial services, energy, manufacturing, hospitality, information technology, government contracting and non-profits.

Julie prides herself on being a passionate advocate and delivering concierge-level client service. She strives to be an invaluable business partner to the employers she is entrusted to serve by learning about their industry, their operations, their culture, their level of risk tolerance and their most valuable asset – their people.

In her litigation practice, Julie regularly defends employers before federal and state courts against claims for discrimination, harassment, wrongful discharge and retaliation, as well as claims brought under wage and hour, family and medical leave, and disability accommodation laws. Julie is a well-rounded litigator: she has a track record of obtaining summary judgment; she is a skillful negotiator; she has successful first and second chair jury trial experience; and she has successful appellate experience before the Supreme Court of Appeals of West Virginia and the United States Court of Appeals for the Fourth Circuit. Her unique background in economics and mathematics has equipped Julie with strong analytical skills that allow her to assist clients with carefully evaluating and managing risk.

Practice Areas
- CARES Act / COVID-19 Response Team
- Education Law
- Higher Education
- Labor and Employment
- WE Mean Business: Women Executives and Entrepreneurs

Representtaive Cases
- Greaser v. Hinkle, 245 W. Va. 122, 857 S.E.2d 614 (2021) (defense of wrongful discharge/Harless claim)
- Schade v. West Virginia University, 2019 WL 2406730 (2019) (whistleblower defense)

Honors
- The State Journal's 2021 Generation Next: 40 Under 40
- Recognized by Chambers USA: America's Leading Business Lawyers (Labor & Employment)
- Named to The Best Lawyers in America ® (Litigation - Labor and Employment)
- Super Lawyers, Rising Star (2017, 2018, 2019)
- Leadership West Virginia, Class of 2018
- Leadership Monongalia, Class of 2014

Education
- J.D., magna cum laude, Duquesne University School of Law (2009) - Duquesne Law Review; Order of the Barristers; Recipient of ABA-BNA Award for Excellence in the Study of Labor and Employment Law
- B.A., summa cum laude, Economics, Washington & Jefferson College (2006) - Presidential Scholar; Phi Beta Kappa Member

Panel: Outside Counsel Report Card – Best Practices and Pet Peeves

Tony Rospert
Thompson Hine (Cleaveland, OH)

A Recipe For Legal Project Management: Look To BBQ Champs
Anthony Rospert

Outside the courtroom, one of my hobbies is judging competition barbecue. As a master certified barbecue judge with the Kansas City Barbeque Society, I recently had the honor of judging the Sam's Club National BBQ Championship in Bentonville, Arkansas. Fifty of the top professional BBQ teams in the country competed for $150,000, the richest purse in competition BBQ. One thing I noticed was that the same small group of pitmasters always seems to excel — their teams are consistently in the money at any given competition no matter the geographic location or the mix of judges. The judging process is double-blind, so these pitmasters are not winning based on reputation. It made me wonder: What gives them an edge? What is driving their excellence in BBQ? Is it their sauce and spice rubs? Is it knowing how to select the choice cuts of meat? Do they have the best equipment?

While all of these factors are important, I believe the real reason is simple: The top pitmasters have developed a consistent, disciplined, comprehensive

and repeatable process in planning and executing their BBQ entries. Following a consistent process in approaching each and every competition results in top performance, higher scores and continuous improvement.

The same can be said about applying project management principles to working on legal matters. Intelligent lawyers recognize that using legal project management (LPM) tools and techniques to actively manage engagements helps optimize performance, reduce costs and improve predictability, enabling them to provide clients with superior service and value. Employing project management principles is the "secret sauce" that can help both lawyers and BBQ competitors achieve success.

Develop a Recipe for Success: Plan and Prepare
Advance planning and preparation for any project is necessary to provide direction, continuity and coordination. The top pitmasters use a formal planning process before each competition. They don't just show up the day of the competition, fire up their pits and start smoking their chicken, ribs, pork and brisket. A successful BBQ begins well in advance of the competition by outlining a detailed plan. Champion pitmasters work backward from the turn-in time for each of the four meat categories to develop a schedule setting forth specific tasks that need to be completed at given time intervals. These schedules list not only the tasks that must be performed, they also designate which team member is responsible for each task. Successful pitmasters do not just decide as they go; they drill down on the details of the plan to achieve the perfection that high-level competition demands. Many also use checklists and templates to ensure consistency and predictability. Because situations inevitably arise that require a change in the schedule (e.g., the pit temperature spikes or the meat temperature plateaus), the pitmaster's plan is flexible enough to accommodate changes and can be revised as needed.

Similarly, LPM requires that lawyers employ a formalized process in planning and executing an engagement. This includes developing a schedule that defines which member of the legal team will perform each task and provides a timeline for completing those tasks. Having a road map showing how a legal project will be executed and how the matter will run start to finish is essential to reaching a project's objectives and achieving the client's goals. A defined, detailed plan also provides the context for team members to understand expectations and outcomes. Engaging in a planning process at the outset of each matter allows lawyers to gain a competitive edge by having a strategic playbook to guide the legal team throughout the engagement.

In law or competition BBQ, having a plan in place avoids inconsistency and inefficiency and helps the team deliver a superior product in a timely fashion.

Trim the Fat: Create and Stick to a Budget
Pitmasters have to be cost-conscious and adhere to a defined budget. Participating in any BBQ competition requires a significant monetary investment to cover the entry fee, bulky specialized equipment and the means to transport it, and meat, spices, rubs and other supplies. Some teams purchase special meats from specialty butchers, which alone can increase costs by hundreds of dollars. However, with the exception of a few national competitions, the available prize money does not justify a win-at-all-costs approach. So the top pitmasters will work within a defined budget based on the available prize money at a given competition. For example, instead of cooking the typical two pork shoulders, two briskets, 12 to 16 pieces of chicken and three racks of ribs, the pitmaster may decide to cook half as much to reduce expenses. This not only helps manage costs, it requires a more thoughtful, measured cooking strategy, as there is less room for error in producing a quality entry.

As part of a comprehensive, disciplined approach to managing legal projects, lawyers and their clients also develop budgets as a concrete way to help control costs, improve efficiency and provide the transparency and accountability clients need to better manage resources and expectations. A well-designed budget is more than a financial estimate; it sets priorities and reflects strategy. Using budgets helps lawyers manage legal matters more effectively so they can provide better client service, improve results and reduce costs. Important elements of any legal budget include a consistent format across types of matters, the ability to modify quickly and the ability to reflect actual costs against budgeted

amounts. Creating a budget enables the lawyer and client to make proactive strategic decisions about the matter and determine whether the costs justify a particular course of action.

Ultimately, the goal of the budgeting process for lawyers and pitmasters is the same — containing costs without sacrificing quality.

Tend the Fire: Monitor Progress

Creating a plan and budget is only half the job. Successful pitmasters are laser-focused on their goals, and they constantly monitor their progress to ensure that they are on track throughout the BBQ process. One key item that needs to be closely monitored during a BBQ competition is pit temperature. Indeed, fire management is a critical component — it is impossible to cook great BBQ with unstable temperatures. It is so crucial that most teams will have members sleep in shifts so the smoker can be tended and the temperature can be monitored throughout the night. The top pitmasters also rely on technology to monitor their smokers; many use a specially calibrated fan system that feeds the right amount of oxygen into the smoker to ensure a consistent pit temperature.

Likewise, to ensure proper execution, work plans and legal budgets must be monitored through the use of metrics and reporting. A best LPM practice is to implement a consistent, periodic reporting process that keeps the client and legal team informed on progress and keeps the matter on task. Technology tools, such as monitoring software, ensure efficiency and accuracy in measuring metrics including budget-to-actual spend, percentage of completion and cycle time for aspects of the project. Moreover, during the life of a case or transaction, situations often develop that suggest the need for revising the project plan, timeline or budget. When the lawyer is closely monitoring the matter, he or she can act quickly and proactively to collaborate with the client to identify the impact of the change on legal strategy, timeline and budget options. Together they can agree on the appropriate adjustments and revise the project tasks as needed to ensure the project is completed on time and in furtherance of the client's goals. The monitoring process also promotes open communication between lawyer and client, which facilitates predictability of costs and helps avoid unhappy surprises.

Tracking project-related metrics, including team performance and task duration, identifying potential problems and taking corrective actions are all keys to success, whether one is handling a legal matter or competing for BBQ bragging rights.

Perfect the Process: Conduct an After-Action Review

Every project yields information that will be useful in planning future projects. Pitmasters receive feedback following each competition in the form of a score sheet listing judges' scores for the appearance, taste and tenderness of the team's meat entries. In addition, judges sometimes provide the cooks with comment cards containing constructive feedback on improving the team's entries. For example, a judge may indicate that the chicken was too salty or that the ribs were slightly overcooked. Some teams use software to track feedback and results, taking into account common BBQ variables such as temperature and cook duration, the sauce/rub combination, or even the type of wood used or the weather at the time of the cook. The pitmaster then can use this information to perfect their process for the next big competition.

A completed case or transaction also provides useful information regarding the resources used and time required to complete the project, as well as its costs. The key is to gather information by conducting an after-action review to take advantage of prior efforts and results. At the end of an engagement, a lawyer should conduct post-mortems with the legal team and with the client to review successes and failures and suggest modifications to approach and process to improve performance on future engagements. For example, the team might consider using a different process or sequence for some discovery or due diligence tasks. The goal of this review is to evaluate performance and find areas needing improvement so the LPM process is constantly refined. Capturing the lessons learned through an after-action review ensures that efficient, repeatable processes are continually improved based on practical experience and the use of internal systems and tools.

Whether striving to stay ahead of the competition on the BBQ circuit or to achieve positive outcomes

for clients, continuous improvement should always be a goal.

The Meat of the Matter

Historian, philosopher and author Will Durant, paraphrasing Aristotle, had it right when he said: "We are what we repeatedly do. Excellence, then, is not an act, but a habit." As I hope this article has illustrated, successful lawyers and champion pitmasters alike can employ project management principles to achieve their common goal of reaching a favorable outcome. The key — or "secret sauce" — is to consistently apply these basic fundamentals to each engagement and continually seek to refine the processes to achieve continuous improvement.

Budgeting for Litigation: Obtaining Efficiencies and Meeting Client Goals

Brian Lamb and Tony Rospert

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

So what can outside lawyers do to control costs and deliver more value to clients? There are many tools in the toolbox, including legal project management (LPM), process improvement, alternative fee arrangements/value billing and flexible staffing models. Thompson Hine embraces all of these in its approach to innovative service delivery. LPM tools and methodologies drive greater predictability and client communication, ultimately maximizing value to clients. Streamlined and standardized processes yield more efficiency and additional cost savings. Value pricing arrangements, as an alternative to the traditional billable hour, can meet a client's need to cap risk or achieve predictability. And flexible staffing models allow the law firm to use the right lawyer at the right price for each task in the litigation, thereby containing costs without sacrificing quality.

Consider one other useful but underutilized tool for delivering more value: a customized litigation budget. Of all the crucial documents a trial lawyer will create during the life of a complex dispute – such as a well-drafted complaint, a comprehensive motion for summary judgment or flawless jury instructions – a sound litigation budget is arguably one of the mos important. Outside counsel should view preparing a litigation budget not as a burden, but as an opportunity – an opportunity to collaborate with the client, to demonstrate a willingness to share risk, to minimize surprises and to maximize the chances bills will be paid without issue or delay. Moreover, a sound legal budget enhances communication and transparency regarding the ongoing progress of the matter, a goal shared by the client and the trial lawyer.

Litigation Budgeting: Thompson Hine's Standardized Approach

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

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

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

Our proprietary budgeting program is the product of

collaboration among trial lawyers, IT specialists and our Director of Legal Project Management. Its user-friendly interface includes a series of prompts, drop-down menus and suggested possibilities drawn from the collective experience of our entire litigation group. Similar to a tax preparation program, the budgeting software asks questions and prompts the attorney to consider various aspects of the litigation planning process. It allows the lawyer to adjust standard budget elements for maximum customization of the budget, while still drawing on the collective wisdom of the firm's past engagements. And it automatically performs all calculations, eliminating the potential for errors due to incorrect (or deleted!) spreadsheet formulas or manual miscalculations.

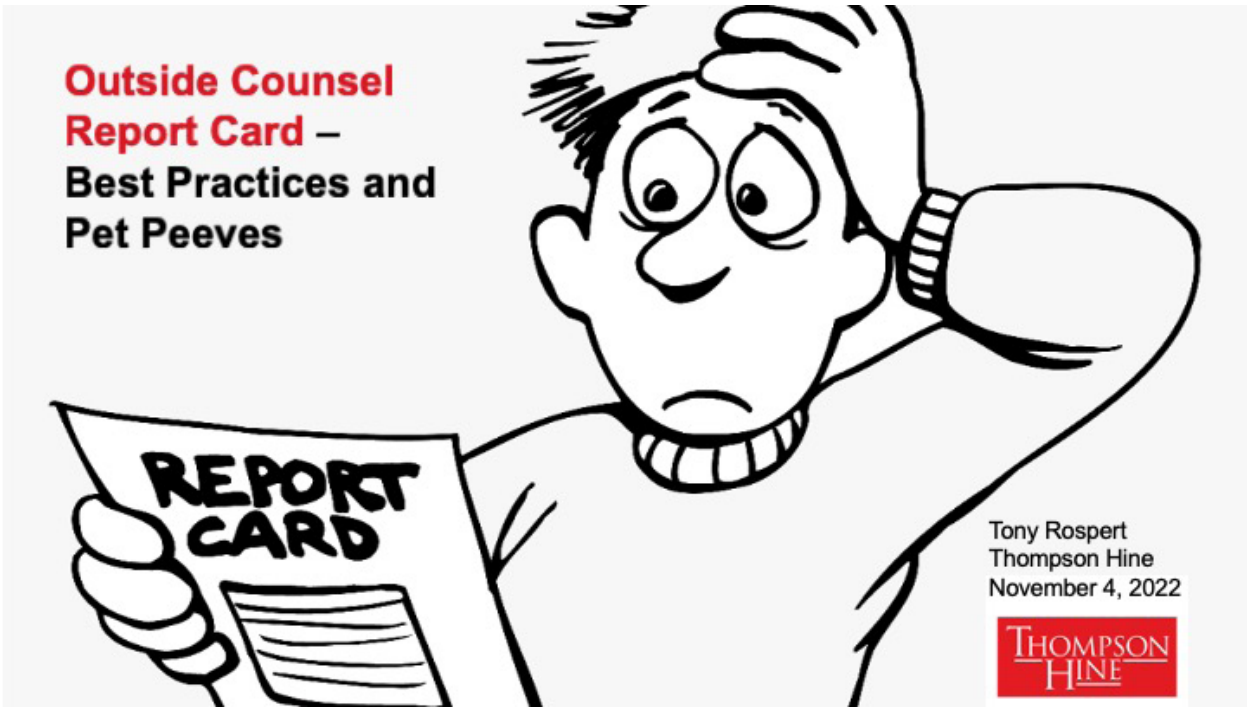
At its heart, the budgeting software prompts the lawyer to plan the anticipated work on the matter by reference to the standard ABA litigation task codes plus a proprietary set of firm-developed sub-task codes. Using high/low ranges to bracket the expected spend for each timekeeper and task, the program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

Tracking Performance

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

Takeaways

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



Agenda

- Brief Introductions
- Best Practices and Pet Peeves
  - Communication
  - Productivity and Staffing
  - Budgeting and Billing
  - Other Pet Peeves

Panelists

- Dee Dee Stephens-Broussard

LSPI
A Berkshire Hathaway Company

- Mike Paa

CUBIC

- Dan Crawford

Galway HOLDINGS

- William Fawcett

Allianz

3

Survey Instructions

4

Survey Question 1

- Exhibits good communication, responsiveness and clear project management/direction.

Survey Question 2

- Understands the business's goals related to the assigned litigation.

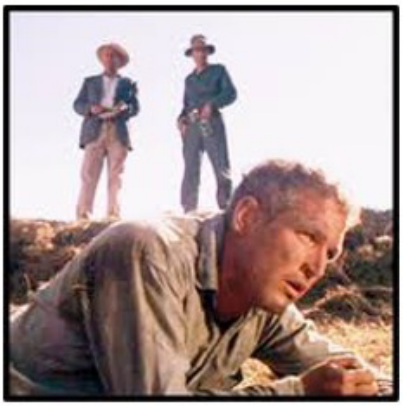
7

Survey Question 3

- Aggressively pursues strategies that achieve litigation goals and manage costs.

8

Communication



9

Communication Pet Peeves

- Failing to provide timely updates, letting the case languish or being unresponsive.
- "Sweeping issues under the rug. If there is a problem, tell me. If we need to adjust the team, tell me. If you need help, tell me."
- "[W]hen outside counsel fails to account for my involvement in the process. The best example is the dreaded 30+ page brief that is sent for my review 24-48 hours before it is due."

10

Survey Question 4

- Is generally responsive to emails, phone calls and information requests.

Communication: Unhappy Surprises

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

Survey Question 5

- Avoids litigation surprises with timely, effective communication.

13

Communication: Developing A Plan

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

14

Survey Question 6

- Provides clear directives and an outline of strategies.

Productivity and Staffing

Productivity and Staffing Pet Peeves

- Over-staffing, bad judgment weighing the risk against the reward of a particular action, training associates on a client's dime and billing extravagantly for doing easy work.
- Sending long emails with non-essential details. "Generally, I just want the answer … "
- Putting too many associates on a case and charging for "ridiculous items like research for things that are obvious and shouldn't require research."
- Outside counsel who "go off on a detour with their pet issues … and incur costs I did not authorize."

17

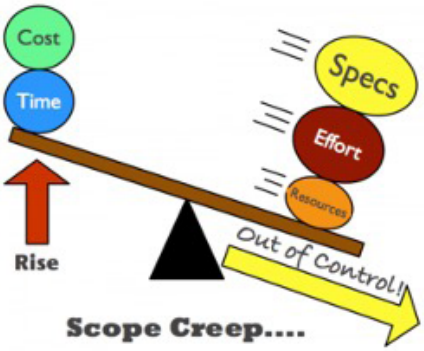
Survey Question 7

- Provides a reasonable staffing model for the size of the case.

18

Productivity and Staffing: Scope

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



19

Survey Question 8

- Proactively suggests litigation efficiencies and ensures the matter stays within scope by following a detailed plan.

20

Budgeting and Billing

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

Survey Question 9

- Provides timely and realistic budgets.

Budgeting and Billing Pet Peeves

- Poor billing and budgeting are the biggest frustration with outside law firms.
- Untimely invoices, ignoring clients' billing guidelines and going over budget without warning are the major complaints in this area.
- "It annoys me greatly when they up the bill with low-value items. If something doesn't actually have business value, it shouldn't be billed for."

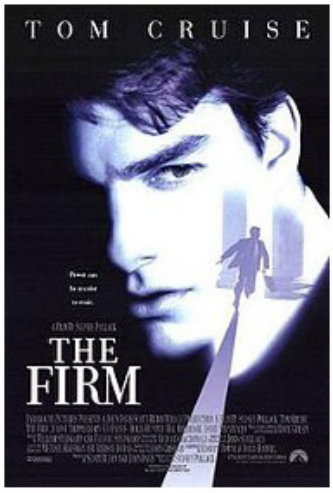
23

Survey Question 10

- Provides good communication and litigation management, avoiding unexpected large invoices for legal services.

24

Budgeting and Billing: Overbilling



25

Survey Question 11

- Provides responsible management of legal costs and expenses.

26

Survey Question 12

- Is willing to make changes to meet priorities and bring services in line with client needs.

Takeaways

- Invite your law firms to a discussion about ways to increase efficiency
- Identify your biggest pain point with outside counsel and hold a meeting to establish open communication on how to address it
- Require a detailed plan
- Require a budget
- Revisit your billing guidelines

29

216.566.5861
anthony.rospert@thompsonhine.com

Tony Rospert

Partner | Thompson Hine (Cleveland, OH)

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

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

Tony focuses his practice on complex business and corporate litigation involving financial services institutions, private equity firms, real estate development and management companies, commercial and contract disputes, indemnification issues, claims involving representations and warranties insurance (R&W insurance or RWI) and other types of transaction liability insurance, post-closing disputes in mergers and acquisitions, shareholder actions, business transactions, class actions, and directors and officers (D&O) litigation.

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

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

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

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

Education
- Vermont Law School, J.D., magna cum laude, senior editorial board, business manager, Vermont Law Review
- John Carroll University, B.A.

A River Runs Through It – Navigating Complex Multidistrict Environmental Litigation

Neil Westesen
Crowley Fleck (Helena, MT)

A River Runs Through It – Navigating Complex Multidistrict Environmental Litigation
Neil G. Westesen

On August 5, 2015, while investigating a collapsed gold mine in Southwestern Colorado, an EPA On Scene Coordinator and two EPA contractors triggered the release of over 3,000,000 gallons of mine impacted water from the Gold King Mine. The water scoured away a BLM owned waste pile, picked up metal laden sediment from Cement Creek, turned the creek bright orange, and then flowed into the Animas and San Juan rivers. The event gathered national and international media attention and sparked numerous congressional hearings, inspector general investigations, and eventually spawned complex multi-district litigation. My firm was retained to represent Sunnyside Gold Corporation (SGC), the owner of a nearby mine, and I basically spent the last five years working on the ensuing litigation. This paper will outline the underlying case, the roles of the various attorneys working on the case, and offer a few overall "big case" management suggestions.

Background
SGC acquired the Sunnyside Mine from the Standard Metals Company on November 19, 1985. The Sunnyside Mine is located approximately two miles from the Gold King Mine and the two mines are not connected. Standard Metals had operated the Sunnyside Mine since 1960, but they eventually went bankrupt. In 1985, the Sunnyside Mine was not commercially producing and was under a cease and desist order resulting from violations of its mining permit and two of its three water discharge permits. Following acquisition, SGC brought all discharge permits into compliance, re-designed the mining operation, and completed a substantial mine permit amendment in cooperation with Colorado regulatory agencies. On February 29, 1988, the Colorado Mined Land Reclamation Division awarded SGC the 1987 Mined Land Reclamation "Most Improved Site" Award. The Director wrote, "Our congratulations and appreciation for the outstanding job you have accomplished." SGC received a similar award in 1994 following mine closure.

SGC's original mine reclamation permit included the following requirement from its Colorado regulators: "Indefinite mine drainage treatment is not acceptable as final reclamation. Please devise an alternate reclamation plan." In September of 1986, the Colorado Mined Land Reclamation Division (MLRD) and SGC discussed conceptual plans to bulkhead the American Tunnel, which served as both drainage and access for the Sunnyside Mine, as part of ultimate mine closure and environmental remediation. In January of 1987, long-term plans for mine closure, including the use of bulkheads, were included in SGC's permit documents. SGC's permit application notes, "As discussed with the MLRD staff at the September 18, 1986 meeting, it is anticipated that, to alleviate the need for indefinite mine drainage treatment, a hydraulic seal will be installed in both the Terry and American Tunnels. The seal will act to prevent substantial releases of underground waters from the tunnels to the ground surface."

In August of 1991, SGC closed the Sunnyside Mine and shifted its activities to a purely reclamation and remediation focus. SGC and the State of Colorado agreed on a comprehensive watershed approach in which SGC would be released from all further reclamation obligations if SGC would install engineered concrete bulkheads to address mine drainage from the Sunnyside Mine and complete

numerous other reclamation projects in the region. Many of these projects were on property SGC never owned or operated. SGC retained experts to evaluate area geology and hydrology and to consider design options for bulkheading the interior workings of the Sunnyside Mine and the American Tunnel. The experts concluded that the bulkheads would serve to re-establish the pre-mining natural hydrology in the region and the State agreed.

Before installing the bulkheads, and cognizant of the possibility that bulkheading might lead to increased seeps, springs, and adit discharge as regional groundwater flows returned to their pre-mining natural pathways, SGC and the State of Colorado discussed how those restored flows would be handled. Initially, Colorado contended that any additional flows would require their own discharge permit and would be SGC's responsibility to treat. SGC disagreed and eventually filed suit to have a Court resolve the issue. SGC and Colorado ultimately reached a settlement and entered into a Consent Decree that a Colorado District Court approved on May 8, 1996. The parties clearly articulated the purpose of the 1996 Consent Decree:

> [T]o resolve this dispute, to allow SGC to proceed with final reclamation of the Sunnyside Mine, to provide for closure of the American and Terry Tunnels by hydraulic seals, to provide for mitigation of certain other historic mining conditions, to protect the waters of the State of Colorado, and to provide for the final termination of CDPS Permits No. CO-0027529 and CO-0036056, the parties agree to the terms and conditions of this Consent Decree.

The Consent Decree, including four separate amendments, required completion of various bulkheads and, by 2003, the collective bulkhead network had decreased the American Tunnel discharge from approximately 1,600 gpm to less than 100 gpm. The remaining American Tunnel discharge is near surface water unrelated to the Sunnyside Mine.

SGC's bulkheading conduct was reviewed and approved by not just the State of Colorado but also by EPA. An internal EPA memorandum at the time noted that with respect to the Sunnyside Mine, SGC "took over after an environmental disaster caused the original company to go bankrupt. Sunnyside did not make a profit at the mine and started shutdown procedures approximately 5 years ago." EPA's own independent expert concluded that bulkheading was the best option for the site. "Technically, the plan makes sense and has merit, and I encourage its implementation without further, long-term discussion."

After its internal review and expert evaluation, on April 5, 1996, EPA congratulated both SGC and the State of Colorado on the 1996 Consent Decree:

> The Environmental Protection Agency (EPA) commends both the State of Colorado and Sunnyside Gold Corporation (SGC) on your innovative approach to problems encountered in final closure of the Sunnyside Gold Mine. Further, the EPA is pleased that Colorado has chosen to use a watershed/trading approach as one step toward achieving the goals of improving water quality in the Animas River. As active members of the Animas River Stakeholders Group, EPA understands and supports the concepts of community based environmental protection.

Eventually, after the expenditure of millions of dollars in remediation costs, the installation of numerous bulkheads, and the completion of other cooperative projects designed to improve regional water quality, the State of Colorado agreed that the conditions for termination of the Court's jurisdiction relative to the 1996 Consent Decree had been met. SGC, with EPA's blessing, successfully completed the work required to remediate and obtain "final closure" of the Sunnyside Mine and considered its reclamation obligations satisfied. Things continued in roughly that fashion for the next dozen years, until August 5, 2015.

The Gold King Blowout

Throughout the early 2000's, EPA and the State of Colorado addressed various discrete water quality issues in the Animas River arising from well over 100 years of historic mining, including at the Gold King Mine. At some point, the Gold King Mine Level 7 adit collapsed and created the possibility of a blowout. In 2007, EPA acknowledged that "it is valuable to know if conditions at Gold King could cause a threat to human health and the environment via a blow-out and large addition of metals contaminated water

to Cement Creek." In 2009, EPA and the State investigated the Gold King Mine and attempted to install drainage pipes into the collapsed adit but failed.

In addition to work at the Gold King, EPA and the State undertook an investigation of the nearby Red and Bonita Mine. There, before digging into the similarly historic and collapsed adit, EPA asked the Bureau of Reclamation (BOR) to conduct an independent review of its plans to open the mine. The BOR warned EPA that there was potential for a blowout. To address this risk, EPA installed a well above the adit to drain the Red and Bonita before excavating into the surface. EPA also enlarged its treatment ponds to capture any potential adit discharge. EPA then successfully installed a bulkhead in the Red and Bonita Mine, similar to those SGC had installed years earlier.

In 2014, Colorado asked EPA to re-open the Gold King Level 7 Adit. EPA knew that a blowout at the Gold King Mine was possible and acknowledged as much in its June 25, 2014 Task Order, "[C]onditions may exist that could result in a blow-out of the blockages and cause a release of large volumes of contaminated mine waters and sediment from inside the mine, which contain concentrated heavy metals." EPA proposed to address this risk through "incremental de-watering and removal of such blockages to prevent blowouts." Specifically, the EPA-generated Task Order stated:

> Collapsed blockage material removal will be performed in a controlled manner in order to control the rate of release of water and allow for appropriate treatment and sludge management. This is to include the ability to pump water from behind the blockage and lower the water level in a controlled manner before the blockage is destabilized by removal of material.

In September of 2014, EPA and its contractors proceeded with the planned reopening work, but as they began excavating at Gold King, they noticed seepage near the drainage pipes Colorado and EPA had installed several years earlier. Concerned that there might be more water impounded behind the blocked adit than anticipated, they stopped work until additional preparations could be undertaken in 2015.

In May of 2015, EPA's subcontractor, Environmental Restoration, issued a task order that described the work to be done and the anticipated risks:

> The Gold King Mine near Silverton, Colorado is a historic gold mine at approximately 11,300' elevation. The mine includes a year-round discharge that is a significant contributor of manganese, copper, zinc and cadmium into the Cement Creek drainage of the Animas River watershed. The Gold King Mine has not had maintenance of the mine workings since 1991, and the workings have been inaccessible since 1995 when the mine portal collapsed. This condition has likely caused impounding of water behind the collapse. In addition, other collapses within the workings may have occurred creating additional water impounding conditions. Conditions may exist that could result in a blow-out of the blockages and cause a release of large volumes of contaminated mine waters and sediment from inside the mine, which contain concentrated heavy metals….It is proposed to re-open the Gold King Mine portal and workings to investigate the conditions to assess the on-going releases. This will require the incremental de-watering and removal of such blockages to prevent blowouts.

Ironically, the precise risk that EPA and its contractors warned about eventually came to pass.

EPA On-Scene Coordinator (OSC) Steve Way knew the project had significant engineering considerations and so planned on again consulting with the BOR and with an underground mine expert, Harrison Western, before undertaking any excavation. Unfortunately, Steve Way left for vacation and his replacement, Hays Griswold, took it upon himself to excavate directly into the face of the adit and to remove material holding back an unknown quantity of impounded water under pressure before that investigation could take place. The Blowout ensued.

A YouTube search of the Gold King Blowout brings up a now infamous video and the sad question, "What do we do now?" See https://www.youtube.com/watch?v=ZBlR05tDCbI.

One of the plaintiffs' expert witnesses in the ensuing litigation summarized the events of August 5, 2015 as follows:

> The disastrous release of contaminated mine waters and sediment containing concentrated heavy metals from inside the Gold King Mine on August 5, 2015, was utterly unnecessary. That it should have been allowed to happen was inexcusable. There was no sudden onslaught of natural forces, no unexpected failure of new or unfamiliar materials. The reasons for the disaster are to be found in the acts and omissions of those entrusted with protecting the safety, health, property, and welfare of the public against releases of toxic water and sediment from the Gold King Mine. Among those engaged upon the design and implementation of the actions taken at the Gold King Mine there was a continuing string of omissions, mistakes, erroneous assumptions, errors of judgement, avoidance of responsibility, failure of communication and sheer incompetence. In greater or less degree, the EPA itself, the designers, the contractors, even the labor engaged in the work, all took unreasonable and unjustified actions, and failed to take reasonable and justified actions. Error begat error, omission begat omission, and the events which led to the disaster moved with the inevitability of a Greek tragedy.

Following the Blowout and the ensuing public outcry, EPA identified itself and its contractors as the cause of the breach and seemingly accepted responsibility for any consequences that followed. The EPA administrator publicly apologized for the agency's conduct, saying "This is a huge tragedy. It's hard being on the other side of this. Typically, we respond to emergencies, we don't cause them." The Director of EPA's Preparedness Assessment and Emergency Response Program acknowledged that EPA was "responsible for this, and we are not running anywhere."

Gold King Litigation

When the deepest pocket in the world admits responsibility for causing an environmental disaster, it spawns litigation. The complicated nature of the ensuing litigation began with the varied mechanisms used by parties in different procedural positions. As a pre-requisite for the plaintiffs' tort claims against the federal government, they were required to file administrative claims under the Federal Tort Claims Act before an action could be initiated in District Court. In addition, New Mexico petitioned the United States Supreme Court for leave to file a complaint against Colorado under the Supreme Court's original jurisdiction alleging that Colorado had indirectly caused interstate pollution of the Animas River by failing to manage the abandoned mines in Southwestern Colorado. The Supreme Court declined to take the case.

After filing a $130,000,000 administrative claim, on May 23, 2016, the State of New Mexico filed Civil Action No. 16-CV-465 MCA/LF, United States District Court for the District of New Mexico, against the United States Environmental Protection Agency ("EPA"), SGC, Kinross Gold Corporation, Kinross Gold U.S.A., Inc., Environmental Restoration, LLC, and Weston Solutions, Inc. Similarly, after filing a $160,000,000 administrative claim, on August 16, 2016, the Navajo Nation filed Civil Action No. 16-CV-931 MCA/LF, United States District Court for the District of New Mexico filed against EPA, SGC, KGC, KGUSA, Environmental Restoration, LLC, and Weston Solutions, Inc.

Not to be outdone, the State of Utah, after filing a $1,900,000,000 dollar administrative claim, filed Civil Action No. 2:17-cv-00866-TS, United States District Court for the District of Utah, Central Division against Environmental Restoration, LLC, Harrison Western Corporation, KGC, KGUSA, SGC, Gold King Mines Corp, USA, EPA, Scott Pruitt and Weston Solutions, Inc.

In addition, on August 3, 2018, 278 individual members of the Navajo Nation filed Civil Action No. 1:18-cv-00744, United States District Court for the District of New Mexico, against the United States of America, the EPA, Environmental Restoration, LLC, KGC, KGUSA, SGC, Gold King Mines Corporation, Weston Solutions, Inc., Salem Minerals, Inc., and the San Juan Corporation.

All of these complaints, along with a separate action, McDaniel et al. v. United States of America, et al., along with any subsequently filed lawsuits arising out of the August 5, 2015 Gold King Blowout, were consolidated in the United States District Court for the District of New Mexico pursuant to an April 4,

2018 Transfer Order issued by the United States Panel on Multi-District Litigation as MDL Case No. 2824. Various parties sought or opposed the MDL approach. The MDL process involved the filing of briefs and then a unique "hearing" before the MDL panel in Atlanta in which various parties argued for and against consolidation and then were basically directed to different corners of a vast federal courthouse to discuss the procedures that would apply to the case. All of the cases were eventually consolidated before the District Court judge in New Mexico for pretrial proceedings, with an understanding that the Utah case would be returned to Utah for any actual trial. Eventually, even a settlement of Colorado's claims arising out of the Blowout and the ensuing Superfund listing were resolved by the New Mexico judge.

In addition to the multi-district litigation, after the Blowout, and in response to the public outcry to "do something" to address the situation, EPA designated a 100,000 acre area in Southwestern Colorado on the National Priority List as a Superfund site. The site included the Gold King Mine, the Sunnyside Mine, and dozens of other abandoned mines, and extended to wherever pollution from those sources came to rest. SGC opposed the listing, which involved filing an original proceeding in the DC Circuit Court of Appeals. SGC argued that EPA was in effect using the NPL process to get SGC to pay to clean up the mess EPA had caused and to gain an unfair advantage in the litigation the Blowout had spawned. The DC Circuit deferred to the agency and concluded that since the "co-mingled releases" in the area "scored" sufficiently high under the Hazard Ranking System, the listing could go forward, including the Sunnyside Mine, even though the EPA never actually scored any of SGC's properties.

The United States ultimately filed a crossclaim against SGC seeking to recover not just the costs the government had incurred in responding to the Blowout, but also seeking to impose joint and several liability for all of the costs to clean up the entire 100,000 acre site. In response, SGC filed its own CERCLA cost recovery and contribution counter-crossclaim against the federal government since the United States owns 75 percent of the land in San Juan County, including the land on which one of the American Tunnel bulkheads was located, the federal government is the largest potentially responsible party in the newly created Bonita Peak Mining District Superfund site, and the federal government caused the Blowout.

The litigation involved complicated and interconnected issues. An abandoned mine Superfund site generates complicated litigation all by itself. The Gold King litigation involved those typical CERCLA allegations, but also negligence, gross negligence, trespass, nuisance, and demands for compensatory and punitive damages. The government's waiver of sovereign immunity under the Federal Tort Claims Act as well as the applicability of the discretionary function exception to that immunity waiver was extensively litigated. The case has involved owner and operator status arising out of unpatented mining claims and the government's PRP status for similar ownership. It has addressed the EPA and its contractors' status as PRPs under CERCLA even while performing environmental remediation work. It has involved questions of Indian law, including parens patriae standing, and the possibility of tribal court actions and potential CERCLA preemption. It has involved the design and construction of bulkheads that were in place and working for well over a decade before the Gold King Blowout. It has involved complicated insurance coverage issues. It has involved the history of a company that operated the Sunnyside Mine over 20 years ago, as well as that company's corporate parents and grandparents, and extensive efforts to pierce those corporate veils. And it has put the United States in the odd position of being on both sides of the verdict form in a major lawsuit. They have been both a defendant responding to allegations that they caused the Gold King Blowout and its resulting damages and a plaintiff seeking to have SGC and others pay to clean up the mess that EPA created.

The cases have been litigated for the last five years and that process has basically been all consuming. Document management involved the production of in excess of 10 million pages of materials. The days of a couple of banker's boxes in the corner of a partner's office with some sticky notes on those documents that seemed most important are long past. Document management and production involved extensive use of technology assisted

review (TAR) and predictive coding. The parties agreed not to specify which document might be responsive to a particular discovery request since each party was using their own litigation support software. Instead, documents were produced in bulk and then electronically searched followed by individual review and coding to fine tune the TAR search results. A comprehensive chronology was created and periodically updated. We had lawyers working on the matter in five or six different firm offices so it was critical that any lawyer anywhere had access to all of the documents.

We were also reviewing additional millions of pages of documents from the client to find documents potentially responsive to the issues in the litigation. As noted, SGC did not acquire the Sunnyside Mine until 1985. Nevertheless, as the litigation expanded beyond just the causes and effects of the 2015 Blowout to include the entire legacy of historic mining in the region, the universe of potentially relevant documents also expanded. During the litigation, the former owner of the Gold King mine died and his boxes and boxes of accumulated "papers" stored in an abandoned railroad car were also made available for inspection and copying in Silverton.

To make things even more unusual, the parties finally reached the deposition phase of the litigation just as the COVID-19 crisis hit. After various short stays to assess the impact of the shutdown, the Court ordered the parties to continue with discovery, albeit remotely. The result was well over 100 depositions all taken over Zoom. In addition, law firms across the country were closing and everyone was working remotely. Internet speeds needed to be fast enough not just for data processing, but for all day video depositions and the review of millions of pages of documents. The parties agreed on a national court reporting firm, Magna Legal Services, that capably handled every deposition. All parties attended each deposition remotely and stipulated that the process would result in an admissible transcript, even though the witness, the court reporter, and all counsel, sometimes as many as twenty or thirty different lawyers, were attending from different parts of the country.

Given the number of parties, and the complexity of the issues, there were a lot of pleadings filed. The EPA Region 8 administrator publicly stated that the government had over "44 battle tested lawyers" working on the case. That number eventually grew substantially with various government and private attorneys coming and going over the life of the litigation. Each private party had teams of lawyers as well. The court docket currently stands at over 1,750 separate filings. Keeping track of who filed what and what admissions had been made in different pleadings was its own ongoing project.

Faced with the possibility of years of continued litigation and exposure to basically uncapped CERCLA joint and several liability, SGC ultimately negotiated various settlements, all of which are reflected in public consent decrees. Following extensive mediation before retired federal magistrate Jay Gandhi from California, again all conducted over Zoom, SGC settled with the State of New Mexico for $11,000,000, with the Navajo Nation for $10,000,000, with the State of Utah for $5,500,000, and with the State of Colorado for any Natural Resource Damages for $1,600,000. In addition, last fall a settlement was reached with the United States to resolve all allegations between the SGC and the federal government, with SGC agreeing to pay $45,000,000 and the government agreeing to pay its own $45,000,000 toward environmental remediation in the BPMD. That settlement was lodged in a consent decree the federal Court approved last spring and the funds were paid this summer.

In addition, New Mexico and the Navajo Nation recently settled their respective claims against the federal government, with New Mexico agreeing to accept $32,000,000 for its damages following the Blowout and the Navajo Nation agreeing to accept $31,000,000 for its damages.

Each settlement was memorialized in a consent decree to provide contribution protection from other PRP claims in the future. That process involved extensive public notice, the gathering and assessment of public comments, and the presentation of the settlement and comments to the federal judge for review and eventual blessing of the settlements reached.

Claims between the sovereigns and the EPA contractors are still pending as well as claims involving the individual Navajo Nation members. A phase one trial on liability has been set for some time in 2023. A second phase to address damages followed by a third phase to decide who pays what share of any damages awarded will be scheduled several years into the future. In addition, the Utah claims have been sent back to Utah for trial.

The Bonita Peak Mining District arose from the Gold King Blowout, but it is also a typical legacy mine Superfund Site. EPA has spent almost $100,000,000 in the area since the Blowout. They have completed various interim remedial actions, reached settlements with other PRP's, held numerous public meetings, engaged in different forms of community outreach, and they remain committed to ongoing investigation and cleanup for the next several years. SGC and EPA entered into an Administrative Order on Consent after the 2015 Blowout to investigate whether some historic tailings impoundments might be contributing metals loading to the Animas River. That effort alone continued throughout the course of the litigation and involved dozens of wells, thousands of samples, numerous experts, and the expenditure of millions of dollars. Separate counsel were involved from our firm to manage the CERCLA process which was operating on a parallel track with the litigation. Following the settlements, the EPA continues with its remedial investigation and the entire 100,000-acre Superfund cleanup process is likely to last for decades.

Challenges with "Big Case" Litigation

This litigation was obviously complex and involved several moving parts. There were lots of different roles for lots of different lawyers. Junior counsel took ownership of the document management and production process. Knowing and applying TAR and then being able to find and produce the critical needle out of a 10,000,000 page haystack was a project on its own. The case involved dozens of experts and fact witnesses and managing those relationships was its own project. Having a staff person dedicated to making sure the hundreds of pleadings and filings were organized in a clear and easy to access format was critical. Over the life of a matter like this, taking the time to implement a system on the front end to keep track of who said what when and where and how to quickly access those pleadings paid dividends as the case went on. The case involved numerous distinct procedural rules. At different points in the litigation, there were different rules of procedure to follow, including those for the District of New Mexico, the District of Utah, the District of Colorado, the Multidistrict Litigation Panel, the D.C. Circuit, the Tenth Circuit, and procedural quirks specific to the Federal Tort Claims Act and CERCLA, depending on the specific claim being addressed.

There are so many moving parts and people with litigation like this that it becomes important to be extra vigilant about staying connected and over-communicating. Our firm would have biweekly calls with the core litigation team just to make sure we all knew what other lawyers were doing and that no balls were being dropped. We had a running "task list" where we could keep track of deadlines and long-term objectives. It was important to "over-communicate" because the chances of missing something were magnified by the scale of the litigation and the stakes involved.

Document management was obviously a challenge. Besides just the scale of the document production, the way in which documents were produced presented its own set of difficulties. All parties engaged in "rolling production," producing responsive documents as they were acquired and ready to produce. Given COVID-19, and especially given the scale of production, no one could just say, "The documents are in a warehouse. Come look at them and tell me what you want copied." Instead, all documents were scanned and uploaded to a common Department of Justice hosted website. Each party would then download whatever was produced and load the material into their particular litigation document management software. In the case of the federal government, however, the "rolling production" lasted for years and millions of pages of documents were produced well after the time for responding to discovery requests had passed. To be fair, the government was gathering documents from hundreds of witnesses in numerous government offices over decades of mine remediation activity.

Sticking to a theme was very important. We worked hard to develop a theme and then to tell that story

in a consistent fashion. Our theme was that SGC was a responsible mining company. We did not file for bankruptcy and walk away. We did not shirk any environmental requirements. We adhered to our permits and met our obligations. We improved water quality. And, most importantly, we did not cause the Gold King Blowout. That story and those facts were repeated throughout the litigation.

The United States was in a much more nuanced position. They could not just be the "good guys" riding in to save the day and clean up the legacy of historic mining. They had a role in the Superfund site as a PRP and caused the Blowout. That conflict of interest—being both a PRP and the agency in charge of administering the site they created following the disaster they caused—was difficult to manage and ultimately influenced the settlements reached.

Any "big" lawsuit is still just a lawsuit. There are claims asserted, those claims have elements, and those elements must be proven. Defense counsel's obligation is to assess the claims and look for incremental victories. There were a couple of examples of that approach in the Gold King litigation. As noted, there were initially 278 individual Navajo plaintiffs. Additional plaintiffs attempted to sign on to the litigation after the statute of limitations had run. We opposed that effort and the Court granted our motion. The universe of claimants was not going to get any bigger. Individual questionnaires were served on every plaintiff in an effort to avoid having to depose all 278 plaintiffs. Many individuals failed to participate in that process. Several had apparently signed up as plaintiffs without clearly understanding what they were signing up for. Those plaintiffs eventually had their claims dismissed, resulting in only 200 individuals with ongoing claims remaining. We then challenged personal jurisdiction for those claims in New Mexico and the Court eventually found jurisdiction lacking. In addition, we argued that the claims against SGC really depended on the design and construction of the concrete bulkheads that were installed pursuant to the 1996 Consent Decree with the State of Colorado. Claims for damages arising out of the design and construction of improvements to real property are eventually barred by a statute of repose which the Court found. Had summary judgment not been granted, attempting any type of settlement with this volume of claimants, all with different and discrete alleged damages and claims, and not part of a certified class action, would have posed its own challenge—a challenge the parties remaining in the litigation are still dealing with today. In addition, the New Mexico court concluded that under the Clean Water Act, the law of the "source state," in this case Colorado, controlled. Colorado has abolished joint and several liability so that finding was important to the tort claims. In addition, Colorado has only a two-year statute of limitations for tort claims, while New Mexico's statute is three years. If the statute of limitations were found substantive rather than procedural, all of the individual claims would be time barred. The federal district court in New Mexico applied New Mexico's longer statute and allowed the claims to proceed, but he certified the question to the Tenth Circuit of Appeals. SGC sought and obtained leave to file an amicus brief in support of the position that Colorado's statute ought to apply. Oral argument was heard in January of 2021, and the 10th Circuit ultimately concluded that Colorado's statute controlled, effectively ending the individual Plaintiff's tort claims.

With respect to the United States' claims, SGC filed its own defensive counter-crossclaims so the government would have something at risk and be held accountable for causing the Gold King spill. We pointed out the unique conflict of interest posed by the facts in the case where the government was administering a Superfund Site where it was also the primary PRP. At one point, EPA issued a Unilateral Administrative Order to SGC requiring SGC to conduct an investigation to basically prove that the Sunnyside Mine and the Gold King Mine were hydrologically connected—a finding of clear relevance to the Blowout litigation but of questionable relevance to any environmental cleanup. Even with potential penalties of thousands of dollars per day, SGC ultimately refused to comply with the order. SGC also filed motions for partial summary judgment based on the passage of time since the 1996 Consent Decree with no CERCLA claim being pursued and the federally permitted release defense available under CERCLA. Those motions were not ruled upon before the case was settled, but they allowed us, and presumably the mediator, to argue that there was a chance the United States would recovery nothing.

Finally, the discovery process had consequences beyond just the documents that were produced. It gave rise to a serious spoliation problem for the federal government. Despite the existence of a litigation hold, EPA wiped or lost the data on the cell phones and iPads of both Hays Griswold and Steve Way, the two key players in the Blowout. EPA allegedly attempted to create a backup for one of the devices, but the password generated to retrieve that information, while purportedly being so easy to remember that no one would ever forget it, was inexplicably forgotten. Both the Sovereign Plaintiffs and SGC sought sanctions for EPA's conduct, and the Court granted those motions on August 6, 2021, finding: (1) "spoliation sanctions are proper;" (2) "EPA failed to take reasonable steps to preserve Mr. Griswold and Mr. Ways' ESI;" and (3) "[T]he Sovereign Plaintiffs and Sunnyside have been prejudiced by the destruction of the ESI." Evidence of the government's spoliation would have been introduced at trial and there was a chance that the evidence lost would have given rise to an adverse inference against the government. SGC would have argued that EPA caused the Blowout and then spoliated the evidence conceding as much. Those facts no doubt influenced the settlement discussions and ultimate resolution.

Conclusion

Litigating a truly "big" environmental case can be overwhelming. But, like every journey beginning with a single step, the "big" case can still be broken down into manageable pieces. The team gets bigger, the tasks get more complicated, and the stakes are higher, but the lessons of developing a theme, telling your story, and looking for incremental victories to eventually produce a settlement or a trial with manageable exposure are the same.

A River Runs Through It- Lessons Learned Litigating a "Big" Environmental Case

CROWLEY | FLECK ATTORNEYS

Sunnyside Gold Corporation & Gold King

- The Sunnyside Mine is near Silverton, Colorado.
- Naturally mineralized and has been for millions of years.
- 1,500 mines, 50 mill sites, 8 smelters, and 35 aerial trams.

Sunnyside Gold Corporation

- Formed in 1985
- Acquired the Sunnyside Mine out of bankruptcy.
- Brought the mine back into environmental compliance.
- Mined from 1986 to 1991.
- Never profitable.
- In reclamation ever since.

SGC's Reclamation Approach

- Reclaim and restore the Sunnyside Basin pursuant to regulations, permits, and a 1996 Consent Decree with the State of Colorado.
- Restore the natural hydrogeology with a series of engineered concrete bulkheads and remediate non-SGC owned sites.
- Basin wide approach to achieving water quality goals.

Engineered Concrete Bulkheads

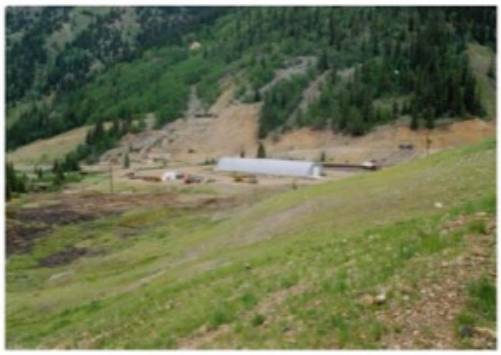
Before & After

Sunnyside Basin, 1988 (before)

Sunnyside Basin, 1996 (after) – SGC placed 240,000 cubic yards of clean fill to cover the Lake Emma subsidence area and to create positive drainage, contoured the area, and seeded.

Before & After

American Tunnel, 1995 (before)



American Tunnel, 1998, (after) – SGC removed 80,000 tons of mostly historic mine waste and tails.

Before & After

Mayflower Tailings pond 1, 1992 (before)

Mayflower Tailings pond 1, 1995 (after) – SGC moved the impoundment toe back from Boulder Creek and the highway to minimize the potential for erosion and migration. SGC flattened the side slopes to increase stability and potential for re-vegetation, regraded to promote drainage, capped with subsoil, and seeded.

Before & After

Lead Carbonate Tailings, 1991 (before)

Lead Carbonate Tailings, 1994 (after) – SGC relocated 27,000 cubic yards of tailings to Mayflower Impoundment #4, regraded, neutralized, and reseeded the area.

Reclamation Summary

- SGC spent $30 million on reclamation and remediation.
- Received the 1987 and 1994 Colorado Mined Land Reclamation Award.
- SGC fulfilled all requirements, complied with reclamation obligations, and a judicially approved Consent Decree.

Status in 2015

- SGC bulkheads in place, functioning as designed, for years.
- State of Colorado and EPA were investigating installing additional bulkheads, including at the Gold King Mine.
- Bulkheads improve water quality by submerging exposed metals in water, reducing acid rock drainage.

Gold King Blowout

- EPA and its contractors excavate into the Gold King Mine.
- Release 3,000,000 gallons of impounded water.
- That water turns the Animas River bright orange.
- Slug of orange water travels downstream over several days, garnering national and international media attention.

Consequences of the Blowout

- Water quality quickly returned to normal.
- NMED reported no long term damage to the environment.
- Utah environmental department reported the same.
- Significant economic, spiritual, and cultural impacts alleged.
- Massive public relations nightmare for EPA.

EPA Admits Responsibility

- Gina McCarthy, EPA administrator, states, "This is a tragic and unfortunate incident, and EPA is taking responsibility to ensure that it is cleaned up."
- EPA website still reads, "EPA takes responsibility for the Gold King Mine release…."

Litigation

- Deepest pocket in the world admits responsibility = litigation.
- New Mexico sought $130,000,000.
- Navajo Tribe sought $160,000,000.
- 300 Navajo Tribal members sought over $70,000,000.
- Utah sought more than $1,900,000,000.
- "Responsible" doesn't mean "liable."

EPA Role

- EPA caused the Blowout.
- EPA then listed the 100,000 acre "Bonita Peak Mining District" as a Superfund site.
- SGC unsuccessfully challenged that listing in the DC Circuit.
- EPA acts as Lead Agency to administer this new site it created.
- EPA is a defendant in the litigation it spawned.
- The government is also a PRP under CERCLA.

Theory Against SGC

- State approved and court blessed 1996 Consent Decree work "created the conditions" by which the 2015 Blowout was made possible and subjected SGC to jurisdiction in downstream States.

Exposure

- Tort and CERCLA claims from Sovereign and private plaintiffs for the Blowout.
- As a PRP, joint and several liability for the entire Superfund site, including the $75,000,000 EPA spent after the Blowout that EPA caused, and the hundreds of millions EPA would spend in the future.

LOTS of Work for LOTS of Lawyers

- EPA had “44 battle tested lawyers” ready to litigate. More were added all the time.
- Every party had multiple lawyers and numerous experts.
- The litigation has gone on for the last seven years.
- The process alone has cost the parties tens of millions of dollars.

Litigation

- Consolidated through the Multi-District Litigation process.
- Over 1,800 filings to date.
- Over 100 depositions taken by Zoom.
- Over 30 expert witnesses.
- Over 10,000,000 pages of material produced.
- EPA has spent over $100,000,000 in the area.

Lessons Learned

- Over-communicate.
- Regular team meetings, updates, task lists, reports.
- Find a good document management tool. Too much for any one brain to remember.
- Find a theme and tell your story. Over and over and over again.

More Lessons

- Look for incremental victories.
  - First cap then reduce the exposure.
  - Analyze each claim and take one step at a time.
- Things like choice of law have a big impact—SOL question.
- Create risk for all sides if possible—counterclaim?
- Be willing to make hard decisions—UAO example.

Discovery Can Drive Outcomes

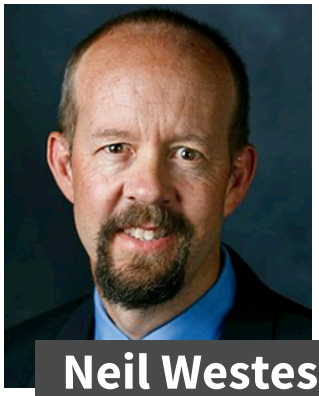
- Witnesses "forget." Documents don't.
- Government "lost" the most important electronic devices.
- Restored to factory settings.
- Password "forgotten."
- Spoliation sanctions imposed.

Settlements

- Settled with New Mexico for $11 million, Navajo for $10 million, Utah for $ 5.5 million.
- Won against the private Plaintiffs—statute of repose, limitations, jurisdiction.
- Settled with EPA/DOJ and the State of Colorado for $45 million. Government paid its own $45 million.
- Government paid New Mexico and the Navajo Nation $63 million.

Conclusion

- The “big case” is still just a case.
- Claims with elements and witnesses with memories and documents to review.
- Law to be found and applied and motions to be filed.
- Manage the team and the process so no balls get dropped.
- Create risk, then reach reasonable resolution if possible.



406.457.2016
nwestesen@crowleyfleck.com

Neil Westesen

Partner | Crowley Fleck (Helena, MT)

Neil Westesen is a Litigation Partner in the firm's Helena office. He was the firm's Managing Partner from 2011 through 2016 and served on the Firm's three person Executive Committee for several years before that. Neil's litigation practice includes significant environmental litigation arising out of the 2015 Gold King Blowout in Colorado. His construction practice involves the representation of architects, engineers, owners, contractors, and sureties. In addition, he has a significant Indian law practice representing industry clients in negotiations with and litigation against Indian tribes. He has represented several attorneys in legal malpractice defense matters. He has served as a mediator in various construction disputes. He has tried cases in Montana and Wyoming and has an extensive appellate practice.

Practice Areas
- Commercial Litigation
- Construction Law
- Energy & Minerals Projects & Transactions
- Indian Law
- Mining – Hard Rock, Coal and Industrial Minerals
- Natural Resources and Environmental Law

Representtaive Matters
- Sunnyside Gold Corporation
- Burlington Northern Santa Fe Railroad Corporation
- Intrinsik Architecture

Presentations and Publications
- Neil has authored or co-authored numerous papers on Environmental law, Indian law, and Construction law and spoken to various groups on those topics. A complete list of publications and presentations is available on request.

Honors and Awards
- Member, American Law Institute
- "AV" rating from Martindale Hubbell
- Best Lawyers in America for Construction Law, Litigation – Construction, and Native American Law
- Best Lawyers – Lawyer of the Year 2023 – Construction
- Mountain States Super Lawyer for Construction Litigation, Native American Law, and Environmental Litigation.
- Rocky Mountain Mineral Law Foundation Trustee at Large, (2011-2014)
- Rocky Mountain Mineral Law Foundation Board of Directors (2017-2019)
- Rocky Mountain Mineral Law Foundation Secretary (2020-2021)

Education
- 1991 – J.D. with Highest Honors, University of Colorado, Order of the Coif, ranked first in class.
- 1988 – B.A. with Highest Honors, University of Montana

The Inherently Harassing Nature of Apex Depositions

Haley Cox
Lightfoot Franklin & White (Birmingham, AL)

The Inherently Harassing Nature of Apex Depositions
Rachel Lary (Lightfoot Franklin & White) and C. Bradford Marsh (Swift Currie)

A deposition is a discovery tool that helps us uncover the facts and truth to defend a case. It is an important tool, but like all discovery tools, it can be abused. That is especially true when it is used to depose a high-ranking official of a corporation who has no personal knowledge of the underlying facts of a case. The intended effect is not to discover the truth, but to harass. Courts have recognized the inherently harassing nature of depositions of high-ranking officials who have no personal knowledge. To combat the harassment, some (but not all) courts have adopted the apex doctrine.

The apex doctrine protects top corporate executives from the needless time and expense of depositions when they do not have personal knowledge of the facts of the case and the information can be obtained through less intrusive means. The doctrine's significance is particularly relevant to large corporations where a CEO's responsibilities require her to spend most of her time overseeing macro-level business affairs, not litigation. Consequently, many plaintiffs view this as an opportunity to put pressure on the corporation to reach favorable litigation outcomes. In doing so, they argue that one deposition, for a limited period of time, in the city where the corporation is headquartered, is not an undue burden. Yet, if depositions of high-ranking officials are allowed despite having no personal knowledge, then officials become subject to innumerable depositions spanning multiple forums and involving complex, fact-specific issues. They no longer have the time to run their companies. The aggregate burden is the undue burden regardless of the temporal and geographical limits placed on a single deposition.

The doctrine's rationale is rooted in pragmatism. While its critics suggest that the apex doctrine facilitates corporate secrecy; it is designed to protect corporate executives from repetitive, time-consuming depositions regarding matters of which they have no personal knowledge of or direct involvement with. It is a practical and flexible doctrine that ensures, on the one hand, that high-ranking officials—who are uncommonly susceptible to discovery practices that are intended principally to harass or embarrass and that are uniquely burdensome in the aggregate—are not denied the protections guaranteed by the rules of civil procedure to all deponents, and on the other hand, that even the highest-ranking official can be compelled to give a deposition when there is a good reason for it.

While many federal and state courts have formally adopted the apex doctrine, there are several jurisdictions that either reject its application or have not yet considered it. Despite this lack of uniformity, a recent decision by the Georgia Supreme Court demonstrates how courts can apply the apex doctrine even in jurisdictions that have not formally adopted it.

This article will examine the apex doctrine in light of the Georgia Supreme Court's recent decision in Buchanan v. General Motors LLC and discuss steps you can take to protect your CEO, regardless of whether your litigation forum recognizes the doctrine.

The Apex Doctrine: Overview

At its core, the apex doctrine recognizes that "high

level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts." In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., No. 4:08-MD-2004 (CDL), 2009 WL 4730321, *1 (M.D. Ga. Dec. 1, 2009). Thus, while state and federal courts vary on the precise articulation of the rule, they share a common regard for its purpose.

The majority of apex doctrine precedent comes from federal district courts, which is derived, in part, from Rule 26 of the Federal Rules of Civil Procedure, which states: "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C). The majority of federal district courts additionally agree on the factors that make up the apex doctrine: (1) whether the deponent is a sufficiently high-ranking executive considering her role and responsibilities in the organization; (2) the extent to which the facts sought to be discovered in the deposition are properly discoverable; (3) whether the executive has unique personal knowledge of relevant facts; and (4) whether there are alternative means, including written discovery or depositions of other witnesses by which the same facts could be discovered.

Federal district courts in five circuits have addressed the apex doctrine in the corporate context. Of those five circuits, federal courts in four have decisions favoring the doctrine.[1] Only the Sixth Circuit has rejected the apex doctrine, finding that the apex doctrine allows the court to improperly assume the depositions of a corporate officer would be unduly burdensome without offering proof of the undue burden. Serrano v. Cintas Corp., 699 F.3d 884, 902 (6th Cir. 2012).

Federal courts further diverge with respect to the party who bears the burden of proof. Some federal courts take the position that "the party seeking to compel the deposition of a high-ranking executive… has the burden of showing that the target's deposition is necessary." Degenhart v. Arthur State Bank, No. CV411-041, 2011 WL 3651312, *1 (S.D. Ga. Aug. 8, 2011). Other federal courts that apply the apex doctrine adhere to the general rule "that a party that seeks to avoid discovery in general bears the burden of showing that good cause exists to prevent the discovery." Scott v. Chipotle Mexican Grill, Inc., 306 F.R.D. 120, 122 (S.D.N.Y. 2015). Finally, a third contingent of federal courts place the initial burden on the deposition-seeking party to show that the high-ranking executive possesses "unique personal knowledge" of the issues involved in the litigation. Naylor Farms, Inc. v. Anadarko OGC Co., No. 11-cv-01528-REB-KLM, 2011 WL 2535067, at *2 (D. Colo. June 27, 2011).

At the state level, courts have been slower to adopt and apply the apex doctrine. Currently, five states have formally adopted some formulation of the doctrine.[2] The first court to apply the doctrine in the corporate context, the California Court of Appeals, succinctly explained that "[i]t would be unreasonable to permit a plaintiff to begin discovery by deposing, for instance, the [CEO] of a major automobile manufacturer when suing over a design flaw in a brake shoe." Liberty Mutual Ins. Co. v. Superior Court, 10 Cal. App. 4th 1282 (Cal. Ct. App. 1992). Over the next two decades, state courts gradually began to implement the doctrine. In 2021, the Supreme Court of Florida issued an opinion that amended the Florida Rules of Civil Procedure in order to formally adopt a burden-shifting variation of the apex doctrine in cases involving high-level government and corporate officers. See In re Amendment to Fla. R. Civ. P. 1.280, 324 So. 3d 459 (Fla. 2021).

Buchanan v. General Motors LLC

In 2022, the Georgia Supreme Court considered whether the apex doctrine was an appropriate

1 District courts in the Fifth, Seventh, Tenth, and Eleventh Circuits have issued favorable decisions regarding the apex doctrine. See Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); Patterson v. Avery Dennison Corp., 281 F.3d 676 (7th Cir. 2002) (acknowledging that there is a higher likelihood of harassment in apex depositions); Thomas v. IBM, 48 F.3d 478 (10th Cir. 1995) (applying the apex factors to find that the trial court did it abuse its discretion issuing protective order for chairman of IBM board); in re U.S., 985 F.2d 510 (11th Cir. 1993) (applying the burden-shifting framework in the context of a government apex case).

2 State courts in Michigan, Florida, Texas, California, and West Virginia have formally adopted the apex doctrine. See State ex rel. Mass. Mutual Life Ins. Co. v. Sanders, 724 S.E.2d 353 (W.Va. 2012) (holding that deposition-seeking party must first show that the corporate official has unique knowledge); Liberty Mutual Ins. Co. v. Superior Court, 10 Cal. App. 4th 1282 (Cal. Ct. App. 1992) Alberto v. Toyota Motor Corp., 289 Mich. App. 328 (Mich. Ct. App. 2010) (holding that apex doctrine in the corporate context was consistent with the state's broad discovery policy); Crown Central Petroleum Corp. v. Garcia, 904 S.W.2d 125 (Tex. 1995) (adopting the apex doctrine and burden-shifting framework in the corporate context); in re Amendment to Fla. R. Civ. P. 1.280, 324 So. 3d 459, (Fla. 2021).

framework for courts to determine whether "good cause exists to forbid or limit the deposition of a high-ranking corporate executive." Buchanan v. Gen. Motors LLC, No. S21G1147, 2022 WL 1750716 (Ga. St. Ct. June 1, 2022), currently pending in the State Court of Cobb County, Georgia.

In Buchanan, the plaintiff alleges that a defect in the vehicle's electronic stability control ("ESC") system prevented the ESC from activating during an accident, which resulted in the death of the decedent. Plaintiff sought the deposition of GM LLC's CEO, Mary Barra, despite the fact that she was not involved in the design of the ESC system of the subject vehicle, or any other relevant component part. The plaintiff argued that her deposition was relevant because she made public statements and testified before Congress about GM's commitment to safety.

