# Sun, Surf, and Strategies

## A Trial Network Litigation Symposium

**May 2-5, 2024** **The Ritz-Carlton Amelia Island**

THE TRIAL Network

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# Young Thug, Old Question: Evidentiary Use of Lyrics at Trial


## Jack Sharman

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**Music Bars and Prison Bars: Art, Rap, and Evidentiary Strategy at Trial**
*Jack Sharman and Amaobi Enyinnia*

Rap lyrics and associated music videos have made hundreds of appearances in American criminal proceedings, creating nationwide controversy regarding race, art, and evidence.

In this article, we touch briefly on the history of art and lyrics as evidence. We then consider two recent cases that help illustrate evidentiary concerns about lyrics at criminal trials. Finally, we offer suggestions for the defense to consider both pre-trial and at trial.

Prosecutorial use of artistic expression did not begin with rap music. A famous non-rap example is the trial of Oscar Wilde, the nineteenth-century British man of letters who faced charges of homosexuality (known then as "gross indecency") twice in 1895. During his first trial, Wilde was questioned about two poems published in a magazine written by a lover, Lord Alfred Douglas, as evidence of homosexuality (i.e., "the love that dare not speak its name").[1] In the United States, literary work was used as evidence in the twentieth century against suspected communists, such as in the Smith Act trials in the 1940s and 1950s, where prosecutors argued that the defendants' adoption of Communist pamphlets and books were evidence of the defendants' intent to advocate for the violent overthrow of the United States government.[2]

In contemporary courts, though, rap is the form of artistic expression most often in a prosecutor's playbook. We can observe the criminal trial of Jeffrey Williams—better known by his professional name, "Young Thug"—playing out in the Superior Court of Fulton County, Georgia. In this Georgia Racketeer Influenced and Corrupt Organizations ("RICO") case, prosecutors allege that Williams and his music collective, "Young Stoner Life" or "YSL," were a violent gang that committed murders and other crimes for over a decade.[3]

Williams is far from the first rapper to be charged with criminal activity and their lyrics or music videos attempted to be used against them, including prominent rap artists Mac Dre, Snoop Dogg, Boosie, Fetty Wap, and 6ix9ine. Rap lyrics as evidence heighten discussion about the weaponization of cultural insensitivity; racial bias; and the association of popular rap topics with minority defendants.[4]

Prosecutors' attempts to use rap lyrics or music videos attached to those lyrics as evidence have recently had a mixed record. In March 2024, in Baker v. State, the Supreme Court of Georgia reversed a murder conviction against Morgan Baker, a road manager for rapper Kobe Crawford (a/k/a NoCap).[5]The court reviewed a 33-second clip from Crawford's "Ghetto Angels" music video, which showed Baker waving a gun. The clip had been admitted in evidence at trial. Invoking Georgia's version of Fed. R. Evid. 403 (O.C.G.A. § 24-4-403), the court determined that the clip lacked sufficient probative value because there was not a "logical and necessary link" to Baker's purported motive to shoot at security guards at a nightclub. There was insufficient evidence, the court concluded, that the rap video was not "wholly theatric."[6]

The idea of a nexus, a "logical and necessary link," was the critical factor one month before Baker, in United States v. Jordan.[7] The court noted that rap lyrics should rarely be used as evidence and barred the prosecution from introducing lyrics about shooting someone in the head and lyrics about selling drugs performed by rapper Karl Jordan, Jr. The court observed that "rap lyrics may

1 https://www.history.com/topics/gay-rights/oscar-wilde-trial#oscar-wilde-on-trial; https://www.famous- trials.com/wilde/342-wildetestimony.

2 Michal R Belknap, American Political Trials (Contributions in American History) (2nd ed. 1994).

3 https://www.ajc.com/news/crime/six-months-later-delays-abound-in-slow-moving-high-profile-ysl- case/K23YP5Q2LNGLDOQRNRA6I4NS6U/

4 https://www.typeinvestigations.org/investigation/2022/03/30/this-rap-song-helped-sentence-a-17-year-old-to- prison-for-life/; https://www.bet.com/article/w9idu1/rap-lyrics-court-history-young-thug-trial; https://www.miamiherald.com/news/local/crime/article276975403.html

5 Baker v. State, --- S.E.2d , No. S23A0860, 2024 WL 923100 (Ga. Mar. 5, 2024).

6 Baker, , 2024 WL 923100, at *9 n.16 (citations omitted).

7 United States v. Jordan, et al., 1:20-cr-00305-LDH, Memorandum and Order (E.D.N.Y. Jan. 30, 2024) ("Mem. Op.")

be properly admitted at trial" but that "in deciding whether any given rap lyric will be introduced at trial, the Court must assess whether the evidence is relevant and whether its probative value is not substantially outweigh by the danger of unfair prejudice."[8] The court applied "a rule-of-thumb [that] has emerged from court decisions that have considered this issue—the relevance of rap lyrics as trial evidence depends on the existence of a specific factual nexus between the content of rap music and the crimes alleged."[9] Finding that the lyrics the prosecution wanted to introduce did not have a "nexus to the criminal conduct" at issue—Jam Master Jay's 2002 murder—the court observed that other rappers with no connection to the murder such as Jay-Z, Nas, and the group Migos had published works with similar lyrics about shooting unnamed men in the head or about drug trafficking. Without more, the court concluded, the references in the defendant's lyrics were simply "generic."[10] Even with lyrics excluded, Jordan was convicted of murder.[11]

Despite its ruling on the question before it, however, the court cautioned that, with the appropriate nexus, rap lyrics could be admissible: "Individuals who choose to confess unmistakable details of their crimes should be held to those statements."[12]

The nexus framework will be put to the test in the Williams "Young Thug" trial, where the prosecution's theory is that Williams's lyrics are evidence of YSL's true identity as a gang and of its criminal activities, including "proclamations of violence"; Williams's leadership of the gang; and his alleged involvement in acts of violence committed by the gang.[13]

Williams will not be the last rapper confronted with his or her own artistic messages. Other defendants, some far less artistic, will likely also see their messaging intended for public consumption—statements—used against them in both civil and criminal matters.

What does rap's battle with prosecutors tell us about pretrial and trial tactics? At this point, a businessperson might point out that he or she is not a rap artist or even in the music business. While entertaining, they might reasonably ask, what does this topic have to do with me? Businesses publish messages for consumer consumption every day. Corporate mission statements and feel-good policies are famously aspirational and sometimes disastrous. (Consider the experience of three Ivy League presidents testifying before Congress who were cross-examined on their organizations' policies and the topic of antisemitism). Statements in the political arena and even in judicial proceedings can be fraught with danger. In the criminal prosecution of former President Trump and others underway in Fulton County, Georgia, lawyers' pleadings and other court submissions were attached to the indictment as evidence of overt acts.

All of these statements can readily come to a prosecutor's attention as potentially useful evidence.

Besides reinforcing the value of pretrial motions in limine and vigilant objections, rap's battle with prosecutors provides guidance for the white-collar trial lawyer representing or counseling a client who face criminal charged related to messaged content.

A comprehensive discussion of the First Amendment is beyond the scope of this article, but it is frequently a fruitful first line of defense whether the message is artistic, political, or business. At its core, of course, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[14] Speech integral to otherwise criminal conduct—a threat to assassinate a judge, for example—is not protected.[15] Such "intregral" speech, however, is not usually the focus of the use of lyrics at trial. If anything, the lyrics are usually extrinsic to the factual allegations and should be argued as such. Besides the First Amendment, evidentiary rules provide bases to prevent the admission of creative expression as a statement or confession, particularly in the absence of a specific link between the art and the conduct at issue.

At trial, the government will offer lyrics or other messages as the defendant's statement, thereby avoiding hearsay problems.[16] Although courts and criminal cases tend to construe "statement" liberally, there may be opportunities to raise a successful hearsay objection if the defendant can establish that he or she was neither the writer nor the performer of the lyrics in question or that the government is in fact offering the statements for the truth of the matter asserted.

The most common fight, however, involves Rule 403 of the Federal Rules of Evidence (or its state cognate).

8 Id. at 6 (citing United States v. Pierce, 785 F.3d 832, 841 (2d Cir. 2015) and Fed. R. Evid. 403).

9 Id. at 8 (footnote omitted).

10 Id. at 11.

11 https://www.npr.org/2024/02/28/1234407240/jam-master-jay-run-dmc-death-trial

12 Mem. Op. at 14.

13 https://www.billboard.com/business/legal/young-thug-lyrics-can-be-used-ysl-rico-case-judge-ruling-1235467208/; https://www.nytimes.com/2023/11/09/arts/music/young-thug-lyrics-ysl-rico-trial.html

14 Ashcroft v. American Civil Liberties Union, 535. U.S. 564, 573 (2002).

15 See, e.g., United States v. Stevens, 559 U.S. 460, 468-469 (2010); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

16 See, e.g., United States v. Graham, 293 F. Supp. 3d 732, 738 (E.D. Mich. 2017) (where government tied lyrics to defendants' actions and offered certain statements within them not for truth or falsity but only to show that they were made, finding admissible non-hearsay under Fed. R. Evid. 801(c) or as statements of party-opponents and adopted statements).

Pursuant to Rule 403, courts may exclude evidence whose "probative value is substantially outweighed by a danger of . . . unfair prejudice[.]" Rule 403 is a consistently raised to challenge the admissibility of artistic messaging. As illustrated by Baker, defense arguments premised on Rule 403 often liken lyrics to propensity-type evidence intended portray the defendant in a negative light that bears no specific, logical connection—or nexus—to the alleged activity at issue.

Finally, the defense should consider the recently amended Rule 106 (colloquially, "The Rule of Completeness," now "Remainder of or Related Statements") to provide context and inject fairness. If the prosecution is going to show the jury certain rap lyrics, the defense should request that other segments be read or played or other related conduct shown. The same concept applies to corporate utterances. The "whole story" might disrupt or minimize the impact of particular lyrics, should it appear that the court is inclined to admit them.[17]

How do we apply these principles in a practical manner?

- Frame Inflammation Versus Prejudice Properly. As the Baker court put it, "[i]n weighing probative value and unfair prejudice under Rule 403, a trial court should consider how the evidence at issue might be used within the context of the evidence and arguments presented at trial, including how a prosecutor could capitalize on the prejudicial effect of the evidence during closing argument."[18] Although a common defense tactic is to argue that the art is more inflammatory than the alleged crime, the core inquiry is one of inflammatory effect without regard to how well or poorly the art aligns with the counts in the indictment. In other words, it does not matter if the government is right. What matters is the degree to which admission of the evidence will cause the jury to decide the case on an improper basis.
- Turn the Probative-Value Escape Valve. Is there other available, admissible evidence that tends to prove the same point as the government's proffered lyric (or other message)? Is the proffered message too generic or too obscure to be helpful to the jury as it considers the charges and the other factual evidence? Conventional wisdom focuses on the inflammatory nature and thus increased prejudice of the lyric, but the same balancing can be accomplished, and in a manner perhaps less controversial and more palatable to the court, by reducing the probative value of the evidence.
- Promote the Pedestrian Presentation. Are the defendant's statements "similar" to what other notable actors have messaged in the same space? It pays to highlight the client's messaging as generalized statements common in a certain artistic, business, or political channel. Others with their messages—especially others with whom the court might have some passing familiarity—operate in the same space and direct speech towards the same general audiences.
- Uncouple the Message from Your Client. For both hearsay considerations and for Rule 403 balancing, consider whether the text was authored, approved, or shared by the client.[19]
- Consider the Role of Theatrics. In the right circumstances, the defense can argue that the government is ignoring reality for the sake of theatrics, that the message or visual was a professional artist's image designed for the consumer and not a reference to actual events or behaviors. Sales of products may provide useful analogies, where messages complained of are most properly considered "marketing pitches," "puffery," or "sales talk."

As Wu-Tang Clan and collaborators once pointed out, "Cash Rules Everything Around Here."[20]

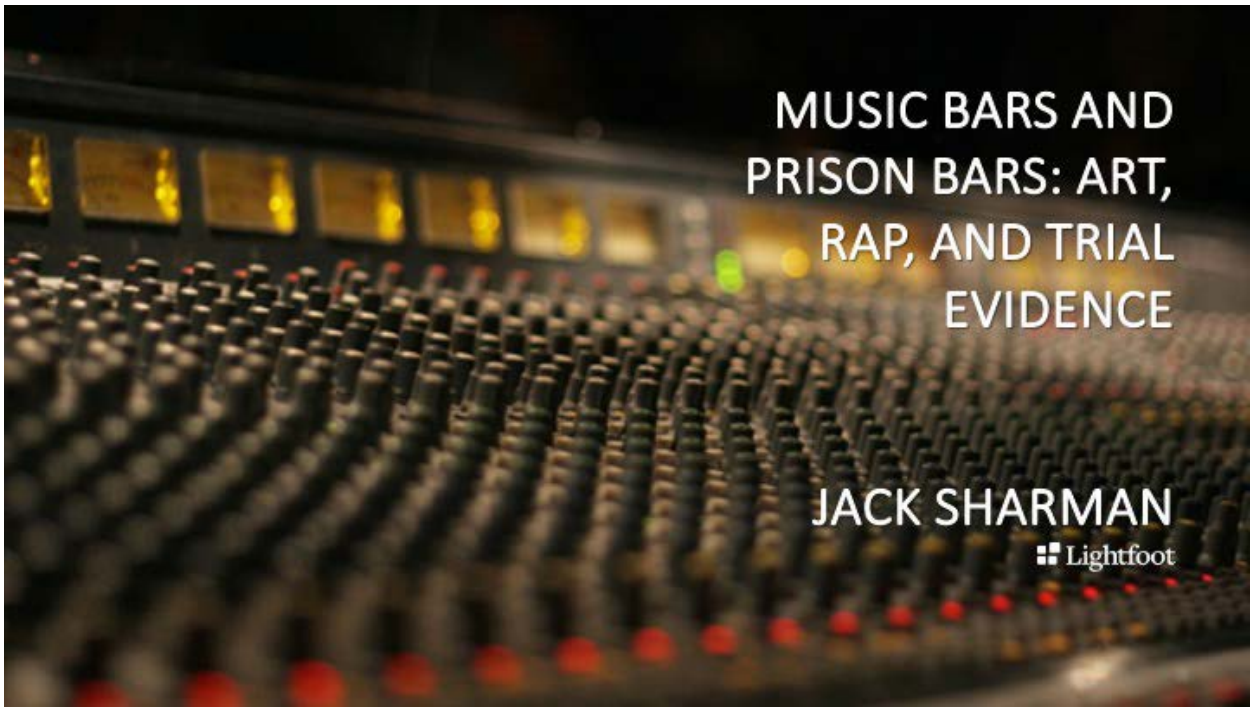
Perhaps. But, with a thoughtful pre-trial and trial approach to messages, the defense will have a fairer shot at acquittal.

17 Fed. R. Evid. 106; see also https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2022_0.pdf

18 Baker, 2024 WL 923100, at *10 n.18.

19 See United States v. Gamory, 635 F3d 480, 493 (11th Cir. 2011) (rap video was minimally probative under Federal Rule of Evidence 403 because there was no proof that the appellant "authored the lyrics or that the views and values reflected in the video were, in fact, adopted or shared by [the appellant]").

20 Wu-Tang Clan, Method Man, Raekwon, Inspectah Deck, and Buddha Monk, "C.R.E.A.M.," on Enter the Wu- Tang (36 Chambers) (1993).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Lyrics as Evidence
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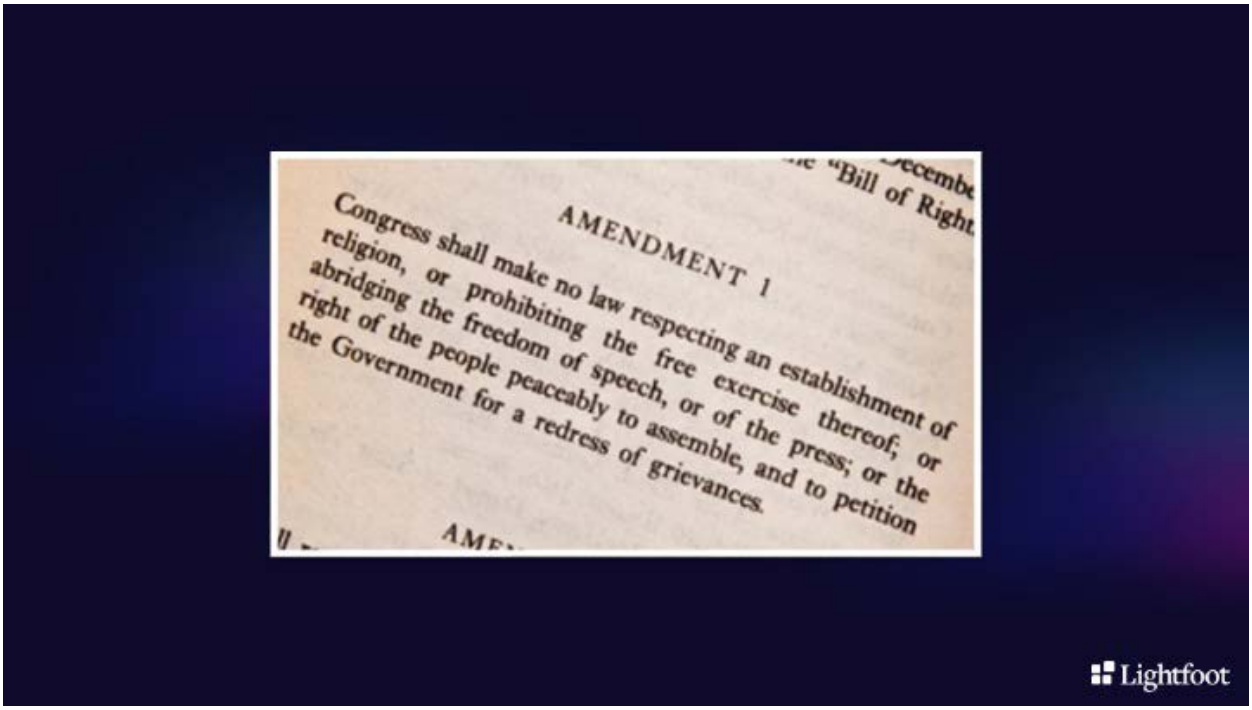
"Bill of Right
AMENDMENT 1
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
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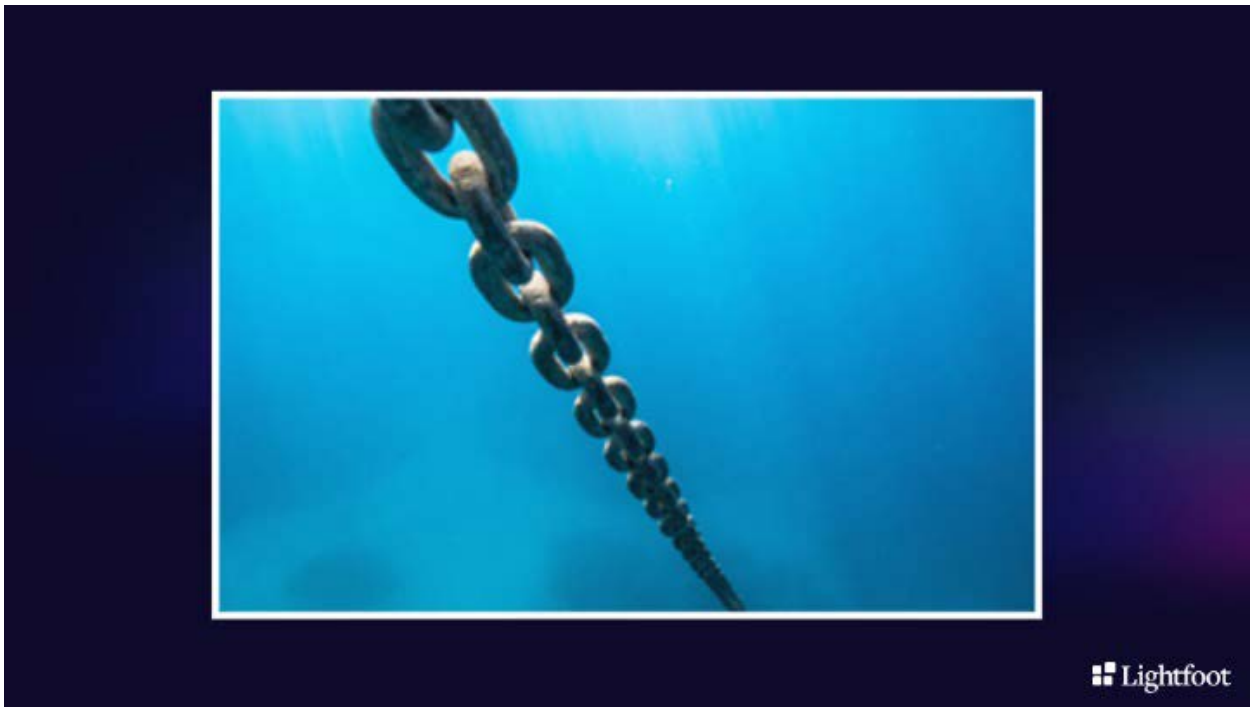
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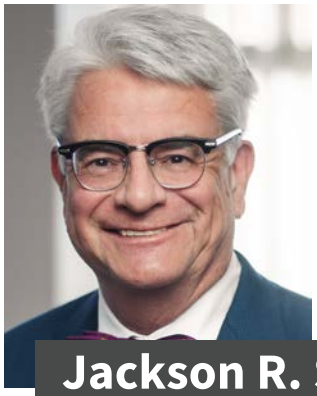

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When crisis comes, Jack Sharman's your experienced ally.

Jack guides corporations and individuals through business crises, civil and criminal white-collar prosecutions, and corporate internal investigations. In an environment of increased uncertainty, regulatory scrutiny and a skeptical public, clients rely on him to respond to and navigate the most difficult circumstances they will ever face.

Jack leads the firm's White-Collar Criminal Defense & Corporate Investigations practice group. He handles and takes to trial matters involving kickback allegations, environmental offenses, public corruption, antitrust and price-fixing charges, gambling, congressional investigations, healthcare fraud and the False Claims Act (FCA). He also has an active civil litigation and civil mediation practice and is on the firm's Recruiting and Marketing & Business Development Committees.

Companies and their decision-makers benefit from the decades of high-profile experience that Jack brings to the table. He served as Special Counsel to the U.S. House Financial Services Committee for the Whitewater investigation involving President Bill Clinton. From 2016-17, Jack was Special Counsel to the Judiciary Committee of the Alabama House of Representatives for the impeachment investigation of Gov. Robert Bentley. Most recently, the Governor of Georgia appointed him Special Counsel to the office of the Georgia Secretary of State with regard to the Fulton County (GA) grand jury investigation into the 2020 presidential campaign.

**Practice Area**

- Arbitration & Mediation Services
- Directors' & Officers' Liability
- International Disputes
- Complex Government Litigation & Investigations
- Securities & Shareholder Disputes
- White-Collar Criminal Defense & Corporate Investigations

**Awards**

- Benchmark Litigation, "Local Litigation Star" — White Collar Crime (2018-21)
- Benchmark Litigation, "Litigation Star" (2022-24)
- The Best Lawyers in America© by BL Rankings — Corporate Compliance Law, Corporate Governance Law, White-Collar Criminal Defense, Electronic Discovery and Information Management Law (2016-2024)
- The Best Lawyers in America© by BL Rankings, "Lawyer of the Year" for Birmingham — Corporate Compliance Law, Corporate Governance Law (2019, 2020, 2024)
- Birmingham Business Journal, "Best of the Bar" (2019)
- B-Metro magazine, "Top Flight Attorneys" (2019)
- Mid-South Super Lawyers by Thomson Reuters, "Top 50 Super Lawyers in Birmingham" (2020)
- Mid-South Super Lawyers by Thomson Reuters — White Collar Criminal Defense (2017-23)

**Education**

- Harvard Law School (J.D., 1989) - Editor-in-Chief, Harvard Journal of Law & Public Policy
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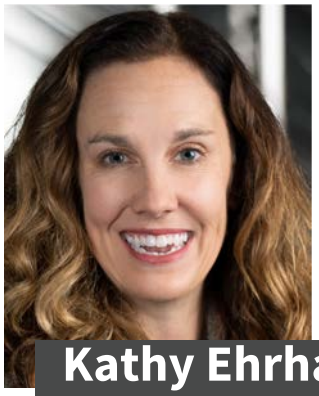
- Washington & Lee University (1983)



# Careful What You Wish For: Defending Against Mass Arbitrations


## Kathy Ehrhart

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**Careful What You Wish For: Defending Against Mass Arbitrations**
*Katheleen A. Ehrhart*

Judge Henry J. Friendly once declared that class actions lead to "blackmail settlements."[1] Corporate defendants who now find themselves on the other end of a mass arbitration rather than a class action may tell you they would rather face good old-fashioned "blackmail settlements." Because if class actions are akin to blackmail, then mass arbitrations are nothing short of holding the company's coffers for ransom.

For the past six years, mass arbitrations have been on the rise, in direct response to the increased use of class-action waivers in arbitration agreements. In AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), the Supreme Court held that the Federal Arbitration Act preempts any state laws prohibiting contractual class-action waivers.[2] As a result, businesses can include in their contracts, including consumer contracts, arbitration provisions with class action waivers that require that any claims against the company be brought in arbitration on an individualized basis.

**What Are The Mass Arbitrations That Companies Are Facing?**
Thwarted from bringing class action claims that often led to large settlements and attorneys' fees, plaintiffs' attorneys began to look at how they could weaponize arbitration agreements. The result? Plaintiffs' attorneys have organized tens of thousands of purported "claimants," each with the same basic individual claim against a company, to file coordinated arbitration demands at the same time. By simultaneously filing or threatening to file tens of thousands of identical but often unvetted arbitration demands, plaintiffs' firms raise the specter of a company having to pay tens of millions of dollars, simply as a result of claimants filing arbitration demands. The demands typically arrive with a massive settlement demand, threatening the company with millions of dollars in filing fees and assuring the company that more claimants and arbitration fees are coming. And all of the filing fees must be paid under the standard terms of the arbitration agreements before the company has even had a chance to review or begin defending the claims on their merits.

While most legal circles and dispute resolution providers define "mass arbitration" as twenty-five or more cases involving the same or similar claims filed against the same party, the mass arbitrations that are raising alarm bells are far larger. Indeed, mass arbitration demands have included:

- 12,500+ arbitration demands filed against Uber on behalf of drivers asserting they had been improperly classified as independent contractors. The initial filing fees alone for those arbitrations were more than $18 million.[3]
- 6,000+ arbitration demands filed against DoorDash on behalf of delivery drivers claiming they were improperly classified as independent contractors. The filings fees amounted to almost $12 million.[4]
- 125,000 demands for arbitration brought against TurboTax's parent company, Intuit, on behalf of taxpayers with alleged consumer fraud claims. At the time, initial filing fees would have cost over $500 million.[5]
- Amazon was threatened with 75,000 arbitration demands related to its Echo device which at the time meant more than $300 million in initial arbitration fees.[6]
- Samsung is facing more than 50,000 arbitration demands alleging violations of Illinois' Biometric Information Privacy Act. In court filings, Samsung stated that plaintiffs' counsel made an opening settlement demand of $50M which if Samsung did not pay would result in Samsung having to pay more

1 Hon. Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).

2 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011)

3 U.S. Chamber of Commerce Institute for Legal Reform, "Mass Arbitration Shakedown," February 2023.

4 Id.

5 Id.

6 Id.

than $400 million in fees at the time along with a threat of the filing of another 50,000+ claims.[7]
- Starz is currently facing more than 7,300 arbitration demands with a threat of tens of thousands more related to alleged video privacy law claims for sharing video usage data which could cost more than $12.7 million in filing fees.[8]

Other reported mass arbitrations include claims brought against Buffalo Wild Wings, Chipotle, Dollar Tree, Peloton, and L'Occitane.[9] As the list shows, the number of mass arbitration filings has been steadily increasing as well as the number of purported claimants with each new mass arbitration.

Also growing is the list of targeted companies. Mass arbitrations can be brought against any company with arbitration provisions in their agreements, although the trending targets include large employers, the gig economy, and providers of consumer products and services. Technology companies or companies susceptible to individual privacy violation claims are facing the biggest threat. The plaintiffs' bar also appears to be targeting companies that have pools of potential claimants with low value claims, who are reachable by social media advertising, and operate in plaintiff-friendly states.

Plaintiffs' counsel knows that the mass arbitration "ransom note" only has teeth if they can acquire a sufficient number of claimants to make the up-front arbitration fees the company is facing in the millions, if not tens of millions. The plaintiffs' bar is using online and social media advertising to grow the roster of claimants for mass arbitrations by placing ads on websites, class action forums, television and radio, and on billboards.

But if plaintiffs' counsel can gather enough claimants, the arbitration fees a defendant is obligated to pay under the parties' arbitration agreement quickly becomes astronomical. The following chart shows the current fee structure for just the initial and/or filing fees for some of the more prominent national dispute resolution services for mass arbitrations.

7 *Id.*

8 Alison Frankel, "Starz Defendants Mass Arbitration Tactics," Reuters, February 14, 2024.

9 U.S. Chamber of Commerce Institute for Legal Reform, "Mass Arbitration Shakedown," February 2023.

| Arbitration Firm | Consumer Mass Arbitration Claims Filing Fees | | Employment Mass Arbitration Claims Filing Fees | |
|---|---|---|---|---|
| AAA[10] | Claimant | Initiation fee of $3,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims: $125<br>501+ claims: $75 | Claimant | Initiation fee of $3,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims: $125<br>501+ claims: $75 |
| | Defendant | Initiation fee of $8,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims - $325<br>501-1500 claims- $250<br>1501-3000 claims- $175<br>3001+ claims- $100 | Defendant | Initiation fee of $8,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims - $325<br>501-1500 claims- $250<br>1501-3000 claims- $175<br>3001+ claims- $100 |
| ADR, Inc.[11] | Claimant | $250 | Claimant | $250 |
| | Defendant | $295 | Defendant | $550 |

10 American Arbitration Association, "Consumer Mass Arbitration and Employment/Workplace Mass Arbitration and Mediation Fee Schedules," January 15, 2024.

11 ADR Services, Inc., "Fee Schedule," current as of March 30, 2024, https://www.adrservices.com/rate-fee-schedule/

| | | | | |
|---|---|---|---|---|
| JAMS[12] | Claimant | $250 | Claimant | $400 |
| | Defendant | $1,750 | Defendant | $1,600 |
| National Arbitration and Mediation[13] | Claimant | $100 | Claimant | $100 |
| | Defendant | First 100 claims- $450 101+ claims- $375 | Defendant | First 100 claims- $450 101+ claims- $375 |

12 JAMS, "Arbitration Schedule of Fees and Costs," current as of March 30, 2024, Arbitration Schedule of Fees & Costs | JAMS Mediation, Arbitration, ADR Services (jamsadr.com)

13 National Arbitration and Mediation, "Fees For Disputes When One Of The Parties Is A Consumer," FEES FOR DISPUTES WHEN ONE OF THE PARTIES IS A CONSUMER (namadr.com), as of January 12, 2024.

The good news for potential defendants is that most of these services have created modified fee schedules for mass arbitrations in the past year, reigning in some of the more exorbitant fees first seen in the examples above.[14] However, even with these modified fee structures, the upfront fees for a defendant in a consumer mass arbitration can exceed millions of dollars once the claimants number hits over 10,000 claims.

14 JAMS is the only firm listed above that has not implemented any modified mass arbitration fees or specific rules and procedures instead applying the standard two-party consumer or employment arbitration rules and fees to mass arbitrations. Kimberly Taylor, JAMS President, "Insight from the President: JAMS Policy Regarding Mass Arbitration Filings," March 3, 2023. JAMS Policy Regarding Mass Arbitration Filings | JAMS Mediation, Arbitration, ADR Services (jamsadr.com)

| Number of Claimants | AAA | ADR, Inc. | JAMS | NAM |
|---|---|---|---|---|
| 10,000 | $1.375 M | $2.95 M | $17.5 M | $3.758 M |
| 25,000 | $2.875 M | $7.375 M | $43.750 M | $9.383 M |
| 50,000 | $4.78 M | $14,750 M | $87.5 M | $18.758 M |
| 100,000 | $10.375 M | $29.5 M | $175 M | $37.508 M |

And these are of course only the initial fees. They do not cover the fees for the arbitrator (and/or process arbitrator) for the actual handling and oversight of the arbitration. Unlike class actions, where defendants have the opportunity to litigate and defend the merits of the claims before potentially feeling the pressure to settle, these initial fees must be paid at the outset of the arbitration.

**Are All These Individuals Really Claimants?**

So now do companies protect themselves and defend against mass arbitrations, either arbitrations it is currently facing or the threat of arbitrations it might face in the future? The key to defending against mass arbitrations is to narrow the playing field, in terms of the number of claimants and the number of issues the company is forced to defend against.

First and foremost, only claimants who are actually parties to a contract with the company with an arbitration agreement can demand arbitration. In several mass arbitrations, defendant companies have found that initial lists of claimants included fake names, deceased individuals, stolen or false identities, and single claimants appearing on multiple counsels' claimant lists targeting the same company for the same conduct. This is a natural consequence of recruiting through social media advertising without doing basic due diligence. If a company can determine a material number of purported claimants are not true claimants at all, the leverage of using mass arbitration goes down commensurately.

The right forum for a company to fight over the validity of claimants' demands is an open question. Some companies have taken their battle on this issue to the courts with mixed results. Recent changes to the AAA Mass Arbitration Supplementary Rules may provide defendants some relief. Counsel must now "include an affirmation that the information provided for each individual case is true and correct to the best of the [lawyer's] knowledge" with each filing.[15] The revised AAA Rules do not contain a sanctions provision if the attestation requirement is violated, but the inclusion of this requirement may make it easier for defendants to take action against or otherwise deter frivolous claims.

Perhaps more importantly, in terms of removing some pressure of extortionate fees before claimants demonstrate their right to bring a demand, under its new mass arbitration rules, the AAA no longer requires defendants to pay the per claim fee until after the initiation stage of the mass arbitration.[16] During the initiation stage of the arbitration a Process Arbitrator is

15 AAA Mass Arbitration Supplementary Rules ("Rules") and Fee Schedule Rule MA-2; MA-4(a), effective January 15, 2024.

16 American Arbitration Association, "Consumer Mass Arbitration and Employment/ Workplace Mass Arbitration and Mediation Fee Schedules," January 15, 2024.

appointed and the parties may seek a determination as to whether the claimants met the AAA filing requirements and the filing requirements of the parties' contract.[17] Similarly, another ADR service provider, FedArb, has set up a mass arbitration "screening" mechanism for defendants to utilize to determine if claimants are actual parties to the arbitration agreement and properly a part of the mass arbitration. The defendant can file a "Pre Filing Fee Motion" for an administrative fee of $30,000, but before paying the $100 per claim filing fee, in which a single former federal judge determines if claimants failed to comply with the contractual terms of their arbitration agreement.[18]

These intermediary steps are far from perfect but provide an avenue for defendants to try and limit the number of claimants to those with actual arbitration agreements.

**How Do You Manage 10,000+ Arbitrations At Once?**

Once the universe of claimants is determined, defendants need to consider how they will manage the actual defense of thousands (and potentially tens of thousands) individual arbitrations. Setting aside the logistical issues alone, defendants must consider if their arbitration agreement binds the parties to using a particular ADR provider and consider whether that provider has a specific process in place for mass arbitrations. If the provider does not, defendants may want to consider a change to their arbitration agreements to listing an ADR administrator that does have rules and procedure in place to reign in the costs of mass arbitrations.

Two newer ADR providers, FedArb (founded 15 years ago) and New Era ADR (founded four years ago) both implemented mass arbitration rules that use a process of grouping and staging individual arbitrations. The New Era ADR model has each party select a bellwether case and the appointed neutral chooses a third. The three cases proceed individually but on a parallel track through a virtual expedited process.[19] After the bellwether arbitrations are decided, a mandatory non-binding settlement conference takes place. If the remaining arbitrations do not settle as a part of the global settlement conference, the neutral will determine the precedential value of the bellwether case decisions and whether they apply to the remaining cases. The rules, however, make clear the neutral is to still to "individually decide each case."[20] What remains unclear is what factors a neutral will use to determine whether the bellwether cases carry precedential value. This means the selection of the bellwether cases and the neutral carries tremendous implications for the outcome of the mass arbitration as a whole.

FedArb has set up a process modeled after multi-district litigation proceedings, with an MDL Tribunal set up to hear any dispositive motions, discovery disputes, common issues of fact or law, common damages issues, or any other relevant motions with a goal of reducing the number of individualized issues.[21] Individual arbitrations that remain after any tribunal decisions will then follow an expedited process, with limited briefing and discovery followed by virtual hearings.[22]

Several ADR providers, however, including the mainstays like AAA and JAMS, have not endorsed similar models to date. Rather, they encourage the parties to agree on any special procedures and rules for handling mass arbitrations.[23] While conceptually it would seem plaintiffs' firms would be similarly daunted in proceeding with 10,000+ individual arbitrations simultaneously, any agreement by them that removes pressure from defendants of having to deal with the upfront fees and the costs of litigating all the arbitrations at once is likely to be met with resistance.

Nonetheless, the bellwether or MDL models have benefits that defendants may want to consider and propose to claimants, or the arbitrator if claimants refuse to agree. Discovery needed on the individual claimants is likely to be the same or substantially similar and defendants should craft a discovery template to use. In addition, defendants will want to ensure that they only have to respond to one set of discovery or have witnesses sit for one deposition rather than provide discovery responses in every individual arbitration. For these reasons, an MDL model, or similar model where discovery is coordinated across arbitrations has benefits. An MDL model can also potentially resolve dispositive issues regarding the validity of claims and defenses in the case, which may limit the number of individual arbitrations that need to go to hearing given the common issues of law and fact across the arbitrations.

A bellwether model also provides a method that may lead to fewer individual arbitrations proceeding to hearing. Critical to the success of the bellwether model will be the selection of the right arbitrations that proceed first.

A batching model provides another alternative. Under a batching model the parties agree on more individual arbitrations proceeding at once than a typical bellwether

17 AAA Mass Arbitration Supplementary Rules («Rules») and Fee Schedule Rule MA-6(c)(i), effective January 15, 2024.

18 FedArb "Mass Arbitration Framework," Rule 1(c), September 26, 2023.

19 New Era ADR "Rules and Procedures," Rule 6(b)(iii)(3)-(6), August 21, 2023.

20 Id. at Rule 6(b)(iii)(6).

21 FedArb "Mass Arbitration Framework," Rule 1(e), September 26, 2023.

22 Id. at Rule 1(g).

23 See, e.g., AAA Mass Arbitration Supplemental Rules and Fee Schedule, Introduction, effective January 15, 2024.

model. The batching model utilizes anywhere from 10-25 arbitrations proceeding simultaneously on individualized basis but on a parallel track. Once complete and the arbitrators' decisions have been rendered in each, the parties hold a global settlement conference to see if the remaining arbitrations can be resolved. If not, a second batch of arbitrations goes forward. This continues until either the mass arbitration is resolved or eventually all the individual arbitrations are heard and decided.

The parties must agree on a process for determining which individual arbitrations will be grouped into each batch, as claimants whose arbitrations are not selected for one of the early rounds of arbitrations will have to wait for a determination of their claim. The selection methods and criteria to consider using in determining which individual arbitrations fit into each batch might include a random selection process, each party choosing an equal number of cases, the arbitrator selecting the cases, or some combination of these methods.

Another option for parties, of course, is to simply move forward with all of the arbitrations at once. While this is by far the most expensive and logistically difficult option, it may call plaintiffs' bluff as they are unlikely to be prepared to arbitrate the claims and could lead plaintiffs to agree to a defense favorable model, taking shortcuts in the presentation of their claims, resolution of the arbitrations on a global basis, or even dropping or consolidating some of the individual claims to the extent they are ethically able to do so.

While the AAA has not adopted a batching, MDL, or bellwether model, it has expanded the role of the Process Arbitrator which defendants can also choose to use to try and limit the number of arbitrations proceeding to an evidentiary hearing. The AAA's prior rules stated that a Process Arbitrator could only decide if claimants had satisfied the AAA filing requirements, allocation of fees, the applicable rules, or other issues "arising out of the nature of" mass arbitrations.[24] Under the new supplementary rules, however, a Process Arbitrator can decide: (i) whether the parties have met filing requirements and how to correct for deficiencies, (ii) disputes over conditions precedent to arbitration such as compliance with a mandatory negotiation period, (iii) selection procedures for the merits arbitrators, and (iv) whether claims can be referred to small claims courts.[25] Most significantly, the rules include that the Process Arbitrator can also decide:

- "Any other non-merits issues affecting case administration arising out of the nature of the mass arbitration that the Process Arbitrator determines is appropriate for determination and
- "Other issue(s) the parties agree in writing to submit to the Process Arbitrator."[26]

These last two items are broadly worded and provide an avenue for the parties to have a number of critical issues determined prior to incurring substantial fees. These expanded powers of the Process Arbitrator may also eliminate claims with procedural deficiencies.

In utilizing any of these methods, defendants will want to negotiate a discovery protocol that avoids each individual claimant being able to seek the same discovery of defendant in each individual case. The overall strategy for handling all of the individual arbitrations, however, will depend on the facts and circumstances of the cases.

**What Best Practices Should A Company Consider?**

Unfortunately, the current court and arbitration service provider system do not provide a lot of good options for dealing with the sheer volume and cost of mass arbitrations once the demands are served. Therefore, it is important for a company to think about how best to deal with mass arbitrations before they arise. One consideration is to take a hard look at your current arbitration agreements. In assessing the adequacy of the arbitration agreement, a company should consider selecting an arbitration service provider where that provider has updated its rules to address mass arbitrations in a cost effective and efficient matter. A company should also take a hard look at the arbitration providers mass arbitration fees and triggers for payment of fees.

Some companies have also decided to incorporate into their arbitration agreements the arbitration model they wish to use for any mass arbitration. This entails crafting a provision that explains either an MDL, batching, or other sequencing model. Other companies have opted to remove their arbitration provisions entirely, deciding they would rather return to the world of potential class actions than deal with the costs, expenses and the risk of facing the prospect of mass arbitration. Another option is to include mass arbitration waivers into the arbitration agreements, providing that the companies have a right to opt out of arbitration and proceed in court if more than a certain number of arbitration claims are filed.

Finally, companies have begun to include in their arbitration agreements provisions designed to eliminate the meritless or deficient claims that are getting swept up into the mass arbitrations. These types of provisions include setting forth details of what an individual must provide as a part of any claim such as individualized

24 AAA Mass Arbitration Supplemental Rules and Fee Schedule, as of August 2023.

25 AAA Mass Arbitration Supplementary Rules («Rules») and Fee Schedule Rule MA-6(c), effective January 15, 2024.

26 Id.

proof like proof of purchase or proof of an account with the company (depending on the company and type of claim). Companies are also requiring claimants to exhaust a pre-dispute resolution process before filing a demand to promote early resolution of disputes before arbitration fees are incurred or an individual can become part of a mass arbitration.

Many of these possible arbitration provisions are untested and courts have only begun weighing in on the enforceability of these provisions. For example, one federal court has held that mass arbitration sequencing procedures are proper if the claimant had notice of it when he/she agreed to the arbitration agreement.[27] Other courts, however, have raised concern that the sequencing of claims can cause unnecessary delays which raises due process concerns.[28]

With each of these possible considerations, a company will have to weigh the pros and cons of their desired approach. Right now, unfortunately, the threat of mass arbitrations is great. The dollars at stake, the number of claims, and risks to target companies is huge. The law is evolving constantly around contract provisions and strategies that companies are implementing to combat mass arbitrations. Companies need to be thinking about a strategy for how to deal with a mass arbitration before they are faced with one and consider if there are steps they can put in place now to avoid becoming a target.

27 E.g., McGrath v. DoorDash, Inc. Case No. 19-cv-05279 (N.D. Cal.) (holding that "mass-claims protocol" permitting companies to "bellwether up to 10" cases at a time was "fair and impartial").

28 E.g., Heckman v. Live Nation Entm't, Case No. 22-cv-004047-CW-GJS (C.D. Cal.).


## You Thought Class Actions Were Bad...

- Judge Friendly: class actions lead to "blackmail settlements.
- Judge Richard Posner: "forcing... defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."



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# . . .Here Come Mass Arbitrations

Dear Fortune 500 Company,

We represent **more than 20,000 individuals** who have claims against your company. We are prepared to serve simultaneous individual demands for arbitration on behalf of each client with [arbitration service provider].

Proceeding to arbitration will obligate you to pay **more than $30 million** in initial costs and fees. More individuals are hiring our firm every day.

We are willing to settle for a **BAZILLION QUADRILLION DOLLARS**.

Signed,
All the plaintiffs of the world



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# Plaintiffs Are Recruiting Individuals





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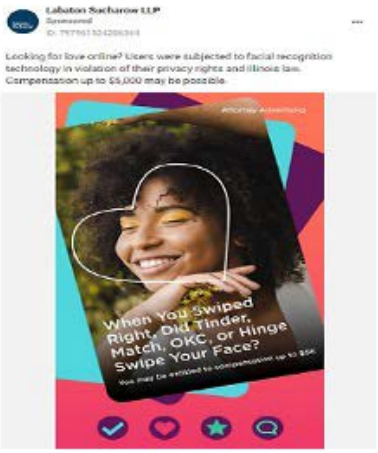
# Plaintiffs Are Recruiting Individuals







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# Plaintiffs Are Targeting Companies



## Lifecycle of Investment

- **Stage 1 - Infrastructure:** $500,000 for software development, advertising and agreement templates, ethics opinions, hardware, marketing and survey consultants, and claim identification.
- **Stage 2 - Client Recruitment:** $2 to $150 advertising cost per client to recruit. Estimated spend of $3.75 million to recruit 75,000 clients at $50 an acquisition.
- **Stage 3 - Filing Cases:** Filing cost of $25,000 plus $50.02 a case, for an estimated filing cost of $3,776,500. (Never expended if an early settlement can be reached.)
- **Stage 4 - Active Arbitration:** Zaiger LLC litigates the first 20 cases, developing templates and models for use on additional cases. $12,000 a case after that to hire contract attorneys managed by Zaiger LLC to litigate disputes using templates and strategies. Most completed arbitrations seen to-date is 160, so total cost likely less than $1.7 million



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# Plaintiffs Are Targeting Companies



## Target and Claim Identification

- **Active Approach:** Identifying 25 to 50 ripe targets, monitor news, and brainstorm claims.
  - Identifying favorable arbitration terms including guaranteed refund of $50 filing fee, use of the AAA as an arbitration provider, application of California law, and language that suggests non-mutual collateral estoppel would apply.
  - Ideal targets: (1) have valuation of ~$10 billion – high enough so they aren't judgment proof and can settle for hundreds of millions of dollars, but low enough that $200 million+ in arbitration fees creates an existential crisis forcing a quick settlement, and (2) a likely IPO or potential acquisition that will make carrying litigation risk unpalatable.
- **Automated/Passive Supplemental Approach:** Monitor court dockets for motions to compel class actions to arbitration, and copycat existing legal theories with potentially better advertising approach.

6



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# Plaintiffs Are Targeting Companies



## Example Target: Valve Corporation

- Valve is an $11 billion company that dominates the market for digital PC game sales. Valve has over a billion customers with accounts. Valve's arbitration is administered by the AAA and specifies all filing fees will be reimbursed for claims under $10,000.
- In April 2021, game developers and consumers filed a putative class action claiming antitrust violations against Valve in the US District Court for the Western District of Washington.
- On October 25, 2021, Judge John Coughenor compelled the consumer claims to arbitration while retaining the developer claims. On May 5, 2022, Judge Coughenor denied (in part) Valve's motion to dismiss the developer plaintiffs' antitrust claims.
- If the proposed infrastructure were in place, today, we could immediately begin recruiting claimants to pursue the claims a federal judge has now ruled are well plead and potentially viable but for which ***a billion*** customers have been compelled to arbitration.

7



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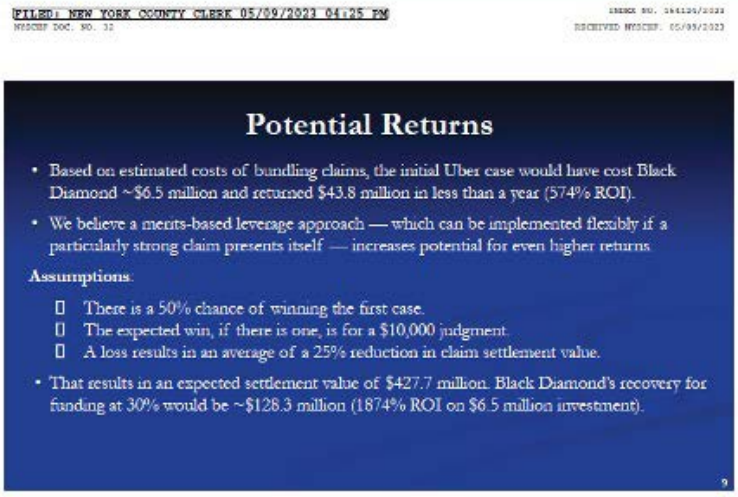
# Plaintiffs are Targeting Companies



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# A Target Rich Environment

amazon STARZ DOORDASH

INTUIT turbotax L'OCCITANE EN PROVENCE



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# A Target Rich Environment






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# The Fees Are Exorbinant

| Arbitration Firm | Consumer Mass Arbitration Claims Filing Fees | | Employment Mass Arbitration Claims Filing Fees | |
|---|---|---|---|---|
| AAA | Claimant | Initiation fee of $3,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims: $125<br>501+ claims: $75 | Claimant | Initiation fee of $3,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims: $125<br>501+ claims: $75 |
| | Defendant | Initiation fee of $8,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims - $325<br>501-1500 claims- $250<br>1501-3000 claims- $175<br>3001+ claims- $100 | Defendant | Initiation fee of $8,125 for the mass arbitration<br><br>Filing fee per case:<br>First 500 claims - $325<br>501-1500 claims- $250<br>1501-3000 claims- $175<br>3001+ claims- $100 |



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# The Fees Are Exorbinant

| Arbitration Firm | Consumer Mass Arbitration Claims Filing Fees | | Employment Mass Arbitration Claims Filing Fees | |
|---|---|---|---|---|
| ADR, Inc. | Claimant | $250 | Claimant | $250 |
| | Defendant | $295 | Defendant | $550 |
| JAMS | Claimant | $250 | Claimant | $400 |
| | Defendant | $1,750 | Defendant | $1,600 |
| National Arbitration and Mediation | Claimant | $100 | Claimant | $100 |
| | Defendant | First 100 claims- $450<br>101+ claims- $375 | Defendant | First 100 claims- $450<br>101+ claims- $375 |



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# The Fees Are Exorbinant

| Number of Claimants | AAA | ADR, Inc. | JAMS | NAM |
|---|---|---|---|---|
| 10,000 | $1.375 M | $2.95 M | $17.5 M | $3.758 M |
| 25,000 | $2.875 M | $7.375 M | $43.750 M | $9.383 M |
| 50,000 | $4.78 M | $14,750 M | $87.5 M | $18.758 M |
| 100,000 | $10.375 M | $29.5 M | $175 M | $37.508 M |



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## Are The Claimants Really Claimants?

- Fake names
- Deceased individuals
- Never a customer
- Name on multiple counsels' claimant lists



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## Are The Claimants Really Claimants?

- Fight the fight in the courts
- Arbitration agreement requirements
- Pre Hearing Arbitration process steps
  - AAA Process Arbitrator
  - Pre filing fee motions



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## Now I Have To Handle 10,000+ Arbitrations At Once???

- Bellwether model
- MDL model
- Batching model
- Call Plaintiffs' bluff
- Use the new arbitration rules



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## The Batching Model

**5. Mass Arbitrations**

If more than fifty (50) claimants (including You) assert similar claims against Samsung through the same or coordinated counsel or are otherwise coordinated ("Mass Arbitrations"), You understand and agree that the additional procedures in this Section 5 apply and that the resolution of Your Dispute might be delayed.

Stage One. Counsel for the claimants and counsel for Samsung shall each select twenty-five (25) claims (per side) to be filed first and to proceed in individual arbitration proceedings as part of a staged process. Any remaining claims shall not be filed or deemed filed in arbitration, nor shall any Arbitration Fees be assessed in connection with those claims unless and until they are selected to be filed as individual arbitration proceedings as part of a staged process. After this initial set of staged proceedings is completed, the Parties shall engage in a global mediation of all remaining claims with a retired federal or state court judge, and Samsung shall pay the mediation fee.

Stage Two. If the remaining claims are not resolved at this time, counsel for the claimants and counsel for Samsung shall each select fifty (50) claims to be filed (per side) and to proceed in individual arbitration proceedings as part of a second staged process. The remaining claims shall not be filed or deemed filed in arbitration, nor shall any Arbitration Fees be assessed in connection with those claims, unless and until they are selected to be filed as individual arbitration proceedings as part of a staged process. After this second set of staged proceedings is completed, the Parties shall engage in a global mediation of all remaining claims with a retired federal or state court judge, and Samsung shall pay the mediation fee.



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# The Batching Model

**5. Mass Arbitrations**

Stage Three. If the remaining claims are not resolved, the Parties shall meet and confer to discuss potential ways to streamline the proceedings, increase efficiencies, and conserve costs. Unless the Parties agree otherwise, counsel for the claimants and counsel for Samsung shall each select seventy-five (75) claims (per side) to be filed and to proceed in individual arbitration proceedings as part of a third staged process. The remaining claims shall not be filed or deemed filed in arbitration, nor shall any Arbitration Fees be assessed in connection with those claims, unless and until they are selected to be filed as individual arbitration proceedings as part of a staged process. After this third set of staged proceedings, the Parties shall engage in a global mediation of all remaining claims with a retired federal or state court judge, and Samsung shall pay the mediation fee.

In connection with each stage set forth above (i) each of the claims within that stage shall be assigned to a different, single arbitrator and (iii) each arbitrator shall aim to issue their award within one hundred twenty (120) days after their appointment.



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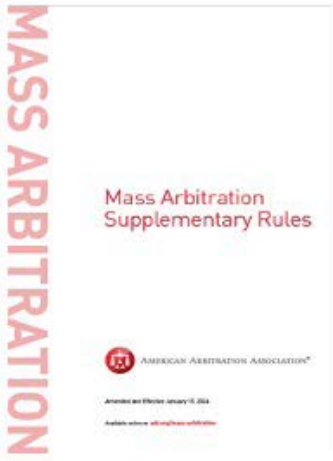
# The New Arbitration Rules




**Rule MA-6(c)**

(c) The Process Arbitrator shall have the authority to determine the following issues:

i. Whether the parties have met the AAA-ICDR's filing requirements or the filing requirements in the parties' contract and, if applicable, how the parties can correct any deficiencies in the filing requirements and how to proceed if they do not;

ii. Disputes over any applicable conditions precedent and, if applicable, how the parties can meet the conditions precedent and how to proceed if they do not;

iii. Disputes regarding payment of administrative fees, arbitrator compensation, and expenses;

iv. Which Demands for Arbitration should be included as part of the mass arbitration filing;

v. The selection process for Merits Arbitrators;

vi. Determining the applicable AAA-ICDR Rules that will govern the individual disputes;

vii. For cases under the Consumer Arbitration Rules:

a) Whether the cases should be closed and the parties proceed in small claims court;

b) Whether the Merits Arbitrator(s) shall proceed by documents only or hold hearings;



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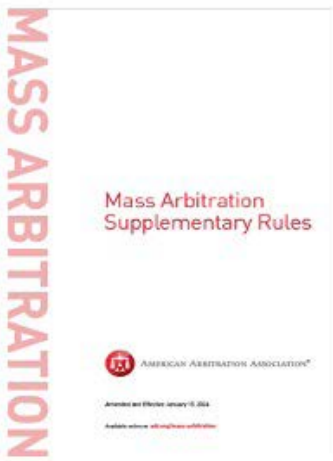
# The New Arbitration Rules




**Rule MA-6(c)**

(c) The Process Arbitrator shall have the authority to determine the following issues:

viii. The locale of the Merits hearings;

ix. Whether subsequently filed cases are part of the same mass arbitration. The Process Arbitrator must allow the parties in these subsequently filed cases the opportunity to address the applicability of any rulings to these cases before making any final determination;

x. Whether any previously issued rulings by the Process Arbitrator are binding on the subsequent cases.

xi. Any other non-merits issues affecting case administration arising out of the nature of the mass arbitration that the Process Arbitrator determines is appropriate for determination and

xii. Any other issue(s) the parties agree in writing to submit to the Process Arbitrator.



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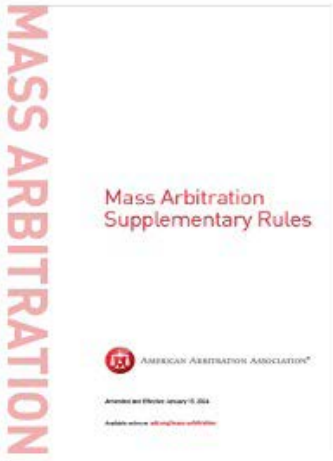
# Try To Reach Agreement




**Parties are encouraged to agree to additional processes that make the resolution of their Mass Arbitration more efficient, such as:**

- An agreed-upon Scheduling Order setting forth deadlines across multiple cases, including those for submission of documents and witness lists, completion of discovery, and filing of motions.
  - Where the parties can agree on the Scheduling Order, they should consult with the arbitrator as to whether a Preliminary Management Conference between the parties and the arbitrator is necessary.
  - Eliminating the need for a separate Preliminary Management Conference in each case can significantly impact time to resolution of the case.
- An agreement to appoint a Limited Service Neutral to oversee procedural issues common to the cases, such as discovery, choice of law, and statute of limitations.



