Top Gun Litigation: Courtroom Mavericks

A Trial Network Litigation Symposium

October 24-27, 2024 **The Grand Del Mar**

THE TRIAL Network

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The Waiter Pivot: Redefining Your Role in the Courtroom

Jerry Glas
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The Waiter Pivot: Redefining Your Role in The Courtroom
John Jerry Glas

The Golden Age of Lawyers has ended.

To be honest, it ended a long time ago, but nobody said anything. Nobody wanted to say anything, certainly not the lawyers lecturing at conferences and bragging at cocktail parties. Hey, don't laugh. Many of them are still in denial, pretending the year is 1965 and trying cases the same way lawyers did when The Sound of Music was in movie theaters. It's difficult to watch (the lawyers, not the movie), but understandable. After all, it was a glorious time to practice law.

Back then, lawyers had gravitas. They worked in posh downtown law offices. They had magnificent private libraries, not personal passwords. They carried leather briefcases, not cardboard boxes. They wore three-piece suits and hats, even when they slept. And they earned their reputations trying cases in smoky courtrooms, not settling cases in conference rooms.

For generations, these venerable lawyers relied on clients to spread word of their kindness and skill. They did not have marketing departments. They did not spend millions on advertising. They did not define themselves—or demean their profession—with irreverent commercials, slogans, and jingles. Thanks to them, there was a time when jurors pictured lawyers like Atticus Finch (Gregory Peck) and Henry Drummond (Spencer Tracy) roaming the courtrooms of America, seeking truth and demanding justice.

Back then, jurors were also different. Jury duty was a civic responsibility, and jury selection was an honor. Jurors dressed for the occasion. They entered the courtroom solemnly and filed into the pews like they were in church. They sat quietly. They waited patiently. They listened.

It was a simpler time. Jurors knew less about science and medicine. When in pain, jurors did not drive to the public library, research their symptoms, and self-diagnose. Nor did they drive to the nearest college campus, find a bulletin board, and hope somebody "posted" something about their symptoms or their illness. Instead, they made an appointment to see a medical doctor, at that doctor's office and during regular business hours. Jurors wanted an expert opinion because they trusted experts and respected expertise. The mere sight of a lab coat gave them goose bumps.

Jurors were also less experienced. Not less intelligent. Not less capable. Just less familiar with trial practice and procedure. For many, it was their first time in a courtroom. For some, it was their first time hearing words like "hearsay" and "preponderance." They needed the judge to explain the law, and they wanted the attorneys to explain the evidence. Best of all, they had no expectation about the quality of the evidence or the lawyering. Such beautifully blank slates.

Back then, it was easier to drown the jury in a sea of words. Jurors were forced to process hours of testimony without the benefit of visual aids or air conditioning. And, once drowned, jurors had the common decency to stay drowned. Opposing counsel could not rescue them with fancy computer animations, and they could not save themselves by going home and researching online. When in doubt, jurors defaulted to "voting" for the lawyer they trusted the most instead of weighing the evidence admitted during the trial. At least, that is what lawyers told their clients behind closed doors. "Jurors love me," they bragged, smiling that smile.

Right or wrong, jury trials were perceived as popularity contests, and that perception influenced every aspect of trial strategy. Voir dire was for getting jurors to love you. Opening statement was for telling jurors what you thought of the evidence and for avoiding promises that would get you in trouble. Expert witnesses were called to establish your expertise and to prove you were "right all along." Cross-examination was for demonstrating your skill, establishing your superiority, springing your surprises, and proving your case. Closing argument was

for telling jurors how you wanted them to vote. The goal of every trial was to persuade the jurors to trust you and to value your opinion. Consequently, how you looked presenting the evidence was as important as the evidence presented, and your credibility was as important as your expert's. That was a special time for trial lawyers. But that time has passed.

The Golden Age of Lawyers did not end because of a single event or innovation. The whole world inside and outside the courtroom changed. Everyone became a lawyer, even that kid who failed algebra. Expert witnesses became professional witnesses. Trials became mediations. Inexperienced lawyers became judges, and judges became less tolerant of inexperienced lawyers.

Meanwhile, the world discovered computers, cable television, the Internet, social media, Google, Wikipedia, iPhones, Netflix, Skype, and Zoom. Information was no longer hoarded in private and public libraries. It was everywhere and in everyone's hands. And that is when the great shift happened. Almost overnight, the world decided to eliminate the middleman. Grandchildren stopped calling grandparents with questions about World War II. Dinner guests stopped admitting they had no idea who Pericles was. There was a magical rectangle in their hands that had all the answers and would never judge them.

It was intoxicating. The world already knew that knowledge is power, and that absolute power corrupts absolutely. What the world discovered was that access to knowledge is also power. And that unlimited access to information limits our need for the well-informed. Finally, the world could eliminate people from the process of learning. Why call a human being to make reservations? Why waste time exchanging pleasantries? Why trust someone else to do it right? Why feel compelled to express gratitude at the end of an unnecessary conversation? There's an app for that.

Lawyers were among the last to get the memo. We still saw ourselves as the Great Communicators, and we still clung to the belief that jurors needed and wanted us in the courtroom. In reality, jurors were increasingly focused on the information and increasingly annoyed by the way lawyers were spinning and spoon-feeding it to them. By the time COVID-19 reared its ugly head in the year 2020 AD, virtual mock trials had already relegated lawyers to one small box in the upper corner of the juror's screen. Lawyers had literally been minimized.

Today, jurors are easily frustrated with lawyers and the legal system. They dislike bench conferences (aka "side bars") or anything else that delays the trial. They detest objections because they want to be trusted with all the evidence. They hate courtroom theatrics and repetitive questions. They are convinced that they could ask fewer and better questions. Given the choice, some jurors would send the lawyers home and have the bailiff stack the evidence in a corner of the deliberation room. Just pile it up and get out of their way.

Jurors have become experts in everything and suspicious of everyone. They do not trust lawyers or their hand-picked experts. They will not be manipulated, and they do not want to be "told" anything. If you have a great case, keep your opinion to yourself. They have seen enough courtroom dramas to know that the obvious answer is never correct, and the "slam dunk" trial always ends with a surprise. Tell jurors something is "clear," and they will assume it is not. Tell them the case is a "no brainer," and they will resolve to find what you missed. Tell them to award a specific number, and they will avoid that number like the bubonic plague. They are not your puppets. They will reach their own decisions, thank you very much.

Times have changed, and trial lawyers must change with the times. We cannot continue trying cases like our truly talented and beloved mentors and ancestors—who are hereinafter fondly remembered, unfairly stereotyped, and respectfully referred to as "Gray Hairs." We are practicing law in a very different time, and we need to take a very different approach to trial advocacy.

Jurors do not want lawyers. They want waiters. They do not want arguments and objections. They want evidence and deference. They will dislike the first lawyer to engage in obvious "lawyering," and they will appreciate the first waiter to bring them a useful timeline. Instead of denying that reality, let's embrace it. Like good waiters, let's bring them what they want and point out something about the soup they might have missed.

Let's change our approach. Let's dedicate ourselves to learning the art of good service. Instead of being lawyering lawyers, let's become wonderful waiters. It's not about us anymore. "Hello, I'll be one of your waiters for the trial. May I start you off with a helpful graphic?"

Let's resolve to be patient with those Gray Hairs who will scream and holler that the legal profession should never be compared to the service industry. They mean well. Gray Hairs just don't understand how a good waiter can influence every dining decision and how a bad waiter can ruin every restaurant review. By shedding our lawyerly skins and donning the trappings of humble waiters, we can maximize our influence with the jury and better serve our clients. We can be more persuasive and more effective. Hasn't that always been our goal? Isn't that our true calling?

This sea change in our profession is not a death sentence.

It is an opportunity for the open-minded. Together, let's write a new playbook that ignores conventional wisdom. Instead of assuming trials are popularity contests, let's assume jurors will base their verdict on the law and the evidence. Yes, I know how crazy that will sound to some. Let's do it anyway.