Rule 26 of Georgia Civil Practice Act that governs the scope of discovery is broad. It allows discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." O.C.G.A. § 9-11-26. The rule further provides that for "good cause shown" the court "may" protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." See id. GM LLC filed a protective order to prevent the deposition of Ms. Barra arguing that there was good cause for the trial court to bar the deposition based on Ms. Barra's lack of personal or direct knowledge of the relevant design issues and the fact that plaintiff could obtain the relevant information through less intrusive means. In essence, GM LLC argued that the trial court should apply the apex doctrine to bar Ms. Barra's deposition even though the Georgia Supreme Court had not officially adopted the apex doctrine. GM LLC supported its motion with an affidavit from Ms. Barra citing both her lack of direct knowledge or involvement with the design, development, or manufacture of the component parts at issue.

The trial court denied GM LLC's motion for a protective order finding that Georgia had not adopted the apex doctrine and finding there was no "other framework that imposes presumptive hurdles to seeking discovery (or deposition testimony) from certain corporate individuals." The trial court, rather, applied the broad relevancy standard to find that deposing Ms. Barra was a "reasonably calculated attempt to discover evidence that might be admissible in a trial of this action." The trial court granted a certificate of immediate review, which allowed GM LLC to appeal to the Georgia Court of Appeals.

The Court of Appeals affirmed the trial court's order, finding that while a trial court "may consider a myriad of factors to determine whether GM showed good cause to protect Barra from annoyance…" it does not have to. It rejected any application of the apex doctrine (or its factors) reasoning that the application was "inconsistent with Georgia's discovery provisions that require a liberal construction in favor of supplying a party with facts."

GM LLC then petitioned to the Georgia Supreme Court for certiorari. The Court granted the petition noting that it was "particularly concerned with the following issue or issue: What factors should be considered by a trial court in ruling on a motion for protective order under OCGA 9-11-26(c) that seeks to prevent the deposition of a high-ranking officer and what is the appropriate burden of proof as to those factors?"

In its brief, GM LLC cited an extensive body of state and federal case law supporting the four "apex factors" that courts should consider when determining whether good cause exists to bar the deposition of a high-ranking official: (1) whether the deponent is a sufficiently high-ranking executive considering her role and responsibilities in the organization; (2) the extent to which the facts sought to be discovered in the deposition are properly discoverable; (3) whether the executive has unique personal knowledge of relevant facts; and (4) whether there are alternative means, including written discovery or depositions of other witnesses by which the same facts could be discovered. GM LLC acknowledged that as the moving party, it bears the burden to show good cause for a protective order to issue.

On June 2, 2022, the Supreme Court issued its opinion. It began its analysis by outlining the scope of discovery in Georgia. It recognized that Georgia law favors liberal discovery practices in order to provide the parties with discovery that is relevant to

their respective claims or defenses, but noted that Georgia courts have the discretion to limit discovery when a party demonstrates that there is "good cause shown…to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." O.C.G.A. § 9-11-26.

The crux of the opinion is found in the Court's discussion of the apex doctrine's burden-shifting framework. The Court explained that it was not bound by federal decisions interpreting Federal Rule of Civil Procedure 26 because Georgia's Civil Practice Act does not contain a proportionality requirement. Id. at *24. As a result, the Court "decline[d] to hold that a trial court must find that good cause is presumptively or conclusively established in each instance that a movant has demonstrated that an executive is 'sufficiently high-ranking' and lacks unique personal knowledge of discoverable information not available through other means."

While the Court's opinion establishes that the apex factors are not dispositive when considering whether to issue a protective order, it found that the Court of Appeals was wrong when it held that a court "may consider a myriad of factors but "was not required to do so." Id. at *38. (internal citations omitted). The Court concluded that because the trial court did not consider any of the factors GM LLC presented, it failed to adequately consider GM LLC's arguments and evidence supporting its motion for a protective order. Consequently, the Court vacated the appellate court's judgment that affirmed the trial court's order and remanded the case for reconsideration. The trial court has not yet reconsidered GM LLC's motion.

After Buchanan, Georgia's lower courts must consider the apex factors when they are raised by a party. The trial court cannot ignore factors that are raised in support of good cause, regardless of whether they are rooted in the apex doctrine factors.

Strategies to Protect Corporate Officials After Buchanan

After Buchanan, how can large corporations protect their CEOs? First, hopefully you are in a jurisdiction that recognizes the apex doctrine. But, the more likely scenario is that you find your CEO facing a deposition notice in a jurisdiction that has not officially adopted the apex doctrine. Buchanan provides hope for those jurisdictions. Rather than trying to convince a court that the apex doctrine should be formally adopted, even courts where the broad relevancy standard remains may be more willing to follow the Georgia Supreme Court's approach and consider the apex factors, but keep the burdens of persuasion and production with the corporation.

Showing the "Apex Factors"

The first step is to present evidence that the apex factors weigh in favor of protecting your client from deposition. The first factor to consider is whether the deponent is considered sufficiently high-ranking. That is an easy analysis when the deponent is the CEO like in Buchanan. Difficulties arise, however, when the potential deponent is not the CEO, but another high-level official within the corporation. The case law shows that courts prefer to evaluate the potential deponent's seniority on case-by-case basis rather than adhering to a bright line rule. Essentially, courts want to ensure that the apex doctrine "as applied to multiple executives does not itself become a tool for evading otherwise relevant and permissible discovery…." Apple Inc. v. Samsung Elec. Co., Ltd., 282 FRD 259, 263 (N.D. Cal. 2012). Despite the lack of clear guidance from the courts, the likelihood of obtaining a protective order is correlative to your executive's position in the corporate hierarchy.

Turning to the "unique knowledge" factor, many federal courts that adhere to the apex doctrine hold that the executive's "knowledge must be personal and unique or superior to that of other persons from the organization who might be deposed in the litigation." Most courts require that any motion for protective order to prevent an apex deposition is supported by an affidavit setting forth the executive's lack of personal or unique knowledge.

Finally, even if your CEO has some general knowledge of the particular issues in the case, it is exceedingly likely that there are other sources of information within the corporation that can provide the same information. This factor heavily overlaps with the "unique knowledge" factor. A number of federal courts find it "appropriate to preclude

a deposition of a highly-placed executive while allowing other witnesses with the same knowledge to be questioned." Burns v. Bank of America, No. 03 Civ. 1685 RMB JCF, 2007 WL 1589437, *3 (S.D.N.Y. June 4, 2007). Discovery responses and deposition testimony identifying individuals with relevant knowledge is helpful to demonstrate to the court that there are less intrusive means to obtain the discovery. At a minimum, those avenues must be exhausted first before jumping to the top of the hierarchy.

Burden-Shifting

Like the Court in Buchanan, many other state courts are concerned that adopting the apex doctrine somehow shifts the burden of proof to the party seeking the discovery versus the party seeking protection against the discovery. Because the vast body of persuasive authority from federal decisions is useful, a key point to consider is whether the federal rules are consistent with the forum state's discovery rules. This was the precise reason the Buchanan opinion declined to apply a burden-shifting framework—it found that the Georgia Civil Practice Act demanded that the burden remain with the party seeking protection against discovery. The more you can analogize the state and federal rules, the greater weight the court will most likely give to the federal case law that supports adopting the apex doctrine.

Changing the Law

While the plaintiff's bar suggests that the apex doctrine is an old doctrine that is on the decline, that is not entirely accurate. As noted above, while the number of states that have adopted the doctrine is limited when compared the number of federal circuits, the trend remains to protect litigants from the harassing nature of apex depositions. Of course, the gold standard for protection is a specific rule that adopts the apex doctrine. But, by the time the deposition notice is on your desk, it is too late to change the law. As the Presiding Judge of the Georgia Court of Appeals stated in a concurrence in Buchanan: "[t]he Apex Doctrine may very well be a policy that Georgia should adopt, but it will have to be the general Assembly or our Supreme Court that does it." Like Georgia, most states' authority to promulgate rules lies with the legislature.

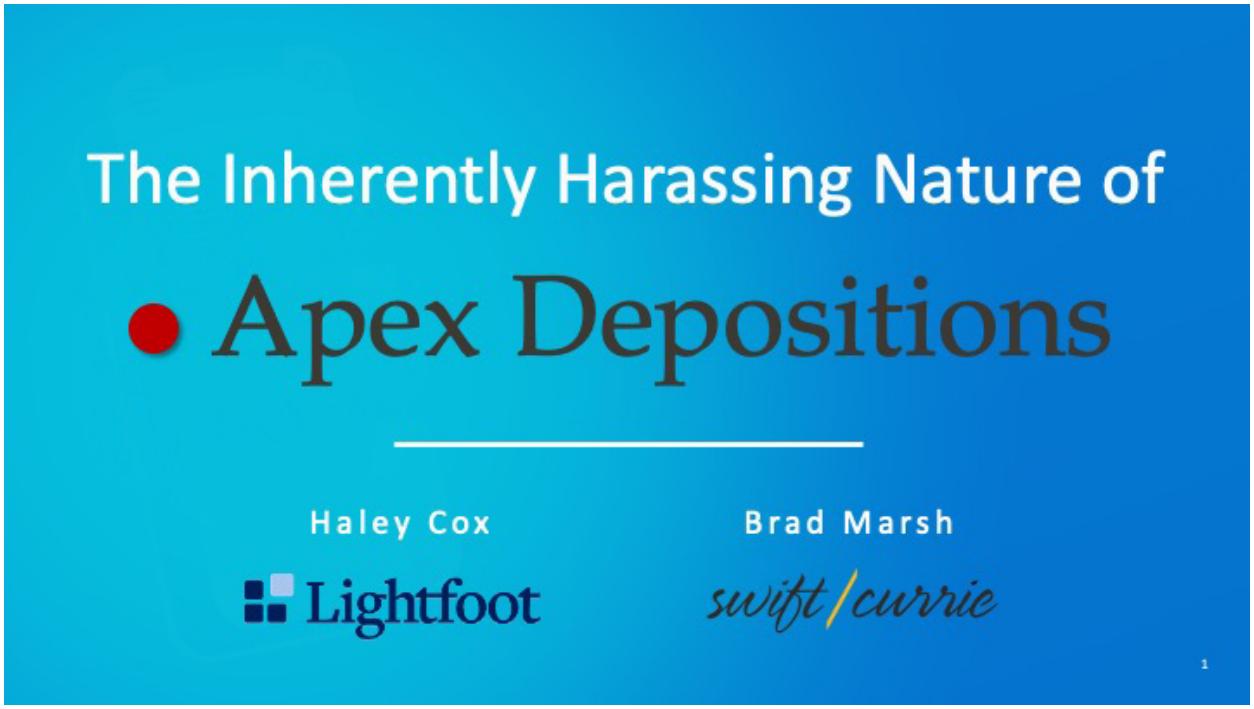
There are a few states, however, where the authority to amend the civil procedure rules is vested in the Supreme Court. For example, in Florida, the Supreme Court is vested with the authority to formally amend the state's rules of civil procedure. As a result, on August 26, 2021, the Florida Supreme Court issued an opinion involving a case in which Suzuki Motor Corporation's CEO was seeking protection from deposition. The Florida Supreme Court used the opportunity to amend its Rules of Civil Procedure to codify the apex doctrine. In re: Amendment to Florida Rule of Civil Procedure. As a result, Rule 1.28(h) was enacted, entitled "Apex Doctrine."

> (h) Apex Doctrine. A current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition. The motion, whether by a party or by the person of whom the deposition is sought, must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated. If the officer meets this burden of production, the court shall issue an order preventing the deposition, unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The court may vacate or modify the order if, after additional discovery, the party seeking the deposition can meet its burden of persuasion under this rule. The burden to persuade the court that the officer is high-level for purposes of this rule lies with the person or party opposing the deposition.

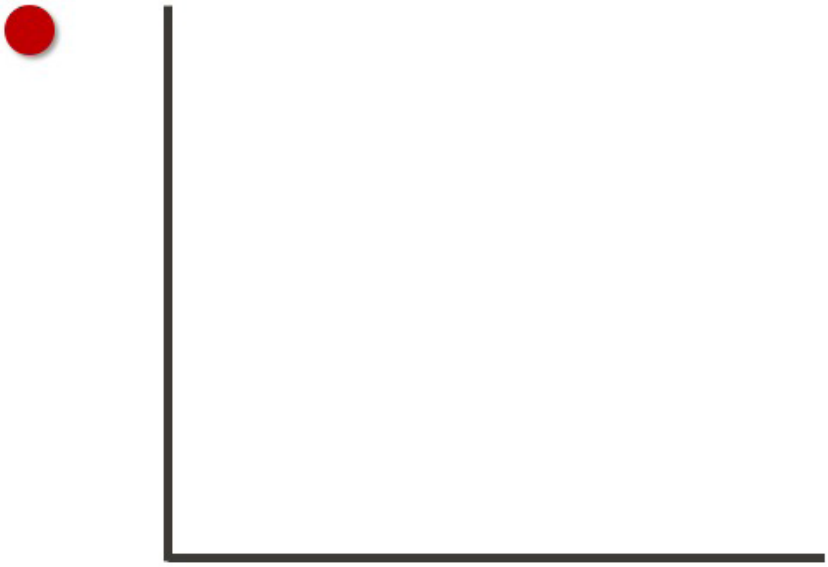
Fla. R. Civ. P. 1.28(h)

Florida's rule provides a roadmap not only for those states where the Supreme Court can promulgate the rules, but also for legislation in other states. The legislatures should take notice of the importance of meaningful limitations on apex depositions. Like in Buchanan, executives are often called upon to make public statements about high-profile issues that are not tied to specific incidents involved in litigation, and are not based on personal, direct knowledge. In the absence of meaningful limitations

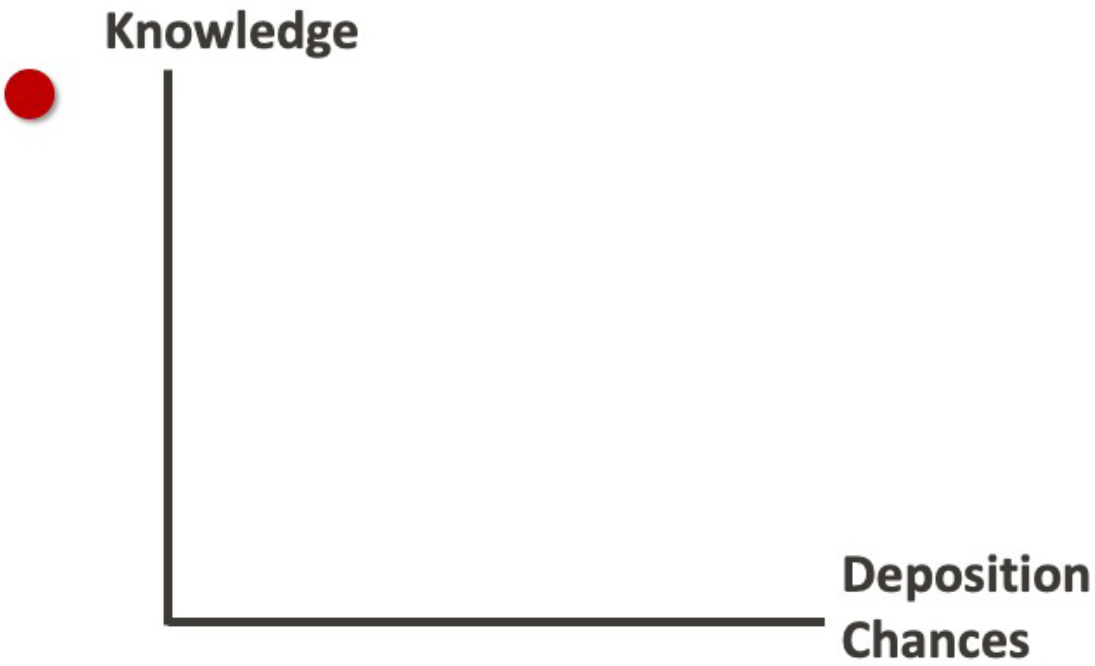
on apex depositions, these executives could face a Catch-22: comment on high profile issues impacting their companies and subject themselves to potentially countless depositions, or avoid making public statements and abdicate their leadership roles within their companies.


The Inherently Harassing Nature of
Apex Depositions
Haley Cox
Lightfoot
Brad Marsh
swift/currie
1

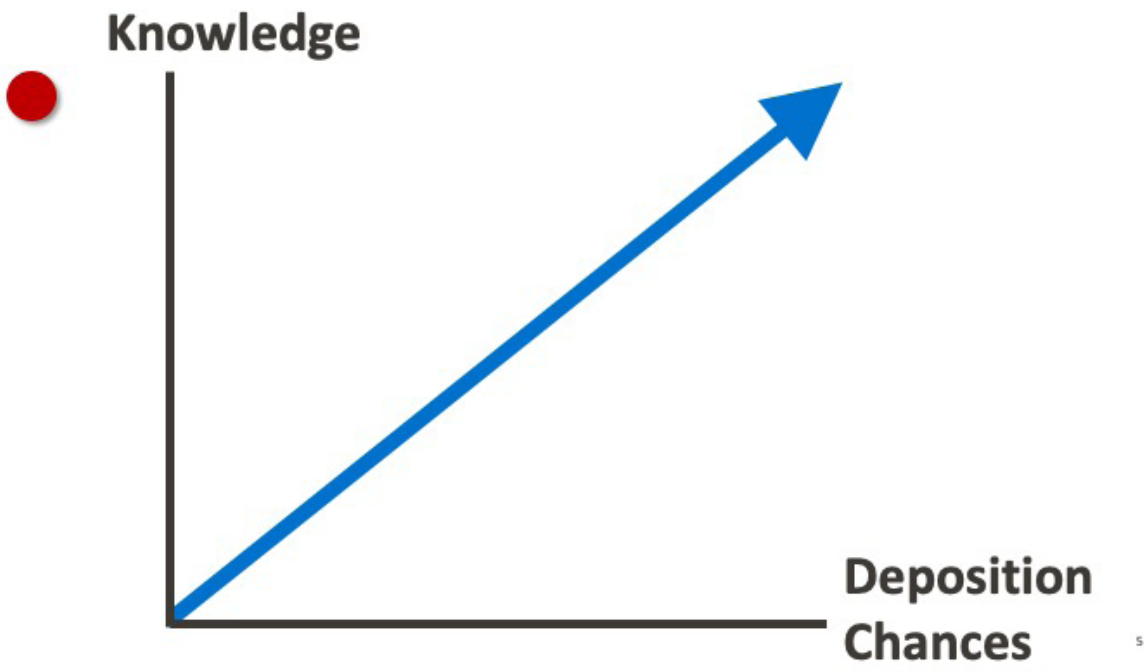

A
2

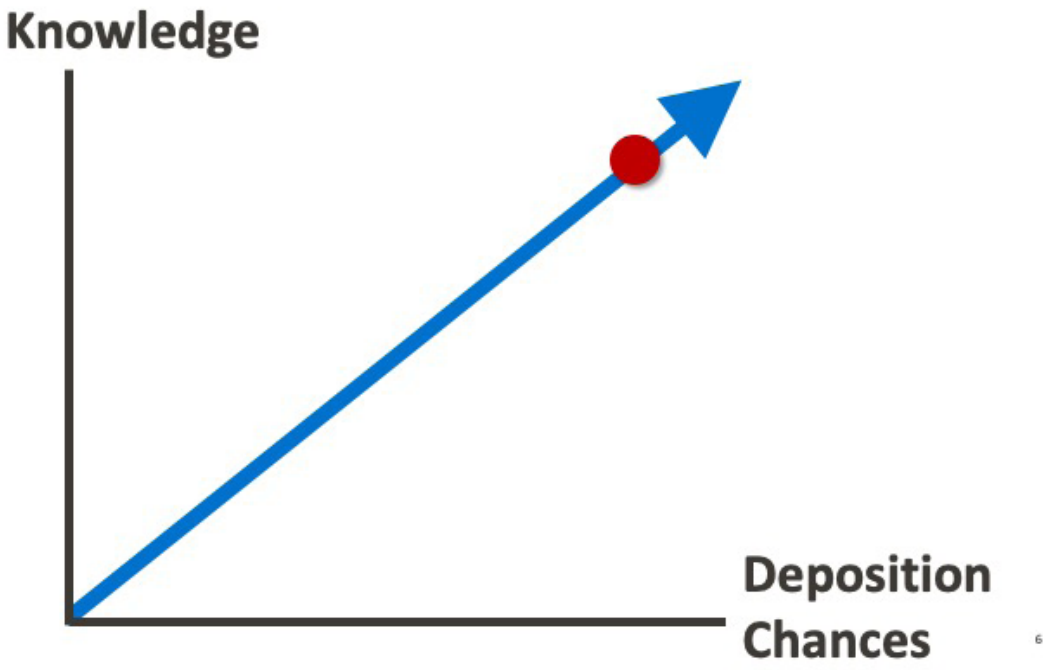


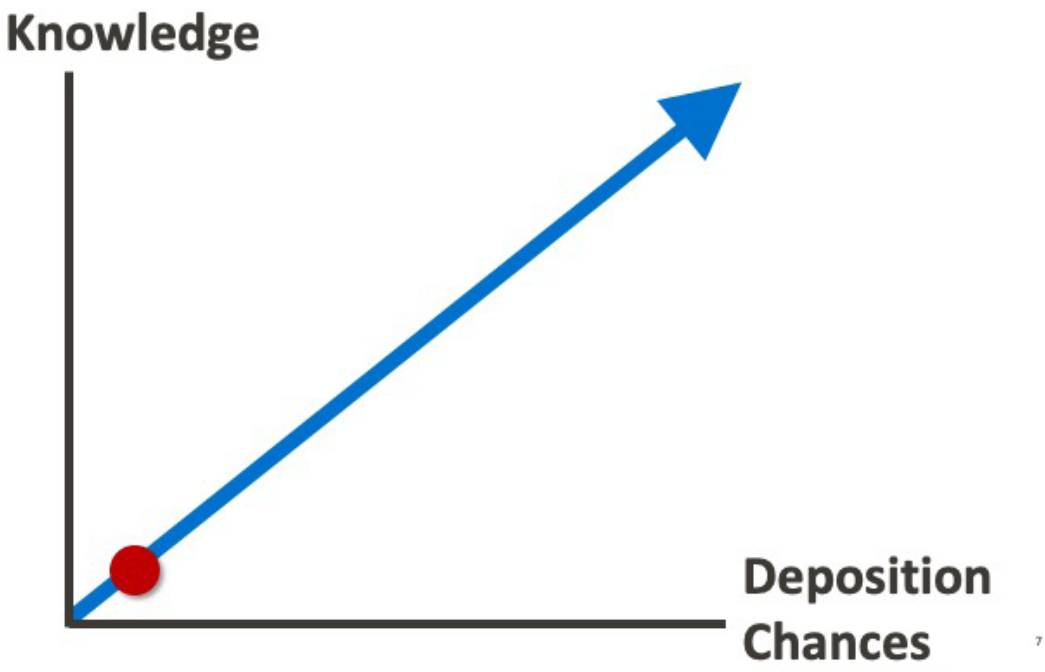
3



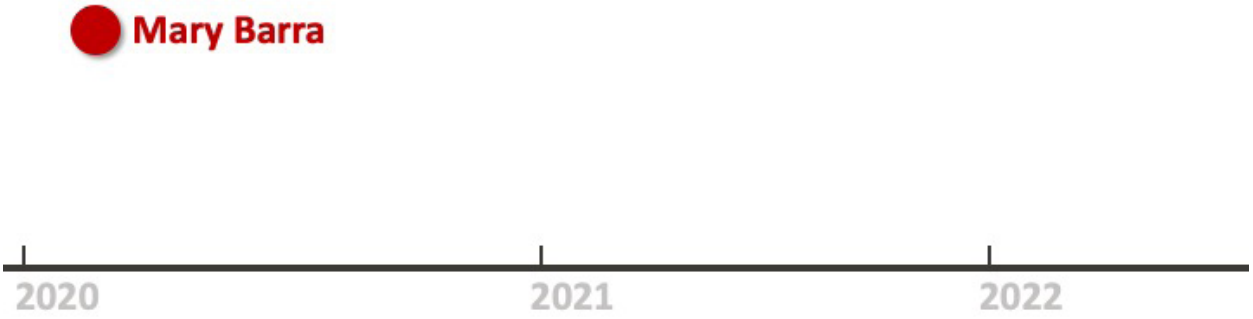
4


Knowledge
Deposition Chances
5

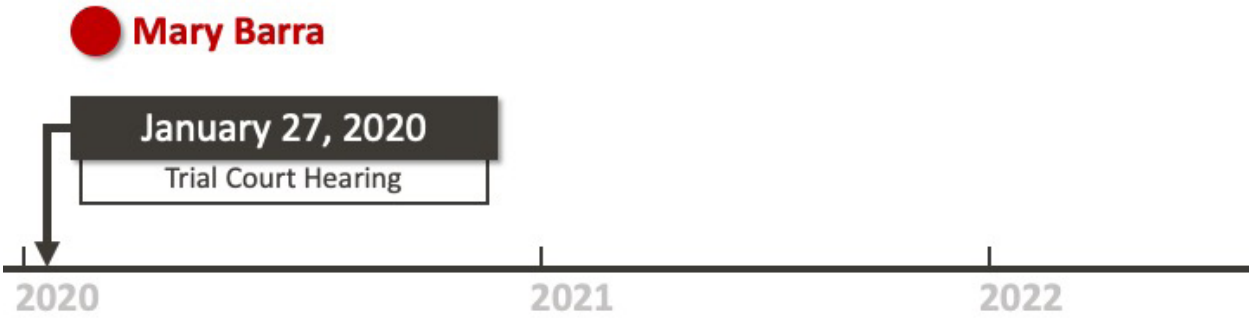

Knowledge
Deposition Chances
6



8


Mary Barra
2020
2021
2022

9


Mary Barra
January 27, 2020
Trial Court Hearing
2020
2021
2022

10

Mary Barra

January 27, 2020

Trial Court Hearing

2020


The New York Times

Kobe Bryant, Transformational Star of the N.B.A., Dies in Helicopter Crash

Bryant, 41, who won five titles with the Los Angeles Lakers, was traveling with his 13-year-old daughter when they and seven other people perished in the crash.

By SCOTT CACIOLA

As Coronavirus Fears Intensify, Effectiveness of Quarantines Is Questioned

Amid news the coronavirus is spreading at an accelerating rate, concern is growing that China's lockdown of cities may not only have come too late but could even make the situation worse.

By CHRIS BUCKLEY, RAYMOND ZHONG, DENISE GRADY and ROMA CARYN RABIN

11

Mary Barra

January 27, 2020

Trial Court Hearing

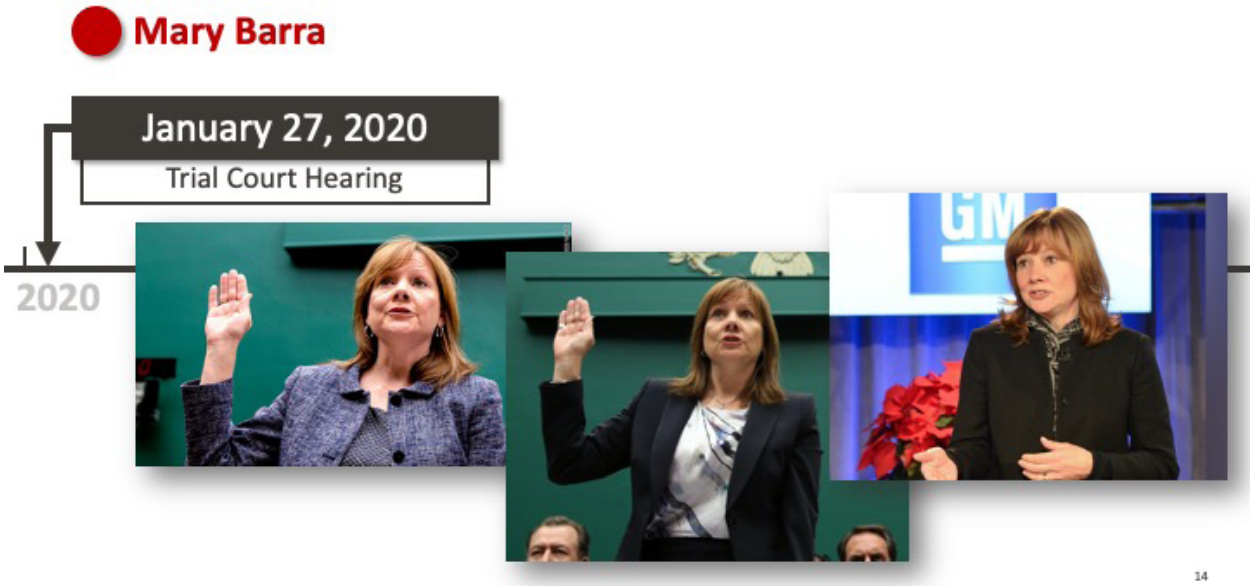
2020

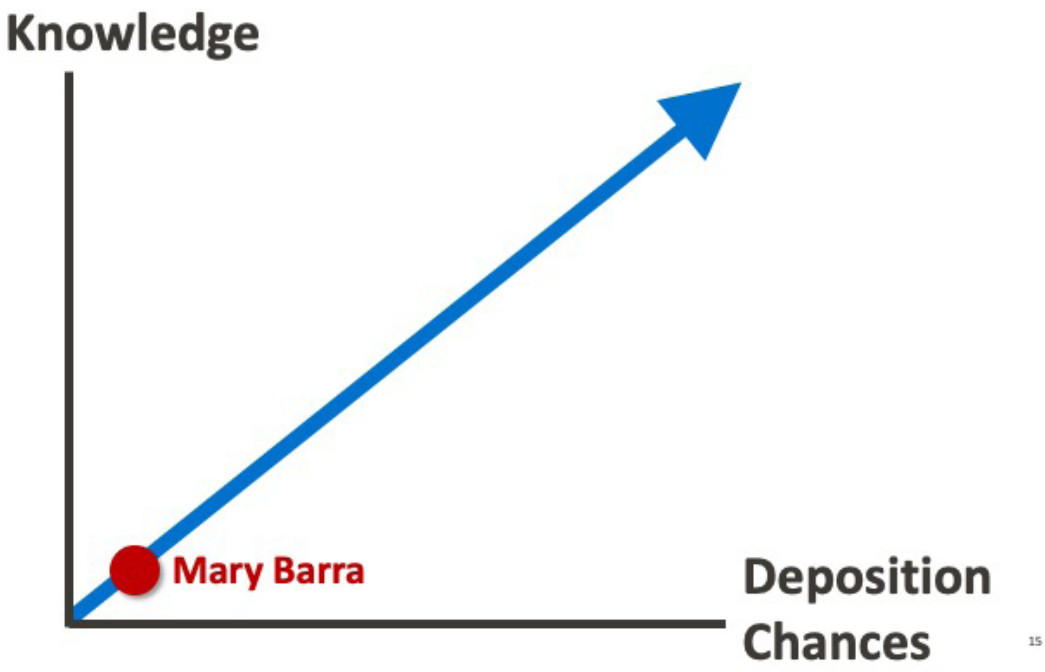
21

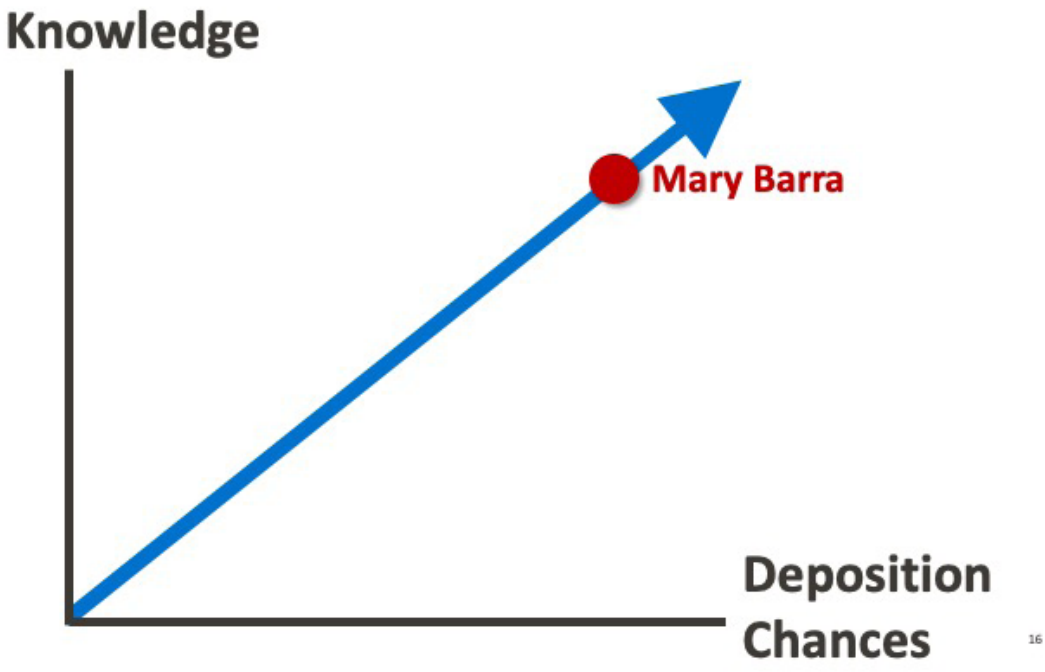
2022

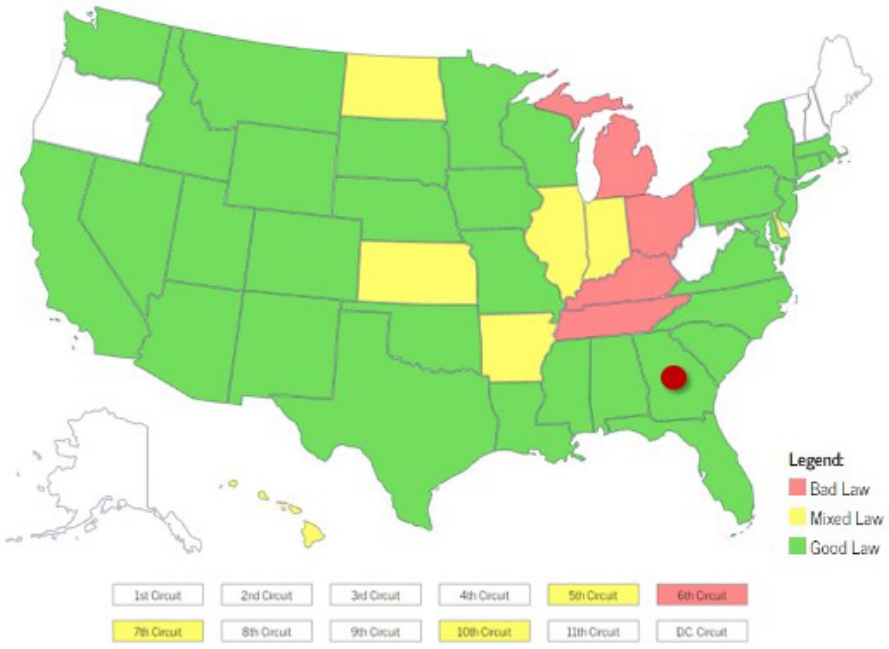
12

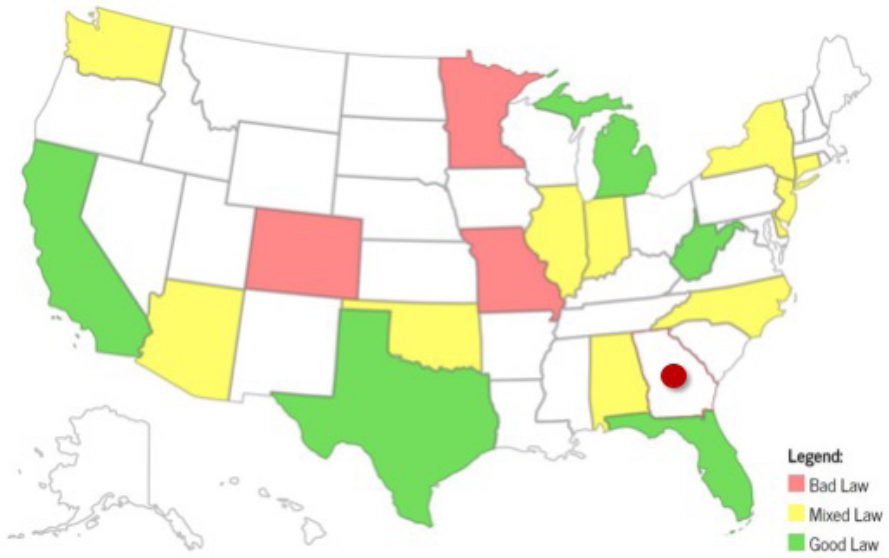

Mary Barra
January 27, 2020
Trial Court Hearing
2020
2022
13


Mary Barra
January 27, 2020
Trial Court Hearing
2020
GM
14


Knowledge
Mary Barra
Deposition Chances
15


Knowledge
Mary Barra
Deposition Chances
16

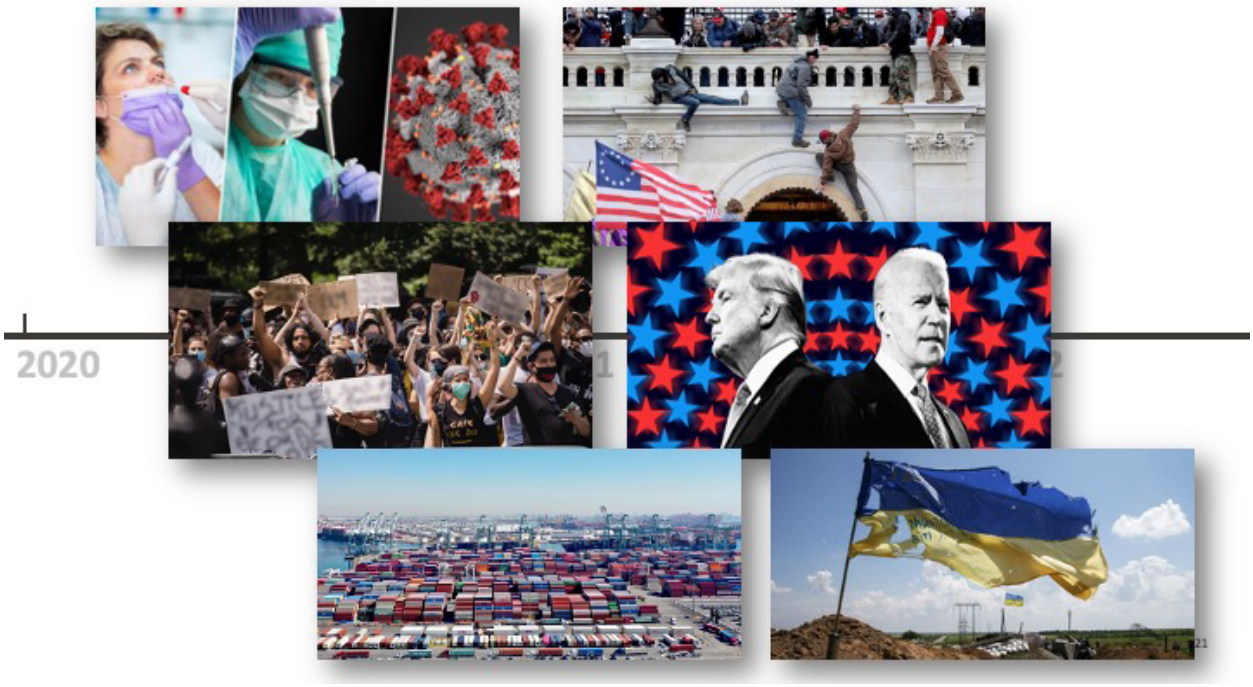

Legend:
Bad Law
Mixed Law
Good Law
1st Circuit
2nd Circuit
3rd Circuit
4th Circuit
5th Circuit
6th Circuit
7th Circuit
8th Circuit
9th Circuit
10th Circuit
11th Circuit
DC Circuit

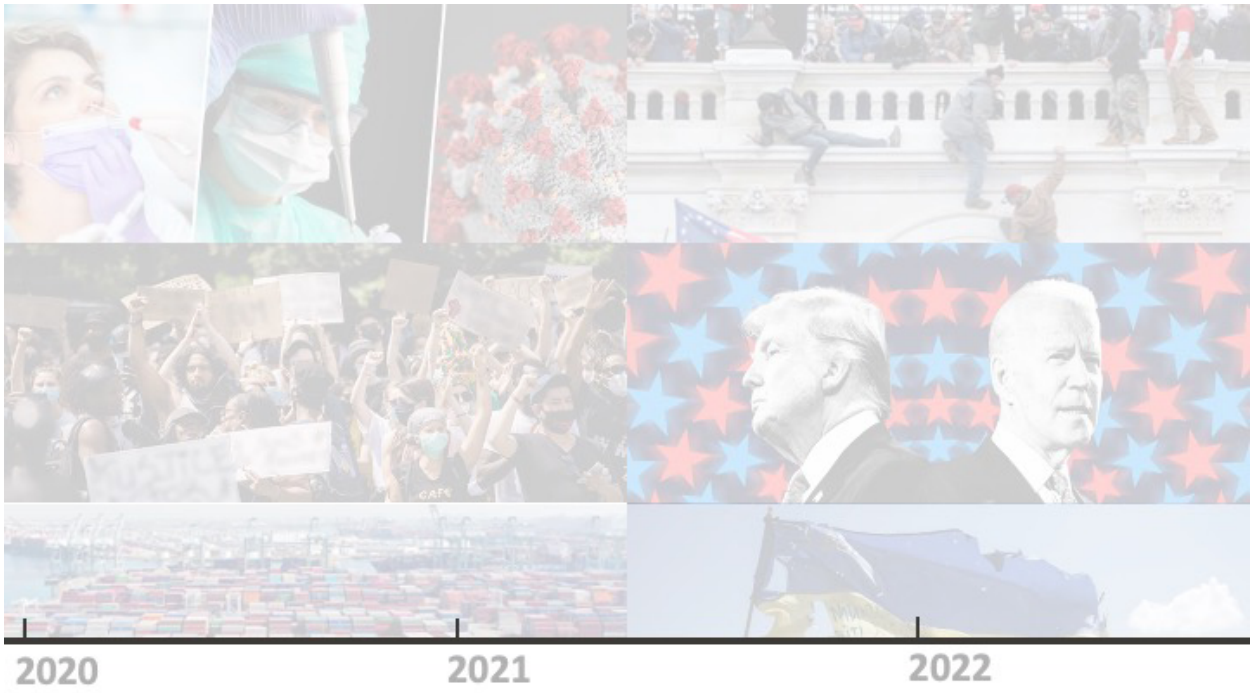

Legend:
Bad Law
Mixed Law
Good Law

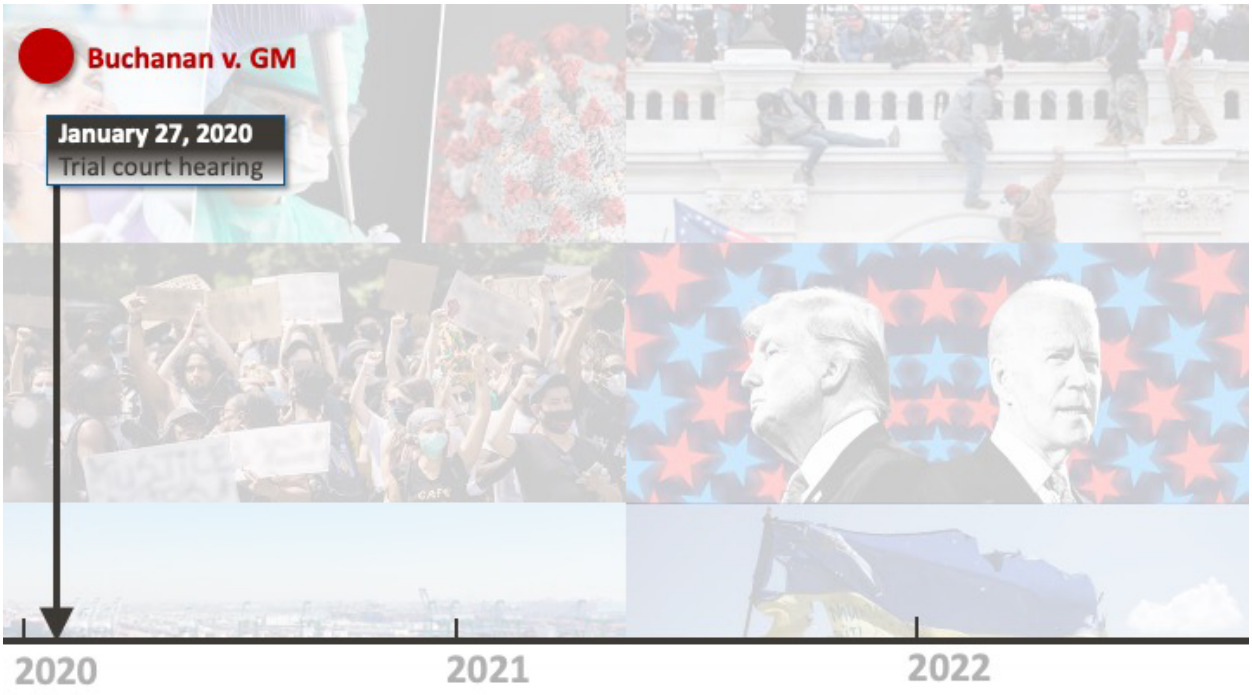
The Inherently Harassing Nature of Apex Depositions

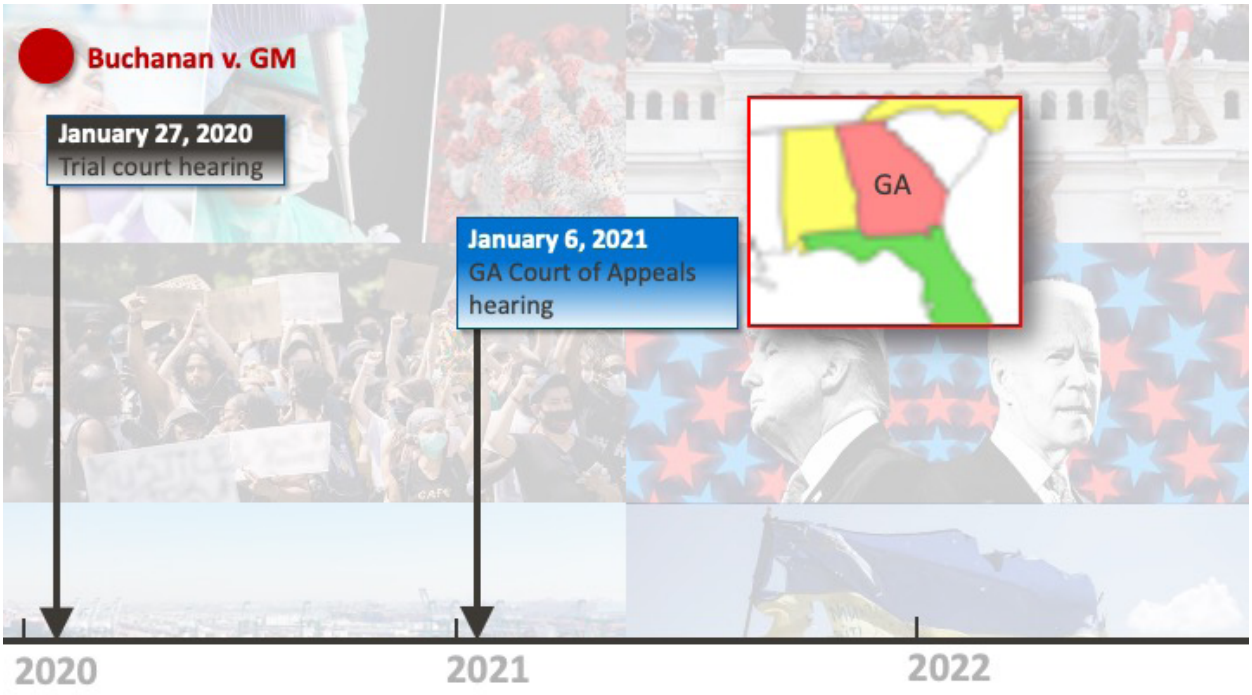
19

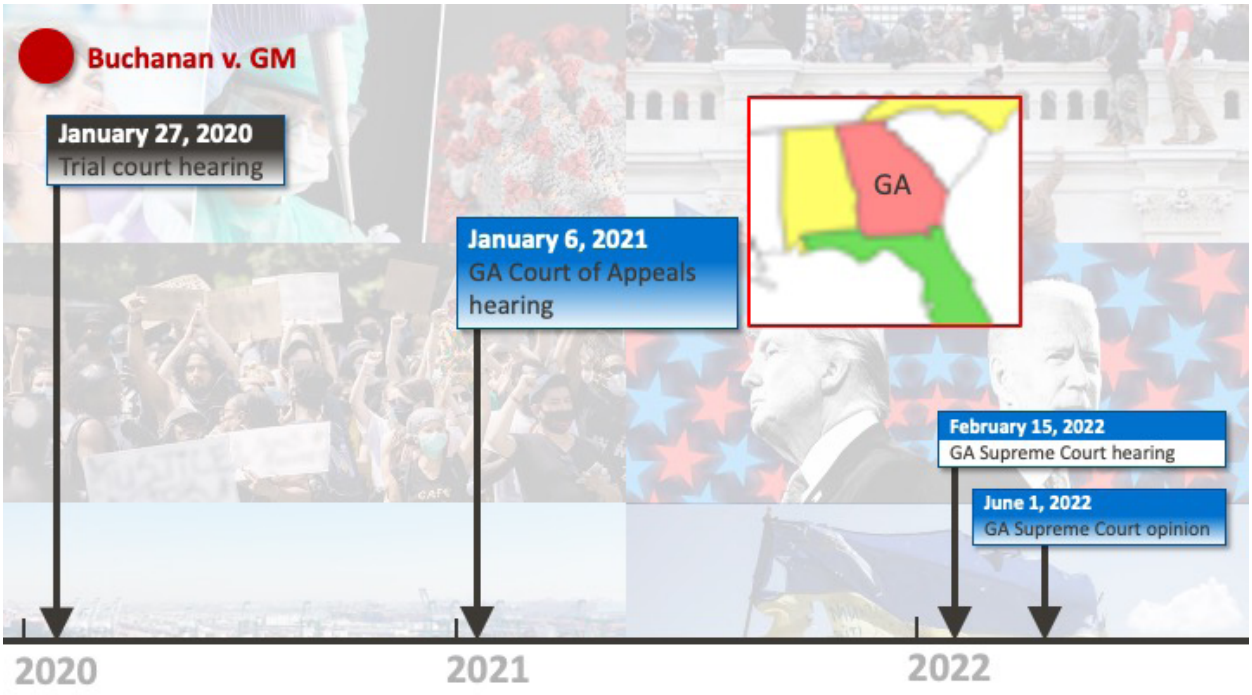
20

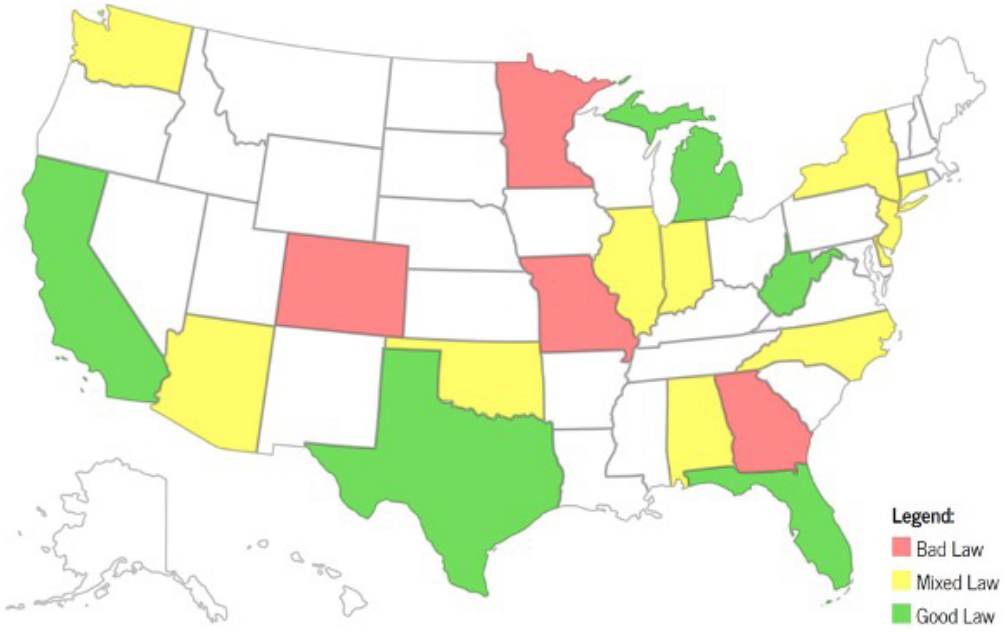

2020

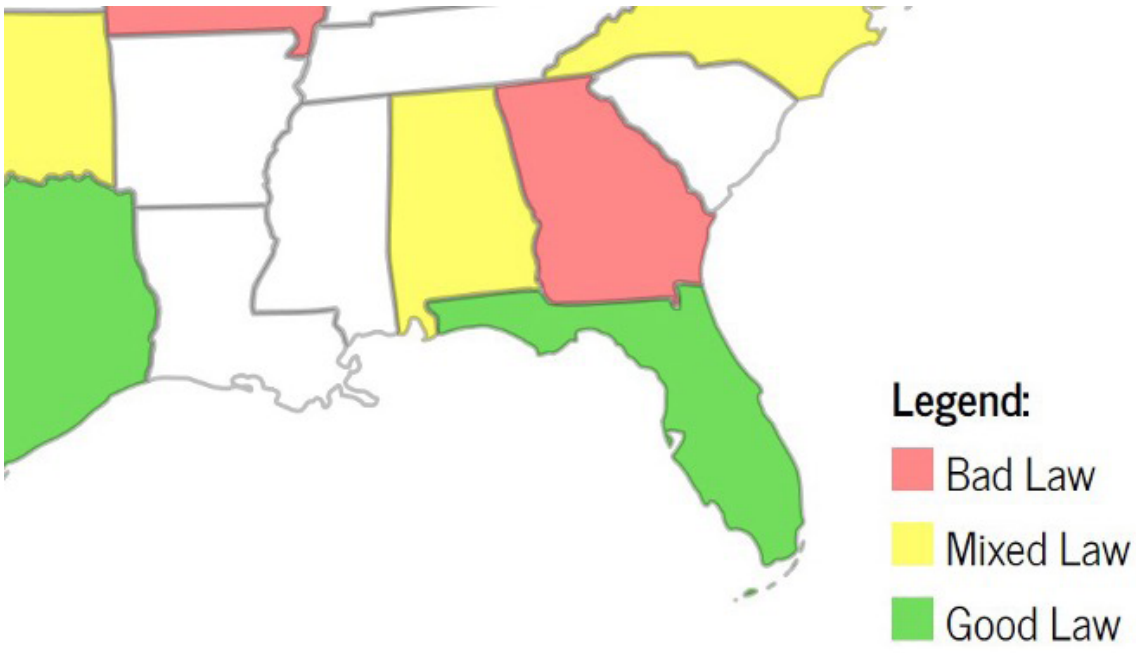

2020
2021
2022

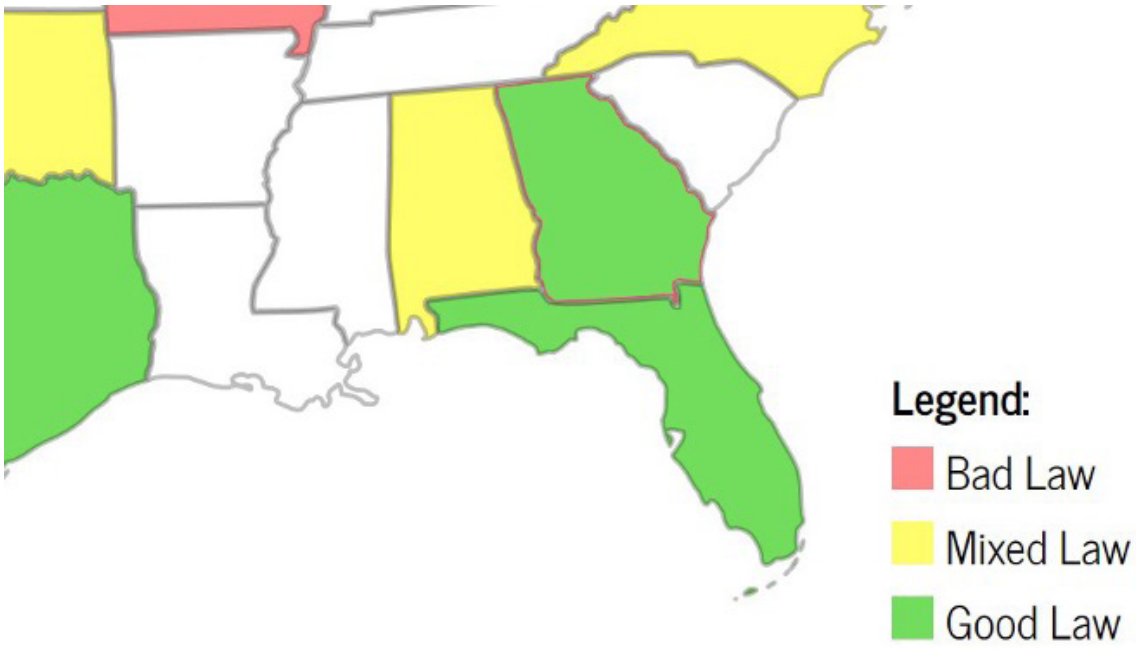

Buchanan v. GM
January 27, 2020
Trial court hearing
2020
2021
2022

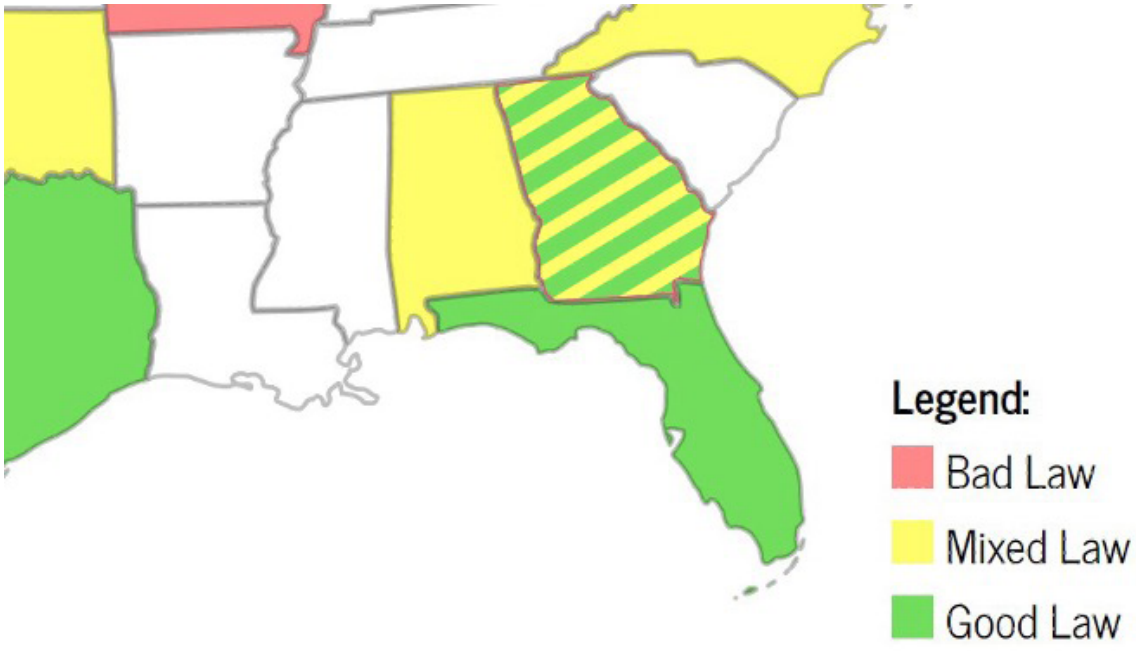

Buchanan v. GM
January 27, 2020
Trial court hearing
January 6, 2021
GA Court of Appeals hearing
GA
2020
2021
2022

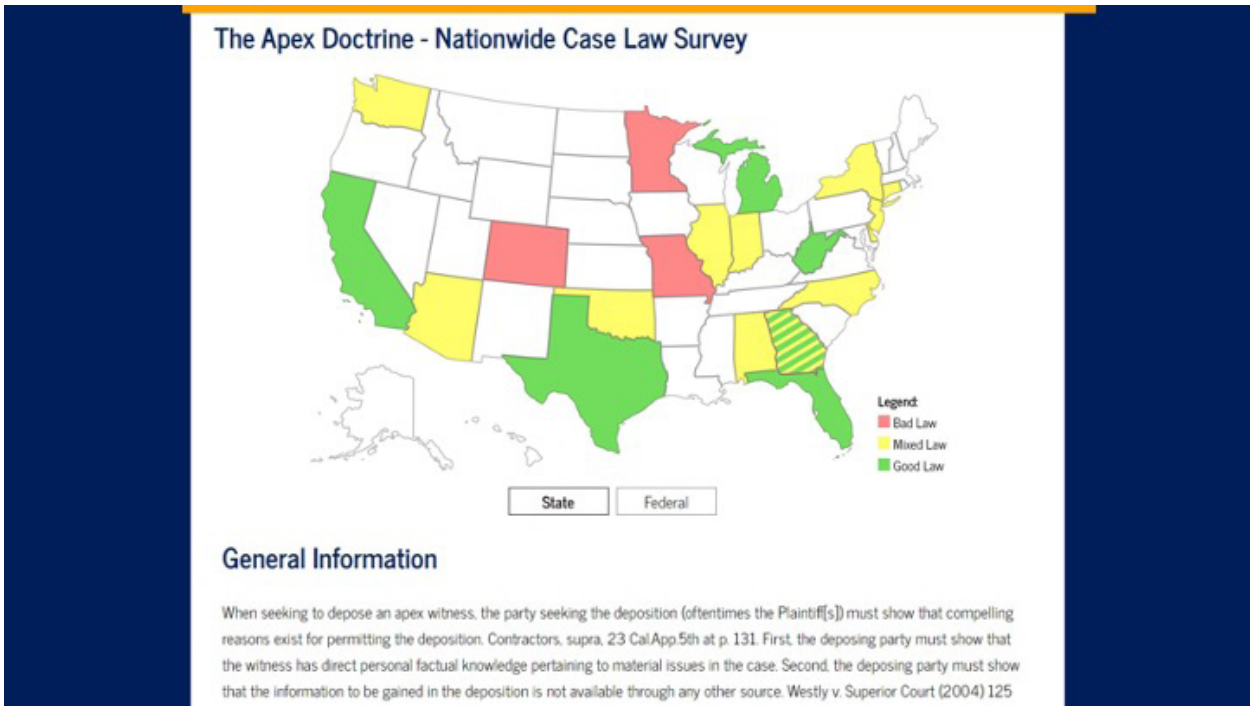

Buchanan v. GM
January 27, 2020
Trial court hearing
January 6, 2021
GA Court of Appeals hearing
GA
February 15, 2022
GA Supreme Court hearing
June 1, 2022
GA Supreme Court opinion
2020
2021
2022

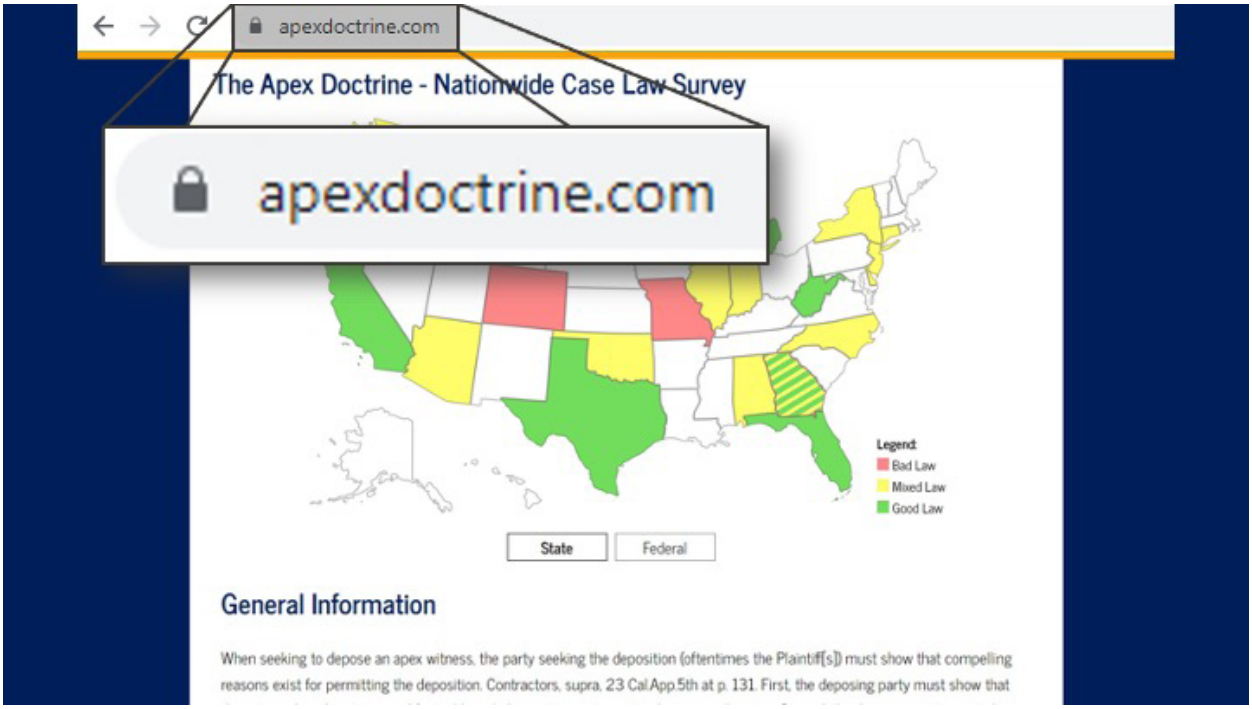

Legend:
Bad Law
Mixed Law
Good Law

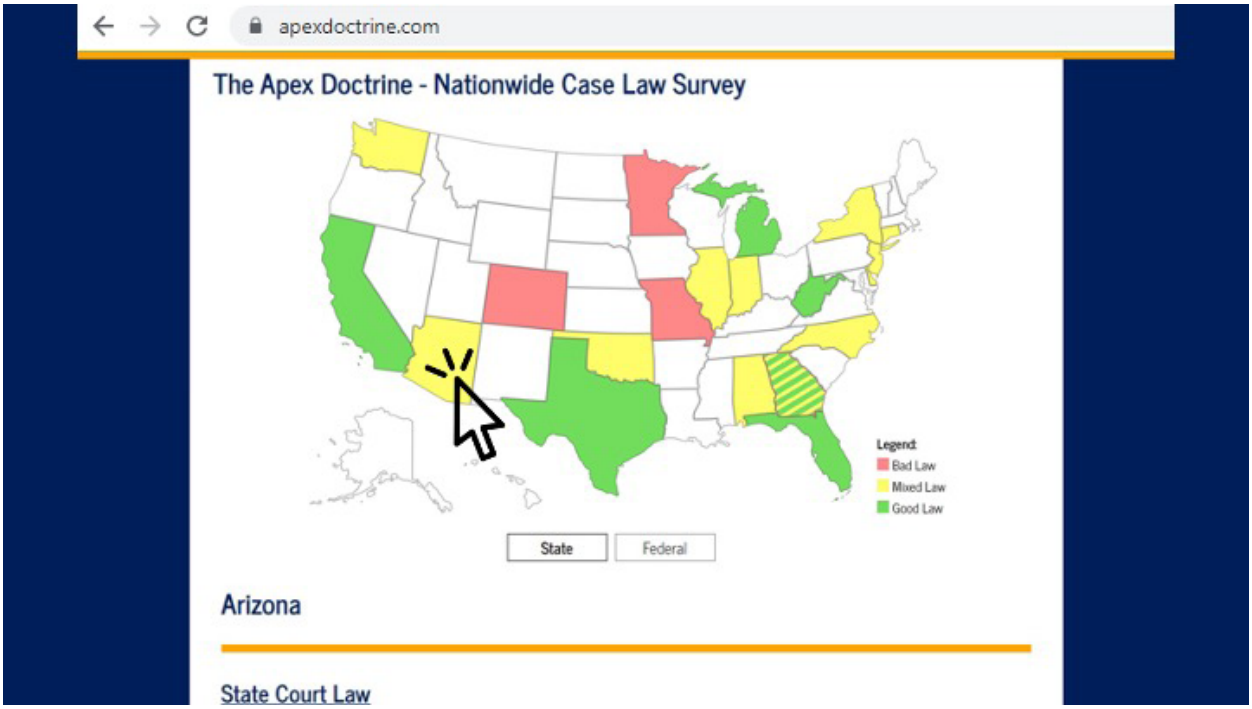

Legend:
Bad Law
Mixed Law
Good Law


Legend:
Bad Law
Mixed Law
Good Law


Legend:
Bad Law
Mixed Law
Good Law


The Apex Doctrine - Nationwide Case Law Survey
Legend:
Bad Law
Mixed Law
Good Law
State
Federal
General Information
When seeking to depose an apex witness, the party seeking the deposition (oftentimes the Plaintiff[s]) must show that compelling reasons exist for permitting the deposition. Contractors, supra, 23 Cal.App.5th at p. 131. First, the deposing party must show that the witness has direct personal factual knowledge pertaining to material issues in the case. Second, the deposing party must show that the information to be gained in the deposition is not available through any other source. Westly v. Superior Court (2004) 125


apexdoctrine.com
The Apex Doctrine - Nationwide Case Law Survey
apexdoctrine.com
Legend:
Bad Law
Mixed Law
Good Law
State
Federal
General Information
When seeking to depose an apex witness, the party seeking the deposition (oftentimes the Plaintiff[s]) must show that compelling reasons exist for permitting the deposition. Contractors, supra, 23 Cal.App.5th at p. 131. First, the deposing party must show that


apexdoctrine.com
The Apex Doctrine - Nationwide Case Law Survey
Legend:
Bad Law
Mixed Law
Good Law
State
Federal
Arizona
State Court Law

Applies Apex Doctrine: District of Arizona

- **Federal Corporate Apex Cases**

Klungvedt v. Unum Group, 2013 WL 551473 (D. Ariz. Feb. 13, 2013)

- **Federal Corporate Apex Notes**

Klungvedt - Rejected a "unique knowledge" argument that the apex, as creator of strategic plan leading to the termination of plaintiff's benefits, would have knowledge unavailable to lower employees.