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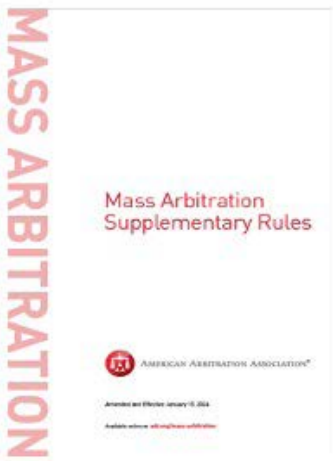
# Try To Reach Agreement




**Parties are encouraged to agree to additional processes that make the resolution of their Mass Arbitration more efficient, such as:**

- An agreement that cases be heard on the documents, rather than by in-person, telephone, or videoconference hearings.
- An agreement to assign multiple cases to a single arbitrator, making the scheduling of conferences and hearings more efficient. Each case will still be heard and decided individually by the arbitrator.
- An agreement on the form of award.
- An agreement limiting briefs, motions, and discovery requests.
- An agreement allowing testimony via affidavit or recorded deposition, rather than requiring live witness testimony.



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# What Else Can We Do?

- Consider revising agreements in terms of arbitration service providers
- Consider revising agreements in terms of requirements for demanding arbitration
- Stay current on risks and legal implications involved



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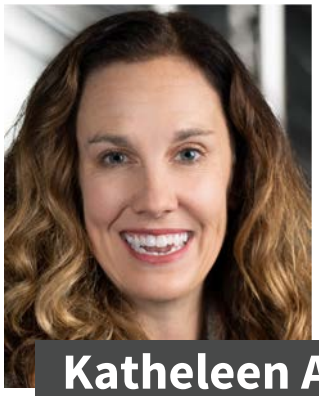

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# Katheleen A. Ehrhart

**Partner | Smith Gambrell Russell (Chicago, IL)**

First and foremost, Ms. Ehrhart is a litigator and has tried cases and arbitrations in federal and state courts throughout the United States. As one client has described, "(Kathy's) cross-examinations are strict and unfaltering, and she irritates counterparties with her thorough preparation." In this role, Ms. Ehrhart represents a variety of individuals, corporations, business and professional firms. She is well-versed in and enjoys representing both the Davids and Goliaths of the world.

She has extensive experience working with executives, senior management, and in-house counsel of corporations in managing litigation as well as advising on litigation risks and strategy. Clients also rely on Ms. Ehrhart for her talent in working with experts, in particular with damages modeling and bringing together the necessary links between mathematics and the law.

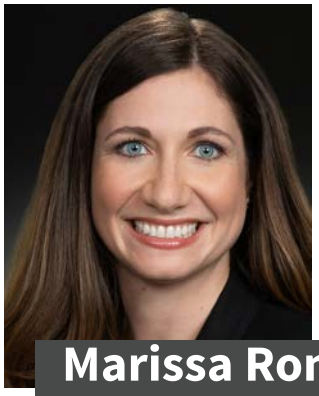
Her areas of focus include complex commercial litigation with particular emphasis on restrictive covenant cases, class actions, reinsurance, antitrust, securities fraud, accountant liability, employment and breach of contract claims.

**Areas of Practice**
- Litigation / Trial Practice
- Insurance and Reinsurance
- Antitrust and Trade Regulation
- International Arbitration & Dispute Resolution

**Representative Experience**
- Successfully represented party in breach of contract and fiduciary duty arbitration with $80 million in claimed damages brought by a major insurance carrier against its managing general underwriter for alleged underwriting guideline violations.
- Obtained temporary injunction in Florida state court for insurance intermediary Brown & Brown, against multiple individuals and AssuredPartners Inc. in a lawsuit over violations of restrictive covenants of former Brown & Brown employees hired by AssuredPartners resulting in a $20 million settlement paid to Brown & Brown.
- Complete defense victory obtained on behalf of managing general agent when carrier brought claims for underwriting violations related to a nonstandard auto insurance program.
- Successfully defended breach of contract, breach of fiduciary duty, and fraudulent misrepresentation claims brought by insurance carrier for over $100 million in damages against its managing general agent related to specialty lines and surety bond programs.

**Recognitions**
- Crain's Chicago Business - Notable GenX Leaders in Law - 2021
- Illinois Leading Lawyers - 2020 (cited in multiple years)
- Illinois Leading Lawyers - Emerging Lawyers - 2017 (cited in multiple years)
- Chicago Daily Law Bulletin and Chicago Lawyer – 40 Illinois Attorneys Under Forty to Watch – 2015
- Leadership Council on Legal Diversity -- Mentor, 2022 - present; Fellow, 2022
- Colorado General Counsel Mentoring Program, 2018-2020

**Education**
- University of Chicago Law School
- University of Illinois at Urbana-Champaign



# How the Plaintiffs' Bar is Moving Away from Reptile Theory Toward Strict Compliance

**Marissa Ronk**
Wheeler Trigg O'Donnell (Denver, CO)

**Using Your Own Rules Against You: How the Plaintiffs' Bar is Moving Away from Reptile Theory Toward Strict Compliance**
*Marissa S. Ronk and Kaleb D. Gregory*

Reptile theory is a now-familiar tactic by the plaintiff's bar to move the jury's attention away from their duty to apply the law to the facts. The modern iteration was presented in 2009,[1] but it has roots in Paul D. MacLean's hypothesis of the human brain from the 1960s.[2] In practice it looks like this: An attorney identifies a generic, unobjectionable safety rule. Then, the attorney argues that the defendant violated the safety rule, and in doing so, puts the community in danger. The attorney then urges the jury to reestablish communal safety by punishing the violation. But a critical element is missing: the legal standard of care.

Today, another theory follows a similar pattern. Plaintiffs' attorneys are urging juries to hold defendants liable for violating an internal policy. In fact, a number of the CVN Top 10 Plaintiffs' Verdicts of 2023 attempted this very tactic.[3] As with reptile theory, plaintiffs' attorneys call on sympathetic facts to obscure the legal standard of care. This is not a new tactic, and prior attempts to define the law have tried to safeguard against using an actor's good intentions and policies against him. For example, under the Second Restatement of Torts, internal policies do not set the standard of conduct of a reasonable man,[4] not even for voluntary undertakings.[5] The Third Restatement retained that rule, stating that an internal policy may be admissible evidence, but "it does not set a higher standard of care for the actor."[6] Nevertheless, the plaintiff's bar has recently attempted to circumvent those longstanding principles by conflating policy violations as a de facto violation of the law. This paper contrasts the correct means of establishing the standard of care with recent illustrative attempts to impose liability for violating internal policies. It also explains that failing to have a policy is not the answer, and proposes practical tips for preventing policy-based liability.

**The Proper Role of Internal Policies**

The law hasn't changed: The legal standard of care still controls, and it cannot be established on the basis of internal policies alone. In many circumstances, courts will allow the admission of internal policies to inform, but not determine, the legal standard of care.[7] The longstanding wisdom has been that using internal policies against the adopter will discourage actors from promulgating guidelines that exceed the prevailing standard of care.[8] Some courts have feared that if the burden of enforcing internal policies becomes too great, actors will forgo adopting voluntary safety policies altogether.[9] To militate against these risks, many jurisdictions require expert testimony whenever the challenged conduct does not fall within the competence of a jury to evaluate[10] and may go so far as to exclude an internal policy that "transcends the traditional common-law standard of reasonable care under the circumstances."[11]

These concerns were at play in Discount Tire v. Bradford.[12] A customer purchased two new tires. Discount Tire moved the old rear tires to the front axle and installed the new tires on the rear axle. Four months later, the left

1 David A. Ball & Don C. Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution (2009).

2 Paul D. MacLean, A Triune Concept of the Brain and Behavior: Hinks Memorial Lectures (T.J. Boag & D. Campbell eds., 1973) (1969 lecture).

3 David Siegel, CVN's Top 10 Most Impressive Plaintiff Verdicts of 2023, Courtroom View Network (Jan. 17, 2024), https://blog.cvn.com/cvns-top-10-most-impressive-plaintiff-verdicts-of-2023.

4 Restatement (Second) of Torts § 285 (Am. L. Inst. 1965).

5 Restatement (Second) of Torts § 324A.

6 Restatement (Third) of Torts § 13 cmt. f (Am. L. Inst. 2010).

7 Shepherd v. Costco Wholesale Corp., 482 P.3d 390, 396 (Ariz. 2021) (collecting cases).

8 E.g., Titchnell v. United States, 681 F.2d 165, 173 (3d Cir. 1982) (discussing health care facilities' guidelines).

9 See Killian v. Caza Drilling, Inc., 131 P.3d 975, 987 (Wyo. 2006) (employer with a "no alcohol" policy did not owe a duty to bicyclist who was killed when an off-duty employee drank alcohol on company premises, drove off premises, and struck the bicyclist).

10 E.g., I.M. v. United States, 362 F.Supp.3d 161, 190 (S.D.N.Y. 2019) (expert testimony is usually required to establish standard of care in the community); see also Ramirez v. Manhattan & Bronx Surface Transit Operating Auth., 258 A.D.2d 326, 327 (1999) (affirming exclusion of report that defendant's driver was at fault because determination was "based on defendant's internal rules and policies that exceeded the applicable common-law negligence standard of care.").

11 Branham v. Loews Orpheum Cinemas, Inc., 31 A.D.3d 319, 323, (N.Y. App. Div. 2006), aff'd, 931, 866 N.E.2d 448 (2007).

12 Discount Tire v. Bradford, 373 So.3d 399 (Fla. Dist. Ct. App. Nov. 3, 2023).

front tire separated. The customer crashed, and he and his son died. The plaintiff argued that Discount Tire's internal policies created a legal duty, and that Discount Tire violated its policy not to service any tire over ten years old when it rotated her husband's fourteen-year-old tires.[13] The plaintiff's expert described Discount Tire's policy as "above and beyond" and "one step higher than other tire retailers."[14]

The trial court initially directed verdict in Discount Tire's favor, but it then ordered a new trial based on the plaintiff's argument that Discount Tire's violation of internal policy could support a negligence claim. The appellate court reversed, holding instead that the industry standard of care controls and not internal policies.[15] The court did not analyze the adverse effects of fixing the standard of care to an internal policy, but they are easy to see: We want retailers getting old tires off the road before tread separation or other incident, and we don't want the companies doing the most to prevent such incidents to disproportionately bear the cost simply because the companies don't live up to their own aspirations.

Undeterred, plaintiffs are testing new ways to focus the jury on the conduct expected of an internal policy, rather than the conduct expected of a reasonable person. So far, the news is good: Courts generally reject or curtail plaintiffs' attempts to obscure the legal standard of care. But a court can protect the legal standard only if defendants recognize these tactics and bring them to the court's attention.

**Employment**

Another area to be wary of is employment. Plaintiffs have had recent success challenging the failure to enforce a policy in hiring decisions. In Taylor v. Los Angeles Unified School District,[16] the plaintiff hired an LAUSD employee to babysit her son during Christmas break. The day after Christmas, the son died as a result of blunt force trauma, and the employee pleaded no contest to second-degree murder. The plaintiff argued that the school was negligent in hiring the employee who killed her son.

The plaintiff provided evidence that LAUSD failed to adhere to proper employment practices. But she also advanced evidence that LAUSD requires direct contact with candidates' employment references before deciding to hire. Trial testimony of another witness established that HR flouted that policy, including when it hired the employee in question. According to news coverage of the case after the verdict, the plaintiff's attorney sought to achieve a policy change once settlement negotiations collapsed. The jury apparently got that message: it returned a $30 million verdict. One juror purportedly told the plaintiff's counsel that the district dropped the ball on its hiring practices.[17] When the jury apportioned fault, it assigned 10% to the mother, 90% to the district—and no fault to the murderer.

**Premises Liability**

Premises liability is another area ripe for manipulation by the plaintiff's bar. In March, a jury returned a multimillion dollar verdict in Morrow v. Walmart Inc., after a woman tripped on a pothole in a parking lot.[18] The woman claimed not to see the pothole because a parked vehicle cast a shadow on it, and Walmart claimed she didn't see it because she was staring at her phone while walking through the parking lot. Plaintiff's counsel argued that the pothole had existed for over a year and Walmart failed to enforce its policy to repair potholes during that period. The plaintiff may have offered evidence that Walmart violated other standards, but counsel did not credit those standards for plaintiff's success. In a post-trial interview, plaintiff's counsel stated that "retailers have to provide the safest shopping experience to [their] shoppers" and that the verdict "emphasizes the importance for retailers to enforce their own safety policies."[19]

**Medical Malpractice**

Another common and more complicated area for plaintiff's abuse of internal policies is medical malpractice litigation. In Michigan, a plaintiff alleged a nurse committed ordinary negligence when he failed to follow an internal policy to contact the physician on call in certain circumstances.[20] The trial court accepted the ordinary negligence claim and believed a jury could consider whether the failure to follow the internal policy was reasonable.[21] As a result, it refused to dismiss the claim.[22] That error was corrected on review—the Michigan Supreme Court found that the plaintiff had asserted a disguised medical malpractice claim.[23] It then reiterated a century-old rule that internal policies do not set the legal standard of care for such

13 Id. at 401.

14 Id. at 402.

15 Id. at 404.

16 Taylor v. Los Angeles Unified Sch. Dist., No. 20STCV33128 (Los Angeles Cnty. Super. Ct. filed Aug. 31, 2020).

17 David Siegel, LA Jury Awards $30M For Murder of Child By School Employee, Beating 75K Settlement Offer, Courtroom View Network (Aug. 14, 2023), https://blog.cvn.com/la-jury-awards-30m-for-murder-of-child-by-school-employee-beating-75k-settlement-offer.

18 Morrow v. Walmart Inc., No. 37-2020-00020399-CU-PO-CTL (San Diego Cnty. Super. Ct. Mar. 27, 2024).

19 David Siegel, California Jury Awards $2.45M in Walmart Parking Lot Slip-and-Fall Trial, Courtroom View Network (Mar. 27, 2024), https://blog.cvn.com/california-jury-awards-2.45m-in-walmart-parking-lot-slip-and-fall-trial-watch-gavel-to-gavel-on-cvn. But see Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 892 (Ind. 2002) (acknowledging Walmart's internal policies for managing spills did not state its belief of the minimum standard of care).

20 Meyers v. Rieck, 983 N.W.2d 747, 751 (Mich. 2022).

21 Id. at 752.

22 Id.

23 Id.

claims.[24] As a result, plaintiffs must usually provide expert testimony to establish the standard of care.[25] With no other allegations supporting a breach of the standard of care, the claim had to be dismissed.[26]

But juries may not be so disciplined. Last year, a plaintiff secured what counsel touted as the largest medical malpractice verdict in Arizona's history for her claim that a medical center's course of treatment during her labor and delivery caused her son to develop cerebral palsy.[27] The verdict cleared $31 million. As in Morrow, the evidence may have proven a violation of industry standards, but that isn't what plaintiff's counsel says the case was about. Its own press release said the defendant endangers the lives of patients "by not enforcing its *own* safety policies."[28] (Emphasis added.)

**Having No Policy Is Not Immunity**

A policy may be fodder for plaintiffs, but James v. PacifiCorp shows that the absence of a policy is not a shield against lawsuits.[29] In September 2020, wildfires broke out in Oregon and eventually covered over 1,000,000 acres, destroying thousands of buildings in the process. The plaintiffs filed a class action complaint against PacifiCorp for, among other reasons, its failure to reasonably implement policies and procedures to avoid igniting or spreading fire.[30]

PacifiCorp's practice was to monitor conditions, maintain situational awareness, and balance the long- and short-term risks and benefits for each local area. One factor PacifiCorp considered was the need to provide electricity to first responders and critical facilities like hospitals. But the conditions contributing to the spread of the fire were unprecedented: a senior forecaster for the National Weather Service claimed he had never seen a weather pattern like the one preceding the fire.[31] PacifiCorp did not have a policy to de-energize its power grid in every high-risk area. It instead weighed the risks and decided whether to energize local divisions. Where emergency responders asked for the grid to be de-energized, PacifiCorp did so.

The jury awarded 17 class representatives $87 million for PacifiCorp's failure to de-energize its grid. The verdict does not specify how PacifiCorp breached any duties, but it will increase pressure for utilities to implement policies to de-energize power lines based on unknown risks rather than a practice of conducting a cost-benefit analysis.

**Protecting the Objective Standard of Care**

When you suspect a plaintiff will try to substitute a violation of an internal policy for evidence of the standard of care, you have options. The goal should be to sever any connection between your client's policy and the legal standard of care. The first step is to ensure that the plaintiff is not disguising a claim that requires expert testimony as a claim that does not. Where expert testimony is required, the plaintiff cannot rely only on the internal policy.

A safe next step is to argue that the internal policy is just that: internal. As such, it is not an objective community standard and cannot establish the standard of care a reasonable person would expect. More specifically, find ways to show that the policy exceeds what the common law requires. Perhaps explain that your client's best practices are aspirational and that imposing liability for failing to live up to those goals would result in lower goals rather than a higher standard of conduct.[32] To further undermine the probative value of the policy, argue that the policy was implemented for reasons other than concerns about tort liability.[33] If the court still believes the policy is relevant, argue for its exclusion under the evidentiary rules because its probative value is outweighed by its prejudicial effect.

Where the policy is admitted, be sure to argue for jury instructions that limit the extent the jury may consider the internal policies. Several jurisdictions allow defendants to include jury instructions stating that the internal policy cannot, on its own, establish the legal standard of care. Ensure that the instructions cannot be read to imply that the policy is presumed or intended to represent the minimum standard of care. And where trial courts insist on making mistakes, be sure to preserve your objections so that the appellate court can review.

24 Id. at 755, 757.

25 Id. at 758–59.

26 Id. at 757–58. The internal policies were admissible as evidence of the community standards as to different claims. Id. at 758. Courts have also been corrected for setting the legal standard to a defendant's internal policy at the defendant's behest. Street v. Upper Chesapeake Med. Ctr., Inc., No. --- A.3d at ----, 2024 WL 885195, at *22–23 (Md. Ct. Spec. App. Mar. 1, 2024).

27 Griepentrog v. Banner Health, No. CV2020-052367 (Maricopa Cnty. Super. Ct. Nov. 22, 2023).

28 Press Release, Snyder & Wenner, Snyder & Wenner Wins Historic $31 Million Verdict against Banner Health (Nov. 18, 2023), https://snyderwenner.com/press-release-snyder-wenner-wins-historic-33-million-verdict-against-banner-health/.

29 James v. PacifiCorp, No. 20CV33885 (Multnomah Cnty. Cir. Ct. filed Sept. 30, 2020).

30 Plaintiffs have relied on this theory in other cases alleging a failure to de-energize power lines. See David Botter & Lisa Schweitzer, Wildfire Challenges for Utility Investors: Liability Theories, Law360 (Mar. 7, 2024), https://www.law360.com/articles/1810679/wildfire-challenges-for-utility-investors-liability-theories.

31 Jes Burns, We know climate change set the conditions for Oregon fires. Did it stoke the flames, too?, Oregon Public Broadcasting (Sept. 21, 2020), https://www.opb.org/article/2020/09/21/oregon-wildfires-climate-change-role/.

32 E.g., In re: Tylenol (Acetaminophen) Mktg, Sales Pracs., & Prods. Liab. Litig., MDL No. 2436, 2016 WL 4039271, at *10 (E.D. Pa. July 28, 2016).

33 See Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 892 (Ind. 2002).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TRIALS. LITIGATION. APPEALS.
Using Your Own Rules Against You
Marissa Ronk
Wheeler Trigg O'Donnell LLP
May 3, 2024


Using Your Own Rules Against You
How the Plaintiffs' Bar is
Advancing Reptile Theory
Toward Strict Compliance
Wheeler Trigg O'Donnell LLP

## History: Reptile Theory

- Plaintiff identifies a generic, unobjectionable safety rule
- Then argues defendant violated that safety rule
- Violation of the rule puts the community at risk

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## Recent Development: Using Your Own Policy Against You

- Plaintiff identifies your own rules
- Then argues defendant violated its own rule
- Violation of that rule puts the community at risk


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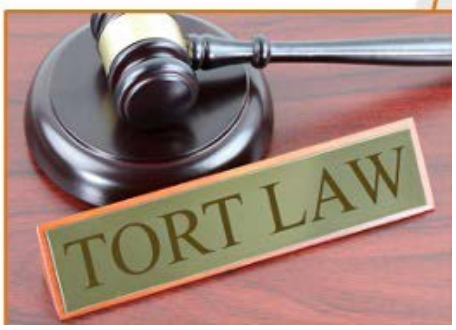
## It shouldn't be this way...

- Established law is that your policy doesn't set the standard of care
- See e.g., Second, Third Restatement of Torts
- State law largely incorporates

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## But the plaintiffs' bar is creative...

- Much easier to point to your own policy violation than actually prove the industry-wide standard of care
- So – argument that conflates your policy with the industry-wide standard of care

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## Recent Examples – Employment

- ***Taylor v. Los Angeles Unified School District* (2023)**
  - District policy did not allow school employees to solicit parents for babysitting; supervisor knew of policy violation
  - Employee tragically murdered a student while babysitting him
  - $30M verdict in negligent hiring and supervision case

Wheeler Trigg O'Donnell LLP

## Recent Examples – Medical Malpractice

- ***Griepentrog v. Banner Health* (2023)**
  - Plaintiff alleged defendant's administration of Pitocin during her childbirth caused her son severe brain damage
  - Plaintiff argued the Pitocin administration was in violation of the hospital's own policies
  - Result? Largest-ever medical malpractice verdict in AZ history

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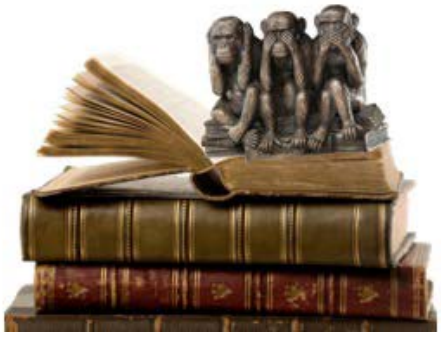
## How Can I Get Out of This?

"Can I get out of this by just not having policies?"

No! Not having a policy will not save you!



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## Case Study – Wildfire Litigation

- ***James v. PacifiCorp.* (2023)**
  - Class action complaint against PacifiCorp for Oregon wildfires
  - Allegations that PacifiCorp should be liable because it *failed* to implement fire policies
  - $87 million verdict to 17 class representatives

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## Case Study – How to Do It Right

- ***Discount Tire v. Bradford* (2023)**
  - Discount Tire violated its policy not to service any tire over ten years old
  - Plaintiffs sued for deaths from tread separation four months later
  - Appellate court found for Discount Tire, holding industry standard of care controls
  - What worked? Expert admissions that DT's policies were "above and beyond" and "higher" than other retailers

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## Practical Tips – Ahead of Time

1. Have a policy
2. Craft policies that expressly allow for independent judgment
3. Training and documentation


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## Practical Tips – Once You're in Litigation

- Affirmative expert testimony
- 

plaintiff's expert testimony
- Sideline the issue as tertiary
- Showcase your good training and documentation
- Fight on admissibility and impact, including motions in limine and jury instructions

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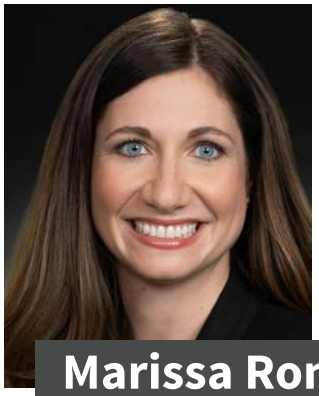

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# Marissa Ronk

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

Marissa Ronk represents sophisticated clients in complex commercial litigation and class and mass actions. She is a strategic leader, setting the direction and development of major cases to establish priorities, challenge and frustrate opponents, and create opportunities. Colorado Super Lawyers lists Marissa for Business Litigation, and Benchmark Litigation has named her to its 40 & Under Hot List.

A resourceful, proactive, and savvy leader, Marissa builds case strategies that align with clients' business goals and values. Rather than react to opponents' moves, she designs litigation plans that exploit pain points and increase leverage for her clients, whether as a plaintiff or defendant. For example, Marissa often develops counterclaims and pursues aggressive discovery to take an upper hand.

In addition to her practice, Marissa serves as a mentor in the Leadership Council on Legal Diversity and a co-chair of WTO's associate review committee. Prior to joining WTO in 2015, she worked in the litigation department of Winston & Strawn in Chicago.

**Practice Areas**
- Commercial Litigation
- Class Actions
- Product Liability
- Appellate

**Industries**
- Consumer Products & Services
- Oil & Gas
- Automotive
- Cannabis
- Healthcare

**Legal Memberships, Activities, and Honors**
- Colorado Super Lawyers -- Super Lawyers, Business Litigation, 2023-2024; Rising Stars, Business Litigation - 2021; Rising Stars, Personal Injury - Products Defense, 2018-2020
- The Best Lawyers in America -- Ones to Watch - Commercial Litigation, 2021, 2022, 2024; Ones to Watch - Mass Tort Litigation / Class Actions - Defendants, 2021-2023; Ones to Watch - Product Liability Litigation - Defendants, 2021, 2022, 2024; Ones to Watch - Litigation - Labor and Employment, 2024
- Benchmark Litigation -- Future Star, 2021-2023; 40 & Under Hot List, 2023-2024
- Leadership Council on Legal Diversity -- Mentor, 2022 - present; Fellow, 2022
- Colorado General Counsel Mentoring Program, 2018-2020

**Education**
- Harvard Law School - J.D., 2011, Journal of Law and Technology, Articles Editor
- Northwestern University - B.A., 2008, cum laude, English and Political Science

# An Ominous Forecast: Climate Change Litigation Threatens Tort Law Concepts

**Mark Clark**
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**An Ominous Forecast: Climate Change Litigation Threatens Tort Law Concepts**
*Mark L. Clark*

In the United States, climate change litigation has taken on several forms. Lawsuits brought by a state, county, or municipality against companies whose products allegedly create greenhouse emissions is the dominant and popular litigation driving much of the climate change litigation. Such lawsuits normally also allege that the companies have engaged in "greenwashing" by misleading consumers on the environmental dangers posed by their products. Regulatory actions brought by government administrative agencies to enforce the Clean Air Act and other federal or state environmental regulations related to greenhouse emissions have been used. States have sued neighboring States over environmental policies or the lack thereof. Non-Governmental Organizations ("NGO's) have sued Federal Agencies and various States seeking to compel stricter regulations or more rigorous enforcement.

Herein we will examine these various forms of climate change litigation in the United States to identify the legal issues presented, the remedies sought and the anticipated effectiveness of such litigation going forward.[1] This litigation as a whole threatens to significantly change ttort law by redefining duties, establishing new forms of strict liability and calling for "rough justice" in determining damages. We will look at the potential changes to come if this litigation is permitted by the U.S. Supreme Court to continue.

**States, Counties and Municipalities vs. Big Oil, Car Manufacturers and Others**
A prime example of a state suing the producers of fossil fuels seeking damages caused by global warming is Platkin vs. Exxon Mobil Corporation.[2] In Platkin the New Jersey Attorney General sued several large oil companies along with the American Petroleum Institute. Plaintiff alleged that the defendants had been long aware of the hazards of the products they sold to the environment and their contribution to global warming. Nevertheless, the defendants allegedly engaged in greenwashing campaigns touting their products as climate friendly or otherwise green products. The state alleged that it had been damaged by rising sea levels, more frequent coastal flooding, more powerful hurricanes, the degradation of water quality, more polluted waterways, warmer temperatures, and a more polluted atmosphere.

The State asserted causes of action for failure to warn, negligence, impairment of the public trust, trespass, public nuisance, private nuisance, and violations of the State's Consumer Fraud Act.

**Federal Preemption Fails as a Basis for Removal and Dismissal of State Causes of Action**
Defendants attempted to get these cases into Federal court and to have them dismissed asserting that federal statutes preempted the state causes of action, asserting federal preemption as both the basis for removal and for dismissal of the state court claims. While pre-emption showed early promise, it now seems to have been nullified by multiple rulings from U.S. Circuit Court of Appeals holding that Federal Preemption does not apply to climate change litigation.

Federal preemption was first raised in an environmental pollution case in 1972, in, Illinois v. City of Milwaukee, Wisconsin.[3] In that case, the State of Illinois sued four municipalities in Wisconsin for polluting Lake Michigan. The U.S. Supreme Court allowed the lawsuit to move forward as there was no federal statute at that time which preempted the State's claims for pollution.

The matter was remanded to the District Court for further proceedings. After the Court issued its opinion, Congress created the Federal Water Protection Act of 1972. In 1981

1 Columbia University maintains a database of U.S. Climate Change Litigation at https://climatecasechart.com/

2 Platkin vs. Exxon Mobil Corporation et. al. Pending in the Superior Court of New Jersey, Law Division, Cause No. MER-L-001797-22.

3 Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972), disapproved in later proceedings sub nom. City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981)

the Supreme Court issued its second opinion in the case, Milwaukee II, and noted that its earlier opinion set forth in Illinois v. City of Milwaukee was no longer applicable as any state based claim was now preempted by the 1972 federal statute.[4]

At first it appeared that federal preemption would be a valuable defense in climate change litigation. In the City of New York vs. Chevron Corp[5], the federal trial court found that all of the state actions were preempted by federal environmental statutes and retained jurisdiction over the matter. Furthermore, the entire case was dismissed as all claims were based upon state common law and preempted by federal law. The U.S. Second Circuit Court of Appeal the Court affirmed that decision stating:

> Global warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law. Consistent with that fact, greenhouse gas emissions are the subject of numerous federal statutory regimes and international treaties. These laws provide interlocking frameworks for regulating greenhouse gas emissions, as well as enforcement mechanisms to ensure that those regulations are followed.
>
> The City of New York has sidestepped those procedures and instead instituted a state-law tort suit against five oil companies to recover damages caused by those companies' admittedly legal commercial conduct in producing and selling fossil fuels around the world. In so doing, the City effectively seeks to replace these carefully crafted frameworks – which are the product of the political process – with a patchwork of claims under state nuisance law.[6]

The success from the Second Circuit was short lived, however, and soon thereafter the U.S. Third Circuit Court of Appeal came to the opposite conclusion when considering a climate change mass action. The court explained that preemption may be a valid defense but a federal preemption defense requires complete preemption. Federal law completely preempts state law only when there is (1) a federal statute that (2) authorizes federal claims "vindicating the same interest as the state claim."[7] The court found that the claims brought by the states in the climate change litigation were not completely preempted by federal statute and therefore remanded the claim to state court. Other appellate courts have likewise remanded climate change cases to state court.[8] Even though numerous defendants have petitioned the U.S. Supreme Court to review these cases, the U.S. Supreme Court had thus far denied all requests.

As defendants move forward litigating these matters in state court other powerful defenses remain. Given that the causes of global warming are myriad and there appears to be no path to prove proximate cause as to any one defendant among a sea of participants in the marketplace, defendants have traditional arguments related to duty and causation. Likewise proving the extent of global warming and its effects on any one storm or weather incident would seem impossible under present evidentiary rules. Establishing reliable expert testimony related to causation and damages also is challenging for plaintiffs. As one legal scholar has noted, certain paradigms that presently exist in the American tort system may change as a result of rulings that could potentially be made in the climate change litigation.[9]

To understand the litigation details of climate change litigation it is important to understand how the claims are brought and in what forums.

**U.S. Administrative Agencies Face Challenges and Limits:**

The EPA and other agencies have attempted to bring isolated suits based upon specific provable acts. One such case is the United States vs. Hyundai Motor Company.[10] In that case the U.S. Environmental Protection Agency ("EPA") on behalf of itself and the California Air Resources Board ("CARB") sought monetary penalties and injunctive relief against Hyundai for allegedly falsifying fuel economy and greenhouse gas emissions claims for over one million Hyundai and Kia vehicles with model years 2012 and 2013. The EPA prevailed and imposed a $100 million dollar fine, the largest fine ever issued in the history of the Clean Air Act. Additionally, Hyundai was required to forfeit 4.75 million greenhouse gas credits and entered a consent decree requiring it to change its process for certifying the emissions of its vehicles.

The case represents the power of the EPA and other agencies to hold companies responsible, in specific

4 City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981).

5 City of New York v. Chevron Corp., 993 F.3d 81, 90 (2d Cir. 2021).

6 Id.

7 City of Hoboken v. Chevron Corp., 45 F.4th 699, 707 (3d Cir. 2022), cert. denied sub nom. Chevron Corp. v. City of Hoboken, New Jersey, 143 S. Ct. 2483, 216 L. Ed. 2d 447 (2023).

8 Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44, 50–51 (1st Cir. 2022); Mayor & City Council of Balt. v. BP P.L.C., 31 F.4th 178, 238 (4th Cir. 2022); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101, 1106-07 (9th Cir. 2022); Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733, 744 (9th Cir. 2022); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1246 (10th Cir. 2022).

9 Douglas A. Kysar, What Climate Change Can Do About Tort Law, Yale Law School, Public Law Working Paper No. 215, Douglas A. Kysar, Environmental Law, Vol. 41, No. 1, 2011, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645871

10 United States v. Hyundai Motor Co., 77 F. Supp. 3d 197, 200 (D.D.C. 2015).

cases, for violating the Clean Air Act and other statutes. However, the nature of such claims is preventative. Statutes and regulations related to pollution were established to stop pollution from occurring and to compel clean up and remediation of specific identifiable spills or other releases of pollutants. U.S. governmental agencies are not equipped with laws or regulations which seek to impose penalties for the overall effects of global warming from the otherwise legal sale, use or release of greenhouse gasses. The ability of the EPA and other governmental agencies to impose fines and other forms of penalties has also come under scrutiny lately. SEC had imposed fines on a hedge fund advisor for securities fraud.In Jarkesy vs. Securities and Exchange Commission[11] the defendant claimed it was unlawful for the SEC to impose penalties without a jury trial. The Fifth Circuit agreed that the imposition of the fines by the SEC violated the defendant's right to a jury trial. The U.S. Supreme has granted writ of certiorari and will hear the case in the coming months. If upheld, this case could potentially extend to other agencies including the EPA and would significantly curtail the EPA's enforcement powers.

The EPA also has limited ability to change entire industries. In West Virginia v. EPA,[12] the EPA implemented a new rule on emissions from electrical power generation that was designed to dramatically reduce the amount of electricity generated from power plants who used coals as their primary source of energy. The U.S. Supreme court held that the EPA had exceeded its legislative mandate by attempting to use its rule making authority to significantly alter power generation from coal on a national scale. The U.S. Supreme Court agreed that the EPA did in fact overstep its authority, applying the major question doctrine to hold that such major questions are reserved to the legislature. The rule was accordingly stricken.

Given these restrictions on the EPA's rule making ability, the EPA is not in a position to effect wholesale change concerning greenhouse emissions across an entire industry.

**Actions on Behalf of Private Citizens**

It is rare that private citizens under U.S. law have standing to sue for public harms. However, some groups are trying or have tried to bring claims seeking damages for global warming personally affecting them. In Pacific Coast Fed'n of Fishermen's Associations, Inc. v. Chevron Corp[13] the Association sued on behalf of itself and all of its members claiming that global warming has harmed the fisheries of the U.S. West Coast and sought damages for the economic impact to the fishing businesses of its members. The case was successfully removed to federal court under the Class Action Fairness Act.

In Bush v. Rust-Oleum Corp[14], a class action was filed on behalf of California consumers against the Defendant for selling cleaning products that were alleged to be non-toxic and earth friendly. The plaintiff alleged that these were misrepresentations. The plaintiff also alleged violation of the Unfair Competition Law, deceptive advertising, breach of warranties and unjust enrichment, seeking an injunction and disgorgement of profits. Defendants challenged the standing of theplaintiff to bring such suits and claimed that other statutory conditions precedent were not met prior to filing suit. The court denied the motion to dismiss. The case is now proceeding and it will be an interesting to examine the role that private actors may play in seeking damages for a contribution to global warming as this case moves forward.

**Future of Climate Change Litigation in the United States**

While significant climate change litigation has been filed in the past few years, m any of the cases have spent years in the state courts and federal courts arguing over whether the federal courts have jurisdiction over such claims. Most of the cases have been remanded to state court and the U.S. Supreme Court has not sought to intervene in such decisions to remand.

Various defendants have sought writ of certiorari to the U.S. Supreme Court concerning federal preemption, but so far the Supreme Court has not been inclined to grant cert to hear the issues presented. That could change as defendants are presently seeking certiorari to the U.S. Supreme Court from a ruling by the Hawaii Supreme Court finding that the City of Honolulu had valid claims under state law against defendants for climate change harms.[15] This Hawaii case is in a different position than others in that it is an appeal from a Hawaii State Supreme Court which accepted an interlocutory appeal from the denial of a motion to dismiss. In the Hawaii Supreme Court's ruling, the court ruled held that the causes of action arose from normal state tort causes of action that were not preempted by federal laws.

The Supreme Court of Hawaii summarized the two sides of the cases brought by Honolulu as follows:

11 Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688 (2023), and cert. denied, 143 S. Ct. 2690 (2023).

12 West Virginia v. EPA, 597 U.S. 697 (2022).

13 Pac. Coast Fed'n of Fishermen's Associations, Inc. v. Chevron Corp., No. 18-CV-07477-VC, 2023 WL 7299195 (N.D. Cal. Nov. 1, 2023).

14 Bush v. Rust-Oleum Corp., No. 20-CV-03268-LB, 2021 WL 24842, at *1 (N.D. Cal. Jan. 4, 2021)

15 City & Cnty. of Honolulu v. Sunoco LP, 153 Haw. 326, 537 P.3d 1173 (2023).

> Plaintiffs argue this is a traditional tort case alleging that Defendants engaged in a deceptive promotion campaign and misled the public about the dangers of using their oil and gas products. Plaintiffs claim their theory of liability is simple: Defendants knew of the dangers of using their fossil fuel products, "knowingly concealed and misrepresented the climate impacts of their fossil fuel products," and engaged in "sophisticated disinformation campaigns to cast doubt on the science, causes, and effects of global warming," causing increased fossil fuel consumption and greenhouse gas emissions, which then caused property and infrastructure damage in Honolulu. Simply put, Plaintiffs say the issue is whether Defendants misled the public about fossil fuels' dangers and environmental impact.
>
> Defendants disagree. They say this is another in a long line of lawsuits seeking to regulate interstate and international greenhouse gas emissions, all of which have been rejected. Greenhouse gas emissions and global warming are caused by "billions of daily choices, over more than a century, by governments, companies, and individuals," and Plaintiffs "seek to recover from a handful of Defendants for the cumulative effect of worldwide emissions leading to global climate change and Plaintiffs' alleged injuries." They argue: (1) the circuit court lacked specific jurisdiction over the Defendants; (2) Plaintiffs' claims are preempted by federal common law, which in turn, was displaced by the Clean Air Act (CAA); and (3) alternatively, Plaintiffs' claims are preempted by the CAA.[16]

While the court agreed with plaintiff's position, the U.S. Supreme Court may find differently if certiorari is granted.

**Paradigm Shifts in Liability and Damages**

Defendants in the climate change litigation assert that global warming is caused by "billions of daily choices, over more than a century, by governments, companies, and individuals . . ." Plaintiffs seek damages for the cumulative effects of worldwide emissions. Such claims present significant problems for traditional standards of proof. As Professor Douglas Kysar has noted:

> [T]ort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible.[17]

However, many commentators, including Professor Kysar, are undaunted by the evidentiary hurdles that the common law presents. These commentators call for an evolution of the common law to address the economies of scale presented by climate change litigation. As one writer noted, "Climate change adaptation is in all likelihood going to be the catalyst for that to happen with uncharacteristic speed for the common law." [18]

These commentators envision a system where environmental regulations are complimented by common law causes of actions such as public nuisance and violation of public trust. As property loss, business damages, and personal injury damages due to climate change litigation increase, the desire for governments to find defendants to fund climate change adaptations will purportedly drive the common law to find a solution. The solution will be fueled by a rapid evolution of property rights and a merger of water law, land-use law, and environmental law. New liability rules, these commentators profess, will be instituted to allow recovery of climate adaption resources. "The litigation grist mill will gear up to resolve these claims, and new ground is likely to be covered to further the traditional common law interests of efficient use of property."[19]

Regarding foreseeability arguments, plaintiffs have put forth a foreseeability argument, arguing that isncer 1992, the harms of selling fossil fuels was foreseen. This argument relies in part on the fact that 193 nations signed the United Nations Framework Convention on Climate Change (UNFCC) document in 1992 and that document stated that "human activities have been substantially increasing atmospheric concentrations of greenhouse gases. . ." Therefore, plaintiffs argue that at least by 1992 the harm from selling fossil fuels was foreseen and defendants had a duty of ordinary care at that point to avoid climate induced harms.

This leads the plaintiffs to imagine a change in tort law such that climate change liability will be based in strict liability. Under this scenario, just as manufacturers of products have been held responsible for failure to warn of hazards that were unknown at the time the product was manufactured, those who produce fossil fuels should be held to have had "constructive knowledge" of the harms they were unleashing, holding them strictly liable for the harms they caused through climate change.[20]

Regarding damages, plaintiffs take a page from hearing

16 Id. at 1180.

17 Douglas A. Kysar, What Climate Change Can Do About Tort Law, 41 Envtl. L. 1, 3–4 (2011).

18 J.B. Ruhl, Climate Change Adaptation and the Structural Transformation of Environmental Law, 40 Envtl. L. 363, 402 (2010)

19 Id.

20 Kysar, p. 41.

loss cases. In hearing loss cases even though a person with hearing loss cannot prove what percentage of loss they have suffered due to a particular industrial work exposure, jurors in some states are instructed by the court to apply a type of "rough justice" and estimate the loss.[21]

The collective wisdom among plaintiffs seems to be that the most successful approach to effecting these changes is for governments to bring actions seeking adaptation damages caused by the defendant's conduct. Such damages include the cost of building seawalls, coastal armoring, flood gates, new dams, bigger levees, fighting wildfires, managing water restrictions, recovering from stronger and more frequent hurricanes, and providing cooling systems to poorer more vulnerable populations.

**Defendant's Perspective Anticipates Due Process**

The legal scholar community has rebutted plaintiffs' argument stressing the link between duty and harm and that the hallmark of duty is foreseeability. The duty that plaintiffs seek to establish is one in which a defendant may be liable for contributing to a risk of harm for society in general without any requirement that the defendant actually caused the harm.[22] If plaintiffs are successful the nexus between victims who are harmed by an actor will be dissolved and defendants will be held liable for harm even though there is no showing that a defendant caused the damages. Such a system would not be a common law-based tort system at all but rather would vest "unbounded legislative and regulatory power to the judiciary."[23] The constitutional separation of powers clause forbids such a transfer of power to the judiciary.

Fairness is likewise still a cornerstone of the U.S. legal system. "[A]llowing liability to be imposed arbitrarily on the few for harms attributed to the actions of the collective" would be fundamentally unfair.[24] Defendants argue that climate change and other "collective action" problems cannot be addressed through the common law tort system. The common law tort system cannot be change or modified to allow a judge to assess and allocate liability for social harms against a small group of defendants.

**The Issue Could be Resolved Soon**

As mentioned above in, City of New York v. Chevron Corp. the U.S. Second Circuit found that the broad climate change damages sought by the plaintiffs for international climate change had no place in a court of law. Plaintiffs' claims were completely subsumed by the environmental statutes and administrative rules of the United States, and all of the claims were dismissed. That viewpoint was not shared by other circuit court of appeals that have held differently and remanded plaintiffs back to state court to litigate the matters. Now the U.S. Supreme Court has a Petition of Writ of Certiorari before it in Sunoco, LP vs. City and County of Honolulu, et. al. Cause No. 23-947. Will the Court finally agree to hear these issues? Dozens of cases involving hundreds of defendants are waiting for some guidance from the U.S. Supreme Court regarding the viability of these claims.

If the Supreme Court does not accept the case, be prepared that some state courts will aggressively seek to change the landscape of mass tort litigation very quickly.

21 Id.

22 David T. Buente Jr., Quin M. Sorenson, Clayton G. Northouse, A Response to What Climate Change Can Do About Tort Law, 42 Envtl. L. Rep. News & Analysis 10749, 10750 (2012)

23 Id.

24 Id. at 10750.

# An Ominous Forecast: Climate Change Litigation Threatens Tort Law Concepts

## THE PROBLEM

Climate Change Lit.
Billions Sought

PMM
LAW
Parsons McEntire McCleary PLLC

## Climate Change History

1992 United Nations Framework Convention on Climate Change

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## Illinois vs. Milwaukee

U.S. SUPREME COURT APPROVES
LITIGATION TO ENFORCE
ENVIRONMENTAL HARMS


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Parsons McEntire McCleary PLLC

# GOVERNMENT ACTIONS AGAINST FOSSIL FUELS

**GOVERNMENTS SUE FOR SOCIETAL HARMS**

CLIMATE ADAPTATION COSTS:
SEAWALLS
LEVEES
COSTAL HARDENING
COASTAL VEGETATION
WATER SOURCE DEVELOPMENT
FIGHTING FOREST FIRES

PMM LAW
Parsons McEntire McCleary PLLC

# PRIVATE ACTIONS

FISHERMAN'S GROUP IN CALIFORNIA

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## EPA LIMITATIONS

WEST VIRGINIA VS. EPA

MAJOR QUESTIONS DOCTRINE

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## DEFENDANTS HAVE EARLY SUCCESS

CITY OF NEW YORK VS. CHEVRON CORPORATION

FEDERAL PREEMPTION DEFENSE ACCEPTED ALL CLAIMS DISMISSED

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## SETBACKS FOLLOW

CITY OF HOBOKEN VS. NEW JERSEY

COMPLETE PREEMPTION IS ELUSIVE FOR DEFENDANTS
SEVERAL MATTERS REMANDED TO STATE COURT

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## PLAINTIFF'S POSITION

Traditional tort case alleging that Defendants engaged in a deceptive promotion campaign and misled the public about the dangers of using their oil and gas products.

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## DEFENDANT'S POSITION

FAIR PLAY AND
SUBSTANTIAL JUSTICE ARE
STILL CORNERSTONES OF
OUR LEGAL SYSTEM

PMM
LAW
Parsons McEntire McCleary PLLC

## RADICAL CHANGES TO TORT LAW PROPOSED

FORESEEABILITY
YOU HAVE KNOWN SINCE UNFCC 1992

DUTY
AVOID CLIMATE INDUCED HARMS

LIABILITY
STRICT LIABILITY – CONSTRUCTIVE KNOWLEDGE

DAMAGES
ESTIMATE BASED UPON ROUGH JUSTICE

PMM
LAW
Parsons McEntire McCleary PLLC

## DEFENDANT'S PROFESSING FAIRNESS AND CONSTITUTIONALITY

LIABILITY
NEXUS BETWEEN VICTIM AND DEFENDANT
ACTIONS MUST BE PRESERVED

SEPARATION OF POWERS
COURTS SHOULD NOT HAVE UNLIMITED
LEGISLATIVE AUTHORITY

HARMS CAUSED BY SOCIETY AS A COLLECTIVE
SHOULD NOT BE IMPOSED UPON A FEW

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Mark Clark has successfully provided leadership to his clients in litigated matters for over 29 years. Corporations and major insurers have consistently relied on Mark's trial skills, judgment, and tenacity in the trial and arbitration of their matters. His experience covers energy, marine, environmental spills, and clean up as well as a large spectrum of litigation in the transportation, construction, real estate, and commercial arenas.

Mr. Clark also has a broad practice in insurance coverage and contractual indemnity litigation. He has had the distinction of being the lead attorney for the Defense in In Re Larry Doiron, Inc. (2018), in which the U.S. Fifth Circuit dramatically changed maritime rules with regard to identifying maritime contracts.

**Expertise**
- Energy
- Environmental
- Insurance
- Admiralty & Maritime
- Commercial Litigation
- Products Liability Litigation
- Real Estate
- Transportation & Motor Vehicles
- Employment Law Litigations

**Memberships and Affiliations**
- State Bars of Texas, Louisiana, Mississippi and Alabama
- Institute for Energy Law Advisory Board Member
- The Network of Trial Law Firms
- Houston Bar Association
- Texas Bar Foundation, Fellow
- Houston Young Lawyers Association, Life Fellow
- Texas Association of Defense Counsel
- International Association of Defense Counsel, Vice Chair Environmental & Energy Law Committee
- Mariners Club of Houston

**Community Services**
- Trustee, St. Francis Episcopal School, Houston, Texas
- Director, Board of Harris County Municipal Utility District #372
- Former Senior Warden, St. Francis Episcopal Church Houston, Texas
- Social Committee and Bylaws Committee Member, Royal Oaks Country Club, Houston, Texas

**Education**
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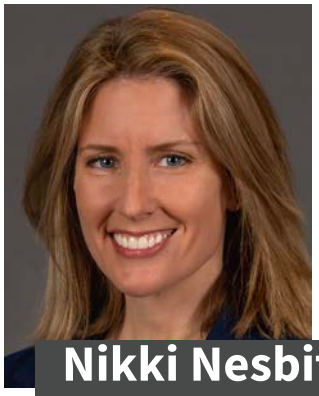


# Separation Anxiety: Can Employers Still Buy Their Peace with Parting Employees?

**Nikki Nesbitt**
Goodell DeVries Leech & Dann (Baltimore, MD)

**Separation Anxiety: Can Employers Still Buy Their Peace with Parting Employees?**
*Nikki Nesbitt*

In March 2023, the National Labor Relations Board ("NLRB") issued guidance that impacts private sector employers' practices for separating with employees. With few (and far from clear) exceptions, the NLRB is now prohibiting employers from presenting parting employees with separation agreements that include confidentiality and non-disparagement provisions. This paper explores the basis for the NLRB's guidance, how likely it is to stick, and what modifications employers should make to their separation discussions and agreements with employees.

**The Case that Led to the New Rule: McLaren Macomb**
At the height of the COVID-19 pandemic in June 2020, McLaren Macomb Hospital in Michigan permanently furloughed 11 non-essential employees in response to government restrictions on having non-essential workers come to the workplace. The hospital offered each of the employees a severance amount based on a pre-existing formula and had them sign severance agreements that contained both confidentiality and non-disparagement provisions. The provisions were as follows:

> 6. Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> 7. Non-Disclosure. …. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

The severance agreement also contained enforcement language for the confidentiality and non-disparagement provisions that gave the hospital "the right to seek and obtain injunctive relief in any court of competent jurisdiction" and imposed on the employees the obligation to pay the hospital "actual damages, and any costs and attorney fees that are occasioned by the violation of these paragraphs."

Given the context of the furloughs – the unanticipated need to reduce personnel because of the pandemic – the hospital did not provide notice of its decision to the applicable Union, and therefore the Union did not have the opportunity to bargain on behalf of the furloughed employees. When the Union found out about the furloughs and separation agreements, it brought charges against the hospital for refusal to bargain or bad faith bargaining in violation of § 8(a)(5) of the National Labor Relations Act ("the Act").[1] An administrative law judge (ALJ) found that the hospital did violate the Act by furloughing the employees and soliciting them directly to enter into separation agreements without first notifying the Union and giving it an opportunity to bargain on behalf of the employees. Importantly, though, the ALJ did not criticize the separation agreements themselves, finding instead that they were voluntary and did not impact the employees' previously accrued benefits. Both the Hospital and the Union filed exceptions with the NLRB.

In the decision that gave rise to the new rule,[2] the NLRB affirmed the ALJ's decision that the hospital had violated § 8(a)(5) of the Act by not involving the Union, but it went further and decided that the confidentiality and non-disparagement provisions of the separation agreements would interfere with or restrain the employees' "Section 7 rights"[3] and that the mere offering of the separation agreements with such language was "unlawfully coercive"

1 29 U.S.C. § 158(a)(5) provides that "it shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."

2 McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union, AFL-CIO, Case No. 07-CA-263041, reported at 372 NLRB No. 58 (February 21, 2023)

3 Section 7 o the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

under § 8 of the Act.

In coming to this conclusion, the NLRB explicitly and forcefully reversed at least four prior NLRB decisions concerning separation agreements, including Baylor University Medical Center4 and IGT d/b/a International Game Technology[5] (both from just 2020) as well as Shamrock Foods Co.[6] and S. Freedman & Sons.[7] Its primary rationale was that both provisions would have a "chilling tendency" against the exercise of both existing and terminated employees' Section 7 rights to assist fellow employees and/or cooperate with future NLRB investigations into unfair labor practices.

**Guidance Arising from the Decision**

Following the ruling, the NLRB's General Counsel, Jennifer Abruzzo, issued a guidance document[8] on March 22, 2023 that attempted to clarify the practical implications of the decision. In the document, General Counsel repeated that separation agreements cannot have provisions "that affect the rights of employees to engage with one another to improve their lot as employees."

Throughout the guidance document, General Counsel denies that all confidentiality provisions must be eliminated, stating instead that only those that "have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties" are prohibited. But this fundamentally includes all confidentiality provisions. The only example of a confidentiality clause that "would not typically interfere with the exercise of Section 7 rights" is one that relates to "proprietary or trade secret information for a period of time based on legitimate business justifications." General Counsel also suggested in a footnote that a confidentiality clause relating solely to "the financial terms" may also pass the test, but her language was frustratingly ambiguous.[9]

As to non-disparagement, the guidance states that "a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful." In other words, it is not a violation of the Act to offer a severance agreement that prohibits the employee from committing malicious defamation. Of course, employers need not require employees to contractually bind themselves to follow tort law.

The guidance touches on the issue of whether a "savings clause" (a clause that clarifies that the confidentiality or non-disparagement provisions are not intended to affect the employee's Section 7 rights) is sufficient to avoid violation of the Act. No clear answer was given, but the document suggests that any savings clause would have to be specific and extensive. Rather than simply stating that the employee retains their rights to organize under Section 7, the savings clause would have to list the types of activity that are not affected by the confidentiality or non-disparagement provisions. As an example, General Counsel listed nine different types of activity that would need to be described to the employee in the agreement, and even then was non-committal about whether it would be enough.

At the end of the guidance document, General Counsel offers a teaser. She states that while confidentiality and non-disclosure provisions are the most likely to offend Section 7 rights, so might other types of provisions, "such as: non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective dates of the agreement" and certain cooperation clauses. Employers should be wary of how those types of agreements are written – or whether they should be implemented at all – but the NLRB has not yet made a judgment call on those types of clauses. The Federal Trade Commission is already heading down the road of outlawing them altogether.

**Necessary Modifications to Separation Agreements**

Based on where things stand now, employers who have separation agreement templates with confidentiality and/or non-disparagement language should amend them to remove those standard provisions and consider adding such provisions only under unique circumstances.

The type of non-disparagement language permitted under these new rules provides no extra protection to employers. Employers already have a remedy in tort for an employee's defamation; they need not introduce a contractual one that could flag the attention of a union. Any confidentiality language going forward needs to be specific. Since the guidance came out, many employers have modified their severance agreements in a way that keeps their standard confidentiality language but

4 369 NLRB No. 43 (2020).

5 369 NLRB No. 50 (2020).

6 366 NLRB No. 117 (2018).

7 364 NLRB No. 1203 (2016).

8 The guidance document can be accessed at https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-with-guidance-to-regions-on-severance.

9 The sentence says, "McLaren Macomb allows for narrowly-tailored provisions, and I believe that approving a withdrawal request when a non-Board settlement has a confidentiality clause only with regard to non-disclosure of the financial terms comports with the Board's decision, would not typically interfere with the exercise of Section 7 rights, and promotes quick resolution of labor disputes."

adds a savings clause. The guidance makes clear that this is a risky way to go and that a savings clause needs to list the Section 7 rights comprehensively to be effective. Of note, the severance agreement in McLaren Macomb itself had a savings clause of sorts. It carved out of the confidentiality obligation any statements made in conjunction with legal proceedings "by a court or administrative agency of competent jurisdiction." The Hospital noted in its briefing that this language allows employees to cooperate with NLRB investigations in accordance with their Section 7 rights. The NLRB nevertheless found that the confidentiality agreement was too restrictive to allow an employee to exercise all of their Section 7 rights, and therefore it was unlawful.

Instead of just adding a savings clause, the confidentiality language should be removed altogether or confined to what the guidance permits: restriction of the dissemination of "proprietary or trade secret information for a period of time based on legitimate business justifications" and, possibly, "non-disclosure of the financial terms." Most other confidentiality language will in some way touch on an employee's Section 7 rights, which the NLRB now strictly prohibits.

But removing confidentiality and non-disparagement language from future severance agreements may not be enough. The McLaren Macomb decision applies retroactively. This doesn't just mean that prior separation agreements with the prohibited language are no longer enforceable. It means that employers who have included the offending language in past separation agreements are – today – in violation of § 8 of the Act, because their "mere offering" of the agreement violated their employee's Section 7 rights and the agreement they offered is still in place. There is a six-month statute of limitations for bringing a claim against an employer under the Act, so it is not likely that employers will be charged for the existence of separation agreements with former employers that contain the prohibited language outside of the limitations period. However, General Counsel did note that actively "maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions" would be an ongoing violation that could be prosecuted. She suggested that "employers should consider remedying such violations now by contacting employees subject to severance agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions."

A practical approach would be to refrain from enforcing confidentiality provisions from previously-signed separation agreements (unless they are tailored enough to comport with the guidance) and send a letter to any employee who signed a separation agreement in the last six months that included such language, notifying them that new guidance from the NLRB declares the confidentiality provision overly-broad and unenforceable and reminding the employee that they maintain their rights under Section 7 of the Act. Rather than paraphrase or quote from Section 7 of the Act, an employer should consider sending a link to the NLRB website page that describes these rights.[10]

**Will These Restrictions Stick?**

It is appropriate for employers to take the NLRB guidance seriously, as it is the current law of the land from a labor standpoint. But the McLaren Macomb case that generated the new law is not over.

The Hospital filed a Petition for Judicial Review in the United States Court of Appeals for the Sixth Circuit on May 3, 2023. It filed its brief on September 18, 2023, as did several amici curiae on its behalf – the Chamber of Commerce of the United States of America, the Coalition for a Democratic Workplace, the Associated Builders and Contractors, the Associated General Contractors of America, the Council on Labor Law Equality, the National Federation of Independent Business Small Business Legal Center, Inc., and The National Retail Federation.

These entities argued that, under earlier precedent, confidentiality agreements were permissible in the context of a departing employee who enters into such an agreement voluntarily, because the voluntary nature of the agreement essentially nullifies any Section 7 violation. They argued that it was inappropriate for the NLRB to overturn its own precedent in that regard, particularly since Section 7 rights are focused on the right to organize and bargain during employment – something an employee can do without disclosing the particular terms of a voluntary agreement following termination. The amici also noted that the "tendency to chill" standard is overly broad and offers employers no practical guidance on the legality of contractual provisions.