Jurors know they are the most important people in the courtroom, and they want better service. Let's give it to them. Let's do more than publicly endorse the waiter metaphor. Let's actually change the way we try cases.
For generations, lawyers have referred to the "art of trial advocacy." The declaration that there exists a "new science of trial advocacy" challenges that fundamental assumption. It suggests we have learned something new about jurors, their perceptions, and their preferences. It implies that old strategies and techniques are proving less reliable. It promises that a different approach can be effective. It openly invites lawyers to consider the possibility that their advocacy can be more scientific. It offers hope, and it heralds change.

That change is already happening. Other trial attorneys have already changed their approach to trial advocacy. They are out there, refusing to carpet bomb the court with omnibus motions in limine. Resisting the urge to treat exhibit books like dumpsters. Disclosing the good, the bad, and the ugly during opening statement. Winning their first two objections. Begging co-counsel to sit down after listing the documents an opposing expert did not read. Apologizing after their own expert politely corrects them in front of the jury and listening intently as that expert explains the "real question." Showing the jury how the evidence stacks up on both sides, but never telling the jury what their verdict should be. Getting their client's permission to warn jurors about the bias, prejudice, and emotion they will likely encounter during deliberation.

Many of these strategies have been percolating for years. Most attorneys will be reminded of a trial where they observed or personally tried at least one of the specific techniques discussed in this book. And as radical as certain trial strategies may seem to certain Gray Hairs, some readers will already consider those strategies old news. That's the thing about change. When change is real, it happens everywhere and is (eventually) recognized by everyone.

To be clear, there is more than one way to try and win a case. Yes, there may be times when justice depends on a prosecutor's unleashing his fierce anger and calling down the Wrath of God. Yes, an innocent man's life may someday depend on defense counsel's ability to malign law enforcement officers, inspire outrage, and sell injustice. Yes, the outcome of some civil trials may turn on whether the jury can be manipulated into sending a message to the plaintiff, or to the defendant, or to an entire industry. And, yes, trials involving beloved and hated celebrities may prove to be the exception to every trial advocacy rule. But for all those untelevised civil and criminal trials, involving ordinary people in ordinary courtrooms, we need a new playbook.

The idea of being wonderful waiters, not lawyering lawyers already appeals to our common sense. There is a reason why "kill all the lawyers" is such a popular misinterpretation of Shakespeare, and a reason why nice restaurants don't need "tip your waiter" signs. People are tired of being told what to do by lawyers, car salesmen, and other paid advocates. What they appreciate is a waiter who quietly and professionally makes their life a little easier. Who brings them everything they could possibly want and helps them make their own decision. That waiter has their respect. That waiter has their attention. That waiter has their ear.

I am not a psycho-historian like Hegel or Vico or Seldon. But I see the pendulum of public perception swinging in the wrong direction. In a handful of generations, jurors have gone from admiring lawyers, to rewarding entertaining lawyers, to distrusting lawyers, to ignoring our experts and resenting our advocacy. We can't stop that pendulum with legislation or marketing campaigns. We need to make our stand in the courtroom.

We should welcome this new era as an opportunity to change the way we practice law and the way our legal profession is perceived. Let's redefine trial advocacy and reinvent ourselves. Let's remind jurors how helpful lawyers can be during a trial. Let's impress jurors with our courtesy and professionalism. Let's send them home with a new appreciation for what we do and a better understanding of why we are needed in the courtroom. Let's find a way to win our trials and win back our jurors. One trial at a time. One juror at a time.

Times have changed, and the time has come to revisit trial advocacy. Yes, becoming good waiters is easier said than done, but we must rethink our approach and rewrite our old trial playbook. We have no choice. We must adapt or die. The Golden Age of Lawyers has ended.

The Age of Jurors has begun.


The Waiter Pivot
John Jerry Glas
Deutsch Kerrigan, LLP
New Orleans, Louisiana

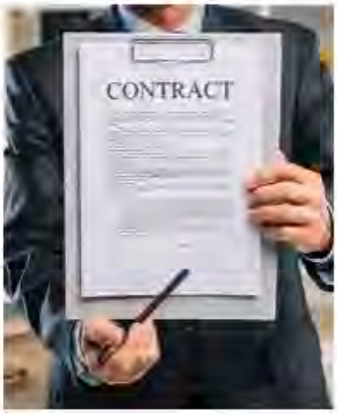
- **Pivot from answers to questions.**

We Want Smart Jurors

- Job requires a lot of reading?
- Job requires analyzing information?
- Job requires logical thinking?
- Job requires investigating complaints?
- Job requires analyzing conflicting estimates?
- Job requires mathematical precision?
- Enjoy Wordle, Sudoku, or Crosswords?

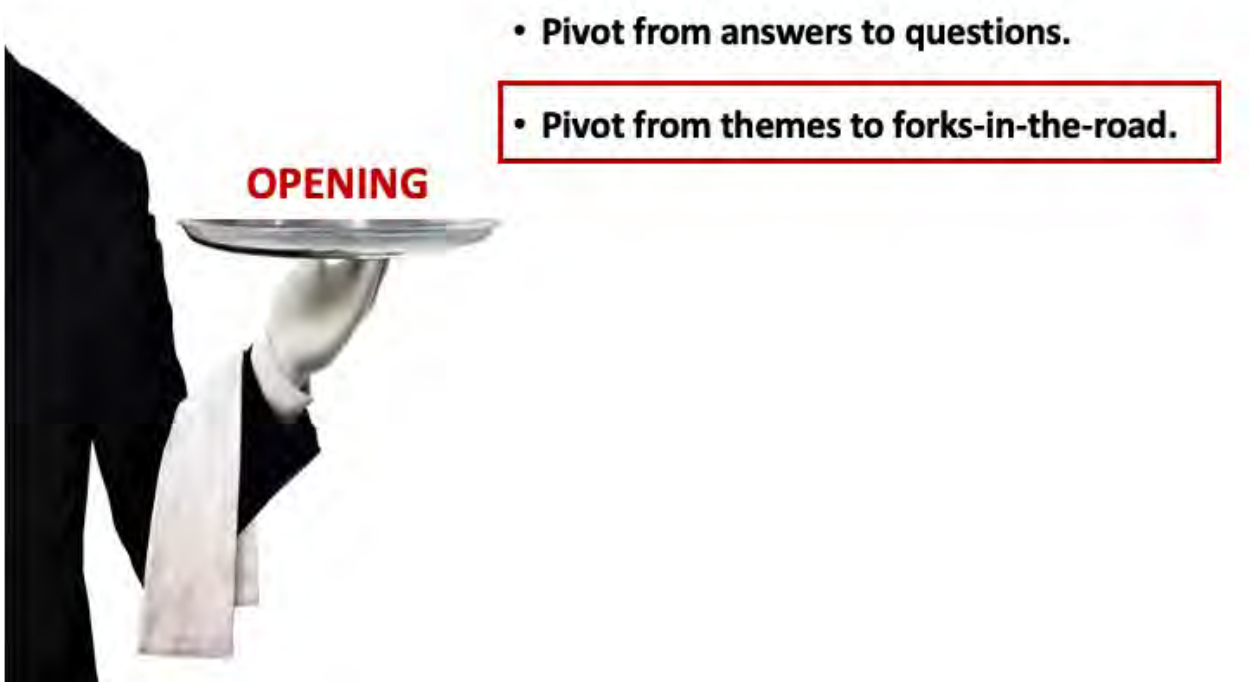
We Want Detectives

- Willing to "roll up sleeves"?
- Willing to "wade through" thousands of pages of records?
- Will demand to see the evidence supporting expert opinions?
- Won't automatically believe whatever the plaintiff/defendant says?
- Will look for inconsistencies and contradictions?
- Religiously watch television shows about Emergency Rooms?



We Want Jurors Who CARE about Our Issue!

- Think written contracts should be enforced?
- Had to painstakingly write a contract?
- Experienced what it is like to have someone break a written contract with you?
- Had to research how to enforce a written contract?
- Believe people who break written contracts should be held accountable?
- Think our community would be better off without written contracts?


OPENING
• Pivot from answers to questions.
• Pivot from themes to forks-in-the-road.