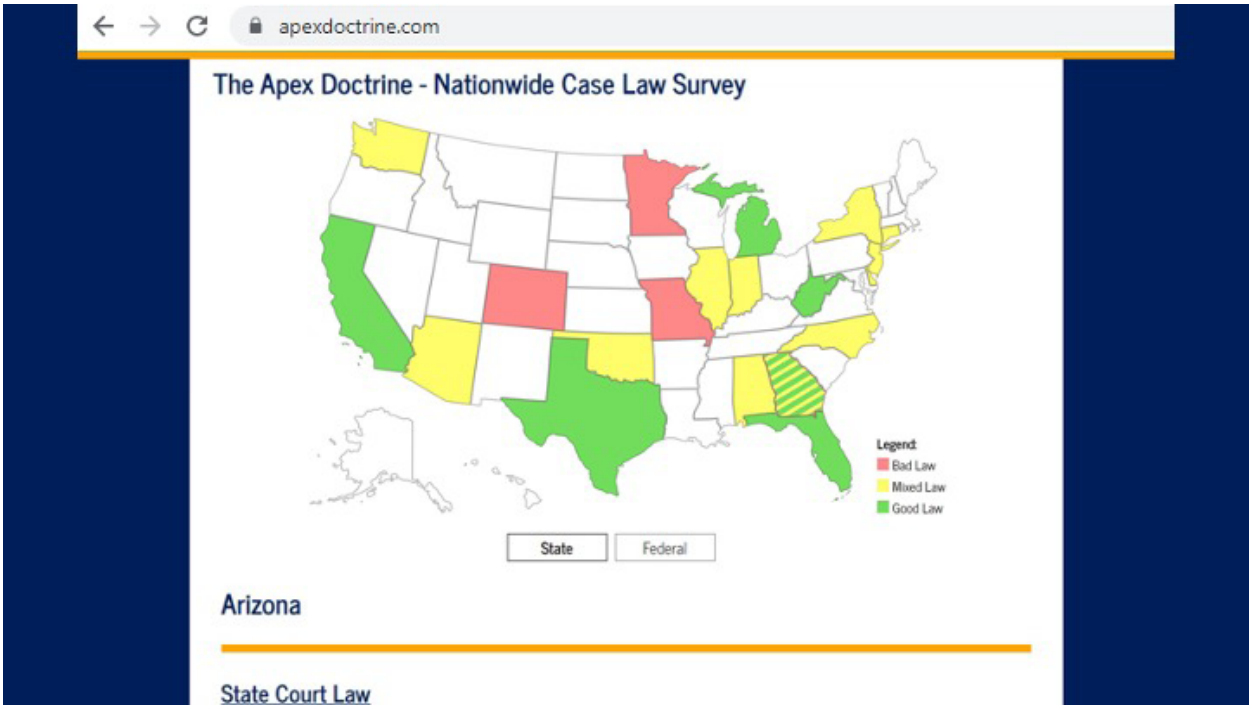
Court granted protective order and required plaintiff to develop a detailed and specific factual basis supporting the idea that apex witness had unique, relevant, personal knowledge.

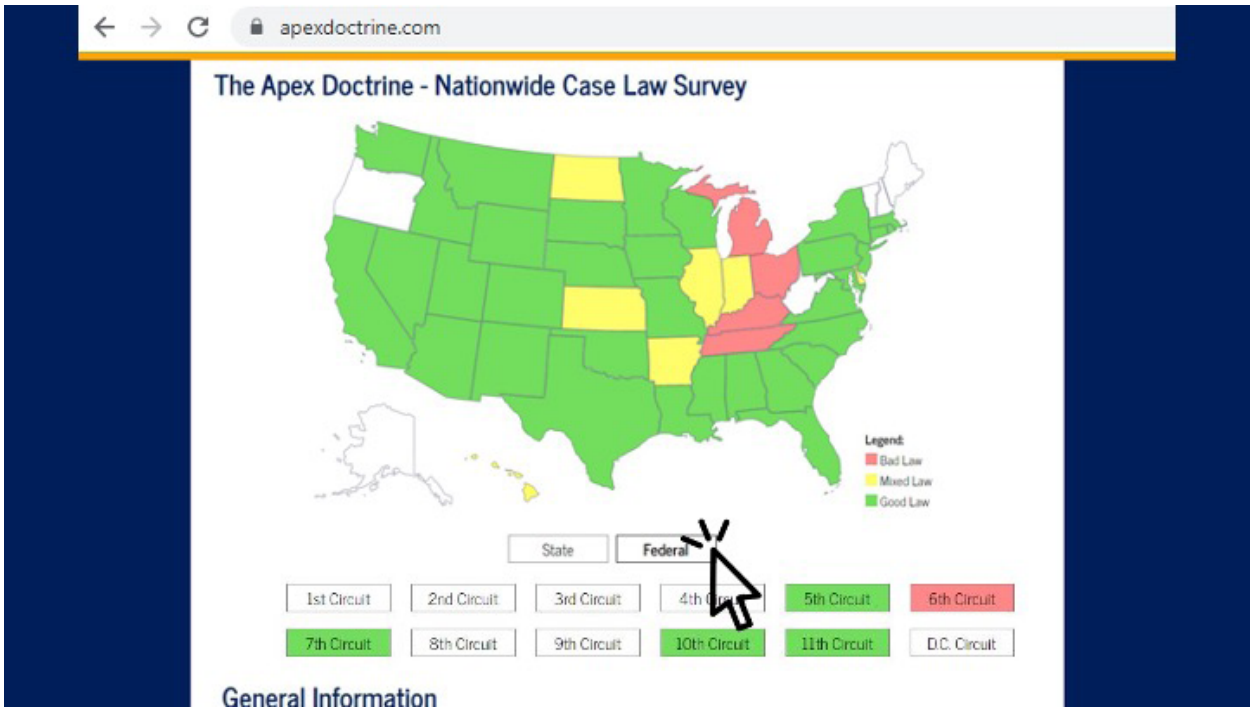
Government Apex Cases/Notes

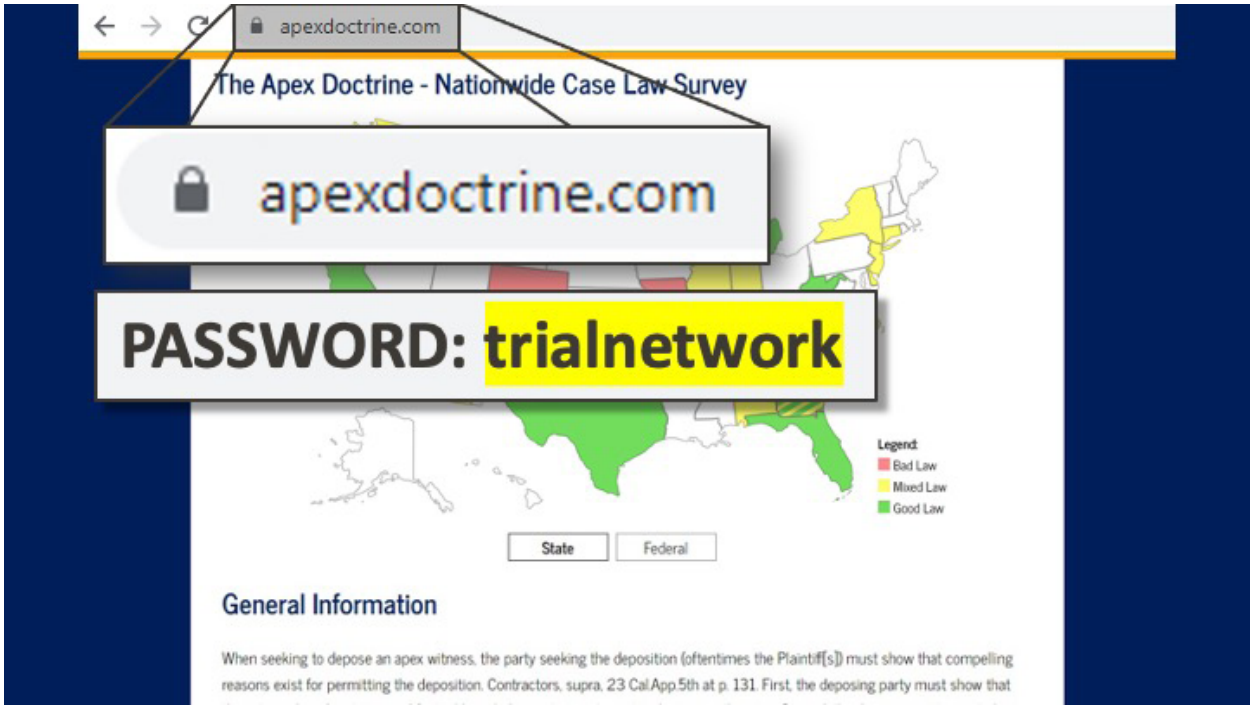
Seems to adopt the apex doctrine. The concludes that "two considerations should guide the decision as to whether [the government official] should be subject to deposition." The two considerations are (1) whether the government official has personal knowledge of the facts and (2) whether the party seeking to depose the government official has made a good faith effort to seek the information from other reasonably reliably available sources. It is unclear whether this test shifts the burden.

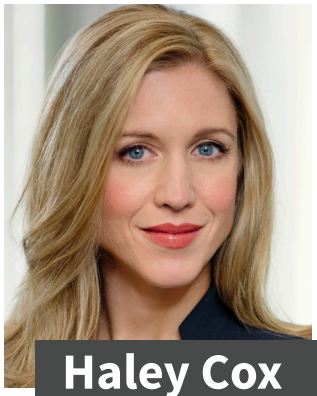
Andrich v. Dusek, 2019 U.S. LEXIS 110522 (D. Ariz. 2019).

Lightfoot




apexdoctrine.com
The Apex Doctrine - Nationwide Case Law Survey
Legend:
Bad Law
Mixed Law
Good Law
State
Federal
1st Circuit
2nd Circuit
3rd Circuit
4th Circuit
5th Circuit
6th Circuit
7th Circuit
8th Circuit
9th Circuit
10th Circuit
11th Circuit
D.C. Circuit
General Information


apexdoctrine.com
The Apex Doctrine - Nationwide Case Law Survey
apexdoctrine.com
PASSWORD: trialnetwork
Legend:
Bad Law
Mixed Law
Good Law
State
Federal
General Information
When seeking to depose an apex witness, the party seeking the deposition (oftentimes the Plaintiff[s]) must show that compelling reasons exist for permitting the deposition. Contractors, supra, 23 Cal.App.5th at p. 131. First, the deposing party must show that



205.581.1519
hcox@lightfootlaw.com

Haley Cox

Partner | Lightfoot Franklin & White (Birmingham, AL)

Haley tries cases and leads defense teams in a wide range of high-stakes cases, including claims of product defect, medical malpractice and serious personal injuries. She is admitted to the Alabama and Texas bars, and she has litigated in more than a dozen states.

Haley understands what it takes to win: the truth, hard work and delivering the client's story so it resonates with judges and juries. She also understands that winning is different to every client and in every case. A win may be a fair and swift resolution, or it may mean fighting all the way to a verdict. Either way, opponents know that Haley – like every Lightfoot lawyer – is prepared to take the case as far as it needs to go.

For more than 10 years, Haley has been instrumental in recruiting the next generation of Lightfoot lawyers to serve the firm's clients. She is committed to carrying out Lightfoot's mission of hiring only the most talented, driven and diverse lawyers, and then training them the right way. In addition to her recruitment role at Lightfoot, Haley is also on the firm's Executive Committee.

Benchmark Litigation recognizes Haley as one of the "Top 250 Women in Litigation" nationally. Since 2014, Haley has been named by Thomson Reuters' Super Lawyers as a "Rising Star." Haley has also been selected for the Alabama State Bar's Leadership Forum, and she has been named as "Best of the Bar," a "Rising Star of Law," and "Top 40 Under 40" by the Birmingham Business Journal.

Practice Areas

- **Automotive**
- **Commercial Transportation**
- **Product Liability**
- **Medical Malpractice**
- **Catastrophic Injury**
- **Consumer Fraud & Bad Faith**
- **Professional Liability**

Awards

- The Best Lawyers in America© by BL Rankings — Product Liability Litigation (2022)
- Benchmark Litigation, "Top 250 Women in Litigation" (2020-21)
- Benchmark Litigation, "Local Litigation Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability (2021)
- Benchmark Litigation, "Future Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability (2018-20)
- Birmingham Business Journal, "Best of the Bar" (2021)
- Birmingham Business Journal, "Top 40 Under 40" (2020)
- B-Metro magazine, "Top Women Attorneys" (2020)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Litigation Defense (2016-21)

Education

- Samford University, Cumberland School of Law (J.D., magna cum laude)
- University of Alabama (B.S., summa cum laude)

Ethics Panel: The Best Defense is a Strong PR Offense

Kathryn Walker

Bass Berry & Sims (Nashville, TN)

The Best Defense is a Strong Public Relations Offense

Kathryn Hannen Walker (Bass, Berry & Sims) and Megan Paquin (Poston Communications)

A company's reputation is its most important asset, yet many corporate counsel historically have not considered public relations to be a central part of their role. That is changing, as one recent survey indicates that 90% of in-house counsel believe they are responsible for corporate reputation. And for good reason: civil litigation can serve as both a grave threat to a company's reputation and as a public relations opportunity—before, during, and after trial. While there are certainly limitations to what an attorney can do in the public relations space, there is a lot more that can (and should) be done than many attorneys believe.

What Is Public Relations and Why Should I Care?

Public relations is a strategic communication process that builds mutually beneficial relationships between organizations and their public.[1] This process encompasses a wide range of strategies and tactics that are designed to advance, protect, and enhance corporate reputation. Effective public relations can help organizations establish credibility among stakeholders and influence their behavior and that of the public-at-large. Yet, there are many misconceptions about the role of public relations in high-stakes litigation and legal matters.

The practice of "Litigation Communication" has evolved to become a public relations specialty practice, combining public affairs, media relations and crisis management strategies to help organizations maintain their valuable stakeholder relationships and better manage the reputational effects of litigation. Moreover, in the context of civil litigation, such efforts are increasingly essential to mitigate public bias against corporate defendants – a sentiment that continues to be apparent in the rise of nuclear verdicts. Recent research indicates nearly six in ten Americans say their default tendency is to distrust something until they see evidence that it is trustworthy.[2]

Integrating public relations professionals into trial strategies enables legal counsel to build trust, while maintaining command and control over the narrative of the case in both the courtroom and the court of public opinion. Public relations professionals take direction from legal counsel, and they serve as a trusted advisor to the litigation team and client alike – ensuring corporate reputation is appropriately considered throughout the process. They can help recommend effective crisis management strategies; evaluate whether and when to discuss legal matters with key stakeholders; identify potential communications challenges (and opportunities) before they arise; protect the confidentiality of and privilege around sensitive matters; and bolster advocacy throughout every stage of litigation.

Ethical Concerns of Legal Publicity

Ethical concerns are rampant in this arena, which is why attorneys often shy away from engaging in any activities that come close to the PR sphere. In our media-savvy world, it is essential for defense counsel to develop a cohesive and thoughtful public relations strategy in high-stakes litigation. Doing nothing is failing.

It is true that studies have shown that pre-trial

1 Public Relations Society of America, 2022.

2 Edelman Trust Barometer, 2022.

publicity can have a prejudicial effect against both plaintiffs and defendants in civil cases comparable to that in criminal cases. Judicial warnings to jurors against considering pre-trial publicity do little to mitigate once-established bias.[3] Because of the risks associated with attorneys engaging in pre-trial public relations campaigns with the intent of influencing a jury, most jurisdictions and courts have established rules governing an attorney's public relations activities regarding an active case. While these rules prohibit certain PR activities, they also permit many others. For example, ABA Model Rule 3.6(a) prohibits lawyers from making statements that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." However, the Model Rule expressly permits lawyers to engage in certain public relations activities, which it considers immaterial or unlikely to be prejudicial, including communications regarding:

> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
> (2) information contained in a public record;
> (3) that an investigation of a matter is in progress;
> (4) the scheduling or result of any step in litigation;
> (5) a request for assistance in obtaining evidence and information necessary thereto;
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
> (7) in a criminal case, in addition to subparagraphs (1) through (6):
> (i) the identity, residence, occupation and family status of the accused;
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
> (iii) the fact, time and place of arrest; and
> (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Moreover, Model Rule 3.6(c) allows a lawyer to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." That statement must be "limited to such information as is necessary to mitigate the recent adverse publicity." Rule 3.6(c).

Of course, it is essential for a lawyer to conform any public relations trial strategy to the ethical rules of the jurisdiction, as well as a judge's own orders, practices and procedures. That being said, at least 25 states have adopted ABA Model Rule 3.6 in full, with other states adopting similar rules, with generally minor variations. For example, one state adds a caveat to Rule 3.6(b)(6) that a warning of danger concerning a person's behavior is only permissible "to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public." In another jurisdiction, the prohibition against extrajudicial statements applies only if the "lawyer knows or reasonably should know" that the statement "will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding." And in yet another, a lawyer may not help a third party to make extrajudicial statements—instead, a lawyer must "exercise reasonable care to prevent investigators, employees," or others helping with a case from making prohibited statements.[4]

Public relations concerns may loom larger over certain areas of litigation. Accuracy in press releases or other statements can have securities implications.[5] Additionally, in the mass torts context, a plaintiff's lawyer may use publicity to attract more clients and thereby pressure settlement, while effective public relations from a defendant may discourage investment in a class action, dissuade new plaintiffs from bringing claims, or even attempt to rescue a product from irretrievable loss.[6] For example, the manufacturer of the silicone gel used in breast implants that were the subject of much litigation published advertisements in national newspapers contending that the implants were safe. Although one judge allowed the manufacturer to publish the ads, another judge ordered a mistrial upon their publication.[7]

3 Bornstein, Brian H., Whisenhunt, Brooke L., Nemeth, Robert J., & Dunaway, Deborah L., "Pretrial Publicity and Civil Cases: A Two-Way Street?" (2002), Faculty Publications, Dep't of Psychology. 153 at 14; Magna Legal Services, 2019.

4 ABA CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct (Sept. 1, 2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-6.pdf.

5 Beardslee, Michele DeStafano, Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?, 23 Geo. J. Legal Ethics 1119, 1157-59 (2010).

6 Jonathan M. Moses, Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 Colum. L. Rev. 1811, 1840 (1995).

7 Id. at 1840, n. 165.

What Not To Say To the Press

So what should lawyers not say to the press? Comment 5 to ABA Model Rule 3.6 is a guide, and identifies several subjects "that are more likely than not to have a material prejudicial effect on a proceeding when they refer to a civil matter triable to a jury." Those subjects include:

> (1) the character, credibility, reputation or criminal record of a party, . . . , or the identity of a witness, or the expected testimony of a party or witness; . . .
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; . . .
>
> (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.
>
> ABA Rule 3.6, Comment 5.

One well-known example of what not to do when engaging in legal public relations is the approach taken by certain attorneys representing tobacco companies, who actively campaigned to deceive the public as to smoking's safety.[8] An attorney's duty of candor cannot be lost when engaging in any public relations exercise.

Practical Guide to a Lawyer's Engagement in Legal Public Relations

Here are some considerations for engaging in legal public relations.

- Get To Know Internal Public Relations Professionals. Before litigation strikes, in-house counsel should maintain relationships with a company's internal public relations professionals. Not only does this help ensure that accurate information is disclosed to the public generally, but it also positions in-house counsel to respond quickly at the outset of litigation.[9]

- Hire a Professional. Public relations is a field similar to the law in that it has many specialties. Hiring a litigation public relations specialist is essential. Search for firms and/or professionals with relevant expertise, and ask about their litigation experience and process. Third parties such as Chambers and Partners rank litigation public relations and crisis communications firms based on their experience and market and client feedback.

- Be Proactive. Crafting a public relations response requires an understanding of the legal ramifications of any disclosures as well as an understanding of the legal issues at play.[10] Lawyers should effectively serve as "gatekeepers."[11]

- Get to Know the Press. Get to know the reporters who are covering the trial or the client's industry. Make their job easier by giving them a soundbite that can be dropped into their piece. To that end, ask if the reporters will provide their questions in writing, and then provide them with a fully-crafted written response.

- Stay Behind the Scenes. Although sometimes appropriate, serving as a direct spokesperson may undermine or overstate the attorney's credibility. For example, a lawyer could be viewed as a mere "hired gun," or, alternatively, be given excessive deference as an officer of the court. Serving as a spokesperson may also exacerbate a potential conflict of interest between the company's best interest and the lawyer's own reputation.[12] However, make sure that both in-house and outside counsel are in control of the public relations strategy—including preparing the corporate representative's statements so that the overall message is appropriate and helpful.

- Consult with your Client. If you do serve as your client's spokesperson, account

8 Beardslee, Michele DeStafano, Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?, 23 Geo. J. Legal Ethics 1119, 1129-31 (2010).

9 Beardslee, Michele DeStafano, Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys, 22 Geo. J. Legal Ethics 1259, 1279-82 (2009).

10 Beardslee, Michele DeStafano, Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys, 22 Geo. J. Legal Ethics 1259, 1297-1300 (2009).

11 Beardslee, Michele DeStafano, Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?, 23 Geo. J. Legal Ethics 1119, 1167-72 (2010).

12 Beardslee, Michele DeStafano, Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys, 22 Geo. J. Legal Ethics 1259, 1302-04 (2009).

for Model Rule 1.4(a)(2)'s admonition to reasonably consult with your client.

- Say Something. Complete silence risks the public inferring that negative publicity or a plaintiff's claims are accurate. "No comment" is not a viable option.[13] This principle is especially true in light of evidence that 76% of jurors believe corporate executives lie and cover up, but this changes as people begin to humanize them and hear what they have to say.

- But Don't Say too Much. A brief—maybe two sentences—statement is all that is needed. For example, "Plaintiff is so embarrassed about its conduct and the facts that are expected to come out at trial that it has repeatedly tried to seal the courtroom and keep the evidence out of the public eye. Nonetheless, the manufacturer's legal team has successfully fought to shine light on Acme's nefarious conduct, and those facts will finally enter the public arena."

- Check (and follow) the Rules. Research whether the court or judge has a standing order or local rule concerning public statements to the media.

- Consider the Nature of the Proceeding. Comment 6 to ABA Rule 3.6 emphasizes that the nature of a proceeding is a key factor in determining whether an extrajudicial statement is appropriate: civil trials may be "less sensitive" than criminal jury trials, with non-jury hearings and arbitration proceedings presenting even less cause for concern.

- Be prepared. Have a general press release ready to go each day of trial and then update it as needed. Consider receiving a "rush" transcript each night and incorporating some of thatday's trial testimony in the press release without any commentary or spin. Before sending the release to the press, of course, make sure that all stakeholders approve of the message, and it follows all of the Court's rules and orders.

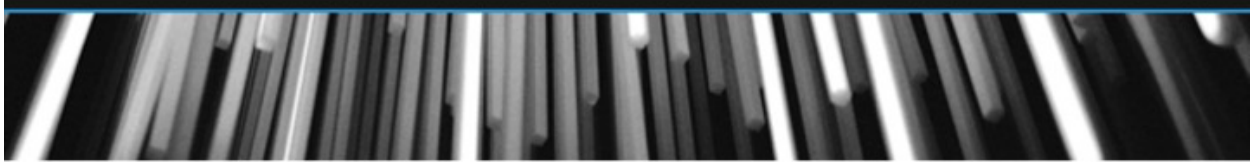
Finally, a lawyer engaging in legal PR must take care in communicating with outside public-relations consultants. Case law considering whether a lawyer's communications with a public relations consultant are privileged is mixed; as such, the safest route is to communicate with a public-relations consultant with the expectation that written communications will be subject to disclosure. Similarly, a lawyer should seek to avoid having confidential communications with the client in the presence of the consultant to prevent waiver. Other opinions, however, suggest that restricting a consultant's work to tasks linked to and necessary for the lawyer's representation may fall within attorney-client privilege, especially if the lawyer engages the consultant, manages billing for the consultant, and is always included on the client's communications with the consultant. Likewise, some courts have upheld attorney-client privilege where a PR firm acted as a "functional equivalent" of the client. Because of the split in authority, though, any lawyer seeking to involve an external PR firm should first check the law in the relevant jurisdiction—do not assume that the privilege will apply.

Despite their traditional hesitancy of public relations activities, trial lawyers no longer have the luxury of avoiding PR. However, you don't need to go it alone—turn to the professionals, but make sure you remain heavily involved to avoid any ethical pitfalls and ensure that it is consistent with your overall trial message. Remember, while you do have ethical limits to your public relations activities, you probably can do more than you think.

Margaret Dodson and Charlotte Elam, both associates at Bass, Berry & Sims, made invaluable contributions to this article and presentation.

13 Beardslee, Michele DeStafano, Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys, 22 Geo. J. Legal Ethics 1259, 1272 (2009).

THE BEST DEFENSE IS A STRONG PR OFFENSE



PANELISTS

MARY HELEN BEARD
Senior HR Counsel
HCA Healthcare

RYAN MCMANIS
VP and Deputy Gen. Counsel
Lumen Technologies

MEGAN PAQUIN, APR, CPRC
Partner
Poston Communications

KATIE A. REILLY
Partner
Wheeler Trigg O'Donnell LLP

SCOPE

- What are Public Relations?
- Why Should Lawyers Care?
- What **Can't** I Do/Say?
  - Ethics of Legal PR
    - ABA Model Rule 3.6 – Trial Publicity
    - Local Rules/Judge's Orders
- What **Can** I Do/Say?
  - It's more than we usually think
- Practical Takeaways

WHAT ARE PUBLIC RELATIONS?

Strategic communication process that builds mutually beneficial relationships between organizations and their public.

WHY SHOULD LAWYERS CARE?

WHAT CAN'T A LAWYER SAY?

- Ethical Rules
  - ABA Model Rule 3.6 – Trial publicity
    - At least 25 states have adopted ABA Model Rule 3.6 in full
    - ABA maintains a list of jurisdictional variations to the Rule
- Court's Rules

WHAT CAN'T A LAWYER SAY

"A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer **knows or reasonably** should know will be disseminated by means of public communication and **will have a substantial likelihood of materially prejudicing an adjudicative proceeding** in the matter."

-ABA Model Rule 3.6 (a)– Trial publicity

7 THE BEST DEFENSE IS A STRONG PR OFFENSE

WHAT CAN A LAWYER SAY?

Notwithstanding paragraph (a), **a lawyer may state**:

- (1) the **claim, offense or defense involved** and, except when prohibited by law, the identity of the persons involved;
- (2) **information contained in a public record**;
- (3) that an **investigation** of a matter is **in progress**;
- (4) the scheduling or **result of any step** in litigation;
- (5) a **request for assistance in obtaining evidence** and information necessary thereto;
- (6) a **warning of danger** concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.

-ABA Model Rule 3.6 (b)– Trial publicity

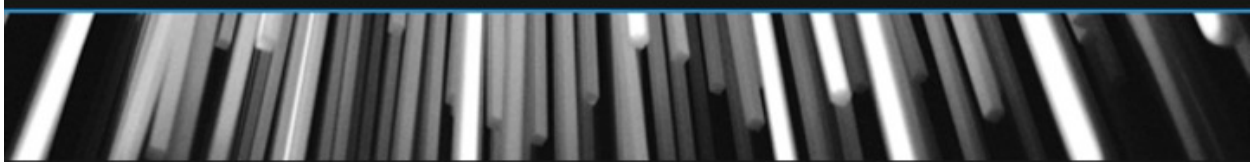
8 THE BEST DEFENSE IS A STRONG PR OFFENSE

WHAT CAN A LAWYER SAY?

"Notwithstanding paragraph (a), a lawyer may make a statement that a **reasonable lawyer** would believe is **required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client**. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."

-ABA Model Rule 3.6 (c)– Trial publicity

THANK YOU!



615.742.7855
kwalker@bassberry.com

Kathryn Walker

Member | Bass Berry & Sims (Nashville, TN)

Kathryn Walker serves as vice chair of the firm's 100-attorney Litigation & Dispute Resolution Practice Group. Her practice focuses on complex commercial litigation, internal investigations, and government investigations and enforcement.

With more than 20 years of complex business litigation experience, Kathryn has helped clients resolve a wide variety of business and commercial disputes in state and federal courts around the country as well as in private arbitrations and mediations. She has also provided counseling and advice to companies overseas on disputes and investigations.

Kathryn has represented numerous clients in bet-the-company litigation with significant financial and reputational risks, ranging from precedent-setting opioid litigation to high-stakes securities class actions. She advises clients in a wide array of industries with an emphasis on healthcare and life sciences.

With extensive experience in data management and e-discovery, Kathryn is frequently called upon to lead massive electronic data analysis projects in high-stakes litigation and investigations.

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

Accolades
- The Best Lawyers in America© — Commercial Litigation (2015-2023)
- Leadership Council on Legal Diversity (LCLD) — Fellow (2013)
- Nashville Business Journal "Best of the Bar" (2008)
- Vanderbilt Law Review — Executive Editor
- Phi Beta Kappa
- Presidential Scholar
- Henry Luce Fellow Finalist

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

Latest and Greatest ADR Strategies for Success

Robert Shimberg
Hill Ward Henderson (Tampa, FL)

Three Components of a Successful Mediation Process; Plus a Discussion of Post-Dispute Amendments to Your Arbitration Clause and Litigating Your Way Into Arbitration
Robert Shimberg

Depending on how the statistics are interpreted, more than 70% of cases reach final resolution through the mediation "process." The process typically refers to the actual mediation, one or more follow-up mediation(s), informal discussions between the mediator and the attorneys/parties after mediation, or discussions between the attorneys/parties that started during the mediation. Throughout the process, the attorneys and client representatives spend a considerable amount of time with and talking to the mediator. The parties must have confidence that the mediator is invested in working to understand the case, and helping to find a process to have the best chance to resolve the case. Therefore, the best opportunity for a positive outcome is created by focusing on 1) the selection of the right mediator for the case, 2) placing the mediator in the best position to work with the parties, and 3) using the parties' greater knowledge about the case and desired outcomes to help fashion possible solutions..

Selection of the Mediator: Every effort should be made to select your side's preferred mediator. However, since the process typically requires the agreement of all sides to select a mediator, you may not get the preferred individual, but instead someone with a preferred background. Your side may believe that your adversary is more likely to respond well to a mediator from a particular background, or the adversary may believe that your side will best respond to a mediator from a particular background. Some of those backgrounds include:

- A retired judge, who one or all of the parties may defer to based on the judge's experience in the courtroom and the belief that the judge may be well-suited to read the situation and dynamics of the dispute;[1]
- An experienced attorney who has litigated a number of similar types of cases; or
- An experienced mediator who has mediated a large number of cases, who is well versed in the mediation process, who knows when to try different approaches, and who knows when it is time to take a break and possibly reconvene in a subsequent mediation or informally through the attorneys.

Placing the Mediator in a Position to Best Work with the Parties: A conscientious mediator will review the pertinent pleadings and the confidential mediation statements and will often convene joint or individual pre-mediation calls with the attorneys for the parties.[2] If it becomes apparent at the beginning of the mediation that the mediator may not have sufficient background information, then it is incumbent upon the attorneys and parties to provide the mediator with additional information so they are best equipped to be most effective. Even if there are opening statements by the attorneys, it remains important to provide the mediator in private sessions with what may be additional helpful background or legal positions. This should continue as needed throughout the mediation process. Similarly, the mediator should be provided with pertinent information about the parties to the lawsuit.

The Parties' Role in Reaching Resolution/Possible

1 In some cases in federal court, a current magistrate may be selected as mediator by the federal judge.

2 Lawyers can request a pre-mediation call.

Solutions: A mediator has a number of approaches available to try to find a path to resolution, including:

- brackets, best and final offers, and/or straight back and forth offers;
- raising perceived weaknesses and/or strengths;
- outside-the-box ideas;
- part monetary and part non-monetary options; and
- less money up front or a higher gross amount if paid over time.

One or more of these approaches may lead to a resolution during mediation. If not, then the parties must guide the process to an alternate approach or brainstorm with the mediator to try and identify experiences from prior mediations that may be worth pursuing. Opposition research, the economy, or changes in circumstance may provide the basis for an alternative approach. Even if the mediation does not succeed in bridging the gap, a goal is that it at least lay a foundation for a possible resolution. Sometimes a mediator will be most effective after the conclusion of the initial mediation, as they now have a relationship with the parties. Again, it is up to the parties to guide the mediator to a role that will be most beneficial.

Conclusion: Whether the mediation is court ordered, pursuant to contract, or voluntary, it is most likely to succeed or lead to a resolution if the parties play a proactive role in the process. The role is not in lieu of the mediator, but instead as an invested participant who is prepared, who is well-versed on the issues, and who takes ownership in the process.

Navigating Post-Dispute Amendments to Your Arbitration Clause

Once the parties to a contract have reached the post-dispute stage where arbitration is inevitable, sometimes the parties do not like the terms of the arbitration clause in the contract, or the arbitration clause lacks specificity on how to proceed. In those instances, it is foreseeable that both sides will have different opinions about how the arbitration clause should be interpreted or effected. Common disputes include who should govern, where the arbitration should be held, and the scope of discovery. When these disagreements arise, the parties are better served to find common ground on how to address them than to seek involvement from the court. One way to resolve this impasse and avoid unnecessary litigation before arbitration is for both entities to meet in good faith and draft a post-dispute amendment to their arbitration clause.

Examples of issues that may require an amendment to the arbitration clause post-dispute are whether the arbitration should be through the AAA, how many arbitrators to include in a panel, the selection process for arbitrators, and the location of the arbitration. Other topics to consider that may not be contained in the arbitration clause but should be addressed in a status conference early on in the arbitration process are as follows:

- Procedural rules applicable to the arbitration;
- A time-frame order;
- Scope of discovery;
- Whether to allow pre-arbitration depositions;
- Expert Disclosures;
- Pre- and Post-Arbitration briefing schedules;
- Timeframe for arbitration decision;
- Whether to have a court reporter for hearings and the arbitration and how these costs will be shared

The following cases illustrate the method and practicality of amending and reaching consensus on the procedure of an arbitration post-contract:

> Contracting parties retain control over the arbitration process by the language of their agreements. Post-dispute, the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. Dowling v. Home Buyers Warranty Corp., II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993).
>
> Parties should take advantage of this autonomy to dictate material terms of their dispute process by mutual agreement. See, e.g., City of Bloomington v. Local of Am. Fed'n of State, County and Mun. Employees, 290 N.W.2d 598, 603 (Minn.1980); Lucas v. Am. Fam. Mut. Ins. Co., 403 N.W.2d 646, 648 (Minn. 1987) (courts have found no reason why the parties to an arbitration cannot dictate terms).
>
> A valid and enforceable amendment to the parties' arbitration clause must include a meeting of the minds between the parties regarding all

essential and material terms. See, e.g., Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Just like any contract, arbitration clauses are governed by contract of law principles. The terms must be clear, or the amendment will not be valid.

Failure to reach a meeting of the minds on all material points such as venue and number of arbitrators prevents the formation of an amendment to an arbitration clause. The parties must ensure they memorialize their agreement so the same is not left up to interpretation by a court of law. See, e.g., Baten v. Michigan Logistics, Inc., 830 F. App'x 808, 811 (9th Cir. 2020). For example:

> If the parties do not specifically agree on an arbitrator, an arbitrator "selected contrary to the method in the parties' agreement lacks jurisdiction over the dispute." PlainsCapital Bank v. Gonzalez, 598 S.W.3d 427, 430 (Tex. App. 2020). In this instance, courts can ultimately vacate the arbitration award after parties spend time and money litigating what they initially desired when they decided who would arbitrate the dispute.
>
> In Americo Life, Inc. v. Myer, 440 S.W.3d 18, 21 (Tex. 2014), the parties were subject to litigation ten years after a $26,000,000 arbitration award was issued because the parties did not formalize a post-dispute amendment to the arbitration clause. Therein, the arbitration clause, decades before the dispute arose, was unclear about the arbitrator-selection process. Years later, this led the losing party to the arbitration to file suit and claim that the choice of arbitrator ultimately selected did not follow the arbitrator-selection process specified in the arbitration clause. The court ultimately vacated the arbitration award because "the arbitration panel was formed contrary to the express terms of the arbitration agreement." Americo, at *25.
>
> Where an arbitrator named in an arbitration agreement could not arbitrate the dispute, a court did not void the agreement but instead appointed a different arbitrator. Astra Footwear Industry v. Harwyn Int'l Inc., 442 F.Supp. 907 (S.D.N.Y.1978); see, also, McGuire, Cornwell & Blakey v. Grider, 771 F.Supp. 319 (D.Colo.1991).

Overall, pre-arbitration litigation certainly conflicts with the Federal Arbitration Act's goal of promoting the expeditious resolution of disputes, and it delays dispute resolution for all parties involved. If the parties take the time to reach an agreed-upon amendment to their arbitration clause and reach consensus early on by discussing key material elements of the process, they can avoid protracted litigation before any meaningful dispute resolution even begins.

Litigating Your Way Into Arbitration—Or Not

It has become almost a mantra to say the goal of arbitration is to ensure the efficient, economical, and speedy resolution of disputes. See, e.g., Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278, 280 (5th Cir. 2007) (en banc); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 989 (9th Cir. 2007); Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 409 (3d Cir. 2004). Yet, in practice, getting a dispute into arbitration—and enforcing the award rendered—can take a great deal of litigation.

Even in the seemingly straightforward circumstance of a dispute between two signatories to an agreement containing a pre-dispute arbitration clause, the parties often feel that arbitration favors one side and litigation favors the other side. The typical result is a procedural skirmish of motions to compel arbitration; motions to stay litigation; arguments about the scope of the arbitration provision, and even about whether judge or arbitrator should decide those arguments; and disputes about whether requests for preliminary injunctive relief justify at least some parallel litigation even if the matter is otherwise arbitrable. Of course, many disputes are not so straightforward, involving further complications such as a non-party trying to enforce an arbitration agreement against one of its signatories, or a mix of claims in which only some claims arguably fall within the scope of the agreement.

One of the most common fights that arises in these skirmishes is the question of waiver: of the right to arbitrate at all, or at least of the right to have an arbitrator decide certain issues. The past year has brought with it not just a return to in-person programming, but also some significant judicial decisions that have weakened what has often been described as a strong national policy favoring

arbitration.

The first such case is Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022). In Morgan, the Court considered what had emerged as the clear majority approach in a nine-to-two circuit split as "a rule of waiver specific to the arbitration context." Id. at 1711. That rule essentially mandated a two-part inquiry: First, had the proponent of arbitration "acted inconsistently with that right"? And, if so, had it "prejudiced the other party by its inconsistent actions"? See id. at 1712. Under such a rule, even deeply inconsistent conduct still would not suffice to divest the right to arbitrate unless the opponent of arbitration established prejudice (the boundaries of which rarely were clear).

The Morgan Court observed that, outside of the arbitration context, questions of waiver generally are resolved by looking at the conduct of the person who holds the right and asking if they intentionally have relinquished a known right. The effect on the opposing party is seldom considered. Yet, nothing in the Federal Arbitration Act's "'policy favoring arbitration'" authorizes federal courts "to invent special, arbitration-preferring procedural rules," the Court observed. Id. at 1713. Rather, "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration." Ibid. On that reasoning, the Court "stripped" the majority rule of its prejudice requirement, leaving only the question of inconsistent action.

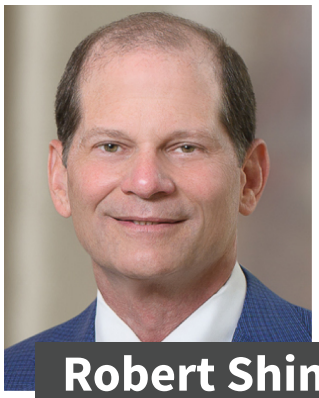
Morgan's holding means that arbitration proponents have lost their second (and arguably stronger) line of defense to waiver accusations, at least in cases governed by the Federal Arbitration Act rather than state arbitration law. What constitutes inconsistent actions, or an intentional relinquishment, may vary from court to court; but such a finding could come much faster than in the past. For example, the Sixth and Eighth Circuits have held that a motion to dismiss on the merits is "entirely inconsistent with later requesting that those same merits questions be resolved in arbitration." Solo v. United Parcel Service Co., 947 F.3d 968, 975 (6th Cir. 2020) (citing Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc., 589 F.3d 917, 922 (8th Cir. 2009)).
This means a defendant could risk waiver just a few weeks into a case by filing a motion to dismiss, even if it does not actually know of an arguable right to arbitration but is later deemed not to have done enough to find out if that right exists. Cf. Smith v. GC Servs. Ltd. P'Ship, 907 F.3d 495, 499 (7th Cir. 2018) (asking whether a party did "all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration") (internal quotation marks and citation omitted). Under pre-Morgan law, however, it was not unusual to see courts reject waiver claims—based on lack of prejudice—even after upwards of a year of litigation and active discovery.

As a practical matter, then, Morgan means that an active and discerning investigation of any possibility of arbitration—through a deep dive into one's own documents and possibly even those documents that might be obtainable elsewhere without formal discovery—is now critical at the very inception of a dispute, lest the opportunity to arbitrate be lost for good.

A different waiver issue arose in United States ex rel. Dorsa v. Miraca Life Sciences, Inc., 33 F.4th 352 (6th Cir. 2022). There, the arbitration proponent filed a motion to dismiss based on an arbitration agreement. The district court denied that motion, concluding that the plaintiff's claim was outside the arbitration agreement's scope. Id. at 354. The proponent then sought to stay the action and compel arbitration, arguing that, under the terms of the arbitration agreement, the threshold question of arbitrability (sometimes referred to as "substantive arbitrability") was reserved to the arbitrator. Id. at 356.

The district court held, and the Sixth Circuit agreed, that the proponent had waived that argument. The Court of Appeals observed that the defendant "invited the district court to rule on the arbitrability of the claim" and then on reply in support of its motion, "changed course to contend that an arbitrator had to rule on the arbitrability of the claim." Id. at 357. The court observed that the Eleventh Circuit had reached a similar conclusion in such circumstances. Thus, under Miraca, even an immediate motion invoking arbitration can still miss the mark if it makes the wrong arguments.

Taken all together, Morgan, GC Services, and Miraca portend a distinctly more difficult and front-loaded landscape for those who would prefer to arbitrate their disputes. The margin for error could be slim indeed, and the consequences of a foot-fault at the very inception of the dispute may be swift and unforgiving.



813.227.8469
robert.shimberg@hwhlaw.com

Robert Shimberg

Shareholder | Hill Ward Henderson (Tampa, FL)

Robert Shimberg earns his clients' respect by listening, understanding their immediate needs and honing in to solve issues in an extremely responsive manner.

Robert's primary areas of practice include commercial litigation, corporate compliance, cybersecurity, governmental relations and corporate investigations and representing clients under investigation by local and state administrative, regulatory and criminal agencies. Robert is also leading the firm's COVID-19 Response Team and advising clients on a number of related issues including government orders, workplace issues, liability-related issues and crisis management and communication. Robert was formerly a prosecutor with the Hillsborough County State Attorney's Office.

Robert led the effort to modify the Florida LAW RISC to include the Seller's Right to Cancel language and incorporate the conditional delivery form into the RISC. He has provided compliance-related services and training to over 300 businesses around the country. He has defended businesses against consumer claims, class action lawsuits, and provided representation in connection with government agency inquiries and investigations and conducts internal investigations. He works extensively with automobile dealerships in Florida and throughout the country on proactive compliance and litigation in areas including sales, F&I, advertising, recalls, warranty audits, TCPA, ADA, accounting and pay plan disputes. He is a frequent speaker on compliance-related topics to industry groups and associations.

Robert assists clients from a variety of sectors in navigating responses to data breaches and cyber and ransomware attacks, including: initial assessment, response options, liaison with law enforcement, asset recovery, customer notice, interaction with third-party resources, and litigation. He understands the time-sensitive nature surrounding data breaches and cyber-attacks and is responsive and available to assist at all hours.

He also helps businesses in bid protests and has handled protests for clients against Florida state agencies, counties, cities, school boards and a state judicial circuit.

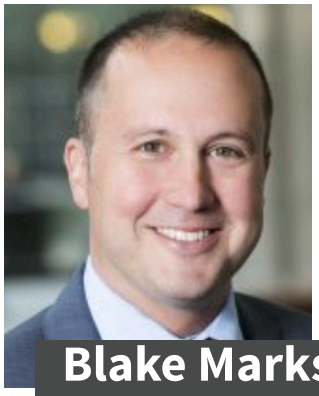
Robert's practice also encompasses counseling high net worth individuals and helping them navigate both business and personal legal issues that may arise.

Practice Focus

- Automotive
- Litigation
- Automotive Regulatory Compliance
- Employment Law
- Cybersecurity, Data Breach & Protection
- Administrative/Regulatory
- Corporate Compliance and Investigations
- COVID-19 Response Team
- Governmental Relations, Bid Protests and Procurement

Education

- University of Florida, B.A., B.S., 1984
- University of Florida College of Law, J.D., 1989, Honors: Moot Court



Wage and Hour Class Action Trends and Developments

Blake Marks-Dias
Corr Cronin (Seattle, WA)

Trends and Developments in Wage and Hour Class Actions
Blake Marks-Dias

In-house counsel will tell you they have a plethora of issues that keep them up at night. And if that in-house counsel's company has a significant number of employees the chances are high that wage and hour class actions are among the items on their sleep-depriving worry list. If wage and hour class actions is not yet on your radar consider yourself lucky, but here are five reasons why it should be:

(1) Record Settlements
One could be forgiven for thinking that COVID-19 and court congestion would result in less, not more, class action suits and settlements. The reality, however, is that wage and hour class action settlements are at an all-time high. The top ten settlements in 2021 totaled more than $640 million. The trend is continuing in 2022 and all signs indicate that this will continue.

(2) Business Impacts
All litigation is disruptive. But wage and hour class actions are particularly so, especially given the costly and time-consuming discovery demands, the attention in-house counsel is required to give to properly manage the case, the potential for negative publicity, and the impact on employee morale and retention issues. In addition, the financial impact due to the scale of such cases has the potential to materially impact the company's finances in a detrimental way.

Although many of the recent settlements in the news are against large, public companies such as Starbucks and Amazon, wage and hour class actions can affect every business. The negative impacts of a class action against small businesses are heightened and can raise the stakes significantly as it could be a potential extinction event for them.

(3) Success Breeds Success
Nothing breeds copycat plaintiff litigation like success. It seems every morning news alerts show up in our email inboxes describing the latest, eye-popping wage and hour class action settlement. With sophisticated information sharing networks – and plain old mimicry – plaintiff-side lawyers across the country are poised to jump on the wage and hour class action bandwagon.

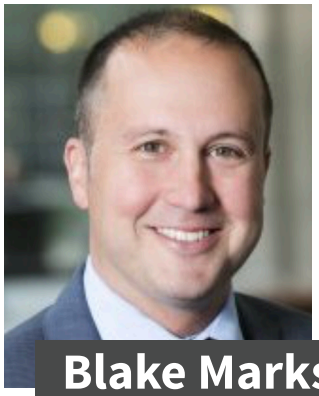
(4) FLSA Claims: The Tort Du Jour
The Fair Labor Standards Act ("FLSA"), originally published in 1938 established the right to a minimum wage, "time-and-a-half" overtime, and prohibits employment of minors in "oppressive child labor." But it has also become a powerful weapon for plaintiff-side class action lawyers to provide a legal basis for wage and hour claims. It takes only one employee to start a "collective action," and these can be maintained more effectively than a traditional class action because they do not share the same barriers to certification. Newer plaintiff FLSA theories include challenges to employers' automatic deductions, rounding down wages, requiring remote work, and utilizing tip pooling/credits.

"Hybrid" class actions where class-action plaintiffs have alleged both federal and state law claims have also become commonplace. Hybrid class actions cause procedural headaches because the FLSA governs procedure for the federal claims, while Rule 23 governs state law class action claims. However, hybrid class actions may also give defendants an edge, since plaintiffs must satisfy the procedural and legal requirements for both frameworks.

(5) Changing Legal Landscape

The case law surrounding wage and hour class actions differs across jurisdictions and regularly changes. Likewise, the applicable regulations, rules, and agency guidance governing wage and hour requirements under the FLSA also are regularly updated. Against this landscape, it becomes very difficult to address – let alone head off – wage and hour litigation.

Yet all is not doom and gloom. There are steps employers can take to prepare a successfully defense against wage and hour class actions. Early-litigation strategies such as moving to dismiss on the basis of defective class representatives, moving to transfer venue, seeking dismissal in order to compel arbitration, and early discovery into the standing of the named plaintiffs are effective strategies a company can use at the outset of any wage and hour class action to defeat class certification.



206.501.3509
bmarksdias@corrcronin.com

Blake Marks-Dias

Partner | Corr Cronin (Seattle, WA)

Blake is a partner in the firm. His practice focuses on cases which the client “must win” and, when necessary, which must be tried. Blake has been widely recognized by his peers for his trial skills. He has consistently been listed as a Washington Super Lawyer (top 5% of attorneys statewide), and for each year since 2016 has been named a Top 100 Super Lawyer. He also has been recognized in Best Lawyers of America in 2022 and 2023, another peer review honor. Blake is a member of the Federation of Defense & Corporate Counsel and a faculty member of the National Institute for Trial Advocacy.

Blake is also actively engaged in the community and is a member of the Board of Directors for Childhaven.
In college, Blake earned the award of the top individual debater in the nation. He and his partner finished second in the 1995 national tournament (final round transcript published in one of the leading college speech and communications textbooks: Freeley and Steinberg, Argumentation and Debate (12th ed. 2009)).

Featured Cases

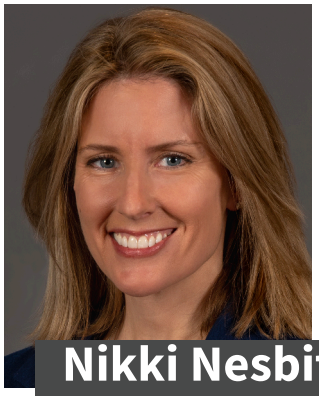
- Defense verdict for Fortune 50 client following jury trial in employment discrimination case.
- Defense verdict following a three-week jury trial on behalf of the University of Washington in alleged employment discrimination case.
- Defense verdict following a three-week jury trial in Portland, Oregon, on behalf of client weatherproofing membrane manufacturer and its product consultant. The case involved a mix of product liability and professional liability claims.
- Currently representing a defendant former property owner in multi-million-dollar MTCA lawsuit.

Presentations and Publications

- **Class Action Trends and Developments, NAMIC Conference, June 9, 2021**
- **Serving Clients: What Makes Good Client Service and What are Our Key Ethical Obligations?, William L. Dwyer Inn of Court presentation, March 13, 2018**
- **Changing the Narrative in Employment Discrimination Cases, KC Bar Bulletin 2018**
- **How Privileged is Communication with Your Firm’s In-House Counsel?, NWLawyer, February 2014**

Education

- B.A., Gonzaga University, 1995 (cum laude)
- J.D., University of Washington School of Law, 1998 (Order of the Barristers)



Battling the Keyboard Warriors – Managing Disparaging Online Reviews and Social Media Posts

Nikki Nesbitt

Goodell DeVries Leech & Dann (Baltimore, MD)

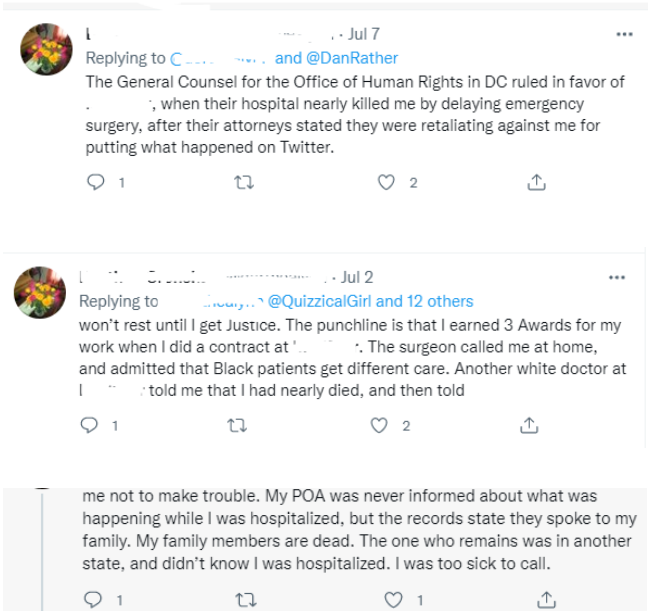
Battling the Keyboard Warriors – Managing Disparaging Online Reviews and Social Media Posts
K. Nichole Nesbitt

No matter how different their products, services, or missions, most companies share the frustration of dealing with inaccurate negative online reviews. Whether baseless, overstated, or downright fabricated, these reviews can have a real impact on the reputation and success of a business. The options for effectively dealing with them are not straightforward and could involve more than one approach. This article describes some of the legal tools and practical strategies available to companies that find themselves battling (often invisible) antagonists who have publicly disparaged their organization and mission.

The Spectrum of Negative Online Posts

Some posts that cast a negative light on a company are, of course, legitimate. When an unhappy consumer submits a truthful review about their actual experience, few legal remedies exist to force the removal of those posts. But online reviews that are fake, false, or intentionally incendiary are a different matter, and companies should consider their options to prevent ongoing disparagement from these communications.

Consider the following tweets by an aggrieved patient against a major hospital system in Washington, D.C. in one of our cases.

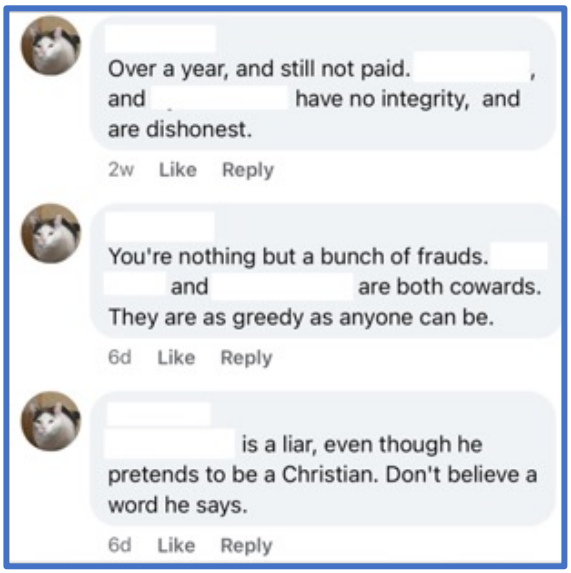


The context is that the patient, dissatisfied with her medical care, brought a discrimination claim with the D.C. Office of Human Rights. (Interestingly, she did not file a medical malpractice claim.) The parties engaged in mandatory mediation, which was unsuccessful. Later, following its investigation, the Office found no probable cause for discrimination and dismissed the matter. That ruling prompted the patient to engage in an online smear campaign against the hospital. It lasted months.

Most of the tweets included entirely false facts. Taking the above tweets as an example, there was no "emergency" surgery, the surgery she did have was pre-scheduled and was not delayed, and no doctor ever told the patient that "Black patients get different care" or that she "had nearly died." These facts were made up. Likewise, the patient's reference to communications with the hospital's counsel were both inaccurate and subject to confidentiality

restrictions that govern the mandatory mediation process. The hospital struggled with whether to ignore the tweets or take affirmative action to address them. More on that below.

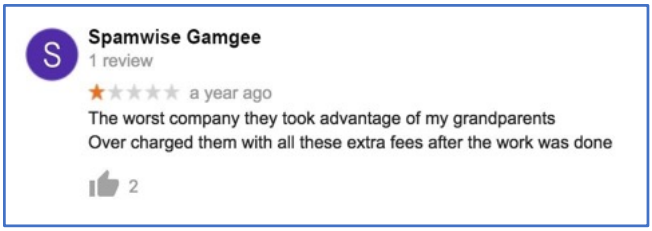
Negative false reviews are not just limited to consumers. Companies can encounter defamatory reviews by competitors, vendors, or employees. Here is an example of one of a series of harassing posts in another of our cases:



These posts were made by a subcontractor retained to build a fence for a general contracting company on a commercial project. The subcontractor was unable to complete the full job because of complexities with the terrain, and the general contractor withheld a portion of the agreed-upon contract price to account for the unfinished job. After a series of unsuccessful attempts to negotiate a fair amended price, the subcontractor became frustrated and threatened to "blast" the general contractor on social media if the full contract price was not paid. The general contractor held firm, and the subcontractor spent over a month continuously peppering the general contractor's Facebook page with negative posts like these – identifying the company's owners and other employees by name. What did the general contractor decide to do? Read on to find out.

These examples involve identifiable posters, but many negative online reviews are posted by anonymous individuals who are difficult (if not impossible) to track down, which means the business has no practical means of reaching them, correcting them, or taking legal action against them. Here is a representative example:

Even more disturbingly, the internet is rife with paid false reviewers who have had no interaction at all with the business.[1] This made-up example comes from an article that offers suggestions about how to combat this particular and ever-increasing problem[2]:



The right approach to negative and false online reviews depends largely upon the content of the posts, the impact of the posts on the business, and the credibility of the posters.

Legal Remedies

1. Anti-Harassment Laws

Most states have criminal statutes prohibiting harassment. Maryland's statute, for example, provides that "a person may not . . . maliciously engage in a course of conduct that alarms or seriously annoys another."[3] The prohibited course of conduct is not specifically defined, but three conditions must be met in order for the conduct to fall under the statute: (1) the accused must have the "intent" to harass, alarm, or annoy the other; (2) the accused must have received "reasonable warning

1 DePompa, R and Molina, D., "Five Star Fakes: Fake online reviews cheating businesses and consumers," (2022) https://www.investigatetv.com/2022/06/20/five-star-fakes-fake-online-reviews-cheating-businesses-consumers/

2 Hainsworth, M., "What to Do About Fake Negative Online Reviews," (July 5, 2018), https://www.energycircle.com/blog/what-do-about-fake-negative-online-reviewshttps://www.energycircle.com/blog/what-do-about-fake-negative-online-reviews

3 Md. Code Ann., Crim. § 3-803(a).

or request to stop" by the other; and (3) the accused must not have a "legal purpose" for engaging in the conduct.[4]

Maryland's General Assembly decided to clarify that online communications can constitute harassment. It enacted a statute that uses the same language as § 3-803(a) but adds the phrase "through the use of electronic communication," so as to remove all doubt that harassment through the internet is still harassment.[5] A related statute prohibits a person from using "telephone facilities or equipment" to engage in harassment.[6]

Being able to warn an offending poster about the criminality of their conduct can be a compelling tool in this context. The anti-harassment laws are a good place to start when contemplating legal action. Criminal statutes can also provide a basis for seeking injunctive relief, as described in the next section.

2. Temporary Restraining / Peace Orders

Because of the potential criminality of false negative online reviews, companies may have the ability to obtain a restraining or peace order to temporarily stop the poster from committing the harassing conduct – or even communicating with the business altogether. A temporary peace order is limited in time (in Maryland, it lasts only seven days) but has a rather low standard of proof: the entity seeking the order need only establish that there are "reasonable grounds to believe that the respondent has committed" the harassment.[7] After the seven-day period expires, a company can seek a final peace order, but this requires additional evidence of both misconduct and injury, which is a more involved process. Still, a temporary order built on a criminal violation may be sufficient to deter a poster from continuing the offending conduct.

Remember the fence subcontractor from earlier? The general contractor decided to send a cease and desist letter threatening the subcontractor with a motion for a peace order. This did the trick. The subcontractor stopped posting. The motion was never filed. The parties went on to resolve their contract dispute.