The NLRB and the Union filed their responsive briefs on December 13, 2023. The NLRB argued that, by overruling prior precedent, it was merely returning to earlier standards for evaluating severance agreements on their merits, which is a fair way of determining whether an employee's rights are being properly reserved. It also argued that Section 7 rights are broad, and any infringement on an employee's right to discuss terms of employment – including terms of the separation

10 See https://www.nlrb.gov/about-nlrb/rights-we-protect/whats-law/employers#:~:text=Section%207%20of%20the%20National,of%20collective%20bargaining%20or%20other

of employment – undercuts the employee's efforts to organize and advocate with their employer, including for a better severance package.

Oral argument has been scheduled for April 30, 2024.

It is impossible to predict what the Sixth Circuit will do with these arguments, but one critical element is whether Chevron deference – the concept that courts should defer to an agency's reasonable interpretation of its own regulations – will apply. If the Sixth Circuit does give deference to the NLRB in interpreting the scope of Section 7 rights and how a contractual confidentiality clause would affect them, it would affirm the NLRB's decision as long as the NLRB interpreted the Act "reasonably" in connection with the case. If deference is not owed, the Sixth Circuit can make an independent judgment.

The United States Supreme Court is currently poised to rule on whether Chevron deference is constitutional, and most Supreme Court enthusiasts who listened to the oral argument this past January came away believing that the Court will strike down the doctrine. The decision could come any day, and the Sixth Circuit likely will await that decision before handing down its McLaren Macomb ruling.

The Hospital and its amici would have an advantage if the Sixth Circuit need not apply Chevron deference, but the NLRB could win with or without that deference. The decision will come down to whether the court believes Section 7 of the Act guarantees rights that would be impacted by an employer's conditioning a departing employee's severance on confidentiality. This is a case of first impression.

**Conclusion**

The fighting over the NLRB's decision in McLaren Macomb wages on, but McLaren Macomb is the law for now, so employers should make immediate efforts to ensure their separation agreement templates do not contain confidentiality and non-disparagement provisions, and they should be aware that confidentiality provisions in previously-executed separation agreements are no longer enforceable.


Separation Anxiety: Can Employers Still Buy Their Peace with Parting Employees?
K. NICHOLE NESBITT
GOODELL DEVRIES

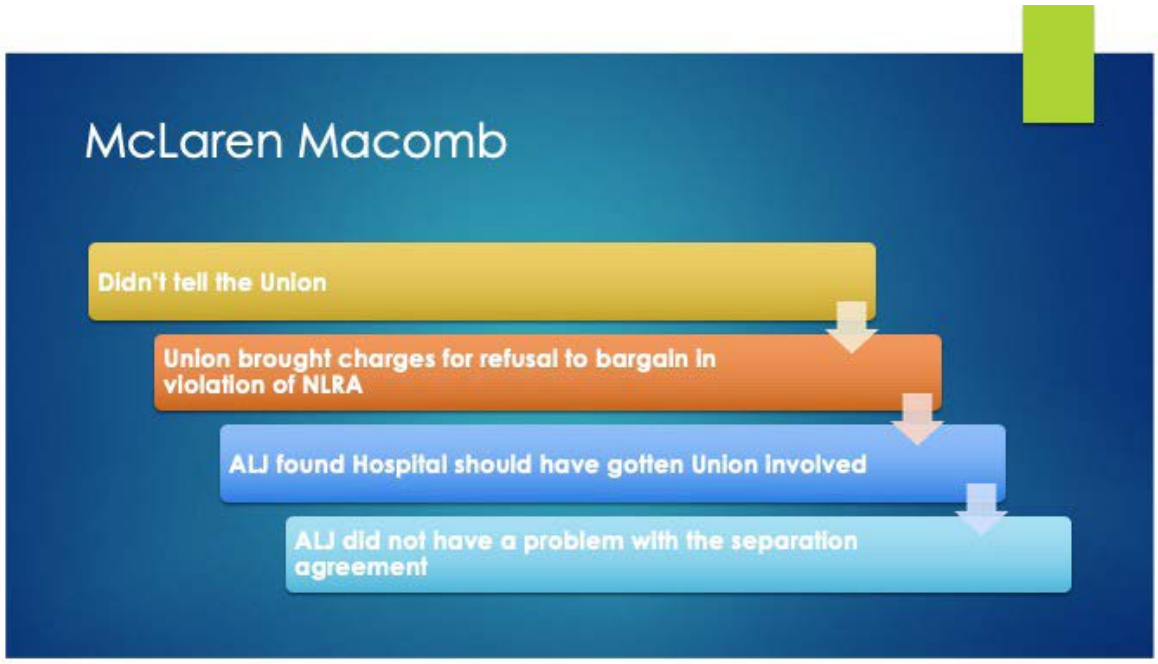

What are we talking about?
It's time to refresh those separation agreements – no more confidentiality and non-disparagement

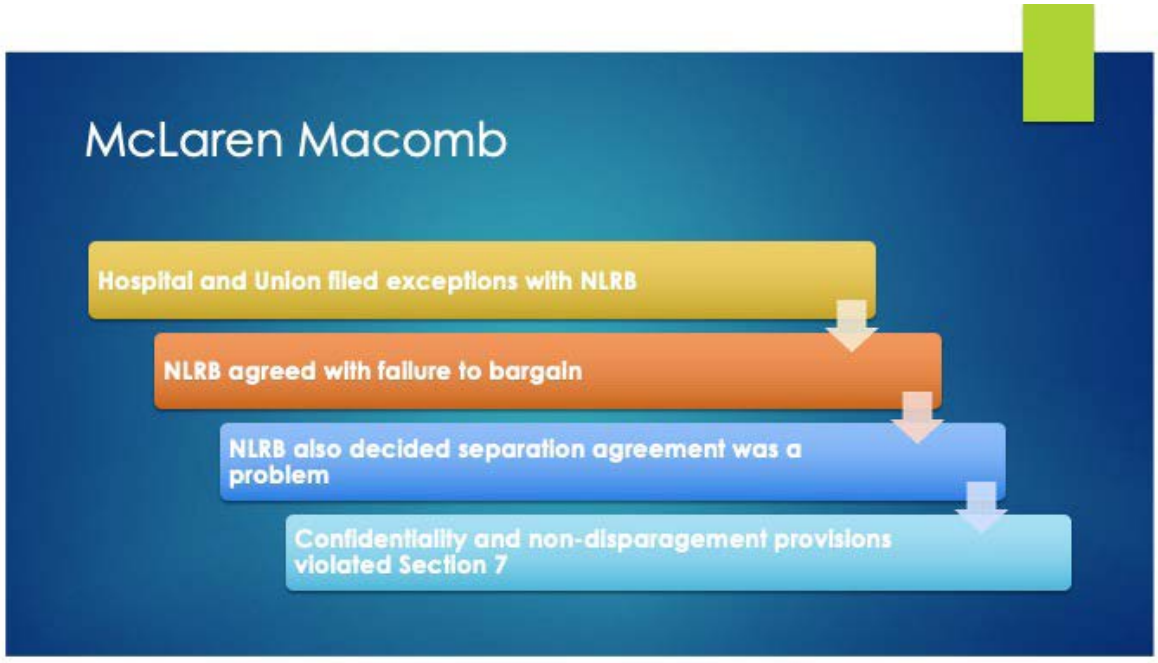
## The case that got us here

McLaren Macomb


## McLaren Macomb

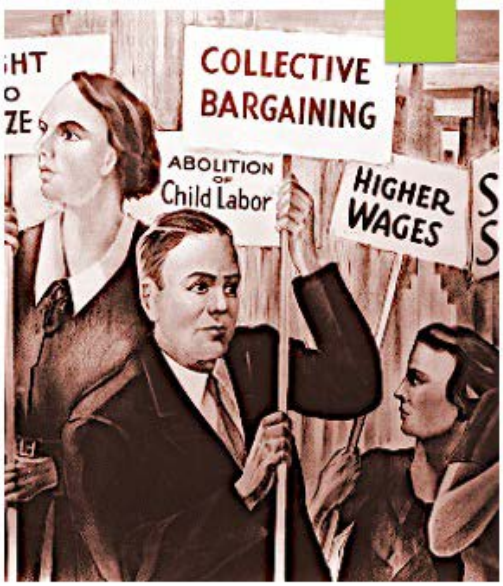
- Hospital in Michigan, height of Covid
- Furloughed 11 non-essential employees
- Paid them severance
- Had them sign separation agreements
- Standard confidentiality and non-disparagement language


McLaren Macomb
Didn't tell the Union
Union brought charges for refusal to bargain in violation of NLRA
ALJ found Hospital should have gotten Union involved
ALJ did not have a problem with the separation agreement


McLaren Macomb
Hospital and Union filed exceptions with NLRB
NLRB agreed with failure to bargain
NLRB also decided separation agreement was a problem
Confidentiality and non-disparagement provisions violated Section 7

## What's Section 7?

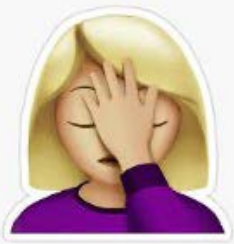
- Guarantees employees **"the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."**




- The **"mere offering"** of a separation agreement with confidentiality and non-disparagement was **"unlawfully coercive"**
- Creates a **"chilling tendency"** against exercise of rights
- Not just departing employees' rights, but **other employees'** rights
- Interferes with employees' **cooperation with NLRB investigations**

## McLaren Macomb

- Furloughs rescinded
- Employees reinstated
- Employees compensated for loss of earnings/benefits
- Employees reimbursed for work search expenses
- Furlough references expunged



**OFFICE OF THE GENERAL COUNSEL**

**MEMORANDUM GC 23-05** **March 22, 2023**

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

RE: Guidance in Response to Inquiries about the *McLaren Macomb* Decision

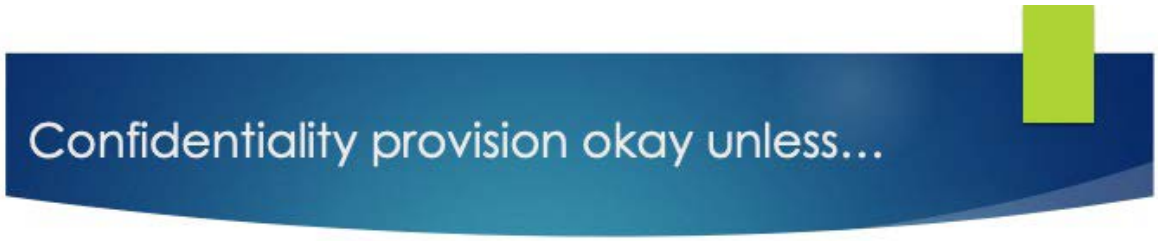
## Guidance

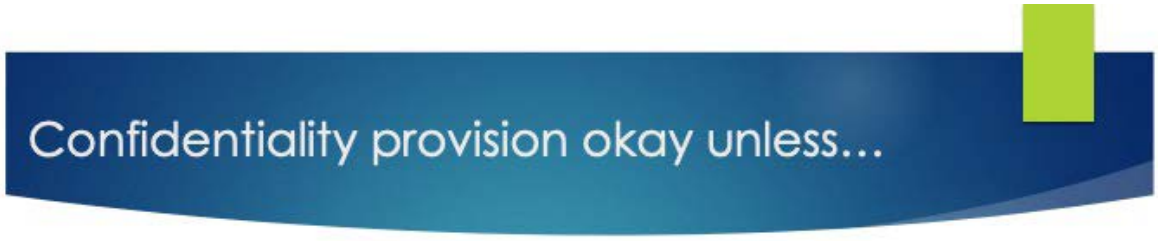
## Guidance

Not *all* confidentiality agreements have to go

## Guidance

Just those with a chilling effect




It precludes employees from assisting others about workplace issues . . .

## Or from communicating with…

## Or from communicating with…

the Agency

## Or from communicating with…

the Agency

or a Union

## Or from communicating with…

- the Agency
- or a Union
- or legal forums

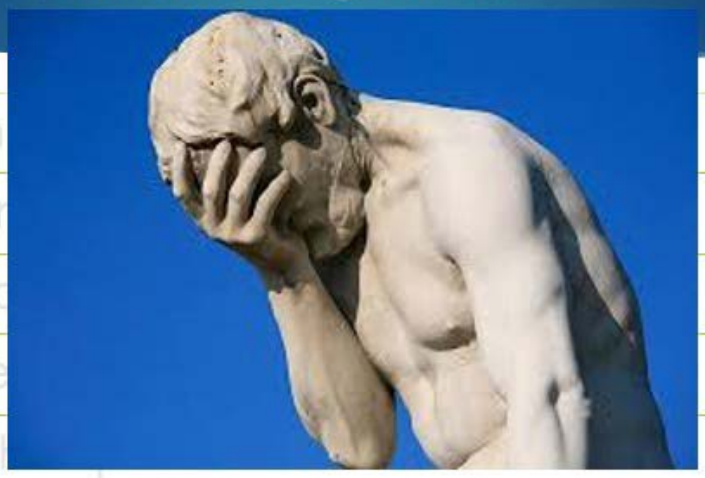
## Or from communicating with…

- the Agency
- or a Union
- or legal forums
- or the media

## Or from communicating with…

- the Agency
- or a Union
- or legal forums
- or the media
- or other third parties

## Or from communicating with…



## Is anything sacred?

- Proprietary or trade secret information

## Is anything sacred?

- Proprietary or trade secret information
- Based on legitimate business expectations

## Is anything sacred?

- Proprietary or trade secret information
- Based on legitimate business expectations
- For a period of time

## Non-disparagement okay if limited to…

## Non-disparagement okay if limited to…

statements about employer

## Non-disparagement okay if limited to…

statements about employer

that are maliciously untrue

## Non-disparagement okay if limited to…

statements about employer

that are maliciously untrue

and made with knowledge of falsity

## Non-disparagement okay if limited to…

statements about employer

that are maliciously untrue

and made with knowledge of falsity

or reckless disregard for truth or falsity

## Non-disparagement okay if limited to…

statements about employer

that are maliciously untrue

and made with knowledge of falsity

or reckless disregard for truth or falsity.

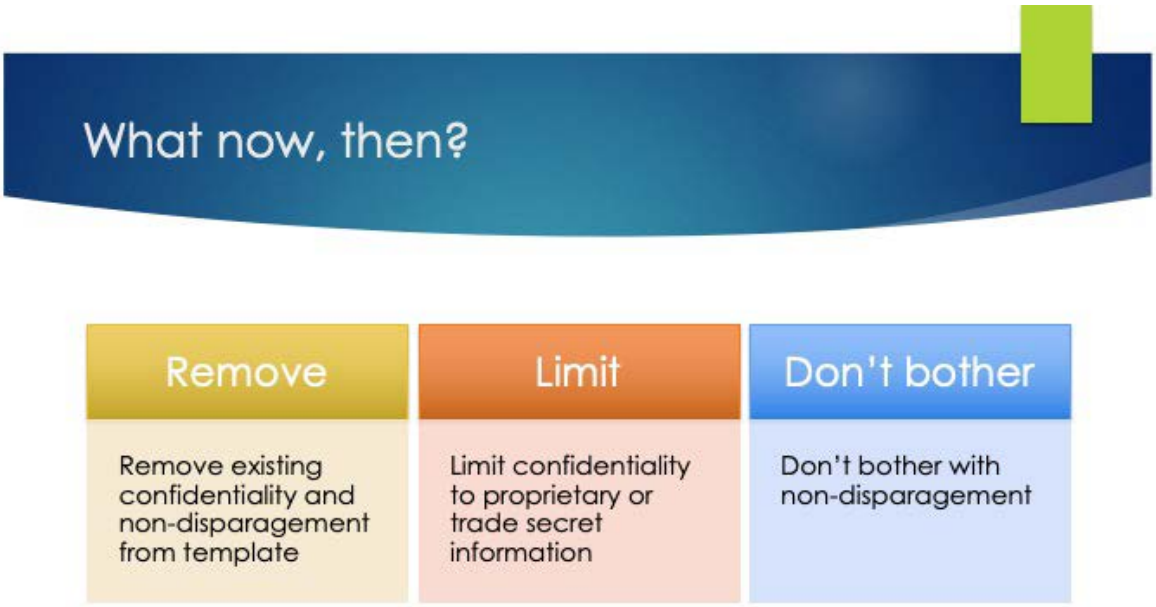
In other words … defamation.

## Would a savings clause work?

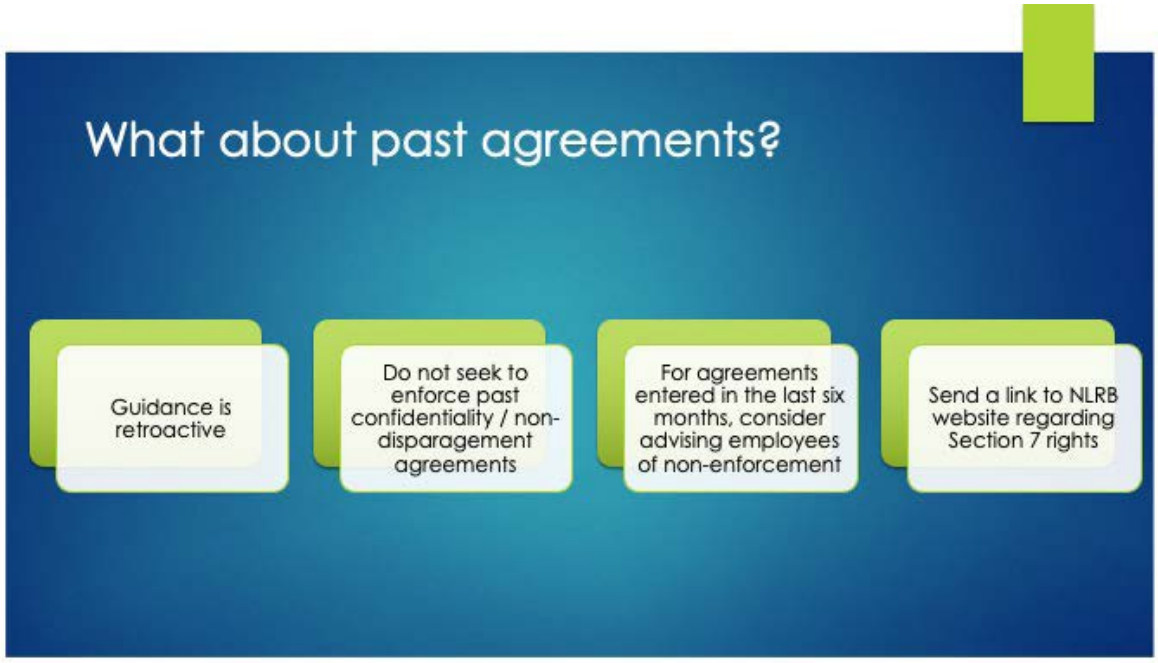
## Would a savings clause work?

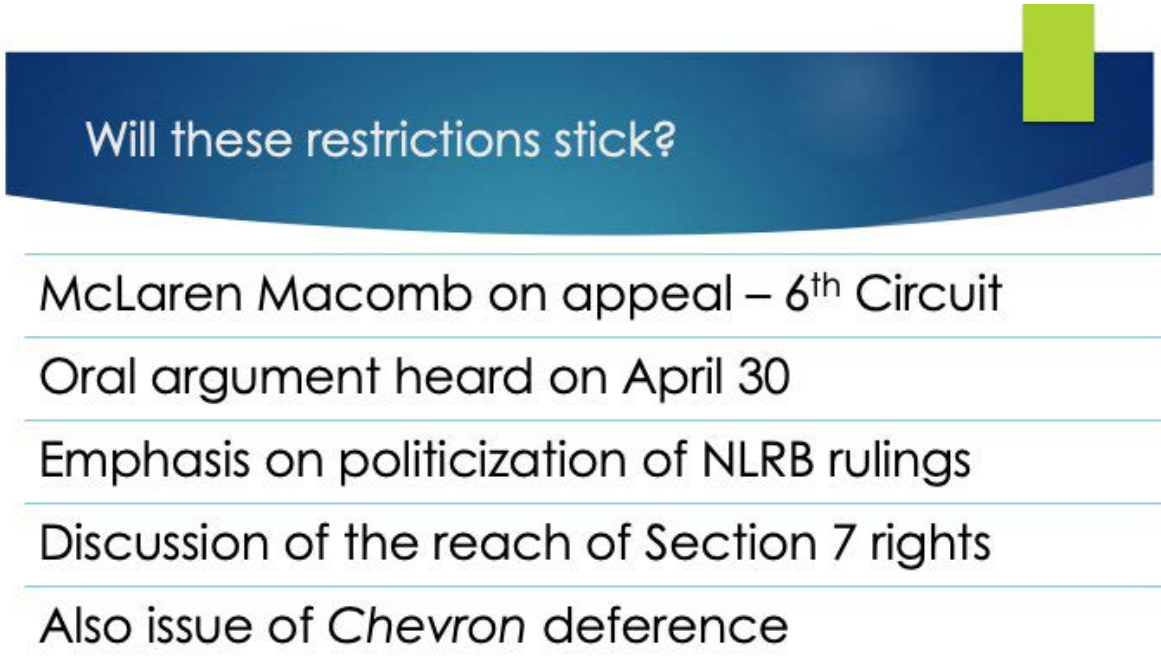
Sure, if you want to recite all of the Section 7 rights in excruciating detail and thereby encourage disclosure

## What now, then?

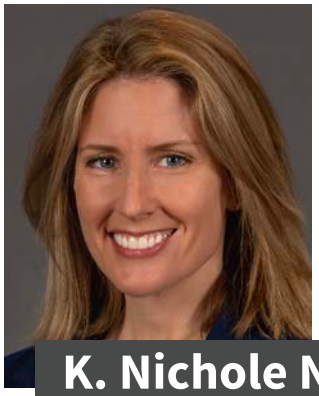

What now, then?
Remove
Remove existing confidentiality and non-disparagement from template
Limit
Limit confidentiality to proprietary or trade secret information
Don't bother
Don't bother with non-disparagement


What about past agreements?


What about past agreements?
Guidance is retroactive
Do not seek to enforce past confidentiality / non-disparagement agreements
For agreements entered in the last six months, consider advising employees of non-enforcement
Send a link to NLRB website regarding Section 7 rights


Will these restrictions stick?
McLaren Macomb on appeal – 6th Circuit
Oral argument heard on April 30
Emphasis on politicization of NLRB rulings
Discussion of the reach of Section 7 rights
Also issue of Chevron deference


Conclusion



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# K. Nichole Nesbitt

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

Nikki Nesbitt is a partner of the firm and currently serves as its Managing Partner. Nikki's current practice concentrates on litigation in the healthcare 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 healthcare context for employers in this region and beyond. Nikki's experience as a litigator provides her with insight to counsel her healthcare 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

**Representative Matters**
- District of Columbia Superior Court (2023): Obtained summary judgment on behalf of hospital client in birth injury case based on plaintiff's failure to establish vicarious liability.
- District of Columbia Superior Court (2023): Obtained summary judgment on behalf of hospital in premises liability matter.
- District of Columbia Superior Court (2022): Obtained voluntary dismissal of hospital client in medical malpractice case alleging mismanagement of post-appendectomy medications by establishing that all decisions were made by independent surgeon.
- District of Columbia Superior Court (2022): Obtained summary judgment in favor of behavioral health facility in assault and false imprisonment claim based on Plaintiff's failure to name appropriate experts.
- D.C. Office of Human Rights (2020): Obtained order of "no probable cause" in discrimination action brought against hospital by patient who claimed she received inferior medical treatment and was discharged too soon as a result of her race.

**Honors and Awards**
- Best Lawyers in America - Commercial Litigation (2016-Present)
- Chambers USA - Litigation: Medical Malpractice Defense, Maryland, Band 3 (2023); Healthcare, Maryland (2017)
- The Daily Record — Leading Women Award (2011)
- Maryland Super Lawyers - Civil Litigation: Defense (2021-2024); Rising Stars (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)n

# The War on Non-Competes: Navigating the National Maze of Restrictive Covenant Enforceability

**Melissa Muro LaMere**
Snell & Wilmer (Los Angeles, CA)

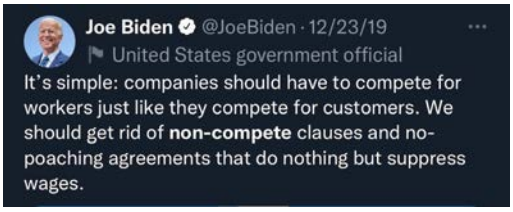
**The War on Non-Competes: Navigating the National Maze of Restrictive Covenant Enforceability**
*Melissa Muro LaMere*

Restrictive covenants have long been an important tool for businesses across industries and geographies when it comes to protecting their most valuable assets: confidential information and customer relationships. But the legal landscape for use and enforcement of restrictive covenants is changing at a rapid pace, creating a maze of inconsistent state laws on non-competition and non-solicitation covenants. This article aims to provide a current snapshot of the legal landscape impacting restrictive covenant enforcement in the employment context, as well as best practices that employers and advisers can implement to reduce risk and cut down on the business interruption inherent in restrictive covenant enforcement.

**Restrictive Covenants: A Quick Refresher**
Historically, and still to this day in most states, restrictive covenants are enforced if they are (1) supported by adequate consideration, (2) narrowly tailored to protect the enforcing party's legitimate business interests in confidential information/trade secrets, and customer and/or employee goodwill, and (3) are reasonable in scope, time, and geography. While the most common context in which a restrictive covenant arises is the employment relationship, such agreements are also commonly used in the sale of businesses and franchise agreements. Restrictive covenants outside of the employment context are analyzed under a less stringent lens, due to the presumed absence of unequal bargaining power.

Typically, enforcement of a restrictive covenant begins with injunctive relief. And more often than not, the injunctive phase is the ballgame when it comes to restrictive covenant enforcement. Because one of the most important factors a judge considers in whether to grant or deny an injunction is the likelihood of success on the merits, the judge's decision on the injunction motion sends a clear signal about where they are likely to come out on the merits at trial. Because of the importance of injunctive relief, noncompete cases rarely go to trial – parties generally settle after the judge's ruling on the injunction.

**Federal Intervention: A Landscape Game Changer**
Federal government has historically left the enforcement and rulemaking regarding restrictive covenants to the states. But that changed dramatically during the 2020 Presidential Election Campaign, when then candidate Joe Biden published the tweet heard around the (noncompete lawyer) world:




Since his election, President Biden's administration has only ratcheted up this anti-noncompete tone, attacking noncompetes on two primary fronts: enforcement actions by the Department of Justice Antitrust Division in the courts, and proposed rulemaking by the Federal Trade Commission that would invalidate all noncompetes.
In July 2021, the President signed the Executive Order on Promoting Competition in the American Economy in which he directed the Federal Trade Commission to consider rulemaking to curtain the use of noncompetes. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

Over the last several years, the Department of Justice's Antitrust Division has led an aggressive attack on the use of noncompetes in the labor market. Its primary focus has been no-poach agreements between companies, intervening in matters involving healthcare and staffing companies among others. However, its campaign has been less than fruitful, and in November 2023, the DOJ voluntarily dismissed its only remaining no-poach case, following a string of losses in similar cases. See https://

www.shrm.org/topics-tools/news/talent-acquisition/doj-drops-last-no-poaching-case-after-string-of-losses.

The DOJ has also targeted noncompetes in the context of mergers and acquisitions. In November 2021, the DOJ announced that it was requiring S&P Global to make significant business divestments in connection with a proposed merger and for one of the divested entities to waive the noncompete agreements it had with a competitor in the gas price reporting industry. https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-and-waiver-non-compete-sp-proceed-its. The DOJ filed a civil suit in the District of Columbia to block the proposed merger, and obtained significant concessions from S&P in settlement.

Increased agency cooperation and information sharing about restrictive covenants has also been a priority for the agencies. The DOJ's Antitrust Division and the US Department of Labor (DOL) entered a memorandum of understanding on interagency cooperation in March 2022, which the agencies claimed was designed to "protect[] workers . . . at risk of being harmed as a result of anticompetitive conduct, including through collusive behavior and the use of business models designed to evade legal accountability."

There can be no doubt that the general increase in enforcement action regarding restrictive covenants has had an impact on state legislative action, judicial enforcement, and the public's general perception of the relative value of noncompetes. But the most impactful action the federal government has taken on noncompetes is the Federal Trade Commission's proposed rule to ban noncompetes. https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking. At the time of print, the FTC has yet to issue its final rule, although it was expected to do so in April 2024. If the most recent public version is passed, the FTC rule would ban all noncompetes, including retroactively, as well as impose affirmative notice obligations on employers. See Fed. Trade Comm'n, Notice of Proposed Rulemaking: Non-Compete Clause Rule, RIN 3084-AB74, at 213-214 (Jan. 5, 2023). Interestingly enough, one the FTC's proposed rules also invalidates noncompete agreements in the context of a sale of a business if the seller does not sell an at least 25% stake in the company. This will have the effect of eliminating the vast majority of sale-of-business noncompetes except in the context of very small businesses.

Once the FTC eventually issues its final rule, we can expect immediate legal challenges likely seeking injunctive relief against the rule being implemented. https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656?mod=opinion_major_pos4. In other words, do not expect that the FTC's rule is going to eliminate your own employees' noncompetes, or those of the candidates you are hoping to hire away from your competitors anytime soon.

**State Trends: The Domino Effect**

It remains to be seen what the impact of a proposed federal ban on noncompetes might have in the real world. But we can safely say that the federal government's actions have inspired action among state legislatures across the country, as evidenced by the slew of lawmaking that has taken place in the last several years. During this time, certain clear trends have emerged:

A. Noncompete Bans.

California, Oklahoma, and North Dakota have long banned noncompetes. But since the federal government has thrown its weight and influence behind the anti-noncompete movement, several other states have taken action to limit or ban noncompetes as well. In 2023, Minnesota banned all noncompetes signed on or after July 1, 2023. Minn. Stat. Ann. § 181.988; https://www.shrm.org/topics-tools/tools/express-requests/minnesota-bans-most-non-compete-agreements-7-1-23. In 2024, the New York legislature passed a full ban on noncompetes, but NY Governor Kathy Hochul did not sign it, citing her concerns that the ban was too broad. Governor Hochul signaled that she would be open to signing a revised ban, though it remains to be seen whether the NY legislature will take her up on the offer. https://apnews.com/article/noncompete-agreement-bill-veto-new-york-61e53ad13f41f1da574740438ee34e63. In April 2024, the governor of Maine vetoed a ban on noncompetes, indicating that the state's current significant restrictions on noncompetes are sufficient.

Currently, at least five states and one major city have pending legislation that, if enacted, would ban noncompete agreements: Illinois, Massachusetts, Michigan, Rhode Island, Wisconsin, and New York City.

B. Salary Thresholds.

Another trend in state actions narrowing the use and enforceability of noncompetes is the enactment of salary minimums for employees subject to noncompetes (and, in some cases, nonsolicits as well). Such rules are designed to prevent the use of noncompete agreements with low-wage workers. At least 12 jurisdictions have salary threshold requirements for noncompetes: Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, Washington, and Washington, D.C. Unsurprisingly, the salary minimums themselves vary considerably between these

various states, ranging from $30,160 per year for workers in New Hampshire, to $150,000 per year for workers in Washington, D.C. Some salary thresholds remain static, while others are adjusted annually for inflation.

C. Unique Notice and Administrative Requirements.
Several states have enacted laws requiring employers to give employees a certain number of days to review and consider a noncompete before signing. For example, Colorado requires the employees receive their noncompetes before they accept the job offer and, in the case of current employees, at least 14 days before the new role takes effect. In Illinois, employees must have at least 14 days to review a noncompete before signing, while Massachusetts workers are entitled to receive their noncompete agreements the earlier of 10 business days before the first day of work or before receiving the offer.

In Virginia, employers are required to post a written notice that the state prohibits noncompetes with low wage workers. Perhaps the most exacting requirement of all hails from Colorado, which requires employers to provide notice in a separate document (accompanied by the noncompete) with "clear and conspicuous terms" (in the language used to communicate with the worker) identifying the noncompete by name, "[d]irect[ing] the worker to the specific sections or paragraphs of the agreement that contain the covenant not to compete," and "stat[ing] that the agreement contains a covenant not to compete that could restrict the workers' options for subsequent employment following their separation from the employer . . . ."

This maze of notice and timing restrictions can pose an administrative challenge for hiring managers and human resource or talent acquisition professionals, many of whom are not accustomed to external forces dictating the speed with which candidates may be hired.

D. Impact of Remote / Hybrid Work.
While not intentional state action akin to the adoption of salary thresholds, the unavoidable reality of an increasingly hybrid and remote workforce adds yet another layer of confusion and chaos to the use and enforcement of restrictive covenants for employers. When businesses nearly always with employees reporting to a brick-and-mortar store, the geographic restrictions that many states require be present in a noncompete made perfect sense. But that is no longer the reality for most businesses, where at least some part of the workforce is working from the field or from home. This shift was of course accelerated by the COVID-19 pandemic, but it has been taking hold for decades, slowly widening the gap between the law judges are applying and the real-world scenarios employers face.

The move to remote and hybrid work also raises serious questions about the reasonable scope of geographic restrictions, because just as employees can often now be located anywhere, so too can customers. The template agreement a company has previously used containing a 10-mile radius geographic restriction loses significant value when its employees are working with customers all over the state or country.

Finally, this shift in how and where employees are located raises concerns about long term agreement enforceability. An employee who signed an agreement while living and working in a state where noncompetes were valid may relocate to a state where noncompetes have been banned.

**Increased Reliance on Nonsolicitation and Confidentiality Agreements**
In light of the national assault on noncompetition agreements, what other tools do we have to protect the business interests that noncompetes are intended to protect: confidential information, and customer or employee goodwill?

With the notable exception of California, most states – including those that ban noncompetes – permit nonsolicitation agreements. Nonsolicitation agreements are valuable safeguards for employers, guarding against the premature loss of talent and a feared exodus of clients. By stipulating that departing employees must refrain from soliciting their former colleagues or clients to join them in their new endeavors, nonsolicitation agreements buy time for an employer to take stock when a key employee departs and take whatever measures are necessary to retain business and talent. Given the increased scrutiny of noncompetes, it is no surprise that nonsolicits have also been under the microscope in recent years. In particular, there is a trend toward requiring more narrow limitations on the scope of the nonsolicit. Typically, such limitations involve ensuring that the restriction only applies to customers the departing employee worked with during employment, sometimes expressly limited to work performed during the last 1-2 years of employment. Additionally, some states prohibit the application of nonsolictation agreements to prospective customers. Finally, some states limit application to active solicitation of the customer (or colleague), but permit the employee to accept the business of a customer who initiates contact.

Confidentiality agreements also remain a critical tool in the protection of company's trade secrets and other confidential information. By delineating clear parameters for the use and dissemination of proprietary information, confidentiality agreements can instill a culture of trust

and responsibility within the organization. When used properly, they act as a deterrent against the unauthorized dissemination of trade secrets, preventing competitors from gaining access to invaluable knowledge that could compromise the employer's competitive advantage. Consistent use of confidentiality agreements is also an important tool when the business is in the unpleasant position of having to assert a trade secrets claim against a former employee, a competitor, or even a third party, because the use of such agreements is evidence that the business employs reasonable measures to safeguard its trade secrets.

**Best Practices and Business Strategies**

Navigating the maze of restrictive covenant enforceability is not for the faint of heart. A successful restrictive covenant strategy will require businesses to let go of outdated practices and expectations. A few specific best practices include:

A. Abandon the one-size-fits all approach to template agreements.

The laws have changed dramatically, and as a result the agreement that worked well for a company 20 and even 10 years ago is now likely outdated and full of legal and business risks. Develop different templates for various states, and update them on an ongoing basis. Understand that not all roles warrant a noncompete, or even a nonsolicit agreement.

B. Update your hiring and onboarding procedures.

Ensure your administrative, human resources, and talent acquisition teams have the tools necessary to ensure compliance with the maze of administrative requirements.

C. Get creative.

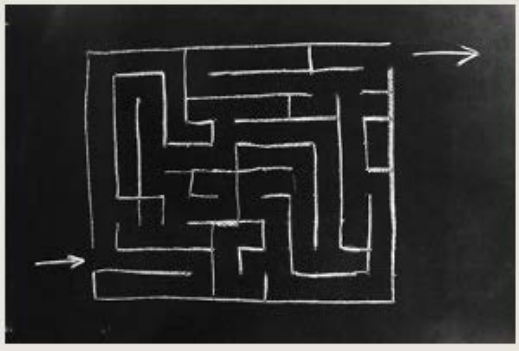
Consider what your company is doing to safeguard confidential information. Practice good confidential information hygiene, including limiting access to confidential information and prohibiting the use of personal external storage devices. When it comes to customer goodwill, consider whether there are ways to build out your customer-facing teams so that no single employee has outsized control over a key customer relationship.

# THE WAR ON NONCOMPETES

## NAVIGATING THE NATIONAL MAZE OF RESTRICTIVE COVENANT ENFORCEABILITY

## LET'S TALK ABOUT IT...

1. Restrictive Covenants: A Quick Refresher
2. Federal Intervention: Recent Enforcement Activity and FTC Rulemaking
3. Trends in State Action
4. Alternatives to Noncompetes
5. Best Practices and Business Strategies



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## REFRESHER: RESTRICTIVE COVENANTS 101

Most Common Types:

- Noncompetition Agreements
- Nonsolicitation Agreements
  - Customer
  - Employee

Most Common Contexts:

- Employment
- Sale of business
- Franchise Agreements

3

## RESTRICTIVE COVENANTS: LIMITED PURPOSE

**YOU *CAN* USE THEM TO PROTECT:**

- **Confidential Information**
- **Goodwill / Relationships**
  - **Customers**
  - **Employees**

**YOU *CANNOT* USE THEM TO:**

- **Eliminate regular legitimate competition**
- **Impose greater restrictions than necessary**

4

## REQUIREMENTS FOR ENFORCEABLE AGREEMENT

MOST JURISDICTIONS:

- Independent consideration
- Protect "legitimate business interest"
- Reasonable in scope, duration, and geography (or substitute limitation)

but...

**ENFORCEABILITY IS CHANGING RAPIDLY**

5


## FEDERAL INTERVENTION:

RECENT ENFORCEMENT ACTIVITY AND FTC RULEMAKING

## EXECUTIVE ORDER AND FTC PROPOSED RULEMAKING

July 2021: President Biden signed Executive Order on Promoting Competition in the American Economy

January 2023: Federal Trade Commission proposes rule banning all noncompetes (retroactive and requiring affirmative notice)

2024: Final Rule?

7

## INCREASED FEDERAL AGENCY ACTIVITY TARGETING NONCOMPETES

**OCTOBER 2016 – ANTITRUST GUIDANCE**

**RECENT ENFORCEMENT ACTIONS FROM DOJ ANTITRUST DIVISION**

**INFORMATION SHARING AMONG AGENCIES**

8

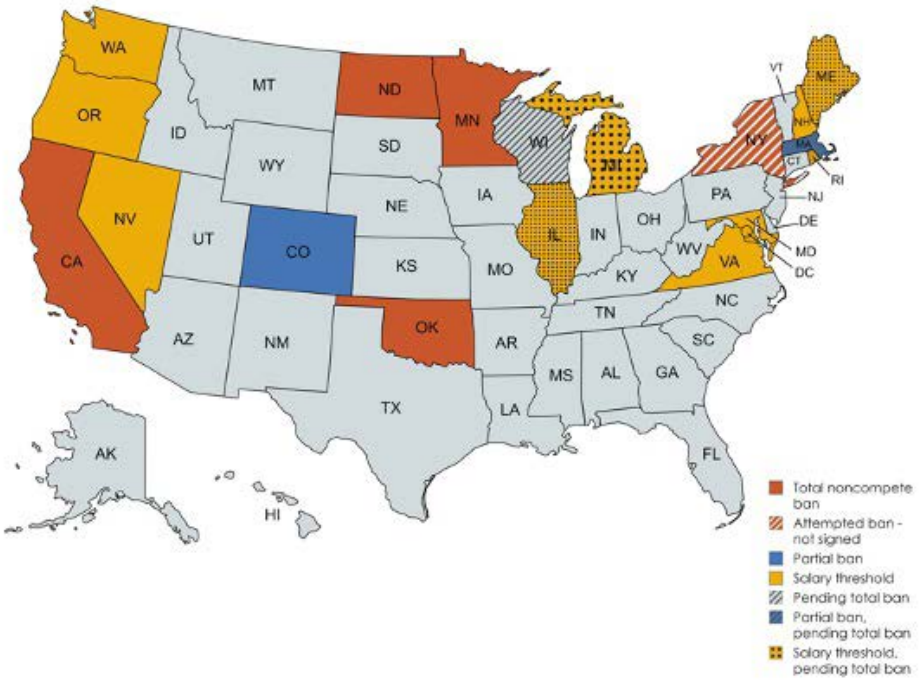
## NATIONAL TRENDS IN STATE LAW

- State bans
- Salary thresholds
- Disclosure and notice requirements
- Statutory time limits
- "Garden Leave"
- Prohibitions on choice of law / venue provisions
- Franchise restrictions

9

## FRANCHISE NONCOMPETES:
HERE TO STAY, OR ON THE CHOPPING BLOCK?

10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OH
WV
GA
FL
SC
NC
VA
PA
NY
VT
NH
ME
MA
CT
RI
NJ
DE
MD
DC
AK
HI
Total noncompete ban
Attempted ban - not signed
Partial ban
Salary threshold
Pending total ban
Partial ban, pending total ban
Salary threshold, pending total ban


US NONCOMPETES 2025?
WA
OR
CA
ID
NV
MT
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
VT
NH
ME
MA
CT
RI
NJ
DE
MD
DC
AK
HI
With pending bans:
Total noncompete ban
Partial ban
Salary threshold

## PRACTICAL CHALLENGES TO NONCOMPETE ENFORCEMENT IN THE CURRENT CLIMATE

- Remote and hybrid workforces
- National or global customer base
- Cloud-based information storage
- Judicial enforcement inconsistent and uncertain

13

## WHERE DO WE GO FROM HERE?

TRADITIONAL ALTERNATIVES TO TRUE NONCOMPETES:

- NONSOLICITATION AGREEMENTS
  - CUSTOMERS
  - EMPLOYEES
- CONFIDENTIALITY AGREEMENTS


14

## BEST PRACTICES AND BUSINESS STRATEGIES

- Say goodbye to one-size-fits-all agreements
- Monitor changing legal landscape
- Get in front of most common pitfalls

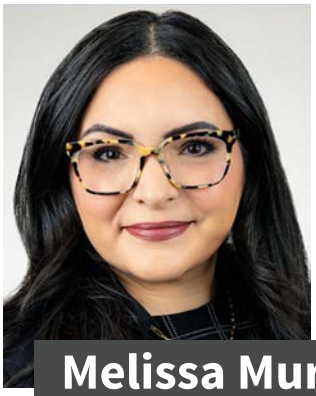
15

*BUT WAIT, THERE'S MORE...*

## BEST PRACTICES AND BUSINESS STRATEGIES

- Pick your battles
- Trade Secrets Hygiene
- Protect key customer relationships
- Incent employee retention

16



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mmurolamere@swlaw.com

# Melissa Muro LaMere

**Litigation Attorney | Snell & Wilmer (Los Angeles, CA)**

Melissa Muro LaMere is an employment and business litigation attorney, licensed to practice in Minnesota. She has extensive experience helping clients protect and grow their business in a competitive marketplace. She focuses her practice on the full spectrum of employment counseling and litigation matters in addition to business disputes involving non-competition and non-solicitation agreements, trade secrets, business contracts and torts, and unfair competition and trade practices. Melissa's clients include multinational corporations, small businesses, and individuals, and she often serves as a trusted advisor in a wide variety of litigation matters in state and federal trial and appellate courts, arbitration, and mediation.

Melissa previously served on the board of the Minnesota Infinity Project, an organization focused on gender disparity on the bench throughout the Eighth Circuit, and on the board of the Minnesota Hispanic Bar Association, for which she also served as the co-chair of the Judicial Endorsements Committee. In 2019, Melissa was appointed by Minnesota Governor Walz and Minnesota Lieutenant Governor Flanagan to the Commission on Judicial Selection.

Before becoming an attorney, Melissa held various positions in the Office of U.S. Senator Amy Klobuchar.

**Services**
- Commercial Litigation
- Employment Litigation
- Healthcare
- Labor and Employment
- Life Sciences and Medical Technology

**Honors and Awards**
- The Best Lawyers in America®: Ones to Watch, Commercial Litigation & Litigation – Labor and Employment (2021-2024), Product Liability Litigation – Defendants (2024)
- Labor & Employment Star, Benchmark Litigation (2023)
- Notable Leader in DEI, Twin Cities Business (2022)
- POWER 30: Employment Law, Minnesota Lawyer (2021-2022)
- Minnesota Super Lawyers, Rising Stars Edition, Employment & Labor (2019-2022)
- Fellow, Leadership Council on Legal Diversity (2021)
- Top Lawyer Under 40, Hispanic National Bar Association (2019)
- Diversity and Inclusion Award, Minnesota Lawyer (2019)

**Education**
- University of Minnesota Law School (J.D., cum laude, 2012) - Minnesota Journal of International Law, Editor; Human Rights Litigation & International Legal Advocacy Clinic, Student Director; Minnesota Hispanic Bar Association Mentorship Program, Member; Latino Law Student Alliance, Member
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# Trade Secret Damages: An Old, Unresolved Issue with Potentially Big Consequences

**Justin Weiner**
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**Developments and Challenges in Trade Secret Damages Litigation**
*Justin Weiner and Jeff Turner*

Trade secret litigation is on the rise. Since the Federal Circuit clamped down on excessive patent damages awards, states updated trade secrets laws to the Uniform Trade Secrets Act, and Congress passed the federal Defend Trade Secrets Act, plaintiffs have increasingly turned to trade secrets as a means of pursuing IP claims. In this breakout, presenters will explore developments in trade secrets law; ways to favorably shape future regulations; and strategies to mitigate risk, respond to post-separation demands, and achieve favorable litigation outcomes.

The Uniform Trade Secrets Act (UTSA) is ubiquitous throughout the United States: forty-eight states and the District of Columbia have adopted it. Trade Secrets Act, Unif. L. Comm'n (last accessed Mar. 29, 2024). Yet new UTSA issues continue to come to the forefront, aided by the decrease in patent litigation following the Federal Circuit's decision in Uniloc USA, Inc. v. Microsoft Corp., which limited the availability of patent damages. In addition, the Supreme Court's decision in eBay Inc. v. MercExchange, L.L.C., applying a more stringent test for patent injunctions has also led to a decrease in the volume of patent litigation. This article focuses on one area at the forefront of the UTSA: damages. While theories of damages are well-settled (and well-regulated) in patent cases, the law of trade secrets damages is a quagmire. Trial lawyers and their clients must contend with numerous, and sometimes conflicting authority (state courts, federal courts, treatises, and Restatements of the Law), vague holdings, and old decisions about older products that fail to apply to advances in technology and modern modes of commerce. This article does not take sides in the conflict, but it does attempt to identify areas that require careful attention.

A UTSA plaintiff can elect from three monetary remedies: (1) actual damages, (2) unjust enrichment (or disgorgement of profits), or (3) reasonable royalty. These three remedies evaluate different measures of harm: actual damages compensate for the plaintiff's loss (such as the loss of sales), unjust enrichment recovers the defendant's gain (such as sales gained by misappropriation), and reasonable royalty arises in absence of those two forms of recovery and recovers a prospectively a fair price to license the trade secret technology.

Of the three forms of recovery, unjust enrichment is the hardest to define and apply. Actual damages and reasonable royalty are, in a sense, tied to the actual market (damages) or prospective market (royalty) for the plaintiff's trade secret. Unjust enrichment is not. For instance, a single trade secret component of a much larger product could cause a defendant to make many more sales, though the component itself has limited value to the plaintiff. Putting clear boundaries on the limitations for recovering "unjust enrichment caused by misappropriation," therefore, is an important task in litigation.

The term "unjust enrichment caused by misappropriation," however, confuses courts and litigants alike. In theory, this term should be straightforward: for instance, if the defendant gained sales for reasons unrelated to the trade secret, it is not "caused" by the defendants' misappropriation. And determining the profits "caused by misappropriation" is comparatively easy when the trade secret is the sole reason a sale is made. If a departing employee steals his employer's trade secret client list and uses the list to make sales for a competitor, the defendant's profits from those sales are profits "caused by misappropriation." This task gets more difficult, however, when a trade secret is a component of a much larger product. How do litigants identify the value of a muti-component product "caused by" the trade secret misappropriation of a single component?

For multi-component products, one point of delineation is whether a party must apportion the value of sales incorporating the trade secret to the component itself. For instance, if the only trade secret in a coffee machine

is the bean grinder, does a plaintiff need to identify the contribution of the bean grinder to sales of the machine? Several decisions have answered this question in the affirmative: a party must apportion value to the trade secret apart from other component parts.

One line of cases recognizes that, under the UTSA, an expert's assessment of damages "caused by misappropriation" is unhelpful and unreliable if the expert's damages number includes damages caused by non-trade secret components. The landmark case is O2 Micro International Ltd v. Monolithic Power Sys., 399 F. Supp. 2d 1064 (N.D. Cal. 2005). There, a trade-secret plaintiff sought an unjust enrichment award based on expert testimony that assumed all alleged trade secrets (11 in total) were misappropriated. The expert provided no contingencies if the jury found misappropriation of less than all of the trade secrets. When the jury found only five of the 11 trade secrets misappropriated, the court concluded the expert's testimony was "useless to the jury" and vacated the unjust enrichment award as unsupported by the evidence. Id. at 1077. This issue recently recurred in Versata Software v. Ford Motor Co., where a trial court in Michigan vacated a $100 million-plus jury verdict on trade secret misappropriation because the plaintiff's expert, like the expert in O2 Micro, did not apportion value to each individual trade secret. No. 15-11264, 2023 WL 3175427, at *16–17 (E.D. Mich. May 1, 2023). The Versata expert offered a damage calculation based on the time it would have taken the opposing party to develop all allegedly misappropriated trade secrets. Id. at *16. When the jury found only three of the four trade secrets misappropriated, the damages number was no longer useful: the expert gave the jury "no way to reliably determine how long it would have taken Ford to develop the three (out of four) trade secrets that it found to have been misappropriated." Id.

Other recent decisions, however, approach the analysis differently. In the Masimo Corp. v. Apple litigation, Masimo's expert witness presented one unjust enrichment number, $3.1 billion, for all alleged misappropriated trade secrets. At several stages, Apple argued for exclusion of that opinion because "the fact that [the expert] suggested that the measure of unjust enrichment could be the same regardless of how many or which alleged secrets are found to be misappropriated, confirms that the numbers he put forth are untethered from any benefit allegedly flowing from the purported secrets themselves." Masimo Corp. v. Apple Inc., No. 20-00048, 2023 WL 3432167, at *9 (C.D. Cal. May 4, 2023). The trial court acknowledged the "link is somewhat attenuated" between the profits and trade secrets but denied the motion. 2023 WL 8898590, at *3. The case proceeded to trial and is in the midst of extension post-trial motion practice.

The distinctions here largely rest on what qualifies as "unjust" profits. On one hand, if a consumer buys a product solely because of the trade secret, nothing in the UTSA would prevent a party from recovering those profits. On the other hand, consumers buy products for different reasons. Attempting to distill a consumer's purchase choice to a single purpose—the trade secret—seems to be an impossible and overly simplistic task. If not for the trade secret, would the consumer not have purchased the product at all? Would the consumer have purchased the competitor's product? And how can a party (and its expert) identify the consumers in a post-hoc analysis?

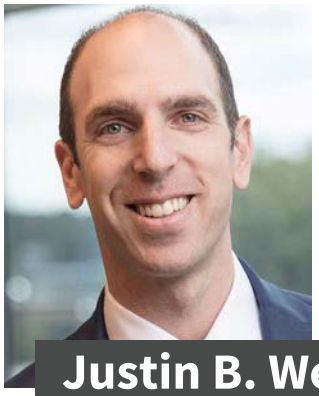
Patent cases have an answer to this problem. They require a party seeking a reasonable royalty for a multi-component product with both patented and non-patented components must identify a royalty for the "smallest salable patent-practicing unit." LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 67 (Fed. Cir. 2012).[1] This approach creates practical advantages: an expert survey can identify what percentage of a product's value comes from a trade secret far more reliably than the total number of consumers who purchased a product solely because of the trade secret. But this apportionment rule has not been rigorously adopted in trade secret cases.

Stepping back, there also are other ways parties can avoid having an unjust enrichment claim lead to inflated damage award. For instance, in many areas of the law, courts have held that the statutory phrase "caused by" establishes a but-for proximate cause requirement. See, e.g., Paroline v. United States, 572 U.S. 434, 450 (2014). An express but-for causation requirement, and tying causation to the trade secret, would reinforce the principle that a party should not obtain broader relief than what the trade secret contributes to the profits. And parties can use other parts of the UTSA to clamp down on the scope of unjust enrichment recovery. For instance, in a recent case from the Second Circuit, an unjust enrichment award was vacated in part because the plaintiff sought recovery for "avoided costs" despite the trial court's entry of a permanent injunction that ended the opponent's use of the trade secret. Syntel Sterling Best Shores Mauritius Ltd. v. The TriZetto Grp., Inc., 68 F.4th 792, 811 (2d Cir. 2023). The injunction, the court stated, precluded the defendant's "ability to profit from any avoided costs." Id. Taking steps in any of these areas will help courts and parties keep trade-secret damage awards in line with reality.

Besides legal arguments, parties in trade secret cases should take care to make damages a focus of

1 The limited exception to this rule is when "the patent-related feature is the basis for customer demand." Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1336 (Fed. Cir. 2009).

their discovery efforts. Obtaining market data about consumer choices is critical. This can come directly from consumers, or it can be from an opponent's own, pre-existing records. Such discovery is important in every case because the question of which party has the burden is often disputed. Some courts take the position that trade secrets are like trademarks, in that a plaintiff need only prove that a defendant profited, and it is up to the defendant to disentangle the profits caused by trade secrets. Other courts take the opposite view. And still others have reached conclusions somewhere in the middle. Given this diversity of views on burden, any party to a trade secret case would be well-served to obtain discovery that goes to the apportionment issue.



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Justin Weiner focuses his practice on complex business litigation, including work as National Discovery Counsel in product liability and class action cases. He also has an extensive background in litigation regarding intellectual property. Justin has experience earning favorable results for his clients in state and federal courts in motion practice, on appeals, and in trials. Justin graduated from The University of Chicago, The Law School, with honors, in 2007

**Services**

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- A taxi company as lead counsel in adversary proceeding in Northern District of Illinois Bankruptcy Court
- A major media company in litigation over a $1.8 billion debt refinancing
- A national moving company in class actions brought by a former employee
- An amicus brief in the landmark patent case Oil States Energy Services, LLC v. Greene’s Energy Group, LLC in the Supreme Court of the United States
- A wireless telecommunications company in patent litigation in the United States District Court for the Northern District of Illinois
- A major auto manufacturer in a products liability case in the Illinois Supreme Court
- A leading engineering firm in trade secret and unfair competition litigation in New York State Supreme Court
- A wireless telecommunications company in a breach of contract claim in the United States District Court for the Western District of Missouri
- A patent infringement suit relating to mobile real-time data technology in the United States District Court for the District of Delaware and the Patent Trial and Appeal Board
- A natural gas company as defendant in patent infringement case
- A garment manufacturing company as petitioner in an ITC action
- A seller of vaping products as respondent in an ITC action

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# 20/20 Hindsight: The Contract Terms Trial Lawyers Wish Their Clients Considered

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**What Trial Lawyers Wish Their Clients Had Considered During the Negotiation of Their Contracts and Commercial Transactions**
*W. David Harless*

**Hypothetical**
In the 1990s, a couple, residents of Ohio, decided to start a company, NewCo, as a means of providing their only son, a bio-scientist and food engineer, a career in producing and selling dairy and grain products developed from new cultures and genetically modified whole grains. NewCo was formed in Delaware, but its principal place of business was outside of Green Bay, Wisconsin, where their son resided. The parents were the sole shareholders of NewCo and their son was employed and compensated handsomely as NewCo's President and CEO. Also, all cultures and genetic processes used in the production of NewCo's products were patented or otherwise owned by the son, and licensed to NewCo under a lucrative agreement.

In 2023, AgriCo, an agri-business conglomerate formed in Delaware with its principal place of business in Virginia, sought to purchase NewCo from the parents. The parents insisted as part of the sale that the son be afforded an employment agreement as President and CEO of NewCo, granted a stock interest of 10% of outstanding NewCo stock, and provided an option to purchase an additional 35% of outstanding Newco stock. In exchange, the son would enter into a new license agreement with AgriCo permitting its use of the proprietary and patented cultures and genetic processes owned by the son.

Following successful negotiations, the parties entered the following agreements:

1. The elderly parents entered a stock purchase agreement with AgriCo selling all of the outstanding stock of NewCo to AgriCo. AgriCo agreed to pay the parents for their stock over five years based on NewCo performance benchmarks. The stock purchase agreement contained a Virginia choice of law provision, and also provided for arbitration before the American Arbitration Association under its Commercial Arbitration Rules. The agreement also expressly provided that it was being entered into by the parents in consideration for AgriCo's and NewCo's entry into all of the following agreements.

2. The son entered an agreement for eight years of employment with NewCo that contained a three-year nationwide restrictive covenant to not compete against NewCo and AgriCo upon separation from employment for any reason. The employment agreement had a Wisconsin choice of law and venue provision.

3. The son and AgriCo entered a stock purchase agreement for 10% of the outstanding shares of NewCo that contained a Delaware choice of law and venue provision.

4. The son, AgriCo, and NewCo entered a stock option agreement that granted the son the right to purchase stock equivalent to an additional 35% interest in NewCo, again subject to a Delaware choice of law and venue provision.

5. The son, AgriCo, and NewCo entered a stockholders' agreement that provided for AgriCo's repurchase of the son's stock in NewCo if his employment with NewCo was terminated for cause, or if he left employment with the Company for any reason other than death, disability, or cause. This agreement was also subject to a Delaware choice of law and venue provision.

6. The son entered into a new license agreement with NewCo permitting its use of the proprietary and patented cultures and genetic processes owned by the son for the duration of his employment. The license agreement provided that all proprietary and patented cultures and genetic processes would be sold by the son to NewCo upon the separation of the son's employment for any reason, and the agreement contained a method for valuing and paying for these intellectual property assets. The license agreement contained a Virginia choice of law and venue provision.