Plaintiff
Defense

This case, though, the reason why we're trying this case is not because of the femur, the knee or the neck. It's their claim that in addition to all of these injuries, the spinal injury, the neck, the knee that Mr. Stewart also sustained permanent brain damage. Now in

This case, though, the reason why we're trying this case is not because of the femur, the knee or the neck. It's their claim that in addition to all of these injuries, the spinal injury, the neck, the knee that Mr. Stewart also sustained permanent brain damage. Now in

	Plaintiff	Defense
Past Medical Expenses:	$789,647	$789,647
Past Earnings:	$362,928	$362,928
Future Medical Expenses:	$904,195	$904,195
Future Earnings:		
General Damages:		
TOTAL:		

	Plaintiff	Defense
Past Medical Expenses:	$789,647	$789,647
Past Earnings:	$362,928	$362,928
Future Medical Expenses:	$904,195	$904,195
Future Earnings:	TBI	NO TBI
General Damages:		
TOTAL:		

PURPOSE

- **Pivot from answers to questions.**
- **Pivot from themes to forks-in-the-road.**
- **Pivot from attacking opposing counsel to protecting the record.**

HEAD

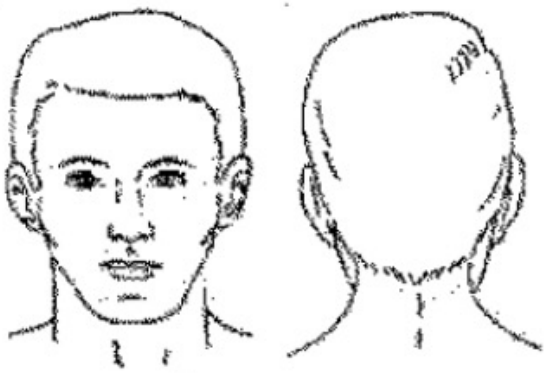
~~non-tender~~

~~no swelling~~

~~no obvious injury~~

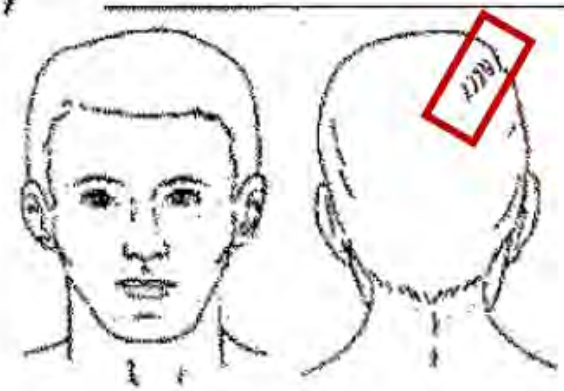
___see diagram _____

___raccoon eyes / Battle's sign _____



HEAD
__non-tender
__no swelling
__no obvious injury

__see diagram
__raccoon eyes / Battle's sign



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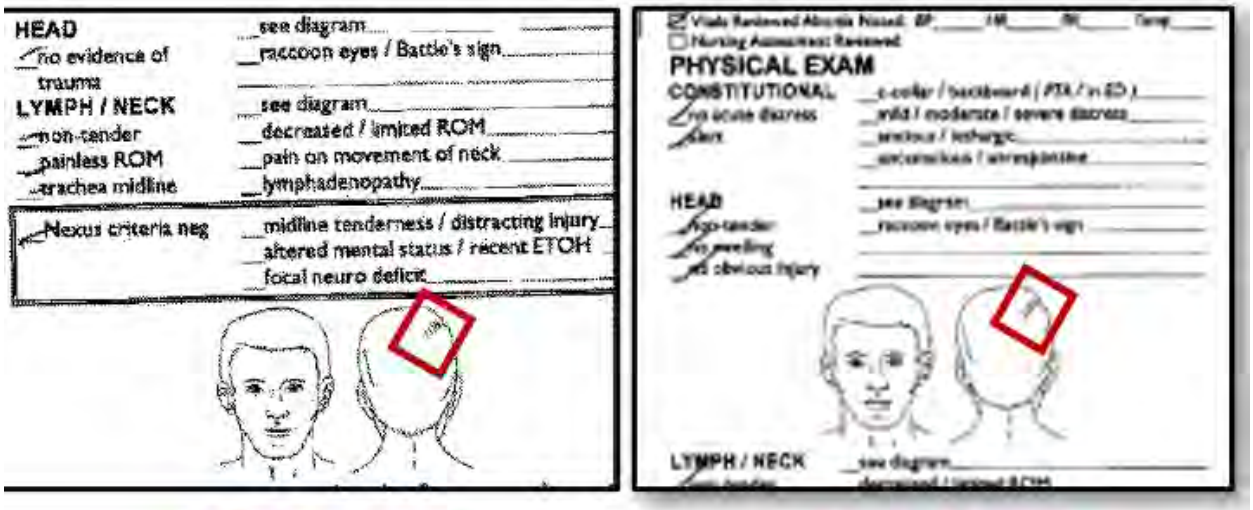


BEFORE ACCIDENT

AFTER ACCIDENT

- Pivot from answers to questions.
- Pivot from themes to forks-in-the-road.
- Pivot from attacking opposing counsel to protecting the record.
- Pivot from testimony to 1006 summaries.

Rule 1006. Summaries to Prove Content

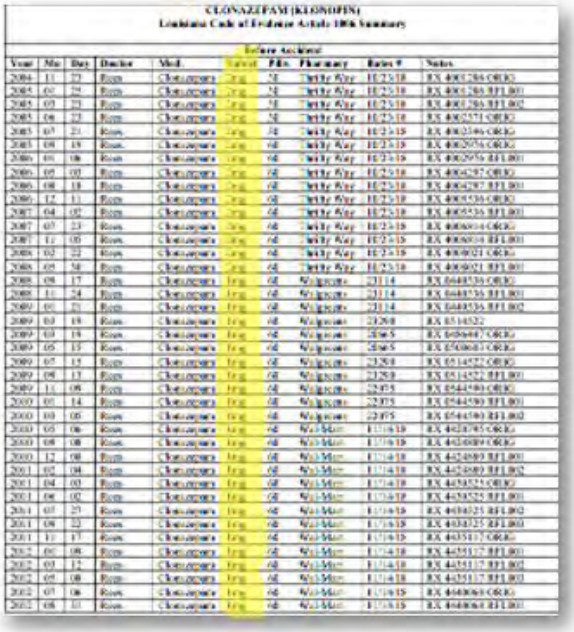
The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