3. Defamation

To the extent the negative post contains factual content that is demonstrably false, a civil defamation claim (or the threat thereof) can serve as a meaningful remedy, because it provides for the award of damages.

In most states, to make a prima facie case of defamation, a plaintiff must establish that (1) the poster published a false statement to a third person; (2) the statement was posted with at least negligent indifference to its wrongfulness; and (3) the plaintiff suffered harm.

One challenge when it comes to online reviews is that defamation does not apply to the expression of an opinion. Negative posts that appear on a business's review platform have been regarded automatically as opinions, because "an ordinary internet reader understands that such comments are mere statements of opinion"; otherwise, "all negative internet reviews [would be] susceptible to defamation claims."[8] But this is not always the case. An internet post can easily meet the elements of defamation if it contains false factual statements.

If successful in establishing defamation against a poster, a company can recover for specific damages like lost business opportunities and lost sales, as well as reputation damage. These can be difficult to prove; not only are damages hard to quantify, establishing that it was the negative post, as opposed to other causes, that led to the damage is a challenge. But some reviews or posts may qualify as "defamation per se," which would permit a plaintiff to recover "general damages" even without establishing a particular injury. Defamation per se occurs when a post is "so likely to cause degrading injury to the subject's reputation that proof of that harm is not required to recover compensation"; for instance, accusing one of a crime or a matter "adversely affecting the person's ability to work in a profession."[9] The amount of general damages available will correspond to the seriousness of the false statement, the believability of the statement,

4 Id.

5 Md. Code. Ann., Crim. § 3-805(b).

6 Md. Code. Ann., Crim. § 3-804(a)(2).

7 Md. Code Ann., Cts. & Jud. Proc. § 3-1503.

8 Galland v. Johnston, 2015 U.S. Dist. LEXIS 35211 *12 (S.D.N.Y. Jan. 13, 2015).

9 Larue v. Johnson, 208 U.S. Dist. LEXIS 238815 *15 (D.D.C. Feb. 22, 2018).

how broadly distributed it was, and the plaintiff's prominence and professional standing in the community, among other things.[10]

4. Federal Trade Commission Act, 15 U.S.C. § 45
To the extent deceptive negative online reviews are perpetrated by someone out to influence consumers, the Federal Trade Commission provides a remedy. The law prohibits "unfair or deceptive acts or practices in or affecting commerce," and the FTC has the authority to order the perpetrator to cease and desist from engaging in the practice.[11] The FTC has acknowledged that this authority extends to online endorsements and reviews.[12] Accordingly, reporting a fake review to the FTC is worthwhile if it can be argued that the poster is intending to affect commerce.

5. FTC Guidance Materials
Beyond the statute itself, the FTC's guidance documents are a potential source of legal support. Although the FTC carries the mission of "Protecting America's Consumers" against potentially misleading business practices, companies too gain some protection from the regulatory framework.

The FTC's guidance is geared to both social media platforms and marketers, meant to prevent companies from "abusing" the trust of consumers by "writing or procuring fake or deceptive reviews . . . that tout their own products or slam those of honest competitors."[13] And even though the goal is to protect consumers rather than companies, the guidance supports a business's interest in taking down false and misleading reviews. The guidance document for review platforms, for instance, encourages platforms to have "reasonable processes in place to verify that reviews are genuine and not fake, deceptive, or otherwise manipulated."[14]

To prove it means business, the FTC issued a Notice of Penalty Offenses to more than 700 companies to advise them that they could incur significant civil penalties if they promote "fake reviews and other forms of deceptive endorsements" to "cheat consumers and undercut honest businesses."[15] Again, the consumer protection focus is clear, but companies can benefit from citing consumer protection as a basis for ensuring that all reviews, even those posted by another consumer, are grounded in truth.

Thus, review platforms like Yelp and social media platforms like Facebook and Instagram run afoul of the FTC when they permit false reviews to stay posted, which gives companies a basis for demanding that false reviews be taken down by the platform.

Platform Policies

A more direct way of approaching internet platforms is to use their stated policies as a basis for action. As required by the FTC, nearly all online and social media platforms have policies designed to safeguard against fake reviews, usually detected initially through computer algorithms and then followed up by humans. Facebook (Meta), for instance, has a "Fraud and Deception" policy that provides it will "remove content that purposefully deceives, willfully misrepresents or otherwise defrauds or exploits others for money or property."[16] Amazon, similarly, prohibits fake reviews and monitors its site for "fake review brokers," reporting in 2021 that it identified more than 16,000 abusive fake-review groups, resulting in "over 11 million members being taken down" from its site.

The same is true of Yelp and TripAdvisor, which regularly flag and report to the FTC posts or individuals who participate in online review exchange groups that post fraudulent reviews.

In light of these platforms' respective pledges to root out fake reviewers, it is worth contacting their fraud departments to flag fraudulent and harassing online reviews. In doing so, companies should cite the

10 Id. at *26.

11 15 U.S.C. § 45(b).

12 "Endorsements, Influencers, and Reviews," Federal Trade Commission https://www.ftc.gov/business-guidance/advertising-marketing/endorsements-influencers-reviews

13 Atleson, M, "I'll pay you to give this blog post five stars," Federal Trade Commission (January 25, 2022), https://www.ftc.gov/business-guidance/blog/2022/01/ill-pay-you-give-blog-post-five-stars

14 "Featuring Online Customer Reviews: A Guide for Platforms," Federal Trade Commission (January 2022), https://www.ftc.gov/business-guidance/resources/featuring-online-customer-reviews-guide-platforms

15 "Notice of Penalty Offenses can trigger steep penalties for recipients who use endorsements to deceive consumers," Federal Trade Commission (October 13, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements

16 Meta Fraud and Deception Policy, https://transparency.fb.com/policies/community-standards/fraud-deception/?source=https%3A%2F%2Fm.facebook.com%2Fcommunitystandards%2Ffraud_deception%2F%3Fprivacy_mutation_

FTC's guidelines for these platforms, which require the platforms to have "reasonable processes in place to spot fake or deceptive reviews."

Importantly, though, companies cannot typically sue online platforms for a false or misleading review posted by a third party: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Review Removal Services

The prevalence of fake reviews has created a business opportunity for web-savvy companies. Companies like guaranteedremovals.com, consumerfusion.com, and webimax.com promise the "permanent removal of online reviews" to "give you control over your brand's online presence. They offer free consultations and some provide business counseling beyond the technological service of removing a post.

Direct Response

Companies with an interest in public engagement, and especially those with skilled public relations personnel, may opt not to utilize legal tools to combat negative posts at all and instead may decide to address the comments directly, in the same forum.

This tends to be recommended more for negative reviews that are not fake or intentionally disparaging, but rather reflect legitimate complaints. Writers on this issue have noted that "[b]y responding to negative feedback, you can make a positive impact on your brand reputation." The strategy is to respond quickly and use a "simple" formula of thanking the poster for the feedback, acknowledging their frustration, and offering a potential solution.

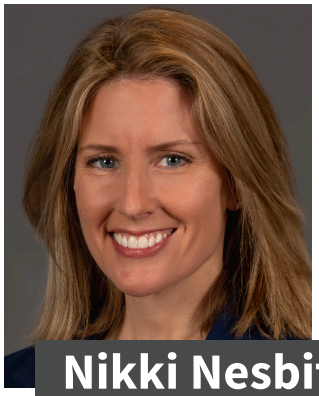
The Do-Nothing Strategy

Finally, a business may decide that ignoring the post is the best course. Often, the language and context of the post itself will lessen the impact of the message. Take, for instance, our indignant hospital patient. We determined that the poster's hyperbole that the hospital "nearly killed [her]" and told her "not to make trouble,' coupled with the rapid succession of posts, likely would not be considered credible by most readers. We further decided that a direct response would only encourage the poster and bring further attention to her message, while legal action would give her additional fodder for protest. She did continue to post for more than a month, but her posts became less frequent over time until they eventually stopped.

Even remarks with the most disparaging intent may have little impact when no attention is brought to them.

Conclusion

Negative false online reviews are commonplace and sometimes short-lived and harmless, but some can cause real damage to the reputation of their subject. Fortunately, legal and practical remedies do exist, and it is in the best interests of every business with an online presence to work with legal counsel to develop a conscientious approach to battling the problem.



410.783.4026
knn@gdldlaw.com

Nikki Nesbitt

Co-Managing Partner | Goodell DeVries Leech & Dann (Baltimore, MD)

Nikki is a partner of the firm and currently serves as its Managing Partner. Nikki's current practice concentrates on litigation in the health care field, most especially in the defense of medical malpractice cases but also cases involving civil rights disputes brought by employees, patients, guests, or other claimants. She represents clients before tribunals ranging from administrative agencies (including human relations offices and offices of administrative hearings) to trial-level courts (state and federal) to appellate courts. Nikki also handles employment matters outside of the health care context for employers in this region and beyond. Nikki's experience as a litigator provides her with insight to counsel her health care clients on preventing claims and crafting meaningful guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation or administrative review.

For the entirety of her 20 years at the bar, Nikki has worked for Goodell DeVries and has moved through the ranks from summer associate to managing partner. She has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, the Trial Network, and in non-legal organizations such as JDRF.

Practice Areas

- Medical Malpractice
- Medical Institutions Law
- Employment Litigation
- Commercial and Business Tort Litigation

Publications and Seminars

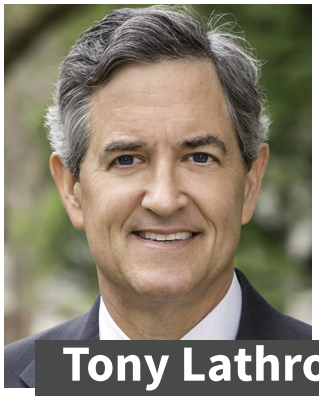
- Moderator, "Distinguishing Between Daubert & Other Expert Challenges," CLE Program, Bar Association of Baltimore City, March 2022
- Presenter, "Understanding Implicit Bias to Improve and Protect Your Workplace," In-House and Outside Counsel: In Sync and In Person, The Trial Network, November 2021
- Presenter, "Vaccine Mandates and Disclosures by Health Care Employers," Lightning Rounds 2021 Education Program, Maryland-D.C. Society for Healthcare Risk Management (MD-DC SHRM), September 2021
- Presenter, "Practical Advice from Women Law Firm Leaders," Women, Leadership, & Equality (WLE) Webinar Series, University of Maryland Francis King Carey School of Law, June 2021
- Presenter, "Minimizing Risk with General Contract Provisions," Associated Corporate Counsel, Baltimore Chapter, February 2020
- Presenter, "Physician Assistants and the Law: What You Need to Know," Maryland Academy of Physician Assistants (MAPA), Annual Conference, September 2013
- Presenter, "How to Avoid Medical Malpractice," Maryland Academy of Physician Assistants (MAPA), Annual Conference, September 2012

Honors and Awards

- Best Lawyers in America - Commercial Litigation (2016-Present)
- Chambers USA - Healthcare, Maryland (2017)
- The Daily Record - Leading Women Award (2011)
- Maryland Super Lawyers - Civil Litigation: Defense (2021-2022) - Civil Litigation: Defense (2009-2014)

Education

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



Legal Developments and Considerations in Connected and Autonomous Transportation

Tony Lathrop
Moore & Van Allen (Charlotte, NC)

Navigating the Smart City: Legal Developments and Considerations in Connected and Autonomous Transportation
Tony Lathrop

Technological innovation is driving and flying us into a more electrified, connected, and autonomous transportation system. The burgeoning use of autonomous cars, trucks, ships and unmanned aerial systems (UASs) will revolutionize the movement of goods and people, presenting businesses with new legal challenges and policy considerations related to liability and insurance, privacy and mobile data security, intellectual property, securities issues, and others. As autonomous technology gains traction, related legal and regulatory developments will illuminate considerations for business operations and innovation.

Autonomous & Connected Transportation – The Time is Now

The use of autonomous transportation and its infrastructure will impact most individuals and businesses in the future. When we discuss autonomous and connected transportation, we must expand our vision beyond the design and sale of autonomous cars for personal use. There are broad applications for the deployment of autonomous and connected transportation, which implicate cars, trucks, drones, electric vertical take-off and landing aircraft (eVTOLs), cargo ships, and even tractors for a range of services like local deliveries, food delivery, shipping & logistics, taxi and ride share services, public transportation, agriculture and more.

Autonomous and connected vehicles have the capacity to enhance the safety and efficiency of our transportation systems. Connected vehicles use wireless networks and vehicle sensors to communicate with other vehicles, surrounding infrastructure (e.g., work zones, toll booths, school zones, etc.), traffic control devices, and even individuals' personal devices.[1] Connected vehicles and infrastructure continuously share real-time data to better control traffic, mobility, and safety. Autonomous vehicles are the technology that once made science fiction movies seem far-fetched. Automation is often described with reference to the "levels" defined by SAE International, which have been adopted by the U.S. Department of Transportation: Level 0 – No Driving Automation, Level 1 – Driver Assistance, Level 2 – Partial Driving Automation, Level 3 – Conditional Driving Automation, Level 4 – High Driving Automation, and Level 5 – Full Driving Automation.[2]

The global market for connected vehicles is projected to grow at a compound annual growth rate of more than 18%, reaching $191.83 billion by 2028.[3] The U.S. autonomous vehicles market has been projected to grow from $4 billion in 2021 to $186 billion by 2030.[4] The development of drones capable of transporting one or more individuals, as well as goods, also is underway. Projections on the possible growth of the advanced air mobility (AAM) market vary greatly. The current AAM market has been estimated at around $8.1 billion,[5] and it has

1 U.S. Department of Transportation, What Public Officials Need to Know About Connected Vehicles https://www.its.dot.gov/factsheets/pdf/JPO_PublicOfficials.pdf.

2 See National Highway Traffic Safety Administration, Federal Automated Vehicles Policy (Sept. 2016) https://www.hsdl.org/?view&did=795644; SAE International, Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles J3016_202104, (Issued Jan. 16, 2014, Current Revision Apr. 30, 2021) https://www.sae.org/standards/content/j3016_201401/.

3 Global Connected Car Market Size to Hit USD 191.83 Billion at a CAGR of 18.1% for 2021-2028, Fortune Business Insights (Aug. 17, 2022) https://www.globenewswire.com/en/news-release/2022/08/17/2499966/0/en/Global-Connected-Car-Market-Size-to-Hit-USD-191-83-Billion-at-a-CAGR-of-18-1-for-2021-2028-Fortune-Business-Insights.html.

4 Marc Saltzman, Self-driving cars are a thing of the future. But is that future right around the corner? USA Today (Aug. 29, 2022) https://www.usatoday.com/story/tech/2022/08/29/self-driving-cars-future-gm-tesla/7896389001/.

5 Paul Brinkman, Making sense of advanced air mobility market projections, Aerospace America (Aug. 25, 2022) https://aerospaceamerica.aiaa.org/making-sense-of-advanced-air-mobility-market-projections/.

been projected to be worth as much as $17 billion by 2025.[6] High end projections have estimated the annual market reaching between $1.5 and $2.9 trillion by 2040 and lower projections estimate $115 billion by 2030 or $318 billion in 20-years depending on how the market fares in major cities.[7]

The key is to act now – now is the time for innovation, strategizing, shaping product and regulatory development, and for companies and counsel to evaluate their place in it all.

Personal/Private Transportation: The most advanced vehicle automation available for sale directly to U.S. consumers is Level 2 advanced driver assistance systems. Examples include vehicles with GM Super Cruise or Tesla Autopilot technology. GM recently announced that its Super Cruise feature will expand to an additional 200,000 miles of mapped roadway (400,000 miles total), including non-divided mapped highways.[8] Super Cruise boasts "hands-free driver-assistance technology for compatible roads…with Lane Change on Demand and Automatic Lane Change."[9] Still, GM warns that "[d]rivers must pay attention to the road at all times. Our Driver Attention System with proprietary head pose and eye gaze software helps make sure your eyes are on the road, and it alerts you when you need to pay more attention or take back control."[10] Tesla's Autopilot feature "enables your car to steer, accelerate and brake automatically within its lane. Current Autopilot features require active driver supervision and do not make the vehicle autonomous."[11]

There are differing views as to when full autonomy will manifest. Early projections claimed that Level 5 fully autonomous vehicles would be available by 2025, but now fully autonomous vehicles are not expected to be viable on the road on a large scale before 2030.[12] Some recent projections are that by 2030, 60% of new cars will operate with Level 2 automation features and 5% of the market will be automated at Level 3 and Level 4.[13] Some believe that "[e]ven decades from now you will not get to 100% truly autonomous vehicles."[14] Barriers to reaching Level 5 fully autonomous vehicles have been cited as consumer acceptance, cost, state-specific regulatory frameworks, and insurance and liability issues, among others.[15]

Logistics, Shipping & Deliveries: The use of autonomous transportation for the movement of goods along the supply chain and to end-use consumers is gaining momentum. Autonomous logistics revenue has been projected to hit $480 billion by 2026 and $920 billion by 2030.[16] Autonomous trucks are expected to make up most of that revenue, with package drones and food delivery drones making up most of the rest.[17] Companies like Walmart and Pitney Bowes are deploying driverless trucks for the middle mile, i.e. "the point in the supply chain where goods travel between warehouses or from a warehouse to a 'last mile' pickup point, such as a store or sortation center."[18] Autonomous trucks with a Human-Guided AutonomySM feature also are being deployed in logistics – the feature electronically connects two trucks and allows the lead truck with a driver to guide the second truck while that driver rests.[19] The Federal Motor Carrier Safety Administration recently announced that it will recruit truck drivers in a study of the implications of incorporating into commercial motor vehicles Level 2 and Level 3 semi-autonomous technology, which require the driver to remain fully engaged or alert to

6 Jane Wardell, Jetpacks, flying cars and taxi drones: transport's future is in the skies, Reuters (Dec. 9, 2021) https://www.reuters.com/markets/commodities/jetpacks-flying-cars-taxi-drones-transports-future-is-skies-2021-12-03/.

7 Brinkman, https://aerospaceamerica.aiaa.org/making-sense-of-advanced-air-mobility-market-projections/.

8 Andrew J. Hawkins, GM's Super Cruise will cover 400,000 miles of roads in North America, doubling coverage, The Verge (Aug. 3, 2022) https://www.theverge.com/2022/8/3/23289019/gm-super-cruise-coverage-expand-400000-miles.

9 General Motors, https://www.gmc.com/connectivity-technology/super-cruise.

10 Id.

11 Tesla, https://www.tesla.com/autopilot.

12 Neil Winton, Computer Driven Autos Still Years Away Despite Massive Investment, Forbes (Feb. 27, 2022) https://www.forbes.com/sites/neilwinton/2022/02/27/computer-driven-autos-still-years-away-despite-massive-investment/?sh=701d47a218cc.

13 Id.

14 Nick Carey and Paul Lienert, Truly autonomous cars may be impossible without helpful human touch, Reuters (Sept. 12, 2022) https://www.reuters.com/technology/truly-autonomous-cars-msuay-be-impossible-without-helpful-human-touch-2022-09-12/.

15 Marc Saltzman, Self-driving cars are a thing of the future. But is that future right around the corner? USA Today (Aug. 29, 2022) https://www.usatoday.com/story/tech/2022/08/29/self-driving-cars-future-gm-tesla/7896389001/.

16 Rudy Ruitenberg, Autonomous vehicles: The self-driving and flying revolution happening out of sight, Viva Technology (June 3, 2022) https://vivatechnology.com/news/autonomous-vehicles:-the-self-driving-and-flying-revolution-happening-out-of-sight.

17 Id.

18 See Walmart is using fully driverless trucks to ramp up its online grocery business, CNBC (Nov. 8, 2021) https://www.cnbc.com/2021/11/08/walmart-is-using-fully-driverless-trucks-to-ramp-up-its-online-grocery-business.html; Dan Berthiaume, Pitney Bowes to deploy autonomous trucks for 'middle mile,' Chainstorage (Aug. 31, 2022) https://chainstoreage.com/pitney-bowes-deploy-autonomous-trucks-middle-mile.

19 Stevens Trucking Selects Locomation to Deploy its Autonomous Truck Service; Will Boost Capacity, Increase Market Share, Reduce Emissions, Freightwaves.com (Aug. 30, 2022) https://www.freightwaves.com/news/stevens-trucking-selects-locomation-to-deploy-its-autonomous-truck-service-will-boost-capacity-increase-market-share-reduce-emissions.

assist with driving where necessary.[20]

Also in the logistics arena, the deployment of autonomous cargo ships is being tested. The Nippon Foundation Fully Autonomous Ship Program in Japan, for example, is working towards implementation of fully autonomous navigation by 2025, and to have fully autonomous navigation account for 50% of Japan's coastal shipping by 2040.[21] Earlier this year, the program ran a successful demonstration test of a fully autonomous container ship between Tokyo Bay and Ise Bay, which is a first in a congested sea area.[22]

Driverless vehicles, autonomous robots, and drones (unmanned aerial systems (UASs)) also are playing a role in revolutionizing the movement of goods. We can expect to see more local deliveries of food and retail items via driverless autonomous vehicles and autonomous robots. For example, the company Nuro has worked with Walmart, FedEx, Kroger and Dominos, and will begin working with Uber Eats on driverless deliveries in Houston, TX and Mountainview, CA.[23] Nuro is reported to be the first of only three companies to have received an autonomous deployment permit from the California Department of Motor Vehicles.[24]

As of May 2022, the Federal Aviation Administration (FAA) reports 865,505 drones registered in the U.S., with 314,689 of them being commercial drones.[25] The nearly 870,000 drones registered was said to be quadruple the number of commercial and private planes.[26] Drones are being used more extensively in other countries to deliver goods, like medicine, food, and other items, but they are expected to pick up momentum in the U.S. as regulations governing their use expand.[27] For example, in 2016 the drone logistics company Zipline began medical deliveries in Rwanda and in Ghana in 2019.[28] In 2020, Zipline began delivering medical supplies and PPE on a limited basis during the COVID-19 crisis in Charlotte, NC.[29] And in June 2022, Zipline received FAA Part 135 Air Carrier Certification, which allows it to deliver up to 26 miles or 42 kilometers roundtrip. "Zipline is now authorized to complete the longest range on-demand commercial drone deliveries in the U.S., with operations covering the largest area and greatest distance of any uncrewed commercial aircraft delivery system (UAS) in the country."[30] Zipline also works with Walmart in the U.S. Other companies like CVS and UPS have delivered medical supplies using drones and earlier this year Wing launched limited drone commercial service in Dallas-Fort Worth and Virginia, delivering goods from Walgreens, ice creameries, local coffee shops, Girl Scout cookies, and more.[31]

Taxis & Ride Sharing: Taxi and ride-hailing services are also a current focus for the deployment of fully autonomous technology – both vehicles and UASs. Several companies have deployed test fleets and pilot programs in limited geographical areas. For example, Cruise has moved through a progression of testing and permitting in California and received a driverless deployment permit in June 2022 that allows it to charge customers for fully driverless robotaxi services in San Francisco.[32] Cruise boasts that "this means that Cruise will be the first and only company to operate a commercial, driverless ridehail service in a major U.S. city."[33] Other companies like Waymo and Lyft are at various stages in the deployment of robotaxis with and without a human "driver" on board in California, Arizona, and Nevada markets. Ford and GM recently applied to the National Highway

20 John Gallagher, FMCSA to recruit truck drivers for autonomous vehicle study, Freighwaves.com (Sept. 20, 2022) https://www.freightwaves.com/news/fmcsa-to-recruit-truck-drivers-for-autonomous-vehicle-study.

21 The Nippon Foundation, Targeting 2025 for Fully Autonomous Navigation: How will newly developed technologies change the future of the ocean? https://www.nippon-foundation.or.jp/en/news/articles/2022/20220602-74388.html.

22 The Nippon Foundation, 5th Demonstration Test of Fully Autonomous Ship Navigation Successfully Completed (Mar. 1, 2022) https://www.nippon-foundation.or.jp/en/news/articles/2022/20220301-67775.html.

23 Andrea Gemmet and Malea Martin, Driverless food delivery: Nuro teams up with Uber Eats to deploy autonomous vehicles in Mountain View: Service set to launch this fall, Palo Alto Online (Sept. 11, 2022) https://www.paloaltoonline.com/news/2022/09/11/driverless-food-delivery-nuro-teams-up-with-uber-eats-to-deploy-autonomous-vehicles-in-mountain-view.

24 Id.

25 The Federal Aviation Administration, Drones by the Numbers, available at https://www.faa.gov/uas/resources/by_the_numbers/ (last modified May 31, 2022).

26 Joann Muller, Managing traffic in the skies is becoming a lot harder, Axios (Sept. 1, 2021) https://www.axios.com/air-traffic-drones-airplanes-skies-crowded-11208585-265c-461a-bb7b-e673b11160ca.html.

27 Joann Muller, Home medicine delivery by drone set to grow in 2022, Axios (Feb. 1, 2022) https://www.axios.com/home-medicine-drone-delivery-2022-86bacbbb-0c41-481c-bed7-7e094306aa0d.html.

28 Jon Porter, Zipline's drones are delivering medical supplies and PPE in North Carolina, The Verge (May 27, 2020) https://www.theverge.com/2020/5/27/21270351/zipline-drones-novant-health-medical-center-hospital-supplies-ppe.

29 Id.

30 John Koestier, Health Via Drone: Zipline Now Delivering Medicine Via Fixed-Wing Drones In North Carolina, Forbes (June 28, 2022) https://www.forbes.com/sites/johnkoetsier/2022/06/28/health-via-drone-zipline-now-delivering-medicine-via-fixed-wing-drones-in-north-carolina/?sh=376b071f5877.

31 Wing https://wing.com/united-states.

32 Rebecca Bellan, Cruise can finally charge for driverless robotaxi rides in San Francisco, Tech Crunch (June 2, 2022) https://techcrunch.com/2022/06/02/cruise-can-finally-charge-for-driverless-robotaxi-rides-in-san-francisco/.

33 Gil West, We're Going Commercial (June 1, 2022) https://getcruise.com/news/blog/2022/were-going-commercial/.

Transportation Safety Administration (NHTSA) for exemptions to permit the limited deployment of vehicles without traditional driver controls, like steering wheels or pedals, for testing of delivery and ride-hailing services.[34]

Air taxis and other advanced air mobility options are part of the vision for autonomous transportation as well. "Paramedics with jetpacks, border police in flying cars and city workers commuting by drone all sound like science fiction - but the concepts are part of [an] advanced air mobility (AAM) market that is expected to be worth as much as $17 billion by 2025."[35] In 2020, the first pilotless air taxi test flight in the United States was conducted by EHang as part of the North Carolina Transportation Summit hosted by the North Carolina Department of Transportation.[36] EHang continues to test and demonstrate its air taxis around the world and is in the process of seeking approval in China to become the first company to launch commercial AAV operations globally.

Other Applications: There are many additional potential applications of autonomous transportation technology, such as public transportation and agriculture. Driverless shuttles,[37] buses,[38] and airport transportation pods designed to assist people with limited mobility in moving through an airport[39] are among AV applications under development in the public transportation space. Autonomous farming equipment also is under development, with companies such as John Deere rolling out fully autonomous tractors.[40] This summer, Monarch Tractor's petition to modify California safety regulations to allow for the expanded use and commercialization of its driver-optional, smart tractor was denied, citing a lack of information regarding safety.[41]

Considerations for Business Operations & Innovation

The broad array of applications envisioned for autonomous vehicles and aircraft suggest that, even if a company is not in the business of innovating and manufacturing AV technology itself, there likely exists a nexus between their daily business operations and autonomous transportation technology. Companies and counsel should evaluate where AVs fit into their business strategy, whether it is the innovation, adoption, application, or adaptation of available and developing technology. In doing so, there are several legal, regulatory and policy areas to consider. These include, but are not limited to, that regulatory development surrounding AVs is in process, how notions of safety and liability will apply in the AV context, intellectual property implications, securities fraud and false advertising risks, and data privacy concerns stemming from connected transportation and infrastructure.

Regulatory Development in Process: In the U.S. and abroad, we are still in the stages of developing a legal framework to incorporate autonomous technology. This can present uncertainty on the one hand, and opportunity on the other. In addition to keeping abreast of relevant regulatory developments, companies should consider how and whether they can participate in the development process to shape the regulatory environment in which they will be operating.

U.S. Federal AV Regulations. In the U.S., the federal government sets motor vehicle safety standards and has issued four versions of voluntary guidelines for regulating AVs starting in 2016:[42]

- Federal Automated Vehicles Policy – Sept. 2016
- Automated Driving Systems (ADS): A Vision for Safety 2.0 – Sept. 2017

34 See Ford Driverless Vehicle Petition, Docket NHTSA-2022-0066 https://www.regulations.gov/document/NHTSA-2022-0066-0001; GM Driverless Vehicle Petition, Docket NHTSA-2022-0067 https://www.regulations.gov/document/NHTSA-2022-0067-0030.

35 Jane Wardell, Jetpacks, flying cars and taxi drones: transport's future is in the skies, Reuters (Dec. 9, 2021) https://www.reuters.com/markets/commodities/jetpacks-flying-cars-taxi-drones-transports-future-is-skies-2021-12-03/.

36 EHang, EHang Conducts First-Ever U.S. Trial Flight of Pilotless Air Taxi at North Carolina Transportation Summit (Jan. 7, 2020) https://www.ehang.com/video/show/318.html.

37 Connor O'Neal, 'Bear Tracks,' MnDOT's new automated shuttle project launches in White Bear Lake, KARE (Aug. 5, 2022) https://www.kare11.com/article/news/local/new-automated-shuttle-project-launches-in-white-bear-lake/89-2047faef-42c2-4621-b688-062b27289d46.

38 Vanessa Bates Ramirez, The UK's First Autonomous Passenger Bus Started Road Tests This Week, Singularity Hub (April 29, 2022) https://singularityhub.com/2022/04/29/the-uks-first-autonomous-passenger-bus-started-road-tests-this-week/.

39 "People with reduced mobility might soon be hailing an autonomous pod to collect them and head for the departure gate." Michael Doran, Atlanta Hartsfield-Jackson Self-Driving Pods Boost Mobility, (Sept. 05, 2022) https://simpleflying.com/atlanta-hartsfield-jackson-self-driving-pods-mobility/.

40 Brianna Wessling, Are farmers ready for autonomous tractors? The Robot Report (Mar. 16, 2022) https://www.therobotreport.com/are-farmers-ready-for-autonomous-tractors/.

41 Margy Eckelkamp, Setback for Autonomous Tractors? California Board Denies Monarch Tractor's Plan for Expansion, Ag Web Farm Journal (June 30, 2022) https://www.agweb.com/news/business/technology/setback-autonomous-tractors-california-board-denies-monarch-tractors-plan.

42 The federal AV guidelines can be found at: https://www.transportation.gov/AV/federal-automated-vehicles-policy-september-2016; https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf; https://www.transportation.gov/av/3/preparing-future-transportation-automated-vehicles-3; and https://www.transportation.gov/policy-initiatives/automated-vehicles/av-40.

- Preparing for the Future of Transportation: Automated Vehicles 3.0 – Oct. 2018
- Ensuring American Leadership in Automated Vehicle Technologies: Automated Vehicles 4.0 – Jan. 2020

The National Highway Transportation Safety Administration (NHTSA) has authority to grant companies seeking to deploy various levels of autonomous technology exemptions from Federal Motor Vehicle Safety Standards (FMVSS) when the request meets the requirements of at least one of the statutory exemption bases set forth in 49 U.S.C. § 30113(b)(3)(B) and related implementing regulations (e.g., 49 C.F.R. § 555.6); and is consistent with the objectives of the Vehicle Safety Act. Exemptions are commonly sought under 49 U.S.C. § 30113(b)(3)(B)(iv), which authorizes an exemption if "compliance with the standard would prevent the manufacturer from selling a motor vehicle with an overall safety level at least equal to the overall safety level of nonexempt vehicles," and 49 U.S.C. § 30113(b)(3)(B)(iii), which authorizes an exemption if "the exemption would make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of that vehicle." An exemption under either provision is limited and must not be for more than 2,500 vehicles to be sold in the United States in any 12-month period and must be limited to not more than 2 years for the exemption or renewal. In March 2022, NHTSA published a Final Rule amending some FMVSS for vehicles with automated driving systems, seeking to specify that "despite their innovative designs, vehicles with ADS technology must continue to provide the same high levels of occupant protection that current passenger vehicles provide."[43] The Rule becomes effective September 26, 2022.

Zoox recently became the first company to self-certify that its robotaxi is compliant with FMVSS standards. Zoox explained that "[f]rom the beginning, we challenged ourselves to create a vehicle that would be compliant with FMVSS requirements within the current regulatory structure. We intended to self-certify our purpose-built vehicle without the need for regulatory changes or requesting exemptions."[44]

U.S. State AV Regulations. Regulations concerning autonomous vehicles vary by state, with some states not having even addressed driverless vehicles. Several sources aggregate data on state autonomous vehicle legislation and regulation, with one recently summarizing that "29 states plus D.C. have passed legislation, governors in 10 states have issued executive orders, and nine states have laws that are pending or have failed altogether during the voting process. The remaining states have yet to take any action concerning self-driving cars."[45]

U.S. Federal Aviation Administration (FAA) Drones & UASs. The Federal Aviation Administration (FAA) regulates drones and unmanned aerial systems (UASs). From 2017 – 2020, the FAA administered the Unmanned Aircraft Systems (UAS) Integration Pilot Program (IPP), which "focused on testing and evaluating integration of civil and public drone operations into the national airspace system."[46] Beginning in 2020, the UAS BEYOND program has focused on "remaining challenges of UAS integration, e.g., beyond visual line of sight (BVLOS) operations, societal and economic benefits of UASs, and community engagement."[47]

FAA regulations under 14 CFR Part 135 govern drone package delivery. The FAA explains that "Part 135 certification is the only path for small drones to carry the property of another for compensation beyond visual line of sight."[48] The company Zipline is the fourth drone operator to receive a Part 135 certificate (June 2022); but its certificate isthe first Part 135 certificate issued under the BEYOND program, and it is the first fixed wing Part 135 UAS operator to be certified.

The FAA is in the process of modifying its regulation of pilots for eVTOLs and air taxis. For air taxis, "[] FAA Part 135 Air Carrier Certification, is the first

43 NHTSA, Final Rule: Docket No. NHTSA-2021-0003, RIN 2127-AM06 Occupant Protection for Vehicles With Automated Driving Systems, March 30, 2022. https://www.federalregister.gov/documents/2022/03/30/2022-05426/occupant-protection-for-vehicles-with-automated-driving-systems.

44 Zoox, https://zoox.com/journal/self-certification.

45 Melanie Musson, Which states allow self-driving cars? (2022 Update), Autoinsurance.org (June 22, 2022)https://www.autoinsurance.org/which-states-allow-automated-vehicles-to-drive-on-the-road/. See also, National Conference of State Legislatures https://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx; Insurance Institute for Highway Safety, Autonomous Vehicle Laws (Sept. 2002) https://www.iihs.org/topics/advanced-driver-assistance/autonomous-vehicle-laws.

46 Federal Aviation Administration, https://www.faa.gov/uas/advanced_operations/package_delivery_drone.

47 Id.

48 Id.

step in a three-pronged regulatory process. The next two certifications are type certification and production certification. Type certification shows the air taxi meets all design and safety standards. Production certification gives final approval for production."[49] Earlier this year, the FAA explained that it was changing its approach because "regulations designed for traditional airplanes and helicopters 'did not anticipate the need to train pilots to operate powered-lift, which take off in helicopter mode, transition into airplane mode for flying, and then transition back to helicopter mode for landing.'"[50] The FAA reportedly stated that the process "for certifying the aircraft themselves remains unchanged."[51]

European Regulations Under Development The development of AV and air taxi regulations is in process in Europe as well. In August 2022, Britain set out its vision for rolling out self-driving vehicles by 2025.[52] Britain estimated the autonomous vehicle market would be valued at 42 billion pounds, creating 38,000 new jobs. The government's framework provides for some self-driving features to be in vehicles on large roads by 2023, with a longer-term, wide rollout by 2025 that would include public transportation and delivery vehicles.[53] The plan includes new legislation that "would state manufacturers are responsible for the vehicle's actions when self-driving, meaning a human driver would not be liable for incidents related to driving while the vehicle is in control of driving."[54]

In June 2022, the European Union Aviation Safety Agency (EASA) released its proposed regulatory framework for urban air taxi operations – which the organization touts as the world's first. This "first comprehensive proposal" for regulation of urban air taxi flight operations covers "airworthiness, air operations, flight crew licensing, and rules of the air."[55] The proposed regulation is open for public comment until September 30, 2022. The EASA explains that the proposal does not address "VTOL-capable aircraft without a human pilot on board.[56]"

Safety & Liability: In 2021, NHTSA issued a Standing General Order requiring identified manufacturers and operators to report certain crashes involving vehicles with automated driving systems or SAE Level 2 advanced driver assistance systems. The NHTSA June 2022 Report on this crash data reflect 130 crashes involving Level 3 – Level 5 ADS-Equipped Vehicles were reported from July 2021 through May 15, 2022[57] and 392 crashes involving Level 2 ADAS-Equipped Vehicles were reported.[58]

As the level of automation in vehicles increases, the principles guiding liability determinations may shift to place more responsibility on vehicle and/or component manufacturers and less on the "driver" or occupant of the vehicle. Product liability will likely be a major component of the analysis with more automated vehicles, but other legal frameworks have been proposed as a starting point for analysis in these cases.

Manufacturers will keep an eye toward minimizing or eliminating features that pose a high risk of accident. For instance, in February 2022, Tesla announced that it was going to recall nearly 54,000 vehicles that had a "roll through the stop sign" feature in the fully self-driving software, due to the risk of collision.[59] Cruise recently issued and completed a recall over unprotected left turn (UPL) software in its automated driving system (ADS) that caused a crash on June 3, 2022. The software had made 123,560 UPLs before the crash.[60] Cruise explained that it "submitted this voluntary filing in the interest of transparency to the public."[61]

49 Thom Taylor, Joby Air Taxi FAA Certified: Flying Air Taxis Have Arrived, Motor Biscuit (May 28, 2022) https://www.motorbiscuit.com/joby-air-taxi-faa-certified-flying-air-taxis-have-arrived/.

50 David Shepardson, U.S. FAA shifts gears on certifying future 'flying taxi' pilots, Reuters (May 10, 2022) https://www.reuters.com/business/aerospace-defense/us-faa-shifts-gears-certifying-future-flying-taxi-pilots-2022-05-10/.

51 Id.

52 HM Government, Connected & Automated Mobility 2025: Realising the benefits of self-driving vehicles in the UK (Aug. 2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099173/cam-2025-realising-benefits-self-driving-vehicles.pdf.

53 Reuters, Britain sets out roadmap for self driving vehicle usage by 2025, The Hindu (Aug 20, 2022) https://www.thehindu.com/sci-tech/technology/britain-car-vehicle-roadmap-2025-self-driving/article65790172.ece.

54 Id.

55 European Union Aviation Safety Agency, EASA publishes world's first rules for operation of air taxis in cities (June 30, 2022) https://www.easa.europa.eu/en/newsroom-and-events/press-releases/easa-publishes-worlds-first-rules-operation-air-taxis-cities.

56 Id.

57 National Highway Traffic Safety Administration, Summary Report: Standing General Order on Crash Reporting for Automated Driving Systems, (June 2022) https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-06/ADS-SGO-Report-June-2022.pdf.

58 National Highway Traffic Safety Administration, Summary Report: Standing General Order on Crash Reporting for Level 2 Advanced Driver Assistance Systems, (June 2022) https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-06/ADAS-L2-SGO-Report-June-2022.pdf.

59 Johnathan Capriel, Tesla Ending 'Rolling Stop' Feature In 54,000 Self-Driving Cars, Law360 (Feb. 1, 2022) https://www.law360.com/transportation/articles/1460708/tesla-ending-rolling-stop-feature-in-54-000-self-driving-cars.

60 Brad Matthews, General Motors subsidiary Cruise announces fix of autonomous vehicles recalled over software error, The Washington Times (Sept. 2, 2022).

61 Id.

Individuals using self-driving technology need to be aware that they will not necessarily be free of all liability. Los Angeles County recently issued the first felony charges in the U.S. against a driver whose car ran through a red light and fatally hit someone while the driver was using partially automated autopilot features.[62] And what will become of the liability analysis with automated and connected vehicles communicating with each other and infrastructure?

Intellectual Property: The drive to innovate leads to the proliferation of familiar kinds of intellectual property disputes – patent infringement, trade secret protection, trademark infringement, etc. In the transportation space, innovation has given rise to matters presenting interesting questions, as well as leading-edge technologies. The AV arena is a breeding ground for technological innovation – from cars, drones, and ships to the radars and cameras that allow them to "see," down to the nuanced software developed to enable autonomous vehicles to "make decisions" in real-time. For example, Toyota recently filed a patent application for a management device to be used in autonomous driving vehicles, which calculates congestion rates of parking lots to determine if the lot can be set as a "waiting place" during a waiting time period for an AV that has been dispatched to pick someone up.[63] Patent infringement cases have been filed featuring technologies like "Virtual Bus Stop" technology, which is designed to be the digital infrastructure for public transportation systems,[64] and light detection and ranging sensors (Lidar) used to facilitate autonomous driving capabilities in vehicles.[65]

With the pressures to break into new markets, and frequent movement of employees between companies, the protection of trade secrets related to transportation technology has been a large concern. Both civil and criminal claims of trade secret theft have been litigated,[66] and companies have sought to prevent their trade secrets from being disclosed to the public while moving through testing and pilot phases of developing technologies. A state court recently issued a preliminary injunction to prevent the Department of Motor Vehicles from releasing safety data provided in the permit application for Waymo, the autonomous driving company.[67] Waymo was seeking a permit to operate its autonomous vehicles on the road and did not want its trade secret information released pursuant to a public records request.

Securities Fraud & False Advertising Risks: Innovation carries with it inherent risks, like protecting intellectual property and navigating changing regulatory environments. How soon should one test a new product or apply for approvals? And in the process, how much should be revealed to the public and to regulators? There are additional risks that should be top of mind when treading into new technologies and markets. The desire to compete – to be the "first" or the "best" – must be tempered with judgment regarding marketing and representations of performance expectations.

With the push to develop new technologies in these industries, securities fraud class actions have been filed claiming that companies have misrepresented the viability of their cutting-edge technology. For example, several class actions have been filed against EHang Holdings Ltd. by shareholders claiming that the company made material misrepresentations regarding its autonomous aerial vehicle platform and business.[68] In other recent cases, investors have alleged that an autonomous truck tech developer failed to disclose concerns about safety risks in the period leading up to its IPO and investors have claimed that QuantumScape Corp. misled them regarding the progress and effectiveness of "solid-state batteries" to be used in electric vehicles.[69]

Regulators have also begun to scrutinize advertising efforts of autonomous vehicle companies. In July

62 Tom Krisher and Stefanie Dazio, L.A. County felony charges are first in fatal crash involving Tesla's Autopilot, (Jan. 18, 2022) https://www.latimes.com/california/story/2022-01-18/felony-charges-are-first-in-fatal-crash-involving-teslas-autopilot.

63 Toyota Submits Patent Application for Management Device of Autonomous Driving Vehicle, Global IP News. Automobile Patent News (Aug. 19, 2022).

64 Via, the TransitTech company, brings patent infringement lawsuit against RideCo, (May 3, 2021) https://ridewithvia.com/news/via-the-transittech-company-brings-patent-infringement-lawsuit-against-rideco/.

65 See e.g., Quanergy Systems, Inc. v. Velodyne Lidar USA, Inc., Nos. 20-2070 and 20-2072, (Fed. Cir. Feb. 4, 2022).

66 An autonomous vehicle trade secret theft dispute between Uber and Waymo arose out of a former employee, Anthony Levandowski, leaving Waymo and starting his own company that was later purchased by Uber. Levandowski pleaded guilty to criminal trade secret theft charges (later was pardoned) and the parties entered into settlements on the civil claims to resolve outstanding issues. The final settlement was reached in mid-February, 2022.

67 Waymo LLC v. California Department of Motor Vehicles, No. 2022-80003805 (Ca. Sup. Ct. Feb. 23, 2022).

68 See Amberber v. EHang Holdings, Ltd., 2022 U.S. Dist. LEXIS 24397 (S.D.N.Y. Feb. 20, 2022) (Appointing lead plaintiff and counsel).

69 See In re: QuantunScape Secs. Class Action Litig., 2022 U.S. Dist. LEXIS 7782 (N.D. Ca. Jan. 14, 2022) (Denying, in part, motion to dismiss).

2022, the California Department of Motor Vehicles filed complaints with the State Office of Administrative Hearings against Tesla for false advertising of its Autopilot and Full Self-Driving capabilities.[70]

Data Privacy. Smart transportation and smart city infrastructure hold great potential, but they rely upon the transmission, collection, and analysis of exorbitant volumes of data. Vehicles will be communicating with each other and surrounding infrastructure, generating a constant flow of data. They may be equipped to take stock of driver and passenger biometrics, location data, etc. Liability and policy questions arise regarding who has the responsibility to house that data and ensure its security? Who owns the data? How is data being used and stored? With whom is data being shared or to whom is it being sold? Is there proper consent for the collection of personal or biometric data? What constitutional concerns are attendant to the collection of and access to this data? And what are the various data privacy legal frameworks a company must navigate based on their operations? Recently, a proposed class action was filed by truck drivers under Illinois' Biometric Information Privacy Act over AI Dash Cam facial recognition software and sensors provided for commercial fleets. The case was filed in the U.S. District Court for the Northern District of Illinois.[71]

Where Does Autonomous Transportation Fit in Your Strategy?

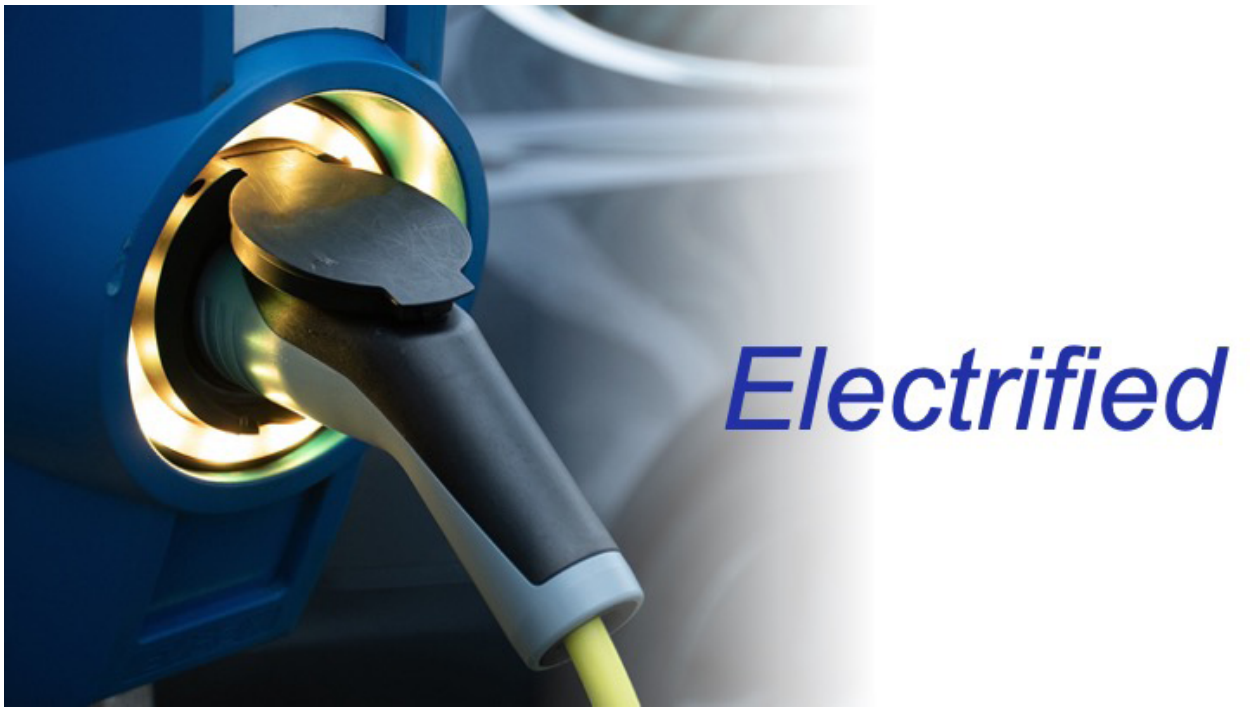
The potential for autonomous transportation is clear and countries around the world are preparing for the eventuality of driverless and pilotless transportation systems to move their goods and people. Although fully autonomous consumer vehicles may be farther off, the deployment of autonomous vehicles on the logistics, delivery, and ride hailing side of business is a more readily attainable reality. It is a good time for businesses to consider how autonomous technologies fit into their strategic plans.

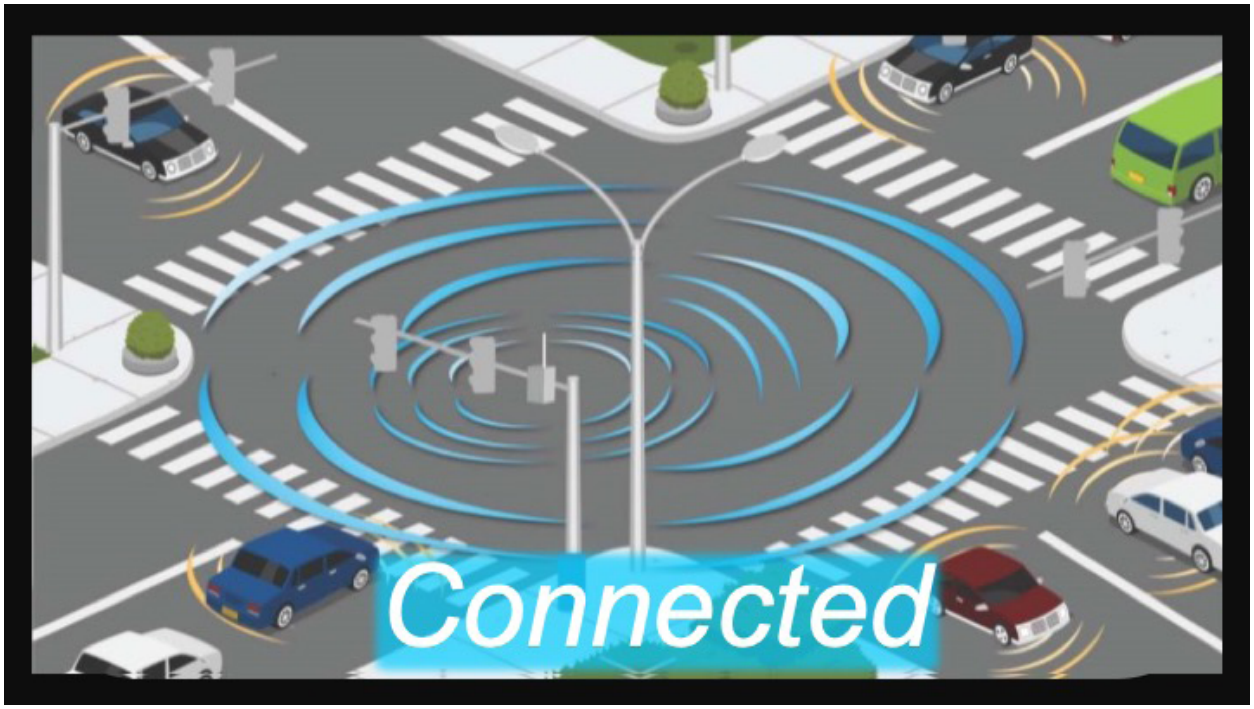
70 Levi Sumagaysay, Tesla accused of false advertising of Autopilot, Full Self-Driving: 'Not based on facts,' Market Watch (Aug. 8, 2022) https://www.marketwatch.com/story/tesla-accused-of-false-advertising-of-autopilot-full-self-driving-not-based-on-facts-11659743583?mod=article_inline.

71 Dashcam Provider Must Face Trucker's Proposed BIPA Class Action, Bloomberg Law, (July 12, 2022) https://news.bloomberglaw.com/privacy-and-data-security/dashcam-provider-must-face-truckers-proposed-bipa-class-action.


Navigating the Smart City:
Legal Developments and Considerations in Connected and Autonomous Transportation
Tony Lathrop

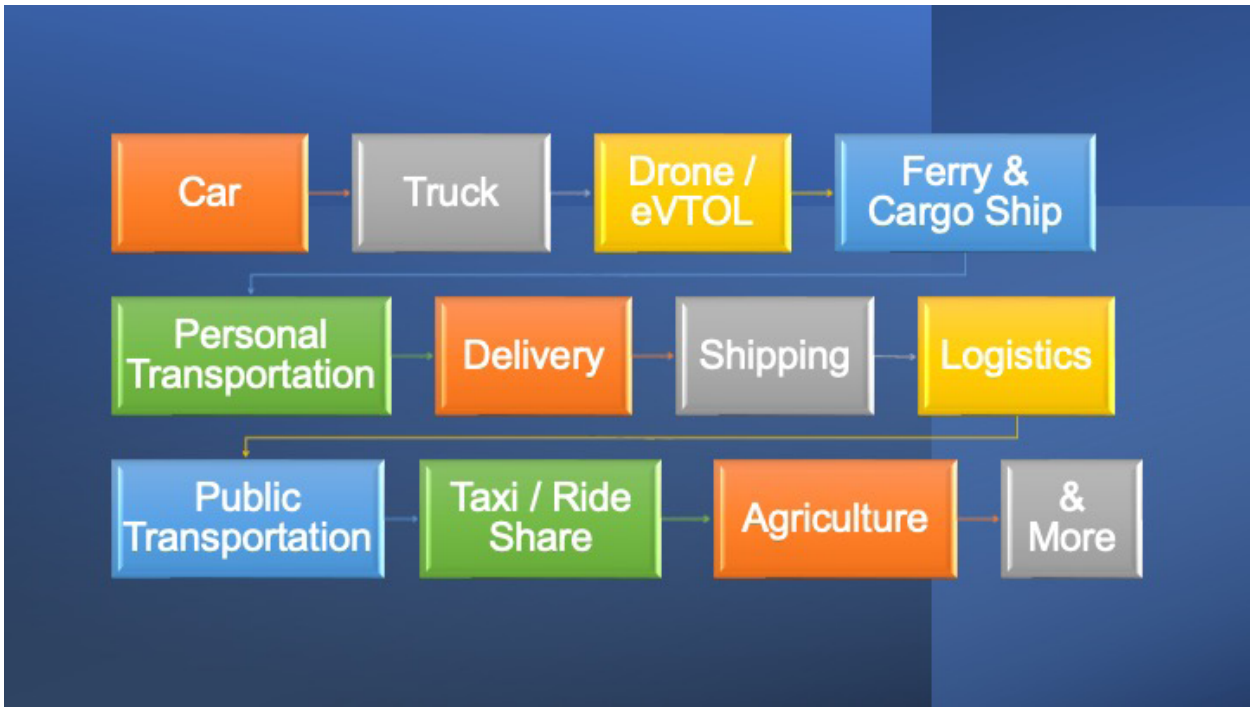

Technological Innovation


Electrified


Connected

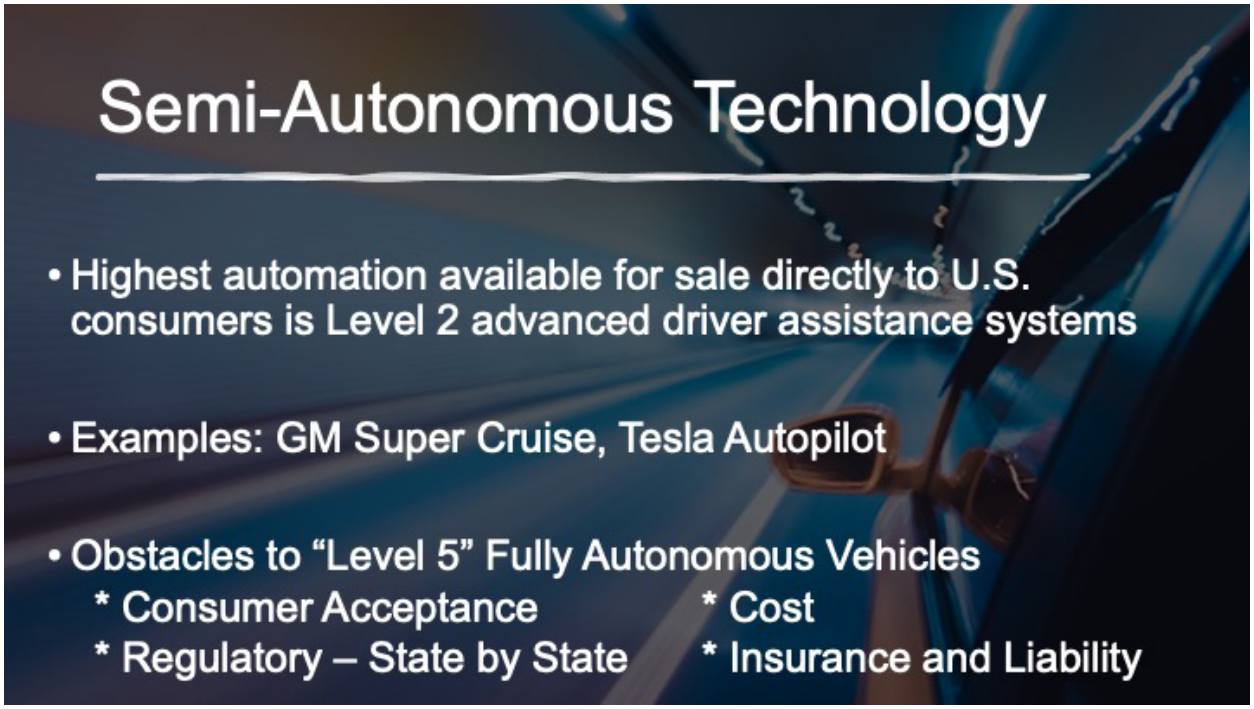

Autonomous


Radical
Transformation
Everyday Life
Policy
Business
Legal

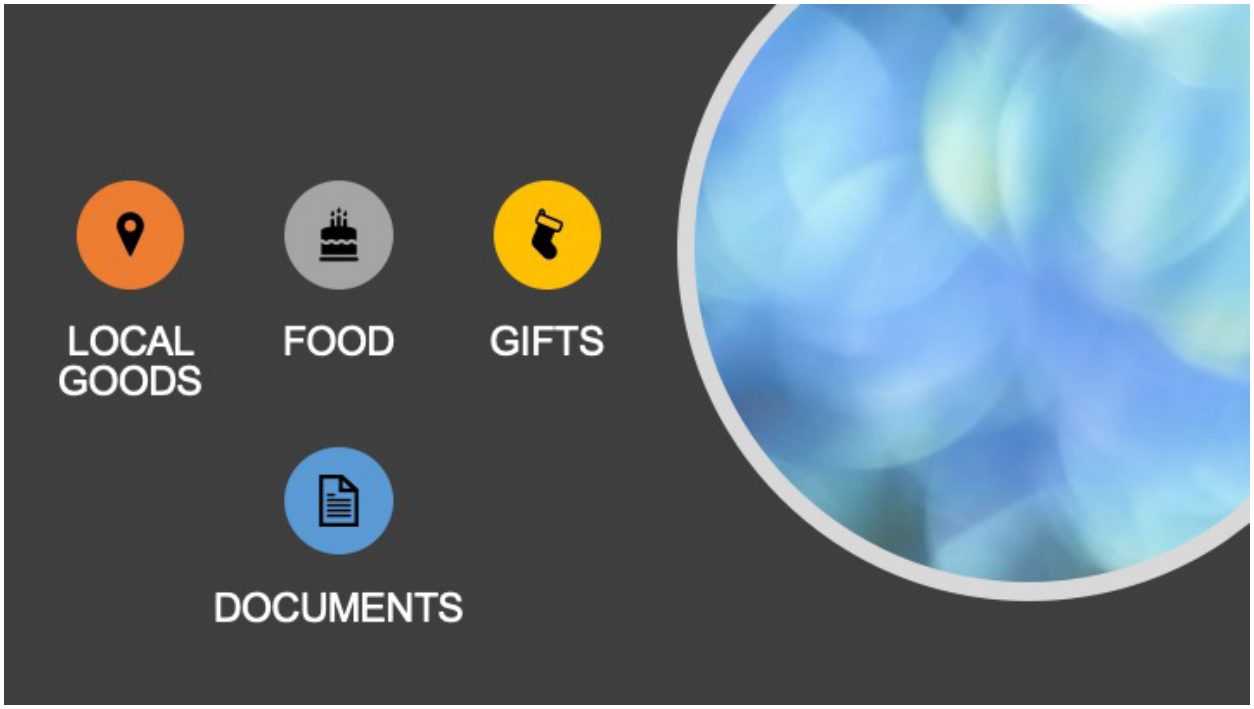

Car
Truck
Drone / eVTOL
Ferry & Cargo Ship
Personal Transportation
Delivery
Shipping
Logistics
Public Transportation
Taxi / Ride Share
Agriculture
& More


The Time is Now


Personal /
Private
Transportation


Semi-Autonomous Technology
• Highest automation available for sale directly to U.S. consumers is Level 2 advanced driver assistance systems
• Examples: GM Super Cruise, Tesla Autopilot
• Obstacles to "Level 5" Fully Autonomous Vehicles
* Consumer Acceptance
* Regulatory – State by State
* Cost
* Insurance and Liability


Local
Deliveries


LOCAL GOODS
FOOD
GIFTS
DOCUMENTS

Nuro Autonomous Deliveries

Nuro has worked w/ Walmart, FedEx, Kroger and Dominos. Now will work with Uber Eats on driverless deliveries in Houston, TX and Mountainview, CA.

Medical Deliveries

https://www.flyzipline.com/technology

Revolutionary technology **built with purpose**

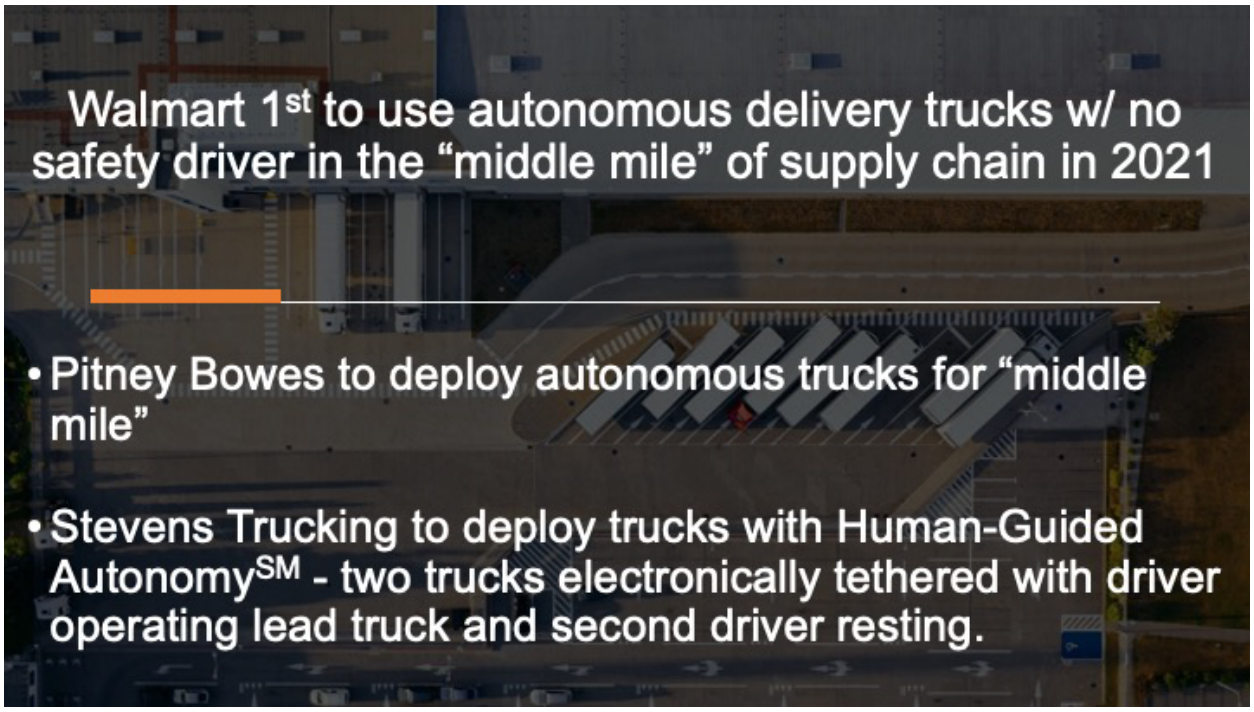
Built to fly

Our autonomous electric aircraft are the backbone of our instant logistics system, safely flying to deliver products anywhere from suburban homes to remote facilities in the countryside.