Each of the above agreements contained the following clause:

> This writing contains the entire agreement of the parties and there are no promises, understandings, or agreements of any kind pertaining to this contract other than stated herein.

In year three of the stock purchase agreement with the parents, AgriCo became dissatisfied with the revenues and earnings of NewCo, and proposed to renegotiate the NewCo performance benchmarks. The parents balked, and in response AgriCo suspended its payments to the parents. AgriCo then filed a demand for arbitration before the AAA claiming breach of contract by the parents in their representations and warranties regarding the financial condition of NewCo. There was little merit to AgriCo's claims, but it believed that forcing the parents to arbitration would likely result in a favorable settlement.

**Introduction**

Commercial trial lawyers, it seems, are endlessly confronted with a single issue in almost every case – what does the contract mean? More specifically, what are the applicable and operative terms of the contract, what is the meaning of those terms, and how do they apply to the facts of each case?

> Contract interpretation is one of the most important topics in commercial law. It lies at the center of contract doctrine, which contains numerous rules that regulate the construction of agreements. Interpretation is the subject addressed most often by contract lawyers, whether they are litigators or transactional attorneys. And interpretive disputes constitute the largest source of contract litigation. In fact, contractual meaning may be the most frequently contested issue in civil cases generally. The significance of contract interpretation explains why the field has received extensive academic attention since the turn of the century. And the subject is now recognized as "the least settled, most contentious area of contemporary contract doctrine and scholarship."[1]

Trial lawyers embroiled in commercial litigation over contract terms inevitably study the origin of the contract and its purpose. Rather than simply undertake a siloed analysis of the four corners of the contract, we investigate, for example, the purpose of the contract, the parties' intent, the context of the transaction, and finally whether the language of the contract has indeed captured the purpose, intent, and context of the transaction.

Scholars refer to these competing approaches to contract analysis and interpretation as a textualist versus a contextualist theory of interpretation.

> 'Textualist' courts and commentators argue that the interpretation of contracts should focus primarily on the language contained within the four corners of written agreements. According to this view, extrinsic evidence is of secondary importance, and many contracts can and should be interpreted without such evidence. 'Contextualists,' by contrast, believe that courts generally ought to examine both the language of the parties' agreement and extrinsic evidence when determining contractual meaning.[2]

The theory of interpretation - textualist versus contextualist - will likely be decided based on the law of a particular jurisdiction.[3]

However, this is not intended to be a "scholarly" or empirical analysis of contract interpretation, although references to such resources have been and will be referenced throughout. Instead, we will endeavor to present and discuss briefly some of the troublesome questions that surface when, as trial lawyers, we analyze at the outset of a case the origins and purpose of the language and terms selected in the contract or contracts at issue. Consider for example the following questions:

- If that is what the parties meant, why did they not say so?
- Was this contract reviewed through the lens of a practitioner with expertise, for example, in restrictive covenants, indemnification clauses, or the laws or procedures of a particular jurisdiction?
- What did my client or their scriveners understand about the advantages and disadvantages of arbitration versus a jury or non-jury trial?
- Were the transaction lawyers for the client licensed to practice in, or otherwise knowledgeable of the laws and procedures of, the jurisdiction adopted to govern and/or resolve the transaction?

Again, the goal of this discussion is not so much to offer solutions or answers to the above questions, but to instead inform clients, their general counsel, and their outside transactional attorneys on particular issues that trial lawyers contend with in challenging or defending contracts.

1 Joshua M. Silverstein, The Contract Interpretation Policy Debate: A Primer, 6 Stan. J.L. Bus. & Fin. 222, 224 (2021) (citations omitted).

2 Id. at 225.

3 See, e.g., Alan Schwartz & Robert E. Scott, Contract Interpretation Redux, 119 Yale L.J. 926, 956 (2010); Miller, Geoffrey P., Bargaining on the Red-Eye: New Light on Contract Theory (May 6, 2008), NYU Law and Economics Research Paper No. 08-21, Available at SSRN: https://ssrn.com/abstract=1129805 or http://dx.doi.org/10.2139/ssrn.1129805 (each concluding that New York's contract-interpretation law is inclined towards textualism, and California's contract-interpretation law is inclined towards contextualism, which may thereby explain a substantial predisposition to the choice of New York law in major merger and contractual transactions).

**What is the Contract? Integration Clauses, Integrated Transactions, and Material Breach Rule**

The textualist versus contextualist competing theories for interpretation are in reality the second issue that confronts the parties and their counsel in enforcing contracts. The first issue is identifying the complete contract. What does it consist of? Is it a single document? Is it instead a group of documents either incorporated by reference in the primary agreement or a series of documents contemporaneously executed as part of a single transaction? Quite often, there is not a simple answer to these questions.

Consider the above hypothetical. Are the individual agreements to be interpreted independent of each other? Each agreement contains an integration clause purporting to make the document a standalone contract. Is that enough?

In a 2017 study published by the University of Alabama Law Review, the author presented research of "the frequency with which contract-interpretation clauses are included in commercial contracts between sophisticated parties."[4] The study examined 1,521 commercial contracts that had been filed by publicly traded companies with the Securities and Exchange Commission. The author found that over 75% of the contracts included a "merger" or "integration" clause, which, he concluded, in turn triggers a "textualist" interpretation of the agreement.[5] Specifically, the study determined that:

> default interpretation rules of commercial contracts between sophisticated parties should embed the set of legal rules normally triggered by a textualist merger clause: (1) prior oral or written statements between the parties cannot add to the written contract; (2) such prior statements cannot modify the written contract; and (3) if the contract text is seemingly unambiguous, extrinsic evidence cannot be considered for the purpose of giving meaning to the contract text.[6]

This study may have correctly concluded that a majority of sophisticated parties use merger or integration clauses because they prefer that interpretation of their contracts be limited to the four corners of the document, exclusive of prior oral or written statements, the parties' conduct, parol evidence, or contextual factors. However, this purpose of the merger or integration clause is likely defeated when the contract incorporates by reference other transaction documents or is otherwise one of many documents executed as part of a larger transaction. More importantly, the consequences can be dire.

Traditionally, in the absence of a contrary intention, all agreements and instruments executed at the same time, for the same purpose, in the course of the same transaction are to be considered and construed together as one contract or instrument, even if they were not all executed by or between the same parties.[7] When all of the instruments of a transaction are viewed as if their several provisions were in the same agreement, but yet there are conflicting provisions within the respective instruments, e.g., different choice of law and venue provisions, some with arbitration provisions and others without, chaos may ensue.

Additionally, when instruments are viewed together as the same agreement, there may be cascading negative consequences when a party commits a material breach of just one of the integrated instruments. Consider the above hypothetical. May AgriCo breach its stock purchase agreement with the parents without collateral consequences? If the instruments executed by AgriCo, NewCo, the parents and the son are considered a completely integrated transaction, is AgriCo now prevented from enforcing all of the agreements? Likely, yes.

In most states and under federal common law, a party who commits the first breach of a contract is not entitled to enforce the contract.[8] The Restatement of Contracts explains that this doctrine of first material breach, or prior material breach, is "based on the principle that where performances are to be exchanged under an exchange

4 Uri Benoliel, The Interpretation of Commercial Contracts: An Empirical Study, 69 Ala. L. Rev. 469, 471-72 (2017).

5 Id. at 472.

6 Id. at 492.

7 See e.g., Countryside Orthopedics, P.C. v. Peyton, 541 S.E.2d 279, 284-85 (Va. 2001) (four agreements as part of a stock transaction should be regarded as part of one transaction and construed as "one and the same instrument" where all parties knew about the agreements and executed them at the same time as part of a single transaction to accomplish an agreed purpose); Baker v. Wilburn, 456 N.W.2d 304, 306 (S.D.1990) (writings executed together as part of single transaction should be interpreted together and "it is not critical whether the documents were executed at exactly the same time or whether the parties to each agreement were identical"); Cushman v. Smith, 528 So.2d 962, 964 (Fla.Dist.Ct.App.1988) ("instruments entered into on different days but concerning the same subject matter may under some circumstances be regarded as one contract and interpreted together"); Atlas Indus., Inc. v. National Cash Register Co., 531 P.2d 41, 46–47 (Kan. 1975) (two documents construed together when parties complied with provisions of interrelated documents although one document was not executed by party to transaction); Schlein v. Gairoard, 22 A.2d 539, 540–41 (N.J. App. 1941) ("where several instruments are made as part of one transaction, relating to the same subject-matter, they may be read together as one instrument ... even when the parties are not the same, if the several instruments were known to all the parties and were delivered at the same time to accomplish an agreed purpose").

8 See, e.g., Coll. Point Boat Corp. v. United States, 267 U.S. 12, 15 (1925) ("A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for non-performance by him although he was ignorant of that fact at the time of the breach."); Laguna Constr. Co., Inc. v. Carter, 828 F.3d 1364, 1369 (Fed. Cir. 2016) ("Prior material breach is a federal common law defense asserted when a party breaches a contract after another party has already breached the same contract."); W. Auto Supply Co. v. Sullivan, 210 F.2d 36, 39-40 (8th Cir. 1954) ("[I]t seems to be generally accepted by well-considered decisions that a party to a contract may defend on the ground that there existed at the time a legal excuse for non-performance by him although he was ignorant of that fact at the time of the breach."); Hamilton v. SunTrust Mortg. Inc., 6 F. Supp. 3d 1300, 1309 (S.D. Fla. 2014) ("It is a fundamental principle of Florida contract law that a material breach by one party excuses the performance by the other."); Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Comm'rs, 786 N.E.2d 921, 928-29 (Ohio Ct. App. 2003) (notice of repudiation of prospective material duties gives the offended party the freedom to cancel its obligations under the contract); Countryside Orthopedics, P.C. v. Peyton, 541 S.E.2d at 285 (Under Virginia law, "when the first breaching party commits a material breach, that party cannot enforce the contract.").

of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties ... if there has already been an uncured material failure of performance by the other party." Restatement (Second) of Contracts § 237b, cmt. b (1981). In other words, because this is an integrated transaction in which all of the instruments are considered one agreement, the son may likely step away from his employment agreement, his restrictive covenants, and the licensing agreement, on the basis that AgriCo has already breached the same agreement.[9] If a court were to hold in the hypothetical that all of the instruments are part of a single, integrated agreement, then further chaos will ensue from the choice of law, arbitration and venue provisions of the various instruments.

In summary, parties to a transaction involving more than one instrument must be attentive at the outset of the deal to whether the associated instruments will be so interrelated as to constitute one agreement. The mere use of integration clauses alone in each instrument will not prevent this outcome. Instead, the parties should address conflicts among the interrelated provisions of the agreements. In some circumstances, identifying particular provisions of the interrelated agreements as being independent of the entire transaction may suffice.[10] Perhaps most importantly, considering the integration of instruments to a transaction will inform the parties and our prospective clients to be wary of suspending performance or taking any other action that might be deemed a material breach of the integrated agreement as a means of addressing a dispute between the parties.

**Choice of Law and Choice of Venue Provisions: Who, What When, and Where?**

Choice of law and choice of venue provisions are ubiquitous in commercial agreements. Yet quite frequently they are not tailored to the particulars of the specific transaction. The parties default instead to the law of the jurisdiction of the party having the greatest bargaining power, or the place of performance, or perhaps a common jurisdiction where the parties were either organized or have their principal places of business. When a commercial dispute reaches litigation, clients often have unsatisfactory responses to the following questions:

1. At the time of the negotiation of this or these agreements, was there an attorney familiar with the laws of the designated jurisdiction who explained to the client the possible effect of those laws on this specific transaction?

2 . What relationship does the law of the chosen jurisdiction have to the parties and the underlying transaction?

3. Did the parties intend the choice of law (or forum selection clause) provision to apply to all claims - contractual, common law, tort, and statutory claims?[11]

4. Did the parties intend for the law at the time of the contract, or the law at the time of the breach, conduct, or contested action, to apply? In other words, "[did] the parties intend to select the law of the chosen state as it existed at the time, or did they intend their obligations to change with the law."[12]

5. Did the parties intend that the chosen law apply to the interpretation of the forum selection clause?[13]

6. Has the client or their counsel evaluated the case disposition statistics for the chosen forum, i.e., average duration from filing to disposition and mandatory alternative dispute resolution.[14]

9 See, e.g., No. Trust Invs., N.A. v. Domino, 896 So. 2d 880, 881-82 (Fla. App. 2005) (refusal to grant injunction to enforce restrictive covenants where employer had failed to fully fund the employee bonus pool); Parr v. Alderwoods Group, Inc., 604 S.E.2d 431, 435-36 (Va. 2004) (breach of two of four integrated agreements by purchaser of funeral home business from former owner relieved the former owner of restrictive covenant obligations); Countryside Orthopedics, P.C. v. Peyton, 541 S.E.2d at 286 (employee-shareholder's failure to make stock purchase payments relieved the remaining shareholder and the employer of severance pay obligations to the breaching party).

10 Consider this provision:

The covenants set forth herein shall be construed as agreements independent of any other provision in any other agreement by, between, among, or affecting Employer and Employee, and the existence of any claim or cause of action of Employee against Employer, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement of this Agreement.

Or the following:

The Parties agree that the existence of any right, claim, or cause of action either may have now or in the future against the other, whether predicated on this Agreement or other associated agreements or instruments, or any other agreement or duty, whether contractual, statutory or at common law, shall not constitute a defense to the enforcement by the Parties of the covenants and agreements contained herein. The Parties agree that any breach of the terms of this Agreement or any other agreement or duty, statutory or at common law, by a Party shall not entitle the non-breaching party to Ins rescind, terminate, or repudiate the non-breaching Party's duties under the covenants and obligations of this Agreement, and its subparts.

11 Consider for example the following clause:

The law of the Commonwealth of Virginia shall govern any and all claims, losses, or damages arising from or related to this contract, including, without limitation any statutory, common law, or tort claims.

This clause, if present in a contract between a general contractor from New York and a subcontractor from Massachusetts performing services on a construction project in Virginia, would afford the parties the defense of contributory negligence against vicarious liability claims by the other. Under Virginia law, contributory negligence by the injured party is an absolute bar to recovery for negligence claims.

12 Jeffrey L. Rensberger, Choice of Law and Time, Part II: Choice of Law Clauses and Changing Law, 39 Ga. St. U. L. Rev. 401, 418 (2023). Professor Rensberger explains that there are two types of choice of time responses to choice of law clauses. Pure choice of time clauses would include phrases such as the "law, statutes, or ordinances now or hereafter in force." Combined choice of law and time clauses may provide, for example, that the "rights of the parties are to governed by the laws of Illinois existing at the time of the making of the contract," or "at the time of the decision upon any claim or controversy between the parties." Id. at 408-09.

13 See Tanya J. Monestier, When Forum Selection Clauses Meet Choice of Law Clauses, 69 Am. L. Rev. 325, 328 (2019) ("Up until fairly recently, it was common to see courts applying forum law to interpret a forum selection clause.... Lately, though, courts have held that issues of forum selection clause interpretation should be governed by the law chosen by the parties in their contract.").

14 For example, the United States District Court for the Eastern District of Virginia is known as the "rocket docket." The typical duration of civil cases from filing to disposition by motion or trial is 9-10 months, and pretrial mediation of the matters before a United States Magistrate Judge is mandatory.

Choice of forum provisions standing alone and in conjunction with choice of law provisions also present unique issues. In Atlantic Marine Construction Company v. United States District Court, the Supreme Court held that a "contractually valid" forum selection clause should be enforced by federal courts absent extraordinary circumstances.[15] However, the Supreme Court provided no guidance as when a forum selection clause is "contractually valid."[16] One legal scholar has offered a framework to evaluate whether a forum selection clause is "contractually valid."[17]

1. Is the forum selection clause valid, i.e., is there consideration for the agreement, was it the byproduct of fraud, etc.?

2. What does the forum selection clause mean? Is it exclusive and mandatory, i.e., does it clearly require the court of the chosen jurisdiction to the exclusion of all others? If so, does the forum selection clause encompass the subject matter of the pending claims?18

3. Is the clause enforceable, i.e., is it contrary to public policy or is it unreasonable?

Although these factors are offered as a construct for courts to evaluate whether the forum selection clause is "contractually valid," the scriveners of the contract should consider the same factors in evaluating the appropriateness of the forum selection clause.

**Jury Trial, Non-Jury Trial, or Arbitration?**

Trial lawyers and their clients may have reasonable disagreements regarding the efficiency, speed, cost-effectiveness, and satisfaction of resolution of commercial disputes in a traditional jury or non-jury trial setting, or before one or more arbitrators. "It depends" is an apt response to whether and which of the above dispute resolution processes are best for a given matter. It also may be difficult to assess the appropriate dispute resolution process at the outset of a contractual relationship, versus at the time the dispute arises. However, there are questions that transactional attorneys and clients should address during the negotiation of their commercial agreements that will inform them whether to resort to court-based dispute resolution or private dispute resolution.

1 .Confidentiality. Does the client wish to resolve resulting disputes confidentially and privately outside the public spectacle of state or federal courts? If so, arbitration alone offers that benefit.

2 .Appellate Review. Do the parties wish to have recourse to appellate courts to address possible error at the trial level or disputed issues of law? In most states and in federal court, the parties have an appeal as a matter of right from a trial court decision. The grounds for appeal from an arbitration award, by contrast, are extremely limited.

3. Speed (and Delay). There is considerable debate whether arbitration provides quicker disposition of disputes. Clearly, the limited availability of an appeal from an arbitration award ensures finality earlier than judicial judgments from which an appeal may be taken. However, as with the evaluation of a forum selection clause, the clients and their counsel should investigate the case disposition statistics for a related forum. Additionally, access to summary judgment in state and federal courts offers a route for summary disposition of claims that are rarely offered in arbitration proceedings. Finally, the number of arbitrators can present obstacles to prompt resolution claims. For example, if there is a three-arbitrator panel, there are three calendars that must be navigated for all hearings and the trial of the matter. If one of the arbitrators must step aside due to health, conflict, or other reasons, there likely will be significant delay in finding a replacement arbitrator and rescheduling trial.

4. Expense. Similarly, there is reasonable debate whether arbitration is more cost-effective than traditional trial court resolution. The most compelling

15 The Court held:

When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a [28 U.S.C.] § 1404(a) motion be denied. . . .

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain.

571 U.S. 49, 62, 66 (2013).

16 The Supreme Court side-stepped analysis of this issue: "Our analysis presupposes a contractually valid forum-selection clause." 571 U.S. at 62, n.5.

17 John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 Iowa L. Rev. 127, 130-31 (2022).

18 Professor Coyle, following a survey of cases involving interpretation of the language of forum selection clauses, has suggested language that should be used by contracting parties to ensure that forum selection clauses are either exclusive (mandatory) or non-exclusive (permissive), or narrow or broad as to subject matter:

If the goal is EXCLUSIVITY, use words like "sole," "only," "exclusive," and "must" to convey an intent to litigate exclusively in the chosen forum.

If the goal is NON-EXCLUSIVITY, omit all the words listed above and use the word "non-exclusive" or state that the parties "submit to jurisdiction" or "consent to venue" in the chosen forum.

If the goal is to give the clause a BROAD SCOPE, state that the clause shall apply to all claims "relating to" the contract or the parties' relationship.

If the goal is to give the clause a NARROW SCOPE, state that the clause shall only apply to "contract claims" or to claims "arising out of the alleged breach of this agreement."

John F. Coyle, Interpreting Forum Selection Clauses, 104 Iowa L. Rev. 1791, 1851 (2019).

cost-basis for avoiding traditional trial court resolution is the increasing costs of discovery, including disputes over, and management, of electronically stored information. However, if there is more than one arbitrator, the costs of the proceedings will be multiplied.

5. Inflexibility. In federal court and in most states, arbitration provisions are interpreted broadly to encompass virtually all disputes and claims that may arise under a commercial agreement. The practical effect is that the parties are bound to this dispute resolution process perhaps years in advance of the accrual of the claims and without knowledge of the precise nature of the dispute. The parties may mutually consent to arbitration once a claim arises, thus preserving flexibility to pair the desired dispute-resolution process with the claim. That flexibility is lost when arbitration is mandated in the commercial agreement.

6 .Rules and Procedures. Some argue that arbitration provides flexibility by allowing the parties and the arbitrators to adopt procedures and rules of evidence tailored to the contested claims. We suspect that this benefit is likely more aspirational than practical. In our experience, the parties to arbitration are suspect of their adversary's suggestion of deviations from either the rules and procedures of the administering organization, e.g., the American Arbitration Association, or procedures that have been established by the arbitrator(s). If adherence to the rules of procedure and evidence of a particular jurisdiction in arbitration is desired, then your clients should consider incorporating those into the arbitration provisions of the agreement. Additionally, you may be well served to specify that only retired judges, individuals familiar with such rules, may serve as your arbitrator(s).

7. Limited Third-Party Practice. Parties to an arbitration agreement are rarely afforded the right to join third parties in an arbitration who are not signatories to that agreement. This could prove inefficient for a party that once arbitration is concluded, must then seek recourse against the third party in a separate proceeding. Consider for example a wholesaler who is sued in arbitration by its customer for delivery of nonconforming goods, but is prevented from joining the manufacturer that supplied the defective products. Again, evaluating the universe of potential claims at the outset of the transaction will inform the clients of the wisdom of a particular dispute resolution process.

8. Jury vs. Non-Jury Trial. A federal district court judge before whom I routinely appeared would often summon to his chambers at 9:00 a.m. the next morning out-of-state CEOs of parties in high-dollar commercial and intellectual property disputes who were at a settlement impasse. He would start his conference with compliments and accolades for the accomplishments, leadership, and business acumen of the attendees, but would conclude with the following comment:

> I suspect that your shareholders might have second thoughts about your judgment and leadership if they learned that you were about to allow seven strangers, having no more perhaps than a high school education, make a decision that could adversely affect the financial future of your company. If you allow that to happen, I would put you in the category of a thrill seeker.
>
> The unknowns of the makeup, education, and judgment of jury members present uncertainties that our clients do not manage easily and often fear. If the client wishes to specify a mandatory jurisdiction for dispute resolution, it would be would be well served to evaluate that jurisdiction's jury pool and verdict histories before finalizing the agreement. Depending on the outcome, mutual waivers of a jury trial may be in the client's best interest.

Unfortunately, trial lawyers often learn following the receipt of an arbitration claim that at the time of the negotiation of the commercial agreement, neither the clients nor their transactional counsel fully appreciated the potential impact of limited discovery, procedures, rules of evidence, and appellate recourse to which they had consented in agreeing to arbitration. Clients should consult with trial counsel before specifying arbitration as the dispute resolution process and be advised of the implications of the above limitations that may arise with the parties' agreement.

**Noncompete, Non-solicitation, Trade Secret, and Nondisclosure Agreements**

On January 5, 2023, the Federal Trade Commission issued its notice of proposed rulemaking that would make noncompete agreements nationwide unlawful and would require all employers to rescind existing noncompete agreements on or before the specified compliance deadline.[19] The only exceptions would be for a noncompete agreement "entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets, when the person

19 Non-Compete Clause Rule (Notice of Proposed Rulemaking), 88 Fed. Reg. 3482 (January 19, 2023) (proposed to be codified at 16 C.F.R. Part 910).

restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause."[20]

According to the Federal Trade Commission, as of the issuance of the referenced Notice of Proposed Rulemaking, three states (California, North Dakota, and Oklahoma) have statutorily declared that noncompete agreements are void and unenforceable for nearly all workers.[21] Among the remaining state jurisdictions and the District of Columbia, eleven states and the District have made noncompete agreements for low-wage employees unlawful.[22] In addition, the majority of the remaining jurisdictions ban noncompete agreements for specified professions, such as physicians.[23] If adopted, the FTC's proposed rule would preempt any "state statutes, regulations, orders or interpretations" inconsistent with the rule, but permit state laws that afforded greater protection than the rule.[24]

The proposed rule does not currently provide an exception for highly paid or highly skilled workers, such as senior executives.[25] However, the proposed rule does not apply to noncompetition agreements between two businesses, where neither is a "worker" as defined under the proposed rule.[26]

An overview or survey of noncompete laws is beyond the purview of this article. However, given the increasing changes in the restrictive covenant landscape, clients and their transaction counsel should consider the following as they negotiate commercial transactions that require protection of proprietary or competitive interests.

1. Trade Secret and Nondisclosure Agreements. The Federal Trade Commission appears to have expressly sanctioned the use of nondisclosure provisions for trade secrets and confidential information provided they are not so broad as to

restrain such an unusually large scope of activity that they are de facto non-compete clauses. Under proposed § 910.1(b)(2), such functional equivalents would be non-compete clauses for purposes of the Rule, whether drafted for purposes of evasion or not.[27]

2. Non-solicitation Agreements. Non-solicitation agreements, in contrast to noncompete agreements, are not expressly forbidden by the proposed rule "because these covenants generally do not prevent a worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment with the employer."[28] Typically, non-solicitation agreements restrict a former employee from soliciting the business of the customers of the former employer and soliciting for hire the former employer's employees. These forms of restrictive covenants should be used in lieu of noncompete agreements.

Finally, because of changing laws in this area, and the uniqueness of the laws of each state, transactional attorneys and their clients should not ad hoc draft and include restrictive covenants in their commercial contracts and employment agreements for former owners and highly paid executives without the advice and assistance of attorneys knowledgeable of and specialized in restrictive covenant matters. Restrictive covenants are not homogenous. They present unique circumstances that will dictate the proper duration, geographical reach, and subject matter scope of each restriction.

**Indemnification Clauses and Negligence of the Indemnitee**

Indemnification clauses are an enigma. Parties to commercial transactions overwhelmingly insist on their inclusion in agreements, yet they seem to be one of the most contested clauses when the parties have a falling out. Between relatively sophisticated business parties, mutual indemnification provisions are commonplace. However, some business relationships foster disparate negotiating power that allows a purchaser or vendor, for example a large global retailer with warehouse club operations or an international online retailer, to impose unilateral indemnification obligations upon the less powerful business partner. Notwithstanding the inequity in bargaining power between parties, there is fundamental rule with regard to indemnification that the client and their transaction counsel should be attuned to in considering such clauses.

The United States Supreme Court and most state courts will enforce an indemnification clause that provides the unspeakable – indemnification of the party whose negligence caused the harm.[29] With virtual unanimity, courts abide by the principal that "a contractual provision should not be construed to permit an indemnitee to recover for their own negligence unless that intent is clearly

20 88 Fed. Reg. at 3536 (proposed 16 C.F.R. 910.3).

21 Id. at 3494.

22 Id.

23 Id.

24 Id. at 3515.

25 Id. at 3512-13.

26 Id. at 3509.

27 Id.

28 Id.

29 See, e.g., United States v. Seckinger, 397 U.S. 203, 211-12 (1970); Estes Express Lines, Inc. v. Chopper Express, Inc., 641 S.E.2d 476, 478 (Va. 2007); District of Columbia v. Royal, 465 A.2d 367, 368–69 (D.C.1983); Levine v. Shell Oil Co., 269 N.E. 2d 799, 801 (N.Y. 1971).

expressed from the terms of the contract…."[30] However, courts vary widely on when the intent to indemnify another for their negligence is clearly expressed in the contract. For the vast majority of jurisdictions, courts do not require the presence of the word "negligence" in the indemnification clause to later make a finding that the clause encompasses the indemnitee's negligence.[31]

Given the uncertainty of whether a given court may interpret a general, but broad, indemnification clause to encompass an indemnitee's negligence, the client and transaction counsel should "call out" the opposing party and their counsel. Specifically, you should propose language that expressly disavows indemnification for the other party's negligence:

> The Indemnifying Party is not obligated to indemnify the Indemnified Party for any claim arising out of or related to the Indemnified Party's negligent, grossly negligent, reckless, or willful or intentional conduct.

30 Travis Talerico, Indemnification From Negligence: Freedom to Contract or Abuse of Bargaining Power?, 70 Syracuse L. Rev. 969, 973 (2020).

31 See supra Note 29 and cases cited therein; see also Adloo v. H.T. Brown Real Estate, Inc., 686 A.2d 298, 304 (Md. 1996); Blide v. Rainier Mountaineering, Inc., 636 P.2d 492, 493 (Wash Ct. App. 1981).

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David Harless is a partner and member of the firm's Litigation and Employment practice groups. He represents a wide variety of corporations, closely-held companies, and individuals in complex business and commercial disputes, such as contract, business tort, restrictive covenant, trade secret, and employment litigation, and products liability, premises liability, and tort defense litigation. He spends significant time advising clients regarding employment matters, and defending against discrimination, wrongful discharge, and hiring claims. He also serves as general legal counsel to the Capital Region Airport Commission, which owns and operates the Richmond International Airport.

Mr. Harless is chairman of the firm and its Executive Committee, a Fellow of the American College of Trial Lawyers, and a former president of the Virginia State Bar and the Bar Association of the City of Richmond. He has been a faculty member of the Virginia State Bar's mandatory professionalism course, the panel that trains such faculty, as well as the National Trial Advocacy College of the University of Virginia. In addition, Mr. Harless has lectured on numerous business and employment litigation and trial practice topics.

**Practice Areas**

- Trials / Appeals / Alternative Dispute Resolution
- Complex Business and Commercial Disputes
- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Products Liability and Torts
- Municipal Governance and Public Sector

**Experience**

- Defense of companies against business conspiracy, trade secret and interference with contract claims.
- Represent parties in disputes over indemnification and allocation of liability for commercial and products liability claims.
- Defense of claims involving fiduciary duties of officers, directors, and members of corporations, closely-held companies and partnerships
- Defense and assertion of violations of restrictive covenants, such as non-compete, non-solicit, confidentiality, trade secret and no-hire clauses.

**Recognition**

- The Best Lawyers in America - Bet-the-Company Litigation, Commercial Litigation, Employment Law-Management, Litigation-Labor & Employment, Personal Injury Litigation-Defendants, 1995-2024
- Chambers USA - Litigation: General Commercial, 2004-2023
- Virginia Super Lawyers - Business Litigation, 2006-2023
- Legal Elite (Virginia Business) - Civil Litigation, 2010, 2019-2020, 2022-2023; Labor/Employment, 2000-2009, 2011-2019, 2021
- William J. Brennan Jr. Award, National Trial Advocacy College at the University of Virginia School of Law, 2020
- Walker Award of Merit, Virginia Bar Association, 2017

**Education**

- University of Virginia School of Law, J.D., 1981
- University of Kentucky, B.B.A., 1978

# When the Client Drives the Bus: Unorthodox Case Management and Mediation Strategies

**Denia Aiyegbusi**
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**When the Client Drives the Bus: Unorthodox Case Management and Mediation Strategies**
*Denia Aiyegbusi*

Building a trusting relationship with your client is especially important in litigation. Clients view their attorneys as trusted advocates who work to protect their rights and interests. Oftentimes, clients turn to their attorneys to outline strategies and push the case forward while the client takes a "backseat" or "wait-and-see" approach toward litigation.

To achieve the best possible outcome, attorneys should be open to a collaborative approach that actively includes their clients in the litigation process. Allowing your client to drive the bus in certain situations, instead of merely taking a ride as a backseat passenger, will help to facilitate their involvement and can significantly impact the end results.

**Reporting**
Traditionally, defense attorneys find themselves reporting to their clients through written reports that analyze the facts of the case and set forth determinations of liability and discussions of potential exposure should a case proceed to trial. These reports are oftentimes lengthy or completed on templates provided by either the insured or its insurance carriers. While we will likely never be able to rid ourselves of these written reporting requirements, there are alternatives that are much more engaging and allow clients to brainstorm and ask questions contemporaneously with learning about the most recent case developments.

One such alternative is to schedule and conduct bi-weekly claim-review calls (or in-person meetings) in which the client sits down with his/her attorneys to discuss and formalize a plan of action. During these calls, the attorney and client can discuss items such as the trial, liability assessment, elements of discovery, potential experts, mediation and trial strategies. Throughout each call, a running list of tasks can be prepared with targeted dates for completion. That list also creates an agenda for future calls.

While the thought of bi-weekly calls on any one case seems like it can be a lot, this alternative reporting schedule actually saves time in the end and allows the client to directly weigh in and ask questions as items are presented, thereby saving time on written reports and allowing the client to have a direct and immediate impact on the attorney's planning and preparation for important steps in discovery, mediation, and ultimately trial.

**Investigation and Discovery**
Given the statute of limitations applicable to specific actions, by the time an attorney receives an assignment, many important pieces of information may have either become stale or disappeared entirely. It is important that your client involves himself/herself in pre-suit investigation to help preserve specific information and to get pre-suit discovery (in anticipation of litigation) completed. Also, once the suit is filed, clients oftentimes rely upon their attorneys to propound and answer written discovery as well as to consult and retain expert witnesses. Have you ever considered the advantages of getting your client to begin discovery pre-suit?

As soon as your client is made aware of a potential cause of action (by way of accident or evidence or some injury/loss), your client should begin by preserving information that documents the accident as well as the scene. This may include taking photos, downloading videos, getting employee or witness statements, etc. By having the client engage in this investigation rather than waiting for assignment of defense counsel, you may get better cooperation from employees who may be hesitant to share information with outside counsel. The client will also have greater access to information and assisting with the initial investigation will prepare the client for later discovery as well as the anticipated corporate deposition.

It is important that the client understand it may be advantageous to order social-media sweeps, background checks, and even pre-suit video surveillance in the months (or years) before suit is filed. Beginning with these tasks

may provide an opportunity to collect information that will likely be otherwise unavailable once a claimant hires an attorney and/or files suit. The client's investigation will also allow for quick decisions related to litigation strategy once suit is filed, such as timing of settlement discussions as well as the reserves to be set for each claim.

**Settlement Negotiations and Mediation**

Pre-COVID, mediations were in person with all parties and counsel in attendance. Post-COVID, more and more mediations are being conducted virtually through online platforms such as Zoom and/or Teams. Even now that we are getting back to in-person mediations, clients continue to participate remotely saving both travel time and expenses. Post-COVID virtual mediations oftentimes require the client to vest his/her attorney with authority to use during mediation. During mediation, the attorney negotiates within that authority reporting each step along the way.

If your client appears for the mediation in person, consider coming to an agreement whereby the client is the one handling the bulk of the direct negotiations. In such a situation, the attorney will prepare for and conduct the presentation during opening caucus. From there, the client would handle the remainder of the negotiations including meeting directly with the Plaintiff (and mediator) to discuss the strengths and weaknesses of the case as well as sharing/disclosing specific evidence that is not included or discussed during the opening presentation.

If your client wants to have direct, face-to-face conversations with your opponent and/or his/her counsel, you should remind your client that (1) what he/she says to the other side is admissible as a statement by party opponent and/or statement against interest; (2) what he/she repeats is waived and the attorney-client privilege is no longer applied, including privilege related to preliminary opinions by experts, surveillance reports, etc.; (3) it is harder to backtrack on definitive statements such as "walk-away" offers and statements that advised "we will never to that."

While there are some cautions to provide your client, ultimately removing the attorney from the negotiations has some benefits including (1) eliminating the middleman and allowing the mediator to tell your opponent that your client is truly "driving the bus"; (2) streamlining negotiations by removing a lot of the puffery that has invaded attorney-driven mediations thereby fostering direct and open communications between the plaintiff and defendant; (3) educating the client about opposing counsel; and (4) humanizing your client—plaintiff and his/her counsel are now dealing with "Sally from Atlanta" rather than "the big, bad trucking company."

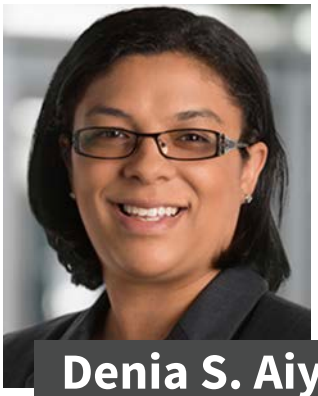
**Settlement Negotiations During Trial**

We have all had the experience whereby a plaintiff and/or his attorney decide to "get real" only on the courthouse steps or, worse, while in the courtroom and in the middle of trial. Such late-stage settlement negotiations are oftentimes a virus—withheld until the most inopportune time and serving only as a thinly veiled attempt to distract the defense from the actual trial.

Instead of focusing your efforts on settlement negotiations rather than preparing for your next witness or overall trial strategy, consider designating your client as the negotiator during trial. Put your client in the power position and allow him/her to directly negotiate with the plaintiff's attorneys. This strategy allows the defense to speak with one voice and will stop the opposing counsel from trying a "divide and conquer" approach. If your client is willing to engage in the negotiations, allow him/her to do so while you focus your efforts on trying the case. Not only will this allow the parties to determine whether the case can be settled, but it also shows plaintiff and his/her counsel that defense counsel will not take the bait and lose focus of defending the case at trial.

**Conclusion**

Next time you are faced with a difficult fact pattern or even a difficult opponent, consider embracing a more collaborative approach to litigation and allow your client to sit in the driver's seat. Having your client take a proactive role in their case is a strategic decision, but it is one which often leads to more effective litigation. Remember, your client is a wealth of factual information and historical data who can aid in your discovery efforts both before and during suit. Further, asking your client to facilitate negotiations both before trial and during trial will also help to build transparency and rapport with your opposing counsel while putting your client's need and goals at the forefront.



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Denia Aiyegbusi takes pride in helping her clients creatively solve litigation problems. Denia knows when choosing a law firm, clients look for an attorney who brings unique perspectives to a matter and gives different solutions in handling any client problems that may arise.
Denia is part of the firm's civil litigation department and works on cases ranging from small property subrogation claims, all the way to multi-million dollar traumatic brain injury personal injury cases. She also defends claims of bad faith/extra-contractual litigation, premises liability, products liability and trucking and transportation defense.

She knows it's less about the expertise of the law, and more about getting the best results for the client. When a matter begins, Denia studies the client and educates herself on the file to develop a strategy that best fits the client's expected end result.

Denia has successfully argued motions in both state and federal courts throughout Louisiana. As an appellate lawyer, she has successfully argued in the Louisiana Fourth Circuit Court of Appeal and briefed to the Louisiana Supreme Court.

**Practices**
- Commercial Transportation
- Education Law
- Manufacturer's Liability and Products Liability
- Premises Liability

**Industries**
- Education
- Manufacturing
- Retail and Restaurant
- Transportation

**Accolades**
- The Best Lawyers in America©, 2024
- New Orleans CityBusiness "Women of the Year," 2020
- Louisiana Super Lawyers, Rising Stars List, 2016-2021
- New Orleans CityBusiness Ones to Watch: Law

**Professional Associations**
- TDefense Research Institute (DRI) - Diversity Committee; Women in the Law Committee, Annual Meeting Marketing Chair
- Louisiana State Bar Association - Diversity Committee, Co-Chair, 2017-present; Diversity Awards Subcommittee, Co-Chair; Diversity Conclave Subcommittee; Minority Involvement Section
- New Orleans Bar Association
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# Data Breaches and Ransomware Attacks: Why These Incidents Continue to be a Top Concern

**Robert Shimberg**
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**A Current Trend in Ransomware - Exfiltration of Data: Considerations for the In-house Attorney**
*Robert Shimberg and Jake Simpson (Sylint)*

"Is the data backup current and unattached" is a critical question that a company hopes to have answered in the affirmative in the face of a ransomware attack, but it is no longer the only critical question. As the landscape of ransomware attacks continues to evolve, data exfiltration can in many situations cause more of a long term and damaging problem than data encryption. So the equally important questions can be "Was any data exfiltrated?" and, if so, "What is the universe of exfiltrated data?"

This evolution represents a significant shift from the traditional focus of ransomware on data encryption to a dual-threat approach where attackers not only encrypt data but also exfiltrate sensitive information. This compounds the potential damage to a victim and can leverage attackers' impact on victims, making the incidents not just a matter of timely data accessibility to avoid disruption but also of data privacy and confidentiality. In this article, we will explore some of the aspects of data exfiltration concerns as a part of a ransomware attack, including some primary early considerations for engaging with a threat actor during a data incident.

**Was Data Exfiltrated?**
A critical aspect of this evolving ransomware strategy is whether the attackers actually have data and, if so, whether their possession triggers notification laws and potential harm to employees, customers, or the business in some other way. If the attackers have accessed certain categories of information (like social security numbers, financial information, protected trade secrets, protected health information, etc.) then states laws and many contracts require notification to impacted individuals and/or governmental entities, and often operate with very strict requirements. Whether or not a company considers a threat actor's ransom demand, the notification requirements nonetheless stand. Some take the position that paying a ransom with a "promise" from the threat actors to destroy could mitigate damages. Regulators will say otherwise, but victim's attorneys may have another perspective. Regardless of the exact motivation, it is critically important to determine exactly what data was exfiltrated and/or accessed because it could trigger federal and/or state regulations requiring notification. =
In the immediate aftermath of a ransomware attack, one job for the internal and external cyber experts and providers is to work to determine if any data was exfiltrated (or accessed). This process can take significant time to accomplish, and can be inconclusive based on a number of factors, including available logs. Simultaneous to this process, the threat actors are often engaging with the victim company to attempt to prove that they have exfiltrated or acquired company data and are threatening to publish, sell or use some or all of the data. The more the threat actor leads the company to believe that sensitive data was exfiltrated, the more the threat actors believe they can extract in the form of ransom from the company. Often, threat actors will release a small subset of the exfiltrated data to a dark web site or other public forums as evidence of the breach. This act is their warning of the potential consequences of non-compliance with their demands, and often comes with communications directly to the company with monetary and time demands. The threat actors may alternatively communicate directly with a corporate executive or other representative "leaking" sensitive data or a list of exfiltrated files. The released data may include highly sensitive information such as personal employee details, confidential corporate documents, or customer data, attempting to display the attackers' ability to inflict damage and regulatory repercussions on the victim organization.

**Engaging with Threat Actors**
For in-house attorneys and internal cybersecurity professionals navigating a ransomware attack, understanding whether and how to engage with threat actors is crucial. The decision to engage—and how to do so—requires a careful, strategic approach that considers both legal and security implications.

Legal Consultation: Before any engagement, consult with outside cyber attorneys to understand the implications of

potential actions. This step helps to ensure that potential communication or negotiations with the threat actors does not inadvertently violate laws or regulations, or innocently make the situation worse.

Deciding to Engage: Determine whether engagement with the threat actors is in the best interest of the company. In some cases, engaging may provide valuable information about what data has been compromised and the possibility of preventing its release. In others, engagement might not yield any benefits, particularly if security professionals have continued concerns about immediate network vulnerability.

Negotiation Channels: If a decision is made to engage, communications should be handled through experienced negotiators with consultation from outside cyber legal counsel. Experienced professionals in this area can often navigate the unique dynamics of cyber related negotiation, which often involves a language of its own and can be premised on historical interactions or known tactics of different threat actor organizations.

Verification of Stolen Data: Obtaining proof of the stolen data can be a critical step in negotiations. Threat actors may provide file lists, samples of the data, or other forms of verification to demonstrate the extent of the data they claim to possess. Other times they provide information that is readily available from public sources including websites. This information is vital for assessing the extent of the breach and formulating an appropriate response.

Analysis of Exfiltrated Data: Conducting a thorough analysis of any provided proof (including where it is housed on the system and who at the company may have had access to the information, including whether administrative credentials may have been compromised) helps to inform the scope of the data exfiltrated, and next steps. This analysis helps to target the organization's response strategy, including notification obligations under data protection laws.

However, the entire process of determination of any exfiltrated data is an unexact science, and can be like proving a negative. One of the things that can compound the problem is the relatively short notification time frames in different federal and state laws, whether to a regulatory body or potentially affected individuals. To that end, many federal and state regulators provide a process for requesting additional time, and they may be open periodic status updates.

**Legal Considerations of Communication Strategy**

Clear, concise, and timely communication with employees and customers is a significant factor for the company. While legal must appreciate the importance of relationship maintenance, it must at the same time focus on protecting the company from communications that can be misinterpreted in the moment, later in the face of regulatory action or lawsuits and with the added eye toward any implications to simultaneous communication taking place with the threat actors.

**Conclusion**

All actions in response to cyber attack should be taken in compliance with applicable federal and state laws and regulations. Reporting requirements vary by industry and whether the company is public of private. Similarly, notification requirements vary and in many instances are driven by federal and state law. However, regardless of the unique circumstance, it is always a best practice to quickly notify the appropriate law enforcement agency of the ransomware attack. There are many ways (phone, meeting, FBI IC3 form, etc.) to notify law enforcement and whom to notify, and outside counsel and any security experts on staff are good resources for this task. In many instances, federal law enforcement will have essential information on the threat actor group involved in the attack.

While companies prepare for the possibility of a cyber attack, including ransomware, the preparation today should include legal ramifications of current trends and tactics used by cybercriminals. The immediate aftermath of a cyber attack is all emcompassing, and this article only briefly explored some of the issues related to data exfiltration through ransomware. There is little time to vet individuals after an attack to select professionals to assist the company with response issues including communication with threat actors. The company should interview and test outside cyber counsel and cyber firms that can assist with specific tasks like response to communication from threat actors and or negotiations, so they are in place and well acquainted with the company before an attack occurs. It may be impossible to prevent an attack, but it is very possible to have a team in place that has thought through and is prepared to address emerging trends.

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Robert's primary areas of practice include commercial litigation, corporate compliance, cybersecurity, crisis management, governmental relations and corporate investigations and representing clients under investigation by local and state administrative, regulatory and criminal agencies. 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 hundreds of 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.

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# When Class Actions are Trending, You Need Tools for Defending

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**Class Action Trends in 2024: Reacting to New Tactics**
*Stephanie A. Douglas and Henry Holland*

As Isaac Newton once proclaimed, "for every action, there is an equal and opposite reaction." This rule is not limited to physics—it's also true in litigation. Class action litigation has grown immensely in recent years, with some projecting record-high defense costs in 2024. As creative plaintiffs' counsel bring new class actions with new tactics, defendants must parry with new defense strategies, or sometimes a return to old ones. This article discusses several current trends and potential defense strategies, including for fraudulent-labeling claims, no-remedy class actions, website-based privacy claims, and lawyer-driven litigation. The best defense may be found in first principles: attacking the premise, the proof, and the plan. And where the class allegations appear to be based not on a client's experience, but on a lawyer's theory, consider discovery into that theory. The counsel's use of a theory as "facts" to support a claim should waive any possible of claim of work product or privilege.

**Fraudulent Labeling and Deceptive Marketing Practices**

A ubiquitous type of class action suit is one premised on fraudulent labeling or deceptive marketing. These cases sound a familiar refrain: "You, company, sold a product that was defective without telling us it was defective." These cases are often brought on theories of fraud, including claims based on common-law duties, and claims under state consumer-protection statutes, which generally offer statutory damages and prevailing-party fees. See, e.g., Mich. Comp Laws § 445.903 ("Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful."); Cal. Civ. Code § 1770 (same); N.Y. Gen. Bus. Code § 249 (same).

A survey of nearly any consumer-based industry finds a host of these class actions filed against defendants. With automobiles, for example, plaintiffs can frame nearly any consumer concern as a defect, including vague concerns of "shift quality" in transmissions, automatic, see, e.g., Francis v. General Motors LLC, No. 19-11044 (E.D. Mich.), or manual, see Gregorio v. Ford Motor Company, No. 20-11310 (E.D. Mich.). Defending these suits requires a return to defense fundamentals, both in defending against the claims and class certification.

A. Deceptive Practices: Attacking the premise or the evidence

Defendants facing labeling claims might, for example, attack the premise that a reasonable consumer would care about the purportedly withheld product information, and thus that a seller has a duty to disclose it. This tack worked to defeat claims that a manufacturer withheld highly technical information about its airbag-deployment strategy—something the Court found "was not part of the [consumers'] bargain to begin with." See Johnson v. FCA US, LLC, No. 22-10494 (E.D. Mich., March 20, 2023) (dismissing complaint).[1]

Defendants facing the fraudulent-labeling trend in other industries, like consumer and personal care products, and even food, have also had success attacking the premise. As with autos, plaintiffs in these spaces often claim sellers misrepresented or omitted information at the time of sale, and typically seek recovery for alleged overpayment. But many of these plaintiffs fall short of the pleading standards. Plaintiffs may bring "unspecific and immeasurable" allegations, like marketing a computer as having "solid performance," Dinwiddie v. Lenovo (United States) Inc., No. 22-00218 (W.D. Mich. Mar. 27, 2024), or they may rely on immaterial puffery, like photos they say make food "more appetizing" or more "visually appealing," Chimienti v. Wendy's Int'l LLC, No. 22-02880 (E.D.N.Y. Sept. 30, 2023). Plaintiffs may "confidently and repeatedly" allege a false statement but allege no factual basis for the conclusion of falsity. Ellis v. Nike USA, Inc., No. 23-00632 (E.D. Mo. Mar. 28, 2024) ("How does she know this to be true? She does not say."). Or plaintiffs may assert fraud-based claims, but never state "when he was lied to, where the lie occurred, or who lied to him." Charette v. adidas America, Inc., No. 23-10114

1 Throughout, unless otherwise indicated, all emphases and alterations are added, and all internal quotation marks, citations, and footnotes, are omitted.

(E.D. Mo. Mar. 28, 2024). In each case, the courts found the pleadings were deficient, and the claims should be dismissed.

A defendant might also rebut a claim of omitted or misleading information with specific labels or disclaimers. For example, one court dismissed claims that laundry detergent labeled "64 loads□" should last 64 full-sized loads, where the diamond symbol led a reasonable consumer to a clarified load size on the back label. See Adeghe v. The Proctor & Gamble Company, No. 22-10025 (S.D.N.Y. Jan. 2, 2024). The court rejected the plaintiff's allegations of consumer confusion as conclusory and implausible, decrying the "seemingly endless supply of trivial (bordering on frivolous)" product-labeling lawsuits and emphasizing that with labeling claims, "CONTEXT MATTERS." Id. Two months later, in affirming the dismissal of another labeling case, the Second Circuit reiterated that context is "critical." Montgomery v. Stanley Black & Decker, 2024 WL 939151, at *1 (2d Cir. March 5, 2024). There, plaintiffs claimed vacuum cleaners could only achieve the advertised "Peak HP [horsepower]" in laboratory testing, not ordinary use. But like the laundry detergent's load-size diamond, the vacuum cleaner's label was accompanied by a "dagger or asterisk symbol" that "would alert a reasonable consumer to the fact that certain caveats may apply to the 'Peak HP' designation." Id. As these cases show, where an allegedly misleading statement is clarified by context, conclusory allegations of potential consumer confusion should not suffice.

Beyond attacking the premise of fraudulent-labeling claims, a defendant might also attack the underlying evidence. One manufacturer took that route to defeat claims that it should have disclosed the use of wires insulated with bio-based materials, which allegedly made them susceptible to rodent attack. The manufacturer showed both that the plaintiffs lacked evidence of bio-materials in their own rat-damaged parts, and that the inclusion of such materials does "not affect rodent gnawing." Caracci v. American Honda Motor Company, Inc., No. 19-2796 (N.D. Ill. Mar. 27, 2024) (granting summary judgment).

B. Deceptive Practices: Defeating class certification
Aside from knocking out the claims altogether, class action defendants have tools to defeat class certification. And here again, the focus should be on fundamentals.

Many plaintiffs attempt to group multiple potential causes for a given symptom together, and labeling them with capital letters ("collectively, The System Defect"), claiming it allows them to characterize the various causes as a "common" defect. It does not. The more complex a product or a plaintiff's theory, the more exacting their showing of a commonality must be.

The recent Sixth Circuit decision in In re Ford Motor Company, 86 F.4th 723 (6th Cir. 2023) illustrates the point. There, the plaintiffs alleged that every brake master cylinder installed in six model years of Ford F-150 trucks was defective for two different reasons, which plaintiffs labeled together as the "Brake System Defect." The district court accepted this characterization and certified Rule 23(c)(4) issue classes for five states. Although the court found that a trial on plaintiffs' proposed class claims for money damages would be predominated by individual issues, the court found plaintiffs could represent a class to litigate the supposedly common issues of "Brake System Defect," materiality, and concealment. On interlocutory review, the Sixth Circuit summarily vacated on commonality, holding that a defect is common only "if the same malfunction could have corrupted the brake cylinders of all the relevant F-150 model years." Id. at 727. Certification thus required a more rigorous commonality analysis, considering whether Ford's evidence of design and manufacturing changes over the years "made a difference as to each of plaintiffs' [two defect] theories," or to the alleged materiality or concealment of either. Id. at 728. Under Ford, a plaintiff's allegations of two class-wide common defects should raise the burden of class certification–not lower it.

Finally, where a plaintiff's class is overly broad, consider two related defenses to certification. Arguably, under TransUnion LLC v. Ramirez, 594 U.S. 413 (2021), all members of a certified class should need standing. See In re Polaris Mktg., Sales Pracs., & Prods. Liab. Litig., 9 F.4th793, 797 (8th Cir. 2021) (claiming a defect "can cause" damage is insufficient). And in many jurisdictions, because the owner of a product that has not manifest an alleged defect has received the benefit of his bargain, he cannot claim an overpayment injury. See, e.g., Johannessohn v. Polaris Industries, Inc., No. 20-2347, 2021 WL 3700153 (8th Cir. Aug. 20, 2021) ("In this circuit, plaintiffs claiming economic injury do not have Article III standing in product defect cases unless they show a manifest defect."). Both issues are pending before the Sixth Circuit, which recently granted review of Rule 23(b)(3) classes composed of new and used owners of more than 800,000 vehicles, all claiming an identical overpayment injury. See Speerly v. General Motors LLC, No. 23-1940 (6th Cir.).

Defendants should not let the plaintiffs' chosen labels in a labeling claim determine their defenses. Instead, defendants must hold the plaintiffs to their pleading and evidentiary standards, and keep their focus on the fundamentals.

**"No Remedy" Class Actions**

Another vexing trend is the so-called "no remedy" class action, that is, a class action that will not remedy the class's alleged injuries. Sometimes, for example, a plaintiff claims a class of products has an alleged safety risk, often already being reviewed by a regulatory agency, and seeks damages for alleged overpayment. But reallocating the economics of the product transactions will not redress an alleged class-wide risk to product purchasers or the public. And often, a plaintiff has no plan to try their proposed class's claims to judgment, but instead seeks to try certain issues (or isolated elements of a cause of action), with the expectation that class members could use a favorable determination in unspecified later proceedings before an unspecified fact-finder.

The no-remedy problem can appear in multiple ways, but the first line of defense is the same: a court should not exercise its limited jurisdiction or expend its limited resources to adjudicate claims that will not remedy the alleged wrong or benefit the alleged class. This argument may be raised as prudential-mootness, redressability, preemption, or perhaps as a class certification objection demonstrating plaintiffs have no constitutional plan for proving their claims on a class wide basis.

A. No Remedy Classes: Defending first principles

A plaintiff that does not seek to remedy an actual alleged injury should not be able to sustain a claim, much less a class action. Thus, the first defense in a no-remedy class action is a call to first principles.

Where, for example, another branch of government is righting the same alleged wrong, the judiciary need not second-guess its work. The prudential-mootness defense may be available where a manufacturer issues a product recall. In Letson v. Ford Motor Company, No. 23-10420 (E.D. Mich. Feb. 28, 2024), for example, the plaintiffs alleged a cracked fuel injector could pose a vehicle fire risk, and that Ford's recall to address the risk was ineffective. The district court agreed with Ford both that the ineffectiveness allegation was speculative, and that the recall had given each plaintiff what they bargained for—a vehicle without an unreasonable safety risk. The court dismissed the case, holding the plaintiffs had not pled "an actual or imminent, post-recall injury."

Claims seeking money-damages for alleged safety defects may also be objectionable on redressability grounds. Often, plaintiffs build their labeling claims on an alleged duty to disclose that a product was sold with a known safety defect. Even when plaintiffs have sought no repair, they claim that remedies offered by product warranties and recalls are ineffective. Similarly, plaintiffs that have not altered their use—and according to their delayed-accrual allegations, the putative class has no reason to think there's a problem—still claim any safety risk makes every class product unsuitable for its ordinary use. And even when plaintiffs have incurred no out-of-pocket damages, they claim every class member overpaid, often by the average cost of some allegedly ineffective repair. For products with a used market, they sometimes claim that every owner of a product incurred this overpayment injury, even former owners, or used as-is buyers, or owners of products that never failed or were repaired under warranty. These market-inflation-from-unknown-safety-risk claims are rarely supported by evidence of real-world price inflation or real-world physical injuries. They are also implausible and not redressable by the money that plaintiffs demand. If the premise of the claims was correct—and every product in an entire class was unsafe and unsuitable for use—then clogging the courts with demands for a discounted purchase price would not redress the alleged risk to the purchaser or the public; only the regulators would. Money damages not used to pay for actual product repairs do not eliminate the supposed safety risk. And payment may not even shift the economic risk. The product may still be covered by warranty, and if a true safety problem existed, the payments would not avoid a product recall at the manufacturer's expense. Thus, at best the payments are pure economic waste, paying imaginary market depreciation where the real marketplace incurred none. At worst they are a double recovery, paying the consumer for a repair that is not done and that the manufacturer remains obligated to fix.

Relatedly, where a regulator has approved a manufacturer doing or saying the very thing the plaintiffs allege was unfair, there may be a preemption defense. The Sixth Circuit recently held that claims of alleged fraud on consumers were impliedly preempted because they required a showing of fraud on a federal agency—in that case the EPA. See In re Ford Motor Company F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation, 65 F.4th 851 (6th Cir. Apr. 21, 2023). In so holding, the court relied on cases involving industries regulated by other agencies, including the FDA. The same logic should apply to other regulated industries.

B. No Remedy Classes: Demanding the plan

A plaintiff's "figure-it-out-as-we-go-along approach" may also be grounds for attacking certification. Robinson v. Tex. Auto Dealers Ass'n, 387 F.3d 416, 426 (5th Cir. 2004) (certification order flawed where trial court "did not indicate that it has seriously considered the administration of the trial). If the plaintiffs present no plan to constitutionally

try claims to a class-wide judgment that redresses their alleged injuries, the plaintiffs have not met the burden of certification, and the court should not have jurisdiction to adjudicate the class's claims.