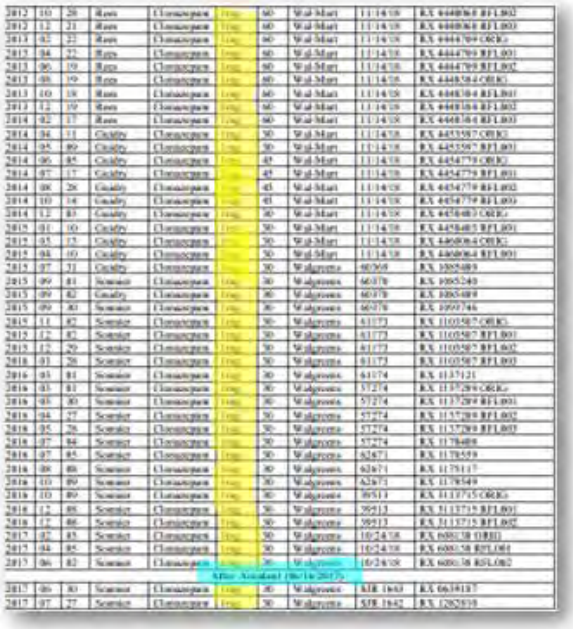
Notes

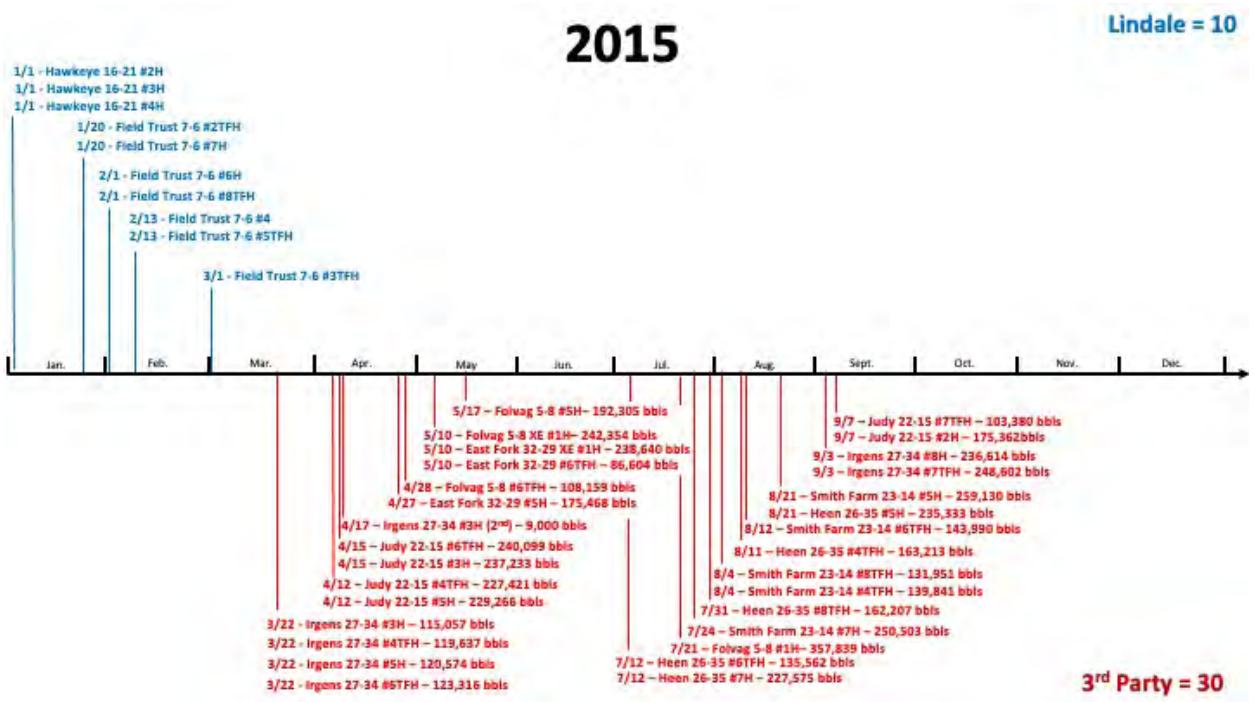
(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore §1230.







- **Pivot from answers to questions.**
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- **Pivot from attacking opposing counsel to protecting the record.**
- **Pivot from testimony to 1006 summaries.**
- **Pivot from punching to pinning on cx.**

"Q. As soon as the person crumbles and falls to the ground, tell me why they crumble and fall to the ground.

A. Because the neuromuscular, uh, connections, uh, cause the muscles to be very flaccid . . "[79]

* * *

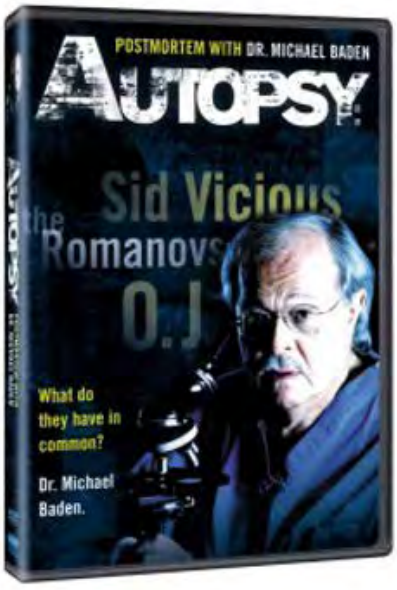
A. The – The- It causes, uh, the neuron – the nerves to the muscle to cause flaccidity FLA. That is the – the muscles, uh, become flaccid rather than – than, uh, active and they – the person is suppose to collapse and then be handcuffed.

Q. Okay. So I want to make sure I wrote this down. Flaccid means not active. Flaccid means –

A. Well, soft. That is he can't –

Q. Soft?

A. – can't keep him – can't, uh, maintain an upright position."[80]



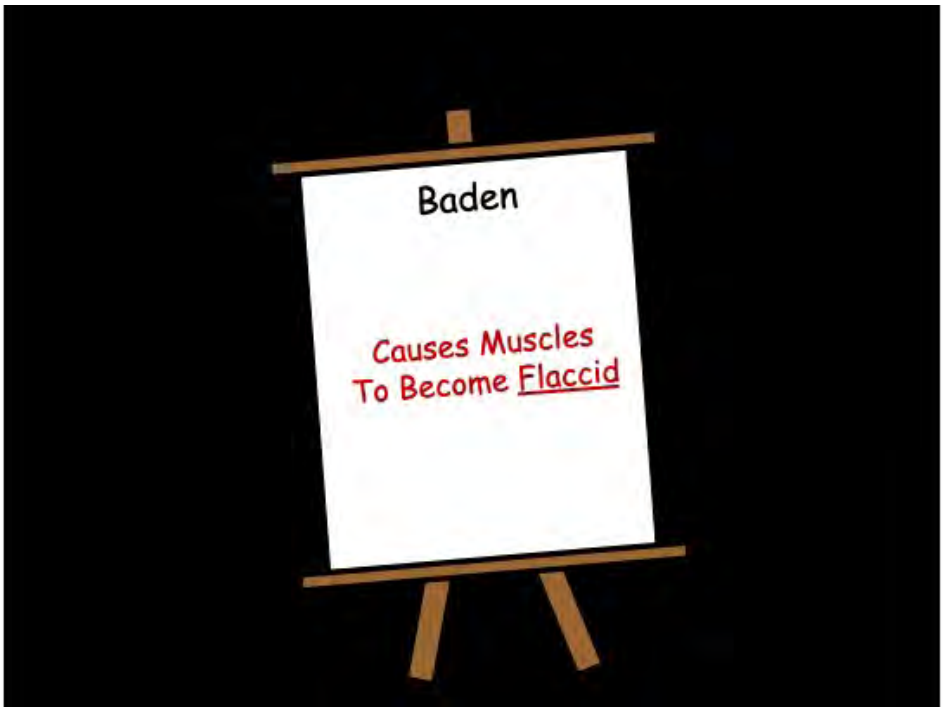


Table 2:

FOUR OPINIONS

		YES	NO
1.	Pipeline Agreement is limited to water delivered "through the pipeline."	✓	
2.	Wells and well pads are NOT included in the definition of Pipeline.	✓	
3.	On day Lindale finished investing $1.2 million & brought Brigham pipeline "online," Brigham was not obligated to purchase a drop of water from Lindale.	✓	
4.	Brigham's obligations are "almost nonexistent" under the contract.	✓	

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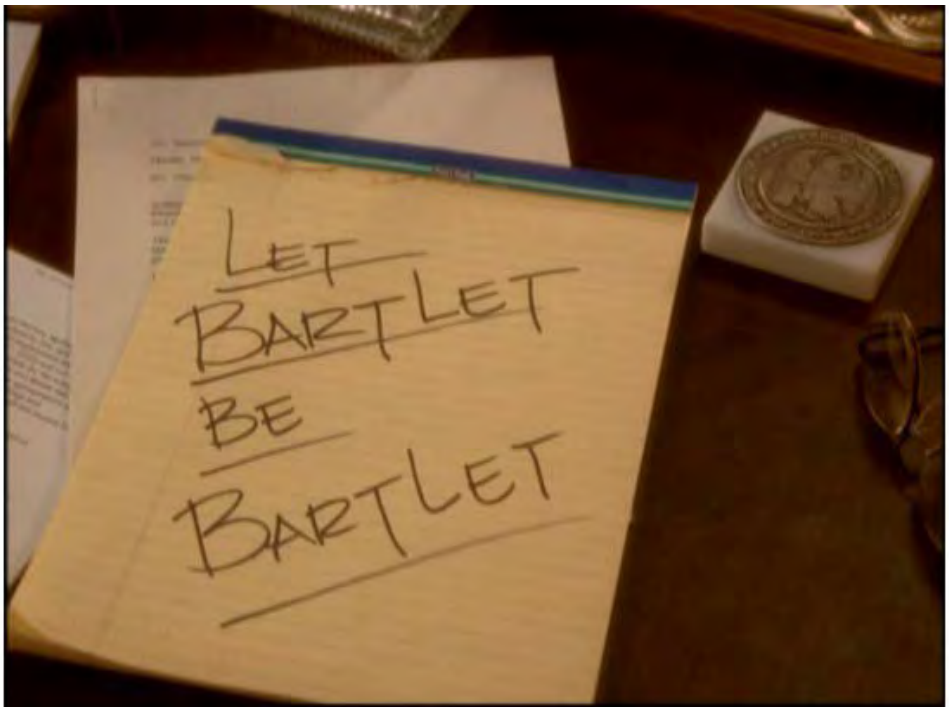
- Pivot from bobbleheads to mavericks.
- Pivot from telling to reviewing.