Shipping & Logistics

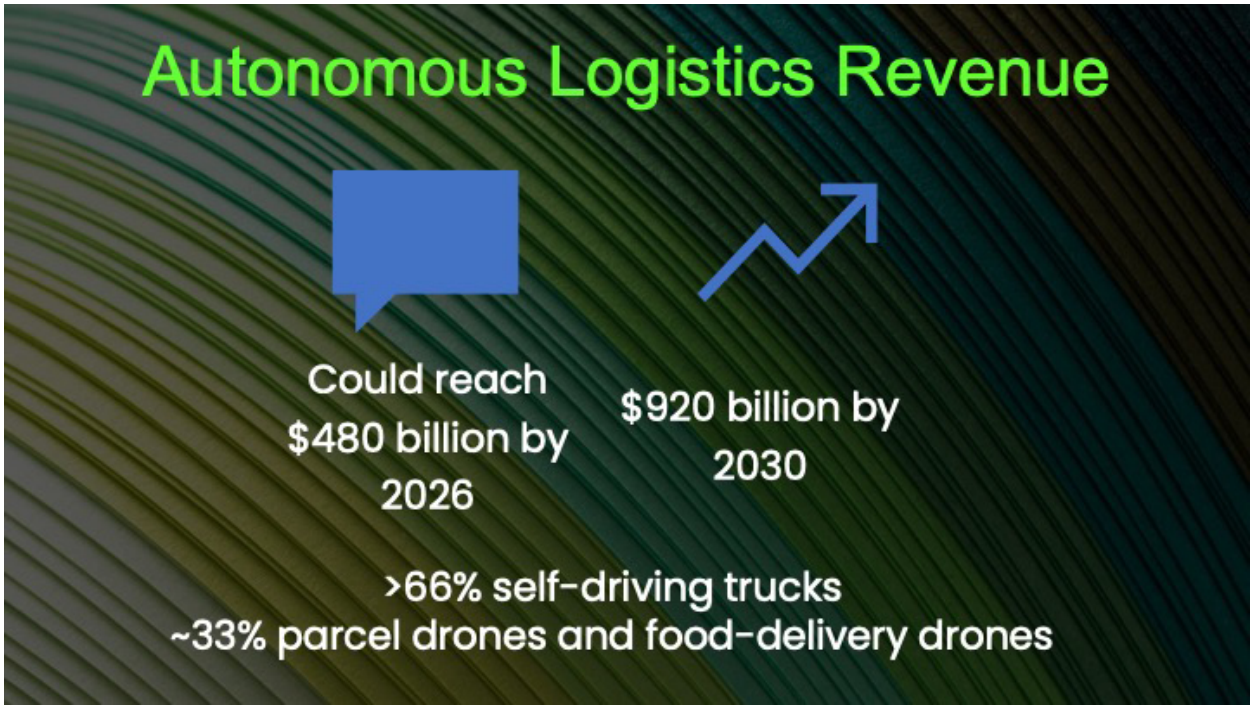
#SelfDrivingCars #Trucks #Truckers https://youtu.be/-H_bvrXsGn0

Self-Driving 18-Wheelers Take To The Road


Walmart 1st to use autonomous delivery trucks w/ no safety driver in the "middle mile" of supply chain in 2021
• Pitney Bowes to deploy autonomous trucks for "middle mile"
• Stevens Trucking to deploy trucks with Human-Guided Autonomy℠ - two trucks electronically tethered with driver operating lead truck and second driver resting.

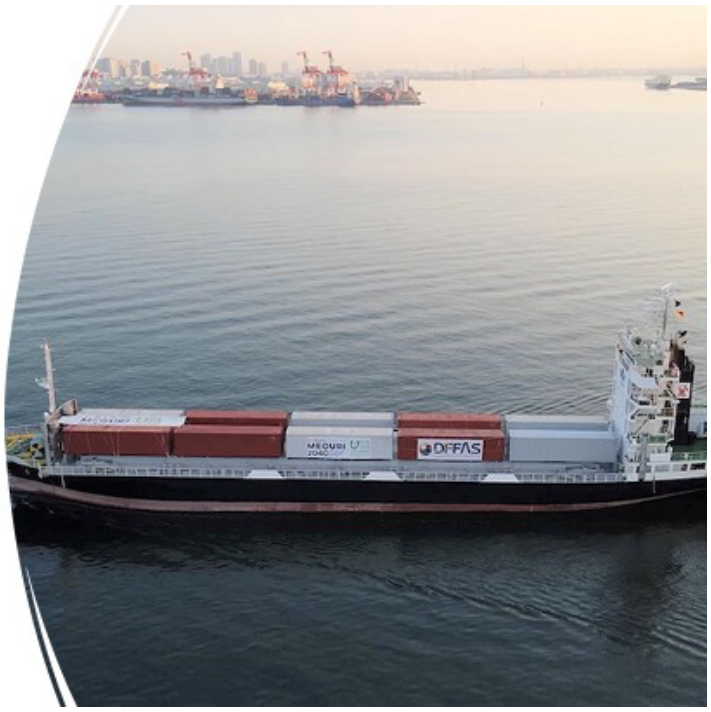

"[T]he large-scale application of self-driving trucks in logistics will reduce delivery costs, save workforce expenses, enhance operational efficiency and make freight transportation safer."


Logistics Drones

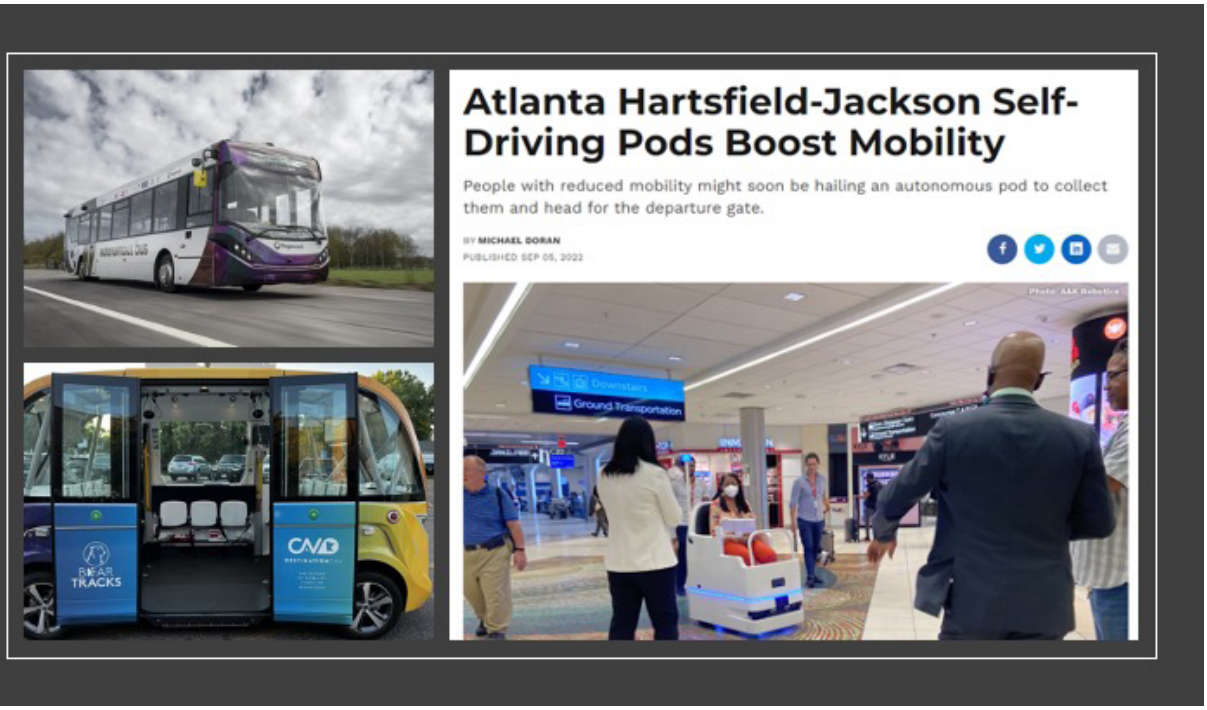

Autonomous Logistics Revenue
Could reach
$480 billion by
2026
$920 billion by
2030
>66% self-driving trucks
~33% parcel drones and food-delivery drones

First Autonomous Cargo Ship Faces Test With 236-Mile Voyage

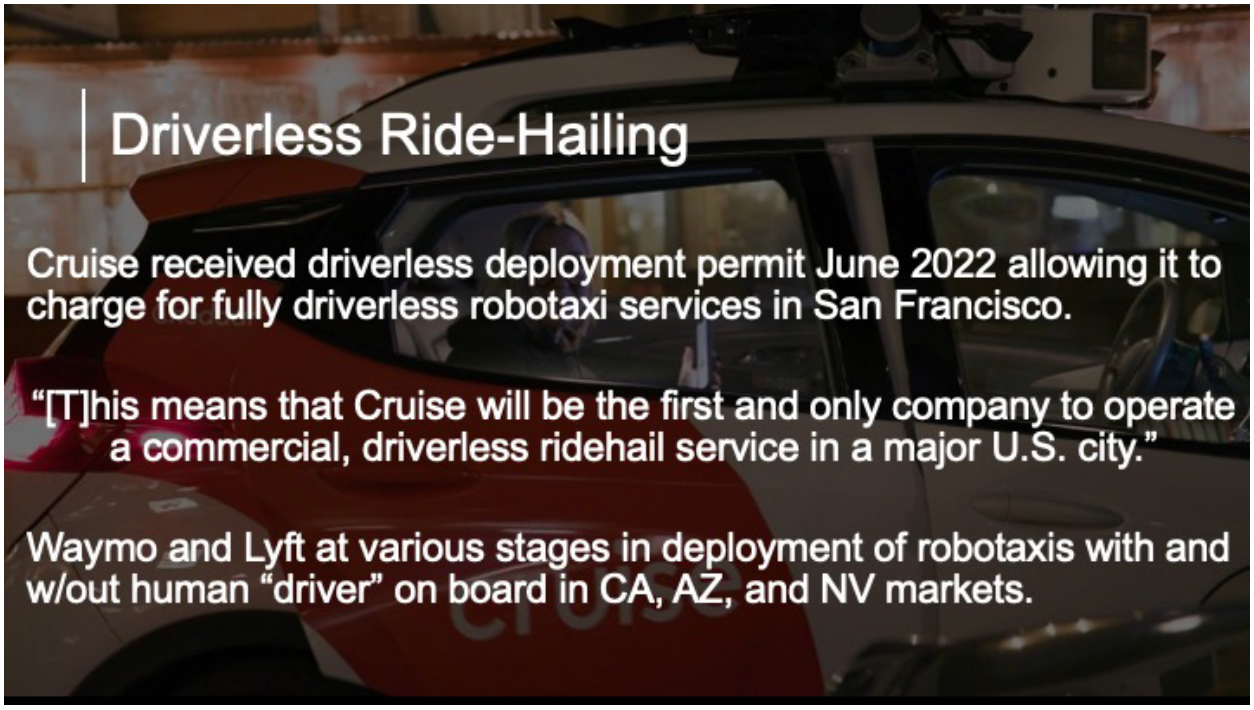
"In just two decades from now, half of all domestic ships plying Japan's coastal waters may be piloting themselves."



Public Transportation



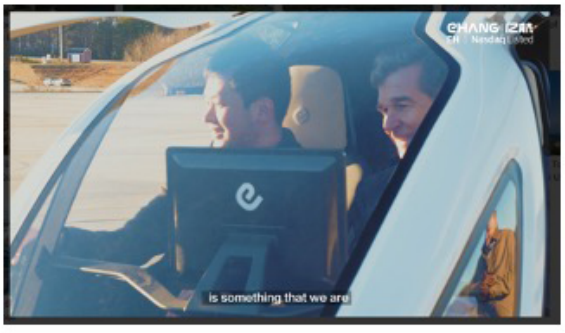
Taxi & Ride Share


Driverless Ride-Hailing
Cruise received driverless deployment permit June 2022 allowing it to charge for fully driverless robotaxi services in San Francisco.
"[T]his means that Cruise will be the first and only company to operate a commercial, driverless ridehail service in a major U.S. city."
Waymo and Lyft at various stages in deployment of robotaxis with and w/out human "driver" on board in CA, AZ, and NV markets.


Air Taxis
Electric
Passenger-grade
Autonomous
Aerial Vehicles
(AAVs)

1st AAV Test Flight in the U.S. in North Carolina January 2020

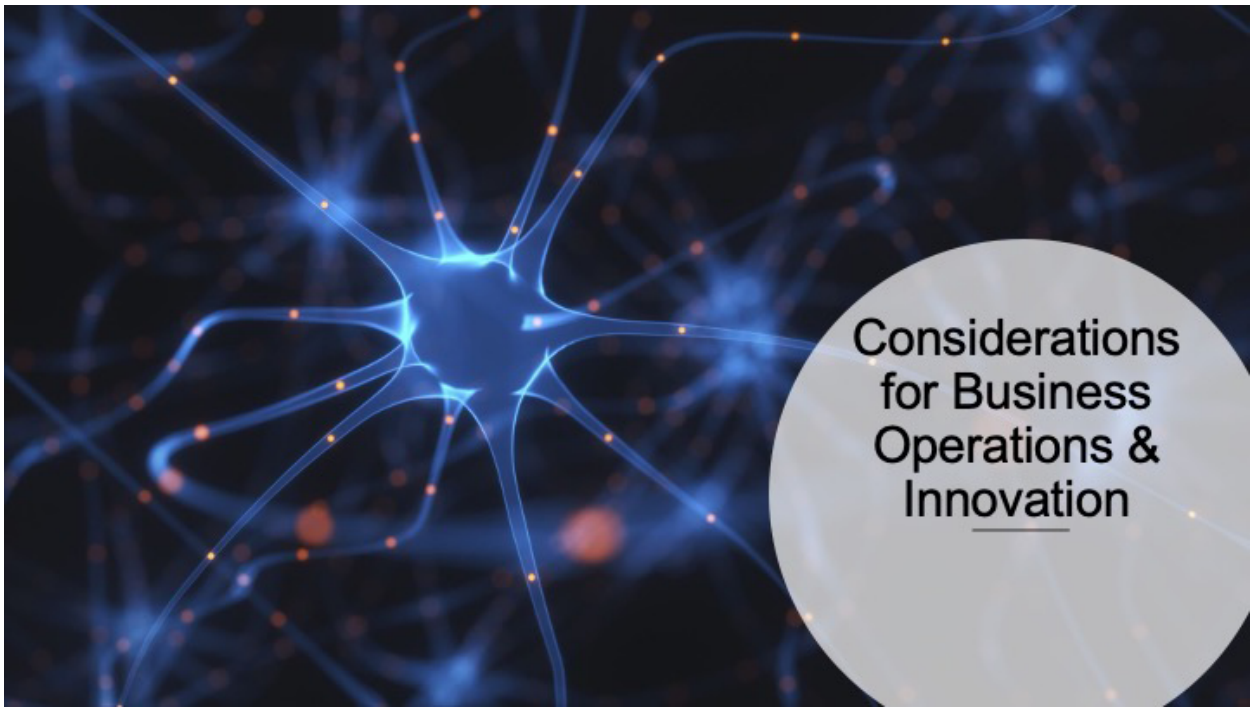
1st AAV Test Flight in the U.S. in North Carolina January 2020



1st AAV Test Flight in the U.S. in North Carolina January 2020

Agriculture


Autonomous Farming
Ex. - Autonomous tractors petition recently denied in California based on law prohibiting automatic equipment on farms/vineyards.

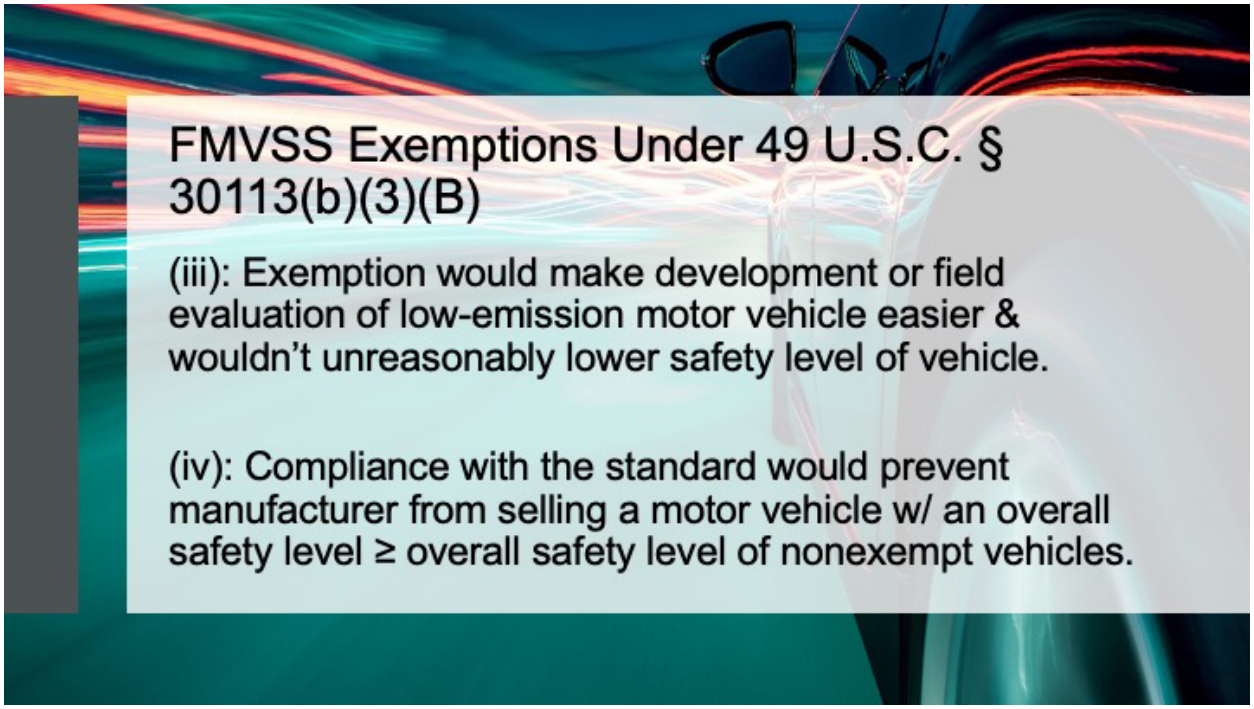

Considerations for Business Operations & Innovation

AV Regulation in the United States

Federal Government Sets Motor Vehicle Safety Standards and Has Issued Voluntary Guidelines for Regulating AVs

Most Recent AV Guidelines - Ensuring American Leadership in Automated Vehicle Technologies: Automated Vehicles 4.0 (2020)


National Highway Traffic Safety Administration (NHTSA) Autonomous Vehicle Regulation
May Grant Federal Motor Vehicle Safety Standards (FMVSS) Exemptions under 49 U.S.C. § 30113(b)(3)(B) and related implementing regulations.
Must be ≤ 2,500 vehicles to be sold in U.S. in any 12-month period
Exemption or renewal must be limited ≤ 2 years


FMVSS Exemptions Under 49 U.S.C. § 30113(b)(3)(B)
(iii): Exemption would make development or field evaluation of low-emission motor vehicle easier & wouldn't unreasonably lower safety level of vehicle.
(iv): Compliance with the standard would prevent manufacturer from selling a motor vehicle w/ an overall safety level ≥ overall safety level of nonexempt vehicles.

Sample Autonomous Vehicle State Law Reference

National Conference of State Legislatures

https://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx

Sample Autonomous Vehicle State Law Reference

Insurance Institute for Highway Safety (IIHS)

Autonomous vehicle laws

September 2022

State	What type of driving automation on public roads does the law/provision permit?	DOES THE DRIVING AUTOMATION LAW/PROVISION... Require an operator to be licensed?	Require an operator to be in the vehicle?	Require liability insurance?
Alabama	deployment — commercial motor vehicles only	not addressed	no	yes; $2,000,000
Arizona	deployment	depends on level of vehicle automation[1]	depends on level of vehicle automation[2]	yes
Arkansas	deployment — commercial purposes only	yes	depends on level of vehicle automation[3]	yes[4]
California	deployment	depends on vehicle[5]	no	yes; $5,000,000
Colorado	deployment	no	not addressed	no
Connecticut	testing	yes	yes	yes; $5,000,000
District of Columbia	testing	yes[6]	no	yes; $5,000,000
Florida	deployment	depends on level of vehicle automation[7]	depends on level of vehicle automation[2]	yes

See Website for Complete Chart:

https://www.iihs.org/topics/advanced-driver-assistance/autonomous-vehicle-laws

Ford & GM Driverless Vehicle Petitions

Seeking to deploy self-driving vehicles without human controls like steering wheels and brake pedals.

Comment Period Closed Sept. 21, 2022

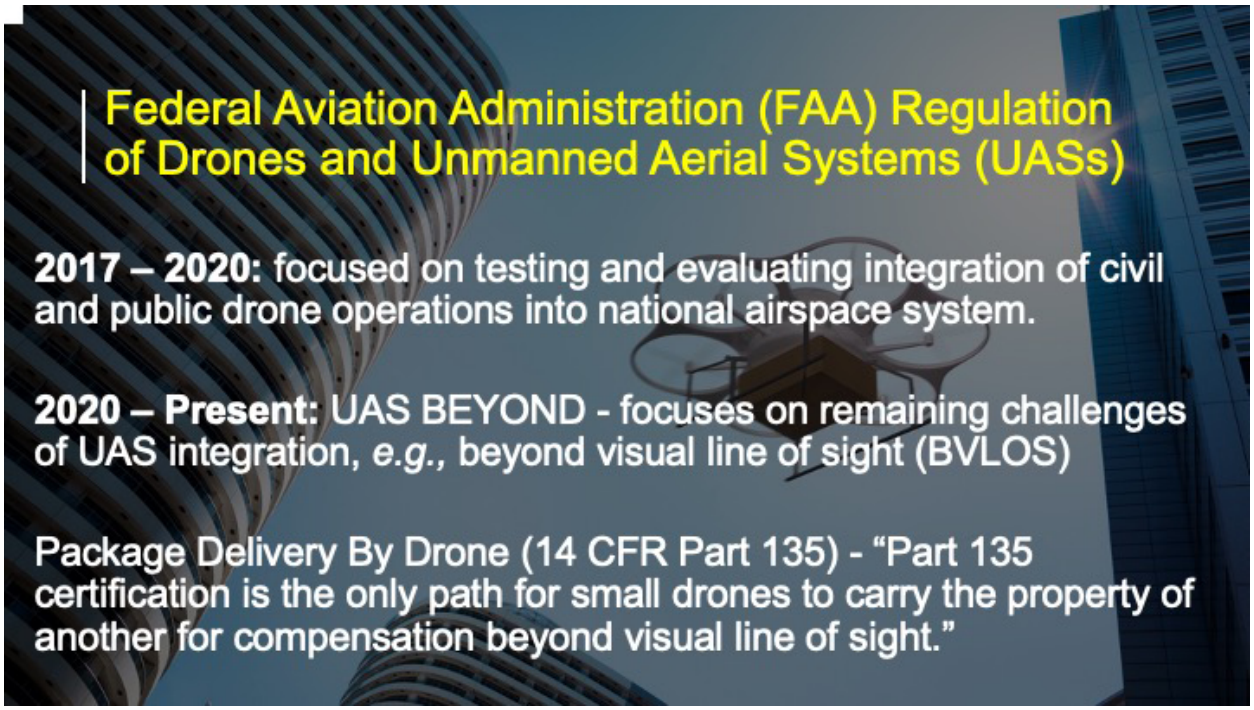
Dockets NHTSA-2022-0066; NHTSA-2022-0067

Self-Certification vs. NHTSA Exemption

Companies with vehicles without steering wheel or pedals generally have applied to NHTSA for an exemption.

Zoox (owned by Amazon) chose to self-certify according to FMVSS instead of seeking exemption.

Zoox is applying for a permit in California to test-drive it.



FAA Modifying Regulation of eVTOLs & Air Taxis

1. FAA Part 135 Air Carrier Certification
2. Type Certification – Design & Safety Standards
3. Production Certification

Early 2022 FAA decided to modify its approach to eVTOLs:

Regs "did not anticipate the need to train pilots to operate powered-lift, which take off in helicopter mode, transition into airplane mode for flying, and then transition back to helicopter mode for landing."

Britain's AV Vision 2025

- Widespread Roll-Out by 2025
- £42 Billion Projected Market; 38,000 jobs
- New Laws – Liability on Manufacturer When Self-Driving

European Union Aviation Safety Agency (EASA) Released World's 1st Regulatory Framework for Urban Air Taxi Operations - June 2022

This "first comprehensive proposal" for regulation of urban air taxi flight operations covers "airworthiness, air operations, flight crew licensing, and rules of the air."

Open for Public Comment Until September 30, 2022

Does not address "VTOL-capable aircraft without a human pilot on board"

Safety & Liability

- NHTSA June 2022 Report
  - Level 3 – Level 5 ADS: 130 Crashes
  - Level 2 ADAS: 392 Crashes
- Los Angeles County - 1st felony charges in U.S. against driver whose car using partially automated autopilot features ran red light and killed someone.

AV Safety Recalls

GM-Cruise recall over unprotected left turn (UPL) software in automated driving system (ADS) that caused June 3, 2022 crash. The software had made 123,560 UPLs before the crash.

February 2022, Tesla announced it was going to recall nearly 54,000 vehicles that had a “roll through the stop sign” feature in the fully self-driving software, due to the risk of collision.


Intellectual
Property


Prolific Innovation
Ex. Toyota Patent Application for Management Device of Autonomous Driving Vehicle
Device calculates congestion rates of parking lots to determine if lot can be set as a "waiting place" during waiting time period for an AV dispatched to pick someone up.

Innovation Risks & False Advertising

- How soon to test?
- What Information to Disclose to Public / Regulators
- False Advertising Complaints - Representations / Marketing
  - Ex. – In July 2022, California DMV filed complaints with the State Office of Administrative Hearings against Tesla for false advertising of its Autopilot and Full Self-Driving capabilities.

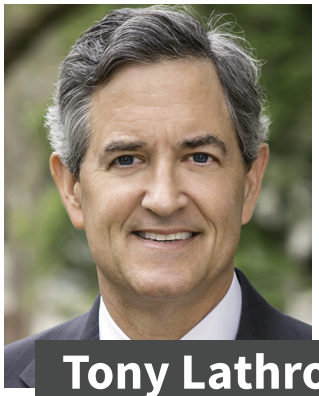

Securities Class Action Litigation
• Investors allege AV truck tech developer suppressed concerns about safety risks in period leading up to billion-dollar IPO (S.D. Cal)
• Shareholders claim EHang Holdings Ltd. made material misrepresentations regarding its AAV platform / business. (S.D.N.Y.)
• Investor claims that QuantumScape Corp. misled them regarding progress / effectiveness of "solid-state batteries" for EVs. (N.D. Ca.)


GPS
Mobile Data
Data Privacy
Biometrics

Liability & Policy Considerations

* How is data being used? Stored?
* With whom is data being shared?
* Who owns the data?
* To Whom is it sold?

- **Truck Driver Biometric Data Class Action Under BIPA (N.D. Ill 2022)** - Truck drivers filed proposed class action under Illinois' Biometric Information Privacy Act over AI Dash Cam facial recognition software and sensors provided for commercial fleets.



704.331.3596
tonylathrop@mvalaw.com

Tony Lathrop

Member | Moore & Van Allen (Charlotte, NC)

Tony Lathrop is a seasoned corporate trial lawyer experienced in complex commercial litigation, transportation, land use, zoning/development, planning, and condemnation law. As a recognized leader within legal, transportation, and planning communities in North Carolina and nationwide, Tony brings valuable industry and governmental perspectives to client matters, which he approaches with an eye towards maximizing value and reducing future risk.

Tony utilizes his experience as a trial attorney and certified mediator to develop strategies seeking optimal trial results and other resolutions in high-stakes matters, and advises clients based on their business objectives and risk-reduction goals. Tony partners closely with his clients and offers valuable industry and governmental perspectives as a complement to his legal experience.

Tony has more than 30 years of experience representing a diverse portfolio of clients in a broad range of complex civil litigation and administrative matters.

Through his commitment to leadership in the legal, transportation, and planning communities of North Carolina, Tony has regular and significant interaction with local, state, and federal elected officials, and governmental agencies, trade organizations, interested stakeholder groups, and industry professionals on matters of policy and advocacy, project planning and management, funding, economic development, public-private partnerships, and general business development efforts.

Capabilities

- Business Court Litigation
- Civil Litigation
- Commercial Litigation
- Commercial Real Estate
- Intellectual Property Disputes
- Litigation, Regulatory & White Collar
- Real Estate & Construction Disputes
- Technology
- Transportation, Infrastructure & Logistics

Notable

- Best Lawyers in America, Commercial Litigation, 2010-2023; Workers' Compensation Law - Employers, 2010-2023
- North Carolina Super Lawyers, Business Litigation, 2006-2022
- Martindale-Hubbell, North Carolina Top Rated Lawyer
- Benchmark Litigation "Local Litigation Star," General Commercial, 2015-2023
- North Carolina Pro Bono Honor Society, 2021
- Advisory Member, NC FIRST (Future Investment Resources for Sustainable Transportation) Commission, 2019-present

Education

- J.D., University of North Carolina at Chapel Hill, 1988
- B.A., University of North Carolina at Chapel Hill, 1983

Controlling the Message: Leveraging "Good" Documents in Litigation

Juan Ramirez
Wheeler Trigg O'Donnell (Denver, CO)

Controlling the Message: Limiting the Damage of "Bad" Documents and Leveraging the Creation of "Good" Documents in Litigation
Juan S. Ramirez and John L. Hayes

> "Dance like no one is watching; email like it may one day be read aloud in a deposition." – Olivia Nuzzi (2014)

In litigation, bad documents are as inevitable as death and taxes. Litigants—humans with all of their foibles and vanity and carelessness of any other humans—sometimes draft sarcastic, snide, reckless, and insensitive documents, and often those documents work themselves into future or ongoing litigation.

Many times, the drafters of bad documents should know better. Take, for example, the human resources leaders who referred to an ongoing investigation—into a group of managers who had far too much to drink in a public hot tub while on a work trip—as the "Hot Tub Time Machine Incident." Or consider the lawyers who described working for a client "in standard 'churn that bill baby!' mode," going on to say that the "bill shall know no limits."[1] Then there are the engineers who sometimes, mostly unintentionally and without foresight, throw their own products under the bus by referring to them as "ticking time bombs," "widow-makers," or even portraying them as weapons of mass destruction. Indeed, lawyers can be some of the worst offenders when it comes to creating bad documents, like the lawyer who wrote that others should do what he did: "Work out a lot and do drugs."[2] When it comes to creating bad documents, it seems, no one is immune.

Eliminating the creation of bad documents is a Herculean task. But there are some strategies in-house counsel, and their law firm counterparts can and should employ to reduce the frequency of their creation and the sting of their impact. These strategies include: (1) conducting effective training; (2) getting to know, understand, and appreciate your client's business to foster trust and transparent communications; (3) closing the loop on bad documents (this is where good documents are "born again"); and (4) encouraging compliance with the company's policies and applicable law, and (5) having a trial strategy to bring it all home.

What are bad documents?
There is no precise legal definition of a "bad document" – it is one of those things in law that you know it when you see it. Arguably, any document that lends itself to an adverse or negative interpretation can be a bad document. And, although most business communication occurs through email, bad documents can come in many forms.

Bad documents generally fall into one of two buckets: (1) the routine business documents that contain pesky, unhelpful facts that must be dealt with, or simply sloppy or inartful language that can be interpreted in a negative way; and (2) those documents containing color commentary, hyperbole, rhetorical flourishes, or sarcastic observations that regrettably paint the client in a bad light and threaten desired litigation outcomes. Such is the life of a litigator who is often charged with defending email-driven, highly matrixed organizations. The

1 WHAT THEY DON'T TEACH YOU AT LAW SCHOOL VI: NEVER WRITE ANYTHING DOWN THAT YOU WOULDN'T WANT READ OUT IN OPEN COURT (January 18, 2017), available at https://www.civillitigationbrief.com/2017/01/18/what-they-dont-teach-you-at-law-school-vi-never-write-anything-down-that-you-wouldnt-want-read-out-in-open-court (last visited September 25, 2022)

2 Id.

latter bucket contains the unforced errors and self-inflicted wounds that drive us lawyers and our clients mad. Below are a few examples of these unforced errors:

1. "Essentially time bombs." Stackable washing machines flooded a high rise condominium, and exposed the company to significant liability, reputational harm, and a very foreseeable litigation. An engineer—likely with the best of intentions—referred to the machines as "essentially time bombs." Thankfully, this document evaded detection (thanks to pre-suit resolutions of claims) and the lawyers were able to swiftly close the loop.

2. "Fat people" with "silly lung problems." Phen-Fen, the newest "it" cocktail weight loss drug in the 1990s, was revealed to allegedly cause significant heart and lung issues. Unfortunately for the manufacturers, plaintiffs came into possession of several thousand emails, many damaging, including one where an executive wrote: "Am I off the hook, or can I look forward to my waning years signing checks for fat people who are a little afraid of some silly lung problem." That memo was turned over in discovery weeks before trial. The insensitivity of the email and callous disregard for patients, many of whom lost their lives, contributed to significant reputational harm, nuclear verdicts, and astronomical settlements.

3. An "even more misleading" product. A senior marketing person at a consumer packaged-goods company referred the branding of an improved product as being "even more misleading than" its predecessor. Unfortunately, the email, which an employee printed and retained well-beyond the company's retention schedule, mirrored language found in California's unfair competition law, which prohibits, among other things, "untrue or misleading advertising."[3] Worse still, this employee implicated both brands in his "misleading" characterization. Needless to say, the employee's ill-advised communication likely drove up the cost of settlement in an otherwise defensible case.

Each of these examples provide a lesson to be learned or an opportunity to cure. Not surprisingly, almost all cases have good and bad facts and documents on both sides – that is why clients pay attorneys to represent them. The goal of this article is to provide practical guidance on how to reduce the number and impact of these unforced errors.

What can be done to mitigate bad documents?

A. Conduct routine training – Rinse, Recycle, Repeat:

A well-designed training program should be the cornerstone of in-house counsel's strategy to mitigate the company's exposure to, and the harm posed by inherent risks of bad documents. Indeed, training is the most effective weapon that attorneys have in their arsenal for reducing both the number of and severity of bad documents. And by taking just a few simple steps, counsel can drastically mitigate the risk of bad documents.

First, understand that training is not – and never should be – a singular event. Employees move on and memories fade. In-house counsel should think of training as an ongoing process rather than an end goal; it should be held at a clearly defined cadence and refreshed as necessary.

Second, a solid training program should begin at the start of employment, when employees are being on-boarded into their new roles. And the more you make training a part of life and encourage a "speak up" culture, the greater the opportunity to build upon the client's trust and intercept bad documents.

Third, outside counsel should, at a minimum, offer to assist their in-house partners with (non-billable) training as part of their commitment to building trust and deepening the attorney-client relationship. The benefits of doing so are obvious:

- Clients appreciate outside counsel's willingness to invest "skin in the game." Non-billable training conveys a visible commitment to getting to know the business, in-house counsel, and the organization in a way you cannot replicate by reading financial statements or news articles.
- Training builds trust. It transforms the perception of outside counsel from "the company's lawyer" to that of distinguished and trusted advisor –

3 Cal. Civ. Code § 17200.

e.g., someone I can trust and report problems to.

- And, more importantly, the trust fostered through effective training facilitates outside counsel's ability to close the loop on "bad documents." Employees will be more inclined to report issues to familiar counsel. The best-in-class outside counsel are the ones in-house counsel see as an extension of the company's legal department.

Effective training should cover both legal issues and the "soft skills" of good communication. For example, while a holistic training program should cover the basic principles of clear communication and proper email etiquette[4], it should also include topics such as attorney-client privilege, waiver, record retention, litigation holds, and the broad discovery rules that require companies to produce enormous amounts of emails. We often counsel that the first principle in avoiding the creation of bad documents is to train employees to think critically up front about whether committing something to writing is even necessary in the first place. An in-person communication or a phone call, while potentially still discoverable, eliminates the chance of creating a bad document.

B. Become a trusted advisor by getting to know the client:

Becoming a trusted advisor means getting to know the business and not just focusing on the matter at hand. Getting to know the business begins with getting to know the in-house counsel and their counterparts, but it extends far beyond the legal department. A trusted advisor knows the products and the company's key stakeholders. A trusted advisor takes the long view on client relationships; they know the long-term goals and objectives of the business, and they are able to anticipate emerging problems and propose meaningful solutions because (wait for it), they have taken the time to know and understand the client. That is evergreen advice, but it is shared so often because it is true, and it is critical to effectively delivering legal services, avoiding litigation, and mitigating the creation of bad documents.

C. Close the loop on bad documents:

The process of closing the loop depends on the client's ability and willingness to call out a bad document. Ignoring bad documents is not an option. Instead, confront them head on and be sure to close the loop in a timely fashion (within hours or days of of discovery), ethically, honestly, and accurately.

Outside counsel should address the situation factually and without opinion or judgment and, instead of adding to the frustration, focus on fixing the problem at hand and incorporating that fix into your trial strategy.

Ultimately, the goal of closing the loop is to create and leverage a good, discoverable document that can be used to offset the potential damages posed by a misguided communications. Beginning with the end in mind, counsel should focus on achieving a fact-based, "good" discoverable document, often in the form of a closing memorandum. Below are some practical steps for closing the loop with a good document:

1. Conduct due diligence to get to the root of the problem. Gather information and prepare a fact-based closing memorandum addressing the issue.

2. Run all drafts through counsel under the cloak of privilege.

3. Replace any exaggerations and poor choice of words with clear, simple statements of fact.

4. Insert helpful facts into the closing memorandum, e.g., discuss the steps and results of an investigation ("our investigation revealed the product is indeed safe and meets and exceeds industry standards"). Helpful information includes documenting the company's motives, including fostering customer goodwill and ensuring compliance.

5. Act quickly to avoid letting too much time pass between the dissemination of a bad document and the creation of a good one. Delays in documentation create negative inferences, and negative inferences create bad litigation outcomes. Bad documents are not like wine, they do not get better with age. Good documents, on the other hand, tend to age well.

4 Anna Rotman, "Cringe-worthy: 8 Tips to Prevent Embarrassing E-Mails (February 17, 2014), available at http://www.yettercoleman.com/wp-content/uploads/2014/06/Cringeworthy-8-Tips-to-Prevent-Embarrassing-Emails_Anna-Rotman_Texas-Lawyer-Reprint.pdf (last visited September 25, 2022).

D. Encourage compliance with company's retention schedule:

Retention schedules can be a company's best friend, but employees also need to understand the value of destroying documents on schedule. Courts have repeatedly recognized that document-retention and destruction schedules are both legal and reasonable.[5] Having a document-retention schedule is a best practice, but strictly following the document-retention (and destruction) schedule is even better—unless, of course, litigation is reasonably expected.[6] Outside counsel would be wise to remind clients of when the routine destruction of documents can and should resume, and ask them to confirm destruction of bad or harmful documents that may be lurking in files long after litigation has ended and is no longer foreseeable. It is important to remember that emails and other electronic documents do not only reside on hard drives; sometimes employees print and store them for their own self-interest for perceived "rainy days," or for "CYA" or other purposes, without thinking about the potential future harm they may cause to the company in the litigation context.

E. Have a trial strategy that confronts "bad" documents head on and incorporates and leverages "good" documents:

In a lawsuit, good or bad documents can often be drivers in reaching a settlement, or in driving up the cost of settlement. Or those documents could impact summary judgment (e.g., one bad document could be enough to create a triable fact issue, or dissuade a party from even seeking summary judgment in the first place). But assuming a case makes it past those touchpoints and you are preparing to face a judge or jury, how does all tie together? After all the training, including reinforcing the document-retention schedule, and after closing the loop to rehabilitate a bad document, how this all plays out in court is the final consideration. The key is to have a trial plan that confronts a bad document directly, and lessens its impact, and turns the focus to the impact of the good document. If training provides an ounce of prevention, and closing the loop provides a pound of cure, trial is where we bring it all home.

The first rule -- do not ignore the bad document; confront it head on. Part of our work as in-house lawyers includes training our business people to bring bad documents to the legal department so we can develop a strategy to lessen their impact. The same goes at trial. This may seem like obvious advice, but the inclination to ignore bad evidence and focus only on helpful evidence is powerful. Trials are about determining and weighing credibility. Ignoring a bad document only harms your credibility. Your opponent will most certainly use the document, so why ignore it and give them the satisfaction of hijacking your narrative?

One method to help determine the best way to deal with such documents is by using focus groups or mock-jury exercises (if the size of the case warrants it). Testing different approaches and gauging the impact of bad documents (and the good documents you create when you close the loop) using unbiased individuals with no connection to the case can yield valuable strategic insights.

Other critical tools in the toolbox are motions in limine and objections to exhibits. Be focused and strategic in working to exclude evidence where the opportunity exists. For example, if the document contains impermissible hearsay, or discusses subsequent remedial measures, or poses unfair prejudice or confusion, take a shot at excluding the document. Motions in limine before evidence begins, or well-founded objections during trial could change the trajectory of the case and the body of evidence the jury hears. Another strategic opportunity to deal with a bad document exists before the introduction of evidence begins -- during voir dire. Consider whether previewing a bad document while picking the jury might lay the foundation to lessen the impact. What do actual jurors think? How did they react to the document or information in it? The eventual jurors will see the document once the case begins anyway, so previewing it in voir dire can be a key place to plant the seed for lessening the impact of a bad document or enhancing the effects of a good document.

Witnesses also play a critical role. The trial plan must include touchpoints to contextualize bad documents using well-prepared witnesses (fact or expert) and demonstrative evidence. Have

5 See Jeffries v. Chicago Transit Auth., 770 F.2d 676, 681 (7th Cir.1985) (finding that destruction of documents through a business retention schedule did not impute any bad faith or consciousness of guilt where the destruction did not violate federal regulations and defendant was not on notice that lawsuit would be filed against it).

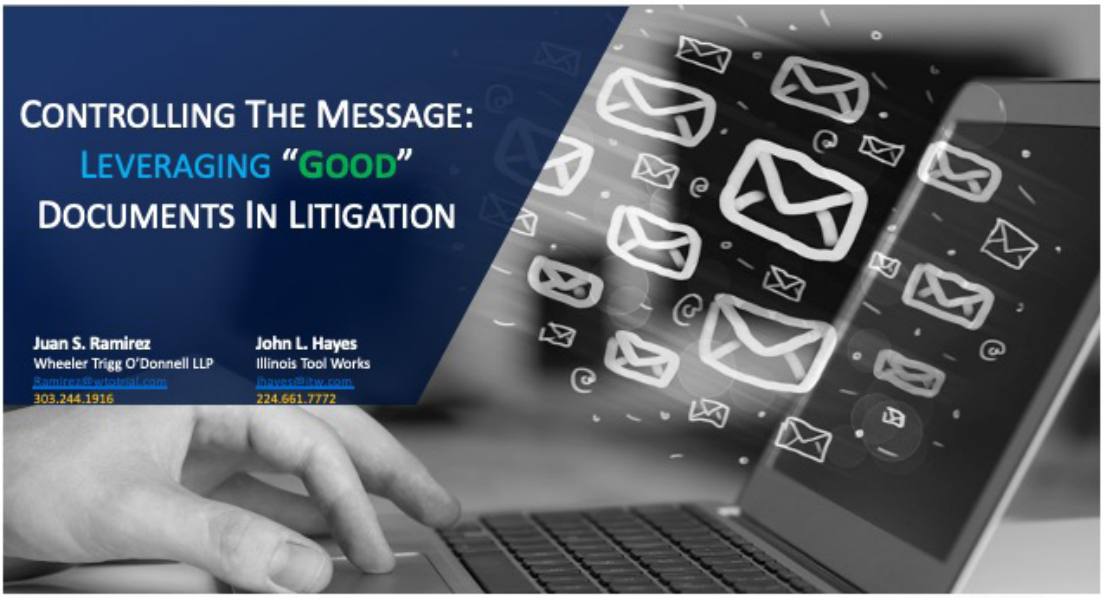
6 Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y.2003). Spoliation of evidence occurs when one party destroys evidence relevant to an issue in the case. Smith v. United States, 293 F.3d 984, 988 (7th Cir.2002) (citing Crabtree v. Nat›l Steel Corp., 261 F.3d 715, 721 (7th Cir.2001)).

a sponsoring witness prepared to talk about the actual facts, and to authenticate and explain the closing memorandum. Or use demonstrative evidence to make it easy for the jury to look past a problematic email by illustrating or depicting helpful facts -- e.g., what actually caused an injury or damage – as opposed to someone's hyperbolic or inaccurate characterization. Visuals aid the jury's understanding. This is all part of not shying away from an inartful or offending email. Instead, call it out, giving yourself solid ground to close with statements like: "Opposing counsel wants you to focus on a single email and ignore the actual facts and the data. Why? Because counsel does not trust you to see past the emotion and focus on the facts – like the ones witness X testified about." This can be an effective way to steal plaintiff's counsel's thunder and soften the blow. If you have expert testimony that aligns with the issue to provide further support, even better.

It is important to remember that jurors are human. They go to work and deal with a deluge of emails and documents every day just like the rest of us. Most of them will understand that given the hundreds, if not thousands of emails we send per week, even more so in the post-Covid-19 era, few of us look back with pride and admiration on everything we write. But at the end of the day, it is the facts that matter, not what someone wrote in the heat of the moment, or while under stress or working under a deadline. Give the jury a way to understand how the bad document happened, and why it does not control the outcome of the case.

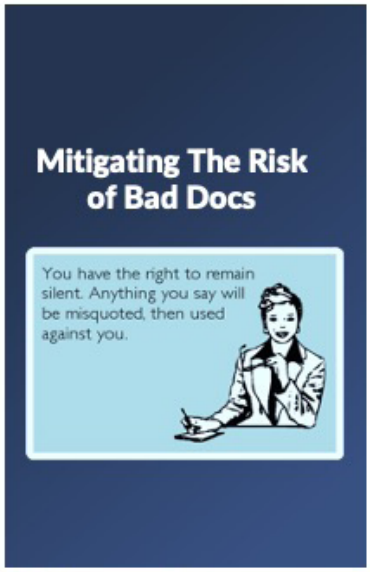
Conclusion

Bad documents are here to stay, but there are things counsel should do to limit their number and impact. For outside counsel, that means participating in or assisting with training, making the investment of time to build trust and get know your in-house counsel partner and the company, and helping to build a culture of compliance, all of which may put you in a position to close the loop before and during trial with good, defensible, and accurate communications.



Wheeler Trigg O'Donnell LLP ITW 1

Wheeler Trigg O'Donnell LLP ITW 2



What constitutes a "bad" document?

Any document that lends itself to a negative interpretation

Wheeler Trigg O'Donnell LLP

ITW

3

THIS IS A BAD DOCUMENT

Yes, **these are essentially time bombs**. A sticker would be very useful. I have raised the issue of the open lids to Irvine and they say their people are not leaving them open.

Wheeler Trigg O'Donnell LLP

ITW

4

Phen-Fen

"Am I off the hook, or can I look forward to my waning years signing checks for fat people who are a little afraid of some silly lung problem?"

ANOTHER BAD DOCUMENT

EXHIBIT
A

From: xxxxxxxxxx
Sent: xxxxxxxxxx xxxxxxxxxx PM
To: xxxxxxxxxx
Cc: xxxxxxxxxx
Subject: Natural Care vs. Pure & Natural

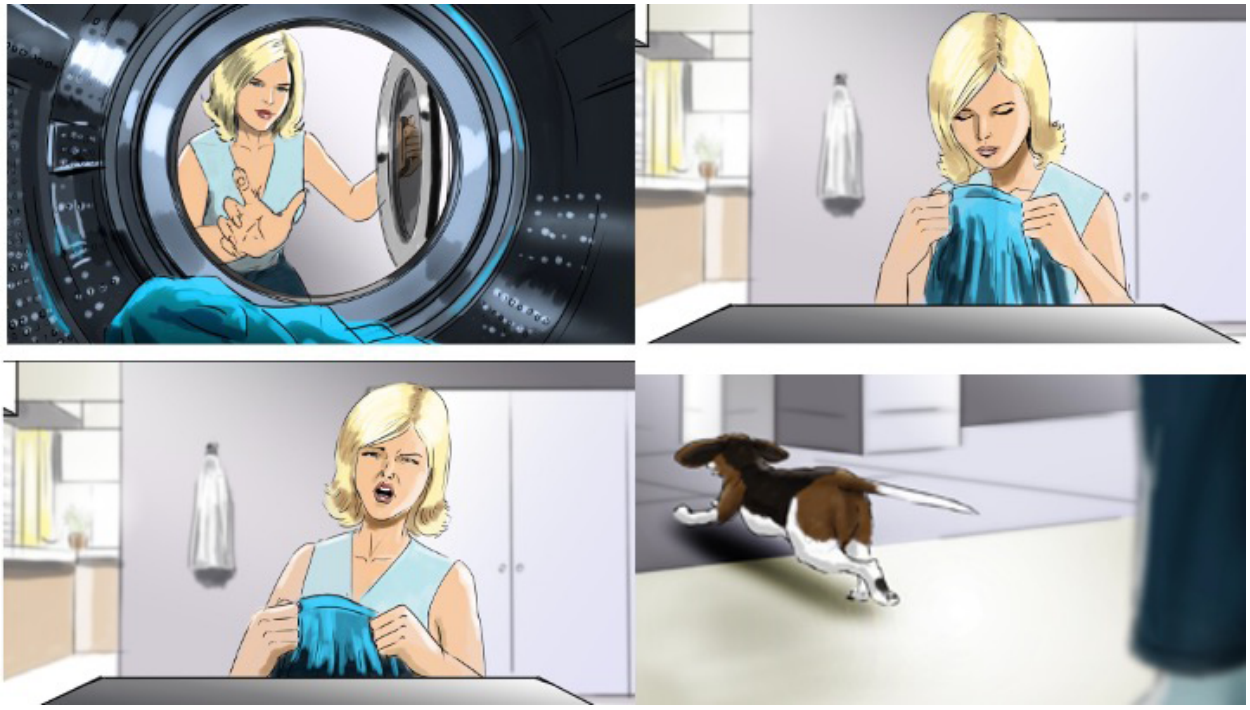
California's Unfair Competition Law

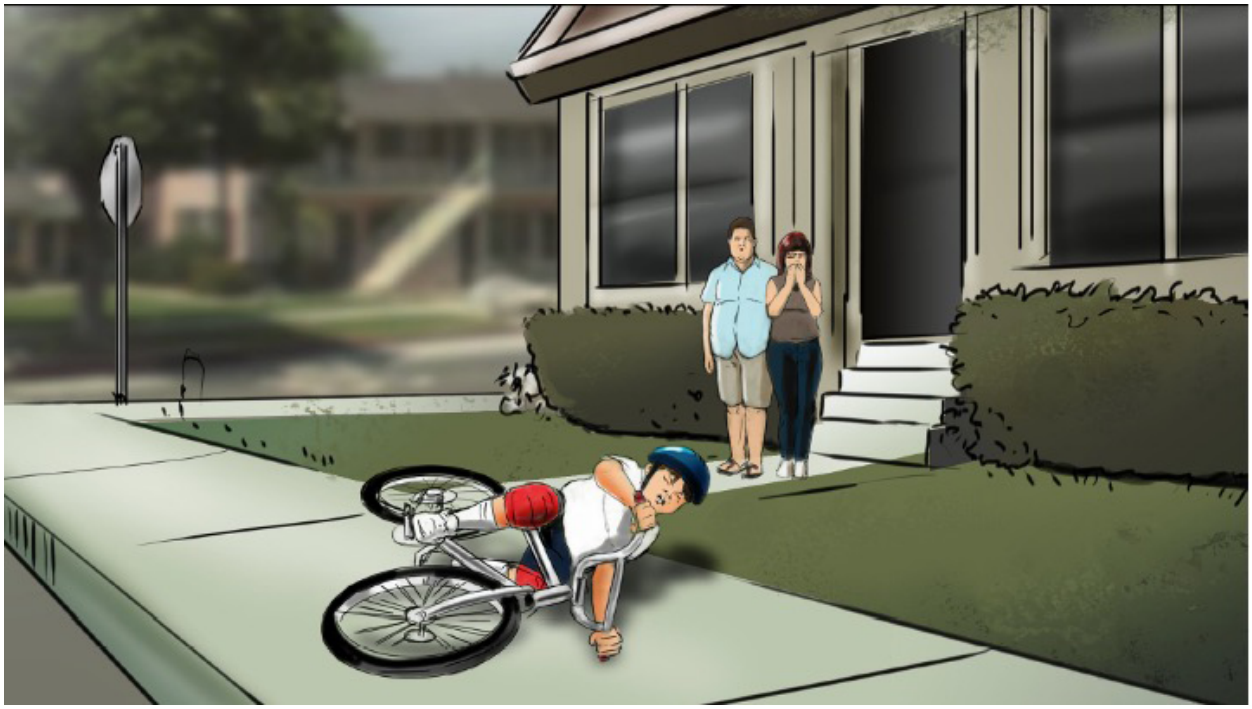
17200. As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . Cal. Civ. Code §17200

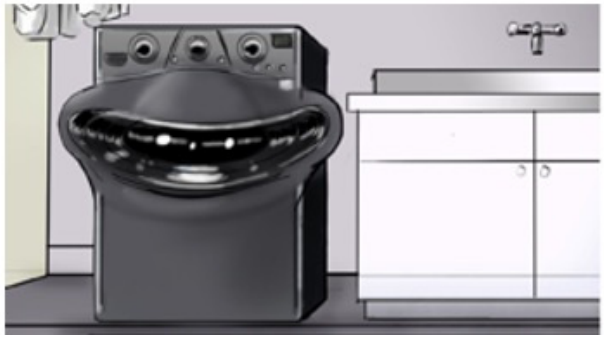
California's False Advertising Law

*To state a claim for false advertising, the plaintiff must show that (1) the statements in the advertising are untrue **or misleading** and (2) the defendants knew , or by the exercise of reasonable care should have known, that the statements were untrue **or misleading**. People v. Lynam, 253 Cal.App.2d 959, 965 (1967)*

Isn't Natural Care Plus even more misleading than Natural Care? ☺







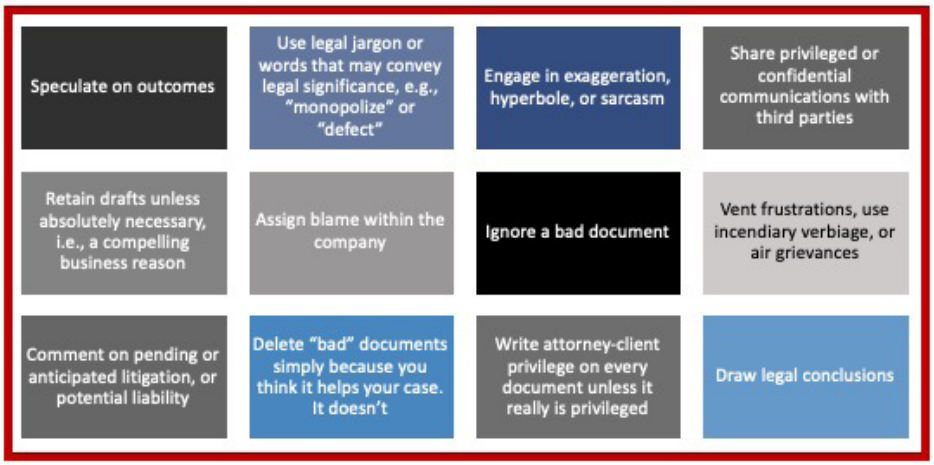
Wheeler Trigg O'Donnell LLP

ITW

16

Best Practices: Things to do

Best Practices: Do not



Controlling the Message

2

GET TO KNOW ME

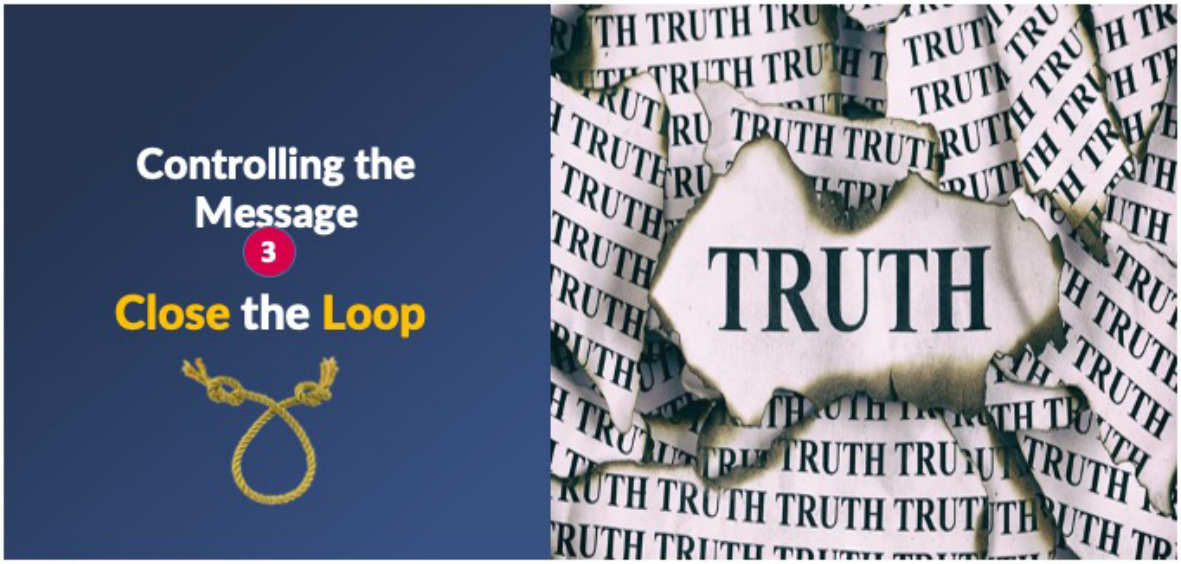
Wheeler Trigg O'Donnell LLP

ITW 19

Controlling the Message

3

Close the Loop



Wheeler Trigg O'Donnell LLP

ITW 20

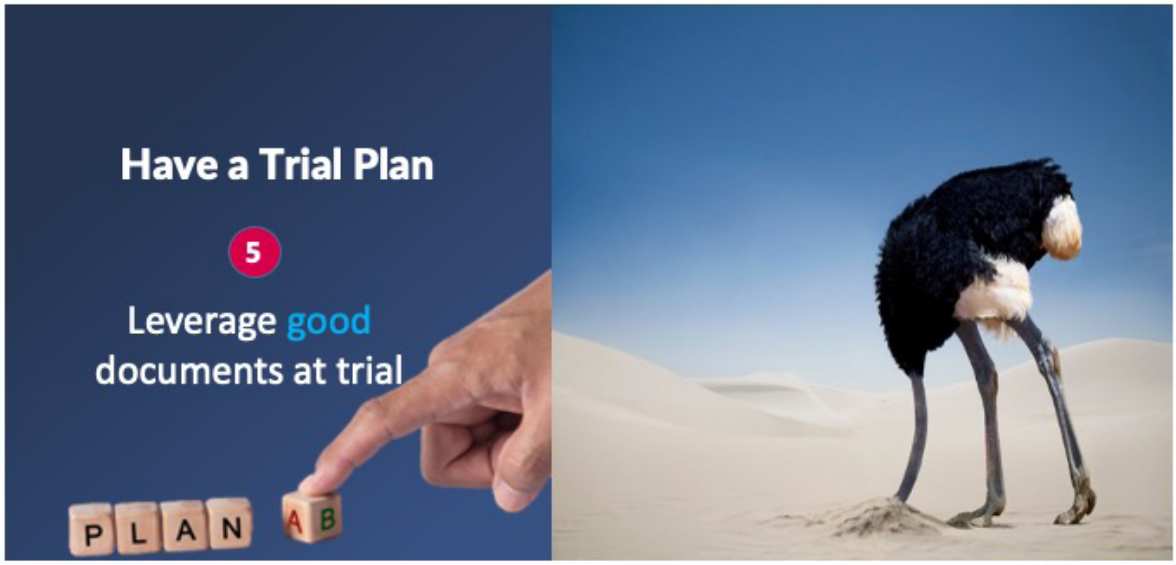
Practical Steps to Closing the Loop With a Good Document

1. Draft discoverable closing memo
2. Run drafts through counsel
3. Replace opinion, hyperbole and exaggeration with accurate and helpful facts
4. Emphasize customer goodwill and safety over cost savings
5. Issue contemporaneous corrections
6. Document corrective actions and investigation

Controlling the Message

4

Reinforce Retention Compliance



Wheeler Trigg O'Donnell LLP

ITW 23

Have a plan to confront the bad and leverage good documents at trial

1. Conduct jury research to assess impact of bad and good documents
2. Motions in limine and objections to exhibits
3. Preview impact of bad documents during voir dire
4. Contextualize documents with demonstratives and witnesses

Wheeler Trigg O'Donnell LLP

ITW 24

303.244.1916
ramirez@wtotrial.com

Juan Ramirez

Partner | Wheeler Trigg O'Donnell (Denver, CO)

Juan Ramirez has led North American and global litigation at a Fortune 150 company and served as senior litigation counsel for another Fortune 150 company. He uniquely understands the challenges his clients face, and he brings a wealth of experience in complex commercial litigation and appellate advocacy. Juan defends companies and consumer product manufacturers against existential litigation threats and government investigations at home and abroad. He helps clients protect their reputations, employees, and assets, including through affirmative claims against suppliers, distributors, and competitors.

Juan's experience leading the litigation functions of large, international corporations means that he truly appreciates the pressures his clients face: from plaintiffs, courts, regulators, and public perception. Juan brings that awareness and know-how to meet his clients where they are—and lead them to higher ground—when they face major litigation.

As both inside and outside counsel, Juan has managed large litigation teams, including coalitions comprised of experts from different firms, to oversee and execute legal strategy to help his clients meet their business objectives. From consumer class actions to government investigations to mass torts, Juan has the knowledge and creativity to effectively engage stakeholders from the C-suite to discovery vendors to claims professionals.

Practice Areas

- Class Actions
- Investigations & Compliance
- Product Liability
- Mass Torts
- Personal Injury Defense
- Commercial Litigation

Cases

- Won favorable settlement for a technology company against a supplier that failed to fulfill or refund a $1.5 million order of personal protection equipment (PPE) amid the COVID-19 pandemic.
- Managed the global investigations, class action, and commercial litigation dockets for a Fortune 150 products manufacturer.
- Managed North American class action and asbestos litigation portfolios for a Fortune 150 products manufacturer.
- Won a first-of-its-kind defense verdict in Australia against that country's effort to ban an entire category of consumable products.
- Obtained favorable resolutions and dismissals with prejudice of municipality-based class actions in New York and Minnesota in which plaintiffs sought to certify national and state classes of municipal wastewater facilities.
- Successfully defended a manufacturing company against multiple government investigations of false advertising allegations related to the company's fastest growing product category.
- Negotiated pre-suit withdrawals of several threatened ingredient-based class actions alleging false advertising of products as "all" or "100% natural."

Education

- University of Wisconsin Law School -- J.D., 2002 International Law Journal, Managing Editor
- University of Wisconsin Stevens Point -- B.A., 1993

Panel: Our Cup Runneth Over: Managing Demands Over Policy Limits

Jerry Glas
Deutsch Kerigan (New Orleans, LA)

Our Cup Runneth Over: Managing Demands Over Policy Limits
John Jerry Glas

The recent wave of nuclear verdicts has inspired (or reminded) plaintiff attorneys that making a demand of more than the insured's policy limits has distinct advantages, especially in direct action states. The demand itself triggers a predictable series of actions and reactions that can change the outcome of the litigation. Just send a well-written demand to the unsuspecting defense attorney for $10 million more than the insured's $40 million policy limits, grab some popcorn, and watch the dominos fall:

1. First, counsel hired by the first layer of insurance ("primary counsel") will send your demand to the insured, along with a letter explaining why the insured may want to retain separate counsel ("personal counsel"); and then

2. The insured will retain personal counsel (or assign in-house counsel) to start monitoring the case; and then

3. Personal counsel will "double check" the available and applicable excess insurance policies and confirm all excess insurers have received the demand; and then

4. Excess insurers will retain local counsel ("excess counsel") to separately evaluate and monitor the case; and then

5. Excess counsel will obtain and review all file materials from primary counsel; and then

6. Primary counsel will re-evaluate the risk, and counsel for each excess insurer will prepare an independent evaluation, resulting in several (often disparate) evaluations.

Within days, making a demand for more than policy limits can change the insured's focus from "what is the likely value of these claims?" and "what amount will likely settle these claims?" to "is there any possibility of a verdict in excess of policy limits?" and "what would happen if our company had to pay millions out-of-pocket?" The distractions are only exacerbated by the introduction of more lawyers "involved" on the insured's side. For the uninitiated, this drill can cause anxiety, generate second-guessing, create distrust among insurers, and artificially inflate the settlement value. What is needed is a plan or a protocol for managing policy limits and "policy limits plus" demands, especially when the claims are not worth policy limits. What follows is such a guide:

Confirm (Only) Your Receipt of the Demand.
Always send a written reply (email or letter) confirming your receipt of the policy limits or policy limits plus demand. You can't always prevent a verdict in excess of policy limits, but you can always prevent the other side from someday arguing that your company "ignored" that demand letter or "set it aside" because your company "did not take it seriously" or "immediately dismissed the demand." Remember that, when confirming your receipt of the demand, less is always more. The perfect "receipt" confirms only your receipt and promises nothing: "Thank you for your demand letter of November 5, 2022."