Sometimes plaintiffs seek not the full resolution of a traditional cause of action, but a jury determination of isolated elements. The plaintiffs may pursue Rule 23(c)(4) issue-only classes, carving out parts of a cause of action for mass determination. Or they may ask the court to certify Rule 23(b)(3) classes while deferring individualized issues to unspecified later proceedings. But to comply with due process and the Rules Enabling Act, a class judgment requires findings on liability, damages, and defenses, for each individual plaintiff. And because a putative class representative bears the burden to offer a constitutional plan for class adjudication, a district court must "forecast how the parties will conduct the litigation from the certification stage through the trial to the final judgment." Fox v. Saginaw Cnty, Mich., 67 F.4th 284, 302 (6th Cir. 2023); Sampson v United Servs. Auto. Ass'n, 83 F.4th 414 (5th Cir. 2023) (vacating and remanding for plaintiffs to demonstrate a classwide method of proving injury to meet the predominance requirement). So far, in forecasting a constitutional trial plan for a certified issues class, courts have had more confidence than success.

Cases in the Sixth Circuit illustrate the problems with the Rule 23(c)(4) issues-class trend. The recent trendline traces back to Martin v. Behr, a case arising from allegedly contaminated groundwater. See 896 F.3d 405 (6th Cir. 2018). The district court certified seven issues for class-wide resolution, generally including the presence of contamination, each defendant's role, foreseeability, and negligence. The court indicated that before trial, it would "establish procedures by which the remaining individualized issues" would be resolved. Id. at 410. On interlocutory review, the Sixth Circuit adopted a broad view of issues classes, under which plaintiffs can represent a class for certain issues, if "common questions predominate within certain issues" and "class treatment of those issues is the superior method of resolution." Id. at 413. [2] The appeals court nodded to the defendant's objection that any follow-on procedure would violate the Seventh Amendment's Reexamination Clause, but found the objection unripe. Id. at 417 ("Because the district court has yet to select and implement a procedure for resolving Plaintiffs' claims, no Reexamination Clause problems exist at this time.").

The promised procedures for a constitutional trial plan never materialized.

In Martin, the month before trial, the court requested counsel's input on "the best path forward" that would "alleviate the risk of the Seventh Amendment violations." Martin v. Behr, No. 08-00326 (S.D. Ohio Sept. 1, 2022). The court noted that there is "little specific guidance" on how to avoid Seventh Amendment concerns where Rule 23(c)(4) is used not to separate liability from damages, a bifurcation with some constitutional precedent, but instead to "certif[y] some liability-related issues for class treatment, leaving other elements of liability, i.e., fact-of-injury and proximate causation, and the question of damages, to be resolved on an individual basis." Id. The court recognized numerous procedural issues with no practical solutions. The parties would not likely be prepared to begin the individual-trial phase immediately after the common-trial phase, so using a single jury was not viable. And the court could not appoint a special master unless the parties waived their rights to a jury trial. Id. The court thus encouraged counsel to "brainstorm other possible options," including using "carefully-crafted special interrogatories and clear jury instructions." Id. In response, the plaintiffs offered "general principles" and suggested the Seventh Amendment concerns were still not ripe. See Martin v. Behr, No. 08-00326 (S.D. Ohio Sept. 20, 2022). The defendants moved for decertification, arguing that with just two weeks left before trial, the Seventh Amendment problems had proven "incurable." Martin v. Behr, No. 08-00326 (S.D. Ohio Oct. 4, 2022). Among other problems, a second jury would need to reexamine issues of general and specific causation, foreseeability, comparative fault, and maybe even causes of action that were not part of the court's certification ruling. Id. Given the constitutionality concerns, defendants argued, the issues class trial was "not superior." Id. Ultimately, the parties reached a settlement that mooted their disputes, leaving another court to answer whether (and how) some subset of class issues can be tried to a jury and constitutionally converted to a class-wide money judgment.

In In re: FCA US LLC Monostable Electronic Gearshift Litig., 16- 02744 (E.D. Mich.), even after an issues class trial, the constitutional-trial-plan question remains unanswered. There, the plaintiffs sued an auto manufacturer over allegations that a faulty gearshift allowed vehicles to roll away after drivers had exited the car, claiming a recall fix (automatic electronic park software) was ineffective. The district court certified 19 state classes for three issues: defect, concealment, and materiality. At the issues trial, the jury found there was no-defect under the laws of 18 states, and that there was a defect but no concealment in the nineteenth state (Utah). That has not stopped the plaintiffs, who moved post-

2 Other circuits reject this view of Rule 23(c)(4). See Harris v. Medical Transportation Mgmt Inc., No. 22-7033 (D.C. Cir. July 18, 2023) (surveying Rule 23(c)(4) decisions and holding that "Rule 23's text and structure offer no quarter to the view that Rule 23(c)(4) creates an independent type of class action that is freed from all of Rule 23's other class-action prerequisites").

trial to certify the same 19 state classes with a new (and frankly, remarkable) theory—that the same component had a "usability defect" that was somehow material to, yet concealed from, the users. The court struck the round-two certification motion as untimely but is still considering the Utah plaintiff's second shot at certifying a money-damages class. The Utah plaintiff wants to tell a second jury that a purported gearshift problem caused every Utah buyer (and only Utah buyers) to overpay, even though gearshift is not defective in other states, not concealed in any state, and addressed by a NHTSA-supervised recall. This latest single-state overpayment theory contradicts plaintiff's prior theory and defies logic. If everyone allegedly overpaid by the same amount, and the non-Utah plaintiffs did not overpay, then how could a jury find the Utah plaintiffs overpaid? Given the current posture, the Monostable litigation is unlikely to answer how a Rule 23(c)(4) representative can constitutionally obtain a money judgment for a class.

Nor have Monostable's progeny answered that question. Another court followed Monostable's path and denied Rule 23(b)(3) certification but certified three issues for a Rule 23(c)(4) trial. Weidman v. Ford Motor Company, No. 18-12719 (E.D. Mich. Apr. 8, 2022). As discussed above, the Sixth Circuit vacated that order because the district court failed to consider Ford's evidence that the two purported defects were different and uncommon over the class period. See Weidman v. Ford Motor Company, No. 22-0109 (6th Cir. June 29, 2022). But Ford raised a second basis for reversal: that courts in the Sixth Circuit have not yet articulated what makes an issues class "appropriate" or how an issues trial could be superior, given that trying three issues and then closing the case without entering judgment "would constitute an unconstitutional advisory opinion." Id.

And Speerly, another auto class in the same district, diverted from Monostable to reach a different end—Rule 23(b)(3) certification—but it still failed to tread a constitutional trial path to a class-wide judgment, as GM is currently arguing on appeal. The court acknowledged the presence of multiple defect theories and individualized issues, including class membership and fact of injury. But the court anticipated it would be "feasible" to define a procedure "to screen out claimants and compensate only those who have in fact incurred losses due to manifestation of the defect." Speerly v. General Motors LLC, 343 F.R.D. 493, 523-24 (E.D. Mich. 2023). The court referenced sales, warranty, and vehicle-registration records, but did not identify a fact finder or require the plaintiffs to show how those records can be used to constitutionally "cull" the class. This approach does not adequately "forecast[s]" the path "to the final judgment," Fox v. Saginaw Cnty, Mich., 67 F.4th 284, 302 (6th Cir. 2023), and it should not survive the Sixth Circuit's interlocutory review, see Speerly, No. 23-1940 (6th Cir.).

**The Novel World of Website Data Privacy**

It's no surprise that, with Americans living more of their lives on the internet, a burgeoning realm of class action litigation is website data privacy. No longer are alleged data breaches the sole privacy concern. Instead, defendants are seeing an increase in privacy lawsuits based on the use of common website tools, including the use of "chatbot" web services, session replay, voice verification, and other technology. See, e.g., Kosak v. N.Y. Media Holdings Co., No. 2:22-cv-11850 (E.D. Mich); Collins v. Toledo Blade Co., No. 3:23-cv-00302 (N.D. Ohio). Many of these claims are premised on state wiretapping laws, statutory privacy laws, and other, often novel, theories.

Unfortunately, with untested theories come inconsistent and unpredictable litigation outcomes. Compare Esparza v. Kohls Inc., — F.Supp.3d —, 2024 WL 1152732 (S.D. Cal. 2024) (declining to dismiss a case premised on a use of a "chat" feature), with Rodriguez v. Ford Motor Company, 2024 WL 1223485 (S.D. Cal. 2024) (dismissing a case premised on such a feature). Preparation and prevention are critical in this space, where certainty may require legislative solutions.

First principles again provide some defenses. Disclosure of basic personal information may not be concrete harm. In re BPS Direct, LLC, MDL No. 3074, — F. Supp. 3d —, 2023 WL 8458245 (E.D. Pa. Dec. 5, 2023) (dismissing invasion of privacy claims for lack of standing). A generally available website may not create personal jurisdiction. See Briskin v. Shopify, Inc., 87 F.4th 404 (9th Cir. 2023). And contract terms may not permit class claims, see In re Marriott Int'l, Inc., 78 F.4th 677 (4th Cir. 2023) (vacating certification where class members signed a class waiver), or may prescribe the parties' choice of law, but see Balanzar v. Fidelity Brokerage Servs., LLC., 654 F. Supp. 3d 1075, 1080–81 (S.D. Cal. 2023) (rejecting the argument under the at-issue contract terms).

Defendants should not overlook other traditional defenses, including holding plaintiffs to their proof. A plaintiff may consent to a communication, see Smith v. Facebook, Inc., 745 F. App'x 8 (9th Cir. 2018); Calhoun v. Google, LLC, 645 F. Supp. 3d 916, 926 (N.D. Cal. 2022), perhaps through the growing presence of "cookie" banners. Or a defendant may not be the entity that intercepted a communication, or the at-issue content may not qualify as personal information. See, e.g., Lightoller v. Jetblue Airways Corp., 2023 WL 3963823, at *4-5 (S.D. Cal. 2023) (allegations that the defendant recorded a plaintiff's interactions with a website to "obtain

information on flight pricing" without alleging disclosure of personal information insufficient to "allege a concrete harm that bears a close relationship to the substantive right of privacy"); see also Hernandez v. Noom Inc., 2023 WL 8934019 (D. Md. Dec. 27, 2023); Adams v. PSP Grp. LLC, 2023 WL 5951784 (E.D. Mo. Sept. 13, 2023).

**Lawyer-Driven Litigation**

Lawyer-driven litigation is driving an increase in class actions, often shifting settlement decisions from the allegedly injured party to the person funding the litigation. Transparency into lawyer-driven allegations, potential conflicts, and the true parties controlling litigation is critical to defending the current wave of counsel-created class actions.

Many class actions are not plaintiff-driven, but plaintiffs' counsel-driven. Indeed, the counsel who accused nearly every diesel-truck manufacturer of committing fraud on the EPA became known around his office as "the one-man EPA," and considered himself the "the de facto chief of holding the car companies' feet to the fire." See https://www.superlawyers.com/articles/online-features/steve-berman-putting-the-brakes-on-alleged-emissions-cheating/. But class actions are not "de facto" procedures for self-appointed lawyers to regulate industries. See Ford Fuel Economy, 65 F.4th 851 (6th Cir. Apr. 21, 2023); Counts v. General Motors LLC, No. 1:16-cv-12541 — F. Supp. 3d —, 2023 WL 449336 (E.D. Mich. July 12, 2023). Courts have been historically suspicious of attorneys seeking out putative plaintiffs. See Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237, 240 (N.D. Tex. 1972) ("Smith's own testimony gives every indication that this action is the result of an effort to seek out people willing to have a class action instituted in their names as representatives of a class. Such activity constitutes an abuse of the class action, which courts should not permit."); see also Conrad v. Boiron, Inc., 869 F.3d 536, 542 (7th Cir. 2017) (describing potential punishments for counsel who pursued vexatious litigation).

Where class theories are lawyer-driven, the foundational evidence generated by counsel should be discoverable. That's true whether the evidence is pre-suit testing that allegedly makes the defect plausible, see Motion to Compel Emissions Testing Materials, Gamboa v. Ford Motor Company, No. 18-10106, ECF 275 (E.D. Mich. Jan. 6, 2022), or consumer complaints that plaintiffs allege make a defendants' pre-sale knowledge plausible, see Roe v. Ford Motor Company, 18-12528 (E.D. Mich. March 27, 2023) (ordering production of non-privileged consumer complaints); see also In re: 3M Combat Arms Earplugs Product Liability Litigation, No. 19-md-2885 (N.D. Fla. Mar. 12, 2021) (overriding work-product and privilege objections and granting motion to compel compliance with subpoena to TopClassActions.com for information about plaintiffs' attorneys, advertising, referrals, and potential-claimants).

And where, as is often the case, a plaintiff alleges delayed discovery to avoid the statute of limitations, the plaintiff places "at issue" when he (or his attorneys) "discovered material facts that would have put them on notice." Tattersalls Ltd. v. Wiener, No. 17-1125, 2020 WL 620286, at *5 (S.D. Cal. Feb. 10, 2020). A defendant accused of concealing legal claims should be "entitled to discover information relevant to when plaintiff and/or its attorneys discovered the material facts that serve as the basis for its causes of action[.]" Id. Courts have even permitted discovery about counsel's pre-suit "investigations he conducted or directed" and "the facts discovered as a result of any such investigations." Id. (granting deposition of counsel and holding any work product or privilege was waived); see also Does v. Boy Scouts of Am., No. 1:13-CV-00275-BLW, 2017 WL 1424300, at *2 (D. Idaho Apr. 20, 2017) ("Numerous courts have held that the nature and timing of a plaintiff's initial contacts with counsel are relevant to a statute of limitations defense, and therefore generally discoverable."); Axler v. Sci. Ecology Grp., Inc., 196 F.R.D. 210, 212–13 (D. Mass. 2000) ("because plaintiffs relied completely on their counsel, the defendants are entitled to discovery from plaintiffs' counsel concerning what investigation they conducted, what information they received, and when they received it").

Discovery into pre-suit facts may reveal conflicts between allegations and the evidence (or between the clients and their counsel). For example, after counsel for the then-certified Weidman classes filed a follow-on class action for later model years, see Klepac v. Ford Motor Company, No. 23-10613 (E.D. Mich.), they attempted to add that plaintiff's anecdote to their Weidman expert disclosures, see Order Granting in Part Motion to Supplement, Weidman v. Ford Motor Company, No. 18-12719 (E.D. Mich. Aug. 10, 2023). In litigating that request, Ford obtained the vehicle download, which showed that just before Mr. Klepac drove into his house, he had been "pressing the gas pedal instead of the brake." See Joint List of Unresolved Issues, ECF 282, PageID.17721 (E.D. Mich. Aug. 4, 2023); see also Transcript, ECF 283, PageID.17735-36 (the court noting Mr. Klepac had deleted his allegation that an independent technician had diagnosed the "brake system defect"); PageID.17766 (plaintiffs' counsel acknowledging it was "Absolutely" possible that Mr. Klepac "fell off the brake and hit the gas pedal"). Mr. Klepac soon withdrew his claims. Klepac v. Ford Motor Company, No. 23-10613 (E.D. Mich. Aug. 17, 2023).

The defendants in the long-running Thalidomide litigation pressed for discovery into limitations-defeating allegations, and eventually sought sanctions against plaintiffs' counsel for obstructing that discovery. The plaintiffs' counsel responded with a request to dismiss some clients' claims and withdraw from others. To ensure those requests were client-driven, the court appointed a special master, who appointed independent counsel for some of the plaintiffs. After a multi-year investigation that included questioning of the plaintiffs and their original counsel, the special master recommended sanctions, including for submitting pleadings "whose falsity was readily discernible, without having made the requisite inquiry under the circumstances." See Glenda Johnson, et al. v. SmithKline Beecham Corp., No. 2:11-cv-05782 (E.D. Penn., Report and Recommendation dated Oct. 12, 2023). Counsel has objected to the special master's authority and recommendation, disputed the fact-finding, and argued to seal large parts of the record. The case is one to watch, though it has largely remained out of the legal news.

And in a class-action spinoff, when settlement talks spawned a dispute between an antitrust claimant and its litigation funder, the plaintiff's counsel switched clients to follow the claim. Sysco opted out of a series of antitrust class actions and sued in its own capacity, funded by Burford Capital. But when the suppliers attempted to resolve their claims with their customer, Sysco, Burford objected to the settlement's terms. That caused side arbitration and litigation about whether Burford was improperly interfering with the settlements, whether Sysco was breaching its funding contract, and whether their common counsel was impermissibly conflicted. Those side disputes were then settled with an assignment of claims from Sysco to newly formed Burford affiliates, and the affiliates moved to substitute in to pursue more favorable terms (taking with them Sysco's original counsel). The courts have so far split on the propriety of that substitution, with the Minnesota Pork court denying it, and the Illinois Broiler Chicken court permitting it. Compare In re: Pork Antitrust Litig., 2024 WL 511890 (D. Minn. Feb. 9, 2024), with In re Broiler Chicken Antitrust Litig., 2024 WL 1214568 (N.D. Ill. March 21, 2024).

**Conclusion**

As plaintiffs' counsel find new ways to generate class actions, defendants must be diligent in their defenses, new and old. Look for pleading problems, proof problems, and preemption. Make plaintiffs prove all elements of standing, including with a constitutional trial plan that can redress alleged class harm, not just extinguish class claims. Prepare to defend website class actions, where a consumer's voluntary visit can be alleged to invade their privacy. And, when faced with counsel-driven litigation, consider counsel-driven discovery. Stemming the growing tide of class actions may mean turning into them and taking them head on.

# Class Actions in 2024:

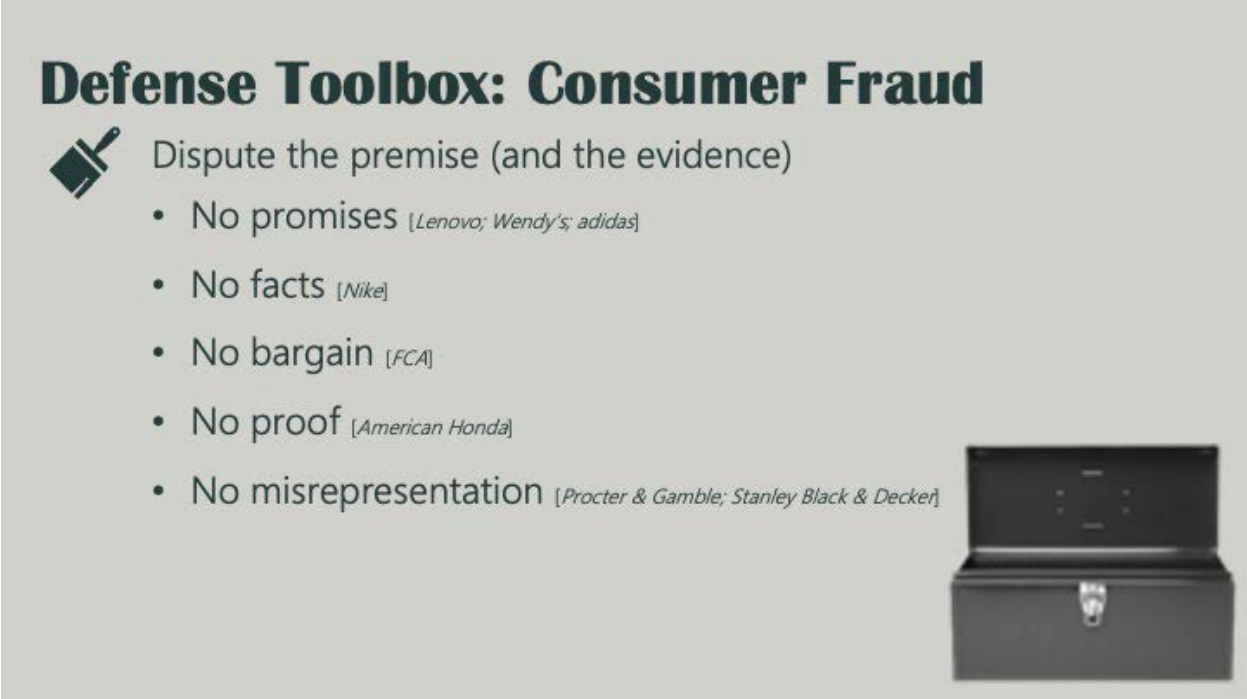
WHAT TO WATCH & HOW TO REACT


Stephanie A. Douglas
Bush Seyferth PLLC
bsp LAW

PLAINTIFF TREND:

## Consumer Fraud and Deceptive Marketing


EXAMPLES
solid performance
Tide
64
LARKIN
71
AUTHENTIC JERSEYS
5.0†
PEAK-HP


Defense Toolbox: Consumer Fraud
Dispute the premise (and the evidence)
• No promises [Lenovo; Wendy's; adidas]
• No facts [Nike]
• No bargain [FCA]
• No proof [American Honda]
• No misrepresentation [Procter & Gamble; Stanley Black & Decker]

## Defense Toolbox: Consumer Fraud

Challenge commonality

- Using Capital Letters Does Not Make Something Common

[*In re Ford (Weidman)*]

Object to overbreadth

- Performing product = No injury and No claim?

[*Transunion v Ramirez; In re Polaris*]

PLAINTIFF TREND:

## "No-Remedy" Class Action

## Defense Toolbox: No Remedy Class Action

Preemption – Fraud on the regulator
*[In re Ford Motor Company F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation]*

Prudential mootness – Government supervised remedy
*[Letson v Ford]*

Primary jurisdiction – Agency expertise w/ regulated product
*[Lloyd v Ford, Fuel economy district court]*

"The Decider"

## Defense Toolbox: No Remedy Class Action

Raise redressability of Rule 23(c)(4) issues classes – *Monostable*

| | |
|---|---|
| A. First Certified Question | **Design Defect:** 19 questions (1 / state) |
| B. Second Certified Question | **Concealment:** 2 questions (1 / burden of proof) |
| C. Third Certified Question | **Materiality:** 2 questions (1 / burden of proof) |

**Damages:** 0 questions

## Defense Toolbox: No Remedy Class Action

Demand the Plan – Rule 23(c)(4) issues classes

- Not predominant – Individual trials required for judgment [*Fox*]
- Not superior – Class can't win, but can lose [*Monostable*]
- Not constitutional – Issues are advisory [*Weidman* petition]
- Not constitutional – Follow-on trials require reexamination [*Behrl*]
- Not certifiable – Plaintiffs bear Rule 23 burden [*Fox*]

## Defense Toolbox: No Remedy Class Action

Consider constitutionality of trial plan

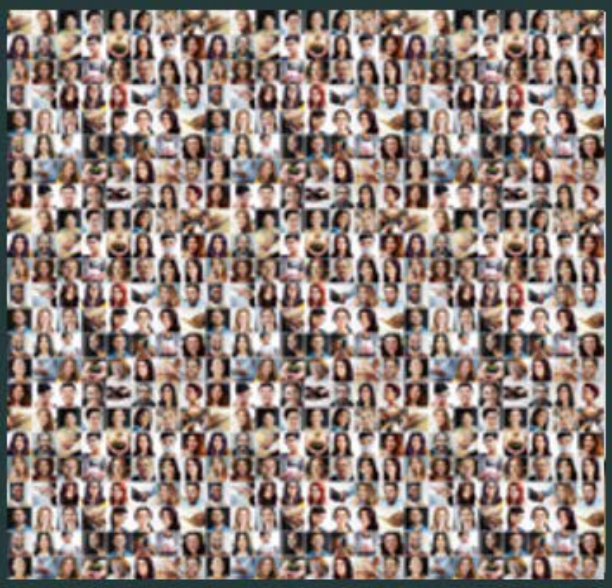
- Will jury answer narrative questions?
- Who decides individual issues, like class members, fact of injury, specific causation/reliance, damages? *And How?*
- What are preclusive effects? *And When?*
- Will findings apply to non-certified claims?
- Can it all be done in one trial?

## Defense Toolbox: No Remedy Class Action

Redressability – Righting an alleged wrong
Rule 23(b)(3) "overpayment" claims for alleged safety defects


PLAINTIFF TREND:

## Website Data Privacy



## Defense Strategy: Website Cookie Classes


- I didn't take it.
- No one took it. [*Rodriguez v Ford (chat)*]
- It wasn't yours. [*Lightoller v Jetblue (not private)*]
- You said I could take it. [*Marriott; Facebook (consent)*]
- You weren't harmed. [*In re BPS (Art III)*]
- I wasn't there. [*Briskin v Shopify (personal jurisdiction)*]

PLAINTIFF TREND:

## Lawyer-Driven Litigation

## Defense Toolbox: Lawyer-Driven Litigation

- Discover lawyer-driven facts *[Gamboa; Roe; 3M; Tattersalls]*
- Discover lawyer-driven conflicts *[Klepac; SmithKline]*
- Consider lawyer-driven legislation

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Stephanie A. Douglas leads BSP's appellate, class action, and complex briefing teams. She focuses on translating complex legal and technical arguments into simple, understandable, and persuasive language.

Stephanie specializes in strategic decisions and issue preservation. She advises clients and other counsel on trial-level issues and appeals in state and federal courts around the country.

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**Services**

- Advanced Technologies
- Business and Commercial
- Class Actions
- Critical Motions / Appeals
- Embedded Appellate Counsel for Trial
- Product Liability

**Representative Matters**

- Providing strategic consulting on trial and appellate matters for auto manufacturer, including development of cross-case strategies, preservation of issues, edits to draft briefs, and participation in mock arguments.
- Providing strategic briefing for patent infringement disputes involving auto manufacturer in federal district court and Federal Circuit.
- Served as co-counsel on appeal for hospital in insurance coverage dispute, successfully preserving $9 million judgment.

**Honors and Awards**

- Inclusion in The Best Lawyers in America©: Appellate Practice (2023-Present)
- Lawyers for Civil Justice, Outstanding Contributor (2022)
- Crain's Detroit Business, Notable Woman in Law (2021)
- America's Top 100 High Stakes Litigators® for Michigan (2020)
- Michigan Lawyers Weekly, Leader in the Law (2020)
- Benchmark Litigation, Future Star (2015 – present)
- DBusiness Top Lawyers (2016, 2018, 2022 – present)
- Michigan Super Lawyers (2016 – Present)
- Michigan Super Lawyers, Rising Star (2013 – 2015)
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# Rough Surf: Social Media and Ethics

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**Rough Surf: Social Media and Ethics**
*David M. Atkinson*

The use of social media is growing exponentially. It is estimated that almost 70 percent of Americans, and more than 4.9 billion people globally are active social networking users. Indeed, Americans have an average of 7.1 social media accounts per person and spend a significant portion of their day—about 127 minutes—on social media.[1] Like most people, lawyers use social media for a multitude of purposes, including professional networking, client development, education, and marketing. But unlike most people using social media, lawyers are subject to ethical guidelines designed to regulate their professional conduct and impose consequences for violating their ethical obligations.

We have all seen the amusing--and/or horrifying--stories of lawyers who ran into trouble after a hasty, ill-conceived post on Twitter or some other social media platform. But a social media scandal is only amusing if you are not at the center of it. This article addresses the ethical question: When does a post by an attorney on their personal social media account cross the line and lead to professional consequences for violating ethics rules? As the use of social media continues to evolve and the line between personal and professional social media continues to blur, it is important for lawyers to be mindful of the ethical issues arising from their social media presence and activities.

**Commenting On Pending Litigation**
Lawyers are not absolutely prohibited from talking about their cases on social media unless a specific order has been entered in the case restricting comment by the parties and counsel. However, even if there is no "gag" order, the Rules of Professional Conduct do not allow lawyers to make public comments which could materially prejudice a pending matter. Rule 3.6(a) of the ABA Model Rules of Professional Conduct ("Model Rules") includes the following statement regarding trial publicity:

> 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 adjudicated proceeding in the matter.[2]

It is common for some lawyers to mention an upcoming trial (or one that has just been completed) on social media, but it is important to avoid commenting on the substance of the case, the parties, a specific issue, or the judge in a way that could influence or prejudice the case.

Lawyers have crossed the line. In a notorious example, a former Assistant United States Attorney in New Orleans was disbarred after it came to light that he had for years posted anonymously commenting on articles published online by a New Orleans newspaper.[3] While most of the posts did not involve the attorney's work with the U.S. Attorney's Office or cases he personally worked on, he did post comments on multiple articles which concerned active cases within his office.[4] After it came to light that the attorney had posted comments about an active case involving former New Orleans police officers who had been prosecuted for shooting unarmed civilians in the aftermath of Hurricane Katrina, the district court reversed the officers' convictions and granted a mistrial, which was affirmed by the Fifth Circuit on appeal.[5]

Upholding the State Ethics Board's decision to disbar the attorney, the Louisiana Supreme Court held that the attorney knew he should not post the comments, yet

1 Belle Wong, Top Social Media Statistics And Trends Of 2024, Forbes Advisor, https://www.forbes.com/advisor/business/social-media-statistics/.

2 Model Rules of Prof'l Conduct, R. 3.6(a).

3 In Re Perricone, 263 So. 3d 309 (La. 2018).

4 Id. at 310-315.

5 See United States v. Bowen, 799 F. 3d 336, 353 (5th Cir. 2015) ("The online commenting alone, which breached all standards of prosecutorial ethics, gave the government a surreptitious advantage in influencing public opinion, the venire panel, and the trial itself."). The Fifth Circuit concluded that anonymous online posting is subject to the same rules as more public speech, noting "there is no dividing line between the prosecutors' professional and private lives with respect to these duties. Had Perricone, Mann, or Dobinski frequented a bar or habitually called in to a radio talk show and blown off steam about the Danziger Bridge prosecution in the terms they used online, their misconduct would have been the same as it is with their anonymous online commentary." Id. at 354.

continued to do so.[6] Quoting a 1991 decision by the United States Supreme Court involving public comment by lawyers on pending cases, Gentile v. State Bar of Nevada, the court noted:

> [I]n this age of social media, it is important for all attorneys to bear in mind that '[t]he vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. . . .[A] profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the Courtroom.'[7]

In affirming the decision to disbar the attorney, the court noted that his "conscious decision to vent his anger by posting caustic, extrajudicial comments about pending cases strikes at the heart of the neutral dispassionate control which is the foundation of our system. Our decision today must send a strong message to respondent and to all members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the internet."[8]

A common feature of social media is to "like" or retweet a post made by a third-party. The Indiana Supreme Court Disciplinary Commission addressed this practice in a 2020 advisory opinion. The Commission noted that "[a]n attorney who responds to or "likes" a third party's comment that contains prohibited content could be deemed to have adopted the third-party comment. Such action could subject the attorney to an ethics violation. The failure by the attorney to delete prohibited content could be considered acquiescence and expose the lawyer to discipline."[9] The Commission also suggested that a lawyer should be careful to adjust privacy settings to avoid being "tagged" to improper content which could show up on the lawyer's page and thereby be deemed adopted by the lawyer.[10]

During the murder trial of former lawyer Alex Murdaugh in South Carolina, the trial judge questioned the defense attorney after he retweeted an op-ed from the Washington Post titled "Alex Murdaugh Trial Reveals Sloppy Investigation."[11] When asked about the tweet, the attorney responded that he had only retweeted the article without comment or statement. The judge reminded the attorney that retweeting an article could be considered the same as if it were the attorney's own tweet and noted that his actions went "against the spirit of the law and do not pass the feel test." The attorney promised not to retweet anything or tweet anything until the trial ended.[12] However, after the trial, the attorney attracted attention in the press by tweeting a photo of himself with his face in a wooden cut-out photo prop of a cowboy riding a chicken.[13]

In a 2023 Georgia case, the trial court granted a defense motion for new trial based on plaintiff's counsel posting videos of himself on TikTok and Instagram making comments about the trial, observing that it was "deeply concerned with the impact of [the] attorney's social media videos."[14] Although there was no evidence that anyone on the jury was actually tainted by the videos or had even seen them, the Court noted its role to protect the integrity of the judicial process.[15]

While there was no evidence the lawyer in the Georgia case had specifically intended to influence the jury, some lawyers have posted content in an attempt to influence the outcome of a particular matter or to prompt those reading the posts to act. In a 2015 case, the Louisiana Supreme Court held that an attorney should be disbarred for using social media in an attempt to influence the outcome of a pending custody matter.[16] Although the disciplinary board had recommended that the attorney be suspended for one year, the Louisiana Supreme Court ultimately determined "her ethical misconduct warrants the highest of sanction – disbarment."[17]

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6 Perricone, 263 So. 3d at 318-319.

7 Id. at 319 (quoting Gentile v. State Bar of Nevada, 501 U.S. 1030, 1058 (1991)).

8 Id.

9 Indiana Sup. Ct. Disciplinary Comm. Op. 1-20, Third Party Comments or Tags on a Lawyer's Social Media (2020), at p. 2.

10 Id.

11 Rachel Sharp, Alex Murdaugh trial judge grills defense attorney over tweet: 'Part of your strategy, Mr. Griffin?', The Independent (February 22, 2023 7:00 AM), https://www.the-independent.com/news/world/americas/crime/jim-griffin-attorney-twitter-murdaugh-trial-b2287229.html.

12 Id.

13 Rachel Sharp, Alex Murdaugh's attorney makes bizarre – chicken related – Twitter return after dressing down from judge, The Independent (March 6, 2023 9:23 AM), https://www.the-independent.com/news/world/americas/crime/alex-murdaugh-trial-jim-griffin-twitter-b2294981.html.

14 Cartagena v. Medford, State Court of Gwinnett County, GA, No. 20C-477-4 (June 16, 2023).

15 Id.

16 In Re McCool, 172 So. 3d 1058 (La 2015). The attorney had posted a copy of a custody petition filed in the Court on her blog, along with an online petition and contact information for the Judge's office. The attorney also posted messages on her Twitter account, including the followings:

I realize most of u think the courts care about kids but too often there's no walk to go with the talk: [link to online petition].

Shouldn't judges base decisions about kids on evidence?: [link to online petition].

GIMME GIMME GIMME Evidence! Want some? I got it. Think u can convince a judge to look at it? Sign this petition: [link to online petition].

Judges are supposed to know [] about ... the law ... aren't they. And like evidence []? Due process? [link to online petition].

I am SO going 2 have 2 change jobs after this ...! I'm risking sanctions by the LA supreme court; u could be a HUGE help.

Id. at 1063-64.

17 Id. at 1084.

Posting on social media after a trial is concluded can also lead to consequences if the posts violate ethical rules. In July 2022, the Florida Bar filed a disciplinary complaint against attorneys after they posted "inflammatory" tweets and retweets alleging that a "white judge stole justice from a black doctor."[18] The bar complaint alleges that the statements violated Florida's disciplinary rules against impugning the integrity of a judge, and against conduct that is "contrary to honesty and justice." It also cited Florida's attorney oath of office, calling for "fairness, integrity, and civility" in all written and oral communications. A judge ultimately recommended a 30-day suspension as a sanction, but the matter remains unresolved.[19]

In January 2018, a Philadelphia judge punished two lawyers who had represented the plaintiff in a December 2017 trial over the medication Xarelto. The attorneys posted photographs of the courtroom to Instagram with the hashtag "killinnazis" (a reference to the Quentin Tarantino movie "Inglorious Basterds" and German pharmaceutical giant Bayer, the developer of Xarelto and the defendant in the case). In post-trial motions following a plaintiff's verdict, the defense argued (among other things) that the plaintiff's counsel's social media posts were intended to create a link in the minds of jurors between the German defendant and Nazi Germany, calling it a "xenophobic" strategy. Although the trial court issued a judgment notwithstanding the verdict on other grounds, it revoked the pro hac vice admission of one of the attorneys, and sanctioned the other, fining her $2,500 and ordering her to perform 25 hours of community service. The judge noted that the Instagram posts in question and the #killinnazis hashtag (which the law firm had used in promotions touting the victory) were "well beneath the dignity of the legal profession."[20]

A California judge granted a motion for new trial following a defense verdict in a medical malpractice case after video was posted of the winning defense lawyer in an "online celebration video" telling his staff that the case involved "a guy that was probably negligently killed, but we kind of made it look like other people did it."[21] Another lawyer representing the defendant doctor later complained about "[h]is former attorney's attempt to make himself appear as a hero by misrepresenting the facts of the case…"[22]

We have all seen examples of people who engage in on-line arguments with others about various topics. As you might expect, lawyers have been unable to resist the urge and have ven engaged in online arguments with litigants about matters in which the attorney was directly involved. For example, a divorce attorney in Indiana was charged with felony intimidation and briefly suspended from the practice of law after he sent threatening messages on Facebook to his client's ex-husband.[23] Unsurprisingly, given the nature of the posts, the court rejected the attorney's defense that he had not intended to threaten his client's ex-husband but was instead attempting to convey that he would gather all relevant evidence to defend his client.[24]

**Confidentiality**

Model Rule 1.6(a) provides, "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."[25] Confidentiality is a fundamental principle in the attorney-client relationship, and lawyers should be careful that any social media posts do not convey confidential information.

While it would appear obvious that a lawyer should not post confidential information of his or her clients online, this has unfortunately happened. For example, a public defender was disciplined for blog entries which contained confidential information about her clients and derogatory comments about judges with sufficient information to identify the clients and judges using public sources.[26] A Massachusetts attorney was publicly reprimanded for posting information regarding a client in his personal Facebook page. In a public reprimand, the disciplinary board noted that the Facebook page was not "shop talk" among lawyers. The posts did not seek advice from another attorney, nor did they have any purpose "that would have served the attorneys' fiduciary duty to his client."[27]

An Illinois attorney received a five-month suspension after he obtained a video of his client completing a drug deal and posted it on YouTube, in the mistaken belief that the video showed police planting drugs. As it turned out, the video confirmed the charges and his client ended up

18 https://www.law.com/dailybusinessreview/2022/07/06/lawyers-tweets-lead-to-bar-complaint-white-judge-stole-justice-from-a-black-doctor/

19 https://firstamendmentwatch.org/florida-attorneys-who-criticized-discrimination-ruling-should-be-suspended-judge-says/

20 https://www.law.com/thelegalintelligencer/2018/01/09/judge-metes-out-punishment-to-xarelto-attorneys-over-courtroom-photos-use-of-killinnazis-hashtag/?back=law

21 https://www.latimes.com/california/story/2022-08-17/a-lawyers-bragging-prompts-o-c-judge-to-throw-out-winning-verdict-in-malpractice-case

22 Id.

23 In Re Hanson, 53 N.E. 3d 412 (Ind. 2016).

24 Id. The message read: "You pissed off the wrong attorney. You want to beat up women and then play games with the legal system … well then you will get exactly what you deserve. After I get [my client] out of jail, I am going to gather all the relevant evidence and then I am going to anal rape you so hard your teeth come loose. I tried working with you with respect. Now I am going to treat you like the pond scum you are. Watch your ass you little [expletive deleted]. I've got you in my sights now."

25 Model Rules of Prof'l Conduct 1.6(a).

26 In Re Disciplinary Proceedings Against Christine A. Peschek, 334 Wis. 2d 373, 798 N.W. 2d 879 (2011). In one post the attorney revealed that her client had told her that she lied to the Court about using drugs at the time of the sentencing, commenting: "Huh? You want to go back and tell the Judge that you lied to him, you lied to the pre-sentence investigator, you lied to me?"

27 Bar Counsel v. Frank Arthur Smith, III, Esq. Pub.Reprimand 219-16 at 7-9 (2019).

pleading guilty.[28]

It is common for clients (and sometimes litigants) to post online reviews of attorneys. Some lawyers have been unable to resist the urge to respond. An Alabama attorney responded to a former client's anonymous negative review on his website by posting a response revealing confidential information, including criminal charges and the fact that the client had a divorce case. The attorney stated that the client had been "locked up in the looney bin" and told the client to "show some fortitude and man-up, boy."[29]

A Washington, D.C. attorney received an informal admonition after revealing confidential information in response to a client's negative online review.[30] Although the client's name had not been revealed, the Office of Disciplinary Counsel found that sufficient information was posted that could lead to the client's identification and that the attorney had therefore violated his obligations under Rule 1.6 to protect his client's confidences and secrets.[31] There were more serious consequences for a Colorado lawyer who received an 18-month suspension for disclosing confidential client information in response to their internet criticism.[32]

**Advertising**

Social media is often used for marketing purposes. Lawyers must be mindful of advertising and solicitation regulations when posting on social media. In particular, advertising must be truthful and should not create unreasonable expectations.

The ABA Model Rules provide: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading."[33]

State and local bars have issued opinions that social media activities are subject to same rules as traditional advertising.[34] For example, the Commercial and Federal Litigation Section of the New York State Bar Association has adopted social media ethics guidelines which confirms that the advertising rules apply to social media posts and caution, "[i]f the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.[35] The guidelines include a cautionary note that "[p]ractitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially 'live' or real time tool."[36] Another guideline discusses the lawyer's responsibility to monitor or remove social media content by others on the lawyer's social media page.[37] As the guidelines explain:

> A lawyer is responsible for all content she posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, etc., that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not, within the lawyer's control, she may wish to ask that person to remove it.[38]

Finally, it is improper for a lawyer to pay for positive online reviews, as they could run afoul of Model Rule 7.1's prohibition against false or misleading statements. Nor can a lawyer pay for online recommendations.[39]

**Social Media Network Connections**

Social media networking can often create conflicts of interest, either an actual conflict or the appearance of a conflict. If a lawyer is "friends" with a judge on Facebook, does this require the judge to recuse? What about a LinkedIn connection? Just as with friendships in real life, these connections are generally allowed, as long as there is no suggestion (or even the appearance) of impropriety.[40]

Social media can often be a useful source of information about an opposing party. One example is the personal injury plaintiff whose social media posts reveal activity

28 https://www.finndlaw.com/legalblogs/strategist/lawyer-posts-video-of-clients-drug-deal-on-youtube/

29 Joe Patrice, 'Man-Up Boy' is the Most Alabama Ethics Opinion Ever, Above The Law (May 27, 2016).

30 In Re John Mahoney, Bar Docket No. 2015-D141 at 1 (2015).

31 Id. at 2.

32 People v. James C. Underhill Jr. Case No. 15PDJ040 (Col. Sup. Ct. August 12, 2015)

33 Model Rules of Prof'l Conduct R.7.1.

34 Cal. St. Bar Formal Op. 2012-186; Fla. Bar Rules Rule 4-7.11(a).

35 Social Medical Ethics Guidelines of the Com. And Fed. Litig. Section of the N.Y.S. Bar Association, Guideline 2A (2019) (noting "if the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation").

36 Id. Comments, at 9.

37 Id., Guideline No. 2.C (2019).

38 Id.

39 Model Rules of Prof'l Conduct R.7.2.

40 See Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association, 271 So.3d 889, 897-898 (Fla. 2018) ("The clear majority position is that mere Facebook 'friendship' between a judge and an attorney appearing before the judge, without more, does not create the appearance of impropriety under the applicable code of judicial conduct.") (collecting authority). For a detailed discussion of judicial use of social media, see John G. Browning, The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media, 8 Faulkner L. Rev. 131 (2016).

that is inconsistent with his claimed injuries. There is no prohibition against an attorney accessing or using publicly available information, but lawyers should not "friend" an unrepresented witness or party in order to access private information.[41]

The ABA Model Rules provide: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a Court Order."[42]

This prohibition extends to third parties acting on behalf of the lawyer, such as staff or investigators.[43] The Model Rules state that a lawyer must ensure that the conduct of nonlawyers acting on his or her behalf is conduct is compatible with the professional obligations of the lawyer.[44] The Model Rules also state that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."[45]

An Ohio prosecutor was fired and later subject to bar discipline after he created a fictitious Facebook account and posed as a woman in a Facebook chat with an accused killer's alibi witnesses in an attempt to persuade them to change their testimony.[46]

A related concern is accessing jurors' social media. As with a party or witness, it is permissible to access a juror's public social media accounts. However, neither the attorney nor anyone acting on her behalf should misrepresent their status in order to gain access to private content.

**Application to Non-Lawyer Staff**

The ABA Model Rules do not allow a lawyer to use a staff member to violate any of the ethical rules on his or her behalf. For example, you cannot ask an assistant or paralegal to "friend" a potential jury member so that you can access their social media accounts. And while an argument can be made that a staff member posting about a case in which the firm is involved has a First Amendment right to express their opinions, the staff member, like the lawyer, would not have obtained information about that case but-for their employment relationship. Thus, it is important to remind both lawyers and non-lawyers in your firm or your company of the importance of maintaining client confidentiality and not posting social media content that could be construed as commenting on a pending legal matter.

**Considerations for In-House Lawyers**

These principles also apply to in-house attorneys and their staff, who are likewise bound by the ethical rules discussed in this article. An additional consideration for an in-house attorney, as with any corporate employee, is when a particular social media post could be considered as one made on behalf of the company. The best way to ensure that you are not speaking on behalf of the employer is to use disclaimers. But perhaps the best practice is not to comment at all, particularly on litigation or other pending legal matters.

**First Amendment Considerations**

In a 1991 decision issued before the advent of social media, the United States Supreme Court recognized that "a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate Courts and their administration of justice."[47] However, the Court reasoned that "a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer …. he is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense."[48] When questions regarding the attorney's ethical obligations and their interest in First Amendment protections arise, the Supreme Court has held that there should be a balancing test weighing the State's interest in regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that is at issue.[49] Restrictions are justified because "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice."[50]

Courts around the country have reached different conclusions when asked to address restrictions on social media commentary and public statements regarding pending litigation. For example, the Alabama Supreme Court reversed an order preventing the plaintiffs in a

41 Numerous ethics opinions have stated that a lawyer may not send a "friend" request to an unrepresented person without disclosing his or her identity and his role. See, e.g., N.H Ethics Op. 2012-13(5); N.Y. State Ethics Op. 843 (2010); Mass. Ethics Op. 2014-5; Pa. Ethics Op. 2014-300; Ky. Ethics Op. E-434 (2012).

42 Model Rules of Prof'l Conduct R.4.2.

43 Conn. Ethics. Op 2011-4 (Lawyer may not engage private investigator to "friend" adverse parties in litigation to obtain information to use against them.); Pa. Ethics Op. 2009-02 (Lawyer may not use third party to gain access to adverse witness's social-networking pages concealing "highly material fact" that he or she was looking for impeachment material.).

44 Model Rules of Prof'l Conduct R.5.3.

45 Model Rules of Prof'l Conduct R.8.4.

46 Disciplinary Counsel v. Brocker, 145 Ohio St. 3d 270, 48 N.E.3d 557 (2016).

47 Gentile v. State Bar of Nevada, 503 U.S. at 1072 (quoting In Re Sawyer, 360 U.S. 622 (1952)).

48 Id. at 1073.

49 Id.

50 Id. at 1074.

lawsuit from making extrajudicial references about the defendant on social media,[51] while a Federal District Court in Ohio granted a motion for protective order which prohibited social media posts by the plaintiff's counsel making derogatory comments about the defendant, concluding that the order was justified by the parties' right to a fair trial by an impartial jury.[52]

However, the First Amendment protects posts that are purely personal . The State Bar of California instituted disciplinary proceedings against an attorney after she posted on Twitter calling for the shooting and summary execution of protesters following the 2020 death of George Floyd.[53] Rejecting the charges, the State Bar Court found that the attorney's speech was communicated as a private citizen, so the full protections of the First Amendment applied.[54] While the court noted that it found the tweets unbecoming of an attorney, it concluded that purely private speech cannot be the basis for professional discipline.[55]

In another California case, a Los Angeles Superior Court Judge received a public admonishment from the Commission on Judicial Performance after posting on a page maintained by a Facebook group calling for the recall of the progressive district attorney whose office prosecuted cases before him.[56] The order noted that the judge also made negative comments on Twitter in response to tweets supporting Democrats and posted tweets that suggested partisan views on issues such as gun control and Black Lives Matter, concluding that his social media activity gave the appearance of bias.[57] Rejecting the judge's defense that he did not intend his social media activity to function as an endorsement of any specific partisan positions or controversial viewpoints, the Commission reasoned, "'Likes' are, on their face, indicia that a person likes content."[58] Therefore, the judge's Twitter and Facebook activity cast doubt on his ability to act impartially in deciding the cases before him.[59]

**Social Media is Not the Problem**

The first recognizable social media site, in the format we know today, was Six Degrees – a platform created in 1997 that enabled users to upload a profile and make friends with other users. Friendster followed in 2002. Then came LinkedIn in December 2002, MySpace in 2003, Facebook in 2004, Twitter in 2006, Instagram in 2010, and Snapchat in 2011. In short, social media has become ubiquitous in a relatively short-period of time. But that does not mean social media creates new ethical dilemmas for lawyers. Lawyers can use social media without violating the rules of professional responsibility.

Social media itself is not the cause of misconduct that violates ethical standards. Ethical conduct does not become unethical when it is posted on social media. Instead, social media serves to expose unethical conduct that might have been hidden from view in an earlier era. There have always been judges whose political views influence their rulings. But now those judges post on Facebook and Twitter. And lawyers have always been subject to discipline for improperly attempting to influence jurors, revealing confidential information, or contacting a represented party. Using social media in a way that violates ethical rules does not make the conduct any more or less unethical – it just makes it more likely the misconduct will be caught. When seeking to avoid violating ethical rules on social media, it is important for lawyers and their staff to remember one simple rule: if it is unethical in the real world , then it is unethical on social media.

51 Ex Parte Wright, 166 So. 3d 618 (Ala. 2014). See also Doe No. 1 v. Kingfisher, 2023 WL 3444698 (W.D. Okla., May 11, 2023) (denying motion for protective order requesting restrictions on plaintiff's attorney discussing the case).

52 Aaron v. Durrani, 2013 WL 12121516 (S.D. Ohio, Oct. 1, 2013). See also State v. Dulos, 2019 WL 4898712 (Sup. Ct. Conn. September 12, 2019) (granting motion for protective order and noting that social media environment created a risk of information or misinformation that could overwhelm the constitutionally guaranteed right to a fair trial)

53 In the Matter of Marla Anne Brown, Case No. SBC-23-O-30270-DGS (State Bar Ct of Cal. Oct. 3, 2023).

54 Id. at *19–*22.

55 Id. at *31.

56 In the Matter Concerning Judge Michael J. O'Gara, State of California Commission on Judicial Performance (Sept. 14, 2021).

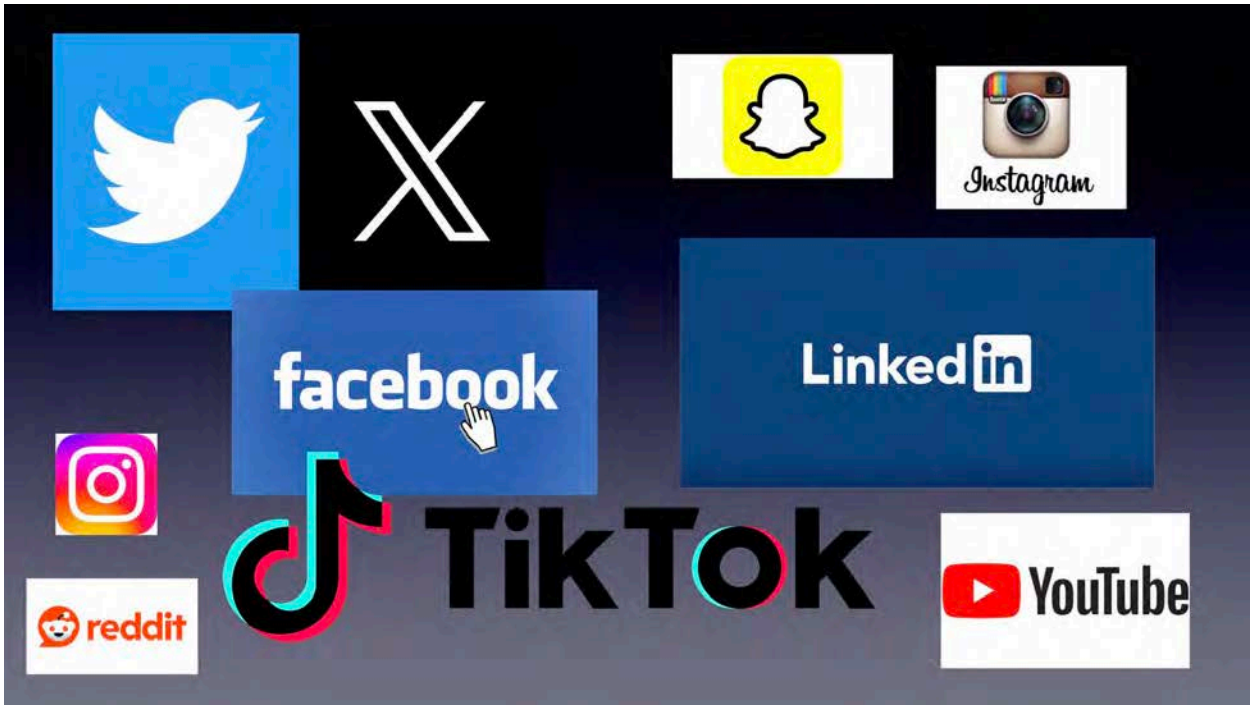
57 Id. at 11.

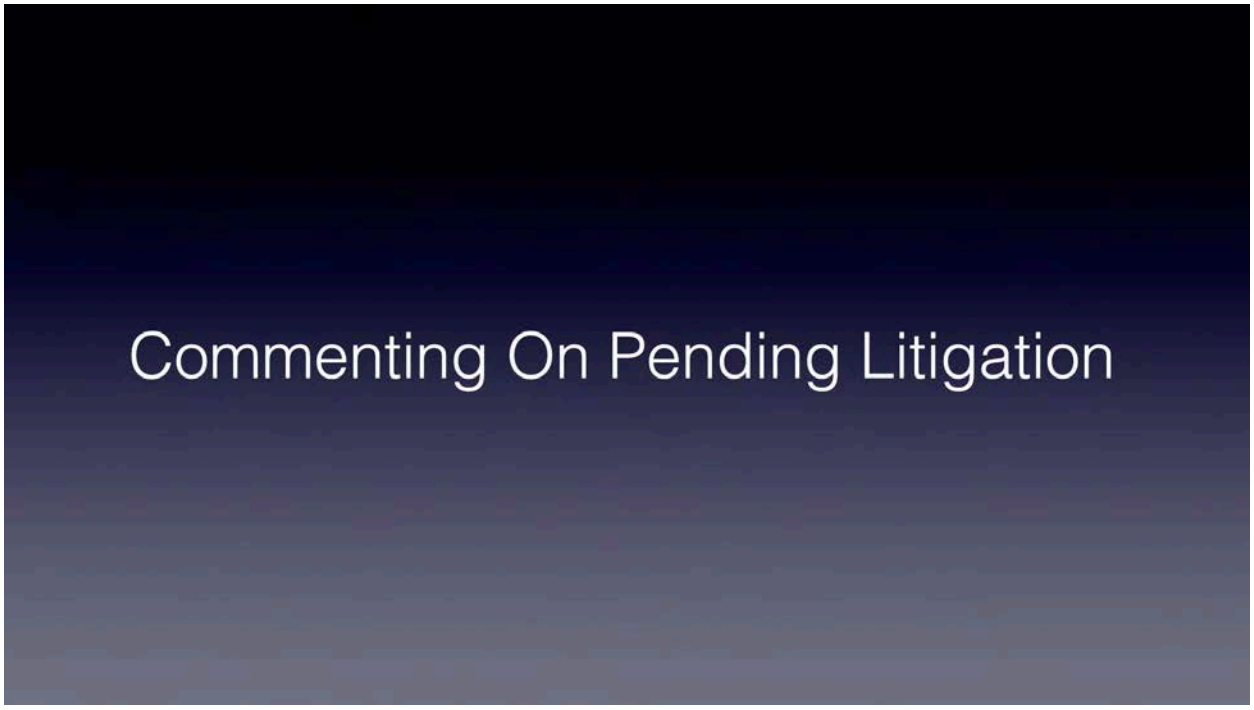
58 Id.

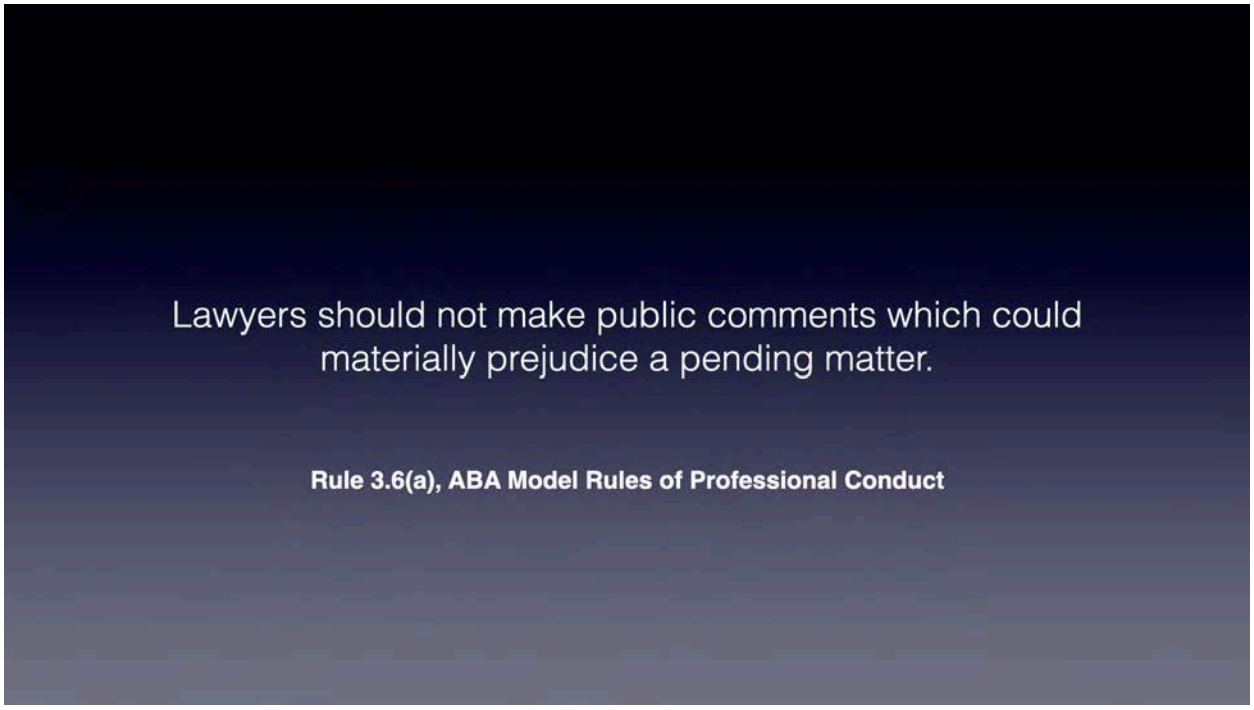
59 Id.