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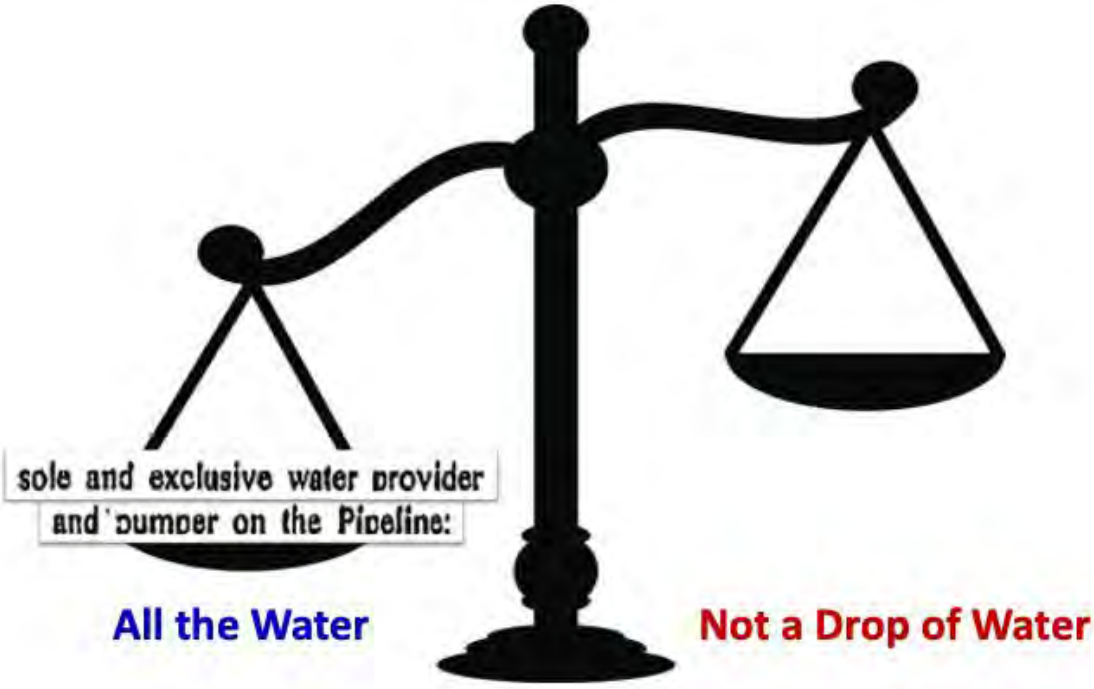
All the Water
Not a Drop of Water