Resist the temptation to hastily send a reply email rejecting the plaintiff's demand and pointing out all the errors, exaggerations, and oversights in the demand letter. A company or an insurer that takes a demand

letter seriously takes the time to investigate the facts, arguments, analysis, and case law contained in that demand letter. A quick response can send the wrong message. Pretend that someday you will be asked to explain everything you did (and did not do) between receiving the demand and replying to the demand:

> Q. Isn't it true that the plaintiff's demand letter cited 15 documents?
> A. Yes.
> Q. Isn't it true that the plaintiff's demand letter cited 8 published opinions and dedicated 2 pages to analyzing recent verdicts for similar injuries?
> A. Yes.
> Q. Isn't it true that, within 18 minutes, you sent a reply email rejecting the demand and dismissing the analysis and case law cited in the demand letter?
> A. Yes.
> Q. How many of those 15 documents did you pull and re-read?
> A. None.
> Q. How many of the 8 published opinions did you read?
> A. None.

Request Clarification, Documents, Information, Answers, Examinations, Supplemental Reports, and Depositions.

It only takes a few minutes for a plaintiff attorney to dictate a demand letter, but it can take weeks for them to send you a document, an answer, an explanation, or a deposition date. So, put them to work. Ask them to "help me help you."

However, resist the temptation to request additional information to help you "complete your evaluation," because that representation can later paint you into a corner and force you to explain why you didn't pay policy limits after you received the requested information and "completed" your evaluation. Instead, wait an appropriate period of time (after receiving the demand) and prepare a reply that politely requests whatever you need to "properly respond" to their demand.

What you request to "properly respond" will always be case-specific. But, when plaintiff's counsel makes the demand before the end of discovery, consider asking plaintiff's counsel to:

- Respond to any previously propounded written discovery;
- Respond to additional written discovery, which is attached to your reply;
- Produce the plaintiff for a deposition or updated deposition;
- Provide dates to depose listed or material witnesses; and
- Produce the plaintiff for an (additional) independent medical examination.
- Make the product/area available for an (additional) inspection.

Policy limits and policy limits plus demands can also be an opportunity. Even when plaintiff's counsel makes the demand after the discovery period has ended, consider asking them to clarify, explain, address, and/or resolve whatever you are willing to highlight prior to trial, including:

- Plaintiff's fault and/or third-party fault ("How do they know that the defendant will be allocated 100% fault?");
- Inconsistencies in deposition testimony ("How do you reconcile…");
- Inconsistencies in documents ("Why does this document record…");
- Disagreements between plaintiff's experts and yours ("How could our expert, with our expert's impressive qualifications, reach the opposition conclusion?... Why is our expert wrong in concluding…");
- Issues with the qualifications/methodology of plaintiff's experts ("why is your expert's methodology more reliable when your expert didn't…");
- Outcome of potential motions and objections ("do you agree that the court's granting our pending/anticipated motion would…");
- Explain why specific cases or jury verdict results are not "more similar" to your case and provide a "more accurate" basis for estimating general damages.

Think outside the box. Remember that it is your (or your client's) money. Request whatever you want. If your surveillance attempts have failed, or it has been years since plaintiff's last deposition, ask plaintiff to provide you with (an updated) "day in the life" video. If the discovery deadline has ended, ask plaintiff to

produce an affidavit for any listed (but not deposed) witnesses so that you can have "the benefit of their testimony."

Request what you know plaintiff will not produce. If you suspect plaintiff conducted a focus group or mock trial, request the video, the jury consultant's final report, and/or the opportunity to discuss the results with that jury consultant. If the court previously ruled that plaintiff did not have to answer, disclose, or produce information or documents, consider asking plaintiff to voluntarily produce that information. When plaintiff inevitably refuses, you will have successfully confirmed in writing: (a) plaintiff had information that you did not; and (b) plaintiff refused to provide you with that information. Plaintiff's refusal to provide you with requested evidence, research, and results may change the way that plaintiff is someday perceived.

Consider the Pros/Cons of Requesting Additional Time.
Before requesting additional time to respond to a policy limit or policy limit plus demand, carefully consider the legal effect of that request in that particular jurisdiction. Research whether, in that specific jurisdiction, the request itself constitutes a rejection of the settlement offer.

In those jurisdictions where the request for additional time does not constitute a rejection of the policy limits demand, make the request. If plaintiff's counsel grants your request, you can put that time to good use. If plaintiff's counsel refuses, you will have additional grounds for defending your decision not to vomit money before the plaintiff's deadline.

Always make sure that your request for additional time is: (a) for a reasonable amount of time; and (b) is consistent with what you have requested to complete your evaluation. Whenever possible, tie your request for additional time to a specific need (i.e., time needed for an IME, a defense Life Care Plan, a specific deposition, or a court ruling). Never request an inordinate amount of time or an indefinite extension. If you only requested an updated deposition of the plaintiff, and opposing counsel provided you with a date next week, don't ask for a 12-month extension. Conversely, never undermine your request for additional discovery (that would take months to complete) by requesting a one-week extension. Make sure that your requests for more information and your request for additional time tell a consistent story.

Sometimes, when you ask for additional time, plaintiff's counsel will send you an inflammatory reply, which openly criticizes you for mismanaging/misevaluating the claim and refuses to grant you additional time unless you identify what specific steps you still need to complete your evaluation. When that happens, do not take the bait. If plaintiff's counsel asks you to explain why you need additional time or what you need additional time to accomplish, politely decline to discuss your investigation, evaluation process, and/or privileged attorney-client communications.

Consider a Focus Group or Mock Trial.
Most policy limit and policy limits plus demands are based on the unpredictable nature of jurors and the corresponding possibility of a "runaway jury." If your seasoned litigator's senses start tingling, and you get the feeling that a policy limit plus demand is headed your way, consider the pros/cons of scheduling a focus group and/or mock trial to identify the real range of potential verdicts.

The primary purpose of this exercise is to give you an understanding of how jurors will likely respond to the evidence that plaintiff will use at trial. Regardless of the circumstances, you should always identify and eliminate confounding variables, including: (a) witnesses who will never testify at trial; (b) opinions the jury will never hear; (c) exhibits the jury will never see; and (d) arguments the court will never allow the parties to make. Regardless of the circumstances, use care that both sides are presented evenly so you don't skew the results. For example, be careful that you do nothave your most talented litigator give a robust and well-prepared PowerPoint presentation for the defense while your most unexperienced colleague "wings it" without any real presentation. Sometimes, mock jurors (and even actual jurors) default to siding with the more prepared presenter, especially when the lawsuit involves complicated concepts, issues, and testimony (that would normally take days or weeks for them to truly understand).

But when there is the potential for a policy limits or

policy limits plus demand, and your secondary goal is to accurately identify the real range of potential verdicts, do not make the mistake of pretending you have a crystal ball. Do not assume you know exactly what evidence will be admitted/excluded. Do not try the case only once to one group of mock jurors. And do not try the exact same case multiple times to multiple groups of mock jurors. When you want to accurately identify the real range of potential verdicts, consider: (a) investing in more than one focus group or mock trial; (b) dedicating the first trial to an evidentiary "best case" for defendants; and (c) dedicating a subsequent trial or trials to an evidentiary "best case" for plaintiffs. Only then will you have secured, as a "snapshot in time", the range of potential verdicts when you were forced to respond to a policy limits or policy limits plus demand.

Explain Your Refusal to Pay.

During a mediation, most defense attorneys welcome the opportunity to hold an opening caucus because they are confident that they can explain the issues and the risk to a plaintiff better than opposing counsel can play Devil's Advocate. Most days, they are correct. So, when a plaintiff makes a policy limit demand or a policy limit plus demand, approach your (eventual) reply in the same way you would approach your opening caucus. Discuss with your counsel the pros/cons of:

- Conceding whatever legal elements or amounts that are undisputed (i.e., past medicals, past earnings, etc.), which will demonstrate that you do not "dispute or deny" everything;
- Reviewing the (conflicting) evidence regarding liability and/or comparative fault;
- Identifying specific "credibility calls" the jury will have to make, which "will almost certainly depend on how the witness testifies and presents that specific day";
- Explaining why jurors will likely believe or trust certain lay witnesses (i.e., "John has been married for twenty years, has raised three wonderful kids, and…");
- Explaining why jurors will likely give "great weight" to the defense expert testimony based on your expert's qualifications and methodology;
- Discussing the case law and recent verdicts that indicate what the range for general damages will be, and distinguish your case from any case law cited in the plaintiff's demand letter;
- Disclosing and generally discussing the results of your focus group and/or mock trial, especially if a jury found no liability or awarded "much less than policy limits";
- Identifying the probability or uncertainty of potential rulings that could significantly impact the outcome of the trial;
- Discussing the possibility/probability that the presiding judge will grant a directed verdict or (post-judgment) reduce any unreasonable award, including citation to any prior directed verdicts or post-judgment ruling reducing a jury's award;
- Discussing any prior rulings by the court with which you "respectfully disagree" and believe will constitute "reversible error," requiring the case to be retried; and
- Identifying any potential appellate issues (especially purely legal issues), any conflict among appellate courts in your state on the issue, and the effect of the court's ruling on the ultimate judgment against the insured.

Make An "Evidence Based" Counteroffer.

Always consider responding to a policy limits or policy limits plus demand by making an "evidence based" counteroffer. During a mediation, plaintiff attorneys routinely make ridiculously excessive opening demands, which are nothing more than proverbial "shots-across-the-bow," and defense attorneys routinely respond with what they believe are reasonable settlement offers "with an explanation" (i.e., "tell the plaintiff this amount represents past medicals plus lost earnings"). No defense attorney who attends a mediation "in good faith" responds to an unreasonable opening demand by abruptly ending the mediation.

Similarly, consider including a fair and justifiable counteroffer when replying to a policy limits or policy limits plus demand, rather than being content to only present a laundry list of reasons why the plaintiff's claims are not worth policy limits. Approach that counter offer the same way you might approach making an unconditional tender for an uninsured motorist (UM) claim. Show your math. Explain why you are offering that specific amount and explain why that amount is reasonable and fair. Pretend

that someday you will be deposed regarding that counteroffer:

Q. In response to plaintiff's policy limit plus demand of $50 million, you offered $5 million, correct?
A. Yes.
Q. At that time, did you recognize that the insured was 100% solely responsible for plaintiff's injuries?
A. Yes.
Q. At that time, did you reduce your settlement offer to allow for the possibility that the jury would award fault to anyone other than the insured?
A. No.
Q. Did that number include past medicals of around $1.5 million?
A. Yes.
Q Did that number include past lost earnings of at least $500,000?
A. Yes.
Q. What did the other $3 million represent?
A Everything else.
Q. What portion of the remaining $3 million did you include for lost future earnings?
A. I don't recall.
Q. What portion of the remaining $3 million did you include for future medical expenses?
A. I don't recall.
Q. What portion of the remaining $3 million did you include for general damages?
A. I don't recall.
Q. Do you have any notes, emails, correspondence, documents, or electronic entries anywhere that would explain how you reached $5 million?
A. No.
Q. Did you factor in, consider, or include judicial interest in your $5 million offer?
A. No.
Q. Why not?

Panning back to the big picture, it is possible to do more harm than good by generously making a $5 million counteroffer when there is no document recording how you reached that number and no explanation of why you offered that amount.

When bidding against yourself, always explain your bid. Whenever possible, include a table that breaks-down your counteroffer, especially when your counteroffer assumes less than a 100% allocation of fault to your insured. Continuing the above hypothetical involving a $50 million policy limits plus demand, consider why offering less than $5 million may someday be infinitely easier to defend when that counteroffer is accompanied with the below chart:

Past medicals:	$1,512,320.20
*Future medicals:	$595,658.76
Past lost earnings:	$516,420.10
**Future lost earnings:	$225,888.25
***General damages:	$2,000,000.00
Allocation of fault to insured:	100%
Total Settlement Offer	$4,850,287.31
*Based on defense economist's 11-5-2022 calculation of defense life care plan, which includes the scheduled cervical fusion. **Assumes plaintiff remains unable to work for another year because of the cervical fusion, but can return to his prior employment, as predicted by defense neurosurgeon. ***Based on the general damage award in *John Doe v. ABC Insurance Company.*	

Call a Defense Summit.

When a policy limit or policy limits plus demand causes the excess insurers to "lawyer up," it can cause a flurry of emails and evaluations. Emails can be misinterpreted, and misinterpreted emails can cause email wars. Evaluations can differ, and different evaluations can lead to all manner of mayhem. So, avoid the drama by calling for a "defense summit."

Make it clear that the purpose of the "defense summit" is to "get everyone up to speed." In the age of video-conferencing, it can easily be done virtually. Make it clear that excess insurers do not need to bring authority for settlement or for their counsel

to complete their evaluations. Rather, it's a meet and greet. It's a chance for the insured to candidly discuss the strengths and weaknesses of the case, as well as provideprimary counsel the opportunity to point the excess insurers in the "right direction" and save them "some time and some headaches."

Do not state or suggest in your email requesting this type of meeting that one of the purposes for the "defense summit" is to discuss the policy limits or policy limits plus demand. If you so much as hint that you want to discuss what everyone is willing to contribute toward a settlement, the excess insurers will decide the meeting is "premature" and will request time for their counsel to prepare independent evaluations, which is not what you want. It is always easier to influence the way that an excess insurer evaluates a case before they evaluate a claim than to change an excess insurer's evaluation after their counsel has evaluated that claim.

Remember that you only get one chance to make a first impression. Do not preach "doom and gloom" during the defense summit. If the excess insurers sense you are trying to "sell risk' to them, you will lose their trust and their interest. If the excess insurers get the impression that you are a "wide-eyed optimist" or a "true believer," your evaluation and future recommendations will mean nothing. Objectively review the favorable and unfavorable evidence. Provide a helpful timeline or graphic, which shows that you are "on top of it." Methodically and candidly share observations regarding witnesses and experts. Welcome issue spotting and brainstorming. Make sure that the newcomers leave with the impression that you are glad to have the extra set of eyes, and that you are "looking forward to working the problem with them."

Put The Excess Insurers to Work.

Good lawyers start by persuading themselves. Consider giving excess insurers purpose and direction by proposing a "division of labor." Assign a specific aspect of the case to your new co-counsel. Encourage them to do a "deep dive" into that issue, element, or witness. And hope that they (eventually) fall in love with their position. They key is to decide on a division of labor that allows the attorneys to work independently and to "take the lead" on the witnesses and motions related to their assignment.

Look for clear-cut ways to divide labor. Consider assigning liability to primary counsel and assigned damages to counsel for the excess insurer. Where liability is stipulated or admitted, assign orthopedic injuries to primary counsel and assign claims of a traumatic brain injury to counsel for the excess insurer. There will always be a handful of cross-over witnesses (like the plaintiff) whose testimony will be relevant to every issue or every claim, but a good division of labor makes it clear how every attorney should be preparing for every deposition and who will be handling every motion.

Furthermore, a thoughtful division of labor improves the quality of your defense. Instead of burdening primary counsel with drafting every motion and taking every deposition, it allows the team to evenly distribute the work and dedicate more time to each issue.

Additionally, a good division of labor can prevent resentment and criticism between counsel. Instead of one attorney dominating every call and making every final decision, it allows each lawyer to present on their assignment—whether it be a particular witness or a legal or factual issue— because they become the "expert" regarding their issue. It also allows attorneys to present their best work to the team.

> Above all, a good division of labor often creates a sense of "team" and can build trust among defense counsel. No team needs eleven quarterbacks on the field at the same time. Divide the labor. Emphasize the importance of each role. Show respect and praise the good work being done by one another. Lay the foundation for being a "great team" if the case goes to trial.
> Bait Two Hooks In Direct Action States.

Direct action states permit plaintiffs to directly sue an insurance company. Some of these states allow a plaintiff to settle with the insured and (one or more of) the insured's underlying insurers, and proceed against the remaining excess insurers for their excess insurance policies. When a state permits a direct action against an excess insurer and permits the underlying insurers to settle, a $50 million policy limits plus demand can motivate the insured, who has $10 million in uninsured exposure, to demand

that its primary insurer pay its $5 million policy limits "to get the insured out," even though that $5 million payment: (a) will not end the litigation; and (b) will fund the plaintiff's direct action against the remaining excess insurers. In those states, plaintiff attorneys will use policy limits plus demands to divide and conquer.

For example, in Louisiana, settling with the insured "below and above"[1] the excess insurers is called a Gasquet settlement. In Gasquet v. Commercial Union Ins. Co., 391 So.2d 466 (La. App. 4th Cir. 1980), the plaintiff settled (pre-trial) with the primary insurer for $200,000, even though the primary insurer had a $300,000 policy limit. In that settlement, the plaintiff fully released the primary insurer and the tortfeasor/insured from all liability not insured by the excess carrier. The insured therefore remained in the lawsuit, but only as a nominal defendant ("in name only"), to allow the plaintiff to proceed against and recover from the excess carrier. After settlement, the excess carrier argued that its policy was not triggered because that policy required "exhaustion" of the underlying policies and the primary carrier had paid $100,000 less than its policy limits. The court rejected that argument, reasoning that the plaintiff was entitled to a direct action against the excess carrier who would, in turn, receive a credit for the full limits of the primary policy.

Thus, Gasquet settlements use the Direct Action Statute to create a fictitious exhaustion of the primary policy that enables the plaintiff to pursue the excess insurance without running afoul of the typical exhaustion requirements in excess policies that require all underlying policies be exhausted before the excess coverage is triggered. Practically speaking, a Gasquet Settlement works like this:

- Plaintiff and the primary insurer settle for the limits of the primary policy (or less);
- Plaintiff agrees to a full and complete release of the insured, who no longer needs to worry about a judgment that exceeds policy limits;
- Plaintiff reserves the right to proceed against and collect from excess insurers, who no longer need to worry about allegations that it was in "bad faith" by its failure to settle within policy limits;
- If plaintiff has not already sued the excess insurers, plaintiff amends the pleadings to add the excess insurer(s) as named defendants; and
- The excess insurers are entitled to a credit for the full amount of the primary policy, regardless of the actual settlement amount (i.e., when the primary insurer settles for $750,000 of its $1 million primary policy, the excess insurer's policy is not triggered until the verdict exceeds $1 million).

In effect, a Gasquet settlement is a type of high/low agreement because it guarantees the plaintiff the settlement amount and only eliminates the possibility of a recovery in excess of policy limits. For example, where an insured has $40 million in insurance and plaintiff makes a $50 million policy limits plus demand, a $5 million Gasquet agreement with primary counsel has the same effect as a $40M/$5M high/low agreement between plaintiff and the excess insurer(s).

When a direct action state permits some form of a Gasquet settlement, the insured should consider responding to a policy limits or policy limits plus demand by baiting "two hooks" and making two settlement offers:

1. A "Global" Settlement Offer, which results in the dismissal of the insured, the primary insurer, and all excess insurers, and

2. A "Gasquet" Settlement Offer, which results in only the dismissal of the insured and specific, but not all, insurers.

By baiting two hooks, an insured can find out (in a hurry) what type of settlement the plaintiff really wants, and that can be valuable information. And, the insured expresses no preference in what type of settlement it wants, which can deprive plaintiff's counsel of valuable information.

Following this method, an insured can influence settlement negotiations as well. If the insured wants to encourage a Gasquet settlement, the insured can intentionally make the Gasquet settlement offer

1 While it is common to describe a Gasquet agreement as a settlement "below and above" the excess insurers, the primary insurer cannot enter into a Gasquet agreement that dismisses the primary insurer unless the insured is completely released and dismissed, remaining only as a nominal ("in name only") defendant to the extent necessary for the plaintiff to collect from the excess insurers.

more attractive and the Global settlement offer less attractive (i.e., "We'll do a Gasquet settlement for $5 million or a Global settlement for $8 million."). If the insured wants to encourage a Global settlement offer, the insured can intentionally make the Global settlement offer more attractive by offering less than the primary policy limits for the Gasquet agreement (i.e., "We'll do a Global settlement for $12 million, or a Gasquet settlement for $3 million).

Most importantly, by baiting two hooks, the insured can keep the team together and encourage global settlement offers. Invariably, when an insured starts myopically focusing on making a Gasquet agreement: (a) plaintiff's counsel will smell blood in the water and drive the cost of a Gasquet agreement up; and (b) the excess insurers will run silent and deep because they absolutely love when a plaintiff reaches a Gasquet settlement, dismisses the insured, and eliminates the possibility of a "bad faith" claim. That is why the start of Gasquet settlement negotiations can mean the end of Global settlement negotiations.

Remember you can offer policy limits anytime. It is important to remember that nothing prohibits you and your insurers from making a policy limits offer (or even a policy limits plus offer) after rejecting a policy limits plus demand. Nothing. After rejecting a policy limits plus demand, keep an open mind. If something changes, be willing to re-evaluate your case. Resist the natural temptation to ignore what hurts your case and focus on what helps your case. Listen to every lay and expert witness. Carefully consider every new report, inspection, and examination. Avoid confirmation bias.

There is a difference between "completing" your evaluation and "changing" your evaluation. Remember that making a policy limits demand after previously rejecting a policy limits demand can also be misconstrued as circumstantial evidence that you arbitrarily rejected or "in bad faith" rejected the plaintiff's (original) policy limits demand. Be careful when making the policy limits offer. In addition to reviewing the strengths in the defense case, and the weaknesses in the plaintiff's case, identify what has changed or what additional information you have received. Make sure your policy limits offer provides a "snapshot in time" regarding your evaluation.


Managing "Policy Limits Plus" Demands
Moderator: John Jerry Glas
Isaiah Fields, Axon Enterprise, Inc.
Bryan Garcia, Pure Insurance
Jessica Nolan, PLZ Aeroscience
Richard Yandle, United Vision Logistics

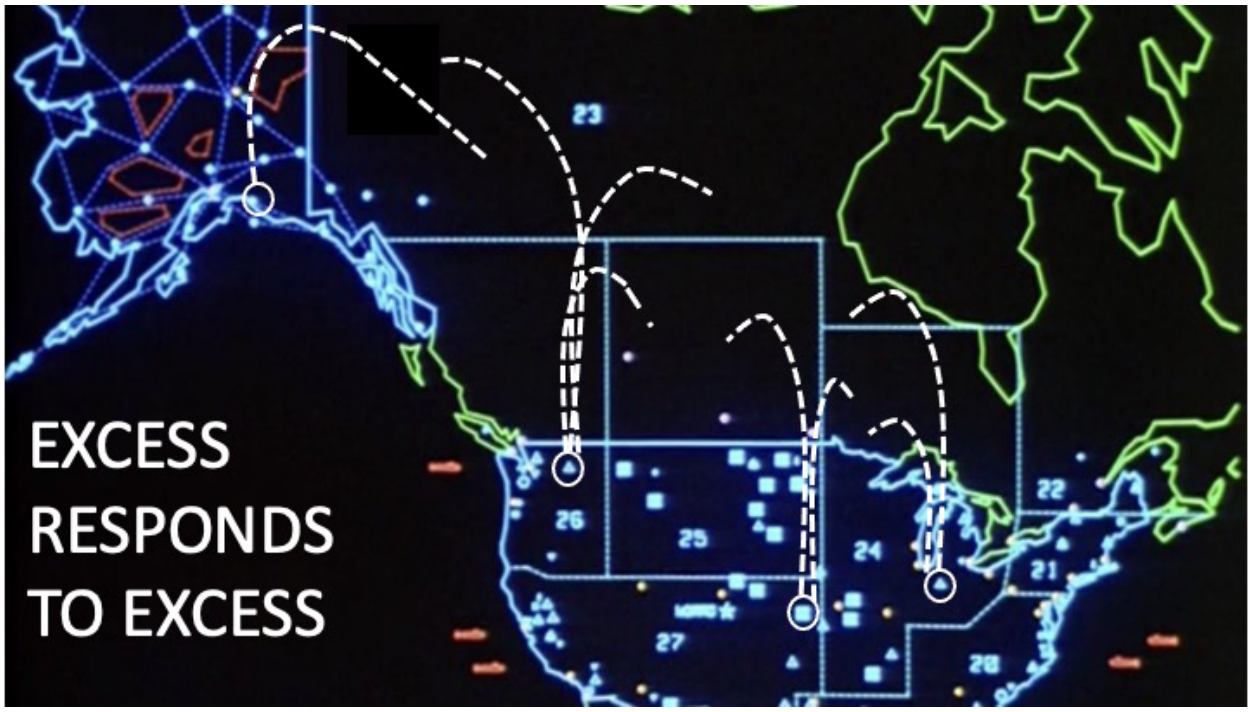

POLICY LIMITS PLUS WARNING

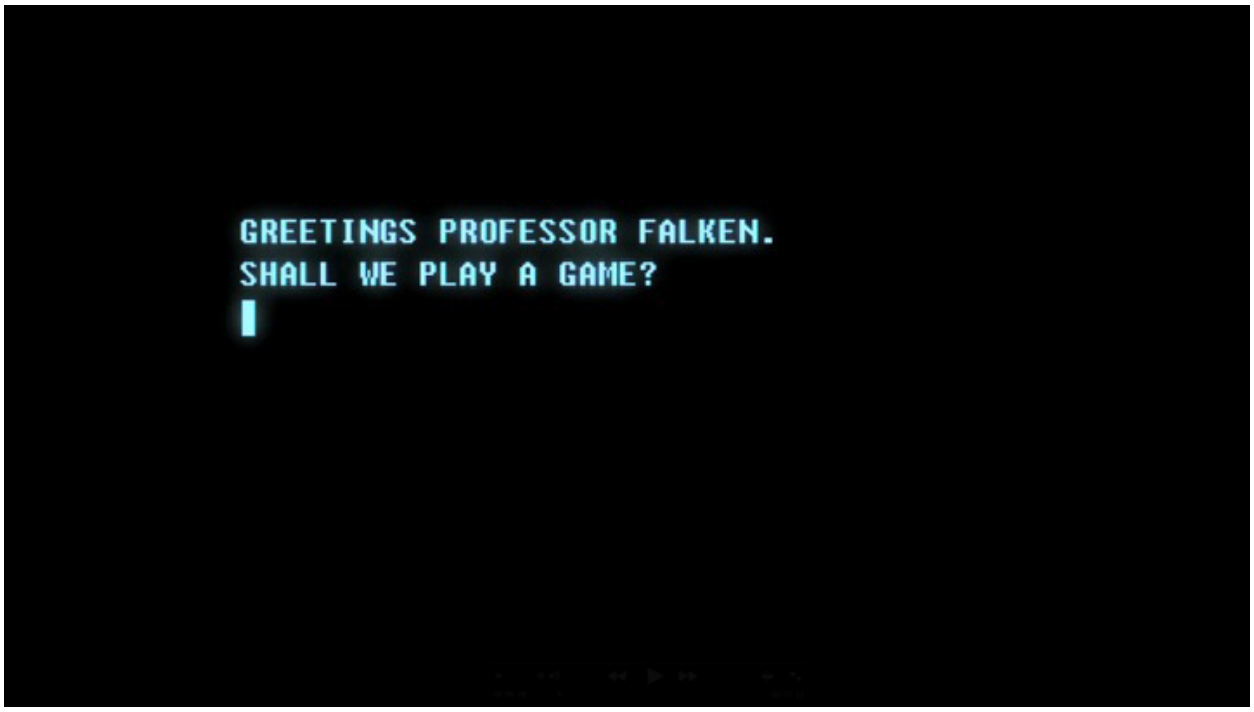

PRIMARY
SENDS NOTICE
TO INSURED
23
22
21
24
25
26
27
28


NOTICE
TO EXCESS
23
22
21
24
25
26
27
28


EXCESS
RESPONDS
23
22
21
24
25
26
27
28


INSURED
RESPONDS
23
22
21
24
25
26
27
28


EXCESS
RESPONDS
TO EXCESS



Confirm Receipt of Demand

- Confirm Receipt of Demand
- Request, Request, Request

Request Additional Discovery

- Respond to any previously-propounded discovery.
- Respond to additional discovery (attached to reply).
- Produce plaintiff for a deposition or updated deposition.
- Provide dates to depose listed/material witnesses.
- Produce plaintiff for an independent medical examination (IME).
- Make the product available for inspection/testing.

Request Explanations

- What is the evidentiary basis for assuming 100% at fault? (fault)
- How do you explain the inconsistencies in testimony? (credibility)
- Why does the plaintiff's medical record state…? (impeachment)
- How could our expert reach the opposite conclusion? (experts)
- Do you agree the court's granting our MIL would…? (potential rulings)
- Why wouldn't the award be more similar to…? (quantum)

- Confirm Receipt of Demand
- Request, Request, Request
- **Consider Extension Pros/Cons**

- Confirm Receipt of Demand
- Request, Request, Request
- Consider Extension Pros/Cons
- **Consider Mock Trial/Mediation**

- Confirm Receipt of Demand
- Request, Request, Request
- Consider Extension Pros/Cons
- Consider Mock Trial/Mediation
- **Explain Your Refusal**

- Confirm Receipt of Demand
- Request, Request, Request
- Consider Extension Pros/Cons
- Consider Mock Trial/Mediation
- Explain Your Refusal
- **Make Smart Counteroffer**

Past medicals:	1,512,320.20
*Future medicals:	595,658.76
Past lost earnings:	516,420.10
Future lost earnings:	225,888.25
General damages:	2,000,000.00
Allocation of fault to insured:	100%
Total Settlement Offer:	4,850,287.31

Past medicals:	1,512,320.20
*Future medicals:	595,658.76
Past lost earnings:	516,420.10
Future lost earnings:	225,888.25
General damages:	2,000,000.00
Allocation of fault to insured:	50%
Total Settlement Offer:	2,425,143.66

Past medicals:	1,512,320.20
*Future medicals:	595,658.76
Past lost earnings:	516,420.10
Future lost earnings:	225,888.25
General damages:	2,000,000.00
Allocation of fault to insured:	50%
Subtotal:	*2,425,143.66*
Judicial Interest (2 Years):	178,454.33
Total Settlement Offer:	2,603,597.99

- Confirm Receipt of Demand
- Request, Request, Request
- Consider Extension Pros/Cons
- Consider Mock Trial/Mediation
- Explain Your Refusal
- Make Smart Counteroffer
- Call a Defense Summit

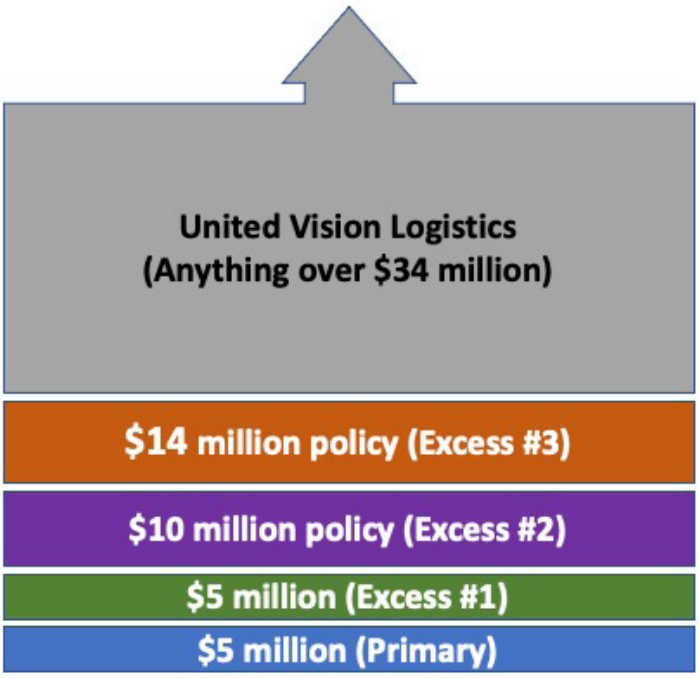
- Confirm Receipt of Demand
- Request, Request, Request
- Consider Extension Pros/Cons
- Consider Mock Trial/Mediation
- Explain Your Refusal
- Make Smart Counteroffer
- Call a Defense Summit
- **Beware Direct Action States**

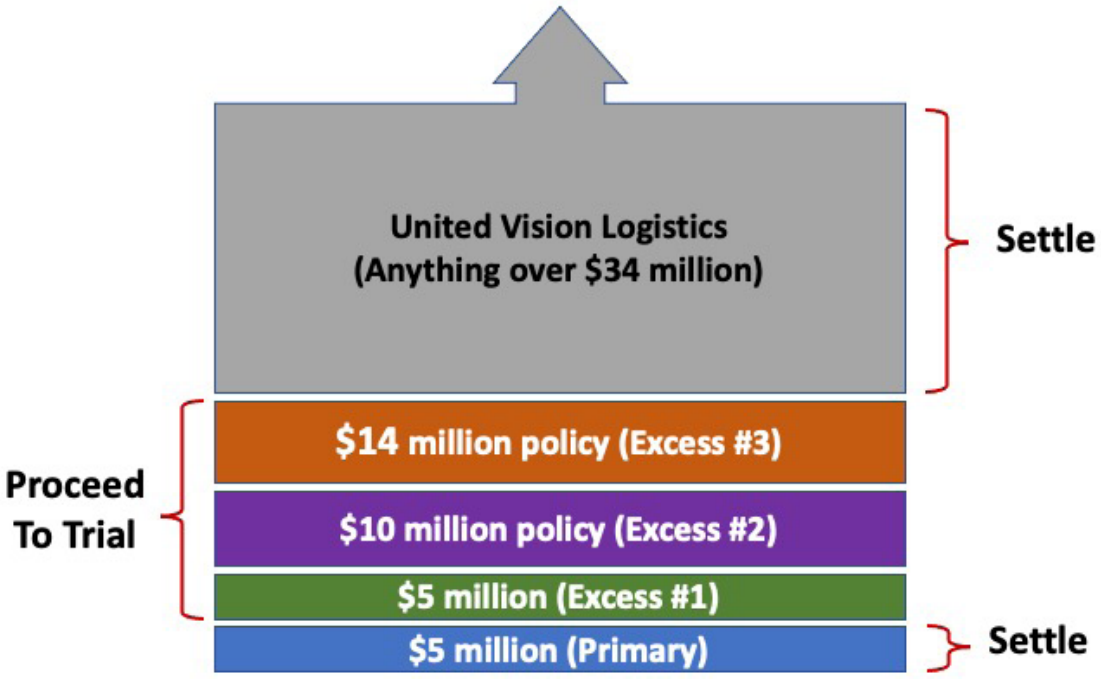
Direct Action States

1. **Connecticut** (post-judgment)
2. **Georgia** (limited)
3. **Iowa** (expansive)
4. **Kansas** (limited)
5. **Louisiana** (expansive)
6. **Nebraska** (limited)
7. **New Jersey** (limited)
8. **Rhode Island** (limited)
9. **Wisconsin** (expansive)

Gasquet v. Commercial Union Ins. Co.,
391 So.2d 466 (La. App. 4th Cir. 1980)

- Plaintiff settles with primary insurer(s).
- Plaintiff releases insured & primary insurer(s).
- Insured remains "nominal" defendant.
- Plaintiff proceeds against excess insurers.
- Excess insurers entitled to credit for full amount of underlying policies.




United Vision Logistics
(Anything over $34 million)
Settle
$14 million policy (Excess #3)
$10 million policy (Excess #2)
$5 million (Excess #1)
$5 million (Primary)
Proceed
To Trial
Settle


DEFCON
3
2

Settlement

TM [redacted]

To Glas, Jerry

EXTERNAL SENDER

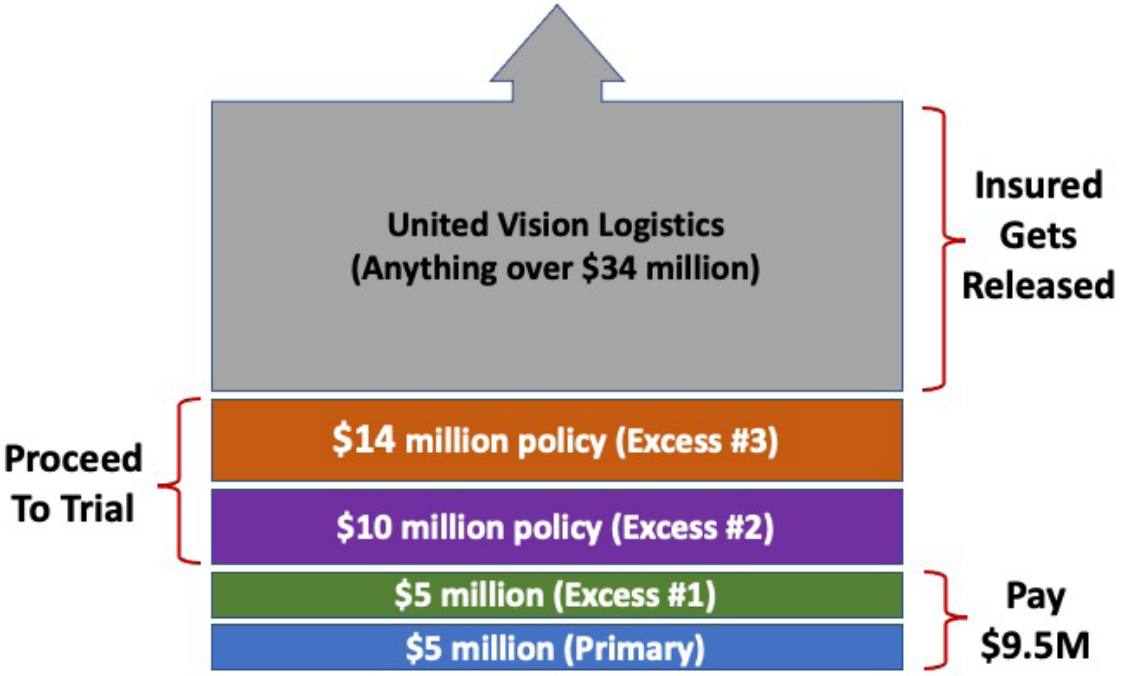
Jerry,

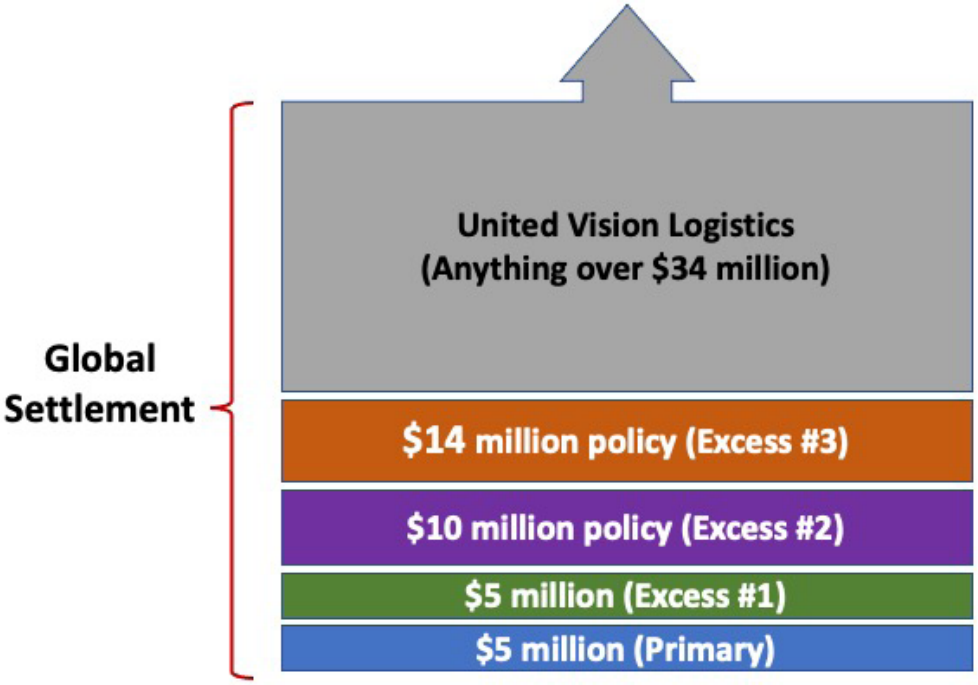
24 million to close it all down

or

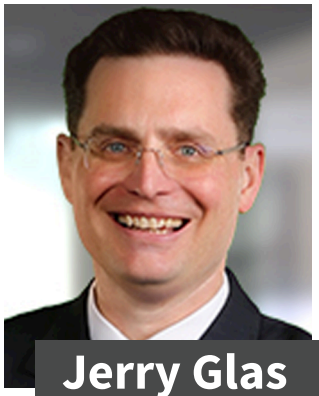
9.5 Gasquet on the first 10 to continue and release first three insurers.

[redacted]


United Vision Logistics
(Anything over $34 million)
Insured
Gets
Released
Proceed
To Trial
$14 million policy (Excess #3)
$10 million policy (Excess #2)
$5 million (Excess #1)
$5 million (Primary)
Pay
$9.5M


Global
Settlement
United Vision Logistics
(Anything over $34 million)
$14 million policy (Excess #3)
$10 million policy (Excess #2)
$5 million (Excess #1)
$5 million (Primary)


GREETINGS PROFESSOR FALKEN
HELLO
A STRANGE GAME.
THE ONLY WINNING MOVE IS
NOT TO PLAY.
HOW ABOUT A NICE GAME OF CHESS?



504.593.0627
jerry@deutschkerrigan.com

Jerry Glas

Partner | Deutsch Kerrigan (New Orleans, LA)

John Jerry Glas is the Chair of the Civil Litigation Department at Deutsch Kerrigan and a Fellow of the American College of Trial Lawyers. He has tried 114 civil or criminal trials, including 76 jury trials and 38 judge trials.
Jerry has been admitted pro hac vice in 11 different states and had success on both sides of the aisle. In 2021, as lead trial counsel for the plaintiff (Lindale Pipeline, LLC), Jerry obtained a $26 million verdict in Houston. In 2012, as lead trial counsel for the defendant (TASER International, Inc.), Jerry obtained a zero verdict in St. Louis, which was listed by Missouri Lawyers Weekly as one of that year's "Largest Defense Verdicts."

Jerry has authored three peer-reviewed book chapters for the American Bar Association's popular "From The Trenches" series on trial strategy. He is also a frequent presenter, having lectured locally and nationally on jury selection, trial strategy, expert witnesses, traumatic brain injury cases, life care plans, and qualified immunity.

Jerry enjoys teaching law school students. He has taught a full-credit Trial Practice class as an adjunct professor at Loyola University New Orleans College of Law (2009-2014). He has lectured annually on the challenges of civil and criminal discovery as part of the Intersession faculty for Tulane University School of Law (2012-Present). He has also served on the teaching faculty for L.S.U. Law School's Trial Advocacy 3-Day Boot Camp (2018-Present).

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

Industries
- Insurance
- Manufacturing
- Transportation
- Health Care
- Retail and Restaurant

Accolades
- Fellow, American College of Trial Lawyers, 2020-Present
- Louisiana Super Lawyers List, Civil Litigation, 2015-2021
- The Best Lawyers in America©, Personal Injury Litigation, 2012-2022
- Inside New Orleans Readers' Favorite Elite Lawyer, 2021
- New Orleans CityBusiness "Leadership in Law" 2012, 2017
- Missouri Lawyers Weekly, Largest Defense Verdicts, 2013
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Federal Bar Association's Camille Gravel Public Service Award, 2009

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

Finding Your Voice: Communicating with Today's Juries

Mike Bell
Lightfoot Franklin & White (Birmingham, AL)

Finding the Right Voice in the Nuclear Age of Verdicts
Michael Bell, Haley Cox, and Trey Bundrick

On July 26, 2022, a Texas jury made headlines across the country after it awarded $7 billion in punitive damages against Charter Communications to the family of a woman who was murdered in her home by one of Charter's technicians. While the Charter verdict is extreme, it is nevertheless representative of a recent trend of so-called "nuclear verdicts" across the country. To better understand this trend, we have reviewed dozens of the highest verdicts from 2019 through 2022 to determine what factors might have led juries to award such high amounts. In this paper, we summarize some of the more significant verdicts and key takeaways. The presentation will provide a model to consider when presenting the "other side of the story."

Pilliod v. Monsanto Co: (Cal. 2019). A jury awarded $55 million in compensatory damages and $2 billion in punitive damages to two plaintiffs after the plaintiffs were permitted to introduce evidence that Monsanto knew and concealed to regulators that its product Roundup caused cancer. The plaintiffs testified that the only reason they used Roundup weekly for 40 years was that Monsanto marketed it as being safe. Several governmental agencies have declared that glyphosate, the active ingredient in Roundup, is noncarcinogenic. However, one of the plaintiffs' expert testified that Monsanto ghost wrote academic articles and manipulated data to skew the results of studies. The trial judge remitted the award to a combined $87 million, which the California Court of Appeals affirmed. This summer, the U.S. Supreme Court declined to review the case.

Madere v. Schnitzer Steel Industries Inc. (Ga. 2019): A jury awarded $180 million in compensatory damages and $100 million in punitive damages after a semi-truck driven by a Schnitzer employee caused a head-on collision, which resulted in the death of five people (however, this trial only concerned the death of one of the five decedents). The Schnitzer employee claimed to have swerved to avoid hitting a dog, but the plaintiffs introduced evidence that the Schnitzer employee had been asleep at the wheel. The plaintiffs also argued that Schnitzer knew of the employee's unsafe driving history but did not provide training or discipline. In closing, the defense counsel suggested that the decedent driver could have done more to avoid the truck that had crossed the center line.

Monson v. Morsette (N.D. 2019): A jury awarded $242 million in compensatory damages and $885 million in punitive damages after the defendant drove on the wrong side of the highway while intoxicated and killed two people and caused significant brain injury to a third (the verdict is the total of damages award to all three injured parties). The defendant had pleaded guilty to vehicular homicide, was serving a 20-year sentence, did not appear at trial, and admitted liability. At the time of the accident, his blood-alcohol level was more than three times the legal limit. The verdict was reversed by the North Dakota Supreme Court and remanded for a new trial, not to include punitive damages. On August 19, 2022, jurors returned awarded $175 million in compensatory damages. It is unknown at this time whether the defendant intends to appeal the 2022 verdict.

Washington v. Top Auto Express, Inc. (Fla. 2020): Following an all-Zoom trial, a jury awarded $411 million in compensatory damages to the plaintiff after he was thrown from his motorcycle attempting

to avoid a 45-vehicle pile-up. The plaintiff survived the crash but suffered substantial injuries: his pelvis was torn away from his spine bilaterally and had to be patched together with metal rods, plates and wires; he sustained severe colon and urethral damage, resulting in permanent bladder and bowel incontinence; experienced a loss of sexual function with paralysis; had a colostomy bag installed during his six month hospital stay; suffered atrophy of his right leg, required a special arm crutch to walk as well as 24 hour care. Top Auto was initially represented by counsel who withdrew several months prior to the trial, citing a failure of client cooperation. Additionally, the trial was over damages only after the judge defaulted Top Auto for "abandoning" its defense two months before trial. Reportedly, Top Auto shuttered its business, and plaintiffs' counsel negotiated a settlement with Top Auto's insurer for around $1 million.

Dzion v. AJD Business Services, Inc. (Fla. 2021): A jury awarded $102 million in compensatory damages and $900 million in punitive damages against two trucking companies and two drivers for the wrongful death of an eighteen-year-old college student. The driver for AJD Business Services had a history of aggressive driving and accidents, did not possess a commercial driver's license, and was driving while distracted by a cellphone when he caused a wreck. The college student was stopped in the traffic caused by the wreck with the driver of Kahkashan Carrier hit him from behind, causing his death. The Kahkashan driver had been driving 25 hours straight and was unable to read the road signs because he did not speak English. The two drivers and AJD Business Services conceded they were negligent. Kahkashan was the only defendant represented by counsel at the trial. It does not appear that any of the defendants appealed the verdict. AJD Business Services' insurer filed a separate action against the decedent's family, requesting that the United States District Court for the Middle District of Florida declare that the insurer had exhausted the $1,000,000 policy limits and bore no responsibility towards the verdict. The insurer and the decedent's family settled this case for an undisclosed amount.

Batchelder v. Malibu Boats LLC (Ga. 2021): A jury awarded $80 million in compensatory damages and $120 million in punitive damages after a 7-year-old boy died in a boating accident. Water came over the bow after the boat's operator drove into the wake, which washed the boy out of the front of the boat. When the operator reversed the boat to keep it from sinking, the boat was trapped in the propellor where he was mutilated and died from drowning and/or blood loss over the course of 60 to 180 seconds. The jury awarded all $120 million in punitive damages against the Malibu Boats entities even though the jury found the entities only 25% at fault for failure to warn about the potential swamping. Recently, the judge denied the Malibu Boats entities' motion for a new trial or remittitur, holding that the verdict was supported by evidence. The order referenced testimony from Malibu Boats engineers and employees who were aware that the boat could swamp under normal conditions, evidence that Malibu Boats knew that the boat's design was defective and carried a risk of swamping under normal conditions, and expert testimony showing that the boat could swamp under normal usage. The case is currently on appeal before the Georgia Court of Appeals.

Cruz v. Allied Aviation (Tex. 2021): A jury awarded $352 million in compensatory damages to an airport worker who was struck from behind by a van driven by the defendant's employee. The collision left him paralyzed from the chest down, and two days after the accident, he suffered a stroke that paralyzed the right side of his body. The award was a sum of damages for past and future physical pain, mental anguish, medical expenses, physical impairment, and disfigurement. The defendant claimed that the plaintiff was negligent and called an expert witness who claimed the plaintiff lacked situational awareness, saying, "You know, you've got to know what's going on around you type of thing." The plaintiff accepted a remitter, reducing the award to $235.2 million. The case is currently on appeal before the Court of Appeals of Texas, First District, Houston.

Rudnicki v. Farmers Insurance Exchange (Cal. 2021): A jury awarded $5.4 million in compensatory damages and $150 million in punitive damages to the plaintiff whom defendants fired in retaliation for his being a witness in a discrimination lawsuit. When he was a senior vice president, the plaintiff told the defendants that he would testify truthfully

in a lawsuit against the companies about pay disparities between male and female employees. The plaintiff claimed that the defendants responded by manufacturing two employee complaints against the plaintiff for making insensitive and inappropriate comments made about female employees and then firing the plaintiff as soon as the lawsuit concluded. The plaintiff claimed that, by contrast, he had a history of taking proactive steps to hire and promote women. In May 2022, the trial court remitted the award to $18.95 million. The case is currently on appeal.

Martinez v. Southern Ca Edison Co. (Cal. 2022): A jury awarded $24.4 million in compensatory damages and $440 million in punitive damages to two former employees of a southern California utility in a worker retaliation lawsuit. Martinez was a supervisor for the utility for 16 years and was approached by numerous employees claiming other supervisors had sexually harassed them and used racist language. Martinez brought the complaints to the human resources department, which prompted the other supervisors to manufacture retaliatory complaints and investigation against Martinez. This led to his constructive termination. Page, the other plaintiff, had previously submitted complaints to the utility's ethics hotline and was a witness to the supervisors' plans to retaliate against Martinez. It appears that the parties reached a settlement following the verdict.

Goff v. Holden (Tex. 2022): A jury awarded $375 million in compensatory damages and $7 billion in punitive damages after an 83-year-old woman was stabbed to death by a Spectrum cable technician in her home. The plaintiffs argued that parent company Charter Communications was responsible for the murder because of its failure to perform a background check that would have revealed the technician's criminal history. Additionally, the plaintiffs argued that Charter failed to address the technician's various personal and potential mental health issues. Two factors that likely contributed the jury's uncommonly high award were (1) the jury's finding that Charter attorneys forged an arbitration agreement, and (2) the judge's inclusion in the jury charges of a spoliation order holding the cable company in contempt for destroying video surveillance and tracking information for the technician. The court recently remitted the judgment to $1.147 billion. Charter has stated that it plans to appeal the judgment.

Hill v. Ford Motor Co. (Ga. 2022): A jury awarded $24 million in compensatory damages and $1.7 billion in punitive damages against Ford after the roof of a F-250 truck collapsed in a rollover, killing two people. The case had previously ended in mistrial after the trial court found that Ford had violated a pretrial order. The court sanctioned Ford by defaulting its defense to the plaintiffs' defective design and failure to warn claims, sending only the issue of damages to the jury. The court also instructed the jury that Ford's conduct in designing the roof was willful and reckless, essentially inviting the jury to award punitive damages. The plaintiffs introduced evidence that Ford had been aware of the defective roof, designed a stronger roof, but delayed implementing the safer design for years. The plaintiffs also introduced evidence of 80 allegedly similar accidents. Ford has stated publicly that it plans to appeal the judgment.

Edwards v. Grubbs (Ga. 2022): A federal jury awarded $80 million in compensatory damages and $20 million in punitive damages to a man who broke his neck in a fall after an Atlanta police officer tased him from behind. The officer admitted at trial that, at the time he deployed his taser, the plaintiff had not committed a crime and that he had no intention of arresting the plaintiff. The plaintiff introduced evidence that the officer interfered with his body camera to prevent it from recording and misrepresented facts on the incident report. During the trial, the judge sanctioned the defendants for a "significant" discovery failure after learning that defendants had not produced documents related to the City of Atlanta's internal investigation of the incident. The sanctions included a curative instruction to the jury and reprimand of the lead defense counsel in front of the jury. On September 15, 2022, the trial court granted the City of Atlanta's judgment as a matter of law, dismissing the award of $60 million in compensatory damages against the city. The court denied the officer's motion, leaving the award of $20 million in compensatory damages and $20 million in punitive damages against him intact. It is unknown at this time whether the officer intends to appeal.

Carusillo v. Metro Atlanta Recovery Residences (Ga. 2022): A jury awarded $65 million in compensatory damages, $1 million in punitive damages, and $11 million in attorneys' fees in a wrongful death medical malpractice action. The decedent was a 29-year-old man diagnosed with bipolar disorder and who had a long history of substance abuse. When the decedent arrived at the defendant's facility, the defendant stopped or reduced his bipolar medications, resulting in the decedent experiencing hallucinations. Three weeks after his arrival, the defendant transferred the decedent to a "sober house," despite the decedent's and his parents' requests to for him stay at the facility with the higher level of care. Two days later, the decedent lay down naked in the middle of Interstate 85, where he was struck by multiple vehicles and killed. The plaintiffs argued that the decedent experienced a psychotic break as a result of the change in his medicine regimen and the facility's discharging him against his will. The defense's theory of the case was that the decedent committed suicide. It is unknown at this time whether the defendant intends to appeal.

Kamuda v. Sterigenics (Ill. 2022): A jury awarded $38 million in compensatory damages and $325 million in punitive damages to a woman who claimed to have contracted breast cancer as a result of an industrial sterilization company polluting the air in her community with ethylene oxide. The award exceeded what the plaintiff requested from the jury and was apportioned as follows: Sterigenics—65% liable; Sotera Health, Sterigenics parent company—30% liable; Griffith Foods, Sterigenics former parent company—5% liable. The plaintiff alleged that the defendant knew since at least the early 1980s that ethylene oxide was carcinogenic but nevertheless released it into the air from 1984 until 2019 when the State of Illinois issued an order shutting down the facility. At trial, a Sterigenics former CEO testified that he and the company knew that ethylene oxide was dangerous when he assumed leadership but did not take efforts to reduce emissions. Sterigenics and Sotera Health intend challenge the verdict, but it is unknown at this time if Griffith Foods will challenge the verdict as well.

Key Takeaways:

1. A truthful, well-supported story is critical. Today's jurors demand an affirmative, truthful, credible story from defendants that explains their conduct, fairly acknowledges problems and mistakes, and is supported by persuasive evidence and witnesses. Defense themes must be developed with these goals in mind. And counsel must thoroughly prepare every fact witness, expert, corporate representative, and party so that the witnesses can speak to the key themes and explain their role in the story. Remember, if a witness is not part of your story, she will inevitably become part of the plaintiff's story instead.

2. Other Incidents are explosive. Two of the largest verdicts in the last two years—Hill and Goff—involved evidence of alleged other similar incidents that were known to the defendants. It is critical that companies monitor and appropriately address other incidents in real time. Otherwise, juries will become furious by evidence that the defendants knew of a problem and did nothing to solve it or warn about it. In discovery, defendants must work to limit overly broad discovery of other incidents that are not substantially similar. If overly broad discovery is permitted, work to properly limit the admission of the other incident evidence at the pretrial and trial phase. When it is inevitable that the plaintiff will be able to introduce evidence of incidents, the defendant must address these incidents head-on as part of their truthful story and themes.

3. Play by the rules. Jurors become inflamed when presented with evidence of a defendant or its lawyers breaking the rules or not owning up to their mistakes. Don't get "cute" in responding to discovery. Don't over-designate documents as confidential or privileged. Avoid pushing the envelope with pretrial, evidentiary, or discovery rulings. If mistakes happen, admit and explain them to the judge or jury. Otherwise, clever opposing counsel will use these mistakes against you to create "heat" in the case.

4. Be wary of the Blame Game. Jurors become angry when they perceive a defendant to be unfairly blaming another party for the defendant's conduct, especially when that blame is directed to the injured party. Of course, defendants must present evidence of contributory or comparative negligence in appropriate circumstances, but they should tread carefully. The same is true for co-defendants

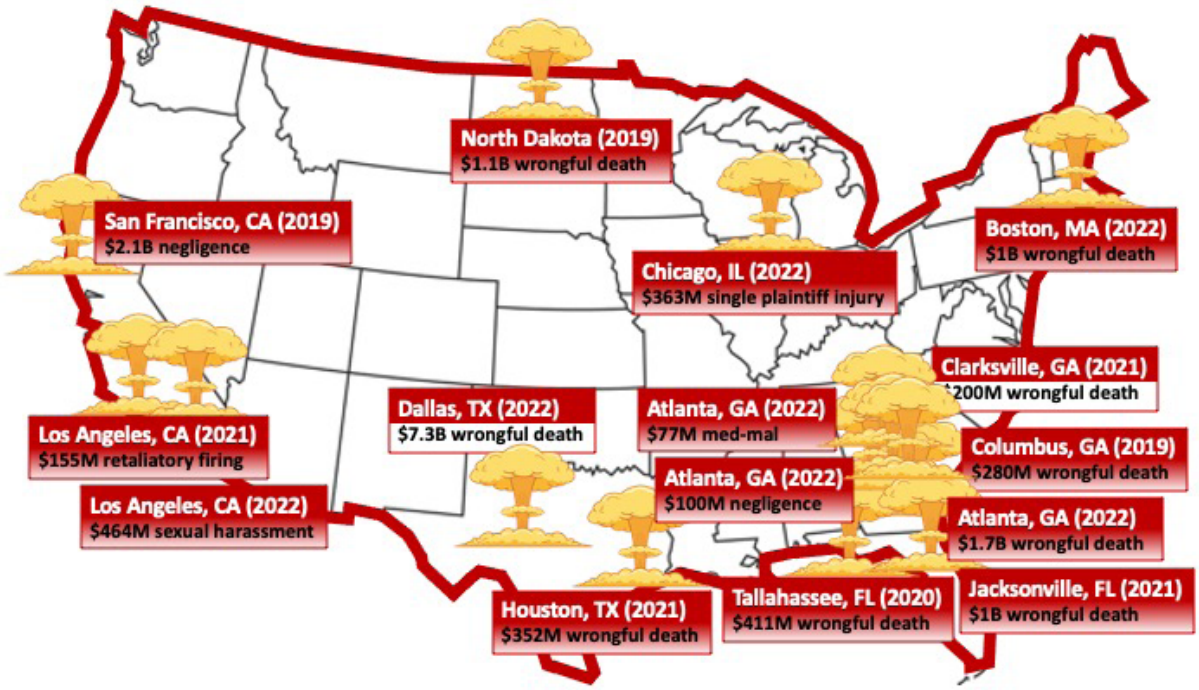
and other parties. Jurors will punish defendants if they believe that they're engaging in unfair "finger-pointing" to avoid responsibility for their actions.