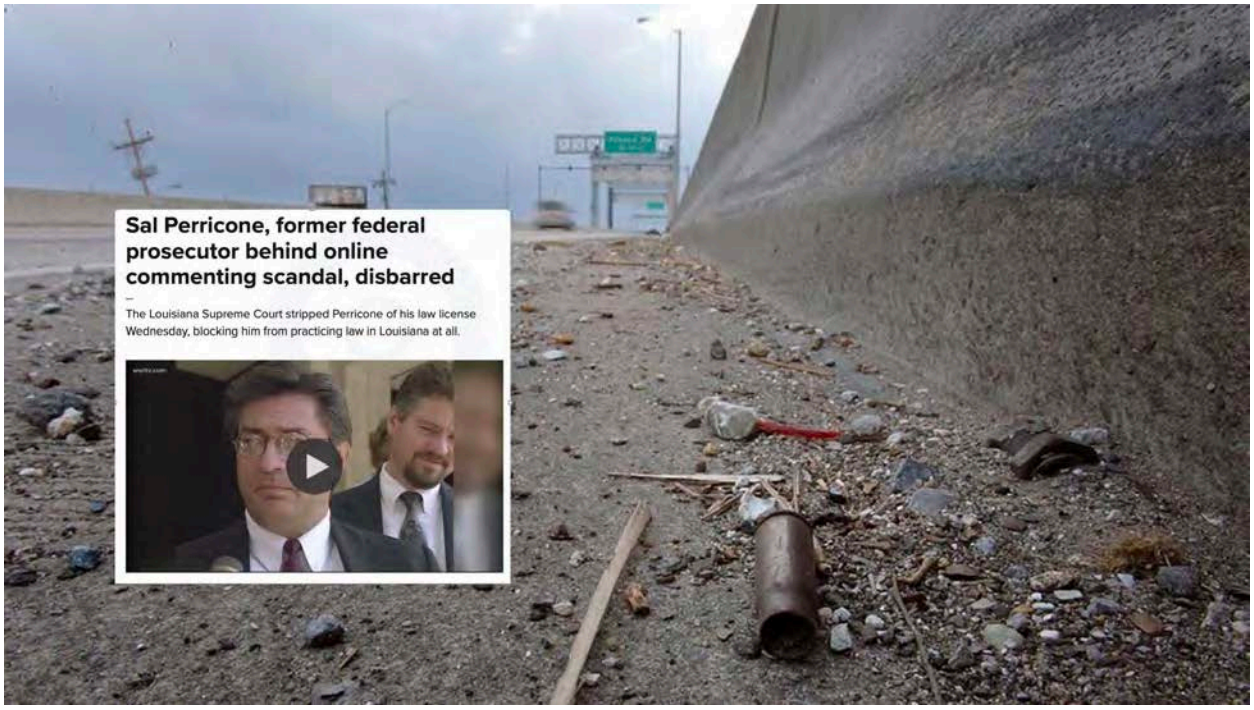
# Rough Surf: Social Media and Ethics

David M. Atkinson
Swift Currie McGhee & Hiers
Atlanta, Georgia

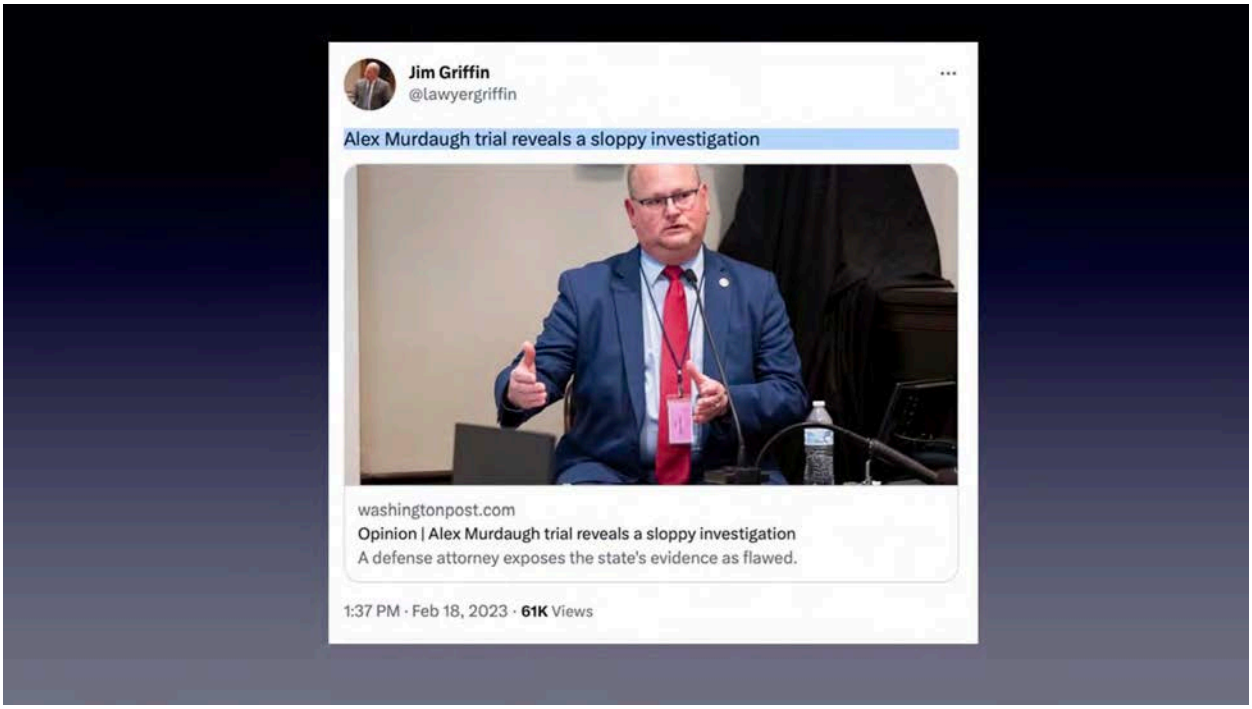



Commenting On Pending Litigation


Lawyers should not make public comments which could materially prejudice a pending matter.
Rule 3.6(a), ABA Model Rules of Professional Conduct


Sal Perricone, former federal prosecutor behind online commenting scandal, disbarred
–
The Louisiana Supreme Court stripped Perricone of his law license Wednesday, blocking him from practicing law in Louisiana at all.


"An attorney who responds to or 'likes' a third party's comment that contains prohibited content could be deemed to have adopted the third-party comment. Such action could subject the attorney to a rule violation."
Indiana Sup. Ct. Disciplinary Comm. Op. 1-20, Third Party Comments or Tags on a Lawyer's Social Media.

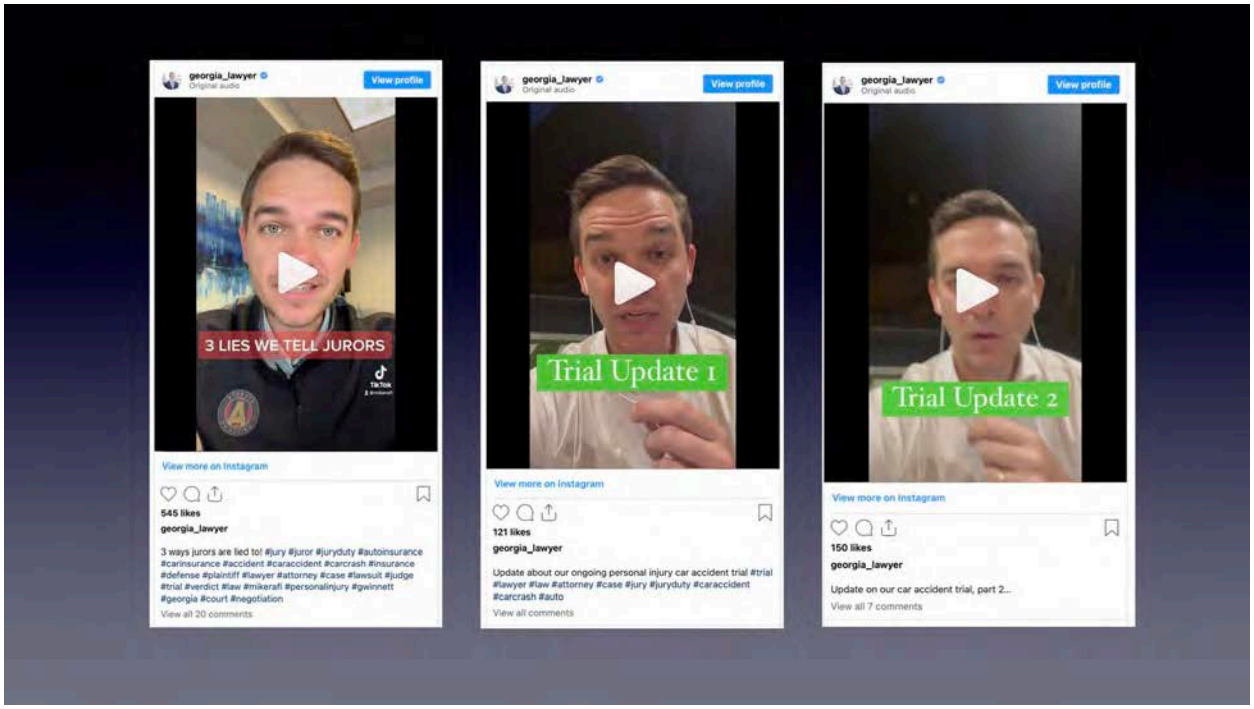

Jim Griffin
@lawyergriffin
Alex Murdaugh trial reveals a sloppy investigation
washingtonpost.com
Opinion | Alex Murdaugh trial reveals a sloppy investigation
A defense attorney exposes the state's evidence as flawed.
1:37 PM · Feb 18, 2023 · 61K Views


Be careful about what you "like" on social media

# Third-Party Comments or Likes

- False or misleading claims.
- Claiming a non-authorized specialty.
- Non-consensual disclosure of client confidences.
- Adoption of a third-party comment.


DON'T LET YOUR DIGITAL FOOTPRINT HURT YOUR CASE
Re-evaluate your privacy settings.
Don't discuss it on social media.
Avoid posting about your emotions.
Deleting a post doesn't delete it forever.
georgia_lawyer • Follow
georgia_lawyer What you think is harmless or private may be all it takes for the defense to convince the jury that you aren't as injured as you say you are. Most people understand that they shouldn't make a post about a crash or treatment, but many don't realize that comments on friends' posts or being tagged by family members can be just as harmful to their case.
15w
13 likes
December 18, 2023
Add a comment...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3 LIES WE TELL JURORS
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3 ways jurors are lied to! #jury #juror #juryduty #autoinsurance #carinsurance #accident #caraccident #carcrash #insurance #defense #plaintiff #lawyer #attorney #case #lawsuit #judge #trial #verdict #law #mikerafi #personalinjury #gwinnett #georgia #court #negotiation
View all 20 comments
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View profile
Trial Update 1
View more on Instagram
121 likes
georgia_lawyer
Update about our ongoing personal injury car accident trial #trial #lawyer #law #attorney #case #jury #juryduty #caraccident #carcrash #auto
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Update on our car accident trial, part 2...
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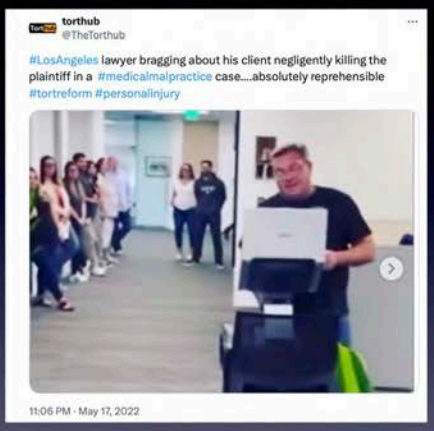



"a guy that was probably negligently killed,
but we kind of made it look like other people did it."

PUBLIC SAFETY

## Attorney charged with intimidation on Facebook

**Associated Press** @ap
Published 7:24 a.m. ET May 13, 2014

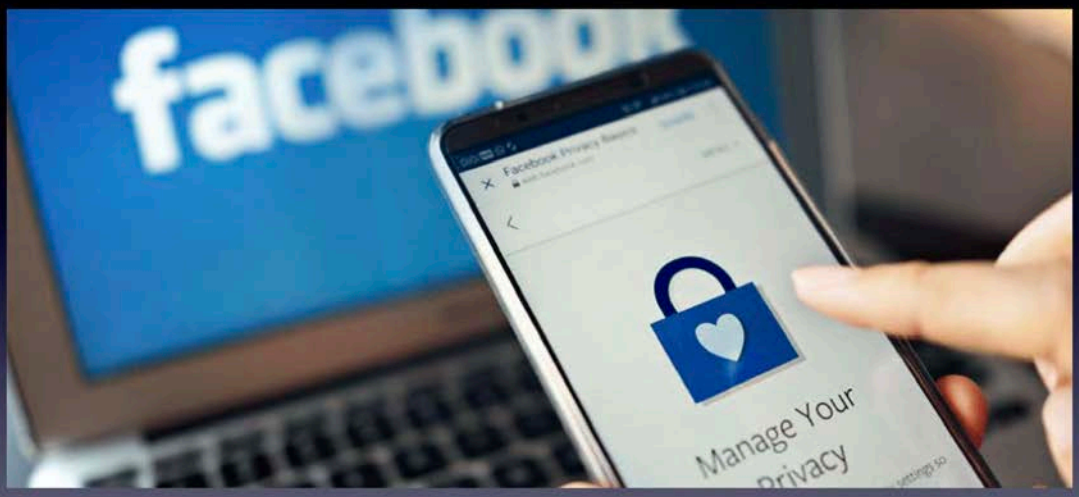
FORT WAYNE, Ind. -- A Fort Wayne attorney faces a charge of intimidation after authorities say he threatened an ex-client's husband on Facebook.

Allen County prosecutors charged 41-year-old Jim Hanson of Fort Wayne with intimidation last week. If convicted, he could face six months to three years in prison and be fined up to $10,000.

The Journal Gazette reports a man called police in April and said his ex-wife's lawyer had sent him a threatening Facebook message. Amid profanity, the message allegedly said "I've got you in my sights now."

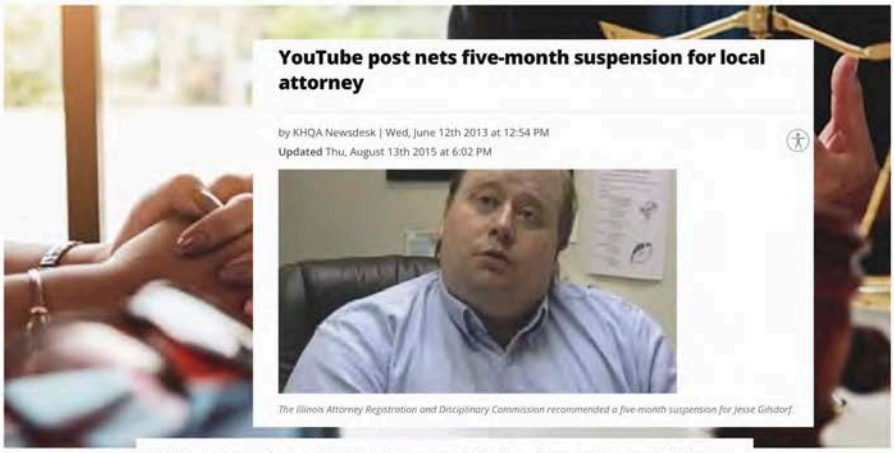
Hanson is representing the woman in her divorce and in a misdemeanor domestic battery case.

Hanson acknowledged Monday that the message was unprofessional and inappropriate. He says it was intended to show that he would vigorously defend his client.




## Confidentiality

Lawyer Posts Video of Client's Drug Deal on YouTube



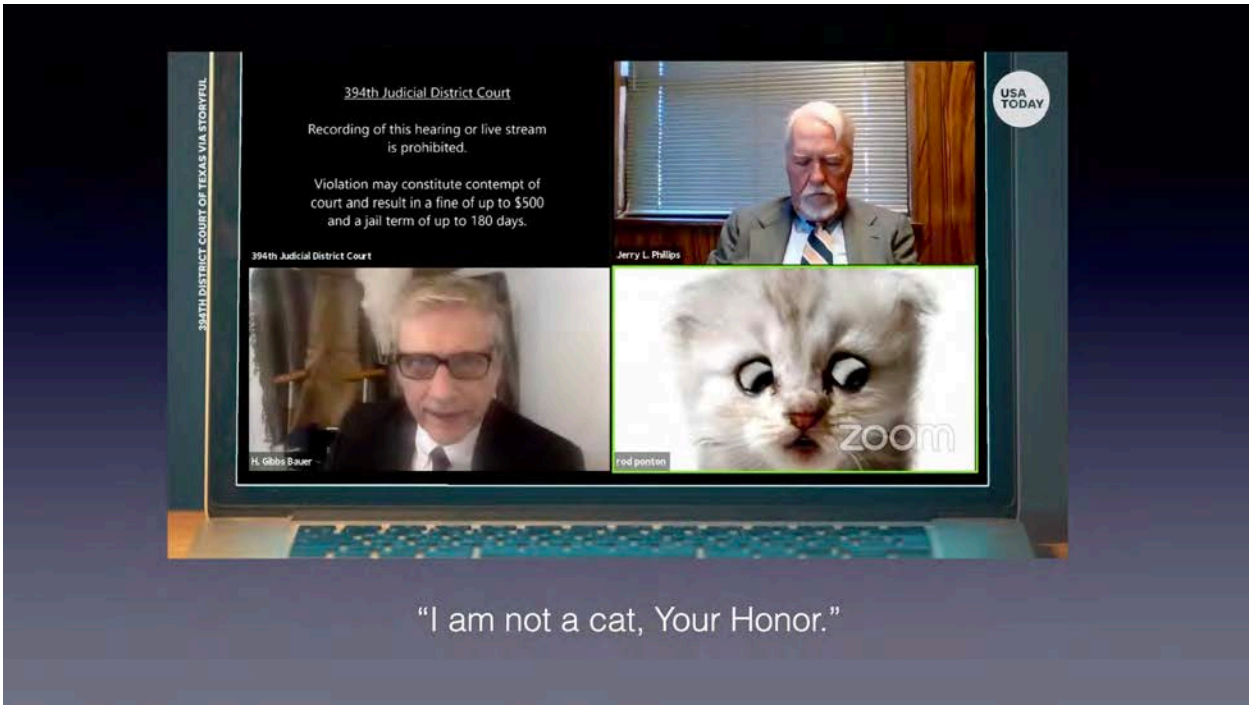
**YouTube post nets five-month suspension for local attorney**

by KHQA Newsdesk | Wed, June 12th 2013 at 12:54 PM
**Updated** Thu, August 13th 2015 at 6:02 PM



*The Illinois Attorney Registration and Disciplinary Commission recommended a five-month suspension for Jesse Gilsdorf.*

**Ethics Complaint Claims Lawyer Tried to Sway Potential Jurors by Posting Discovery Video on YouTube**

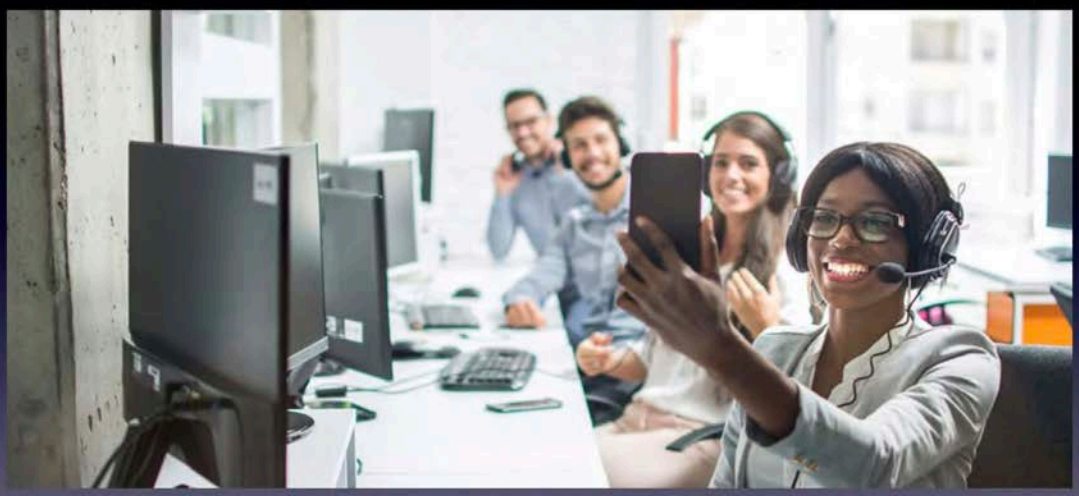

394TH DISTRICT COURT OF TEXAS VIA STORYFUL
394th Judicial District Court
Recording of this hearing or live stream is prohibited.
Violation may constitute contempt of court and result in a fine of up to $500 and a jail term of up to 180 days.
394th Judicial District Court
Jerry L. Phillips
USA TODAY
H. Gibbs Bauer
zoom
"I am not a cat, Your Honor."


Advertising Rules Apply to Social Media


Social Media Network Connections

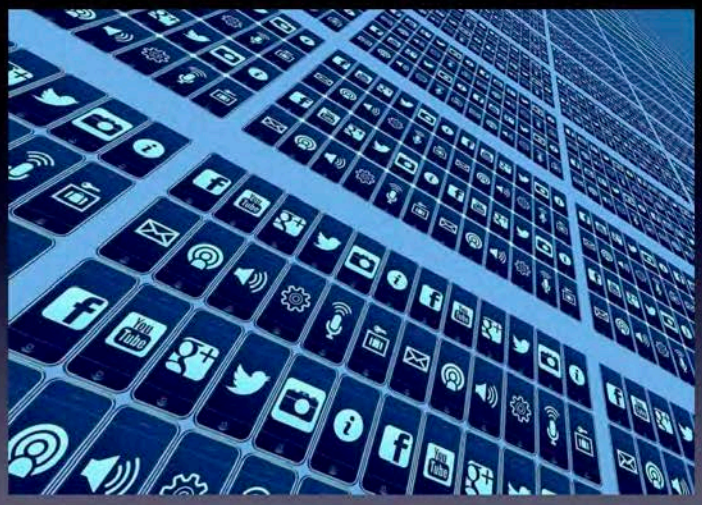
Judges on Social Media

# Application to Non-Lawyers - Staff and Investigators



Employees on social media

Third-Party Investigators



In-House Lawyers and Staff


"[A] lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate Courts and their administration of justice."

**Gentile v. State Bar of Nevada, 501 U.S. 1030, 1072 (1991).**

"[A]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice."

**Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073 (1991).**

"Indeed, a lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the lawyer's use of social media."

**The Commercial and Federal Litigation Section of the New York State Bar Association**

# Social Media Best Practices

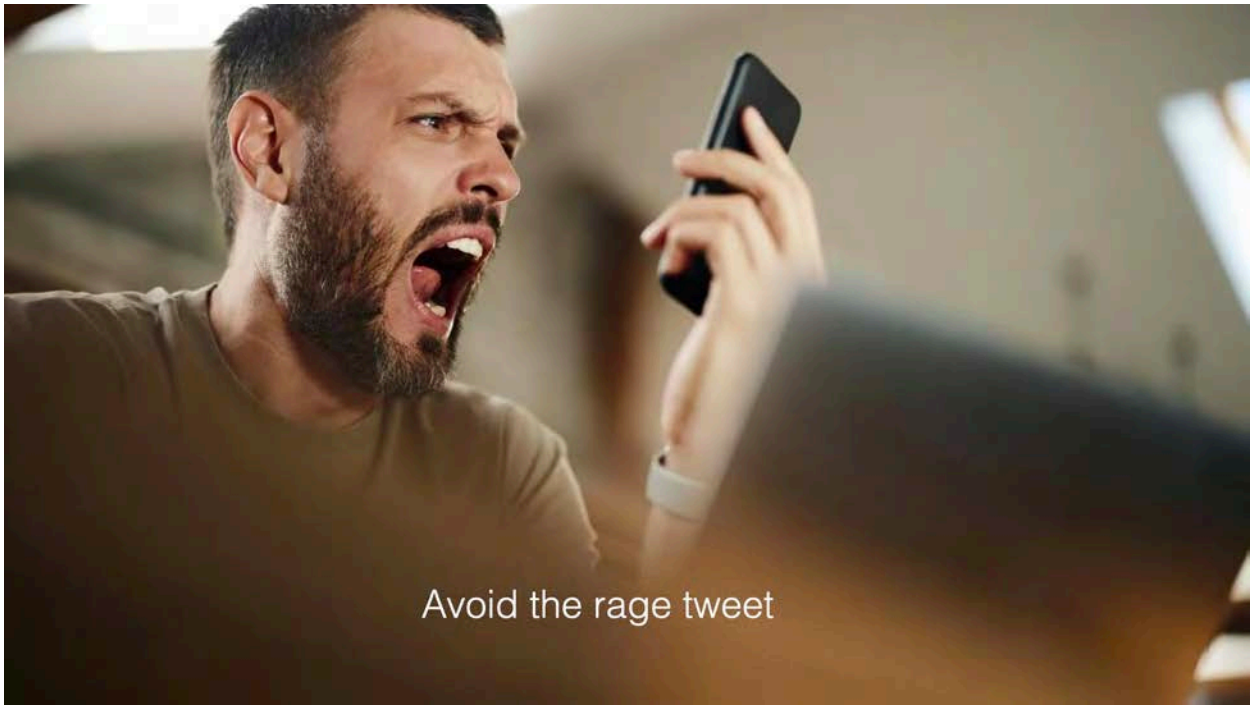
- Social media posts must comply with advertising guidelines
- Be careful about discussing pending matters
- Never post false statements or disparaging comments (and do not contradict what you're telling the court)
- Do not discuss sensitive client matters

## Social Media Best Practices

- Disable comments on social media posts
- Be careful when "liking" or retweeting
- Monitor your social media accounts
- Do not communicate with represented parties

## Social Media Best Practices

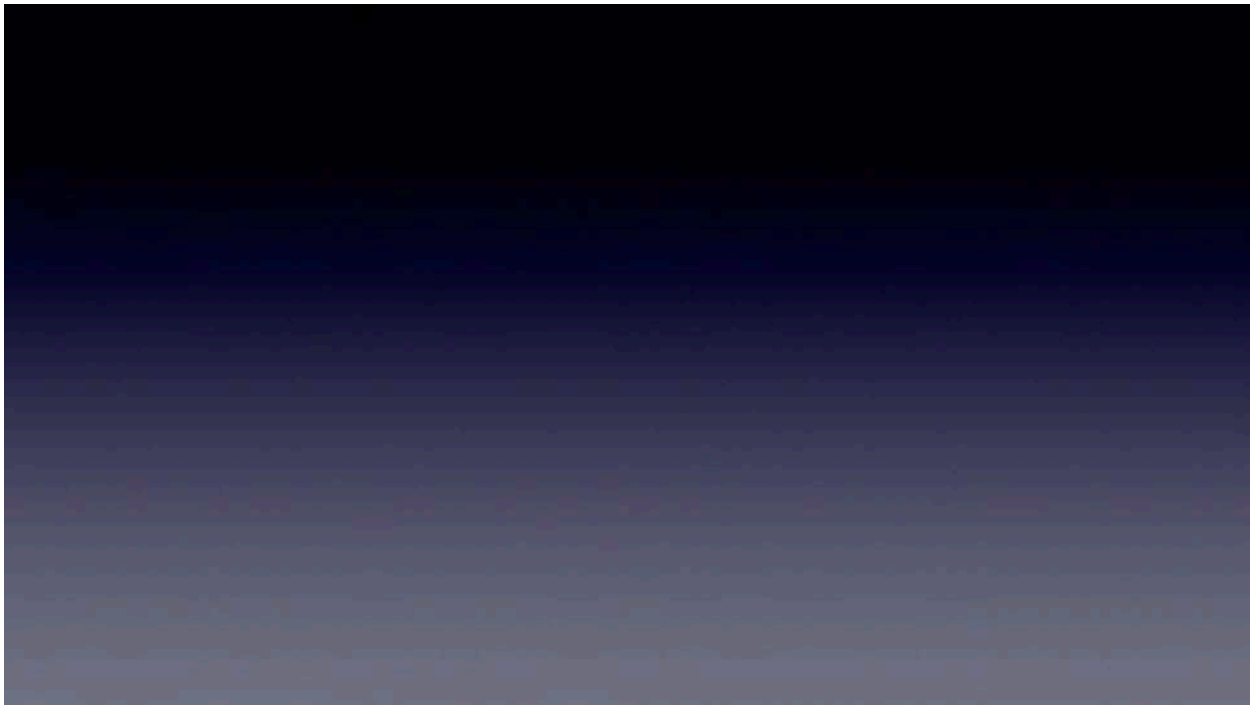
- Adopt social media policies
- Avoid unauthorized practice of law through social media
- Include a clear and conspicuous disclaimer
- **If you're not sure whether to post - don't!**


Avoid the rage tweet


If it is wrong in real life, then it is wrong on social media.


Social Media is Not the Problem


Social Media
Facebook



404.888.6166
david.atkinson@swiftcurrie.com

# David M. Atkinson

**Partner | Swift Currie McGhee & Hiers (Atlanta, GA)**

David M. Atkinson has been a trial lawyer since 1991, focusing on civil litigation defense, including tort claims, construction litigation, products liability, insurance coverage, business disputes and intellectual property. He has served as lead trial counsel in federal and state courts throughout Georgia and the Southeast, as well as appellate counsel before the Supreme Court of Georgia, Court of Appeals of Georgia and United States Court of Appeals for the Eleventh Circuit.

A regular speaker on insurance and litigation matters, David has chaired annual seminars presented by The Seminar Group titled, “Bad Faith Claims: Extra-Contractual Liability in Georgia,” “Georgia Insurance Law” and “Insurance in the Construction Industry.”

David is a member of the State Bar of Georgia (Litigation Section), American Bar Association (Litigation Section, Tort and Insurance Practice Section and Insurance Coverage Litigation Committee), Atlanta Bar Association, International Association of Defense Counsel, Defense Research Institute, Georgia Defense Lawyers Association, Federal Bar Association, Lawyers Club of Atlanta and Atlanta Volunteer Lawyers Foundation. He has also been elected as a fellow in the Litigation Counsel of America, an invitation-only trial lawyer society.

David earned his B.A., cum laude, in 1988 from Washington and Lee University and J.D. in 1991 from the Marshall-Wythe School of Law at the College of William & Mary. He was admitted to the State Bar of Georgia in 1991 and practiced at other law firms prior to founding the firm then known as Magill & Atkinson in 1996.

In 2016, he and his team joined Swift Currie.

**Practice Areas**
- Appellate
- Bad Faith Litigation
- Catastrophic Injury & Wrongful Death
- Commercial Litigation
- Construction Law
- Insurance Coverage
- Premises Liability
- Products Liability

**Awards/Recognitions**
- The Best Lawyers in America©, 2018-Present
- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Georgia Super Lawyers Rising Stars

**Education**
- The Marshall-Wythe School of Law at the College of William & Mary (J.D., 1991)
- Washington and Lee University (B.A., 1988)

# ETHICS - Eight Tips on Attorney-Client Privilege and the Common-Interest Doctrine


## Katrina Smeltzer

**Sandberg Phoenix & von Gontard (Kansas City, MO)**


**Eight Tips on the Attorney-Client Privilege and the Common-Interest Doctrine**
*Katrina Smeltzer*

The attorney-client privilege is a fundamental rule in our profession that "encourages full and frank communication between attorneys and their client[.]" Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The privilege applies to communications made between privileged persons in confidence for the purpose of obtaining or providing legal assistance for the client. Many states codified this privilege by statute or rule.

The common-interest doctrine is an extension of the attorney-client privilege that prevents waiver of the privilege when privileged communications are shared with third persons not a part of the attorney-client relationship. However, for this doctrine to apply, there must be a common interest between the people involved and the communication must still be for the purpose of seeking legal advice.

**Tip 1: Know your venue.**
While the fundamentals of privilege are uniform across the states, there can be nuances in every state, especially as to application of the privilege. It is thus critical to know what state's laws the privilege analysis will be conducted under.

Most state courts will defer to the application of their own state's common law or statutory law to apply privilege. However, a choice-of law analysis may change this. Restatement, Conflict of Laws 2d, § 139 addresses such a choice-of-law analysis, which essentially considers the laws of both the forum state as well as the state with the most significant relationship and favors admission over exclusion when the two conflict.

Pursuant to Fed. R. Civ. P. 501, federal courts will usually apply common law for the determination of privilege, especially if the cause of action at issue is defined by the state's common law. This will likely follow the law of the state where the federal court sits. However, again, a choice-of-law analysis may change this. That being said, there is a lot of federal common law developed on the issue that stems from state law.

It is best to have a general awareness of the nuances of privilege law in all states that potentially could apply. For those companies that interact across state lines, this may require an understanding of the law in multiple states.

**Tip 2: Know your purpose.**
Communication is only protected under the attorney-client privilege if it involves the provision or receipt of legal advice. The U.S. Supreme Court has recognized the attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391 (1976)

But, as the Ninth Circuit has observed, "[g]iven our increasingly complex regulatory landscape, attorneys often wear dual hats, serving as both a lawyer and a trusted business advisor." In re Grand Jury, 23 F.4th 1088, 1090 (9th Cir. 2022). Legal advice is protected by the attorney-client privilege, but business advice is not. However, when a communication serves both purposes, there is no consistent standard for determining when the attorney-client privilege applies.

Many circuits and state courts follow the "primary purpose" test, which looks at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice. Id. at 1091. "The natural implication of this inquiry is that a dual-purpose communication can only have a single 'primary' purpose." Id.

The D.C. Circuit Court adopted a bit of a spin-off from the "primary purpose" test in In re Kellogg Brown & Root, Inc., which is referred to as "a primary purpose" test (as opposed to "the primary purpose"). 756 F.3d 754, 758 (D.C. Circuit 2014). This is described as whether "obtaining or providing legal advice [was] a primary purpose of the communication, meaning one

of the significant purposes of the communication." Id. As the Kellog court explained, "trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task" because often it is "not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B." Id. at 759.

Other courts follow the "because of" test, which "considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospective litigation." Id. at 1091-2. This is a broader test than the "primary purpose" test because it only considers causation and usually involves work-product in anticipation of litigation. Id. This begs the question whether this test can apply if there is no litigation directly involved with the communication at issue.

The simplified solution is to keep legal advice separate from business advice. Notably, the illusory addition of counsel to a communication on business strategy in hopes of obtaining privilege likely will not hold up.

**Tip 3: Know your client.**
Pursuant to the Supreme Court's holding in the Upjohn case, the attorney-client privilege applies equally in the corporate context. Further, the privilege applies to in-house counsel. Courts state "that a lawyer's status as in-house counsel 'does not dilute the privilege.'" In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758 (D.C. Circuit 2014).

Two major tests determine who can assert the attorney-client privilege in the corporate context:

1. The control-group test:
- The "client" is the corporation but the only people who can "personify" the corporation when communicating with counsel are those employees who have authority to act on counsel's legal advice. See City of Philadelphia v. Westinghouse Elec. Corp., 210 F.Supp. 483, 485 (E.D. Pa. 1962).
- It is a restrictive approach that has been explicitly rejected by the U.S. Supreme Court in Upjohn. Nevertheless, it remains in some jurisdictions (Illinois, for example, but in a relaxed form) and some jurisdictions have not specifically addressed the issue (Wyoming and Nebraska, for example).
- Some states have relaxed this test to include individuals who regularly advise management in decision-making and whose opinions would normally be relied on in such decision-making. See Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. App. 1982).

2. The subject-matter test (those who "need to know"):
- Acknowledges that low and mid-level employees often possess the most relevant information when legal issues arise. The privilege is applicable if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. Diversified Indus., Inc. v. Meredith, 572 F.3d 596, 609 (8th Cir. 1977).
- Adopted by the U.S. Supreme Court and is more liberal.
- At least 28 states have followed: Alabama (codified), Arizona (codified), Arkansas, California (its rule predated Upjohn), Colorado, Connecticut, Delaware, Florida, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Nevada (supreme court holding despite conflict with codification), New Jersey, New York, Ohio, Oregon (codified), Pennsylvania, Tennessee, Texas, Utah, Vermont (codified), Virginia, Washington, and Wisconsin.

Be wary of providing legal advice in an open corporate forum—particularly if the session is recorded.

When communicating with lower-level employees about topics that likely are privileged, indicate you do so for the purpose of providing legal advice and they should consider the conversation confidential.

There is no consensus about how the privilege interacts with communications with former employees. Some courts apply the same subject matter test and others find these communications are never privileged.

**Tip 4: Know your company.**
Information or documents may lose their privilege if the communication is shared with a non-protected third party. In the corporate setting, this could include someone beyond those who reasonably need to know of it in order to act for the organization. Generally, people who "need to know" are those agents who are responsible within the organization for accepting or rejecting a lawyer's advice or acting on legal assistance provided by the lawyer. Thus, the fact that advice received from a corporate

attorney is communicated by one corporate employee to another does not defeat the privilege if the purpose of that communication is to transmit the advice of counsel to an employee with a need to know and act on that advice. However, care must be taken to track such dissemination and ensure that it does not go beyond those with a legitimate need to know.

Similarly, the privilege can extend to agents of the client or the lawyer who require the information to carry out the legal assistance. This can include a consulting expert.

**Tip 5: Common-Interest Doctrine - Know your situation.**
Several states have directly addressed whether actual and pending litigation must exist for there to be coverage by the common-interest doctrine. Many of these states, including Indiana, Colorado, Kentucky, Michigan, and New Mexico, have said pending litigation is not necessary. Thus, in these states, communications and documents exchanged prior to anticipated litigation or in a transactional setting still retain protected status even if involving a third-party. However, Texas and Mississippi refuse to extend this doctrine outside of the litigation context and do require actual, pending litigation. Other states have not directly addressed this issue, and thus, care is warranted.

All states require there to be an articulable common legal interest between the parties. Thus, even if pending litigation is not required, there still must be a common legal interest between the parties that is facilitated by the communications. Notably, a few states have clarified a common business interest will not satisfy this test, including North Carolina, Pennsylvania, and Missouri

**Tip 6: Common-Interest Doctrine—Know your parties.**
There are also a few states that require the parties to be parties in the same litigation, if litigation is pending. These include Texas, Illinois, and Mississippi.

**Tip 7: Common-Interest Doctrine—Put it in writing.**
Most states require an agreement between the parties, including keeping communications confidential. Florida and North Carolina have expressly stated a written agreement is not necessary but may be prudent. Other states have not addressed the need for a written agreement, so, again, care is warranted.

**Tip 8: Mark your stuff.**
This seems simple but is rarely done on a consistent basis. Marking communication and documents you intend to keep privileged will help in-house and outside counsel focus on retention of privilege. However, do not overuse this technique. Not every communication to and from an attorney, especially if in-house, is considered privileged.

State-by-state review of the common-interest doctrine:

| State | Recognize Privilege? | Elements | Nuance/Red Flags? |
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| Texas | Yes. Tex. Evid. R. 503(b)(1)(C). | "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: … (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action." Tex. Evid. R. 503(b)(1)(C).<br><br>For privilege to apply:<br><br>Actual litigation must exist<br>All must be parties to said litigation (same case)<br>Communication concerns common interest in litigation | "[N]o commonality of interest exists absent actual litigation. Accordingly, our privilege is not a 'common interest privilege' that extends beyond litigation. Nor is it a 'joint defense' privilege, as it applies not just to defendants but to any parties to a pending action. Rule 503(b)(1)(C)'s privilege is more appropriately termed an 'allied litigant' privilege." In re XL Specialty Ins. Co., 373 S.W.3d 46, 52 (Tex. 2012); See also In re Park Cities Bank, 409 S.W.3d 859, 875-76 (Tex. App. 2013) (rejecting privilege for documents/ communications created prior to start of pending litigation, and for communications to counsel in related litigation, but applying privilege to other documents which were "sent and received by those authorized to receive confidential communications.") |

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| Missouri | Yes. Lipton Realty, Inc. v. St. Louis Housing Authority, 705 S.W.2d 565 (Mo. App. E.D. 1986); State ex rel. Winkler v. Goldman, 485 S.W.3d 783 (Mo. App. E.D. 2016); State ex rel. Garrabrant v. Holden, 633 S.W.3d 356 (Mo. banc. 2021) | Seen as an exception to waiver of an attorney-client privileged communication.<br><br>Elements:<br>Communication must otherwise be privileged;<br>Third party must share common interest in outcome of litigation (common commercial interest likely not enough);<br>Communication was made for purpose of obtaining more effective legal assistance; and<br>Communication was otherwise made in confidence. | Must have shared interests in the litigation in question, Missouri courts have not well-defined what a shared interest in the litigation could be, but it does not appear to be a requirement all involved parties to the common interest be a defendant in the litigation in question. |
| Illinois | Yes. Selby v. O'Dea, 2017 IL App (1st) 151572, ¶ 50. | "The common-interest exception to the waiver rule protects from disclosure to third parties those statements made to further the parties' common interest, pursuant to a common-interest agreement, (1) by the attorney for one party to the other party's attorney, (2) by one party to the other party's attorney, (3) by one party to its own attorney, if in the presence of the other party's lawyer, and (4) from one party to another, with counsel present." Selby v. O'Dea, 2017 IL App (1st) 151572, ¶ 105.<br><br>Must have a common interest agreement<br>Must be in same litigation<br>Communication concerns common interest in litigation | Potentially could extend from actual litigation to potential litigation, as that has not yet been decided by an Illinois court. Selby v. O'Dea, 2017 IL App (1st) 151572 ¶ 74.<br><br>Another potential avenue: corporate control group test described in Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr., 213 Ill. App. 3d 427, 431 (1991). Assuming Drury has an overarching corporate structure to which both smaller orgs both belong: "[T]here are two tiers of corporate employees whose communications with the corporation's attorney are protected. The first tier consists of the decision-makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision-makers rely." Huebner v. Family Video Movie Club, Inc., 2019 IL App (5th) 180215-U, ¶ 24 (privilege destroyed where previously privileged communications were distributed to non-control group employee). |

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| Indiana | Yes. Price v. Charles Brown Charitable Remainder Unitrust Trust, 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015); Groth v. Pence, 67 N.E.3d 1104, 1119 (Ind. Ct. App. 2017) | "The privilege is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. The common interest privilege permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims. … It applies in civil and criminal litigation, and even in purely transactional contexts. The privilege is limited to those communications made to further an ongoing joint enterprise with respect to a common legal interest." Price, 27 N.E.3d at 1173.<br><br>"When two or more persons, with a common interest in some legal problem, jointly consult an attorney, 'their confidential communications with the attorney, though known to each other, will of course be privileged in a controversy of either or both the clients with the outside world." Corll v. Edward D. Jones & Co., 646 N.E.2d 721, 725 (Ind. Ct. App. 1995)<br><br>Common legal interest - whether civil, criminal or purely transactional.<br>Must be otherwise confidential communications with attorney.<br>Need not be ongoing litigation. Corll, 646 N.E.2d at 724-25. | Not much nuance, as long as parties have a common legal interest, pending litigation or not, their joint conversations with counsel are privileged. |

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| Ohio | Yes. Cleveland Botanical Garden v. Drewien, 153 N.E.3d 700 (Ct. App. 2020). | "The common interest exception is another step beyond the joint client situation where two or more clients, each represented by their own lawyers, meet to discuss matters of common interest - commonly called a joint defense agreement or pooled information situation." Buckeye Corrugated, inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, ¶ 14 (Ct. App.); Cleveland Botanical Garden v. Drewien, 153 N.E.3d 700, 713 (Ct. App. 2020).<br><br>"This exception typically arises when parties 'are either represented by the same attorney or are individually represented but have the same goal in litigation." Cincinnati Enquirer v. Hamilton Cty. Bd. of Comm'rs 2020-Ohio-4856, ¶ 33 (Ct. Cl.)<br><br>"To fall within the common interest exception, it must be shown that<br>The communications were made in the course of a joint defense effort; and<br>The statements were designed to further the effort."<br>Buckeye Corrugated, inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, ¶ 15 (Ct. App.).<br><br>"[T]he exception will only apply where the disclosures are made in the course of formulating a common legal strategy." Id. (quoting Cigna Ins. Co. v. Cooper Tires and Rubber, inc., 2001 WL 640703, *2 (May 24, 2001)).<br><br>Elements:<br><br>Common litigation goal<br>Comments made in course of joint defense effort.<br>Designed to further joint defense effort by formulating common legal strategy. | |

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| Alabama | Yes. Int'l Bhd. of Teamsters, etc. v. Hatas, 252 So.2d 7 (1971). | Attorney client privilege "applies to third persons who are present and are represented by the same attorney or have an interest in the proceedings." Crenshaw v. Crenshaw, 646 So.2d 661, 662 (Ala. 1994).<br><br>"Where two or more persons employ an attorney as their common attorney their communications to him in the presence of each other are regarded as confidential so far as strangers to the conference are concerned, and are privileged as to them. Likewise, where two or more persons interested in the same subject matter are present at a conference with an attorney who represents only one of those present, it has been held that matters discussed at such conference are confidential as to strangers to the conference and accordingly they constitute privileged communications as to such strangers." Int'l Bhd of Teamsters, etc. v. Hatas, 252 So.2d 7, 27-28 (Ala. 1971)<br><br>Common legal interest in the subject matter discussed. (two parties to a will could be considered to have adverse interests, thus no common legal interest). Crenshaw<br>Attorney is present | Attorney client privilege "does not exist when … client to attorney communications are made in the presence of a third party whose presence is not necessary for the successful communication between the attorney and the client." Branch v. Greene Cty. Bd. of Educ., 533 So.2d 248, 255 (Ala. Civ. App. 1988) (not analyzing whether common interest privilege exists, but red flag nonetheless). |
| Arizona | Yes. Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1099-1101 (Ariz. Ct. App. 2003) | "If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged [as attorney-client communications] that relates to the matter is privileged as against third persons." Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1100 (Ariz. Ct. App. 2003).<br><br>The common interest may be "legal, factual or strategic in character." Id. at 75 P.3d at 1100.<br><br>"For the doctrine to apply, exchanging communications and work product must further the legal interests of each client." Vanoss v. Bhp Copper, 2015 Ariz. Super. LEXIS 2479, *14 (2015) (citing Ariz. Indep. Redistricting Comm'n, at 1100).<br><br>Communication would otherwise qualify as privileged<br>Common interest between two or more clients (can be legal, factual, or strategic)<br>Communication exchange must further legal interests of each client | |

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| Colorado | Yes. Black v. Southwestern Water Conservation Dist., 74 P.3d 462, 469 (Colo. Ct. App. 2003) | "Communications shared with third persons who have a common legal interest with respect to the subject matter thereof will be deemed neither a breach nor a waiver of the confidentiality surrounding the attorney-client relationship." Black, 74 P.3d at 469.<br><br>No requirement of existing or impending litigation. Id. Includes information shared during a common enterprise. Ritter v. Jones, 207 P.3d 954, 960 (Colo. Ct. App. 2009).<br><br>"Only applies to communications given in confidence and intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy." Id. (internal citations omitted).<br><br>Common interest and/or enterprise<br>Reasonably intended to be part of building common legal strategy | |
| Florida | Yes. Fla. Stat. § 90.502(4)(e); AG Beaumont 1, LLC v. Wells Fargo Bank, N.A., 160 So. 3d 510, 512 (Fla. 2d DCA 2015) | Common interest privilege is an exception to general rule of lawyer-client privilege and applies when "[a] communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest." Fla. St. § 90.502(4)(e)<br><br>"[L]itigants who share unified interests in litigation" are permitted "to exchange privileged information in order to adequately prepare their cases without losing the protection afforded by the privilege." Brinkmann v. petro Welt Trading Ges.m.b.H, 324 So.3d 574, 579 (Fla. 2d. DCA 2021).<br><br>Written agreement is not explicitly required so long as both parties "intended to maintain confidentiality while sharing information in pursuit of their common interests[.]"AG Beaumont 1, LLC v. Wells Fargo Bank, N.A., 160 So. 3d 510, 512 (Fla. 2d DCA 2015).<br><br>Common interest in litigation<br>Parties reasonably intended to maintain confidentiality while sharing such information<br>Communication made in pursuit of common interest<br>Otherwise privileged communication<br>Written JDA not required but seems to be suggested | In Visual Scene, Inc. v. Pilkington Bros., 508 So.2d 437, 441 (Fla. 3d DCA 1987), the party claiming privilege produced "an affidavit attesting to a before-the-exchange agreement stating their intention to maintain confidentiality and to use the information only in preparation for trial on those issues common to both." |

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| Georgia | Yes. McKesson Corp. v. Green, 266 Ga. App. 157, 161 n.8 (Ga. Ct. App. 2004), aff'd, 279 Ga. 95 (Ga. 2005). | The Common interest privilege applies where:<br>Communication made by separate parties in the course of a matter of common interest.<br>The communication is designed to further that effort and<br>The privilege has not been waived.<br>McKesson Corp. v. Green, 266 Ga. App. 157, 161 n.8 (Ga. Ct. App. 2004), aff'd, 279 Ga. 95 (Ga. 2005).<br><br>Communications can be legal, factual, or strategic so long as parties have common legal interest. McWhorter v. Ward, 2007 Ga.Super. LEXIS 77, at *8-9. | |
| Iowa | Yes. Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004). | Communications between two parties and their shared attorney are privileged where two or more persons jointly consult with the same attorney to act for them in a matter of common interest. Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004).<br><br>"Actual consultation by both clients is not a prerequisite to the application of the joint-client exception." City of Coralville v. Iowa Dist. Court, 634 N.W.2d 675, 677 (Iowa 2001).<br><br>"When two or more persons, each having an interest in some problem, or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other, will of course be privileged[.]" City of Coralville, at 677 | |

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| Kansas | Yes but it's shaky. State v. Maxwell, 10 Kan. App. 2d 62, 65 (1984); | "Where two or more persons jointly consult an attorney concerning mutual concerns, their confidential communications with the attorney, although known to each other, will be privileged in controversies of either or both of the clients with the outside world." State v. Maxwell, 10 Kan.App.2d 62, 65 (1984).<br><br>But see Associated Wholesale Grocers v. Americold Corp., 266 Kan. 1047, 1058-59 (1999) (refusing to issue a holding on whether K.S.A. § 60-426 affects whether the joint-defense privilege is recognized in Kansas).<br><br>See Watchous Enters., L.L.C. v. Pac. Nat'l Capital, 2017 U.S. Dist. LEXIS 160718, at *7 n.16 (D. Kan. 2017) ("This court has not been presented with convincing evidence that the Kansas Supreme Court would deviate from Maxwell's recognition of the joint-client doctrine. Indeed K.S.A. § 60-426 itself appears to recognize the doctrine in discussing 'a communication … relevant to a matter of common interest between two or more clients if made by any of them to an attorney whom they have retained in common.' … Accordingly, the court will apply Maxwell's ruling on the joint-client doctrine."). | Not quite an open question but certainly not settled law. Tread carefully and be over-cautious here |
| Kentucky | Yes. Ky. Rules of Evidence 503 | "A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client: … (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein[.]" KRE Rule 503(d)(5).<br><br>See Lewis v. Fulkerson, 555 S.W.3d 432, 440 (Ky. Ct. App. 2017)<br><br>See Prisma Cap. v. Ky. Ret. Sys., 2020 Ky. App. Unpub. LEXIS 579, at *21 (Aug. 28, 2020) (There must be more than a commercial, rooting interest between parties to amount to a common legal interest. So long as transferor and transferee of information anticipate litigation against a common adversary on the same issue or issues, they have strong common interest in sharing the fruit of the trial preparation efforts.") | |

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| Louisiana | Yes. La. C.E. Art. 506(B)(3) | A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication … when the communication is … (3) By the client or his lawyer, or a representative of either, to a lawyer, or representative of a lawyer, who represents another party concerning a matter of common interest." La. C.E. Art. 506(B)(3)<br><br>J. Caldarera & Co. v. Ernest N. Morial Exhibition Hall Auth., 2019 La.App. LEXIS 1390, at *10 (4th 2019) (upholding claim of privilege because at the time of the communication, "the Authority and Landis were common-interest litigants.")<br><br>Common legal interest<br>Communication made to a lawyer or lawyer's representative.<br>Communication would otherwise be privileged | Appears to be litigation-based interest |
| Michigan | Yes. Nash v. City of Grand Haven, 321 Mich. App. 587 (1st Dist. App. 2017) | "[T]he common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise." Nash, 596.<br><br>Common legal interest<br>Communications made to further that shared interest<br>Litigation need not be pending<br>Communication otherwise privileged | |
| Minnesota | Yes. Energy Pol'y Advocates v. Ellison, 2022 Minn. LEXIS 402, at *11 (Minn. Sept. 28, 2022) | "The common interest doctrine applies when<br>Two or more parties<br>Represented by separate lawyers<br>Have a common legal interest<br>In a litigated or non-litigated matter<br>The parties agree to exchange information concerning the matter and<br>They make an otherwise privileged communication in furtherance of formulating a joint legal strategy.<br>Energy Pol'y Advocates v. Ellison, 2022 Minn. LEXIS 402, at *11 (Minn. Sept. 28, 2022).<br><br>The common interest doctrine extends to attorney work product. Id.<br><br>"[A] purely commercial, political, or policy interest is insufficient for the common-interest doctrine to apply." Id. at 12. | |

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| Mississippi | Yes. Miss. R. Evid. 502 | "A client has a privilege to disclose - and to prevent others from disclosing - any confidential communication made to facilitate professional legal services to the client: … (3) by the client, the client's representative, the client's lawyer, or the lawyer's representative to another lawyer or that lawyer's representative if: (A) the other lawyer represents another party in a pending case; and (B) the communication concerns a matter of common interest[.]" Miss. R. Evid. 502(b)(3).<br><br>"[T]he rule is inapplicable in situations where there is no common interest to be promoted by a joint consultation[.]" Miss. R. Evid. 502, Advisory Committee Note.<br><br>"[T]he party asserting the privilege must have been, at the time of the communication, a co-party to pending litigation with the party to whom it bears a relationship of common interest." United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 488 (N.D. Miss. 2006).<br><br>Communication otherwise privileged<br>Communication made in furtherance of matter of common interest in pending litigation<br>Communication must be made to a lawyer or lawyer's representative | |
| New Mexico | Yes. 11-503 NMRA. | "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating or providing professional legal services to that client, … (3) between the client or client's lawyer and another lawyer representing another in a matter of common interest[.]" 11-503 NMRA.<br><br>"[T]he common interest rule protects the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." Santa Fe Pac. Gold Corp. v. United Nuclear Corp., 175 P.3d 309, 316 (N.M. Ct. App. 2007).<br><br>Actual litigation not required, only a common legal interest. Id.<br><br>In order for common interest doctrine to apply, must show: (1) that there is a common interest agreement between the parties; (2) that each document contains a privileged communication and (3) that each document disclosed was designed to further the common legal interest. Id. | |

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| N. Carolina | Yes.<br><br>Friday Invs., LLC v. Bally Total Fitness of the Mid-Atlantic, Inc., 788 S.E.2d 170, 177 (N.C. App. 2016) | No requirement that agreement be in writing, but it would be prudent to do so. Friday, at 177.<br><br>"To extend the attorney-client privilege between or among them, parties must (1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential." Friday, at 177.<br><br>Must be a common legal interest, as opposed to "business interest[s] that may be impacted by litigation involving one of the parties." SCR-Tech LLC v. Evonik Energy Serv. LLC, 2013 NCBC LEXIS 38, at 17.<br>Common legal interest<br>Comments made pursuant to facilitating legal representation<br>Otherwise confidential communication | |
| Pennsylvania | Yes. Young v. Presbyterian Homes, Inc., 2001 Pa. Dist. & Cnty. Dec. LEXIS 414, at *12-13. | "To demonstrate that the common interest doctrine applies, four elements must be shown: The parties agreement to same; (2) a common-interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement, and (4) the continued confidentiality of the communications."<br>Pa. PUC v. Energy, 177 A.3d 438, 445 (Pa. Cmwlth. 2018) (internal quotations omitted).<br><br>Must be common legal interest, a shared business or commercial interest is insufficient. Id. | |
| S. Carolina | Yes, Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287 (2010) | The common interest doctrine is not a privilege in itself, but is instead an exception to the waiver of an existing privilege. The doctrine "protects the transmission of data to which the attorney-client privilege or work product protection has attached" when it is shared between parties with a common interest in a legal matter. John Freeman, The Common Interest Rule, 6 S.C. Law. 12 (May/June 1995). It is an exception to the general rule that disclosure of privileged information waives the applicable privilege. In re Grand Jury Subpoenas, 902 F.2d 244, 248 (4th Cir. 1990). Thus, information covered by the common interest doctrine cannot be waived without the consent of all parties who share the privilege. Id. | Arguably adopted in a somewhat limited capacity |

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| Tennessee | Yes | A party asserting that certain communications are protected by the common interest doctrine must show:<br>that the otherwise privileged information was disclosed due to actual or anticipated litigation,<br><br>(2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation,<br><br>(3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and<br><br>(4) that the person disclosing the information has not otherwise waived its [sic] attorney-client privilege for the disclosed information.<br><br>Gibson v. Richardson, 2003 Tenn. App. LEXIS 43 (Ct. App. 2003) | |
| Wisconsin | Yes, Section 905.03(4)(e) | This section provides that there is an exception to the attorney-client privilege "as to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." See § 905.03(4)(e). | Limited to one lawyer representing two clients |

# Eight Tips on the Attorney-Client Privilege and the Common-Interest Doctrine

**Katrina Smeltzer**

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## The Attorney-Client Privilege

- Private communication
- Between privileged persons
- To obtain legal assistance

# The Common-Interest Doctrine

- Extension of the attorney-client privilege
- Prevents waiver when third-person is involved
- Must be a common interest
- Beyond a joint defense application?