sole and exclusive water provider
and pumper on the Pipeline:
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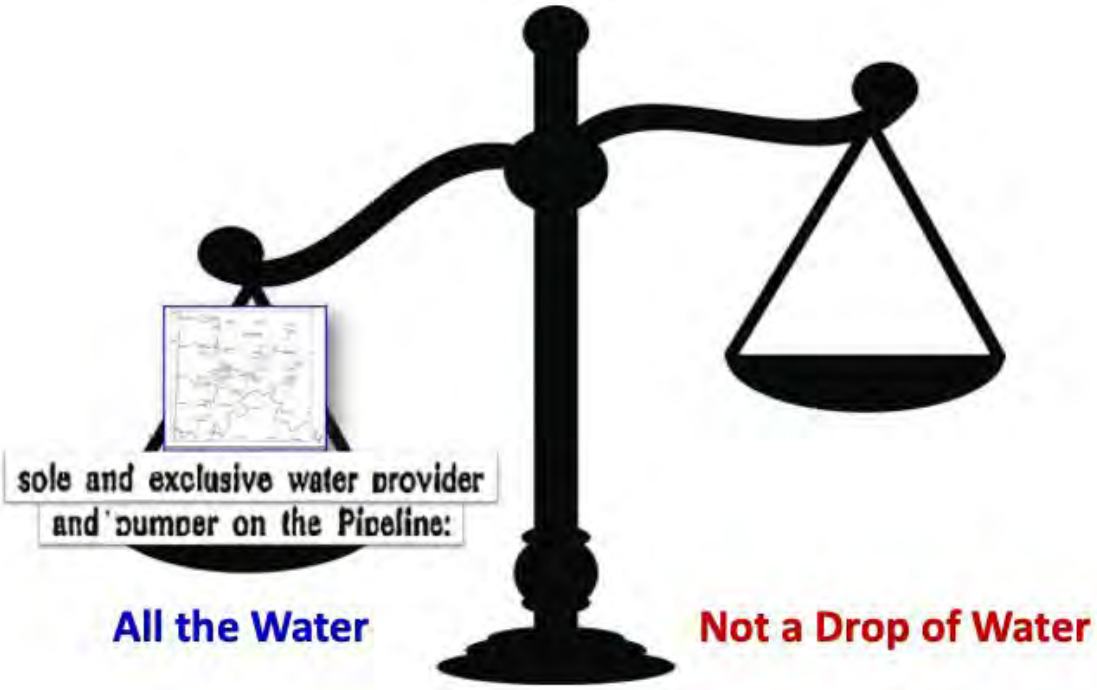
Not a Drop of Water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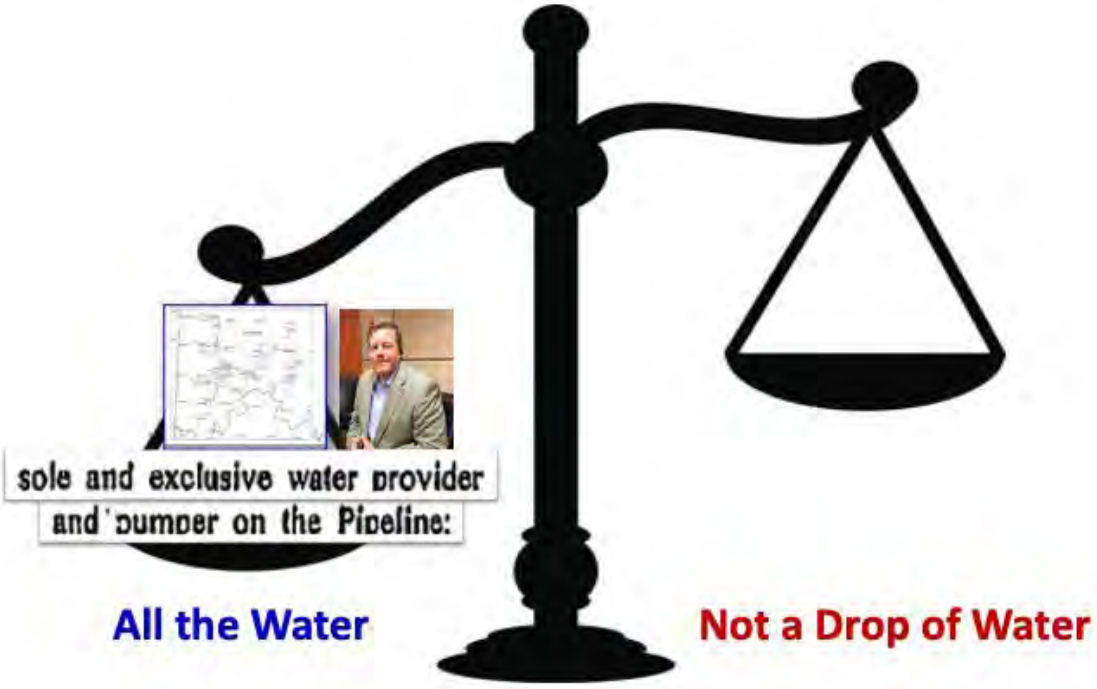
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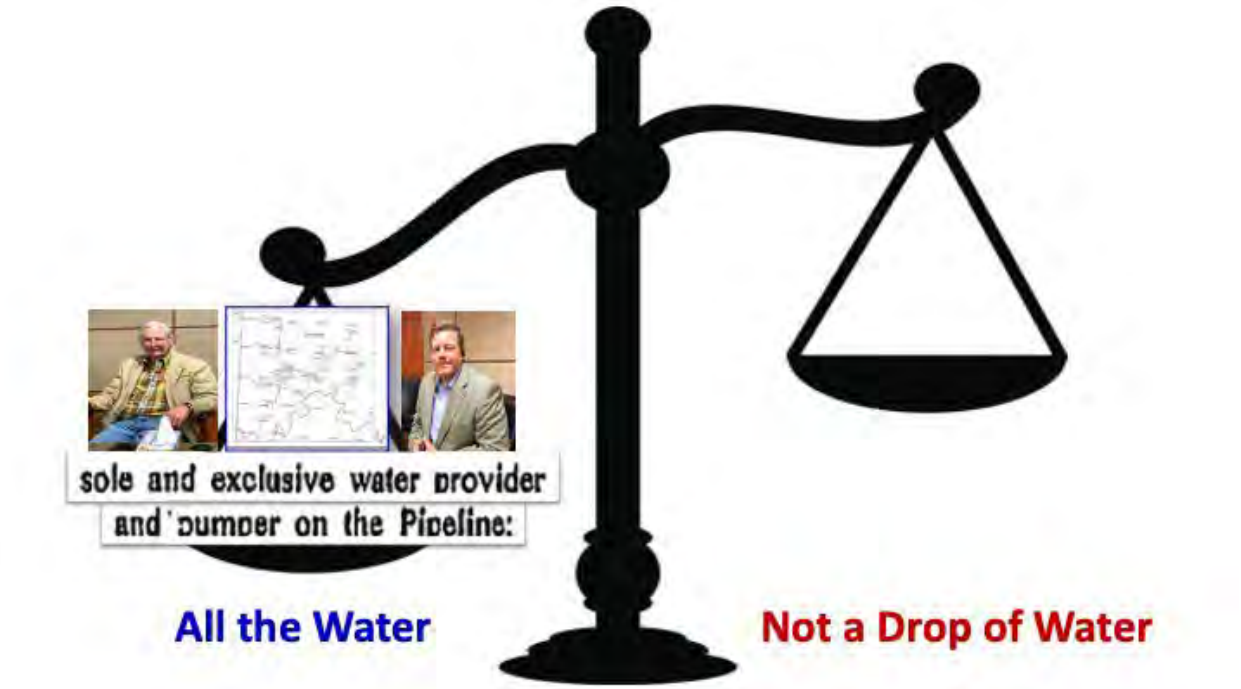
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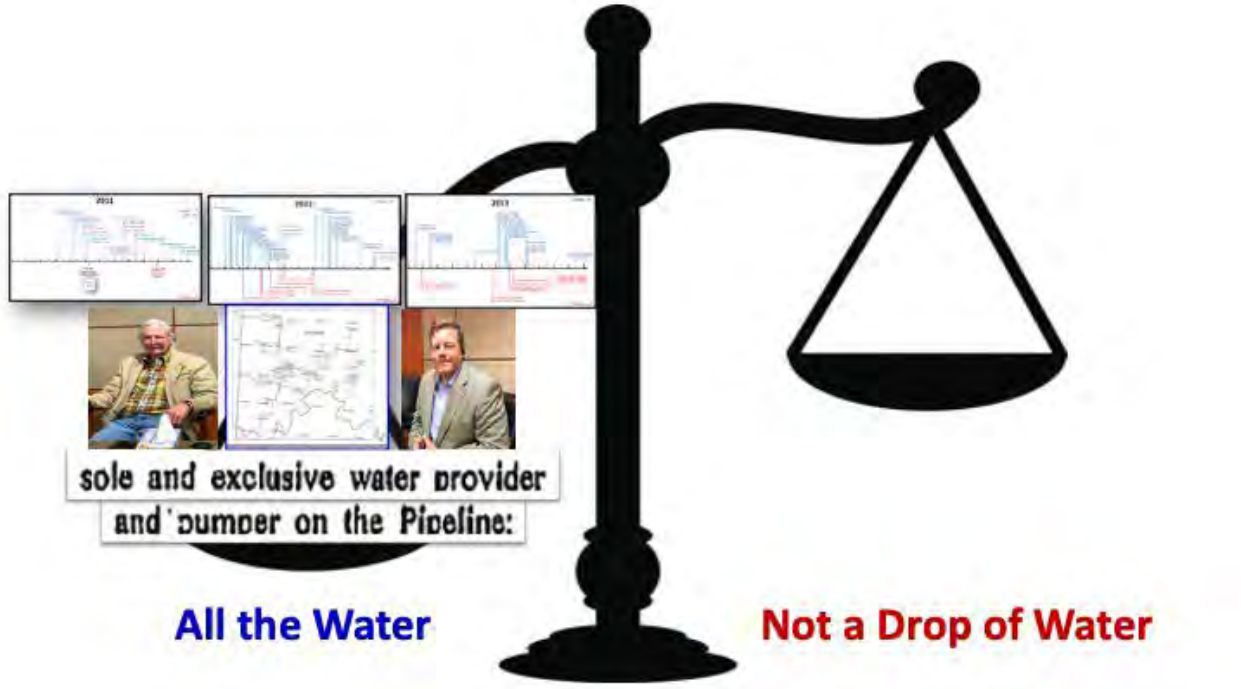
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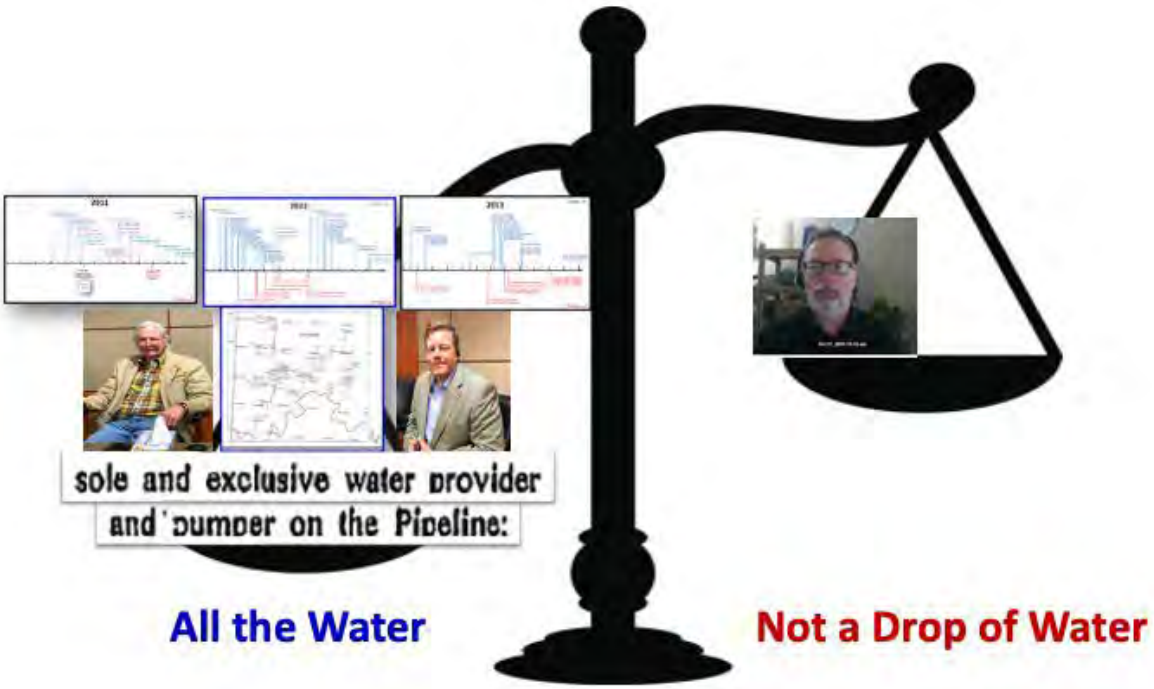