Finding the Right Voice in the Nuclear Age of Verdicts

Mike Bell

Lightfoot


ENTER
BARBOUR
COUNTY
Gulf of Mexico

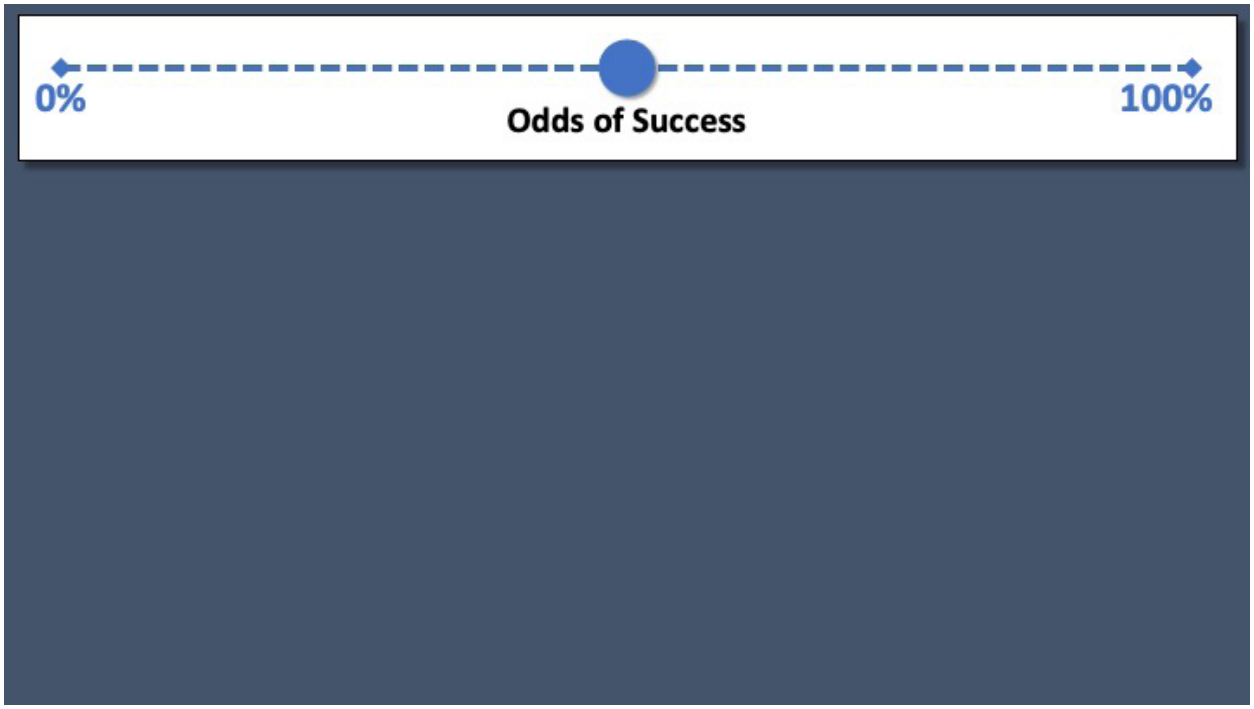

North Dakota (2019)
$1.1B wrongful death
San Francisco, CA (2019)
$2.1B negligence
Chicago, IL (2022)
$363M single plaintiff injury
Boston, MA (2022)
$1B wrongful death
Clarksville, GA (2021)
Dallas, TX (2022)
$7.3B wrongful death
Atlanta, GA (2022)
$77M med-mal
Columbus, GA (2019)
$280M wrongful death
Los Angeles, CA (2021)
$155M retaliatory firing
Atlanta, GA (2022)
$100M negligence
Los Angeles, CA (2022)
$464M sexual harassment
Atlanta, GA (2022)
$1.7B wrongful death
Houston, TX (2021)
$352M wrongful death
Tallahassee, FL (2020)
$411M wrongful death
Jacksonville, FL (2021)
$1B wrongful death

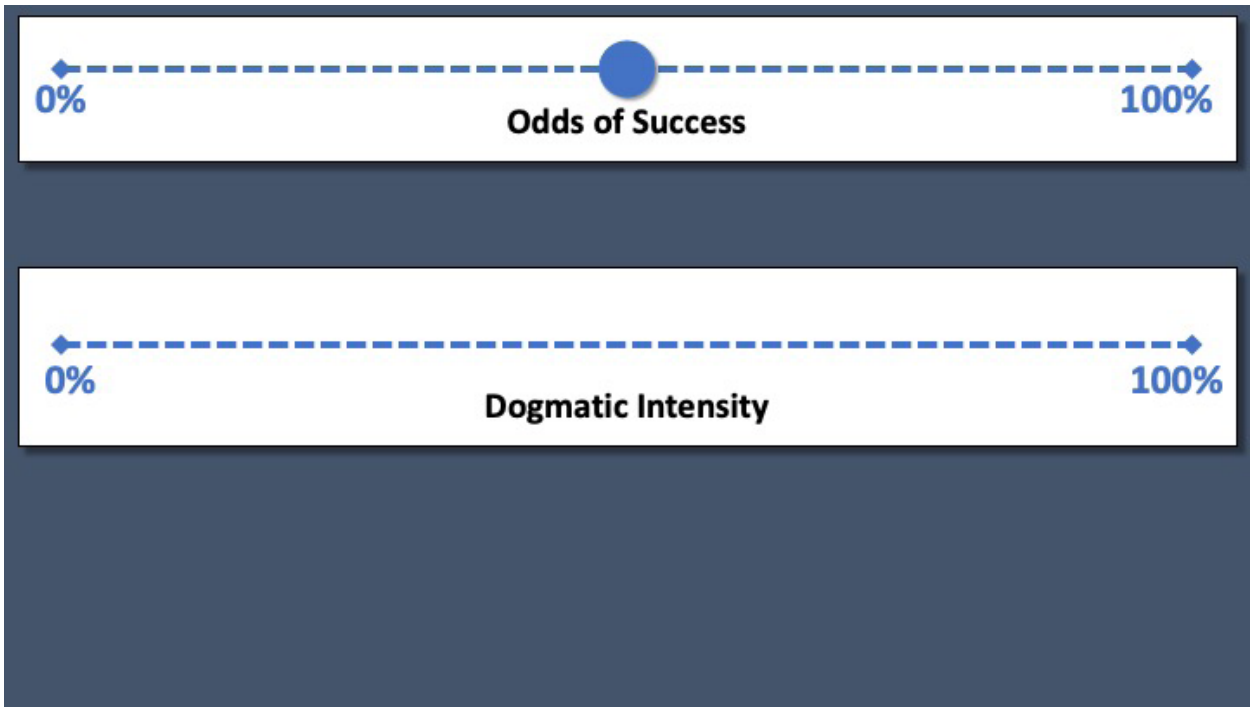

0%
Odds of Success
100%

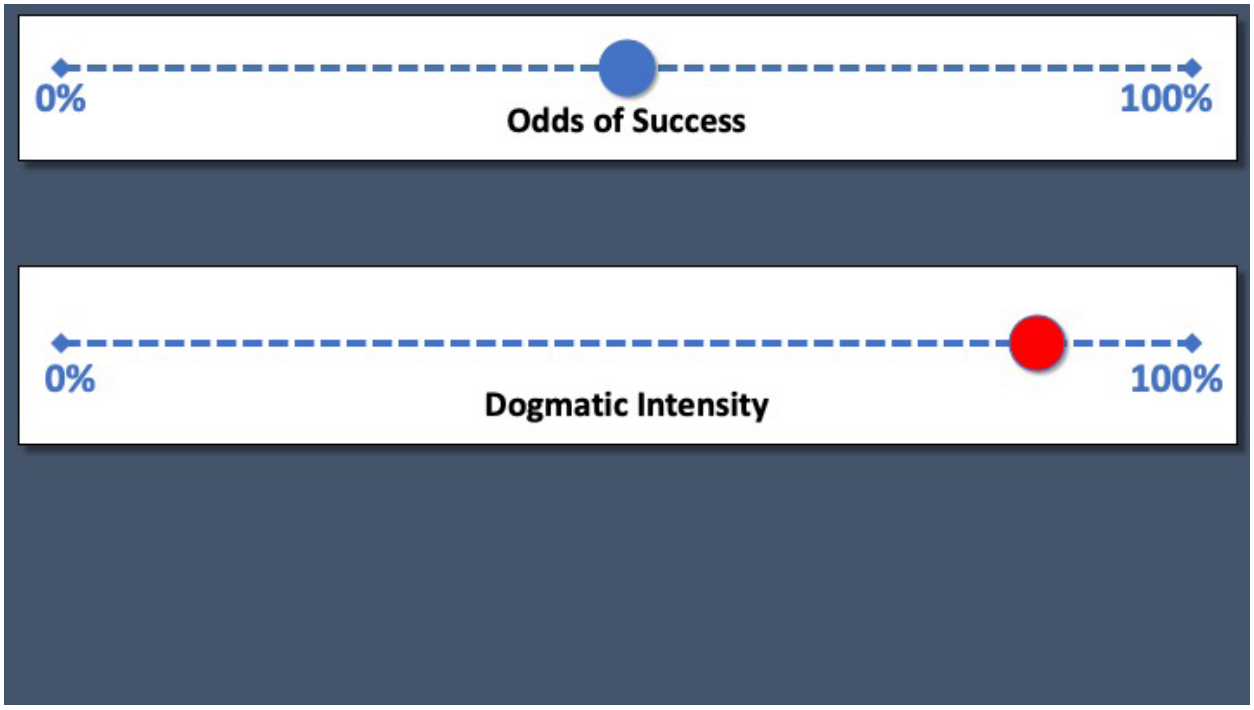

0%
Odds of Success
100%

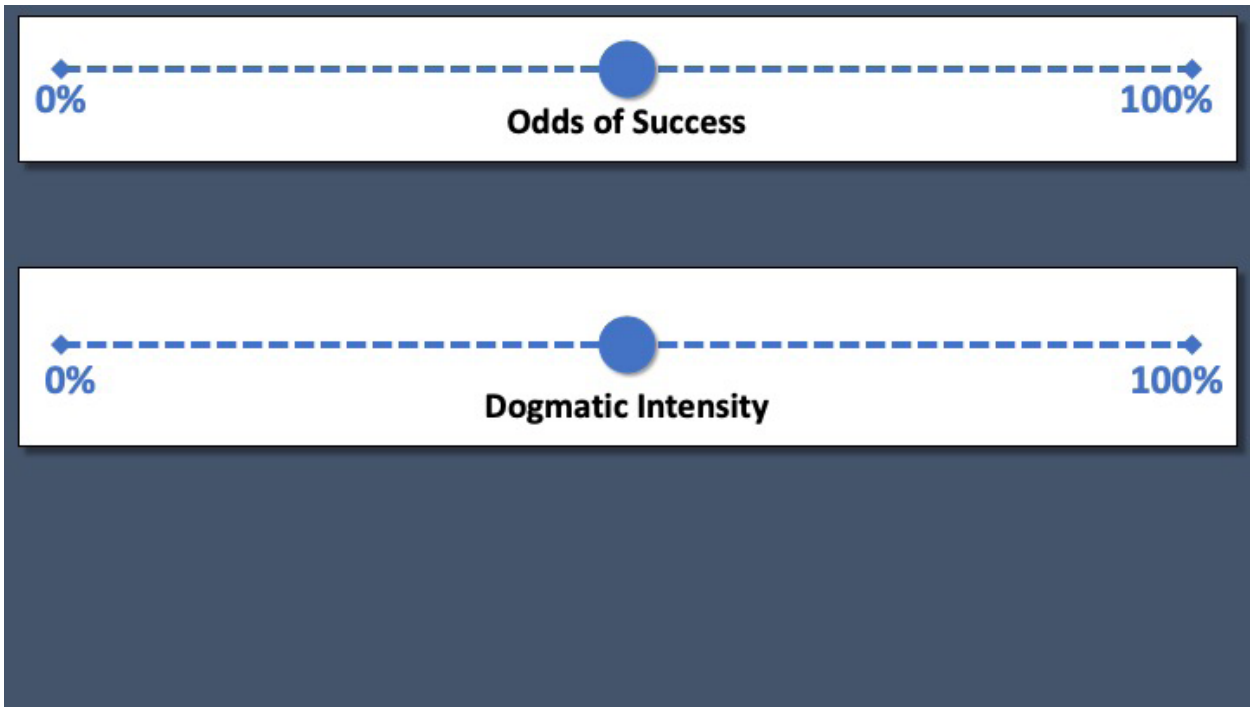

0%
Odds of Success
100%

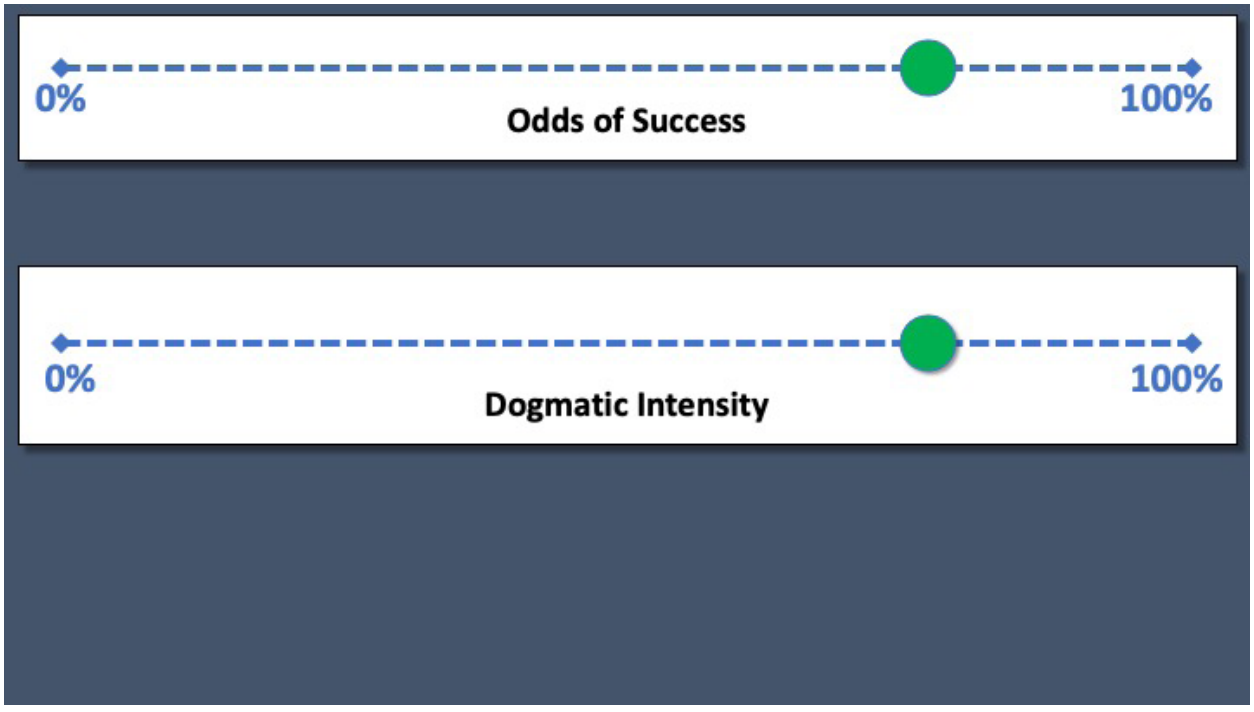

0%
Odds of Success
100%

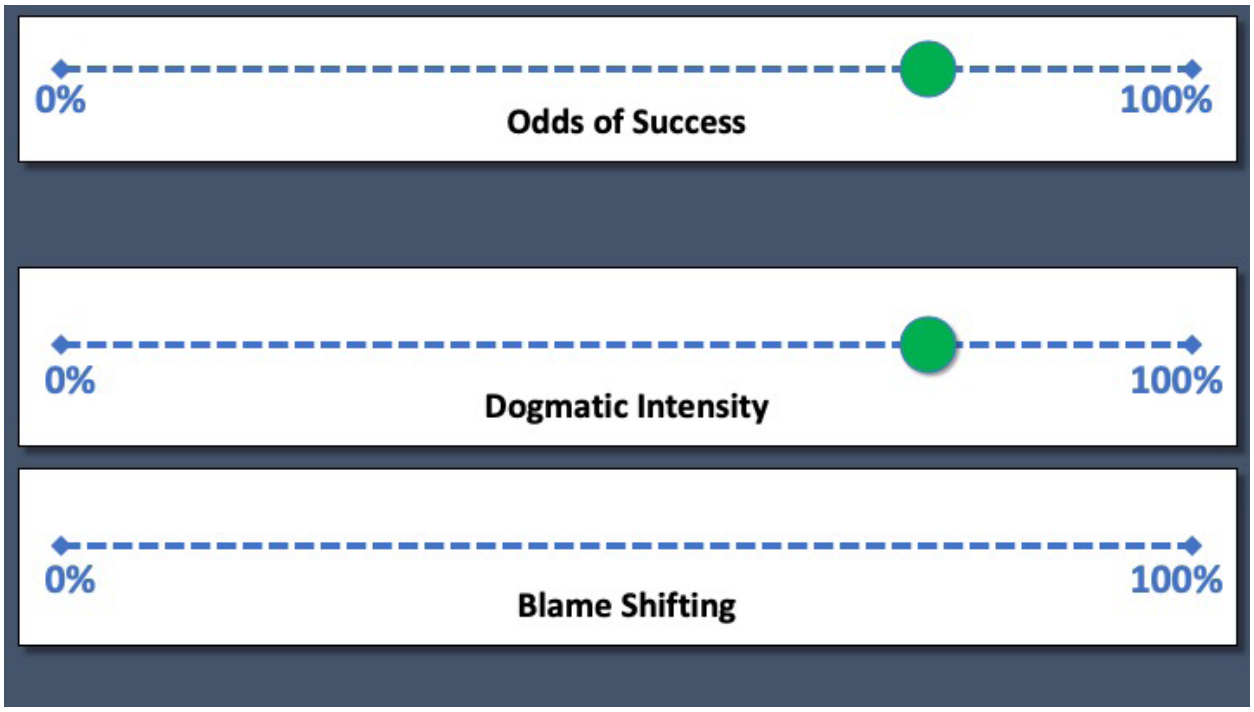

0%
Odds of Success
100%

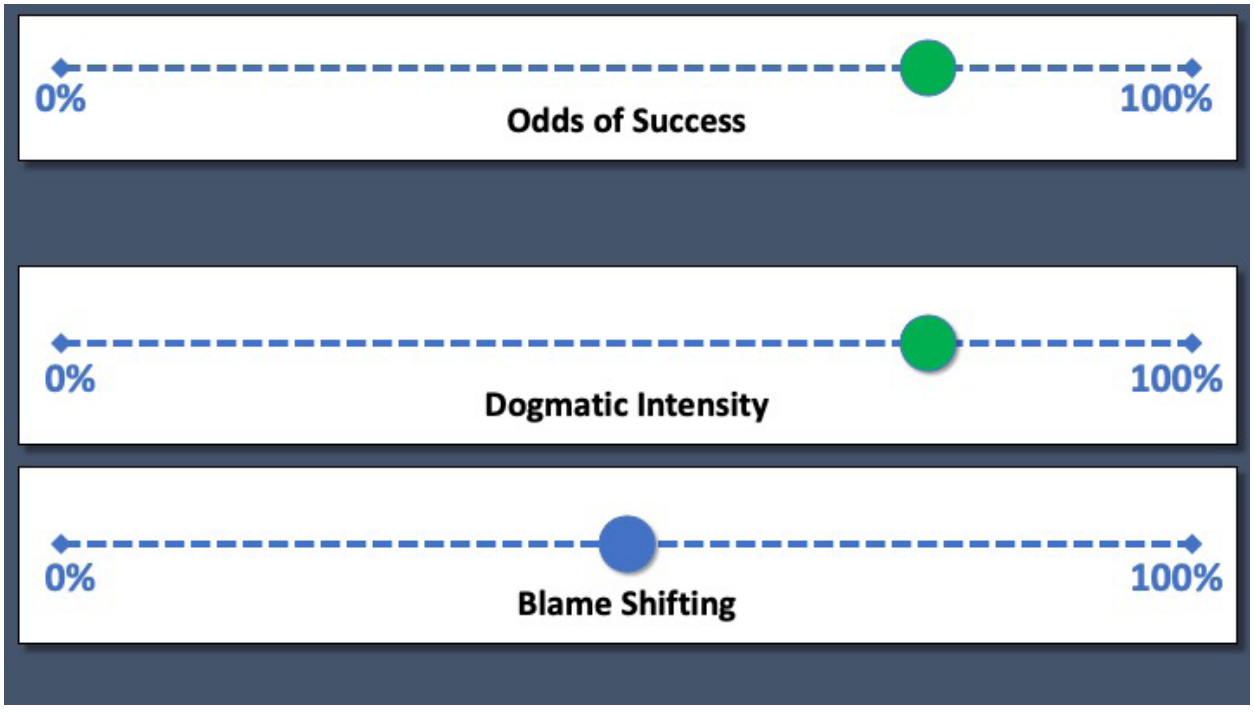

0%
Odds of Success
100%
0%
Dogmatic Intensity
100%

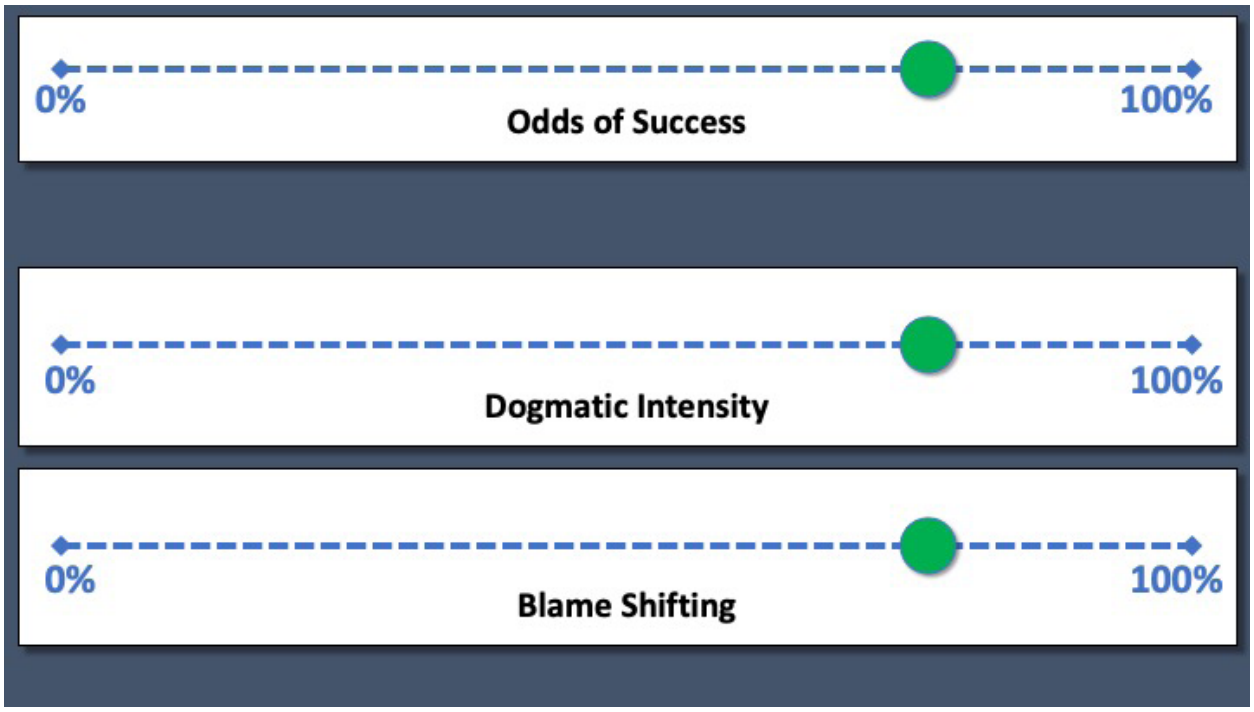

0%
Odds of Success
100%
0%
Dogmatic Intensity
100%

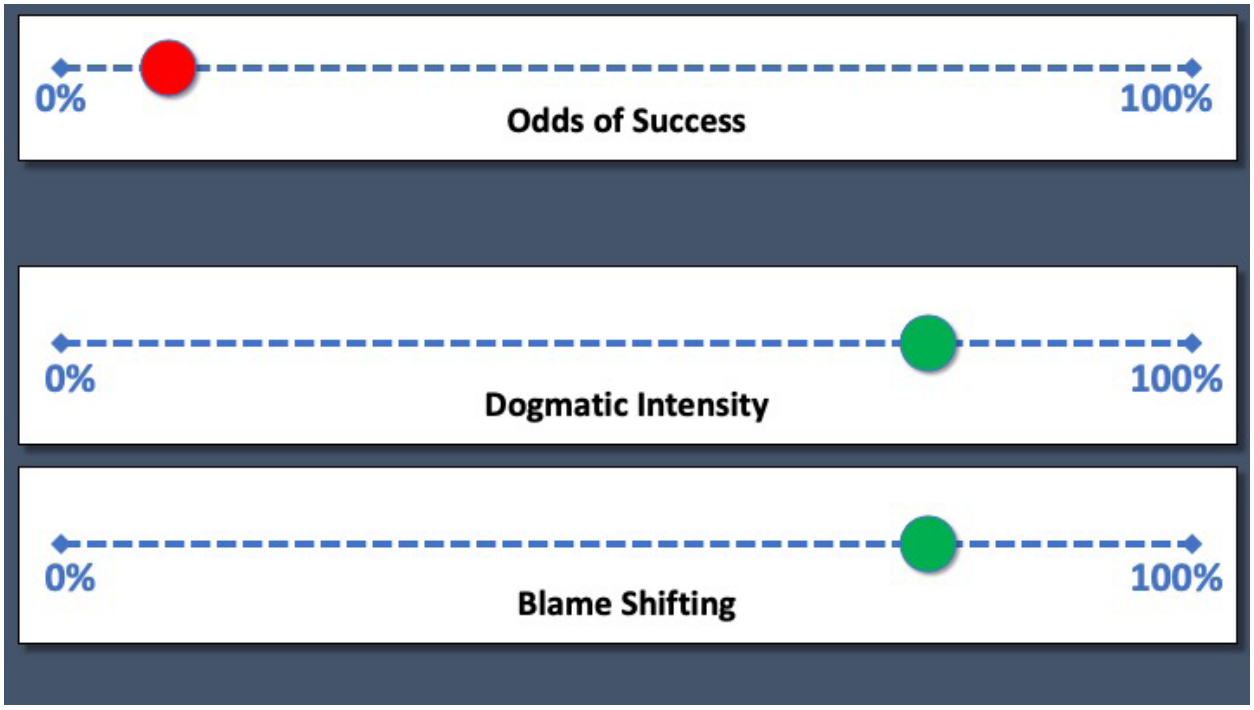

0%
Odds of Success
100%
0%
Dogmatic Intensity
100%

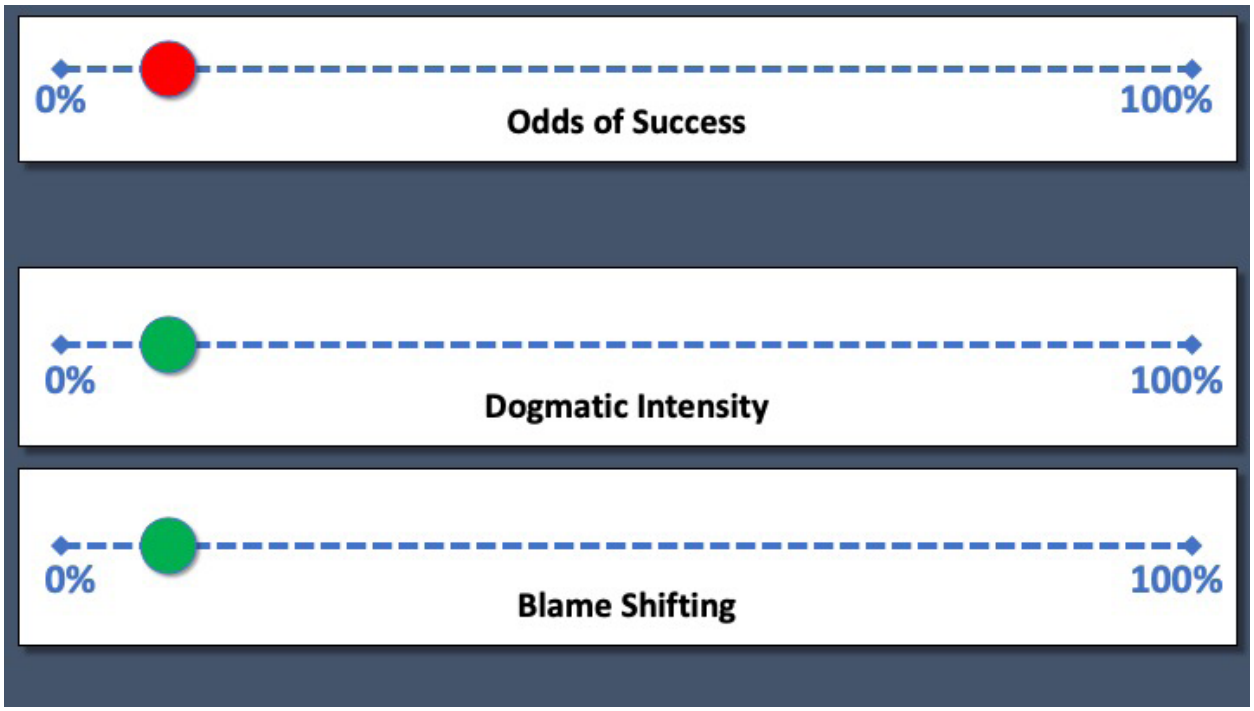

0%
Odds of Success
100%
0%
Dogmatic Intensity
100%

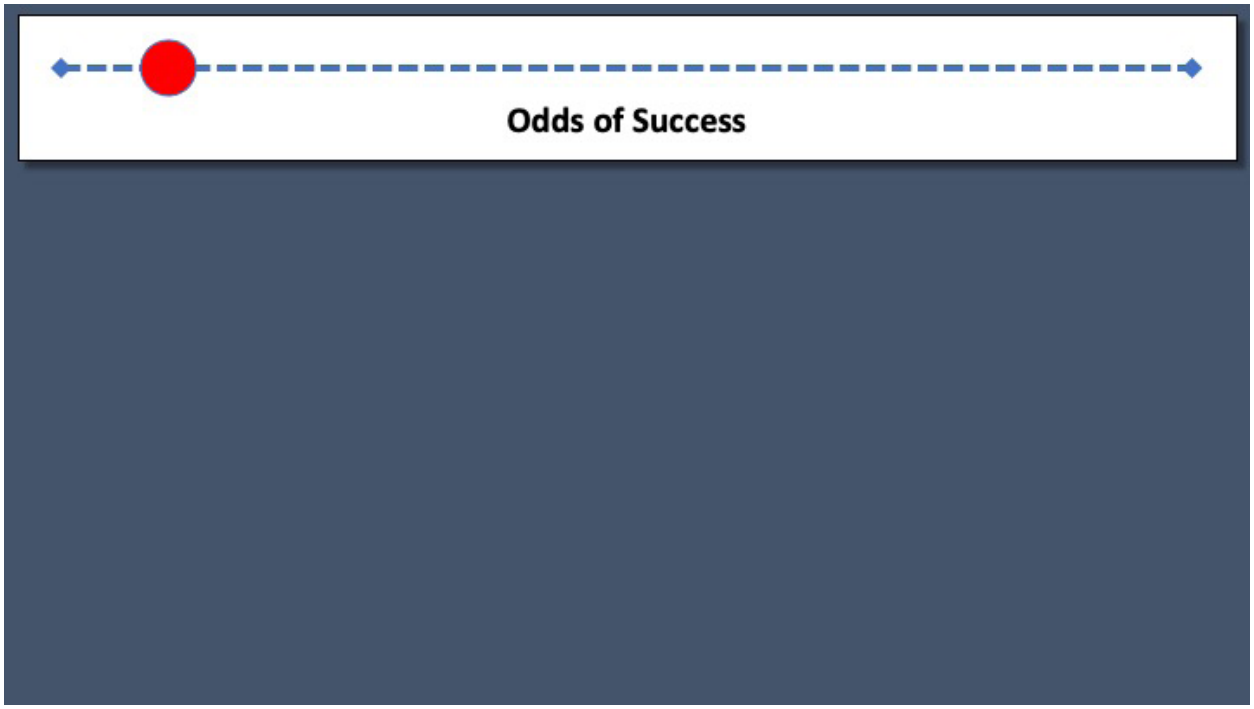

0%
Odds of Success
100%
0%
Dogmatic Intensity
100%
0%
Blame Shifting
100%


0%
Odds of Success
100%
0%
Dogmatic Intensity
100%
0%
Blame Shifting
100%


0%
Odds of Success
100%
0%
Dogmatic Intensity
100%
0%
Blame Shifting
100%


0%
Odds of Success
100%
0%
Dogmatic Intensity
100%
0%
Blame Shifting
100%


0%
100%
Odds of Success
0%
100%
Dogmatic Intensity
0%
100%
Blame Shifting

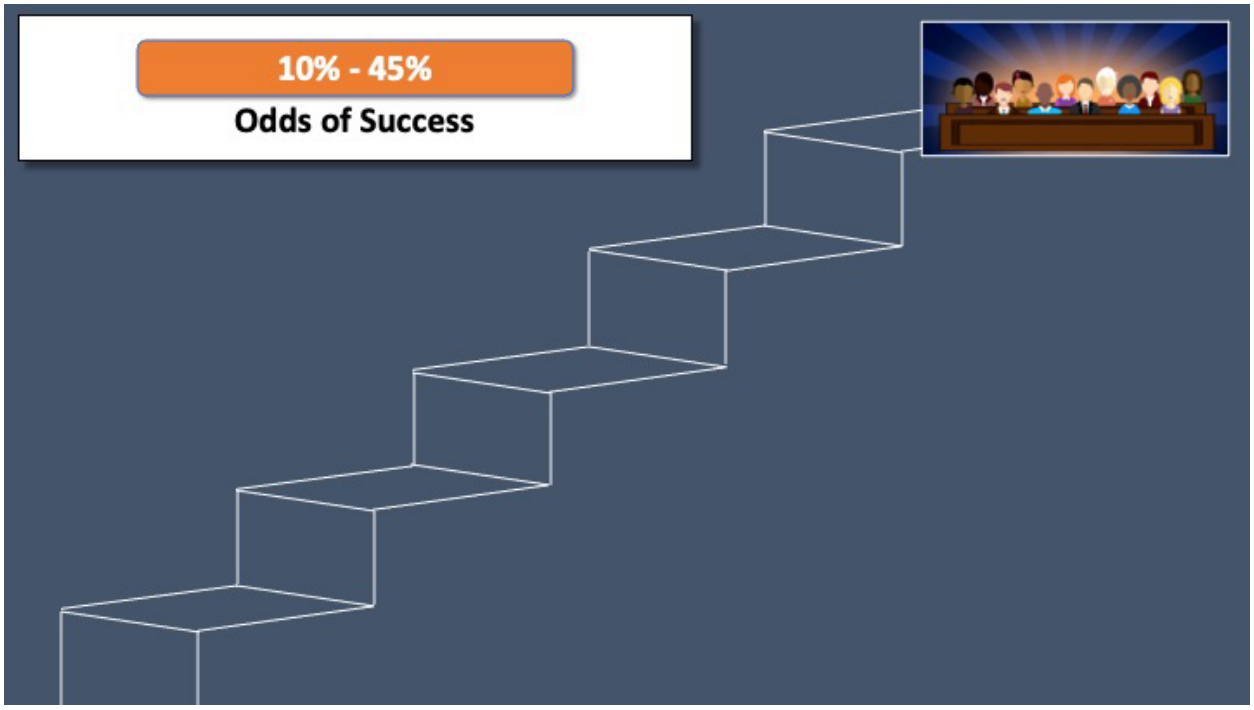

Odds of Success

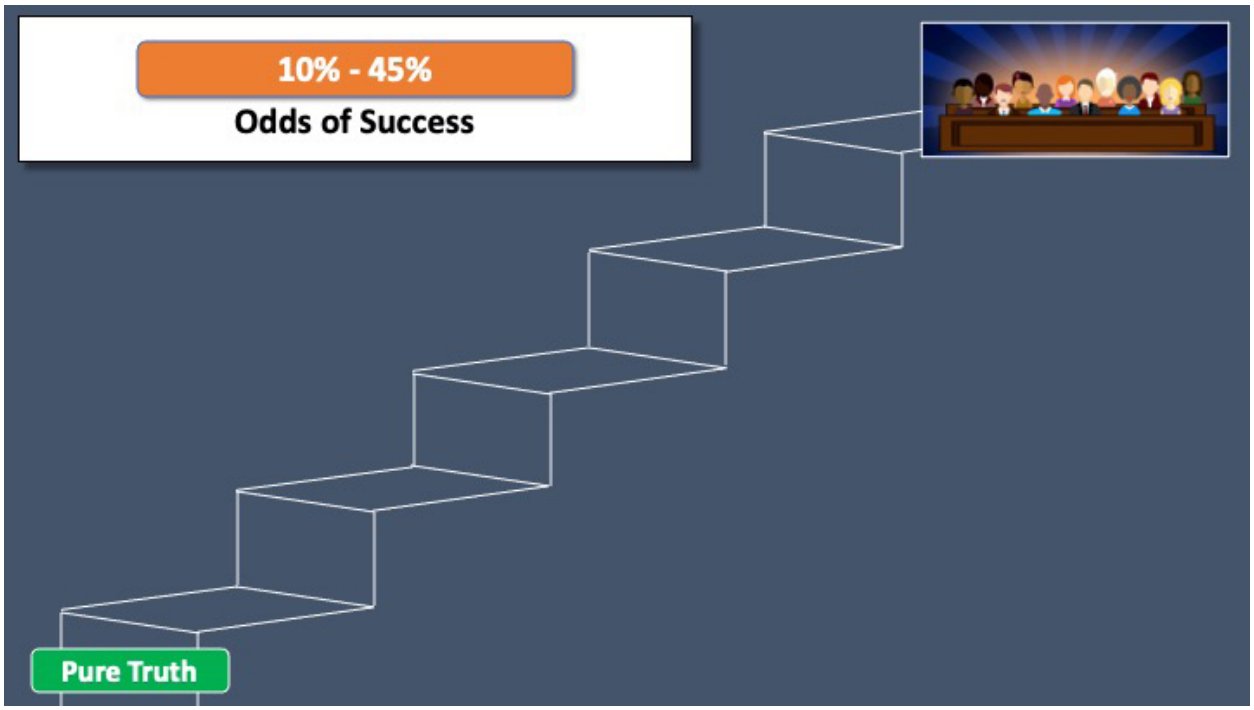
10% - 45%

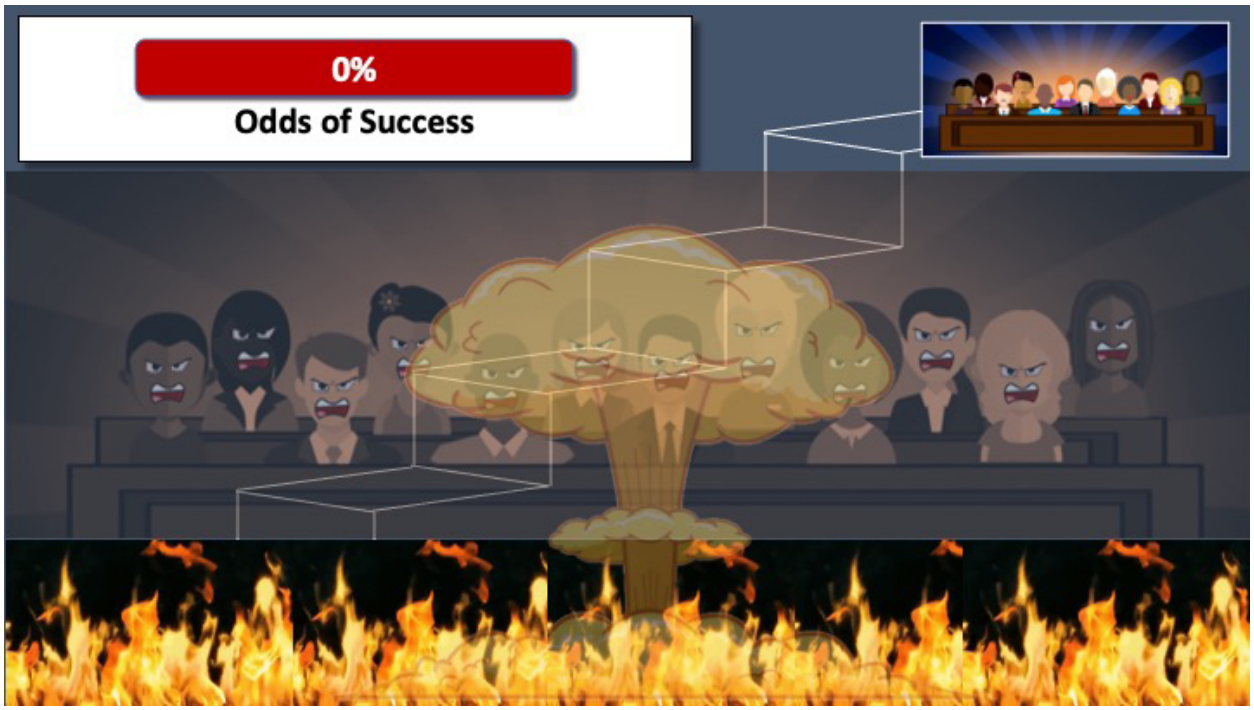
Odds of Success

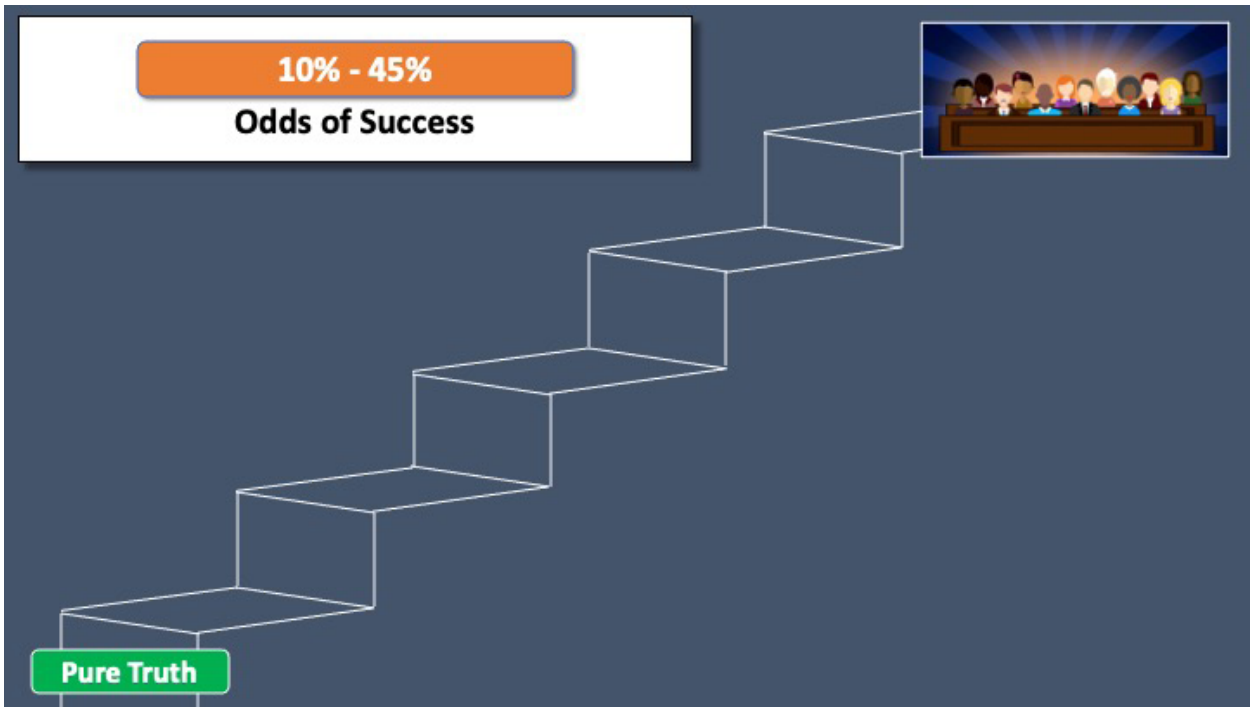
10% - 45%

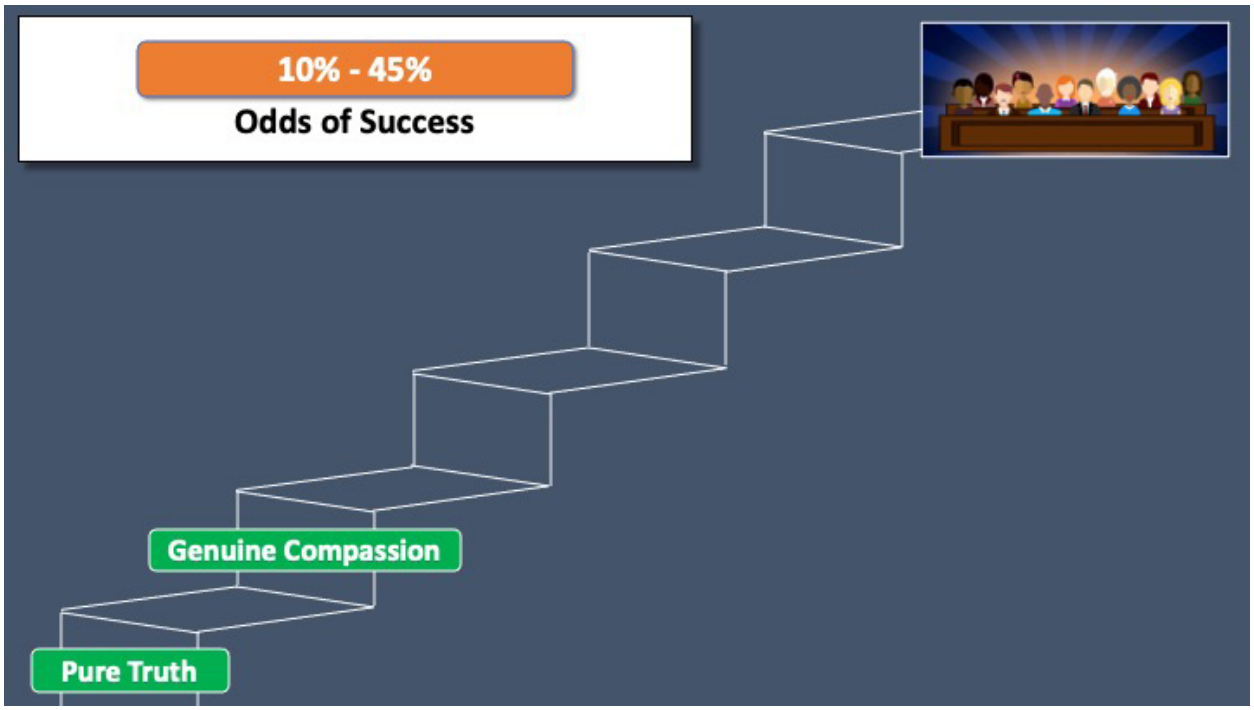
Odds of Success

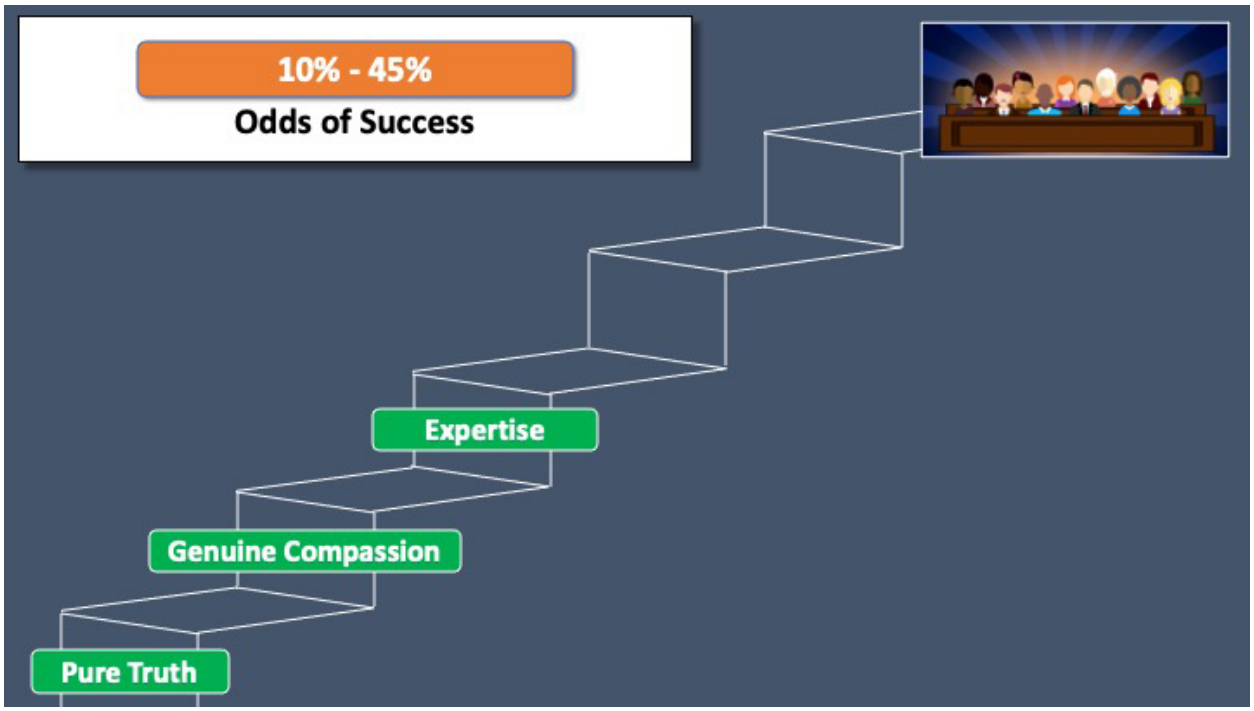

10% - 45%
Odds of Success

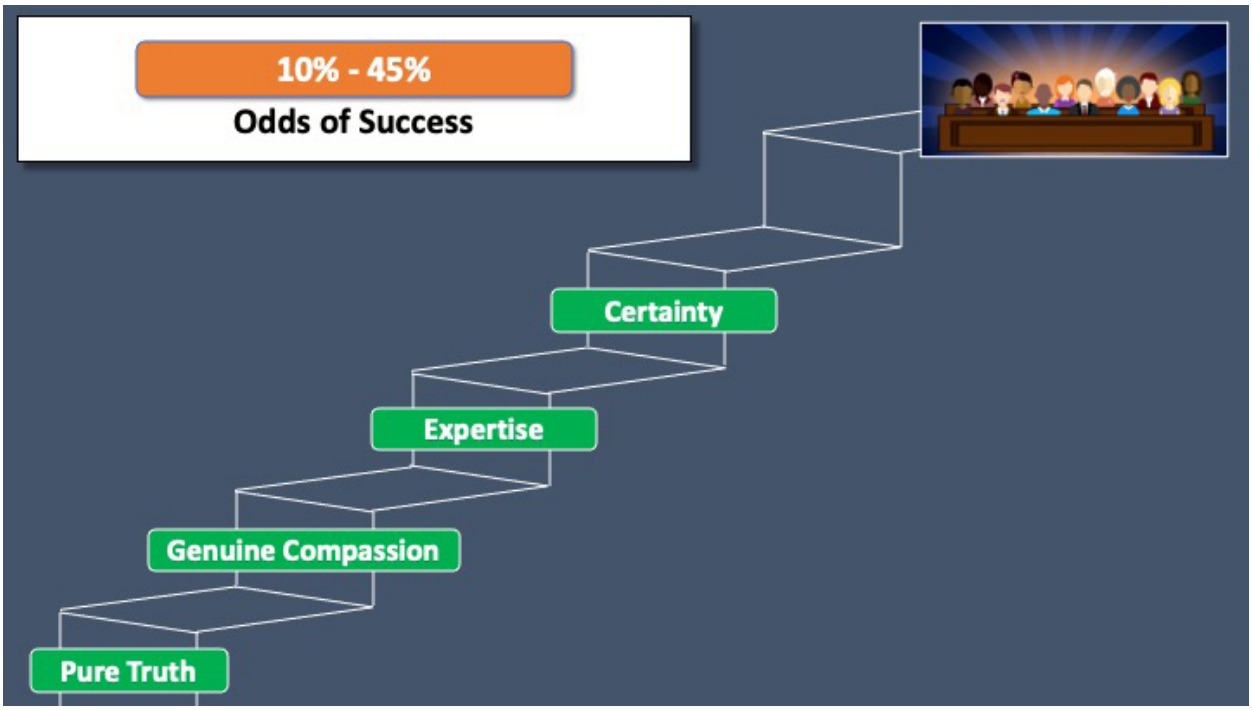

10% - 45%
Odds of Success
Pure Truth

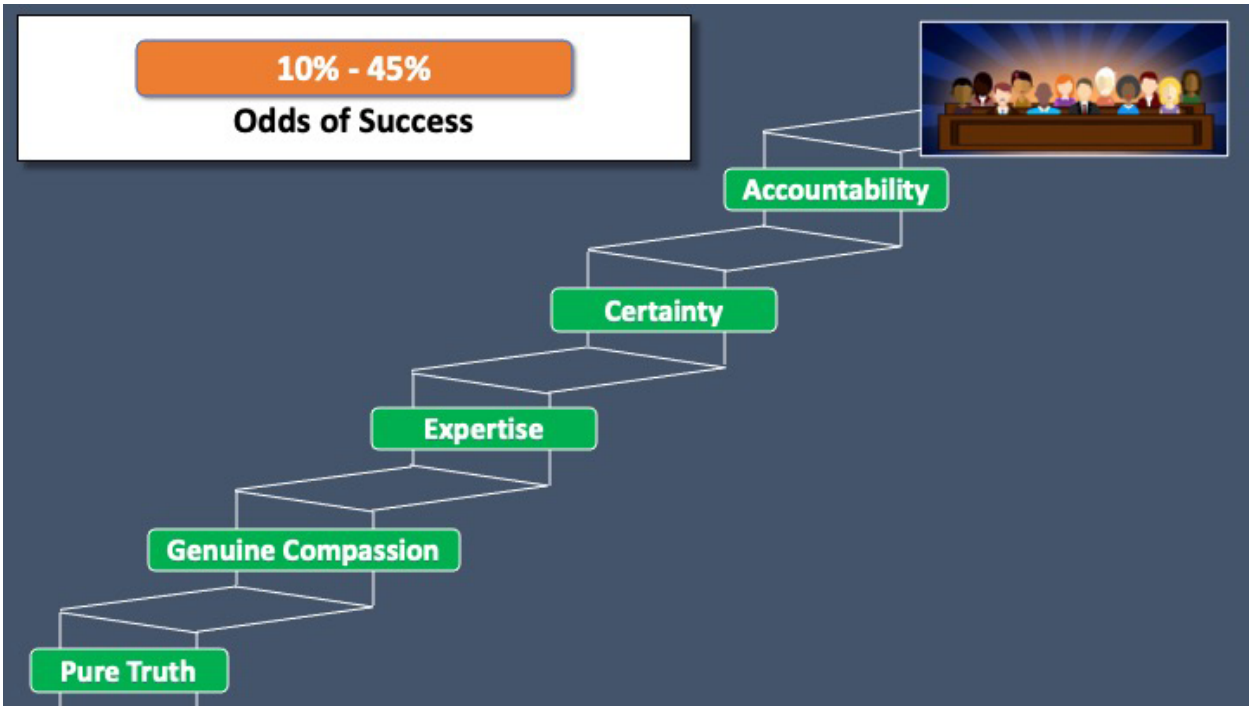

0%
Odds of Success


10% - 45%
Odds of Success
Pure Truth


10% - 45%
Odds of Success
Genuine Compassion
Pure Truth


10% - 45%
Odds of Success
Expertise
Genuine Compassion
Pure Truth


10% - 45%
Odds of Success
Certainty
Expertise
Genuine Compassion
Pure Truth


10% - 45%
Odds of Success
Accountability
Certainty
Expertise
Genuine Compassion
Pure Truth

205.581.0721
mbell@lightfootlaw.com

Mike Bell

Partner | Lightfoot Franklin & White (Birmingham, AL)

In 1990, I was just another fresh-faced lawyer at a large firm eager to learn the litigation craft. Little did I (or anyone) know of the convergence of events that would start over 30 years ago that would form Lightfoot and create a Lightfoot DNA that exists today.

On Tuesday, January 9, 1990, two message slips were on my desk. The return of these calls would lead to an invitation to join 11 other lawyers in the creation of something called a litigation boutique in Birmingham, Alabama. A dozen young lawyers led by three southern litigation giants — Warren Lightfoot, Sam Franklin and Jere White — started a litigation boutique at the beginning of the time where Alabama later would be deemed number one on the list of "Tort Hell."

For the next several years, the Lightfoot DNA was formed in an atmosphere of high-stakes litigation in the worst venues with the worst legal underpinnings that civil litigation defendants could possibly find themselves. This meant that young Lightfoot lawyers were honing their craft with mentoring from giants, with unmatched opportunities and breath taking legal battles that would shape the legal landscape in Alabama, form a Lightfoot DNA that still exists, today, and lead to a demand for the Lightfoot approach well beyond Alabama.

As a result of the events starting in 1990, Lightfoot lawyers were recognized as lawyers who could morph and shape shift into the forces necessary to attack problems described by the common litigaton phrase "bad cases, bad places." I've handled wrongful death cases of all types, class actions, commercial disputes, general products liability, consumer fraud cases, automotive litigation, professional negligence cases and just about everything in between. I have faced scores of juries in my 20s, 30s, 40s and 50s fighting for Lightfoot clients in the litigation arena. I've had juries come back in minutes. I've had juries deadlocked for days. I've won cases and lost them (by the way, my jury win rate exceeds 90%).

I and the other Lightfoot lawyers with whom I work have the battle scars that come from being a Lightfoot lawyer where we are ready for the litigation knowns, unknowns and the inevitable unknowables. This is what we call the Lightfoot DNA..

Practices

- Automotive
- Catastrophic Injury
- Class Actions
- Commercial Litigation
- Consumer Fraud & Bad Faith
- Fire & Explosion
- Medical Malpractice
- Product Liability
- Professional Liability

Education

- Samford University, Cumberland School of Law (J.D., cum laude)
- Birmingham-Southern College (B.A., cum laude)

Panel: Diversity Efforts in the Workplace: What's Working and What's Not

Malissa Wilson
Forman Watkins & Krutz (Jackson, MS)

Laws Protecting Diversity in the Workplace

Malissa Wilson

Today's landscape of diversity, equity, and inclusion (DE&I) laws began nearly 60 years ago with the enactment of federal anti-discrimination statutes, such as the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. These landmark laws paved the way for modern day DE&I laws such as the Ending Forced Arbitration Act of 2021. Now, employers have limitless resources to guide them on what does (and does not) work in terms of promoting diversity, equity, and inclusion in the workplace.

Defining DE&I

After taking office in 2021, President Biden enacted Executive Order 14035 to advance diversity, equity, and inclusion in the federal workforce.[1] The President recognized that, as the Nation's largest employer, the Federal Government should function as a model for DE&I "where all employees are treated with dignity and respect."[2] Under the Executive Order's language, the term diversity means "the practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities." The Order defines equity as "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment." As for inclusion, the Order defines the term as, "the recognition, appreciation, and use of the talents and skills of employees of all backgrounds." Although these Presidential definitions shine much needed light on what DE&I means, this clarity did not come until 2021 – that is, almost 60 years after the passage of the first legislative act geared towards equality in the workplace.[3] This newly found clarity is not without problems, however. New challenges facing legislatures and courts arise in the context of making sure that each moving piece – (1) foundational anti-discrimination laws, (2) prior court precedent interpreting those foundation laws, and (3) President Biden's new Executive Order defining the parameters of DE&I – conform with, rather than contradict, each other.

Foundational Anti-Discrimination Laws

The Equal Employment Opportunity Commission ("EEOC") enforces federal laws that prohibit discrimination of an employee or job applicant based on the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information.[4] The EEOC covers most employers who employ at least fifteen people, and includes most labor unions and employment agencies.[5] The EEOC's laws, and enforcement power, apply to all types of work situations including hiring, firing, promotions, harassment, training, wages, and benefits.[6] Because enforcement of these laws requires employees to speak out against the actions of their employer, each law contains provisions making it illegal for an employer to retaliate against an employee who (1) complained about discrimination, (2) filed a charge of discrimination, or (3) participated in an employment discrimination

1 https://www.whitehouse.gov/briefing-room/presidentialactions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/

2 https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/diversity-equity-inclusion-accessibility-in-the-federal-workforce.pdf

3 The act referenced is the Equal Pay Act of 1967.

4 https://www.eeoc.gov/overview

5 Id.

6 Id.

investigation or lawsuit.[7] However, even with the protection of federal laws and additional anti-retaliation provisions, courts around the country still wrestle with cases of workplace diversity and discrimination issues. The following offers insight into the federal laws that lay at the heart of DE&I and previews new laws that expand the reach of those foundational anti-discrimination statutes.

Equal Pay Act of 1963

The first legislative anti-discrimination act was the Equal Pay Act ("EPA") in 1967.[8] This law protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination. The EPA covers all forms of pay, including salary, overtime pay, bonuses, stock options, profit sharing and more. The Lilly Ledbetter Fair Pay Act of 2009 amends the EPA and specifies that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new discriminatory paycheck.[9] The enactment of this law came in response to a Supreme Court decision holding that the statute of limitations for presenting an equal-pay lawsuit begins on the date the pay was agreed upon, not on the date of the most recent paycheck.[10] Now, the Lilly Ledbetter Fair Pay Act strengthens the punch behind the EPA by providing a greater statute of limitations period for plaintiffs to bring a claim.

To better understand the EPA and its relationship to the court system, EEOC v. Enoch Pratt Free Library (2020) illustrates a modern-day EPA violation.[11] There, female branch managers filed suit and asserted that their employer, a public library, violated the EPA when it failed to pay them equal salary for equal work. The court recognized that although the library ran several branches of different sizes, collections, and demographics, the manager positions for each branch remained the same in terms of required training, experience, qualifications, and core duties. Despite performing identical job duties, the female plaintiffs were paid thousands less than their male counterparts. The court upheld the EEOC's wage-based discrimination claim because even though differences existed among the branches in physical footprint, circulation size and demographics, "none of the[se] differences translated into job duties that differed significantly from one another." As such, the library's practice of paying different wages to individuals who perform the same work violated the EPA.

Title VII of the Civil Rights Act of 1964

While the EPA protects against sex-based wage discrimination, Title VII of the Civil Rights Act ("Title VII") prohibits discrimination based on a person's race, color, religion, national origin or sex.[12] When enacted in 1964, this Act created the most comprehensive civil rights legislation since the reconstruction era.[13] Since then, Title VII has provided a much-needed vehicle for diverse employees to challenge the myriad of inequalities within their work lives.[14] Case law illustrates the wide applicability of Title VII, and how its terms are flexible enough to include modern forms of discrimination. The two most recent expansions to Title VII include (1) ending forced arbitration for sexual assault and sexual harassment claims, and (2) protections for transgender individuals.

Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act ("PDA") amended Title VII to explicitly prohibit discrimination against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[15] The PDA mandates that employers must treat women affected by pregnancy or related conditions in the same manner as other applicants or employees who are similar in their ability to work.[16] In other words, this Act does not require preferential treatment for pregnant employees; instead, it mandates that employers treat employees the same, regardless of pregnancy status, if those employees are similarly situated with respect to their ability to

7 https://www.eeoc.gov/statutes/laws-enforced-eeoc

8 https://www.eeoc.gov/statutes/equal-pay-act-1963

9 S.181 - 111th Congress (2009-2010): Lilly Ledbetter Fair Pay Act of 2009, S.181, 111th Cong. (2009), http://www.congress.gov/.

10 Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007).

11 EEOC v. Enoch Pratt Free Library, 509 F. Supp. 3d 467 (D. Md. 2020).

12 https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964

13 The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, was enacted pursuant to the Thirteenth Amendment. It contained a list of federally protected rights and its most important provisions, derived from § 1 and now codified at 42 U.S.C.A. §§ 1981 and 1982 (1982), mandated that all persons born in the United States are citizens and that all citizens have the same right as white persons to make and enforce contracts and or lease property.

14 Twenty-seven years later, Congress enacted the Civil Rights Act of 1991 which amended both Title VII and the Americans with Disabilities Act to allow for jury trials, compensatory damages, and punitive damages.

15 S.995 - 95th Congress (1977-1978): A bill to amend title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy, S.995, 95th Cong. (1978), http://www.congress.gov/.

16 https://www.eeoc.gov/laws/guidance/fact-sheet-pregnancy-discrimination

work.[17] An employer does not violate Title VII or the PDA if the employer can show a legitimate reason for the adverse employment decision – unrelated to the employee's pregnancy.[18] As for practical application, courts analyze a PDA claim as a sex discrimination claim under Title VII. This is because the PDA created no new rights or remedies, but instead clarified the scope of Title VII by recognizing that inherently gender-specific characteristics may not form the basis for the disparate treatment of employees. Still, modern questions about Title VII and the PDA arise, such as whether these Acts protect lactating women or if sex-stereotyping is a prohibited form of discrimination.

In the Fifth Circuit case of EEOC v. Houston Funding, the EEOC established a prima facie case of sex discrimination in violation of Title VII when a Texas employer fired a female employee because she was lactating and wanted to express milk at work.[19] Similar facts arose in Mayer v. Professional Ambulance where a Rhode Island federal district court recognized that "[l]actation is a medical condition related to pregnancy, and therefor [is] covered under Title VII."[20] As for sex-stereotyping, a California federal district court found that a female employee sufficiently alleged adverse employment actions when she was denied breaks to express milk following the completion of a gestational surrogacy, even though other mothers were permitted to take breaks to express breast milk if the milk was for their own children.[21] These cases illustrate Title VII's ability to expand and conform to modern forms of discrimination.

Rehabilitation Act of 1973

The Rehabilitation Act prohibits discrimination on the basis of disability.[22] This Act includes sections that lay out specific instances of prohibited conduct. For example, Sections 501 and 505 prohibit the federal government from discriminating against qualified employees with a disability. Section 502 goes further and requires employers with federal contracts or subcontracts that exceed $10,000 to take affirmative action to hire, retain, and promote qualified individuals with disabilities. The central purpose of this Act "is to assure that handicapped individuals receive evenhanded treatment in relation to nonhandicapped individuals."[23] As shown in the following section, Congress used the Rehabilitation Act as a model for the later enacted ADA, which is much broader in scope.

Americans with Disabilities Act of 1990

Similar to the Rehabilitation Act, the Americans with Disabilities Act ("ADA") makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments.[24] In fact, the ADA of 1990 made its mark as the world's "first comprehensive declaration of equality for people with disabilities."[25] In 2008, Congress amended the 1990 bill with the ADAAA – that is, the "ADA Amendments Act."[26] Along with maintaining the original purpose of the 1990 ADA, the ADAAA went further and overturned Supreme Court decisions that interpreted the definition of "disability" too narrowly.[27] By expanding this definition, Congress expanded the statute's protection to individuals who have a physical or mental impairment that: (1) substantially limits major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. In the years following 2008, federal courts began broadening the extent of the statute's physical impairment language. For example, in the 2011 case of Norton v. Assisted Living, a Texas federal district court held that renal cancer was a "physical impairment" covered under the ADAAA's regulations.[28] That same year in Medvic v. Compass Sign Co., a Pennsylvania federal district court held that stuttering also constituted a physical impairment covered by the statute.[29] Price v. UTI., followed in 2013, where a Missouri federal district court held that the term "physical impairment" under the ADAAA includes an impairment or complication related to pregnancy.[30]

17 Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358 (3rd Cir. 2008).

18 130 A.L.R. Fed. 473.

19 EEOC v. Houston Funding II, Ltd., 717 F.3d 425 (5th Cir. 2013).

20 Mayer v. Pro. Ambulance, LLC, 211 F. Supp. 3d 408 (D. R.I. 2016).

21 Gonzales v. Marriott Int'l, Inc., 142 F. Supp. 3d 961 (C.D. Cal. 2015).

22 S.7 - 93rd Congress (1973-1974): Rehabilitation Act, S.7, 93rd Cong. (1973), http://www.congress.gov/.

23 Traynor v. Turnage, 485 U.S. 535, 548 (1988).

24 S.933 - 101st Congress (1989-1990): Americans with Disabilities Act of 1990, S.933, 101st Cong. (1990), http://www.congress.gov/.

25 https://www.thrivetogethertoday.org/post/ada-the-history

26 Id.

27 Id.

28 Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011).

29 Medvic v. Compass Sign Co., LLC., No. 10-5222, 2011 WL 3513499, at *5 (E.D. Penn. Aug. 10, 2011).

30 Price v. UTI, Inc., No. 4:11-CV-1428 CAS, 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013).

Genetic Information Nondiscrimination Act of 2008

The Genetic Information Nondiscrimination Act ("GINA") prohibits discrimination against employees or applicants because of their genetic information.[31] "Genetic information" includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members (i.e., an individual's medical history). GINA does not, however, prohibit an employer from requesting non-genetic medical information about a "manifested" disease, disorder, or pathological condition of an employee, even if the "manifested" disease, disorder, or pathological condition "has or may have a genetic basis or component."[32]

For example, an employer violated GINA by requiring all job applicants to complete a pre-offer history form in the 2016 case of EEOC v. Grisham Farm.[33] There, the form required applicants to reveal whether they had consulted with a doctor, chiropractor, therapist, or other health provider within the last 24 hours, and whether "future diagnostic testing had been recommended or discussed" with their medical provider. A Missouri federal district court condemned this type of "pre-offer" medical examination because the questions required an "applicant without the manifestation of, for example high blood pressure, heart disease, or breast cancer, who has previously 'consulted' with a physician. . . to reveal such information" to their employer.[34] The court ultimately rejected this practice and held that the employer violated GINA by requiring job applicants to fill out this pre-job-offer health history form.

State DE&I Laws

As illustrated above, federal laws govern a vast majority of the DE&I landscape. To follow the federal government's lead, some states have taken the opportunity to promote diversity and equality through the enactment of individual state laws. The ultimate goal in this regard is to have a system of laws, both federal and state, that work together to ensure an inclusive (and therefore more productive) work environment.