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# Tip 1: Know your venue

- What state's laws will apply?
  - Forum state
  - State with most significant relationship
  - Federal court

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# Tip 2: Know your purpose

- Legal advice = protection
- Business advice = no protection
- Dual purpose
  - "Primary purpose" test
  - "*A* primary purpose" test
  - "Because of" test

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# Tip 3: Know your client

- "Control group" test
  - Those with authority to act on legal advice
  - The decision-makers
- The "subject matter" test
  - Those who need to know
  - At the superior's request

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# Tip 4: Know your company

- Legal advice communicated from one employee to another
- An agent of the client or lawyer
  - Must be for the purpose of legal advice

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# Tip 5: CID: Know your situation

- Actual or pending litigation required?
  - Pre-suit
  - Transactional
- Common legal interest
  - Is a common business interest enough?

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# Tip 6: CID: Know your parties

- Parties to the same litigation?

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# Tip 7: CID: Put it in writing

- An agreement between the parties
- Written not necessary but may be prudent

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# Tip 8: Mark your stuff

- Written communications
  - Mark them “Privileged”
- Documents prepared for legal purposes
  - Mark them “Privileged”
- Do not overuse

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# Katrina Smeltzer

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Katrina Smeltzer is part of the Business Litigation practice group, focusing her practice on representing professionals and representing and assisting insurance carriers.

Katrina is an experienced litigator, representing clients from many different industries on varied matters. She handles matters from the pre-suit investigative stage through trial. She also has significant writing experience and is a part of the firm's Appellate team.

Katrina chairs the Professional Liability team at Sandberg Phoenix. She represents insurance professionals, design and construction professionals, accountants, attorneys and real estate professionals when facing disputes and claims. She also counsels clients on a variety of pre-suit matters, with an eye toward minimizing risk and avoiding litigation.

Katrina additionally represents insurance carriers in insurance and bad faith cases, both in litigation and pre-suit. She assists clients with analysis of complex factual and legal coverage disputes involving various lines of commercial insurance.

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- Accounting
- Architects & Engineers
- Lawyers & Law Firms
- Insurance Agents & Brokers Construction & Development

**Representative Experience**
- Katrina obtained complete defense verdict following trial in Missouri state court for insurer in equitable garnishment/ bad faith lawsuit. Plaintiffs and insured were seeking over $10 million in damages and interest for a judgment relating to a fatal motor vehicle accident.
- Katrina obtained summary judgment for an insurance carrier in the U.S. District Court, Western District of Missouri in a coverage dispute involving a builder's risk policy.
- Katrina obtained summary judgment in favor of her client in a case pending in the District Court of Lane County, Kansas involving the interpretation of a trust document prepared in the 1970s. The judge agreed with the interpretation advocated by Katrina, and ordered judgment in favor of her client and other defendants.

**Education**
- J.D. with a Certificate of Concentration in Litigation, Creighton University School of Law, magna cum laude
- B.A., Creighton University, magna cum laude

# Liar, Liar: Ethical Considerations in the Use of Deception in Settlement Negotiations

**Tony Rospert**
Thompson Hine (Cleveland, OH)

**Liar, Liar: Ethical Considerations in the Use of Deception in Settlement Negotiations**
*Tony Rospert, Amy McClurg and Micah Fishman*

Must trial lawyers always tell the truth when negotiating settlement agreements? The lawyer's ethical obligations are far from clear. Attorneys experienced in the art of settlement negotiations may be laser focused on getting the best results for their client, which is consistent with a lawyer's ethical duty to diligently represent their clients.[1] But there is a limit to this type of zealous representation, and each jurisdiction may have a slightly different interpretation of just how far a trial lawyer can go in using puffery and deceptive tactics to secure the best deal for their client. The bottom line is that it is never ethically permissible to lie – in settlement negotiations or otherwise. But that is not the end of the analysis. Being completely transparent in settlement negotiations may not be the best strategy either. As one commentator has opined:

> [A] careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions … To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.[2]

Indeed, being overly transparent and divulging information that one is not ethically required to disclose could be deemed a failure to provide competent representation or a waiver of attorney-client privilege.[3] "Attorneys who believe that no prevarication is ever proper during bargaining encounters place themselves and their clients at a distinct disadvantage, since they permit their less candid opponents to obtain settlements that transcend the terms to which they are objectively entitled."[4] Thus, in any settlement discussion there is a tension between negotiating with honesty and good faith and obtaining the best result for your client.

**The Ethics Rules: A Certain Shade of Gray**

The Preamble to the Model Rules of Professional Conduct ("Model Rules") specifically carves out "negotiator" as one of several functions a lawyer performs, stating that "as negotiator, a lawyer seeks a result advantageous to the client, but consistent with the requirements of honest dealings with others."[5] Model Rule 8.4(c) provides: "It is professional misconduct for a lawyer to: … (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[6] Yet Rule 8.4 is not intended to regulate lawyers in their role as negotiators; rather, it is more about prohibiting conduct (including dishonesty) that would reflect poorly on the lawyer's fitness to practice law.[7] Thus, Rule 8.4 addresses dishonest statements and conduct outside the course of representing a client. Other rules are triggered if the conduct occurs in the attorney's professional capacity – such as during settlement negotiations on a client's behalf.

Any lawyer vacillating between truth-telling and using deception in settlement negotiations needs to become familiar with their state's version of Model Rule 4.1, which provides: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[8] If a trial lawyer responds to an inquiry regarding material facts, the response must be true and free of partially correct statements that could be subject to misinterpretation.

The American Bar Association Standing Committee on Ethics and Professional Responsibility ("Committee")

1 Model Rules of Prof'l Conduct R. 1.3 (1983).

2 James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 929 (1980).

3 Model Rules of Prof'l Conduct R. 1.1 (1983).

4 Charles B. Craver, Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive, 38 S. Tex. L. Rev. 713, 717-18 (1997).

5 Model Rules of Prof'l Conduct, Preamble 2 (2015).

6 Model Rules of Prof'l Conduct R. 8.4(c) (1983).

7 Model Rules of Prof'l Conduct R. 8.4(c), cmt. 2 (1983).

8 Model Rules of Prof'l Conduct R. 4.1(a)-(b) (2019).

issued Formal Opinion 06-439, which lays out a roadmap to analyze Model Rule 4.1 in the context of settlement negotiations.[9] This opinion is especially helpful if your state has not issued an ethics opinion analyzing the issue. The Committee provides multiple examples of what a "false statement of material fact" is under Rule 4.1.[10] The Committee opines that "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' ordinarily are not considered 'false statements of material fact' within the meaning of the Model Rules."[11]

Likewise, exaggerating or emphasizing strengths and minimizing or deemphasizing weaknesses of factual or legal position can be deemed "puffing" or "posturing."[12] Parties to a negotiation typically would not be expected to rely on these statements, which must be differentiated from "false statements of material fact."[13] As one court found: "The ethics cases suggest that lawyers have a responsibility to limit their traditional duty of zealous advocacy when the lawyer knows that her statements or other conduct will be acted upon … Again, the crucial distinction turns on the concept of reliance."[14]

The Committee gives as an example of a false statement of material fact "a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee."[15] However, the Committee opines that determining whether a statement can be regarded as one of material fact can depend on the particular circumstances, stating that the value placed on the subject of a transaction, price estimates, a party's intent as to a satisfactory settlement of a claim, and the existence of an undisclosed principal (unless such nondisclosure would be deemed fraud) would all typically not be considered statements of material fact,[16] nor would statements pertaining to goals of negotiating, or willingness to compromise.[17]

Model Rule 4.1(a) pertains only to statements of material fact the attorney knows are false, and therefore does not apply to false statements made unwittingly, that concern inconsequential matters, or that do not relate to facts.[18] Referring to a previously issued opinion, the Committee reminds lawyers that while posturing and puffing can be appropriate in settlement negotiations, "a party's actual bottom line or the settlement authority given to a lawyer is a material fact."[19] Thus, a lawyer may decline to give the client's bottom line without violating the rules, but once a lawyer discloses the limit of their settlement authority, they cannot lie about the client's true position.

Referencing Formal Opinion 94-387, the attorneys representing claimants in negotiations have no duty to notify the opposing party that the statute of limitations has run on the claim; however, they must not make any factual affirmative misrepresentations.[20] Conversely, the Committee opines in Formal Opinion 95-397 that attorneys representing a plaintiff in settlement negotiations of a pending personal injury lawsuit must not hide the fact that the client died, because the client's death is a material fact.[21] Indeed, continuing such communication with the opposing side or court would be deemed an implied misrepresentation that the client is still living, a misrepresentation that violates Model Rule 4.1.[22]

Further, parties otherwise shielded from attorney misrepresentation by Rule 4.1 are not allowed to waive such protection, whether by informed consent or impliedly agreeing to allow false statements to be made in the process. Not only can lawyers be disciplined for Rule 4.1 violations, but affirmative misrepresentations made by attorneys in negotiations have led to the imposition of sanctions, the filing of civil lawsuits against the attorney, and settlement agreements being set aside.

Finally, the Comment to Model Rule 1.6 interacts with the Comment to Model Rule 4.1; truth is not the objective. In negotiations, a lawyer is entitled (but never required) to reveal client confidences if making a disclosure "facilitates a satisfactory solution,"[23] which is not necessarily one that is equitable to both sides. A lawyer is not required to reveal a confidence in order to reveal the truth.

To the extent any bright line can be drawn from the Model Rules, it is that in the course of settlement negotiations, a lawyer may not knowingly lie about facts that result in justifiable reliance (i.e., make statements that could be considered fraudulent), but may engage in posturing and

9 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006) (Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation).

10 Id.

11 Id. at 8.

12 Id. at 2.

13 Id. at 2.

14 Statewide Grievance Comm. v. Gillis, No. CV030479677S (Conn. Super. Ct. Jan. 28, 2004).

15 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439, at p.2.

16 Id. at 3.

17 Id. at 6.

18 Id. at 4.

19 Id. at 4.

20 Id. at 5.

21 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of a Client).

22 Model Rules of Prof'l Conduct R. 4.1 (2019); Model Rules of Prof'l Conduct R. 3.3 (1983).

23 Model Rules of Prof'l Conduct 1.6, cmt. 2 (2019).

hyperbole.

**Puffery Versus Misrepresentations of Material Fact: Demand Letters**

The New York State Bar Association Committee on Professional Ethics analyzed New York's Rule 4.1 in the context of a draft complaint in a demand letter.[24] The letter to the opposing party stated that if the matter was not resolved by a specific day, the complaint would be filed as a result. New York ethically prohibits lawyers from presenting or threatening to present criminal charges exclusively to gain an advantage in a civil matter, pursuant to New York Rule 3.4(e).[25] Since the lawsuit included with the letter is civil, the conduct would not be prohibited. In threatening to file a civil lawsuit, however, attorneys cannot use falsehood or deception without violating New York's Rule 4.1.[26] Referencing Formal Opinion 06-439, lawyers are warned that "threatening a legal proceeding may not rise to the level of an express or implied assertion of fact or law or of the lawyer's intended future conduct."[27] It can be challenging to distinguish between a threat and a statement of fact.

Lawyers submitting demand letters are cautioned about using language to present their client's position that would convert them into false representations of fact. If a client has in fact authorized the attorney to file a lawsuit unless the opposing party gives a satisfactory response to the demand letter, then the falsehood and deception proscribed in New York's Rule 4.1 is not a concern.[28] On the contrary, if an attorney knows that his client would never authorize filing suit, then threatening that the attorney "will" file the complaint could be considered false or deceptive.

**Puffery Versus Misrepresentations of Material Fact: Examples**

The following hypotheticals illustrate the types of statements that would likely be considered ethical violations under Model Rule 4.1, compared to statements that would be considered permissible puffing.

**Example 1: The Bottom Line**

The defendant manufactures "restrictor plates" used in auto racing that must be of an exact size with precise measurements. The plaintiff, a car owner who purchased a significant number of restrictor plates, claims the parts he received do not meet the correct specifications. A lawsuit is filed, and settlement communications ensue. The defendant's lawyer is authorized by her client to pay $2 million to resolve the matter and avoid additional litigation expenses. The plaintiff is willing to accept $1.5 million to achieve a resolution.

In the initial settlement discussion, the defendant's lawyer states that the defendant cannot pay more than $1 million to resolve the case and the plaintiff's lawyer states that they must get $3 million. Both participants are pleased, since the plaintiff was seeking $5 million in the lawsuit, "even though both have begun with intentionally misleading statements," none of which violate Model Rule 4.1. After further negotiations, the defendant's lawyer states that her "client does not wish to settle for $1.4 million." The plaintiff's attorney responds that "$1.9 million is the lowest his client has authorized him to go."

Here, the plaintiff's lawyer may have violated Model Rule 4.1 because he actually lied by making a material misstatement about the limits of his authority, claiming that it was $1.9 million when it was in fact $1.5 million. On the other hand, by using the term "wish to," the defendant's lawyer would inform attentive opponents that they are engaging in puffery and not meaning to communicate a positive misrepresentation.[29]

**Example 2: The Nonexistent Witness**

The plaintiff files an action against a bank for improper dissemination of credit reports. In the course of settlement negotiations, the plaintiff's counsel promises the bank's attorneys that he will, in exchange for a substantial cash payment, disclose the identity of a confidential informant who has penetrated bank security and leaked confidential credit reports. The parties resolve the matter, and when the plaintiff's attorney is subsequently forced to concede that he had fabricated the mole's existence, the judge refers the case to the relevant disciplinary authorities, writing: "It does not require a rule of professional responsibility for a lawyer to know that, during the process of settlement negotiations, he or she may not lie to opposing counsel about a fact that is material to the resolution of the case."[30]

**Example 3: The Dead Client**

The plaintiff, who had filed a personal injury action against the defendant, dies two days before trial. The parties had been in settlement negotiations and on the eve of trial settle the matter for $500,000. The lawyers meet with the judge the next day and inform her of the settlement and their agreement to dismiss the case. Only as they are leaving the judge's chambers does the plaintiff's

24 N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 1228 (2021).

25 N.Y. Rules of Prof'l Conduct R. 3.4(e).

26 N.Y. Rules of Prof'l Conduct R. 4.1.

27 Supra note 5.

28 Supra note 20.

29 This example is modeled after an example discussed in Charles B. Craver, Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive, 38 S. Tex. L. Rev. 713, 728 (1997).

30 This example is modeled after the case Ausherman v. Bank of America, 212 F. Supp.2d 435 (D. Md. 2002). C.f. California State Bar Form. Opn. No. 2015-194, at Ex. 3 (2015) (an intentional misstatement of the client's bottom line or other settlement goal is permissible posturing and is not an ethics rule violation).

attorney tell the defendant's attorney about the plaintiff's death. The defendant then challenges the settlement. In setting aside the settlement, the court states that the plaintiff's attorney had an ethical duty to promptly advise the defendant's attorney of the plaintiff's death; the court deemed this an "absolute ethical obligation."[31]

**Example 4: The Personal Injury Case**

In Formal Opinion No. 2015-194, the State Bar of California Standing Committee on Responsibility and Conduct presents an example involving a plaintiff injured in an automobile accident who sustains $50,000 in medical expenses and advises her attorney that she is no longer able to work.[32] The plaintiff earned $50,000 annually before the accident.[33] Before discovery, the plaintiff's attorney files suit and agrees to participate in a settlement conference.[34] The plaintiff's attorney falsely contends in a settlement conference brief that he can prove the defendant was texting immediately before the accident because a credible eyewitness saw everything.[35]

The defendant's attorney asserts that the defendant will file for bankruptcy if they do not get a defense verdict.[36] However, the defendant's lawyer knows that the defendant does not qualify for bankruptcy and has no intention of filing.[37] When the matter is not settled, the parties agree to meet in one month for a follow-up settlement conference[38] at which the plaintiff will provide information showing her efforts to mitigate damages by seeking to obtain other employment.[39] In the meantime, the plaintiff's attorney learns that the plaintiff has obtained a new job and will be earning $75,000 annually.[40] The plaintiff tells her attorney not to discuss her new employment at the upcoming settlement conference and to refrain from including any information about her efforts to obtain new employment.[41] At the settlement conference, the plaintiff's attorney makes a settlement demand including future earnings as a part of the plaintiff's damages and specifying a dollar amount for that component.[42]

What statements violate Model Rule 4.1? The misrepresentation regarding the nonexistent eyewitness is not considered an expression of opinion and, thus, is an ethical violation.[43] This is an improper false statement of fact that is intended to mislead, and the type of statement that another would attach importance to in determining their course of action.

The defense attorney's assertion that the defendant will file for bankruptcy is a false representation of fact because they in fact know there is no intention, and the defendant is not eligible to file. However, if the defendant or their lawyer did not know whether the defendant was eligible or actually intended to file, this statement may be regarded in a different light.

The plaintiff instructing her attorney not to reveal that she has a new job making more money would be deemed a material omission of fact if the lawyer followed the plaintiff's instruction. Concealing facts about her new employment is considered a misrepresentation since she would not be entitled to lost future earnings upon finding new employment. Including such damages in the demand implicitly and impermissibly misrepresents that the plaintiff has not found new employment. It is also important for lawyers to note that there is no exception for violating ethics rules simply because a client instructs them to do so. Here, the opinion warns lawyers that if following a client's instructions would violate ethics rules, lawyers must counsel against such concealment and misrepresentation. If the client insists on proceeding with such conduct, the attorney must withdraw from the representation.

**Takeaways**

Trial lawyers should become familiar with the ethics rules pertaining to settlement negotiations in the states where they are licensed, looking to ethics opinions, case law, and the applicable Rules of Professional Conduct. They will want to understand permissible distinctions such as puffing versus impermissible misrepresentations. For example, some states specifically authorize comments made under the general category of puffing.[44] However, making affirmative false representations of fact – lying – is never ethically permissible and one should not be too cavalier in classifying a statement as puffing when in fact it is a misrepresentation of fact. Crossing the line can jeopardize an attorney's license, cost their firm and client's money, and put a case at risk.

31 This example is modeled after the case Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983). But see Virginia State Bar Op. 952 (1987) (indicating a lawyer need not tell the other side of the death of a client unless asked about it).

32 California State Bar Form. Opn. No. 2015-194 (2015).

33 Id.

34 Id.

35 Id.

36 Id.

37 Id.

38 Id.

39 Id.

40 Id.

41 Id.

42 Id.

43 Id. at 4.

44 Ga. R. Prof. Conduct 4.1, cmt. 2.

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# Liar, Liar: Ethical Considerations in the Use of Deception in Settlement Negotiations

**May 4, 2024**

**Tony Rospert Thompson Hine**



## Deception in Settlement Negotiation

- "Only saints and fools can be relied on to tell the truth in negotiations."
  - **Gerald Wetlaufer**
- "Truth is such a precious quantity, it should be used sparingly."
  - **Mark Twain**
- "To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation."
  - **James J. White**
- Settlement communications are "a dance of nuance and strategy, of cajolery and intimidation, of exaggeration and minimization."
  - **Cedar Island Improvement Ass'n v. Drake Assocs., Inc., (Conn. Super. Ct. 2009).**

# Roadmap

- Certain Shade of Gray: Model Rule 4.1(a)
- Benchmarks in Complying with Model Rule 4.1(a)
- Consequences of Lying
- Defensive Tactics to Defeat the Liars


Be sure to research these issues in your particular jurisdiction.

Extremely nuanced ethical area that is highly dependent on facts and circumstances.

Jurisdictions have divergent case law and ethical opinions on these topics.

# Model Rule 4.1(a)

**Truthfulness in Statements to Others: Rule 4.1**

In the course of representing a client a lawyer shall not knowingly:

a) **make a false statement of material fact or law to a third person**; or

b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.



# Comments to Model Rule 4.1(a)

**Comment 1.** "Misrepresentation": A lawyer is required to be truthful when dealing with others on a client's behalf, but generally **has no affirmative duty to inform an opposing party of relevant facts**. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by **partially true but misleading statements or omissions** that are the equivalent of affirmative false statements.

## Comments to Model Rule 4.1(a)

**Comment 2.** This Rule refers to **statements of fact**. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. **Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.**



## Model Rule 4.1(a): ABA Opinion

- **ABA Formal Opinion 06-439**

Lays out a roadmap to analyze Model Rule 4.1 in settlement negotiations.

Sets boundaries on what constitutes a "false statement of material fact."

Permits posturing and puffery which "are not considered false statements of material fact."

Exaggerating or emphasizing strengths, and minimizing or deemphasizing weaknesses of factual or legal position can be deemed "puffing" or "posturing."

Parties to a negotiation typically would not be expected to rely on these statements.

## Certain Shade of Gray: Model Rule 4.1(a)

- Good trial lawyers expect a little deceit, bluffing, puffery, bluster and embellishment in negotiations.
- But where is the line to be drawn when negotiation tactics become deceitful and unethical?
- How do we reconcile the tension between Model Rule 4.1(a) and other ethical obligations applicable in settlement negotiations including attorney-client privilege and the duty of zealous advocacy?

## Certain Shade of Gray: Model Rule 4.1(a)

### Bright Line Best Practices?

A lawyer in the course of settlement negotiations may not knowingly lie about facts that result in justifiable reliance (i.e., make statements that could be considered fraudulent), but may engage in posturing and hyperbole.

Once an attorney speaks about facts, what is said must be truthful and not a misrepresentation, consistent with the attorney's duty to preserve client secrets and confidences.

Zealous advocacy should not require the use of personally compromising techniques.

## Benchmarks: Material Facts

**Not Material:**

Estimates of the value of the case

Parties' intention as to the acceptable settlement of claims

- **Nothing per se unethical about:**
  - Inflated or deflated offers and counteroffers
  - False estimates of value of the case
  - Misdirection or opinions about target points and party's goals
  - Statements about how court will value the case.
  - Statements about strengths of your case and weaknesses of the other side's case



## Benchmarks: Material Facts

Existence of or the amount of an insurance policy

Drafting error in a settlement agreement

Intention to bring a second action after the execution of a release in the first case

Death of a client

- Exceptions: California, Pennsylvania and Virginia – no duty absent a direct inquiry.

## Benchmarks: Material Facts

**No duty to inform an opposing counsel of relevant facts.**

However, affirmative duty to correct adversaries' misinformation or misperception of a material fact **induced by the lawyer or the lawyer's client.**

| If a lawyer makes an innocent misstatement of fact believed to be true and later learns the statement is false, the attorney must correct it. | No ethical obligation to prevent opposing counsel from relying on faulty information from another source. |
|---|---|

## Benchmarks: Settlement Authority

- In most jurisdictions you cannot misrepresent settlement authority.
  - Asserting no authority to settle for $100,000 when the client has authorized paying that exact sum.
  - Compare statements: "Client does not wish to settle for $1.9 million" with "$1.9 million is the lowest the client has authorized me to go."

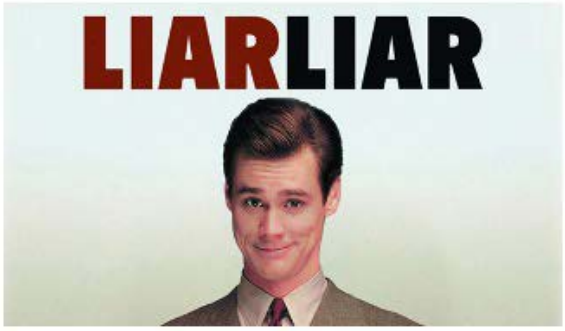
## Benchmarks: Interest and Priorities

- Non-monetized phony issues, false demands, red herrings and decoys used as throw-aways.
- Permitted if the information and statements exchanged do not contain any misrepresentations of fact.

## Benchmarks: New Legal Developments

- No obligation to inform opposing counsel of relevant law that undermines your case.
- However, relying on overturned precedent in settlement negotiations probably violates Rule 4.1.
- Could ask ill-informed adversaries to cite a single case that supports their position!

## Consequences of Lying in Settlement Negotiations




- Setting aside settlement agreements
- Litigation sanctions
- Disciplinary action against the attorney
- Civil lawsuit for fraud against the attorney
- Reputational harm

## Defensive Tactics to Defeat the Liars

- Conduct thorough background research.
- Create rapport.
- Dig deeper.
- Thwart evasion tactics.
- Use "come clean" questions.
- Include representations and warranties in settlement agreements.

## Takeaways

- When making factual statements – never lie.
- You may engage in puffery posturing and hyperbole.
- Beware of providing information about the client's bottom line.
- Preface statements with "Wish to", "I think" or "I believe" which connotes an opinion.
- Do not convert a negotiation goal, an opinion or puffery into a false statement of fact.

## Takeaways

"On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled."

**- Charles Craver**

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

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

Tony focuses his practice on complex business and corporate litigation involving financial services institutions, private equity firms, real estate development and management companies, commercial and contract disputes, indemnification 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
- Environmental Justice

**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

**Community Activities**
- Cornucopia, Inc., Board Member (2006-2018) and President, Executive Committee Chair (2012-2018)
- WIRE-NET, Member, Resource Development Committee, 2016-2017
- Ohio Bankers League, Member
- Cleveland Leadership Center, Cleveland Bridge Builders Ad Hoc Curriculum Committee (2012-2015) and Leadership Action Project Selection Committee (2014-2017)

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

# Strict Liability Is Just One Click Away

**Steve Finley**
Gibbons (Philadelphia, PA)

**Liability Is Just One Click Away!**
*Stephen J. Finley*

Section 402A of the Restatement (Second) of Torts provides that a user or consumer injured by a defective product may seek redress from the product seller under a theory of strict liability. Nevertheless, not every entity with a role in putting a product into the hands of consumers is a "product seller" within the meaning of Section 402A. Entities like brokers, auctioneers, leasing agents and second hand markets have generally been exempted from the definition of "product seller" and therefore not subject to strict liability for defects in the products they help place in the hands of the consumer or user.

The development of e-commerce has led courts to consider whether online sales platforms are akin to brick and mortar retailers or more like the intermediaries that fall outside the scope of strict liability. See Oberdorf v. Amazon.com, Inc., 930 F.3d 136 (3d Cir. 2019); Bolger v. Amazon.com, 55 Cal.App.5th 431 (Cal. Ct. App. 2020). In Oberdorf, the plaintiff filed suit against Amazon alleging the product she purchased from a third-party vendor was defective. Although the Middle District of Pennsylvania held Amazon was not a "product seller" within the meaning of Section 402A, the Third Circuit disagreed, finding that Amazon qualified as a product seller, thus expanding the scope of strict products liability to include online sales platforms. Other courts have reached the same conclusion and expanded strict products liability to include e-commerce sites.

The decisions in cases like Oberdorf and Bolger are not surprising, since the factors courts consider to determine whether or not an entity is a product seller weigh heavily in favor of imposing strict liability. Courts generally consider four factors to determine whether an entity qualifies as a product seller: (1) whether the actor is the only member of the marketing chain available to the injured plaintiff for redress; (2) whether the actor can exert pressure or control over upstream entities such that imposing strict liability on the actor serves as an incentive to safety; (3) whether the actor is in a better position than the consumer to prevent the circulation of defective products; and (4) whether the actor can distribute the cost of compensating for injuries resulting from defects by building it into the price charged to the consumer. See, e.g., Bolger, supra; see also Musser v. Vilsmeier Auction Co., Inc., 562 A.2d 279 (Pa. 1989).

None of these factors weigh against imposing strict liability, nor do any consider the ability of the consumer to make an informed purchase or protect against the risk of injury. Rather, application of these factors inevitably leads to the imposition of strict liability.

The first factor (availability of a remedy) is too often watered-down to whether the "seller" is the only entity the plaintiff can easily pursue, not whether the plaintiff's remedy against the manufacturer has been fully destroyed. The Court in Bolger, for example, considered only that many entities with an online presence may have limited resources, not whether these entities are judgement proof or not subject to being brought into court for redress. As to the second factor, it is difficult to imagine a scenario where imposing strict liability on the seller would not serve as an incentive to safety, but this factor ignores important considerations like facilitating commerce and making products available to consumers. Similarly, regarding the third and fourth factors, there is likely no circumstance where the consumer can more effectively prevent the circulation of defective products or where the seller cannot better distribute the cost of compensating for injuries. These factors become a "plaintiff always wins" test that does not fairly weigh competing policy interests or account for the relationship between the consumer and the online platforms that help facilitate e-commerce. The current test also fails to consider the consumer as a knowledgeable individual who can act responsibly and account for any risks associated with a particular product. This is especially true with regard to online platforms that give consumers easy access to instructions and customer reviews (including photographs and videos of the product) on a once unfathomable scale. The factors courts currently consider do not account for the availability of information

and the ease with which potential consumers can educate themselves about the products they purchase online.

The current test applied in cases like Bolger and Oberdorf not only creates a "heads I win, tails you lose" scenario for online retailers, but also calls into question the long-established rule that brokers, second hand markets, and auctioneers are exempt from the scope of strict liability. Application of these criteria, for example, to a broker arguably leads to the same result, as a dealer in used goods may be the only available entity available to the plaintiff, the imposition of strict liability might serve as an incentive to safety, the professional is arguably better positioned than the occasional customer to address the circulation of a defective product, and a dealer or broker who sets the price can by definition factor in any number of considerations, including the risk of injury, into that price. But rather than conclude that the rule against imposing strict liability on brokers, dealers, auctioneers and second hand markets should be jettisoned, it is time to jettison the test by which sellers and dealers are evaluated.

It is clear that a more even-handed, relevant framework that better accounts for the nature of e-commerce is needed to determine whether these entities should fall within the scope of strict liability. This framework must consider the features and functions of online marketplaces and the ways in which consumers interact with those platforms, while also allowing a court to meaningfully consider whether an online platform's role in facilitating a transaction is sufficient to impose strict liability.

The new test should consider:

(1) whether the online marketplace facilitates a transaction between consumer and product seller that would not otherwise be readily available to the consumer, and thus provides the consumer with a benefit.
(2) whether the online marketplace obtained physical possession, took title of the product, or otherwise had control over the product at any time.
(3) whether the online marketplace identifies the manufacturer or upstream seller in a way that a reasonable consumer would understand someone other than the online platform manufactured the product.
(4) whether the consumer has the opportunity, through readily available insurance products or the purchase of additional warranties, to address the risk of injury and insure against that risk.

This new framework not only provides for a more balanced analysis, it recognizes the benefits of e-commerce and the ability of e-commerce platforms to facilitate transactions that might not otherwise be feasible. This new test recognizes the consumer's role in the transaction, including the customer's ability to make an informed purchase by reviewing online information and customer reviews. It also accounts for the fact that online marketplaces can actually advance safety by providing product information, updates, and even customer reviews at the click of a button, leading to better informed consumers. It jettisons one-sided factors like risk spreading and removing allegedly defective products from the marketplace. This new test equally considers the role of consumer and seller in determining whether strict liability should attach.

# LIABILITY IS JUST ONE CLICK AWAY!

Steve Finley

Gibbons P.C.

## LIABILITY IS JUST ONE CLICK AWAY

- Clip 1 (Flea Market)

## LIABILITY IS JUST ONE CLICK AWAY

## LIABILITY IS JUST ONE CLICK AWAY

ebay

## LIABILITY IS JUST ONE CLICK AWAY

- **Not everyone who sells a product is a "product seller"**
  - Auctioneers
  - Brokers
  - Estate Sales
  - Flea Markets
  - Healthcare Providers
  - Leasing Agents

## LIABILITY IS JUST ONE CLICK AWAY

## LIABILITY IS JUST ONE CLICK AWAY

### E-COMMERCE = PRODUCT SELLER

- No title or possession of the product
- Merely acts as an intermediary
- Identifies seller clearly and conspicuously
- Upstream seller viable and subject to suit

## LIABILITY IS JUST ONE CLICK AWAY

1. Whether the seller is the only member of the chain of distribution available to the injured plaintiff for redress
2. Whether the seller can exert pressure or control over upstream entities to incentivize safety
3. Whether the seller is in a better position than the consumer to prevent the circulation of defective products
4. Whether the seller can distribute the cost of compensating for injuries in setting the price

## LIABILITY IS JUST ONE CLICK AWAY

Clip 2: (Post Office Write Off)

## LIABILITY IS JUST ONE CLICK AWAY


The Plaintiff

## LIABILITY IS JUST ONE CLICK AWAY

**The current test**

- Employs one-sided factors that lead to a finding of "product seller"
- Relies on outdated factors
- Applied in favor of the plaintiff
- Treats strict liability as rule, not exception

## LIABILITY IS JUST ONE CLICK AWAY

**We need a new test that:**

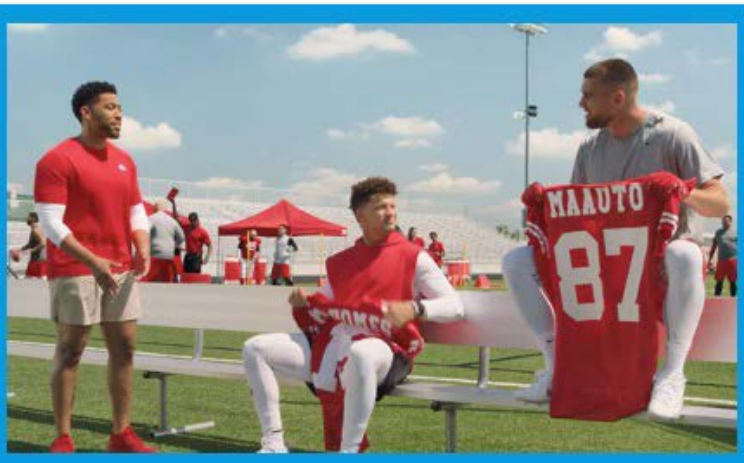
- Recognizes the benefits of e-commerce
- Avoids imposing strict liability on an entity that acts a broker/dealer
- Places some responsibility on consumer
- Prevents limitless imposition of strict liability

## LIABILITY IS JUST ONE CLICK AWAY

1. Whether the seller facilitates a transaction with the consumer that would not otherwise be feasible
2. Whether the seller obtained possession or title
3. Whether the seller identifies the upstream entity
4. Whether the consumer has the opportunity to address the risk of injury and insure against that risk

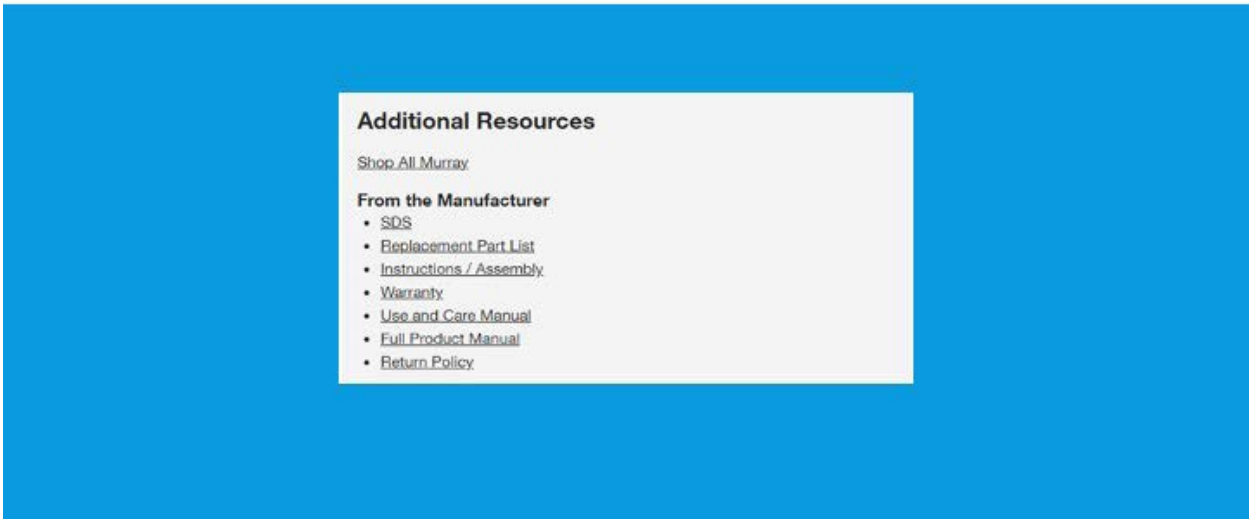
## LIABILITY IS JUST ONE CLICK AWAY

## LIABILITY IS JUST ONE CLICK AWAY




## LIABILITY IS JUST ONE CLICK AWAY

# LIABILITY IS JUST ONE CLICK AWAY



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# Stephen J. Finley, Jr.

Director | Gibbons (Philadelphia, PA)

Mr. Finley is a litigator who dedicates his practice to the defense of cases involving wrongful death, catastrophic personal injury, and major property loss. He defends companies involved in complex litigation, including multidistrict litigation, mass tort litigation, class action lawsuits, and serial lawsuits. A frequent author on emerging issues in products liability law, he has represented defendants facing novel products liability claims, such as publishers and patent holders.

In addition to his product liability practice, Mr. Finley handles the prosecution and defense of commercial matters, including breach of contract disputes and business tort claims.

While in law school, Mr. Finley was an intern in the Chambers of the Honorable Jacob P. Hart, United States Magistrate Judge for the Eastern District of Pennsylvania. He also served as Co-Editor-in-Chief of the Villanova Journal of Catholic Social Thought and was President of the St. Thomas More Society. As an undergraduate, Mr. Finley served as a staff intern in the White House Office of Faith-Based and Community Initiatives during the Bush Administration.

**Areas of Focus**
- Products Liability Litigation

**Experience**
- Representation of a retail distributor of nutritional products in Pennsylvania and New Jersey in a variety of matters, including consumer fraud and personal injury claims.
- Representation of a leading manufacturer of safety equipment in wrongful death and catastrophic personal injury claims. Mr. Finley has obtained summary judgment or favorable settlements in each of these cases.
- Defense of the nation's largest propane distributor in multiple matters around the country, including wrongful death, personal injuries, and major property damage claims.
- Representation of various manufacturers, owners, and operators of cranes in numerous wrongful death and toxic tort claims.
- Representation, with broader Gibbons team, of leading manufacturers of consumer products in a variety of product liability cases in Pennsylvania and New Jersey.
- Representation of a manufacturer of agricultural and construction equipment in cases involving wrongful death and catastrophic personal injury in Pennsylvania's state and federal courts.
- Defense of members of the petrochemical industry in toxic tort cases claiming wrongful death and personal injury stemming from exposure to benzene and other chemicals.

**Honors and Awards**
- Included on the Benchmark Litigation list, "Future Stars," Products Liability
- Included on the Pennsylvania Super Lawyers Rising Stars list, Personal Injury Products: Defense, 2020

**Education**
- Villanova University School of Law (J.D.)
- Catholic University of America (B.A.)

# Truth and Consequences of Reverse False Claims

**Gabriele Wohl**
Bowles Rice (Charleston, WV)

**Truth and Consequences of Reverse False Claims**
*Gabriele Wohl*

Some experts estimate that as much as 10 percent of all government spending is lost in fraudulent activity. The United States False Claims Act ("FCA"), 31 U.S.C. § 3729, imposes civil liability for conduct involving fraud on the United States Government, including, but not limited to, submitting false claims for payment to the government. The False Claims Act generally imposes treble damages and civil penalties on persons and organizations that present or cause the submission of false or fraudulent claims to the government.

Under the False Claims Act, "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus three times the amount of damages which the government sustains because of the act of that person." Liability generally arises when a person knowingly: presents a false or fraudulent claim to the government; or makes a false or fraudulent statement that is material to a false or fraudulent claim.

The False Claims Act punishes conduct in reverse as well—Reverse False Claims violations are just like they sound. Instead of a violation based on the taking of money from the government under false pretenses, it is based on preventing the government from collecting money that it is rightfully owed. Under the Reverse False Claims provision, any person who makes a false statement "material to an obligation to pay or transmit money or property to the government" or avoids an obligation to pay money the government faces the same penalties.

False Claims and Reverse False claims actions may be brought directly by the government, or indirectly by a private citizen who stands in the place of the government in a qui tam lawsuit. "Qui Tam" is the abbreviation for the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning "who sues on behalf of the king as well as for himself." In a qui tam action, a whistleblower, known as a relator, brings an action against a person, company, or other entity on behalf of the government. The government, not the relator, is considered the plaintiff. If the government succeeds, the relator bringing the suit receives a share of the award.

When a relator sues on behalf of the government, the government has the option of intervening in the case and taking on the primary litigation duties. If the government declines to intervene, the relator is responsible for the litigation costs and duties, but the government still benefits from any reward. If the government declines to intervene and the relator receives a settlement of judgment, then the relator's share of the award is greater (although, statistically, the chances of an award are significantly lower when the government does not intervene).

The False Claims Act generates enormous recoveries for the government and for relators. For 15 years, False Claims Act settlements and judgments have exceeded $2 billion each year, with relators' share awards amounting to nearly $350 million in 2023 alone.

In order to prove a cause of action under the FCA, the government or qui tam relator must demonstrate that the defendant knowingly presented a false claim for payment. Under a Reverse False Claim theory, the requirement is a little different. Liability for Reverse False Claims attaches when a defendant:

(1) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the government, or

(2) knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.

False Claims Violations and Revere False Claims violations tend to be used synonymously by the government, because, technically, if you have wrongfully

secured a payment from the government (a False Claim), then an obligation arises to return that payment to the government. When you do not return the payment, you are avoiding your obligation to pay (a Reverse False Claim). Courts have pushed back on that approach though, dismissing Reverse False Claims that are merely redundant of affirmative obligations to pay the government.

The second clause of the Revere False Claims provision is significant to certain conduct that distinctly falls under the Reverse False Claims provision. By imposing liability for knowingly avoiding an obligation to pay the government, the statute covers conduct where no affirmative false statement was ever made to the government. The Reverse False Claims provision punishes any scenario where the defendant retains government money that the defendant knows it is not entitled to keep.

The two elements of this violation are (1) an obligation to pay, and (2) knowledge that the funds are owed. The obligation arises from contracts, laws, and regulations, such as the statutory duty to return Medicare overpayments and federal grant requirements to return unspent funds. The knowledge requirement is defined by the False Claims Act to mean that a person has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information. For Reverse False Claims, liability attaches not when a person receives an overpayment or fails to make a required payment, but when that person has the requisite knowledge of the overpayment or payment obligation. It is significant that a person can violate the Reverse False Claims provision by just keeping money without ever lying about it or hiding it.

It can be difficult to determine whether avoiding a payment to the government rises to the level of a Reverse False Claim, and courts take a fact-specific approach to that question or leave it up to a jury. In some cases, conduct as passive as failing to investigate the possibility that an overpayment has been made can violate the Reverse False Claims provision.

With the substantial penalties ascribed to False Claims Act violations, exposure can be colossal, especially for companies and individuals that regularly transact business with or rely on government agencies for funding. It is important to understand that the False Claims Act statute not only covers making false statements and falsified records, but also the more passive conduct of simply retaining government money or withholding payment to the government.

# Truth & Consequences of Reverse False Claims

**Gabriele Wohl**
Bowles Rice LLP

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## False Claims Act

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## Qui Tam

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3

## Damages

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4


Recovery
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5


Reverse False Claims
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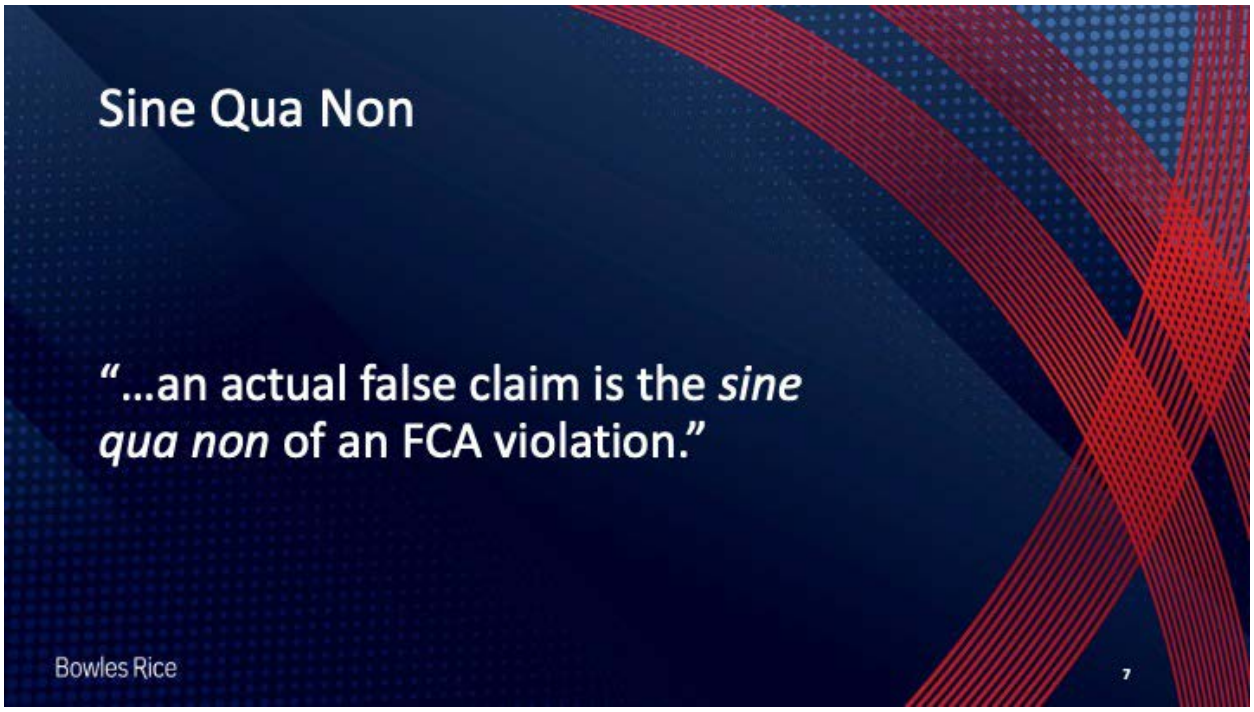
6


Sine Qua Non
"...an actual false claim is the *sine qua non* of an FCA violation."
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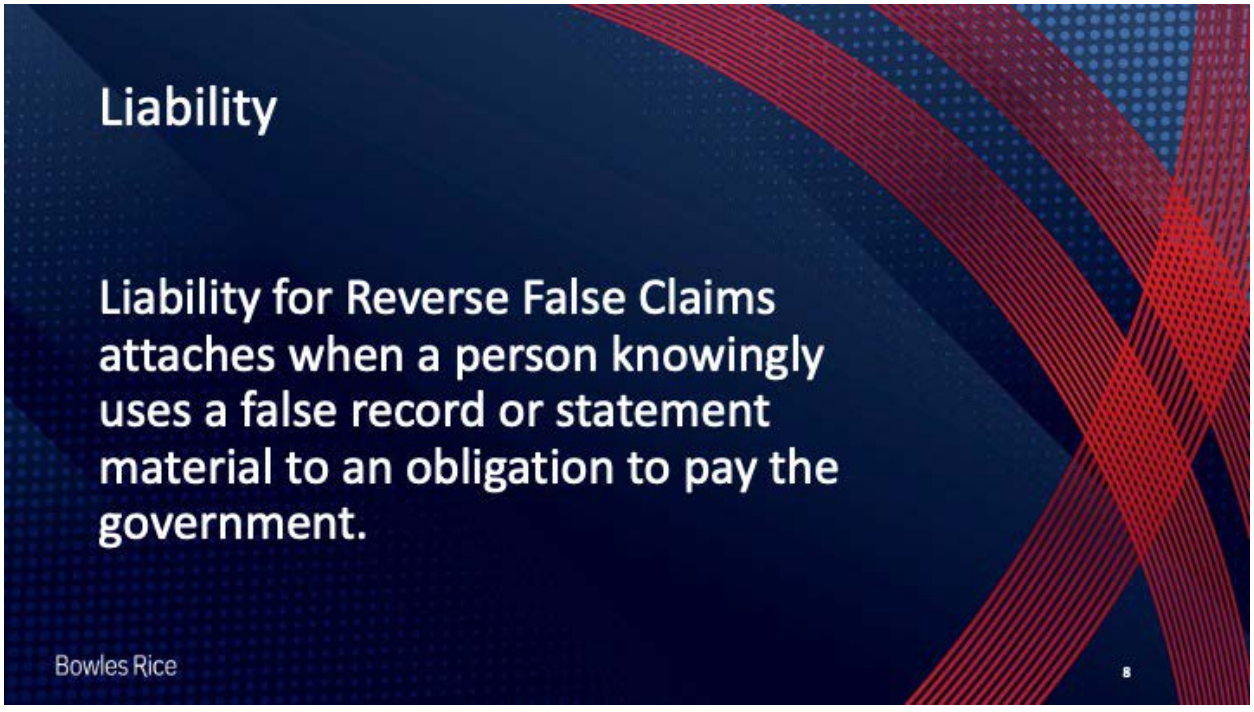
7


Liability
Liability for Reverse False Claims attaches when a person knowingly uses a false record or statement material to an obligation to pay the government.
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## Expansion of Reverse False Claims

Liability can be imposed where a person knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.

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## Obligation

An established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment

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10


Knowledge
• Actual knowledge
• Deliberate indifference
• Reckless disregard of the truth
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11


2023 Developments in FCA Litigation
• United States ex rel. Polansky v. Executive Health Resources, Inc.
• Defining the government's power to dismiss
• United States ex rel. Schutte v. SuperValu Inc.
• Refining the intent element
Bowles Rice
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Self-Correction
• Investigation
• Repayment
• DOJ disclosure and cooperation
• OIG contractors
• Healthcare-specific disclosure protocols
Bowles Rice
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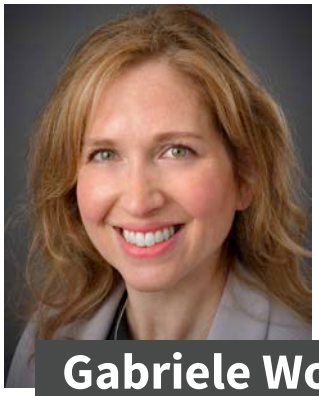

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# Gabriele Wohl

**Partner | Bowles Rice (Charleston, WV)**

Gabriele Wohl is an experienced litigator in the firm's Charleston, West Virginia office, regularly handling complex civil litigation for national corporations. In addition to her practicing in the Litigation Group, she leads the White Collar Defense and Investigations team and chairs the Bowles Rice Diversity Committee. Gabe keeps in close contact with her clients and enjoys helping them navigate stressful and intricate legal issues.

In her litigation practice, Gabe has years of experience advocating for businesses ranging from Fortune 500 companies to local entrepreneurs. She has traveled nationwide to represent witnesses and corporations in complicated multi-district litigation matters and government investigations. Gabe has litigated several False Claims Act cases to favorable resolutions, and routinely defends medical professionals and practices against Medicaid fraud allegations. She also conducts thorough internal investigations for her business clients, focusing on employee misconduct, financial fraud, and compliance. Gabe appears often in federal court and has argued before the Court of Appeals for the Fourth Circuit.

Before joining Bowles Rice, Gabe served as an Assistant United States Attorney for the Southern District of West Virginia. There, she gained first-chair experience in drug trafficking and public corruption trials and served as the office's District Elections Officer and Computer Hacking and Internet Prosecution Coordinator. At the U.S. Attorneys Office, she participated in complex white collar investigations and prosecutions involving a variety of federal offenses, including fraud, identity theft, worker safety violations and civil rights violations. She also provided civil rights training for the West Virginia State Police Academy.

**Practice Areas**

- Appellate Advocacy
- Business Litigation
- Education Law: Higher Education
- Labor and Employment
- Litigation
- WE Mean Business: Women Executives and Entrepreneurs
- White Collar Defense and Investigations

**Professional Highlights**

- Leadership Council on Legal Diversity, Fellow (2021)
- Member of the Fourth Circuit Advisory Committee on Rules and Procedures
- Member of the Judicial Conference of the Fourth Circuit Court of Appeals
- Served as Deputy General Counsel to former West Virginia Governor Earl Ray Tomblin (2013-2014)

**Honors**

- Recognized in the 2024 Edition of Best Lawyers in America for Commercial Litigation and Litigation - Labor and Employment
- Extra Mile Award, West Virginia Center for Children's Justice (2017)
- Award for Excellence, Council of Inspectors General on Integrity and Efficiency (2016)

**Education**

- J.D., West Virginia University College of Law (2009) - Editor-in-Chief, West Virginia Law Review; Order of the Coif
- B.A., Political Science, Wellesley College (2004)

# New Rule 702: Everything You Need to Know About the Admissibility of Expert Testimony

**Stephanie Laws**
Maslon (Minneapolis, MN)

**New Rule 702: Everything You Need to Know About the Admissibility of Expert Testimony**
*Stephanie Laws*

Federal Rule of Evidence 702 was amended effective December 1, 2023 to clarify how judges, as gatekeepers, should analyze expert admissibility issues. This article provides an overview of the amendments, their interpretation by the courts, and best practices for leveraging the new rule in litigation.

**What is Rule 702?**
Federal Rule of Evidence 702 governs the admissibility of expert testimony in federal courts. First enacted in 1975, its original construction was brief: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." 28 USC app Fed. R. Evid. 702 (1975). The rule sat untouched for decades until 2000, when it was modified to codify the Daubert trilogy of decisions issued by the U.S. Supreme Court in the 1990s, which clarified the judiciary's gatekeeping role in ensuring all expert testimony be reliable. See Fed. R. Evid. 702 advisory committee's note to 2000 amendment; Daubert v. Merrell Dow Pharma., Inc., 509 U.S. 579 (1993); General Elec. Co. v. Joiner, 522 U.S. 136 (1997); and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The 2000 amendments "affirm[ed] the trial court's role as gatekeeper and provide[d] some general standards that the trial court must use to assess the reliability and helpfulness of the proffered expert testimony." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. The Advisory Committee noted, however, that the amendments were not intended to be a "sea change over federal evidence law" and that the court's gatekeeping role "is not intended to serve as a replacement for the adversary system." See Id. (quoting United States v. 14.38 Acres of Land, More of Less Situated in Leflore Cnty., State of Miss., 80 F.3d 1074, 1078 (5th Cir. 1996).

**Why was Rule 702 Amended?**
Starting in 2017, the Judicial Conference Advisory Committee on Evidence Rules again sought to amend Rule 702 in response to continued concern that some federal court judges were not properly fulfilling their gatekeeping function. See Symposium, Forensic Expert Testimony, Daubert, and Rule 702, 86 Fordham L. Rev. 1463 (2017). Among other topics, critics of the rule noted that wayward courts were misinterpreting the rule's requirements to focus exclusively on the reliability of a proposed expert's methodology, while ignoring whether that methodology was reliably applied to the facts of any given case. David E. Bernstein & Eric G. Lasker, Defending Daubert: It's Time to Amend Federal Rule of Evidence 702, 57 Wm. & Mary L. Rev. 1, 43 (2015).CITE. As one early critic noted, "courts have been, at best, lackadaisical and, at worst, disingenuous, in carrying out their gatekeeping duties," particularly in more technical cases involving complicated forensic evidence. David L. Faigman et al., Modern Scientific Evidence: The Law and Science of Expert Testimony, § 1:30 (2014).

One illustrative case is the Ninth Circuit's decision in City of Pomona v. SQM N. Am. Corp., an action brought by the City of Pomona, California against SQM, a company that imported sodium nitrate for use as fertilizer that allegedly contaminated the City's drinking water. 750 F.3d 1036 (9th Cir. 2014). The lynchpin of the City's case was expert opinion identifying the sodium nitrate imported by SQM as the "dominant source" of the drinking water contamination based on a stable isotope analysis that compared oxygen and chlorine isotopic analyses taken from groundwater samples to a reference database to determine the probable source. Id. at 1042. Ultimately, the district court excluded the expert's opinion, reasoning, among other things, that he had failed to properly follow his own specified methodologies when testing the samples at issue. Id. at 1043-48. Upon appeal, the Ninth Circuit overruled the exclusion, reasoning "[t]he district court did not apply the correct rule of law: only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony." Id. at 1048.

The Advisory Committee agreed with the critics. In its final report to the Judicial Conference Committee on Rules of Practice and Procedure in May 2022, the Advisory Committee noted that the proposed amendments were "made necessary by the decisions that have failed to apply . . . the reliability requirements of Rule 702." Committee on Rules of Practice and Procedure (May 17, 2022) (Memorandum from the Honorable Patrick J. Schiltz, Chair, Advisory Comm. on Evidence Rules, to the Honorable John D. Bates, Chair, Standing Comm. on Rules of Prac. & Proc.). Additionally, the Advisory Committee sought to clarify the standard by which reliability must be established:

> Finally, the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence.

Id. at 6.

After years of discussion, public input—and even a report to then-President Barack Obama (President's Council of Advisors on Sci. & Tech., Exec. Office of the President, REPORT TO THE PRESIDENT, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 1, (Sept. 2016))—the U.S. Supreme Court submitted the amendments to the Senate in April 2023, and they ultimately took effect December 1, 2023.

**How was Rule 702 Amended?**

Rule 702 in its amended form states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702.

As the Advisory Committee noted, "[n]othing in the amendment imposes any new, specific procedure Fed. R. Evid. 702 advisory committee's note to 2023 amendment. Rather, the amendments are intended to highlight two main points regarding how Rule 702 should be applied to increase consistency across the judiciary. First, the amendments clarify and emphasize that the proponent of the proffered testimony must demonstrate that it meets the rule's admissibility requirements by the preponderance of the evidence standard—i.e., it is "more likely than not" that each criterion is satisfied. This amendment makes clear that Rule 702's requirements, like most admissibility requirements, are governed by Federal Rule of Evidence 104(a), which requires the court to determine admissibility by the preponderance of the evidence, and not by the more permissive 104(b), which requires only "proof . . . sufficient to support a finding that the fact does exist." Compare Fed. R. Evid. 104(a) with 104(b). The Advisory Committee also emphasized that questions about the sufficiency of an expert's basis and the application of the expert's methodologies are questions of admissibility (and thus subject to Rule 104(a)) and not weight—but only to a point. According to the Advisory Committee, once a court has determined it is more likely than not that an expert has a sufficient basis to support his or her opinion, a question of admissibility governed by Rule 104(a), arguments that, for example, the expert has not read all relevant studies go to weight.

Second, the amendment "emphasize[s] that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Id. In other words, experts must not only use valid methodology, but reliably apply those methodologies to the case at hand. This amendment strengthens the mandate that judges serve as gatekeepers to prevent unreliable testimony from being presented to the jury. As the Advisory Committee wrote, "[j]udicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support." Id. Although the genesis for the amendment was feature comparisons by forensic experts (e.g. fingerprint comparisons, etc.), it has the potential for a much broader impact, including, for example medical causation in product liability matters.