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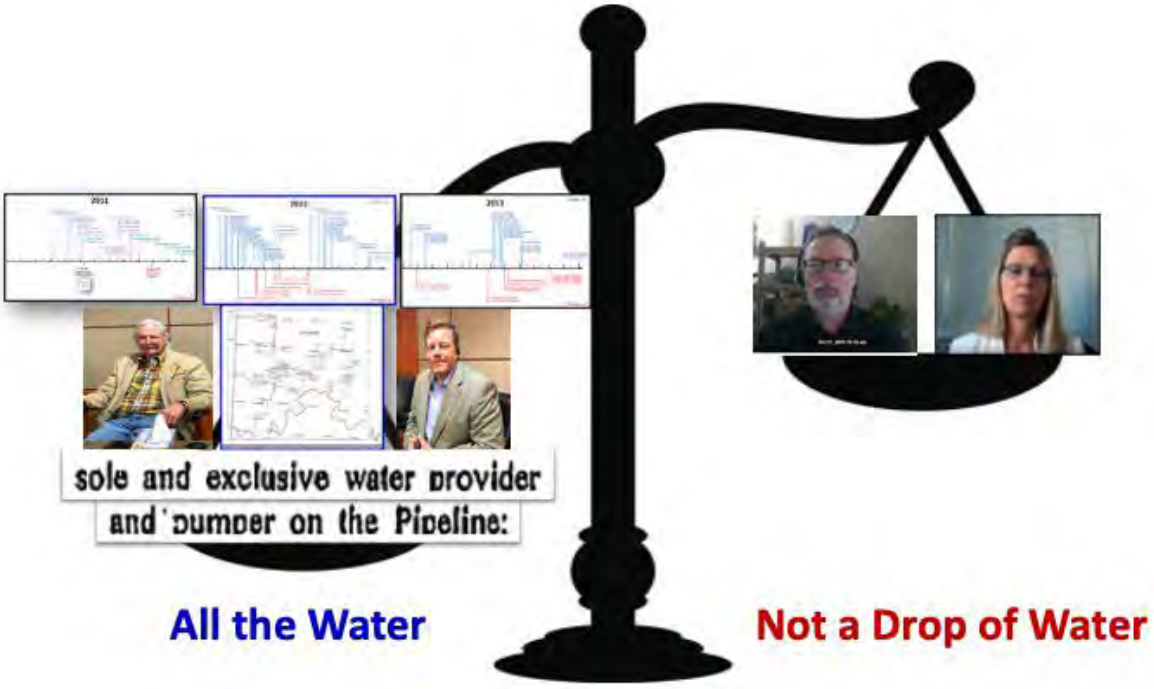
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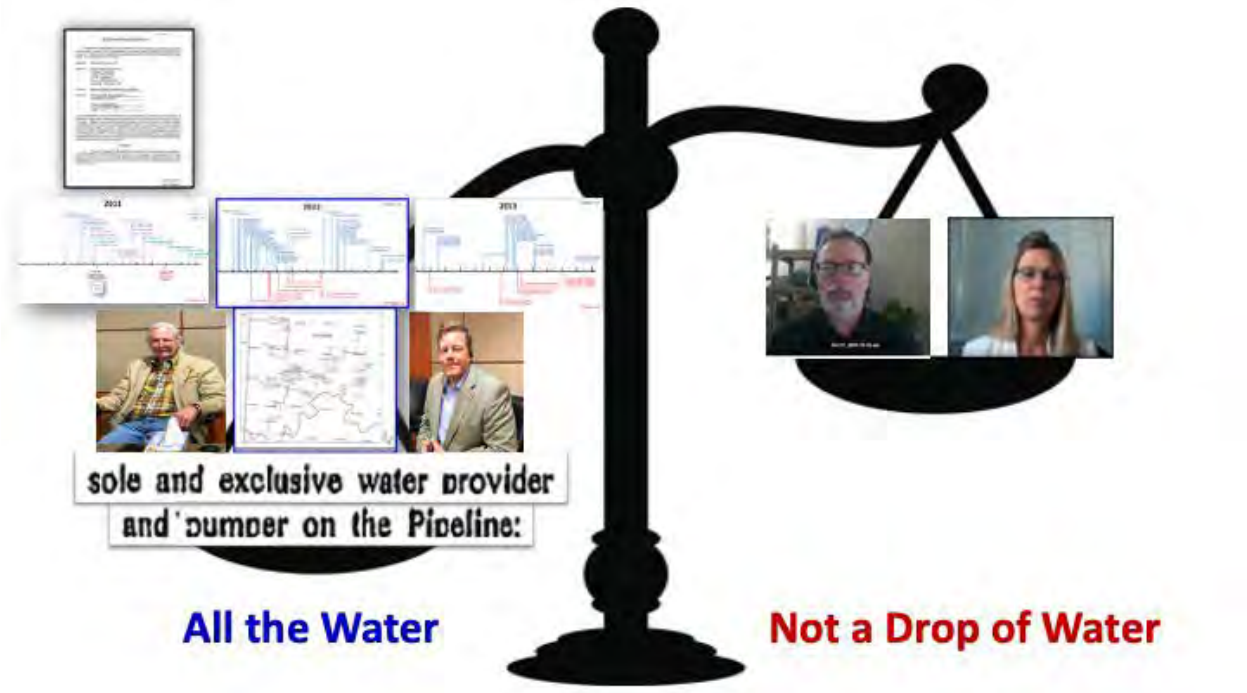
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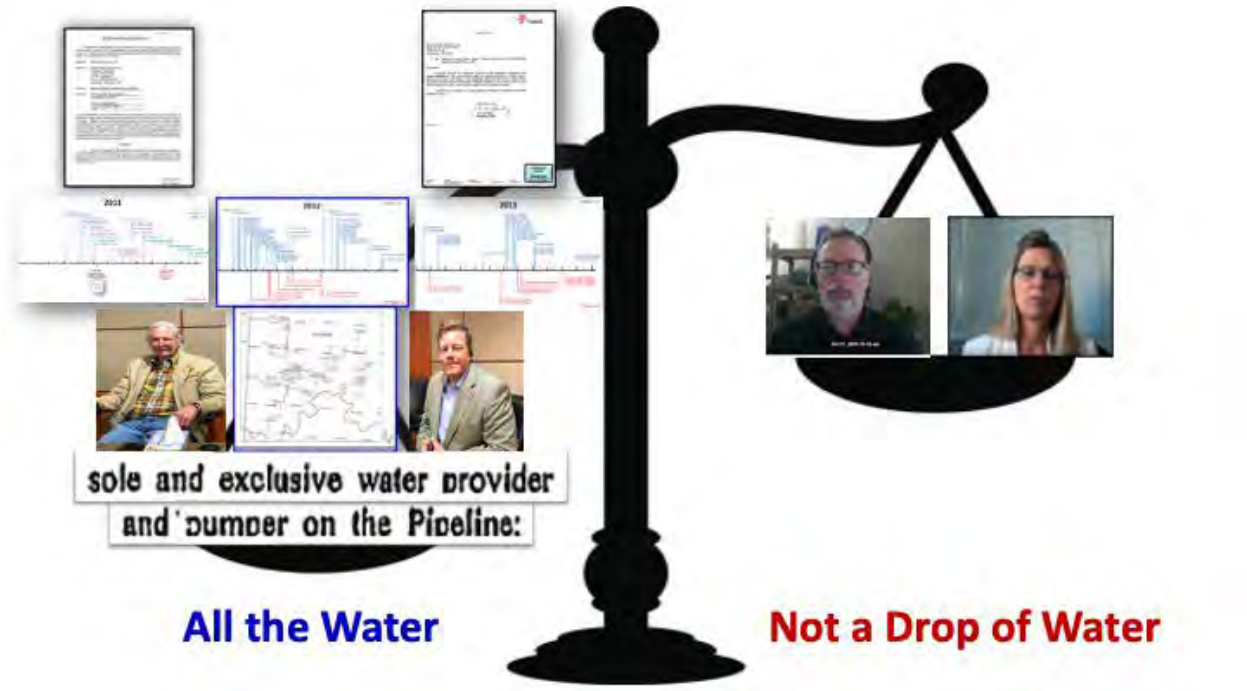
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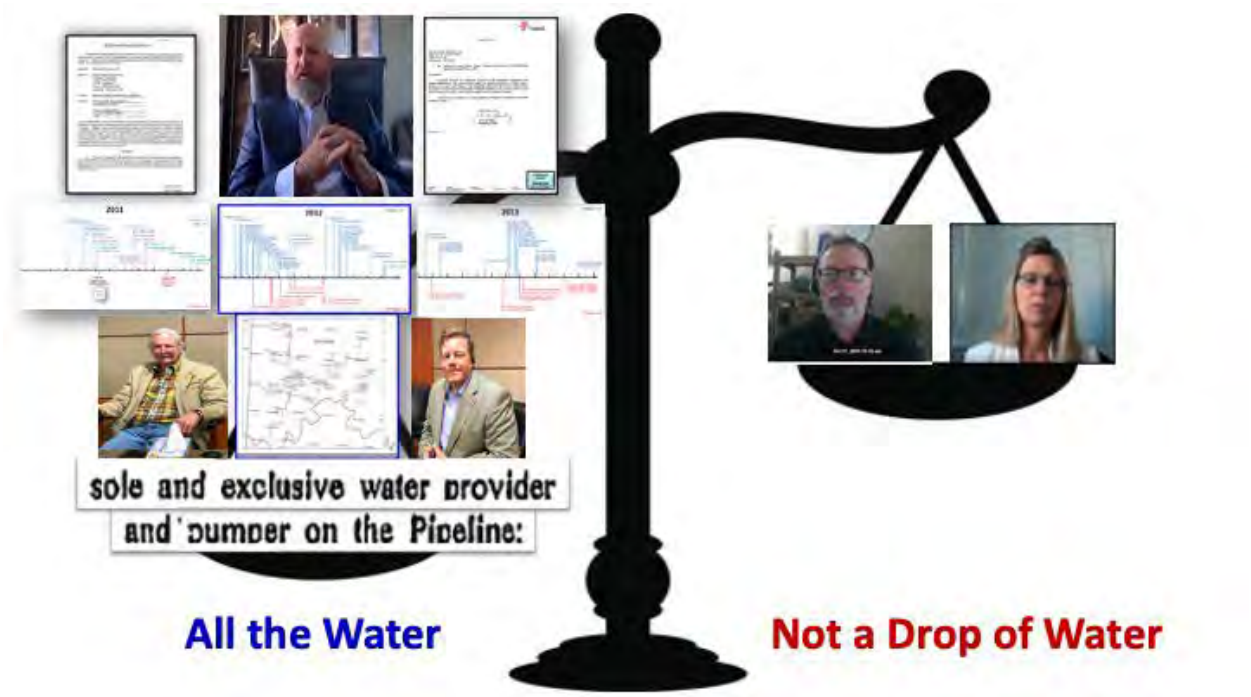
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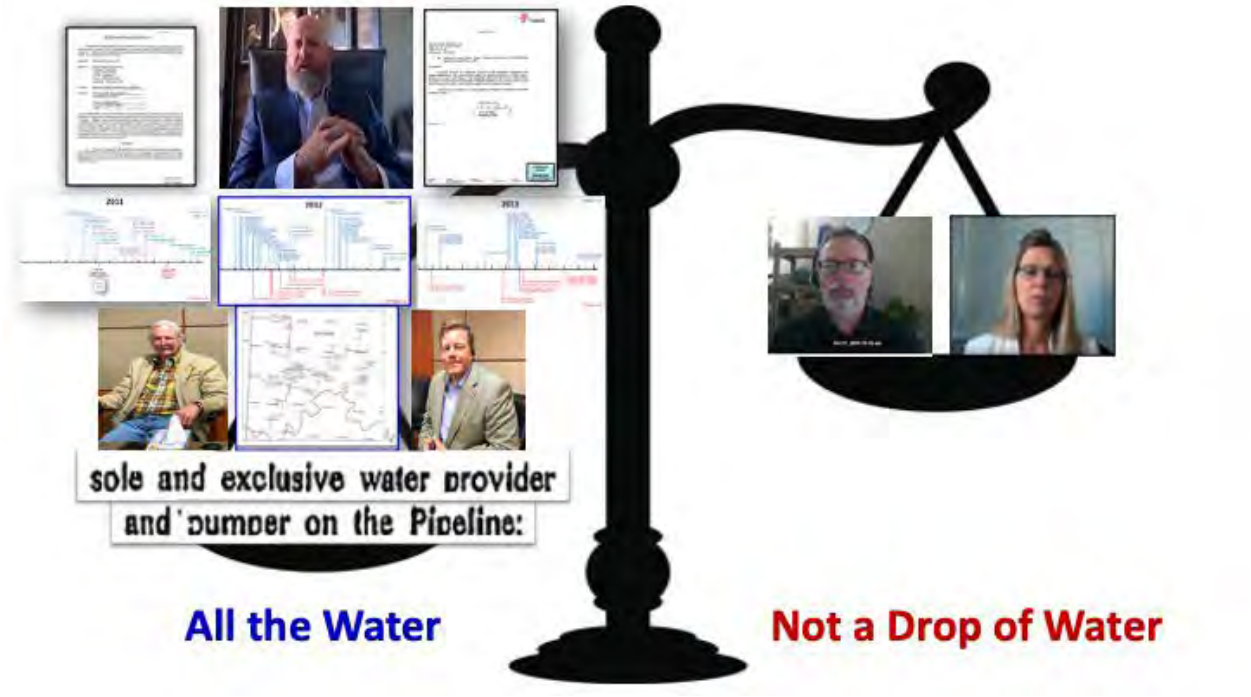
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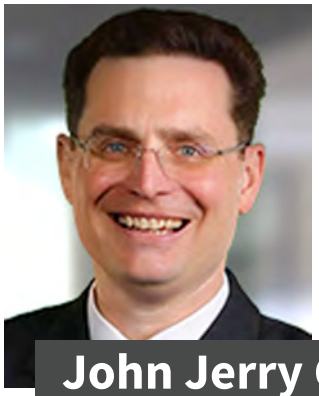
All the Water
Not a Drop of Water