The Crown Act

The Crown Act, which stands for "Creating a Respectful and Open World for Natural Hair," is a law that prohibits race-based hair discrimination. Although the United States House of Representatives passed a Crown Act bill on the federal level, the bill still awaits the Senate's approval. Meanwhile, multiple states have enacted their own state-mandated Crown Acts. Currently, sixteen states have made it illegal to discriminate against a person over the way they wear their hair.

California led the way in passing the first state-level Crown Act in 2019. New York, New Jersey, Virginia, and Colorado followed close behind with their own versions of the bill. Following this lead, Washington, Connecticut, Delaware, New Mexico, Nevada, Nebraska, Oregon, Illinois, Maine, and Tennessee each enacted their own versions of the Crown Act.

Corporate Board Diversity Legislation

In June of 2020, Washington enacted 38B.08.120, requiring that "each public company must have a gender-diverse board of directors."[35] This law deems a public company to be "gender diverse" if, for at least 270 days of the fiscal year preceding a public company's annual meeting of shareholders, its board is comprised of at least 25 percent women. Other states, such as Colorado and Pennsylvania, have since passed legislation that encourages companies to enhance the number of women on their boards of directors.[36] Illinois and New York enacted board diversity disclosure requirements, but stopped short of mandatory diversity quotas.[37] Under the Illinois law, publicly held domestic and foreign corporations with a principal executive office in Illinois must annually report to the Secretary of State the number of women and minority board members. Similarly, New York's law requires the New York Department of State and the Department of Taxation and Finance to conduct a study on the number of women board directors for each domestic and foreign corporation authorized to do business in

31 H.R.493 - 110th Congress (2007-2008): Genetic Information Nondiscrimination Act of 2008, H.R.493, 110th Cong. (2008), http://www.congress.gov/.

32 EEOC v. Grisham Farm Prod., Inc., 191 F. Supp. 3d 994, 997 (W.D. Mo. 2016); 42 U.S.C. § 2000ff-9; 29 C.F.R. § 1635.12.

33 EEOC v. Grisham Farm Prod., Inc., 191 F. Supp. 3d 994 (W.D. Mo. 2016).

34 Id. at 998.

35 Wash. Rev. Code Ann. § 23B.08.120 (West).

36 ttps://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_hjr1017_enr.pdf; https://legiscan.com/PA/text/HR273/id/1600747

37 https://www.ilga.gov/legislation/publicacts/101/PDF/101-0589.pdf; https://legislation.nysenate.gov/pdf/bills/2019/S4278

New York.

While these corporate board diversity laws met success, others did not. An example of a short-lived DE&I bill is California's 2018 Senate Bill 826.[38] This Bill required all corporations headquartered in California to have a minimum number of females on their boards of directors. In the event a corporation failed to comply, the bill called for monetary penalties of up to $100,000 for one violation and up to $300,000 for a second or subsequent violation.[39] Shareholders of a California corporation quickly challenged the bill's constitutionality. As a result, the California legislature amended Senate Bill 826 with Assembly Bill 979, which required publicly held companies whose "principal executive offices" are based in California – regardless of where they are incorporated – to have at least one member from an underrepresented community on their board by the end of 2021.[40] The bill broadly defined a "director from an underrepresented community" as those who "self-identify" as Black or African American; Hispanic; Latino; Asian; Pacific Islander; Native American; Native Hawaiian; Alaska Native; or gay, lesbian, bisexual, or transgender. State taxpayers challenged the law in 2020 and in April of 2022, a Los Angeles Superior Court Judge granted summary judgment finding that the law violated the California state constitution.[41]

Pay Scale Disclosure Laws

Another example of a state DE&I law includes "Pay Scale Disclosure Laws" which are laws that require employers to provide applicants – or in some instances both applicants and current employees – with a wage range or rate information for their positions. The jurisdictions that currently have these types of wage range/rate disclosure laws include California, Colorado, Connecticut, Maryland, Nevada, New York City, Ohio (Toledo and Cincinnati), Rhode Island, and Washington State.

Ban on Employer Non-Disclosure Agreements

As of 2022, Washington became the largest state to restrict an employer's ability to request or demand a non-disclosure agreement (NDA) as a condition of employment or as part of a settlement agreement in discrimination or other employment related cases.[42] This goes a step further than similar laws seen in California and New York. Namely, the Washington law bans confidentiality agreements, in addition to NDAs, as part of workplace settlements related to allegation of illegal conduct. The exact language of the bill states that "[a] provision in an agreement by an employer and an employee not to disclose or discuss conduct, or the existence of a settlement involving conduct that the employee reasonably believed under Washington state, federal, or common law to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy, is void and unenforceable." Others states with laws restricting employers' use of NDAs include Illinois, New Jersey, New Mexico, and Oregon.

Initiatives & Other Legal Measures

Along with the enforcement of federal anti-discrimination laws, the EEOC leads the way in the production of initiatives geared towards promoting diversity, equity and inclusion in the workplace. The following sections give a brief overview of the EEOC's newest initiatives including the introduction of (1) non-binary markers, as well as the creation of multiple career-enhancing initiatives such as (2) the Artificial Intelligence & Fairness Initiative, (3) the Hiring Initiative to Reimagine Equity, (4) E-RACE, and (5) Leadership for the Employment of Americans with Disabilities.

(1) Non-binary Markers. The EEOC announced that, as of 2022, the commission will promote greater equity and inclusion for members of the LGBTQI+ community by giving individuals the option to select a nonbinary "X" gender marker during the voluntary self-identification questions that are part of the intake process for filing a charge of discrimination. The EEOC also modified its charge of discrimination form to include "Mx." in the list of prefix options.[43]

(2) Artificial Intelligence & Algorithmic Fairness Initiative. The Artificial Intelligence and Algorithmic Fairness initiative ensures that software, including

38 ttps://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826

39 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB979

40 https://legiscan.com/PA/text/HR273/id/1600747

42 https://app.leg.wa.gov/billsummary?BillNumber=1795&Year=2021&Initiative=false

43 https://www.eeoc.gov/newsroom/eeoc-add-non-binary-gender-option-discrimination-charge-intake-process; https://www.natlawreview.com/article/eeoc-taking-steps-to-include-non-binary-classification-forms

artificial intelligence (AI), machine learning, and other emerging technologies used in hiring and other employment decisions comply with the federal civil rights laws that EEOC enforces.[44]

(3) Hiring Initiative to Reimagine Equity ("HIRE"). The EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs are joining together to reimagine hiring and recruitment practices in ways that advance equal employment opportunity and help provide access to good jobs for workers.[45] HIRE is a multi-collaborative effort that engages a broad array of shareholders to expand access to good jobs for workers from underrepresented communities and to help address key hiring recruiting challenges. HIRE is in response to the devastating impact of COVID-19 and its disproportionate impact on underserved communities. In April of 2020, the pandemic caused nearly 16 million people to lose their jobs. Today, the economy is rebounding and continuing to add jobs, but many communities still face high levels of unemployment. HIRE intends to fight back against the pandemic's losses and to inform workplace DE&I initiatives by developing a better understanding among employers of the needs and challenges faced by various underrepresented communities.[46]

(4) E-RACE. The E-Race Initiative is designed to improve EEOC's efforts to ensure workplaces are free of race and color discrimination. Specifically, the EEOC will identify issues, criteria, and barriers to improve the administrative processing and the litigation of race and color discrimination claims and enhance public awareness of race and color discrimination in employment.[47]

(5) Leadership for the Employment of Americans with Disabilities ("LEAD"). LEAD is the EEOC's initiative to address the declining number of employees with targeted disabilities in the federal workplace. The goal for this initiative is to significantly increase the population of individuals with severe disabilities employed by the federal government.[48]

Conclusion

Prior to the 1960s, there were no legal safeguards in place that prevented workplace discrimination. The enactment of federal anti-discrimination laws changed this reality and allowed for the creation of DE&I state laws and workplace initiatives seen today.

44 https://www.eeoc.gov/ai

45 https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire

46 Id.

47 https://www.eeoc.gov/initiatives/e-race/e-race-initiativeeradicating-racism-and-colorism-employment

48 https://www.eeoc.gov/lead-initiative

DIVERSITY EFFORTS IN THE WORKPLACE

What's Working and What's Not

Tiffanee Wade-Henderson
Associate General Counsel,
Chief Ethics and
Compliance Officer
INTERNATIONAL PAPER

Rachel McCall
Vice President Litigation, Enterprise Risk and Chief Compliance Officer
WEYERHAEUSER COMPANY

Eric M. Alderete
Deputy General Counsel
MOLINA HEALTHCARE, INC.

Denia Aiyegbusi
DEUTSCH KERRIGAN LLP

Diversity

The practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities.

President Biden's Executive Order 14035

Equity

The consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment.

President Biden's Executive Order 14035

Inclusion

The recognition, appreciation, and use of the talents and skills of employees of all backgrounds.

President Biden's Executive Order 14035

60

- 95.8% of Fortune 500 CEOs identify as White, Non-Hispanic individuals.
- Working-class women earn 65 to 81% of the wages of working-class White men.
- Workforce research shows that LGBTQ+ women represent 1.6% of management-level employees, while LGBTQ+ men represent 2.8% of management-level employees.

	Partners						Associates						Total Lawyers					
	Asian		Black or African-American		Latinx		Asian		Black or African-American		Latinx		Asian		Black or African American		Latinx	
	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women
2021	4.30%	1.73%	2.22%	0.86%	2.86%	0.92%	12.49%	7.39%	5.22%	3.17%	6.11%	3.25%	8.06%	4.40%	3.63%	1.97%	4.37%	2.04%
2020	4.08	1.62	2.10	0.80	2.80	0.90	12.12	7.18	5.10	3.04	5.64	2.99	7.88	4.30	3.55	1.91	4.17	1.92
2019	3.89	1.46	1.97	0.75	2.52	0.80	12.17	7.17	4.76	2.80	5.17	2.70	7.71	4.15	3.31	1.77	3.79	1.72

Source: 2021 NALP Report on Diversity

Table 12. Lawyers with Disabilities at Law Firms, 2021

	All Firms		Firms of 250 or Fewer Lawyers		Firms of 251-500 Lawyers		Firms of 501-700 Lawyers		Firms of 701+ Lawyers	
	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total
Partners	340	1.07%	81	1.19%	66	1.02%	19	0.71%	174	1.11%
Associates	361	1.25	33	0.89	67	1.42	17	0.72	244	1.34
Other Lawyers*	164	1.59	24	1.35	25	1.38	13	1.33	102	1.77
All Lawyers	865	1.22	138	1.12	158	1.22	49	0.82	520	1.31
Summer Associates	43	1.00	—	—	—	—	—	—	—	—

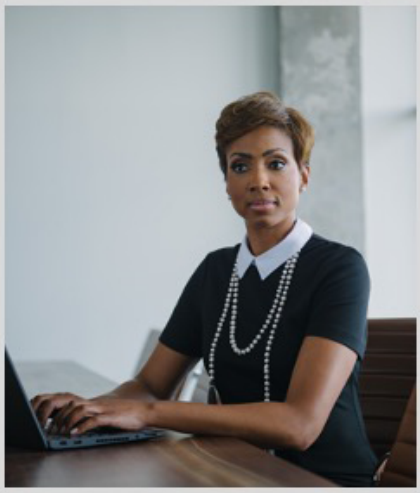
Source: The 2021 *NALP Directory of Legal Employers*.

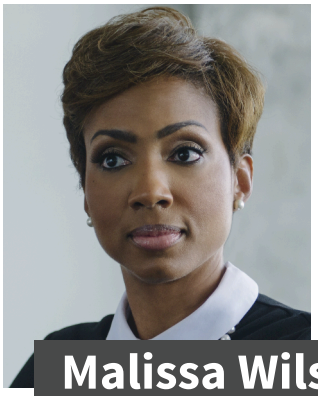
Table 13. LGBTQ Lawyers at Law Firms, 2021

	All Firms		Firms of 100 or Fewer Lawyers		Firms of 101-250 Lawyers		Firms of 251-500 Lawyers		Firms of 501-700 Lawyers		Firms of 701+ Lawyers	
	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total
Partners	976	2.31%	34	2.34%	122	2.13%	170	2.08%	83	2.06%	567	2.47%
Associates	2,276	5.35	32	4.08	123	3.83	246	4.39	171	4.92	1,704	5.78
Other Lawyers*	401	2.73	4	1.06	25	1.59	61	2.47	37	2.46	274	3.12
All Lawyers	3,653	3.67	70	2.67	270	2.57	477	2.94	291	3.23	2,545	4.16
Summer Associates	522	8.41	5	2.94	26	6.70	44	7.31	40	7.50	407	9.02

Source: The 2021 *NALP Directory of Legal Employers*.

Malissa Wilson
FORMAN WATKINS & KRUTZ





601.960.3173
malissa.wilson@formanwatkins.com

Malissa Wilson

Partner | Forman Watkins & Krutz (Jackson, MS)

Before becoming an attorney, Malissa worked as a journalist and public relations practitioner in crisis communications. Though she is not a working journalist covering stories anymore, as an attorney, Malissa offers clients her ability to lay out and present the story-line of their cases clearly and efficiently to a judge or juror as demonstrated by her successful trials in state and federal court and oral arguments before the state supreme court. With her experience in crisis communications, she offers a calm and honest confidence that clients will find indispensable in the midst of tough litigation. A firm believer of the golden rule, Malissa handles every case how she would want an attorney to handle a case for her, always going the extra mile and never backing down from a challenge.

Malissa brings to the firm nearly 20 years of litigation and trial experience. Before joining FormanWatkins, Malissa was employed as a Special Assistant Attorney General for the Office of the Mississippi Attorney General in the Civil Division and as a Senior Assistant City Attorney for the City of Houston (Texas) in the Labor, Employment and Civil Rights Division. She has served as in-house counsel for a national insurance company overseeing cases in Texas, Oklahoma and Mississippi and for the state's largest public employer, The University of Mississippi Medical Center. In addition to handling employment matters, she has also worked in areas of Workers Compensation, Insurance Defense, Toxic Tort, Civil Rights and Media Law.

Malissa's diverse background and vast array of knowledge make her a key asset to the creative, efficient work ethic of FormanWatkins. Ultimately, clients can expect a thorough job well done when working with Malissa, and will not find a kinder advocate.

Practice Areas

- Labor & Employment Law
- Insurance Coverage & Bad Faith Defense
- Media Law
- Personal Injury
- Political Law
- Premises Liability
- Workers' Compensation

Professional Recognition

- The Best Lawyers in America®, 2021: Litigation – Labor and Employment, Workers' Compensation Law – Employers
- Selected as one of Mississippi's 50 Leading Businesswomen by the Mississippi Business Journal (2019)
- Martindale-Hubbell® Silver Client Champion Rating
- Martindale-Hubbell NotableSM Peer Review Rating
- Selected as one of Mississippi's Top Ten Leaders in Law by the Mississippi Business Journal (2017)
- Leadership Jackson, class of 2005

Education

- University of Mississippi, J.D., cum laude
- Columbia University, Master of Science, Journalism
- Texas Southern University, B.A., Journalism, magna cum laude

A Picture is Worth a Thousand Words: Leveraging Visuals and Demonstratives

Joe Angersola
Swift Currie McGhee & Hiers (Atlanta, GA)

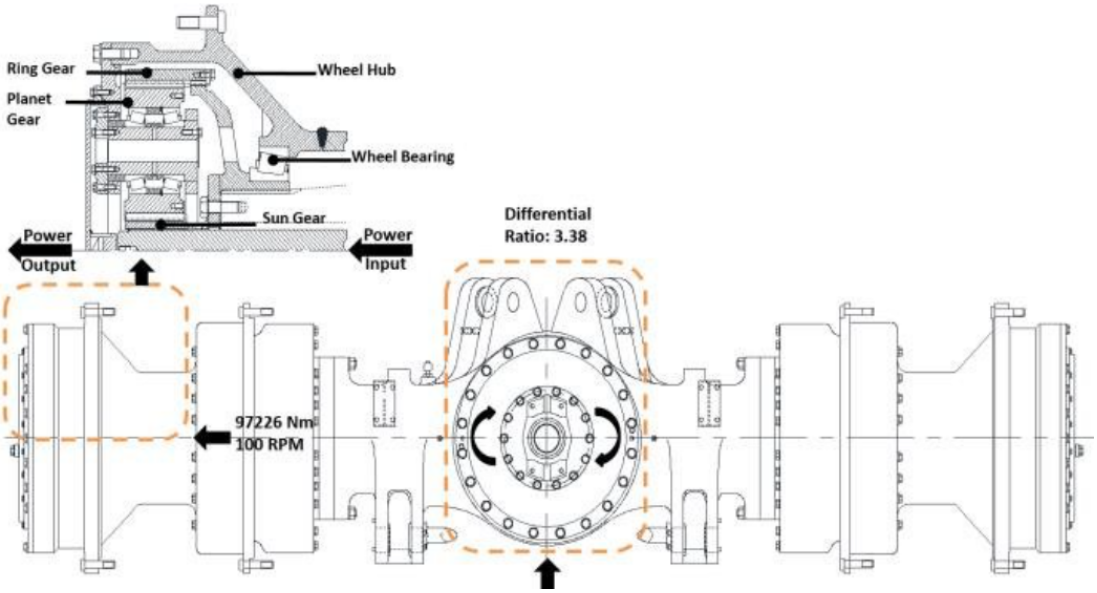
A Complicated and Tech-Centered Consumer Landscape
Ryan Siekmann (S-E-A)

As consumer products and daily lifestyles are increasingly more automated, internet-connected, and electrified with alternative power sources, the ability to explain how these things work, fail and operate also requires more technical knowledge. This can make explaining the details of a nuanced case to a judge or jury even more difficult. Despite these ever-changing complexities and nuances, one thing has remained unchanged: you only get one opportunity to present your case. All the photos, documents and technical information are ineffectual unless they can be clearly conveyed to a judge or jury. For this reason, animations, simulations, and models are increasingly used in the courtroom. If created and presented properly, complex ideas and situations can be demonstrated for all to easily understand.

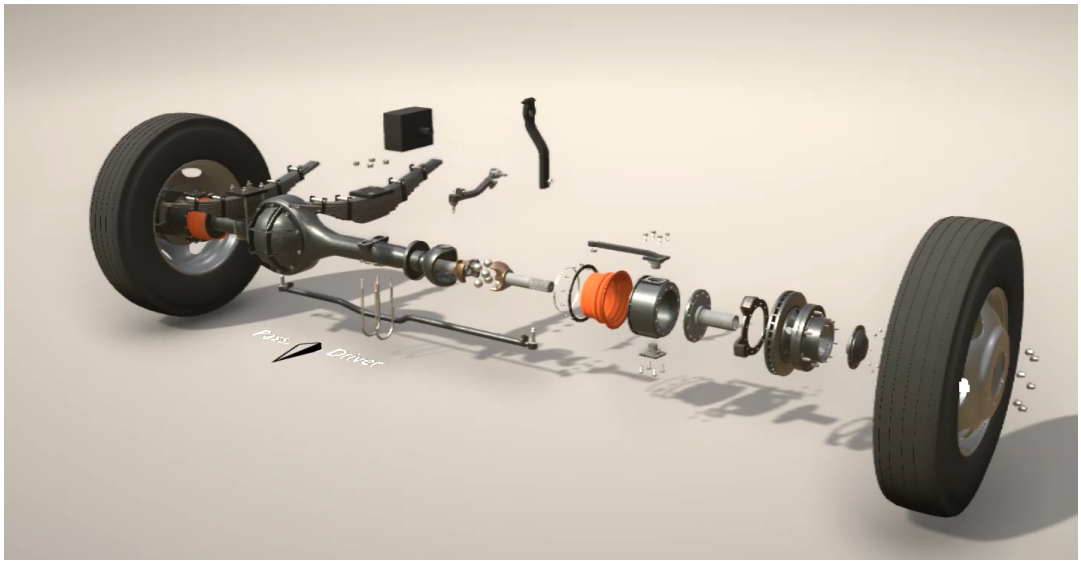
It's even more important in today's tech heavy environment for litigation visuals and graphics to meet the public's use and expectation of the "iPhone experience." Consumers increasingly rely on video and rich media content more than ever before to understand products, installation methods, warnings and safety methods. This is compounded as it is usually done all from the palm of their hand using a phone or tablet. It's simple, it's immediate, and it is always there. In order to meet these increased expectations, the programs, methods, and standards for litigation graphics and visuals have also increased. Virtual Reality (VR), Artificial Intelligence (AI) and gaming engines are all being used to produce the next generation of visuals meant to simplify the telling of one's story to a jury.

Interactive Visuals Using Gaming Engines
Traditional courtroom animations have always followed a linear, one-way path. The animation is designed, produced, rendered, and presented with a fixed view and timeline. Any change based on new information, a witness statement, or counsel arguments would take hours and hours of re-rendering a new point of view. This is expensive, time consuming, and unable to be done in the moment, while presenting.

With the rise in popularity of virtual reality and immersive video games, gaming engine platforms like Unreal, Unity, and Lumberyard are becoming an increasingly popular way to build animations and graphics. These new gaming engines use real-time rendering, physics, and software to produce much more lifelike and scalable graphics. Think of it this way; traditionally, an attorney would have to show 3 different viewpoints of an accident using 3 different, fully rendered animations that could only be played in a certain sequence. Using a gaming engine as the platform, these 3 views can now be shown in real time, in whatever order or sequence an attorney would like. In fact, any viewpoint in the model can be shown at any time, depending on where a line of questioning might go. Gaming engines utilize the same 3D, science-based models and animations visualized in traditional animations but presents them in an interactive environment that allows full navigation of the 3d space, and allows for additional functionality, such as toggling layers, highlights and text, or linking photos, videos, documents or other resources.



A 2-dimensional diagram of a truck axle



A 3-dimensional view of a truck axle using a gaming engine platform

VR Goggles in the Courtroom

Imagine being dropped into the operator cab of a 30,000-pound excavator without leaving the jury box with no operating license or training required. Combining the above gaming engine platforms with VR hardware such as the HTC Vive or Oculus Rift, litigation consultants can now take jury members to the scene of an incident or behind the wheel. Sound can be incorporated into the headset headphones, giving the viewer a full sensory experience of what someone would have encountered. These simulated models are built on the same physics-based software programs as traditional 3D animations, making them accurate enough to be considered for admission into evidence. Courts are aware of the influence these evidentiary devices can have and they have established guidelines for their admission, both demonstrative and substantive. A compendium of circuit court and state court requirements can be found here: https://www.iadclaw.org/defensecounseljournal/the-use-of-computer-generated-animations-and-simulations-

at-trial/?b=dVWYaLjZMGKY3U9rKlWc3IGxDZGZ8 zR
yId%2FM5KTCtnvcMEKxw%2BRxalTWEzBpYpzb

An operators view of an excavator mirror, showing line of site of a worker on the ground, through HTC Vive

Why Are Graphics So Compelling in the Courtroom?

Due to the variety of personal experiences and biases that may affect how each juror independently evaluates information, graphics and animation can be exceptionally useful in cases where complex information needs to be presented and/or clarified. This complexity can come in many forms, such as a technical mechanism, an expansive timeline of events, or a series of interrelationships between the agents in a large system. So long as your case involves concepts that fall into at least one of these three categories below, graphics will most likely prove very useful to helping jurors understand the concepts more clearly.[1]

• Systems impacted by simultaneous influences (such as the moving parts of a machine).
• Change over time (such as a device failure or construction accident).
• Systems not visible to the naked eye (because they are far away, underground, microscopic, abstract concepts, historical events, or otherwise unable to be brought into the courtroom).

Advantages of Using Graphics in the Courtroom

Besides providing "eye candy" that will keep jurors engaged during, graphics can perform a number of instructional feats that reduce the mental effort required for jurors to properly integrate new information. The most important advantages include:

1. Explicitly show moving parts and evolving processes;
2. Explicitly show changing views of objects and environments;
3. Control spatial relationships between objects of varying sizes and distances;
4. Speed up and slow down time;
5. Draw focus to the most relevant information among the "noise";
6. Highlight the key steps in a sequence;
7. Organize information into a comprehensible hierarchy; and/or

1 Weiss, Renee E, Dave S Knowlton, and Gary R Morrison. "Principles for Using Animation in Computer-based Instruction: Theoretical Heuristics for Effective Design." Computers in Human Behavior: 465-77

8. Use symbols to communicate complex and abstract concepts efficiently.

The abilities of graphics in these examples illustrate some of the ways you can efficiently and clearly educate the jury and minimize decision-making errors that may result from heuristic behavior. Remember, with such tools at your disposal, you are able to reach jurors at two very important levels:

• At an intellectual level by presenting new information, and then clarifying this information so it can be understood with minimal cognitive effort; and

• At an emotional level by being attention-gaining, aesthetically pleasing, and motivating.[2]

It is worth noting that the use of graphics does not automatically increase learning outcomes for the jury. Researchers have found many of the reasons that graphics of various designs do (and do not) help in the educational process. A discussion of this cognitive research, and how it informs the design of trial graphics, can be found here: https://www.litigationinsights.com/maximize-jury-comprehension-animation/

2 Ibid

404.888.6171
joseph.angersola@swiftcurrie.com

Joe Angersola

Partner | Swift Currie McGhee & Hiers (Atlanta, GA)

Joseph “Joe” J. Angersola defends clients in a variety of disputes, with an emphasis on product liability, personal injury and commercial litigation. In addition to representing clients in Georgia, Joe has defended clients as regional and national counsel in Arizona, Florida, Kentucky, Mississippi, Nevada, North Carolina, Oklahoma and Tennessee.

Joe understands that each client, whether it is a large corporation, local business or an individual, has specific objectives and challenges in litigation. His experience in a variety of cases and jurisdictions allows him to tailor his approach to address those considerations.

Originally from Iowa, Joe practiced in Chicago for five years before moving to Georgia. He is active in various professional organizations, along with his children’s youth activities.

Practice Areas

- Automobile Litigation
- Catastrophic Injury & Wrongful Death
- Commercial Litigation
- Environmental Law
- Premises Liability
- Products Liability
- Professional Liability

Experience

- Defended electrical manufacturer in product liability cases alleging defects in electrical equipment and components, including switch-gear, circuit breakers, surge arrestors and disconnect boxes.
- Defended automated-door manufacturer in a lawsuit alleging improper maintenance.
- Defended forklift manufacturer in a lawsuit alleging improper service.
- Defended skid-steer loader manufacturer in product liability suit alleging design and manufacturing defects.
- Defended hose manufacturer in product liability suit alleging design and manufacturing defects.
- Defended tool manufacturer in a product liability lawsuit alleging catastrophic head injury.
- Defended boat manufacturer and dealer in a product liability lawsuit alleging defect in stair design.
- Defended boat manufacturers and dealers in warranty and recall lawsuits.
- Defended individuals in lawsuits involving recreational boats and jet skis asserting wrongful death claims and personal injury.
- Defended importer and distributor of fireworks in product liability lawsuit alleging defective design and manufacturing.

Awards/Recognition

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Martindale-Hubbell Top Rated Lawyer, 2016
- Georgia Super Lawyers Rising Star, 2016-2018
- The Best Lawyers in America©, 2021-Present

Education

- Syracuse University College of Law (J.D., 2005)
- Loyola University of Chicago (B.A., 2001)

Reflecting on 2+ Years of Remote Work

Bill McDonald
Bush Seyferth (Troy, MI)

Reflecting on 2+ Years of Remote Work: Trends across Litigation
Bill McDonald III (Bush Seyferth PLLC) and Mike Steinberger (General Motors)

As the pandemic continues to linger, its effects on the legal profession, including remote work, have permanently changed the way the legal industry operates. While attorneys initially battled through extraordinary and unprecedented circumstances, many legal professionals have embraced comfort with a new norm. Even as many firms and in-house counsel step back into a brick-and-mortar office, creative innovations from the work-from-home era have established a new mode of lawyering: the hybrid model. This article explores some of the greatest changes to our collective modes of virtual litigation, as well as exciting areas for continued growth.

Hybrid Modes of Litigation and Interactions with Virtual Courts

Most notably for litigators, the pandemic forced courts online. Certainly, remote court proceedings have meant a shake-up for jury participants, as well as for clients subject to their verdicts. Since the onset of the pandemic two years ago, legal circles have opined about remote juries – are they more or less fair to parties?[1] Are jurors paying attention to witness testimony, or simply scrolling through their newsfeed? Plagued by Zoom fatigue? Certainly, a hearing conducted over Zoom provides a glimpse into a party's or testifying witness's home life, which could affect jury sympathies or the confidentiality of the case. Given this shifted dynamic, remote hearings have altered strategic considerations for advocates. In particular, a virtual forum lends itself to changes in presentation style, which trend toward tighter arguments, measured language, and lessened theatrics when interacting with remote jurors.

In part, the same technologies that buoyed court systems during the pandemic have led to increased challenges. Across the board, courts have seen a growing backlog of cases,[2] driven by both halted proceedings at the onset of the pandemic, as well as inefficiencies embedded in the remote court process. Consistent across jurisdictions, a "digital divide" has created uneven access to online courts, and has caused challenges where participants possess varying levels of technological competences.[3]

Additionally, a remote forum is not compatible with the needs of all kinds of legal proceedings. Almost two years into the pandemic, Texas state courts observed that remote hearings are best suited to the resolution of shorter matters, such as status conferences, divorce dockets, or motions with more limited subject matter. By contrast, videoconferencing fails as a suitable platform for matters requiring witness testimony or evidentiary presentations, which remain best-suited to in-person proceedings.[4] Already, courts in Arizona, Minnesota, and others have triaged matters for a remote versus in-person forum, and this trend is likely to continue.[5] Further, deploying various videoconferencing technologies has created new challenges for court reporters

1 Alicia Bannon, The Impact of Video Proceedings on Fairness and Access to Justice in Court, Brennan Center for Justice (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court.

2 Pandemic Impact on Weighted Caseload Models – Executive Summary, Nat'l Center for State Courts (Mar. 31, 2022), https://www.ncsc.org/__data/assets/pdf_file/0033/75588/Pandemic-Executive-Summary.pdf.

3 The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload, Nat'l Center For State Courts, (Dec. 2022), https://www.ncsc.org/_media/ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf.

4 Id.

5 Recommended Remote and In-Person Hearings in Arizona State Courts in the Post-Pandemic World, Arizona Supreme Court (Feb. 22, 2021), https://www.ncsc.org/__data/assets/pdf_file/0029/75809/Recommended-Remote-and-In-Person-Hearings-in-Arizona-State-Courts-in-the-Post-Pandemic-World-2222022-FINAL.pdf.

and interpreters, where even a moment of shaky internet connection can jeopardize the accuracy of the record. Compliance with ADA accommodations, too, looks a bit different in a virtual court, and most virtual courts utilize closed captioning, a service which Zoom opted to provide free of charge about a year into the pandemic.[6]

Beyond the obvious challenges involved in orchestrating formal court proceedings in a virtual space, the changes to legal procedure have been stark. Even where some proceedings are shifting back to an in-person forum, technology has retained salience in chambers. Shortly after the pandemic, for example, Michigan courts that were not already equipped were encouraged to create avenues for electronic court filings.[7] The majority of courts continue to utilize e-filing, and reliance on hard copies in the courts has waned. And, even where personal service of process remains the gold standard, jurisdictions have authorized various, alternative methods of service, such as Texas's recent adoption of a provision permitting plaintiffs to serve citations "by an electronic communication sent to a defendant through a social media presence."[8] Depositions and notarizations, too, regularly take place remotely – a trend that is likely to persist.[9]

As courts have shifted operations to the online space, access to and participation in the courts by the general public has increased. Like the Supreme Court, 38 states have adopted live broadcasting of appellate court proceedings since the onset of the pandemic.[10] For litigators, this creates an additional layer of strategic thinking in preparing oral arguments: The potential for abused audio or visual recorded material – or even simply the chance that your argument might go viral – is worth considering.[11]

Besides the changes to how cases are litigated, the remote environment has brought about substantial shifts to Alternative Dispute Resolution. Before the pandemic, in-person mediation was assumed.[12] But, by necessity, many mediations moved online during the pandemic's peak. And that shift has had staying power. To be sure, virtual mediations have several advantages—the convenience and lack of travel foremost among them. But other critical parts of mediation are lost. It's easier for a party to walk away from a mediation when he or she is already at home; mediators have a greater challenge in "sizing up" the parties and have less insight into nonverbal cues and clues; and parties not well-versed in the litigation process miss out on the "courtroom" experience of a mediation, something that can help drive resolution. Like many pandemic-era changes, the option of remote mediation is worth considering, especially in lower-value cases. But whether it makes sense across the board is worthy of in-depth consideration.

Tech Competency: Buffering Cybersecurity in a Hybrid Environment

Certainly, the implementation of newlycommon technologies has changed the ways in which we interact with clients and colleagues. In many ways, the legal field has come a long way since our early days of Zoom snafus. These days, document screen sharing has revolutionized meeting workflow efficiencies, remote server systems have created access to important case information outside of the physical office, and video conferencing has largely obviated the need to jet set to depose a witness.

Even as we've honed competencies on video conferencing platforms as individuals, additional concerns persist where technology, confidentiality, and legal ethics intersect. At the end of 2020, the ABA analyzed the trend toward remote legal work through the framework of ABA Model Rule 5.5 in its Formal Opinion 495. In particular, the ABA raised concerns that "practicing law mainly through electronic means" may fly in the face of jurisdictional

6 Remote Hearings and Accommodations under the ADA, https://www.courts.michigan.gov/4a1e13/siteassets/covid/covid-19/ada-remotehearingsinfo.pdf; see also Jeannette Muhammad and Peter O'Dowd, Zoom Pledges Provide Closed Captioning For All Free Users – A Win for Hearing Health Advocates, WBUR (Feb. 26, 2021), https://www.wbur.org/hereandnow/2021/02/26/zoom-free-closed-captioning.

7 State Court Administrative Office, Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021: Findings, Best Practices, and Recommendations (Nov. 19, 2021), https://www.courts.michigan.gov/4afc1e/siteassets/covid/lessons-learned/final-report-lessons-learned-findings-best-practices-and-recommendations-111921.pdf; see generally How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations, https://www.pewtrusts.org/-/media/assets/2021/11/clsm-court-tech-methodological-appendix.pdf.

8 Tex. Civ. Prac. & Rem. Code Ann. § 17.033 (West, Westlaw through the end of the 2021 Regular and Called Sessions of the 87th Legislature).

9 US Remote Depositions and Oath Status, Perkins Coie (Dec. 9, 2021), https://www.perkinscoie.com/en/news-insights/us-remote-deposition-and-oath-status.html.

10 Robert B. Mitchell and Monica A. Romero, Covid-19: Cameras in the Courtroom & Post-Pandemic Access to Appellate Proceedings, K&L Gates (Jan. 10, 2022), https://www.klgates.com/COVID-19-Cameras-in-the-Courtroom-Public-Access-to-Appellate-Proceedings-Post-COVID-19-1-10-2022.

11 Appellate Courts: Return to Workplace Planning, Nat'l Center for State Courts (June 24, 2021), https://www.ncsc.org/__data/assets/pdf_file/0028/65845/Appellate-Courts-Return-to-the-Workplace-Planning.pdf.

12 Kristi J. Paulson, Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?, Southwestern Law Review (Fall 2021), https://www.swlaw.edu/sites/default/files/2022-02/Article%2011_Paulson.pdf.

licensing rules, particularly if a lawyer is no longer bound by physical presence within a geography.[13] Even so, the ABA authorized practicing remotely under some circumstances. The advice for navigating this process? Jurisdictions vary, and even two years in, remote-working lawyers must be familiar with relevant statutes outlining the contours of an unauthorized legal practice.[14]

Client confidentiality in the remote world has generated additional ethical considerations. Since the advent of email, most law firm environments have been equipped with ample technological capabilities to maintain client confidentiality. A cloud-based practice is bolstered by password-protected, encrypted data management systems, two-factor authentication, and managing strict tech policy compliance. However, protections are only as good as the technical competence of the lawyers who deploy them, and outside of a brick-and-mortar location, additional vulnerabilities emerge. For example, depending on the location from which a lawyer takes their client call, privacy and confidentiality can quickly unravel where children, neighbors, or even smart speakers pick up the conversation.[15] Vigilance remains key – and unplugging Alexa during client meetings is probably a new best practice for at-home lawyers.

As law firms continue to shore up cyber protections in this next phase of a hybrid work modality, be on the lookout for elevated phishing scams targeting legal practitioners. In particular, the last two years have been characterized by a spike in SMS text phishing – aptly dubbed "smishing" – which rose by 700% in the first six months of 2021 alone.[16] Hackers leverage the prevalence of phones as a primary conduit to cloud-based data to gain access to passwords. Experts advise equipping phones with security software, training a discerning eye to detect well-disguised attacks, and generally avoiding shortened or QR-coded links.

Legal Talent and Hiring Initiatives in the Hybrid Space

For many firms recruiting new attorneys, remaining flexible through a hybrid work environment has been a boon. In many ways, remote work has precipitated a reimagining of the legal industry, particularly where employee wellness is concerned.[17] For some, a hybrid working model bolsters work-life balance and overall mental well-being, freeing up time for legal professionals to allocate to their personal lives.[18] In fact, in a recent survey of legal professionals about the effects of remote work, more than half of respondents indicated that remote work increased their quality of life and home relationships.[19] This new mode of working, coupled with increased wellness offerings by many firms, has created opportunities to cultivate happier, better-balanced lawyers.

Certainly, the new emphasis on flexibility has affected hiring practices. With increased frequency, young associates expect some measure of hybrid working capacity from their employers – capabilities which are often critical to employee retention. Of course, managing staff remotely brings its own challenges. For one, tax liabilities across jurisdictions may be incurred for organizations that employ litigators across state lines.[20]

Despite some challenges to overcome, more and more firms are observing the ways in which hybrid working capabilities dovetail with Diversity, Equity, and Inclusion (DE&I) hiring initiatives. As a general matter, DE&I efforts have been elevated as a primary focal point in legal industry hiring practices, and flexible workplace arrangements can buttress a firm's measurable progress on this front. For one, across broad swaths of the working world, organizations that encourage remote modes of working boast higher percentages of women in leadership positions.[21] Generally, and compared

13 Lawyers Working Remotely, A.B.A. Formal Op. 20-495 (Dec. 16, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf.

14 Carole J. Buckner, Spotlight on Ethics: Rules of Remote Work, Cal. Lawyers Ass'n (Feb. 2021), https://calawyers.org/california-lawyers-association/spotlight-on-ethics-rules-of-remote-work/ (noting that some states still follow the so-called "butt-in-the-seat" rule while others have temporarily authorized remote practice).

15 Protecting Client Confidentiality While Working Remotely, L. Soc'y of Alberta, https://www.lawsociety.ab.ca/resource-centre/key-resources/practice-management/protecting-client-confidentiality-and-data-security-while-working-remotely/#:~:text=%20These%20are%20our%20top%20ten%20tips%20to,especially%20vigilant%20against%20phishing%20attacks.%20Cyber-criminals...%20More%20; see also The Duty of Tech Competence in the Age of Covid-19, GPSolo, November/December 2020, at 32.

16 See Sharon D. Nelson and John W. Simek, Smartphone Phishing Attacks Escalate, Bedeviling Law Firms, 15 J. of Ins. & Indem. L. (2022).

17 The New World of Remote Word: The Impact on Wellness, A.B.A. (July 1, 2021), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2021/ja21/moore/?q=&fq=(id%3A%5C%2Fcontent%2Faba-cms-dotorg%2Fen%2Fgroups%2Flaw_practice%2F*)&wt=json&start=0.

18 Id.

19 https://www.law.com/americanlawyer/2022/05/10/pandemic-anxiety-wanes-but-legal-industrys-mental-health-struggles-persist/

20 24 No. 5 Mich. Emp. L. Letter 4.

21 Remote Companies Have More Women Leaders, and These are Hiring, Remote.Co,

with more traditional brick-and-mortar offices, hybrid work environments allow employees to better balance work with other competing interests. And, where the full-time, face-time norm is no longer the norm, legal organizations sidestep an "essentialist approach to workplace flexibility," which naturally broadens employment opportunities for many, including those living with disabilities.[22]

Forward-looking: Hybrid Models Here to Stay

As the legal industry continues to navigate a return to the office and the courts, balanced by continued remote capabilities, the general effect seems to wax positive for the profession. Navigating the new normal regarding legal procedure, technological competencies, and hiring practices has certainly created challenges, but overall, has opened the door to reinvigorating the legal field with creative innovations.

https://remote.co/remote-companies-have-more-women-leaders-these-are-hiring/.

22 Michelle A. Travis, A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility, 64 Wash. U. J.L. & Pol'y 203 (2021); see also Stacy A. Hickox, Chenwei Liao, Remote Work As an Accommodation for Employees with Disabilities, 38 Hofstra Lab. & Emp. L.J. 25 (2020).

248.822.7807
mcdonald@bsplaw.com

Bill McDonald

Member | Bush Seyferth (Troy, MI)

William ("Bill") McDonald, III focuses his practice on commercial, insurance, and product liability litigation. Bill has counseled clients in matters involving the Federal Trade Commission, the National Highway Traffic Safety Administration, and the Department of Justice. Bill has extensive experience handling large-scale e-discovery projects.

Related Services

- Advanced Technologies
- Business and Commercial
- E-Discovery Management
- Financial Services Litigation
- Insurance Litigation
- Intellectual Property Litigation
- Product Liability
- Securities / Finance

Representative Matters

- Currently serving as lead national air bag coordinating counsel for a major OEM.
- Lead responsibility for coordination of discovery and depositions, including company witnesses, experts and 30(b)(6) depositions, in the Takata MDL for a major OEM.
- Prepared discovery and dispositive motions in the Takata MDL for a major OEM.
- Coordinated depositions of plaintiff's putative class representatives in the Takata MDL for a major OEM.
- Prepared and conducted dozens of 30(b)(6) depositions and expert depositions for major companies, including major OEM clients.
- Secured summary disposition for a bus manufacturer in a product liability action stemming from a bus accident.
- Secured summary judgment for a vehicle manufacturer in action in United States District Court for the Western District of Michigan in which Plaintiff alleged product defects caused a fire in the subject vehicle.
- Secured summary disposition for U-Haul Co. of Michigan in an asserting claims of owner's liability and vicarious liability stemming from a vehicular accident.
- Obtained summary judgment on behalf of an automotive manufacturer in complex product liability case involving building fire in federal court.
- Obtained summary judgment on behalf of a bus manufacturer in complex product liability case.
- Secured summary judgment on behalf of property storage company in long-fought battle on bailment and conversion in state court.
- Secured international arbitration award exceeding $3M on behalf of automotive company in breach of contract dispute.
- Managed and resolved multi-year, large-scale federal investigation response for Fortune 500 company involving cybersecurity practices.

Honors & Awards

- Michigan Lawyers Weekly, Leaders in the Law (2022)
- Michigan Super Lawyers, Rising Star (2016 – Present)

Education

- The Ohio State University Moritz College of Law J.D., 2012
- Grand Valley State University, B.A., 2009

Your Downfall, Their Windfall – How Mass Torts Are Driving Bankruptcy

Warren Martin
Porzio Bromberg & Newman (Morristown, NJ)

Can The Bankruptcy Courts Continue to Effectively Navigate the Current Flood of Mass Tort Claims in Mass Tort Bankruptcy Cases?
Warren J. Martin Jr.

The Current Bankruptcy Mass Tort Landscape
As of October 14, 2021, the day that LTL Management, LLC, the spinoff of Johnson & Johnson Consumer, Inc. ("Old JJCI"), filed for bankruptcy, there were some 38,000 talc claims pending against Old JJCI. While many additional talc claims had previously been dismissed or failed at trial, a few claims resulted in massive jury verdicts, e.g., one for $2.85 billion.[1] Following these significant verdicts, talc litigations were being filed at the rate of 1 per hour, 365 days per year. As a result, in addition to its indemnity obligations, Old JJCI was paying $10 million to $20 million per month in professional fees to defend the suits. All in, an amount equal to 33% of the company's total sales were being spent on the talc cases each year. Total exposure, while not capped, has now been estimated in the hundreds of billions of dollars.

Similarly, as of July 26, 2022, the day it filed for bankruptcy, Aearo Technologies, LLC, a company with 330 employees and approximately $100 million in annual sales, was facing a multi-district litigation ("MDL") comprised of 290,000 claims and an estimated liability of $100 billion[2]—an amount equal to 1,000 years of Aearo's annual sales.

Bankruptcy courts have dealt with mass tort claims before, in cases like Johns Manville,[3] A.H. Robbins,[4] and W.R. Grace[5] dating back to 1982 and earlier. But in the age of social media, with attorney advertising moving beyond costly radio ads and still more costly television commercials, to the virtually no cost, wide-reaching Facebook, Twitter and other social media outlets, claims can multiply at an astonishing rate. Take for instance the In re Boy Scouts of America bankruptcy proceeding, which, prior to filing for bankruptcy protection, had suffered "hundreds" of sexual abuse litigation claims at a cost for indemnification and loss adjustment expenses of approximately $150 million during the prepetition period from 2017 through 2019.[6] Following the bankruptcy filing, and the attendant publicity and social media blitz that followed, some 82,209 unique and timely claims were filed asserting abuse,[7] requiring a settlement fund for the post-confirmation trust running into the billions of dollars. As just one more example of today's easy reach of social media plaintiff attorney advertising, has anyone not heard about the water at Camp Lejeune?[8]

The Purdue Pharma L.P.[9] chapter 11 plan of reorganization, providing billions of dollars for resolving opioid claims, and supported by 95% or 120,000 of the voting plaintiffs in the case, is on appeal to the Second Circuit where the third-party releases granted to the Sackler family members (owners of Purdue Pharma) in return for a voluntary payment of $6 billion are being challenged by a very small number of appellants.[10] The Boy Scouts of

1 Ingham v. Johnson & Johnson, 608 S.W.2d 663, 724-725 (Mo. Cir. Ct. 2018).

2 Testimony of Dr. J.B. Heaton. See August 26,2022 Bankruptcy Court Order at Docket #143, Case No. 22-50059, at p. 33.

3 MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988).

4 Menard–Sanford v. Mabey (In re A.H. Robins Co., Inc.), 880 F.2d 694 (4th Cir. 1989).

5 In re W.R. Grace & Co., 729 F.3d 332 (3d Cir. 2013).

6 Decision of Judge Laurie Selber Silverstein dated July 29, 2022, Docket # 10,343, Case No. 20-10343, at p. 20.

7 Id. at 23.

8 See, e.g., Camp Lejeune Victims, available at https://www.camplejeunevictims.com/v3/1step/lac01/ (last visited September 25, 2022).

9 The Purdue cases are jointly administered under Case No. 19-23649 before the United States Bankruptcy Court for the Southern District of New York.

10 The case is In re: Purdue Pharma LP et al., case number 22-110, in the U.S. Court of

America plan, which provides for the funding of a $2.46 billion trust for abuse claims, is on appeal filed by a number of insurers.[11] The LTL talc cases and the Aearo cases face substantial uphill battles with swarms of claims coming in every day. Is the bankruptcy system equipped to handle the onslaught of mass tort claims in the age of instant contact social media?

The Policy of the Bankruptcy Code

The American justice system is premised upon due process and the ideal that every injured or aggrieved person will have both the right and the opportunity to "have her day in court," in order to prove her claim and to obtain recompense. There is, of course, also the "race to the courthouse" concept, embedded in American jurisprudence, such that the first plaintiff in line that obtains a judgment typically will have rights under state law to impose liens on assets of the defendant in order to collect on her claim, before those who may be awaiting their day in court in the same forum or in other jurisdictions. In mass tort cases, plaintiffs that file first exhaust liability insurance recoveries and other assets of the defendants in advance of injuries to, let alone claims of, potential future plaintiffs.

The Bankruptcy Code[12] was designed to provide a "breathing spell" from creditor actions during the pendency of the bankruptcy case, and ultimately, give an honest debtor a "fresh start." More subtle policy underpinnings also guide the chapter 11 process: (i) that going concern value is better than liquidation value, i.e., that assets provide more value to all stakeholders when they continue to operate in the stream of commerce; and (ii) the economy, specifically the players in our economy like employees (salaries), retirees (pension benefits), the government (taxes) and other businesses and creditors (contractual and business arrangements), are all better off in a restructuring where the business continues, rather than in a liquidation where the business ceases to operate. Indeed, section 1129(a)(7) of the Bankruptcy Code, which articulates the "best interest of creditors" test, requires analysis of this test in every chapter 11 case. Specifically, to confirm a bankruptcy plan and obtain a ticket out of bankruptcy, a corporate debtor must prove that creditors and other stakeholders, including plaintiffs, will obtain "more than they would in a … liquidation" of the company. When companies liquidate, employees lose their jobs, retirees may lose their pensions, the government misses out on tax revenue, and vendors lose their customer, resulting in "game over" losses for layers and layers of economically inter-related stakeholders. Most importantly, in the context of this article, in a straight liquidation assuming exhaustion of insurance proceeds—only the first plaintiffs that obtained judgments such that they were situated in the front of the line will get paid on account of their personal injury claims, while those still awaiting trial and those whose injuries have not yet manifested will find themselves without an effective remedy.

Bankruptcy Code Provisions Benefiting Tort Victims and Their Attorneys

Sections 501 and 502 of the Bankruptcy Code, coupled with Rule 3003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), provide that a proof of claim, when timely filed, "is deemed allowed" unless a party in interest objects. In other words, the filing of a proof of claim is prima facie evidence of its validity.[13] By contrast, in state or federal court, a plaintiff doesn't "win" simply by filing a complaint. When a defendant defaults in a state or federal court action, that is simply step one of the process. Next, the plaintiff will typically be required to enter default on the docket, seek the entry of judgment by default, present its proofs at a hearing on damages and then, once judgment is entered and docketed, seek to collect on its claim. None of these steps is required in a bankruptcy case, where filing of the claim itself checks all the boxes to perfect the claim and sets the claimant up for collection. If no objection is filed, the claim is allowed as stated. Further, the proof of claim can literally be limited to a one-to-two-page form that is completed by filling it out with the claimant's name, address, alleged amount of the claim, and a signature.

Section 1103 of the Bankruptcy Code provides that

Appeals for the Second Circuit.

11 Dietrich Knauth, Boy Scouts' $2.46 billion bankruptcy settlement draws appeals from insurers, abuse claimants, Reuters (September 22, 2022), available at https://www.reuters.com/legal/litigation/boy-scouts-246-billion-bankruptcy-settlement-draws-appeals-insurers-abuse-2022-09-22/(last visited September 25, 2022).

12 11 U.S.C. 101 et seq.

13 "A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001.

"the United States Trustee shall appoint a Committee of Creditors" (the "Committee"). Appointment of a Committee is not optional in a chapter 11 case, and the United States Trustee ("UST") takes this obligation very seriously. In a mass tort case, the UST may appoint a "Tort Claimants Committee,"[14] or may mix the tort victims with trade creditors by appointing one joint committee of creditors.[15] Committees are afforded broad powers under the Bankruptcy Code, including the ability to "investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan."[16] Bankruptcy proceedings are broadly transparent, with the bankruptcy courts requiring cooperation in discovery, and the Bankruptcy Rules—particularly Rule 2004—allowing "fishing expeditions" by a Committee or others into a debtor's financial affairs, something that would never be countenanced during the pendency of a state or federal court litigation.[17]

All of these rights and powers of a Committee might be of less concern to corporate debtors but for two additional sections of the Bankruptcy Code. First, the Bankruptcy Code permits a Committee to hire attorneys, financial advisors, accountants, investment bankers, appraisers, and other professionals. Significantly, the fees incurred by these professionals are paid not by the Committee members or by the underlying plaintiffs, but rather by the bankruptcy estate. Second, if a debtor's assets are under the control of the bankruptcy court, a requirement for plan confirmation and exiting bankruptcy is that all post-petition professional fees must be paid in full.[18]

By comparison, in a typical litigation, a plaintiff's attorney must, inter alia, (i) prepare and file a complaint, (ii) prosecute the action through to judgment, potentially involving years of discovery and motion practice, and (iii) after obtaining a judgment, seek to collect on that judgment, an effort that in many cases is more difficult than obtaining the judgment itself. Instead, as the Bankruptcy Code sections described above reveal, a plaintiff's attorney prosecuting a mass tort claim in a bankruptcy case can (i) assist her client in filling out a two-page proof of claim form, or not, as these forms are simple enough for the client to fill out without an attorney's help, (ii) file the form without appearing on the docket in the case (claims are maintained on a separate "creditor registry" or matrix), (iii) have a client's form constitute prima facie evidence of the claim, which will result in "allowance" of the claim unless it is objected to, (iv) review the corporate debtor's financial dealings since they will be an "open book" pursuant to the transparency present in a chapter 11 case, (v) use the tort claimants committee or Committee as the collection tool for the plaintiffs and their attorneys, bringing on attorneys and experts to learn everything about the debtor's finances and to fight for the highest possible distribution, and (vi) avoid the costs of collection, since the Committee's professional collection agents, so to speak, will be paid for by the corporate debtor, and so the more the debtor fights, the more it pays.

Sections 544 and 548 of the Bankruptcy Code convey creditor actions to recover on account of fraudulent transfers to the debtor's estate. While technically, by virtue of these provisions, fraudulent conveyance actions are no longer owned by individual creditors but instead belong to the estate, in the typical case, debtors are unwilling or unable to bring fraudulent conveyance actions against their parents, officers and directors or affiliates. As a result, the Committee will petition the court for derivative standing to do so on the estate's behalf.[19] Such standing is often granted.

In both the Aearo and LTL cases, the non-debtor affiliates and parents of both companies entered into billion-dollar funding agreements with the prepetition debtors to reimburse them for any

14 See In re the Roman Catholic Diocese of Camden, Case No. 20-21257 before the United States Bankruptcy Court for the District of New Jersey, Docket Nos. 111, 29, where the United States Trustee appointed two committees: one consisting strictly of tort claimants and the other consisting of trade creditors, respectively.

15 Purdue Pharma, Case No. 19-23649 before the United States Bankruptcy Court for the Southern District of New York, and The Weinstein Companies, Case No. 18-10601 before the United States Bankruptcy Court for the District of Delaware, are two recent cases where the United States Trustee appointed mixed committees containing both business/trade creditors and tort claimants.

16 11 U.S.C. §1103(c)(2).

17 See In re SunEdison, Inc., 572 B.R. 482, 490 (Bankr. S.D.N.Y. 2017)(scope of Rule 2004 is very broad, sometimes referred to as a "fishing expedition").

18 11 U.S.C. §§507(a)(2) and 1129(a)(9)(A).

19 See Official Comm. of Unsecured Creditors Corp. v. Chinery, 330 F.3d 548, 568, 580 (3d Cir. 2003)("Cybergenics") (holding that bankruptcy courts can authorize creditors' committees to pursue avoidance actions). Courts following Cybergenics have determined that the Committee or individual creditors can pursue suit if: (1) the creditor alleges a colorable claim that would benefit the estate; (2) the creditor makes demand on the debtor in possession to file the action; (3) the demand is refused; and (4) the refusal is unjustified in light of the statutory obligation and fiduciary duties of the debtor-in-possession.

mass tort liabilities the debtors could not satisfy themselves. Why did they do so? Because had they not, they would be easy targets for fraudulent conveyance actions seeking to bring affiliate and parent assets into the bankruptcy. By doing this voluntarily, however, the issue is not resolved; rather, a fraudulent conveyance action may still be brought, but the conversation changes to whether or not the parent or affiliate's funding commitment is fair consideration for any value extracted by the affiliates and/or parents from the corporate debtors.[20]

Bankruptcy Code Provisions Benefitting the Corporate Debtor

The automatic stay embodied in section 362 of the Bankruptcy Code is the codification of the "breathing spell" doctrine described above. It takes effect automatically and contemporaneously with the filing of the complaint and enjoins any lawsuits or actions against the debtor from proceeding. Its reach includes mass tort plaintiffs' claims. For example, Old JJCL faced 38,000 tort claims and was spending $10 million to $20 million per month on defense costs; Aearo faced 290,000 MDL claims. The automatic stay provides the necessary breathing spell for the debtors facing these unprecedented numbers of claims to pause to consider and develop a plan for payment of the plaintiffs' claims, negotiate a plan with the representatives of the various stakeholders, most importantly in a mass tort case, with the Committee, and to chart a course to continue their operations.

Similarly, section 105 of the Bankruptcy Code allows, in certain circumstances, the court to enjoin actions against third parties of the debtors, such as affiliates. For example, in the Roman Catholic Diocese cases, of which there have been some 30 filed nationwide, separately incorporated parishes that were not in bankruptcy received the benefit of an injunction under section 105, which prevented plaintiffs from proceeding against the parishes, even though those parishes were not suffering the burdens of bankruptcy. In addition, in In re Boy Scouts of America, some 500 separately incorporated local boy scout councils all over the country, as well as "Chartered Organizations" that had allowed the Boy Scouts to use their facilities for meetings, received injunctions protecting them from lawsuits during the pendency of the Boy Scout bankruptcy case. This injunction granted pursuant to section 105 is sometimes referred to as "extending the automatic stay" to protect these non-debtor parties.[21] Recently, in the LTL case, Judge Kaplan entered a section 105 injunction protecting affiliates of LTL, including its indirect parent Johnson & Johnson, thereby enjoining plaintiffs from bringing or continuing any pending talc lawsuits against these non-debtor affiliates. By contrast, Judge Graham, in the Aearo case, recently denied a section 105 injunction that would have protected Aearo's parent, 3M, from the onslaught of earplug cases it is currently defending. Both decisions are currently on appeal to the Third Circuit and the Seventh Circuit, respectively.

Section 524(g) of the Bankruptcy Code is a bankruptcy "superpower" available only in asbestos chapter 11 proceedings, although that has not stopped the debtor's bar from modeling bankruptcy plans along the same lines and successfully confirming bankruptcy plan after bankruptcy plan, using a structure akin to the relief section 524(g) provides. Section 524(g) utilizes a procedural device referred to as a "channeling" injunction wherein a trust is created under the bankruptcy plan, and all claims derivatively related to any asbestos injury caused by the debtor are "channeled" into the trust. This includes claims against affiliates, parents, predecessors, successors, and insurers that contribute to the trust via settlement with the debtor or otherwise.[22] Notably, section 524(g) requires an affirmative vote in support of the plan by 75% of personal injury claimants, a significantly higher bar than the "more than one-half in number" requirement for an "ordinary" confirmation.[23] It also requires that the trust created for this purpose be funded with, among other things, a majority of the voting shares of the debtor or its parent.[24] In practice, however, channeling injunctions modeled on section 524(g) have become routine in mass

20 In the Caesar's Entertainment bankruptcy, Case No. 15-01145 before the United States Bankruptcy Court for the Northern District of Illinois, affiliates that had siphoned off Debtor's assets prepetition had agreed prior to the bankruptcy to repay $2 billion to the bankrupt debtors for the purpose of addressing creditor claims. But after an Examiner's report commissioned as a precursor to a Committee fraudulent conveyance action, resulting in, among other things, a ruling that the billionaire owners had to turn over their personal financial statements to the Committee, the affiliates' settlement offer increased from $2 billion to more than $5 billion.

21 In re Aearo Technologies, LLC, et al., Case No. 22-50059 (August 26,2022 Bankruptcy Court Order at Docket #143, at pp. 21-22).

22 11 U.S.C. § 524(g)(1)(B), 524(g)(3)(A), 524(g)(4)(A).

23 Compare 11 U.S.C. §524(g)(B)(ii)(IV) with 11 U.S.C. §1125(c).

24 11 U.S.C. § 524(g)(1)(B)(i)(III).

tort and other bankruptcy cases, and for the most part, are supported by Committees and plaintiffs, often without any stock ownership interest being contributed to the trust, as would be required by the plain terms of section 524(g).

Section 502(c) of the Bankruptcy Code provides for estimation of claims, i.e., the ability to fix claims in a truncated procedure, without a full trial.[25] While there are constitutional problems with this procedure in a personal injury case,[26] all parties recognize the risks of litigation on the issue, and therefore Tort Claimants Committees typically negotiate, and personal injury claimants overwhelmingly vote, in support of bankruptcy plans that create Trust Distribution Procedures ("TDPs"). These TDPs provide a matrix to be utilized by a post-confirmation "Plan Trustee" or "Administrator," which is used to value claims quickly and easily. The Boy Scout plan even included a "no look" settlement, where a plaintiff could accept $3,000 in settlement and avoid any scrutiny of his claim, other than the fact that he filed the claim and signed it. Thousands of Boy Scout claimants availed themselves of this option.

In addition to these statutory provisions, which serve to strike a balance between the corporate debtor and the mass tort victims, there is the bankruptcy judge, who, at rock bottom, and often times, via his or her decisions throughout the case, either gently or firmly moves the parties towards a resolution. And in furtherance of the goal of a mediated settlement, bankruptcy judges in mass tort cases in recent years have appointed mediators, often retired bankruptcy judges, to mediate discussions between the Tort Claimants Committees, the debtors, and the insurers. These efforts have yielded success, with few, if any, mass tort bankruptcy proceedings ending in the liquidation of the debtor and the destruction of its economic value.

Conclusion

The easy aggregation and multiplication of mass tort claims in today's social media world, coupled with the simplicity of perfecting a claim in bankruptcy and collecting on tort claims via "free" discovery and collection attorney provides a huge time and cost savings to plaintiffs and the plaintiffs' bar. Corporate debtors have found themselves addressing exponentially larger claims than they had anticipated pre-bankruptcy filing, straining their resources far beyond the point of insolvency and easily exhausting insurance coverages. And while the bankruptcy system has clearly bent under the weight of the onslaught, it has not broken. The ultimate goal of any bankruptcy reorganization—maintaining value for all stakeholders—continues to be paramount. The financial transparency required in bankruptcy, along with automatic stay, section 105 injunctions, claims estimation powers, post-confirmation trusts, and channeling injunctions continue to be valuable tools that debtors and courts can use to strike a balance between the goals of maximizing distribution to all stakeholders and the successful reorganization of the corporate debtor. Fortunately, the task is made easier because of the Bankruptcy Code's requirement that a plan must give the claimants "more than they would in a… liquidation." There is usually only one way to do that, which is to keep the debtor's assets operating as a going concern.

25 In re North American Health Care, Inc., 544 B.R. 684, 688 (Bankr. C.D. Cal. 2016) (bankruptcy court could estimate personal injury/wrongful death tort claims in the aggregate and not individually, for purposes of voting and plan confirmation).

26 See, e.g., Stern v. Marshall, 131 S. Ct. 2594 (2011) (Article I Bankruptcy Courts cannot adjudicate a claim where there is a Constitutional right for that claim to be adjudicated before an Article III Court).

973.889.4006
wjmartin@pbnlaw.com

Warren Martin

Principal | Porzio Bromberg & Newman (Morristown, NJ)

Warren J. Martin Jr. is a principal of Porzio, Bromberg & Newman and co-chair of the firm's Bankruptcy and Financial Restructuring department. He practices in the areas of bankruptcy, workouts, financial reorganizations and creditors' rights. Known by clients and adversaries for his negotiating skills, Warren has a talent for bringing people together and leading them to recognize that they have a common goal.

Practice Areas
- Bankruptcy and Financial Restructuring

Areas of Focus
- Creditor Committees
- Healthcare: Bankruptcy & Financial Restructuring
- Recent Bankruptcy Filings

Recognition
- Recognized in Chambers USA - America's Leading Lawyers for Business, Bankruptcy/Restructuring, 2009 - 2022.
- Recognized by Best Lawyers in America as the Newark Area - Bankruptcy Lawyer of the Year, 2013; Best Lawyers in America, Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law; Litigation - Bankruptcy, 2012 - 2023.
- Recognized on the New Jersey Super Lawyers List, Bankruptcy - Business, 2008 - 2022.
- Received Outstanding Contribution Award, Berkeley College Foundation, 2018.

Speaking Engagements
- "Third-Party Release Battleground: Clash of the Titans," 2022 Honorable William H. Gindin Bench Bar Conference, 5/06/2022
- "Asset Protection Strategies: Advantages and Pitfalls of Using Trusts, LLCs and Other Techniques," NJICLE, 12/13/2021
- "Anatomy of the Infamous Caesar's Entertainment Chapter 11 Restructure," Porzio CLE Webinar, 9/29/2021
- "Asset Protection Planning in 2020: An Essential Crash Course," NJICLE Webcast, December 2019
- "The Role Of A Patient Care Ombudsman In A Business Bankruptcy," ABI 31st Winter Leadership Conference, December 2019
- "Successfully Restructuring Atlantic City's Finances and Addressing the Legal and Practical Issues Involved," 21st Annual William H. Gindin Bankruptcy Bench Bar Conference, 4/05/2019
- "Fallout of Health Care Consolidation: Who Will Be the Winners and Losers?" American Bankruptcy Institute, 14th Annual Mid-Atlantic Bankruptcy Workshop, 8/03/2018
- "Navigating Healthcare Bankruptcies to Maximize Creditor Recoveries," American Bankruptcy Institute Webinar, 9/08/2017
- "Structured Dismissals," Bankruptcy Inn of Court of New Jersey, 5/01/2017
- "Structured Dismissals," 19th Annual Hon. William H. Gindin Bankruptcy Bench-Bar Conference, March 2017

Education
- Georgetown University Law Center - J.D., 1986; cum laude
- Rutgers University - B.A., 1983; with high honors, Phi Beta Kappa