**What is the Impact?**

The amended rule has been cited by hundreds of courts over the past five months. Although this body of case law is in early days, two things are clear: First, in amending the rule, the federal judiciary was seeking to toughen up

Rule 702 to emphasize the court's gatekeeping function in keeping unreliable evidence out of the courtroom. Second, the lack of controlling case law creates room for smart advocacy to effect outcomes.

Several courts applying amended Rule 702 have explicitly acknowledged that the amendments require more robust judicial diligence. See, e.g., Boyer v. City of Simi Valley, 219CV00560DSFJPR, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024) ("The Court is required to analyze the expert's data and methodology at the admissibility stage more critically than in the past."); Optical Solutions, Inc., v. Nanometrics, Inc., 18-CV-00417-BLF, 2023 WL 8101885, at *1 (N.D. Cal. Nov. 21, 2023) (noting that expert opinion must "meet[] the more stringent standard under the amendment to Rule 702(d)."); see also Post v. Hanchett, 21-2587-DDC, 2024 WL 474484, at *2 (D. Kan. Feb. 7, 2024) ("[T]he 2023 Amendments to Rule 702 make clear that reliability, both in theory and application, is the hallmark of admissible expert testimony."); Burdess v. Cottrell, 4:17-CV-01515-JAR, 2024 WL 864127, at *3 (E.D. Mo. Feb. 29, 2024) ("The Advisory Committee Notes to the 2023 amendments to Rule 702 underscore that the proponent of an expert's testimony must first demonstrate that the admissibility requirements have been met before the testimony may be tested by the adversary process.") Some courts have made this proclamation more implicitly via extensive citing of the Advisory Committee Note emphasizing the need for active judicial involvements. See Allen v. Foxway Transportation, Inc., 4:21-CV-00156, 2024 WL 388133, at *3 (M.D. Pa. Feb. 1, 2024); Ballew v. StandardAero Bus. Aviation Svsc., LLC, 2:21-CV-747-JLB-NPM, 2024 WL 245803, at *3-4 (M.D. Fla. Jan. 23, 2024); Johnson v. Packaging Corp. or Amer., CV 18-613-SDD-EWD, 2023 WL 8649814, at *2 (M.D. La. Dec. 14, 2023); Cleaver v. Transnation Title & Escrow, Inc., 1:21-CV-00031-AKB, 2024 WL 326848, at *2 (D. Idaho Jan. 29, 2024).

Other courts have found the amendments had no impact or—confoundingly—failed to acknowledge the amendment and continue to cite the outdated version of the rule. See, e.g., Rodriguez v. Hosp. San Cristobal, Inc., 91 F.4th 59, 70 n.6 (1st Cir. 2024) ("[T] he application of the rule to this case is not affected by the 2023 changes."; Taylor v. Garrett, 17-CV-2183, 2024 WL 1177744, at *1-2 (C.D. Ill. Mar. 19, 2024) (applying outdated version of Rule 702 without acknowledging amendment); McKeon v. Bank of Amer., 21-CV-03264-RM-KAS, 2024 WL 810023, at *3 (D. Colo. Feb. 27, 2024) (same); Fort Worth Partners, LLC v. Nilfisk, Inc., 5:22-CV-05181, 2024 WL 734527, at *4 (Feb. 22, 2024) (same). Similarly, although Rule 702 now explicitly incorporates the preponderance of the evidence standard regarding questions of admissibility, many courts continue to cite to and rely on pre-amendment case law stating admissibility is favored. See, e.g., Regents of the Univ. of Minnesota v. AT&T Mobility LLC, CV 14-4666 (JRT/TNL), 2024 WL 844579, at *8 (D. Minn. Feb. 28, 2024) ("[T]he Court is to resolve disputes in favor of admission. . . ."); United States v. .55 Acres of Land, 2024 WL 960941, at *3 ("Doubt regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility.") (internal citation and quotation omitted); ; United States v. Dyncorp. Int'l LLC, 2024 WL 604923, at *3 (D.D.C. Jan. 25, 2024) ("'In general, Rule 702 has been interpreted to favor admissibility.'") (internal citation omitted)); Blue Buffalo Co., Ltd. v. Wilbur-Ellis Co. LLC, 4:14 CV 859 RWS, 2024 WL 111712, at *4 (E.D. Mo. Jan. 10, 2024) ("'Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony' and favors admission over exclusion.") (internal citation omitted).

A handful of courts have relied upon Rule 702's new emphasis to exclude experts whose opinions do not reflect a reliable application of his or her methodology to the facts of the case—sometimes explicitly citing the Advisory Committee Note to do so. In In re Acetaminophen - ASD-ADHD Prod. Liab. Litig., MDL plaintiffs sought to establish that use of certain over-the-counter products containing acetaminophen in utero could increase the risk of autism spectrum disorder and attention-deficit/ hyperactivity disorder. --- F. Supp. 3d ---, 2023 WL 8711617, at *1 (S.D.N.Y. Dec. 18, 2023). The court granted defendants' motions to exclude each of plaintiffs' five general causation experts, explaining that while "[n]othing in the amendment imposes any new specific procedures," that "one purpose of the amendment was to emphasize" that "judicial gatekeeping is essential" to prevent jurors from being misled by "the conclusions of an expert [that] go beyond what the expert's basis and methodology may reliably support." In re Acetaminophen – ASD – ADHD Prods. Liab. Litig., --- F. Supp. 3d. ---, 2023 WL 8711617, at *16, n. 27 (S.D.N.Y. Dec. 18, 2023) (quoting Advisory Committee Note). This decision is currently being appealed to the Second Circuit. For its part, the Sixth Circuit recently cited the amended Rule 702 to affirm the dismissal of plaintiff's general causation expert under similar circumstances, reasoning that, by cherry-picking data to support his outcome and inconsistently applying several of the Bradford Hill factors used to establish general medical causation, he had not reliably applied his methodology to the facts of the case. In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prods. Liab. Litig., 93 F4th 339, 347-48 (6th Cir. 2024).

Less clear cut is how courts have implemented the Advisory Committee's directive that "critical questions of the sufficiency of an expert's basis" go to admissibility, not

weight, and thus must established by the preponderance of the evidence standard. Several post-amendment cases have recognized the sufficiency of the expert's factual basis to be an admissibility criterion. See, e.g., Harris v. Fedex Corp. Svcs., Inc., 92 F.4th 286, 303 (5th Cir. 2024) ("By allowing [plaintiff's expert] to testify without a proper foundation, the district court abdicated its role as gatekeeper."); Moncayo v. United Parcel Service, Inc., 23-161-CV, 2024 WL 461694, at *1 (2nd Cir. Feb. 7, 2024) (rejecting argument that deficiencies in proffered expert's factual basis go to weight not admissibility); Boyer v. Citi of Simi Valley, 219CV00560DSFJPR, 2024 WL 993316, at *2 (C.D. Cal. Feb. 13, 2024) (excluding expert testimony as being based on insufficient facts and data in reliance on the Advisory Committee Note); United States v. Uchendu, 2:22-CR-00160-JNP-2, 2024 WL 1016114, at *2 (D. Utah Mar. 8, 2024) (summarizing the Advisory Committee Note as stating that "questions as to the sufficiency of the basis for an expert's opinion and the application of his methodology go to admissibility rather than weight.")

Others continue to follow pre-amendment case law holding that critiques of an expert's factual basis go to weight. See, e.g. Hosp. San Cristobal, 91 F.4th at 70 (relying on pre-amendment case law to state that "the focus of the inquiry into the admissibility of expert testimony under Rule 702 must be solely on principles and methodology . . . when the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony") (internal quotations and citations omitted); BAE Systems Norfolk Ship Repair, Inc. v. United States, 2:22CV230, 2024 WL 1057773, at *4 (E.D. Va. Feb. 23, 2024) ("Plaintiff is questioning the 'factual underpinnings' of [the expert's] opinion which 'affect[s] the weight and credibility of the witness' assessment, not its admissibility.") (internal citation omitted).); Sher v. Amica Mut. Ins. Co., 22-CV-02470-NYW-NRN, 2024 WL 1090588, at *4 (D. Colo. Mar. 8, 2024) (finding the defendant's challenges to sufficiency of expert's data and/or assumptions fail to address expert's methodology or application of the methodology to the data, "and thus go to weight, rather than admissibility," of expert's opinions); Garza-Insausti v. United States, CV211578JAGHRV, 2024 WL 531270, at *4 (D.P.R. Feb. 8, 2024) (refusing to exclude an expert because, among other things, "the extensive caselaw holding that issues related to the factual basis of an expert's opinion go to credibility of the testimony as opposed to its admissibility.")

**Best Practices**

Given the disparate impact of the Rule 702 amendments, litigators should take care to follow these five tips for leveraging the rule in their briefs:

1. Flag the Amendment—It Happened! Briefs citing to Rule 702 should flag that it was recently amended. Do not assume the Court is aware of the amendment, as many courts have quoted the language of the prior rule when issuing rulings.

2. Let the Rule Be Your Guide. Focus the legal standard on the text of the updated rule, as opposed to prior versions or case law. Federal rules are binding law. While this guidance is always applicable, it is particularly so here, where Rule 702 was explicitly amended due to misapplication of the rule by the courts.

3. Dig Into Legislative Intent. The Advisory Committee Notes to Rule 702 set forth an intent to change federal judicial practice as to how Rule 702 should be interpreted and best encapsulate the legislative intent as to the rule's correct interpretation. Although the Advisory Committee Notes are relatively brief, the Committee's publicly-available reports and hearing transcripts are much longer.

4. Carefully Parse Precedent. Given the corrective purpose of the amendment, practitioners should carefully review precedent against the amended rule. Use the Advisory Committee Notes to help determine which holdings are still good law. Case law is suspect if it does not apply the preponderance of the evidence standard, refuses to apply it to each Rule 702 element, or cites precedent suggesting a presumption toward admissibility. Do not be afraid to call out bad decisions.

5. Going to the Mat? Ask for Help. Although Rule 702's impact extends across different areas of practice, many of them have a shared goal of predictable, uniform application that excludes unreliable testimony from the purview of the jury. If your client finds itself embroiled in an expert issue with potentially significant ramifications, do not be afraid to look for amicas curie support.

**Conclusion**

In the five months following its amendment on December 1, 2023, Rule 702 has been analyzed and applied in hundreds of courts across the country with varying approaches and results. Understanding the amendment, its purpose, and interpretation, is critical to using the new rule effectively in your cases.

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# Stephanie M. Laws

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Stephanie Laws is a practical problem solver who represents businesses in product liability and complex civil litigation in federal and state courts nationwide. She also conducts internal investigations and helps companies respond to government enforcement actions. Stephanie's product liability bandwidth spans multiple industries, with particular focus on defense of FDA-regulated products. She is an experienced litigator who has handled cases from fact investigation through jury verdict. She has significant experience managing large-scale document collections and productions as well as e-discovery issues, both in one-off cases and across coordinated portfolios. Stephanie leverages insights from multiple client secondments to develop efficient legal strategies that are custom tailored to fit business needs.

Stephanie is also deeply engaged with pro bono work. She partnered with Maslon attorney Steve Schleicher in his role as special prosecutor for the state of Minnesota in the trial of former Minneapolis police officer Derek Chauvin for the murder of George Floyd, providing integral support to the state's use-of-force case. Stephanie also serves on Maslon's Pro Bono Committee and maintains an active practice, including representing victims of domestic violence seeking orders for protection against their abusers and representing asylum seekers, among other endeavors.

Prior to joining Maslon, Stephanie was a litigation defense attorney at two large national firms. Stephanie graduated cum laude from the University of Pennsylvania Law School in 2012 and earned her bachelor's degree, magna cum laude, from the University of Wisconsin, Madison.

**Areas of Practice**

- Litigation Toggle Display of Child Services
- Business Litigation
- Investigations & White Collar Defense
- Tort & Product Liability

**Honors**

- Selected for inclusion in Best Lawyers: Ones to Watch, 2021-2024 (These awards recognize attorneys, who are earlier in their careers, for outstanding professional excellence in private practice in the United States.)
- Invited to join the International Association of Defense Counsel, 2023
- Up & Coming Attorney, Minnesota Lawyer, 2022
- Recognized on Minnesota Super Lawyers® list, 2023 (Minnesota Super Lawyers® is a designation given to only 5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2018-2022 (Minnesota Rising Stars is a designation given to only 2.5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Light of Justice Award, Texas Defender Service, 2018
- Top Women Attorneys in Minnesota® list, 2019-2023 (The annual edition of the Top Women Attorneys in Minnesota list features attorneys selected for the previous year's Minnesota Super Lawyers® and Rising Stars lists.)

**Education**

- University of Pennsylvania Law School - J.D., cum laude, 2012
- University of Wisconsin-Madison - B.A., magna cum laude, 2007; English

# Teamwork Makes the Litigation Dream Work: The Partnership in Litigation Management

**Vito Gagliardi**
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**To Do Or Not To Do, We Have Answered The Question: What Are Best Practices For In-House and Outside Counsel to Partner In Managing Litigation?**
*Vito Gagliardi and Kerri Wright*

Collaboration between in-house and outside counsel is critical to ensuring the attainment of the client's goals in any litigation. Outside counsel serve as in-house counsel's eyes and ears, often handling the most difficult and most contentious of a company's legal matters. At the same time, in-house counsel is forced to juggle responsibility for those matters, ensuring the attainment of the business unit's goals, all while taking on more work and responsibility amid tightening internal legal budgets. Therefore, this relationship must be a partnership and in that partnership mutual respect for the role each "partner" will play is of utmost importance.

In this article, we aim to provide best practices based on years of collaborative litigation experience and input received directly from in-house clients. A resounding theme throughout these best practices is communication, up front and direct -- on both sides of the in-house and outside counsel partnership.

**Know The Basics Of The Business**
Outside counsel must know the basic information about the client's business. What do they do? Who are their clients? Are they direct customers or end-users of the client's products or services? Where do they operate? How large are they? What are their general business units? It is not only the lead outside counsel who needs to know this information, but the members of the team who will be working with the client. Nothing makes someone in the business trust outside counsel less than when a member of the outside counsel team fails to demonstrate that they know the client's business when they ask an obvious question or gets a client's fundamental business concept or fact wrong. To really stand out, counsel should know more than the basics.

Failure to understand the business of the client, and the perspective of that business, can frustrate the client and negatively impact the relationship.[1] The failure of outside counsel to understand the fundamentals of the business impacts in-house counsel and their relationship with the members of the business units, and their internal reputation. For this reason, in-house counsel also should be invested in making opportunities available for outside counsel to learn about the business, which could take the form of an informal conversation about the business or a tour of one of the client's facilities if time and security protocols permit. The more outside counsel can know about the inner workings of the business, the better they can understand it and be more effective in protecting it (and, by extension, the in-house counsel with whom they work).

**Be Aware Of the Client's Public Perception**
Determining how to best represent a corporate client will depend on the client's public perception and its risk tolerance. In-house counsel can help explain the risk tolerance, public relations, and public policy pain points of the company. Different clients care about different things. Some clients have higher media profiles and are subject to distinct levels of scrutiny. These seemingly non-legal issues can be the deciding factor to a client on how to treat a particular legal matter. Being cognizant of business concerns and reputational risks will lead to more effective and actionable legal advice. For certain corporations, these concerns are well known. However, this is another area where in-house counsel can help by providing opportunities for outside counsel to learn more about how the company views its public perception.

**Interaction With Non-Lawyers**
The level of involvement and interaction outside counsel has with non-lawyer employees of the company will depend on the corporate culture and the internal expectations set by the company's legal and business units. When establishing a new partnership, it is important for in-house counsel to articulate those expectations for outside counsel; this includes how in-house counsel

1 "In-House Attorneys Irked That Outside Counsel Lack Business," www.law.com, June 22, 2023, https://www.law.com/corpcounsel/2023/06/22/in-house-attorneys-irked-that-outside-counsel-lack-business-savvy/.

wishes for outside counsel to interact with or communicate with non-lawyers via email. Simply because in-house counsel copies a non-lawyer employee on an email does not necessarily mean they want outside counsel to email that same non-lawyer directly. Clear communication up front about these expectations and protocols will facilitate a smooth engagement.

When interacting with non-lawyer employees of the company -- who might be fact witnesses, in a litigation-support role (e.g., IT, HR, finance)-- effective outside counsel need to take the time and effort to explain, in practical terms, the reasoning behind a request, decision or issue, ensure that all questions or concerns are timely addressed, and effectively and appropriately engage with non-lawyers at the company without in-house counsel having to be present or involved every step of the engagement (if that is the desire of the in-house counsel).

In addition, if the "rules of engagement" or expectations may change from one matter or issue to another, in-house counsel should be clear with outside counsel what they are hoping to accomplish in a meeting or call with a non-lawyer employee of the company. Outside counsel seeks to partner with in-house counsel and help support them in whatever way will be most helpful. To do so, they will need to know the game plan. For example, if in-house counsel intends to use outside counsel for different reasons or in different ways -- such as, if outside counsel can help by playing the role of "bad cop" or can be most effective by simply repeating and emphasizing a particular point, strategy, or potential outcome -- clear communication in advance will help effectuate this changing role. Effective outside counsel not only ensure they have a clear understanding of their respective role in each situation, but they also look for ways that they can enhance or improve this dynamic.

When interviewing witnesses, especially senior level employees, one should be mindful of their job level and availability. As a general rule, when interviewing a more senior level individual, like a director or vice president, about a situation, get in and ask the salient questions and get out. This shows the employee that you are respectful that their time is precious and that they have a business to run.

In-house counsel can support outside counsel by facilitating relationships with certain business units that are frequently involved in litigation. Those relationships can, when appropriate, relieve some of the day-to-day management by in-house counsel. However, in-house counsel should always be copied or kept in the loop on any communications between outside counsel and non-lawyer employees -- unless expressly advised that they need not be copied, which likely will be the rare case.

**On-Time And On-Point**

Communication and timeliness are two of the major drivers of success when interacting with in-house counsel. In a company with 5,000 employees spread across the country, who travel for work frequently, work remotely, and have more-important-to-them business issues, it can sometimes be very difficult for in-house counsel to get what is needed from their colleagues (factual information, documents, approvals, their attention) in any given legal matter. As such, it can be very frustrating to run up against deadlines due to lack of communication or urgency from outside counsel. Most in-house counsel prefer overcommunication to having to wonder about the status of a matter or reach out to outside counsel for an update. On the flipside, there are times where in-house counsel just cannot devote attention to a single case because there are higher priorities, or they are managing a significant number of legal matters. Impressive outside counsel will figure out the proverbial sweet spot.

The flow of information can sometimes appear one sided. As a result of the desire to protect the company from adverse findings or rulings, outside counsel know the stress resulting from knowing about an impending deadline and, despite diligent communication, failing to hear from the client. In-house counsel can assist in this process by noting the important deadlines that outside counsel places on their radar screen. If in-house counsel prefers deadlines to be presented in a certain way, that up front communication will pay dividends overall. Indeed, outside counsel should endeavor to learn how the client contact wants to be communicated with, as well as the rhythm, cadence, and other preferences of the various touch points. In-house counsel should, in turn, note the important deadlines highlighted by outside counsel and update outside counsel of "blackout dates," vacations or other competing priorities that may interfere with a deadline.

**What Seems Easy, Sometimes Is Not**

What might seem like an easy fix to outside counsel (i.e., just change the language on a form) can be complicated to in-house counsel. This is especially true if it involves an electronic form that feeds into multiple downstream systems. Or, it may at first blush sound easy to request all files related to a particular medical restriction for the last three years. It is never as simple as hitting "Control-P" and printing a list. Outside counsel must work with in-house counsel before asking non-lawyers at the company to pull large volumes of information or suggesting to an adversary a solution that may sound simple, but actually may be very hard to execute. In-house counsel should keep an open mind to the solutions presented by outside

counsel. What may seem impractical or impossible to in-house counsel still may be preferable to the alternatives remaining in litigation.

**Answer The Question Asked**

If in-house counsel asks what time it is, do not tell them how to build a clock. There are very few times when in-house counsel needs to know how to build a clock and they are extremely busy. Get them their answer up front in a concise manner. If there is critical context they need, summarize that later. Similarly, in-house counsel may ask about extreme legal options. Often times, this is because in-house counsel knows individuals inside the company will ask. Providing that information will help in-house counsel explain that option, how it was considered, and why it is not being recommended. When helpful, in-house counsel can use outside counsel to deliver contingencies or alternatives. This can lend additional credibility when it is concurring with the advice that in-house counsel has been delivering to the business unit.

**Remember That In-House Counsel Has To See The Whole Forest, Not Just Your Tree**

Even a medium-sized corporation can have dozens of legal matters assigned to outside counsel. As outside counsel, each matter assigned by in-house counsel is treated as a priority. However, the sheer volume of matters that in-house counsel is monitoring, along with the varied business concerns on their plate, may push an individual update, like a new demand or status conference update to the bottom of their priority list.

A recent survey by Bloomberg supports the conclusion that in-house counsels have heavy workloads with often competing deadlines and priorities.[2] A successful outside counsel will understand these demands and provide written updates that are succinct and timely. Make sure emails contain the key information -- what do in-house counsel need to know up front, when is a response needed, and a concise description of any key information. Similarly, multiple emails in rapid succession can overwhelm an inbox. Outside counsel should write a single, complete email with all of the information that is required.

**Time Is Money**

In-house counsel must have adequate time to review major filings. In the ABA's "Practical Pointers for Working with In-House Counsel" the time constraints of in-house counsel were featured prominently.[3] Getting a summary judgment motion to in-house counsel a day or two before it is due to be filed will damage the partnership. In-house counsel may be at a trial that day or in eight hours of meetings. Some things (like a reply brief) or order to show cause may come with tight deadlines. Those should be considered rare exceptions.

Timing is everything because a major filing may require review from other business units beyond in-house counsel which may include review by Public Relations, Public Policy, transactional attorneys, and/or multiple levels of legal review. In-house counsel may need to work with other law firms managing similar cases to make sure the filings are consistent. In-house counsel can support outside counsel across jurisdictions with detailed guidelines and timelines. Information in-house counsel shares with its panel attorneys across the common areas served will result in greater consistency with minimal additional review.

**Money Is Also Money**

By the time in-house counsel hire outside counsel for a matter, there likely already has been substantial discussion internally with the affected business unit and management about the expected costs. More than two-thirds of in-house counsel lawyers report that they are experiencing pressure to reduce costs.[4] The company relies on in-house counsel to engage quality lawyers that provide an accurate estimation of the costs in handling a legal matter. Sometimes, litigation blows up estimates for reasons outside of anyone's control -- that is understandable and even expected for a certain percentage of cases. In-house counsel can and should be proactive about the specific matters, and types of matters, which are likely to balloon and be in a position to explain reasons for the increased costs. But in-house counsel will be frustrated having to go back to the business unit/management with legal bills that are dramatically higher than estimated. Sometimes, it is because the legal fees are high in relation to the particular nature or significance of the work performed. Other times, it is because there was no communication about the total potential fees. An estimate that something is going to take 10 hours, and instead results in a bill for 50 hours, will be an unhappy surprise that in-house counsel will have to explain internally. Over-communication is critical to avoid issues. It is always easier for in-house counsel to keep internal stakeholders apprised of an increasingly expensive matter along the way than it is to hit them with a big invoice.

This is by no means an exhaustive list. However, these

2 Blaemire, Jessica R., "In-House Counsel Say They Work More Than Firm Lawyers," www.bloomberg.com, November 30, 2023, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-in-house-counsel-say-they-work-more-than-firm-lawyers.

3 Berry, Naomi M., "Practical Pointers for Working with In-House Counsel," www.americanbar.org, May 2, 2023, https://www.americanbar.org/groups/litigation/resources/newsletters/corporate-counsel/practical-pointers-working-in-house-counsel/.

4 Dezso, Jen, "Insights in Action: Who does it better? In-house teams or outside counsel?," www.thomsonreuters.com, June 8, 2023, https://www.thomsonreuters.com/en-us/posts/legal/insights-in-action-in-house-teams/.

best practices can help maintain a good partnership between in-house and outside counsel. Open communication upfront at the start of a new engagement or relationship will help to avoid issues in the future. In addition, mutual respect is important to maintaining this relationship and to driving positive results for the client.

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# Vito A. Gagliardi, Jr.

**Principal | Porzio Bromberg & Newman (Morristown, NJ)**

Vito A. Gagliardi, Jr. is the Managing Principal of Porzio, Bromberg & Newman, P.C., and the President and CEO of Porzio Compliance Services (PorzioCS) and Porzio Governmental Affairs (PGA). Beyond his roles, Vito co-chairs the firm's Litigation Practice Group, and its Education and Employment Team. Certified as a Civil Trial Attorney by the Supreme Court of New Jersey Board on Trial Certification and a distinguished fellow in the American College of Trial Lawyers,

Vito has left an indelible mark by arguing precedent-setting cases before the New Jersey Supreme Court. Vito's exceptional talent for simplifying complex facts and evidence to judges and juries sets him apart, with a remarkable track record of successful dispute resolutions through trial or negotiation. Widely renowned for his astute counsel, Vito's vast experience extends to boards of education, colleges, universities, APSSDs, charter schools, and businesses ranging in size from Fortune 100 companies to small, privately held entities. His influence expands to the Employment and Labor sector, where he is recognized for his strategic counsel in state and federal courts and key agencies. Vito's reputation as a trusted advisor and litigator reflects his unwavering dedication to achieving favorable outcomes for his clients.

**Practice Areas**
- Education Law
- Employment and Labor
- Litigation

**Areas of Focus**
- Disability Accommodations & Leaves of Absence
- Discrimination, Harassment and Retaliation
- Employment Counseling
- HR Training & Policy Development
- Reductions in Force
- Restrictive Covenants
- Wage and Hour

**Recognitions**
- Included in NJBIZ Law Power 50 list, 2022-2023.
- Recognized in ROI-NJ's Influencer "Power List" in the Law 2023 and "Influencer: Law" list 2022.
- Certified by the Supreme Court of New Jersey as a Civil Trial Attorney.
- Chambers USA—America's Leading Lawyers – Labor & Employment (2017-2022).
- New Jersey Super Lawyers® (since 2005).
- The Best Lawyers in America® – Education Law (since 2012); Litigation - Labor & Employment (since 2013).
- Recipient, 2016 Chief George C. Tenney Award, New Jersey State Association of Chiefs of Police.
- Recipient, 2011 President's Award, New Jersey State Association of Chiefs of Police.

**Education**
- Washington and Lee University School of Law - J.D., 1989; cum laude
- University of Notre Dame - B.A., 1986

# An Ounce of Prevention: Proactive Steps Employers Can Take to Limit Litigation in 2024

**Lauren Fisher White**
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**An Ounce of Prevention: Proactive Steps Employers Can Take to Limit Litigation in 2024**
*Lauren Fisher White*

Staying abreast of the latest changes to employment regulations and monitoring litigation trends can help employers identify and correct problems before plaintiffs' attorneys come knocking.

**Equal Pay and the Pay Transparency Movement**
For years, the EEOC has claimed to prioritized equal pay actions, but without a great impact: only around 1,000 of the charges of discrimination filed per year allege claims arising under the Equal Pay Act, and the EEOC has very rarely brought litigation under the statute. With the growing pay transparency movement taking hold, and more employees becoming aware that their pay differs substantially from their peers, the EEOC is seeing an uptick in charges alleging unequal pay, not only based on sex, but also on race, disability, and a number of other protected classes. Because establishing a prima facie case of pay discrimination is relatively easy, as compared to other forms of discrimination, employers who are not proactive may find themselves facing individual lawsuits and even class actions.

When most employers consider "equal pay," they think of the Equal Pay Act of 1963, a federal law that prohibits wage discrimination based on sex and requires that men and women be given equal pay for equal work.[1] However, equal-pay laws are not limited to unequal treatment based on sex. Title VII of the Civil Rights Act of 1964 also prohibits pay discrimination based on a number of other protected classes: race, color, religion, and national origin, as well as sex (including pregnancy status, gender identity, and sexual orientation). The Age Discrimination in Employment Act prohibits pay discrimination on the basis of age, and the Americans with Disabilities Act prohibits pay discrimination on the basis of disability. All forms of pay are covered by these laws, including salary, overtime pay, bonuses, vacation and holiday pay, insurance, use of company vehicles, and benefits.[2]

The EEOC administers and enforces the Equal Pay Act by investigating charges of pay discrimination filed by employees against their employers. For the years 2024-2028, the EEOC has identified as one of its strategic enforcement priorities "advancing equal pay for all workers," and stated the following:

> The EEOC will continue to focus on combatting pay discrimination in all its forms—on the basis of sex under the Equal Pay Act and Title VII, on other protected bases covered by federal anti-discrimination laws, including race, national origin, disability, and age, and at the intersection of protected bases. Because many workers do not know how their pay compares to their coworkers' and, therefore, are less likely to discover and report pay discrimination, the Commission will continue to use directed investigations and Commissioner Charges, as appropriate, to facilitate enforcement.

Thus, often people do not know that they may have an equal pay or pay discrimination claim. However, this landscape is changing. For 2024 and beyond, the EEOC also stated the following:

> The Commission will also focus on employer practices that may impede equal pay or contribute to pay disparities and may lead to violations of statutes the Commission enforces, such as pay secrecy policies, discouraging or prohibiting workers from asking about pay or sharing their pay with coworkers, and reliance on past salary history or applicants' salary expectations to set pay.

While the EEOC has stated that it will not enforce the National Labor Relations Act's Section 7.1, which prohibits pay secrecy policies, it appears the EEOC may view pay secrecy as resulting in disparate impact and therefore under its jurisdiction. This is a natural outgrowth of the

1 See U.S. Equal Employment Opportunity Commission. "The Equal Pay Act of 1963." Accessed April 1, 2024. https://www.eeoc.gov/statutes/equal-pay-act-1963.

2 See U.S. Equal Employment Opportunity Commission. "Pay Discrimination." Accessed April 1, 2024. https://www.eeoc.gov/youth/pay-discrimination

recent "pay transparency" movement.

The pay transparency movement has gained traction in recent years as a means to address wage disparities and promote fairness in the workplace. Advocates argue that transparency around compensation fosters accountability and enables employees to identify and challenge discriminatory pay practices. Research indicates that increased transparency can lead to reduced wage gaps, particularly among marginalized groups. For example, a study by Oblog and Zenger (2022) found that implementing pay transparency policies was associated with a decrease in gender pay gaps within organizations, highlighting the potential of transparency measures to mitigate inequality.[3]

As of the date of this article, at least 22 states and localities have pay transparency laws, most of which have been enacted after 2022. Some of these laws, such as Colorado's, require pay to be disclosed in job postings, including job postings by out-of-state employers that could be filled remotely by state residents.[4] Others, such as Virginia's, codify under state law the NLRA's Section 7.1 by prohibiting employers from taking retaliatory action against an employee because the employee discussed or disclosed wages to another.[5]

Problems can arise when an employer outright violates these laws, of course, but haphazard compliance with the laws can also give rise to claims—even collective actions. If, for example, an employer decides that it will publish salaries for all advertised positions, existing employees who are paid less than the salary advertised will potentially be put on notice of this disparity. While a company's advertising that it will pay a new candidate more than an existing one does not by itself constitute discrimination, it will suggest to employees that inequitable pay practices exist. Additionally, workers uninhibited by policies prohibiting salary discussions may be able to obtain the data that plaintiff's attorneys have historically lacked: data that demonstrates a disparity in the compensation of men and women, between races, etc. This is particularly risky for employers because plaintiffs can establish a prima facie EPA violation by showing that an employer pays different wages to employees of opposite sexes for equal work on jobs requiring equal skill, effort and responsibility, and which are performed under similar working conditions.

As employees' access to pay data is increasing, litigation is predicted to also increase. For example, in November 2023 three female employees of Amazon filed a class action alleging that the company's gender-neutral job-coding system did not eliminate bias but instead permitted gender-based disparities in pay.[6] Employers who wish to avoid equal-pay claims should be proactive in auditing their compensation model to ensure that (1) there is no statistically significant difference in pay between protected classes within a job title and grade; and (2) employees within job titles are appropriately graded, based on legitimate factors (level of experience, tenure, etc). Additionally, while there is no "safe harbor" for equal-pay claims, employers may consider inserting handbook provisions that encourage employees to come forward with equal-pay concerns, much like employees are often encouraged to report concerns regarding improper deductions in pay.

**The DOL Independent-Contractor Rule and the Freelance Economy**

One of the most significant legal challenges facing U.S. employers today is the classification of workers, whether as employees or independent contractors. Entire business sectors, such as financial services (financial advisors or insurance agents), freelancers (writers and producers), and personal on-demand services (Uber or DoorDash), depend on the classification of most of their workforces as independent contractors and endeavor to craft their policies and spend their lobbying dollars to ensure ongoing contractor classification. The growth of these "freelance" jobs is not slowing down; in fact, a December 2023 survey found that 38% of the American workforce—64 million people, and 52% of Generation Z—had performed freelance work in 2023.[7] While some workers may prefer the freelance lifestyle, it may also benefit businesses: among other differences, true independent contractors are not required to be provided health insurance, complete I-9 forms, or be paid overtime for hours worked over 40.

Because workers treated as independent contractors may work many hours for which they are paid only a flat rate, companies who misclassify employees as independent contractors may be at risk for substantial damages—both minimum wage and overtime—for claims arising under the Fair Labor Standards Act (FLSA), which is enforced by the Department of Labor (DOL). Before 2021, most courts determined whether a worker was an employee or independent contractor by using a state- or Circuit-specific version of the "economic

3 See Harvard Business Review, Research: The Complicated Effects of Pay Transparency, last accessed April , 2024, available at https://hbr.org/2023/02/research-the-complicated-effects-of-pay-transparency.

4 See Colorado Department of Labor and Employment, Equal Pay Transparency Rules, last accessed April 5, 2024, available at https://cdle.colorado.gov/sites/cdle/files/Adopted%20Equal%20Pay%20Transparency%20Rules%207%20CCR%201103-13%2011.9.23%20%5Baccessible%5D.pdf

5 Virginia Code § 40.1-28.7:9.

6 See Outten & Golden, Women File Landmark Equal Pay Class Action Against Amazon, last accessed April 5, 2024, available at https://www.outtengolden.com/insights/media/news/women-file-landmark-equal-pay-class-action-against-amazon/

7 See Upwork, Freelance Forward 2023, last accessed April 5, 2024, available at https://www.upwork.com/research/freelance-forward-2023-research-report

realities" test. That changed in 2021, when the Trump-era DOL attempted to enforce a final rule on independent contractor classification under the FLSA that used a five-factor test with two "core" prongs, making it simpler—and ultimately less risky—for businesses to classify workers as independent contractors. That rule was challenged and then formally rescinded. On January 10, 2024, the Biden-era DOL published a final rule, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (the "Final Rule"), which went into effect on March 11, 2024.[8] The Final Rule employs a six-factor "totality of the circumstances" test. As used in the Final Rule, "independent contractor" refers to workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves. The following six factors guide the assessment of the economic realities of the working relationship:[9]

1. Opportunity for profit or loss depending on managerial skill;
2. Investments by the worker and the potential employer;
3. Degree of permanence of the work relationship;
4. Nature and degree of control;
5. Extent to which work performed is an integral part of the potential employer's business; and
6. Skill and initiative.

The Final Rule discusses each of these factors in detail and also provides for additional factors to be considered if they indicate whether the worker is in business for themselves. No one factor is dispositive.

While the DOL has taken the position that the Final Rule was intended make worker classification more consistent with existing judicial precedent under the various pre-existing "economic realities" tests and the FLSA's text and purpose,[10] this Final Rule's level of specificity and nationwide application prompted significant concerns and thousands of comments. Fortunately for some industries that commonly rely on the labor of independent contractors, some of these concerns were addressed by carve outs. For example, a number of financial services firms argued that their independent financial advisors would be considered employees under the proposed rule's "nature and degree of control" factor, because FINRA Rule 3110 requires financial services firms to supervise the activities of their associated persons to ensure compliance with securities laws and regulations.[11] The DOL responded by providing a carve out: if supervision amounts only to ensuring compliance with a specific law or regulation, such action will not weigh toward employee classification.[12] Other industries, such as long-haul trucking, did not receive similar carve-outs and fear that enforcement of the Final Rule may further exacerbate driver shortages, as trucking can be significantly more profitable for owner-operators.[13]

While some commentators have taken the position that the Final Rule is simply a codification of the common-law test, such that it will likely not have a substantial impact on businesses who misclassify their employees, those commentators must not have felt the sting of a DOL audit. Now that the DOL has a nationwide framework for determining proper classification, it will not hesitate to apply it on a nationwide scale, demand extensive documentation related to independent-contractor classification in every overtime or minimum wage audit. Thus, those businesses that hire a significant number of independent contractors should check every position against the Final Rule and evaluate whether the company is comfortable taking on the risk of misclassification, given the substantial costs associated with non-compliance.

**The FTC Non-Compete Rule and Protecting Company Investments**

In January 2023, the Federal Trade Commission (FTC) issued a Notice of Proposed Rulemaking (NOPR) that, if adopted, would ban non-compete provisions in the vast majority of employment agreements. The FTC is expected to vote to adopt the Non-Compete Rule in April 2024.[14] The Rule would declare it an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker, maintain with a worker a non-compete clause, or represent to a worker that the worker is subject to a non-compete clause where the employer has no good-faith basis to believe that the worker is subject to an enforceable non-compete clause.[15]

Within the non-compete clause rulemaking, "worker" is defined broadly as "a natural person who works, whether unpaid or paid, for an employer."[16] The term includes

8 See Final Rule, available at: https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act.

9 29 C.F.R. 795 et seq.

10 89 F.R. 1638, 1639–40.

11 See FINRA Rule 3110 (Supervision), available at https://www.finra.org/rules-guidance/key-topics/supervision#:~:text=FINRA%20Rule%203110%20(Supervision),and%20regulations%20and%20FINRA%20rules.

12 See 29 CFR § 795.110(b)(4).

13 See TruckSafe, Shifting Sands of Independence: Breaking Down the DOL's New Independent Contractor Rule, last accessed on April 5, 2024, available at https://www.trucksafe.com/post/shifting-sands-of-independence-breaking-down-the-dol-s-new-independent-contractor-rule

14 See Bloomberg Law, FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses, last accessed April 5, 2024, available at: https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses

15 See 88 F.R. 3482, 3535.

16 See Proposed Rule, Section 910.1 (Definitions), at https://www.ftc.gov/legal-library/

interns, unpaid workers, and independent contractors, as well as traditional employees.[17] But some employing entities would presumably be exempt because the proposed rule would be issued pursuant to the FTC Act.[18] Pursuant to the FTC Act, the FTC's jurisdiction does not extend to banks, savings and loan institutions, common carriers, nonprofits and certain other entities.[19]

Controversially, the Rule as proposed would not only proscribe future non-competes but retroactively eliminate non-competes already in place and require employers to notify subject employees that such provisions are rescinded.[20] Such notice would have to be a written, individualized communication.

Many comments to the Rule proposed alternatives, such as a nationwide ban on non-competes for employees below a compensation threshold.[21] Whatever rule is ultimately published is likely to be challenged immediately in court as exceeding the FTC's rulemaking authority. Should the rule go into effect, employers who employ noncompete clauses must consult counsel concerning the notice requirement, revisions to pre-existing employment agreements, and the Rule's potential effects on their business and recruiting efforts.

**Conclusion**

The current landscape of U.S. employment law is shaped by a complex regulatory framework that presents challenges for employers. Navigating this evolving regulatory environment requires a proactive approach to compliance and risk management, as well as the willingness to modify pre-existing pay structures, classifications, and employment agreements. By staying informed about these evolving regulations, employers can adapt to changing circumstances and be better placed to avoid costly litigation.

browse/federal-register-notices/non-compete-clause-rulemaking

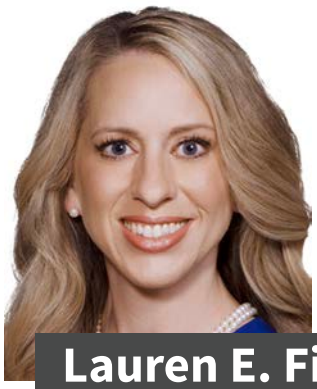
17 Id.

18 The NOPR cites as its source of authority 15 U.S.C. §§ 45, 46.

19 15 U.S. C. § 45(a)(2).

20 88 F.R. 3482, 3513.

21 See SHRM, Will the FTC Finalize a Ban on Noncompetes?, last accessed April 5, 2024, available at https://www.shrm.org/topics-tools/employment-law-compliance/will-ftc-ban-noncompetes



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Lauren Fisher White chairs the firm's Labor and Employment practice group and is a partner in its Litigation group. She counsels company owners, human resource executives, and boards of directors on complex employment matters, ranging from executive onboarding and departures to contested terminations and resulting litigation.

Ms. Fisher White serves as a trusted advisor to non-profit, government, and for-profit entities, from startups to publicly traded companies. Her skill in navigating difficult personnel situations with clients, coupled with her thorough understanding of the legal framework underlying such matters, makes her an invaluable resource for the firm's many clients that regularly consult with her. For example, Ms. Fisher White regularly counsels clients on the viability of independent contractor designations or risks associated with disciplinary actions and equips them with language tailored to minimize risk while achieving the desired business result.

Ms. Fisher White brings her extensive employment knowledge to her litigation practice, where she represents clients in state and federal courts. She also regularly engages with members of the firm's corporate group, managing the employment side of business mergers or divestitures, and serves in a consulting capacity with companies seeking to modify their business structure to maintain compliance with the Fair Labor Standards Act or other employment laws. She assists in the investigation of and response to claims of harassment, discrimination and retaliation, and revises employee handbooks to account for updates to Virginia and federal law. Ms. Fisher White is an engaging speaker who provides regular employment law training to managers and supervisors, equipping them with the knowledge necessary to identify and report claims and aiding her clients' defense against future litigation.

**Practice Areas**

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

**Representative Matters**

- Advised employers on complex issues such as harassment and discrimination claims, leave under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act(FMLA), worker misclassification, and pay equity.
- Counseled clients on the enforceability of restrictive covenants, such as non-competition, non-solicitation, confidentiality, and trade secret clauses, and represented clients in negotiation and litigation involving such covenants.
- Guided employers through COVID-related regulations, including vaccine mandates, exemption requests, and Virginia Department of Labor and Industry audits and whistleblower complaints.
- Provided strategic guidance to clients regarding key employee issues, such as workforce reorganizations and the development of wellness and diversity, equity, and inclusions programs.

**Recognitions**

- Legal Elite (Virginia Business) - Labor/Employment, 2023

**Education**

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

# The New Normal for Juries? Safetyism, Emotional Thinking, and High Damages

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**A Strange New Litigation World: Safetyism, Plaintiff Verdicts, and High Damages**
*By Jill Leibold, PhD, and Nick Polavin, PhD (IMS Legal Strategies)*

Recent news headlines have seen no shortage of shockingly large jury damage awards in personal injury, transportation, and toxic tort cases. Such verdicts make it riskier for corporate defendants to take such cases to trial and leave many defense attorneys and corporate counsel alike wondering what changed—and if the trend will ever end.

In an attempt to find defense solutions, Drs. Jill Leibold and Nick Polavin published introductions to the theory of "safetyism" and how it has changed the landscape for corporate defendants, as jurors' tolerance for risk has reached new lows and their demands for safety have reached new highs (Leibold, J., Polavin, N., Burrichter, C., Kim, M., & Ozurovich, A. Summer, 2023. "The New Normal: Safety-ism and Conspiracies Are Affecting Juries," In-House Defense Quarterly, p. 17-21; Leibold & Polavin, "The Rise of Safety-ism Has Entered the Courtroom;" Law360, May 3, 2023).

While productive, the authors' initial research into jurors' safety assessments hinted at the possibility of even more psychological variables that make up "safetyism." These questions prompted further research into factors that could influence verdicts and damages. The goal of this article is to establish the basics of "safetyism," present these newest findings and put forth a series of defense strategies that seek to address the slew of explosive jury verdicts.

**The New Era of Safetyism**
Although it may appear that jurors' outsized safety expectations are something sudden and new, they have likely been creeping into the nation's psyche for years. Decades ago, the 24- hour news cycle hit cable TV after the Three-Mile-Island crisis, milk cartons highlighted missing children at every breakfast table, and media attention on crime in large cities kept communities on high alert. Far from the latchkey kids of the '80s, concerned parents began to raise younger generations with extra protections from—and fearful warnings about—the world's dangers.

"Safetyism," coined by authors Greg Lukianoff and Jonathan Haidt, is the culmination of this societal progression. In The Coddling of the American Mind, Lukianoff and Haidt define safetyism as being characteristic of three fallacies of thinking:

- Desiring a total avoidance of risk, harm, or verbal/social discomfort;
- Always trusting feelings first, such that emotional reasoning is more legitimate than logic or science; and
- Perceiving the world as a battle between good and evil, such that resulting tribalism allows for little to no good-faith discourse or compromise.

In that its adherents carry these mindsets into the courtroom, safetyism forms a helpful lens to categorize the changes we have witnessed in the jury pool. Each of these fallacies can be applied to the field of litigation when considering how jurors will view the evidence and arguments and arrive at their final decisions. And while the third fallacy lends itself to hasty party judgments and more combative, stubborn deliberations, this article focuses on how the first two fallacies inform jurors' views of the evidence.

**Risk Aversion**
It appears that people's tolerance for risk has plummeted, while expectations for safety have skyrocketed. Whether it involves a product, driving, a workplace, or premises, the authors' prior research shows that many people now expect 100% safety 100% of the time. Jurors follow the same path— expecting little to no risk in their environment, products, or activities—and look to corporations and government agencies to keep them safe. Our initial data backed up these fears.

**Intuition Over Facts**
"Hey, that's not fair!" "Wow, that can't be safe!" Everyone

has probably made sudden exclamations like these. Are they based on reasoned, fact-based thought? Not often.

People's first reactions tend to be based on emotion, perhaps with a dash of past experience, followed by a process in which they rationalize how those feelings are correct (Murphy, Sheila, 2001. Feeling without thinking: Affective primacy and the nonconscious processing of emotion. Unraveling the complexities of social life: A festschrift in honor of Robert B. Zajonc, p.39-53).

Emotions help people more efficiently navigate the world and the people around them, but the justice system is based on evidence, law, and critical analysis. The "safety-ist" problem occurs when jurors deem it acceptable to rely on their gut feelings to serve in place of logic and fact.

Explicit jury instructions restricting emotion-based decisions only go so far. For the growing number of safety-ists, "fairness" and "risk" are feelings that win the battle over reasoned thought. Factual truth makes way for "my truth," which is really just feelings or intuition. Even if the defense has more scientifically sound evidence, safety-ist jurors are thus able to discount it and favor their feelings of sympathy for the plaintiff, their corporate distrust, and their fear that they or someone they know may possibly be harmed.

**New Research**

The authors' preliminary research both confirmed the prevalence of safetyism and uncovered a number of juror characteristics associated with such beliefs. Through questions about product safety, manufacturer responsibility, and more, respondents were classified along a "safetyism" scale. Those measuring high in safetyism tended to be liberal, have higher education, reside in urban areas, and favor the internet and social media as news sources.

Given the link between those characteristics and common plaintiff juror profiles, much could be hypothesized about the effects of safetyism on verdicts. But to flesh out our understanding of the safety-ist and test the direct relationship between safetyism and verdict outcome, a new online survey evaluated 220 additional jury-qualified respondents. This time around, participants were analyzed along multiple scales—not only by the initial safetyism scale, but more granularly by risk avoidance and reliance on intuition (the first two safety-ist thought fallacies). Questions identified respondents' placement on these scales after collecting their reactions to a fictional lawsuit. The survey also assessed participants' trust in various government agencies (e.g., EPA, FDA, OSHA) to keep people safe, as well as some personal and demographic factors.

The fictional scenario described the following case issues and claims about an herbicide product, "Canophyde," produced by chemical manufacturer "Chemegent."

- Canophyde is approved by the EPA (but banned in the EU) for use by approved applicators on commercial farms.
- The plaintiff has lived near commercial farms, where Canophyde had been applied, for the past 35 years.
- The plaintiff claims that scientific evidence shows Canophyde is carcinogenic and that he now has cancer as a result of exposure to the chemical through drifting spray.
- Chemegent denies that Canophyde caused the plaintiff's cancer, arguing that years of studies prove it is not a carcinogen and that the product was properly labeled.
- Chemegent further argues that other herbicidal agents produced by other manufacturers have been found to cause cancer and that other nearby farms could have used those agents.

Participants responded with a verdict, as well as an indication of how strongly they desired to award damages and how angry they felt toward Chemegent. These responses were submitted to linear regression analyses to measure safetyism, intuitive thinking, risk aversion, attitudes toward government agencies, political leanings, and several demographics as potential predictors.

**Verdict Predictors**

Ultimately, 45% of respondents voted for the plaintiff, 44% favored Chemegent, and 10% remained neutral. Results of the regression model revealed that higher safetyism, greater reliance on intuition, greater risk aversion, and younger age significantly predicted a pro- plaintiff verdict. Pro-defense jurors, in contrast, were low on safetyism, utilized greater fact- based thinking, accepted more risk, and were older than their pro-plaintiff counterparts.

**Monetary Compensation Predictors**

Among our respondents, 20% reported an extreme desire for Chemegent to compensate the plaintiff, 38% had a moderate desire, 22% slightly desired to compensate, and 21% reported no desire. Regression analysis revealed once again that higher safetyism, greater reliance on intuition, greater risk aversion, and younger age predicted greater desire to award the plaintiff damages.

Low to no desire to compensate the plaintiff significantly related to low safetyism, more fact- based thinking, greater risk acceptance, and older ages.

**Anger Toward Chemegent**

Younger age and greater reliance on intuition were the strongest predictors of anger toward the defendant. The intuition finding is unsurprising, given that anger is an emotion and intuitive reasoning is rooted in emotions. However, in eliciting anger, respondents' level of intuitive thinking could even outweigh their otherwise low safetyism. That is, participants with low safety-sm and low intuition experienced little to no anger, as one might expect; but, low safetyism respondents with high intuitive thinking experienced anger toward Chemegent that was no different than high safetyism respondents. This finding suggests that low safetyism is good for defendants only to the extent that those jurors do not engage in intuitive reasoning; if they do, they are more likely to experience anger that can drive a high-damages verdict.

**Desire to Punish Chemegent**

Respondents were asked if they desired to award punitive damages to punish the defendant and deter similar behaviors. Among those who found for the plaintiff, 71% desired to award punitive damages. Interestingly, only greater risk aversion and younger age significantly predicted a stronger desire to punish Chemegent. Respondents who were older and more accepting of risk had little to no desire to punish the defendant.

**Additional Findings**

Additional significant findings offer insight into potential jurors' decision-making:

- Plaintiff support significantly correlated to less trust in government agencies.
- Plaintiff support significantly correlated to greater liberalism on financial issues.
- Pro-plaintiff respondents believed jury damage awards for diseases such as cancer deserve more money than other types of cases.
- The greater the desire to award punitive damages against Chemegent, the less trust in government agencies.
- Safetyism significantly correlated to many political opinions:
    1. More positive views of Democratic Senators, President Biden, and Vice President Harris correlated to greater safetyism.
    2. More positive views of Republican Senators, former President Trump, or former Vice President Pence correlated to lower safetyism.
- Regarding verdicts, the only significant political rating was that more negative views of Donald Trump correlated with plaintiff support.

**Strategies for the New Future**

While there is no absolute answer to the safetyism dilemma, psychological science can point to strategies for alleviating some of its harmful effects. For example, in his book, The Righteous Mind, Jonathan Haidt portrays six elements of humans' moral reasoning and explains how reaching out to decision-makers in as many of those ways as possible tends to gain more backing. The six reasoning markers are: compassion, anger, team cohesion, fear, avoidance of contaminants, and liberty. Plaintiffs have a certain advantage in selling their cases by appealing emotionally to more of these categories. Plaintiffs can generate compassion for injuries, anger over wrongs, pit sympathizers against reasoners, incite fear, and raise disgust over contaminants or injury. Defense teams therefore will need to supply counter-offensives on as many of these levels as possible, through as many avenues as possible—from voir dire to a strong thematic case story to motions with the courts.

**Short-Term Strategies**

Voir dire will be key to understanding jurors' safetyism, risk aversion, and emotional decision-making habits. Many courts have restricted parties' voir dire time, so asking for more voir dire time will be important, as well as cutting to the chase with questions. Pre-pandemic, there was often more leeway for building rapport with the jury panel, but extreme time crunches now often mean saying farewell to the basic pleasantries. The forefront should belong to questions that home in on safetyism beliefs, instinctual or emotional decision-making, and risk aversion. With so little time to waste, attorneys might consider conducting a voir dire practice session with mock jurors to practice sharpening questions and quickly forming cause challenges.

When it comes time to present the case at trial, themes will be more critical than ever in jurors' understanding and acceptance of a defendant's case. Jurors think in stories, so telling them a story with highlighted themes—repeated often and presented on slide headers—builds rapport, comprehension, and retention. To help defense jurors bridge the gap with stubborn plaintiff counterparts, remind jurors to hold each other accountable for the facts, evidence, and reason behind their decisions. Emotion has no place in their verdict decisions.

Some themes that could be helpful include:

- Facts Not Feelings
- Follow the Science
- Correlation Is Not Causation
- Probabilities Not Possibilities
- The Defendant Is Here for Justice, Too

**Mid-Range Strategies**

Corporate experts and company witnesses could benefit from a witness "school" that teaches them the company

story, safety story, product development story, etc. The more witnesses are able to explain the history and reasoning of any product development, the harder it will be for plaintiffs to poke holes in the defense.

Motions for individual voir dire also can be very helpful because plaintiffs' media strategies of advertising their biggest verdicts and fishing for new plaintiffs can influence jurors' view of companies' behaviors—explicitly and implicitly. Oftentimes, jurors may not be able to explain what media they have been exposed to or appreciate the impact of that exposure on their attitudes toward the defendant.

Lastly, file motions for single-plaintiff cases. As the number of plaintiffs increases, jurors begin to view the case as "Where there's smoke, there's fire." (Leibold, J. "Does Trial Length Increase Jury Damages?" https://www.expertservices.com/insight/trial-length-jury-damages). What's more, every plaintiff added to the case increases the cognitive demands for the jury, as they try to analyze that many more details. There are limits to what jurors can listen to, process, encode, and retrieve when it comes time to make a decision. When they are cognitively overwhelmed, they rely on "heuristics," or mental shortcuts. In multi-plaintiff cases, the shortest route is to decide that all the claims must be valid since they all experienced the same illness or injury.

**Long-Term Strategies**

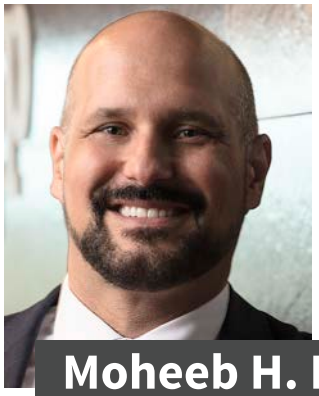
Ideally, companies identify key corporate witnesses before litigation ever occurs—witnesses who can be prepared to describe the company's safety practices and policies, as well as the history of the safety development of any products or procedures. Well-prepared, high-level company representatives must be able to deftly counter the plaintiff's claims of "profit over safety" with a "good company" story.

Multiple firms and defense teams need to be deployed for litigation across all 50 states. While there may be many working parts among the defense teams, it is critical for all involved to share strategies and themes that work. The plaintiff bar has a website to share experts, themes, and presentations. Defense firms would do well to establish their own collaborative website or working group, sharing witnesses, strategies, themes, stories, and voir dire tactics.

**Conclusion**

Defense counsel and corporations have a tough path ahead to combat jurors' safetyism, risk aversion, lack of trust in government agencies, and emotional verdict decisions.

Gen Z jurors are the most risk-averse generation yet ('Generation sensible' risk missing out on life experiences, therapists warn | Alcohol | The Guardian). However, culturally, all generations have embraced greater safetyism and risk aversion, just to different degrees. Thus, the safetyism problem is not going away soon. The sooner defense counsel and corporations can come together on strategies, the sooner they can fight back.



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Moheeb Murray represents clients in complex commercial disputes, tort defense cases, insurance coverage matters, and construction litigation. He leads BSP's insurance coverage and construction litigation practice groups.

In commercial litigation matters, his extensive experience includes complex breach of contract and breach of warranty claims, shareholder actions, and cases involving misappropriation of trade secrets and covenants not to compete. In his insurance coverage practice, Moheeb represents leading insurers in life, health, disability, ERISA, long-term care, annuity, P&C, commercial general liability, and auto-insurance no-fault matters.

He advises and represents clients from pre-litigation strategy through final verdict and on appeal. Moheeb has helped clients obtain favorable awards and outcomes at trial and in arbitrations involving claims of breach of contract, breach of warranty, construction, and design-professional malpractice. Moheeb is also a trained civil litigation mediator.

**Services**

- Business and Commercial
- Class Actions
- Construction Litigation & Counseling
- Insurance Litigation
- Product Liability
- Securities / Finance

**Honors and Awards**

- Michigan Lawyers Weekly, Go-To Lawyers Power List (2023)
- DBusiness Top Lawyers (2024)
- Michigan Lawyers Weekly, Go-To Lawyers for Business Law (2023)
- Oakland County Bar Association Committee of the Year Award (2023)
- Best Lawyers® Lawyer of the Year, Insurance Law (Troy, MI: 2023)
- DRI Lifetime Community Service Award (2019)
- Inclusion in The Best Lawyers in America©: Insurance Law (2018 – present)
- Oakland County Bar Association Distinguished Service Award (2017)
- Oakland County Executive's Elite 40 Under 40 (2015)
- Michigan Super Lawyers, Rising Star (2011-2015)
- Michigan Super Lawyers (2018 – Present)
- Michigan Lawyers Weekly, Leader in the Law (2014)
- American Arab Professional of the Year Award in the Legal Category (2013)
- Martindale Hubbel® AV Peer Review Rating

**Education**

- University of Michigan Law School, J.D., cum laude, 2001
- University of Michigan Ross School of Business, B.B.A., with high distinction, 1997 - James B. Angell Scholar; William J. Branstrom Freshman Prize for academic excellence; Civil Litigation Mediation Training
- Harvard Professional Development Programs, Harvard Division of Continuing Education, Participant, Strategic Leadership, September 28-29, 2016

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