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John Jerry Glas

Partner | Deutsch Kerrigan (New Orleans, LA)

John Jerry Glas is the Chair of the Civil Litigation Department at Deutsch Kerrigan and a Fellow of the American College of Trial Lawyers. He has tried 114 civil or criminal trials, including 76 jury trials and 38 judge trials.

Jerry has been admitted pro hac vice in 11 different states and had success on both sides of the aisle. In 2021, as lead trial counsel for the plaintiff (Lindale Pipeline, LLC), Jerry obtained a $26 million verdict in Houston. In 2012, as lead trial counsel for the defendant (TASER International, Inc.), Jerry obtained a zero verdict in St. Louis, which was listed by Missouri Lawyers Weekly as one of that year's "Largest Defense Verdicts."

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

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

Practices

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

Accolades

- Fellow, American College of Trial Lawyers, 2020-Present
- Louisiana Super Lawyers List, Civil Litigation, 2015-Present
- The Best Lawyers in America© 2012-2023, Insurance Law (2021), Mass Tort Litigation / Class Actions - Defendants (2020), Personal Injury Litigation - Defendants (2013)
- Best Lawyers "Lawyer of the Year," Mass Tort Litigation / Class Actions - Defendants, 2023
- Louisiana Super Lawyers, Cover & Featured Article, January 4, 2022
- Inside New Orleans Readers' Favorite Elite Lawyer, 2021
- New Orleans CityBusiness "Leadership in Law" 2012, 2017
- Missouri Lawyers Weekly, Largest Defense Verdicts, 2013
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Federal Bar Association's Camille Gravel Public Service Award, 2009
- Louisiana State Bar Association's Pro Bono Publico Award, 2009
- New Orleans Magazine "Top Lawyers" List, 2016, 2018-2019, 2023
- New Orleans CityBusiness Ones to Watch: Law

Education

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

Under the Microscope: Increased Scrutiny of Class Action Settlements

Jessica Salisbury-Copper

Thompson Hine (Dayton, OH)

Under the Microscope: Increased Scrutiny of Class Action Settlements
Jessica Salisbury-Copper

A study of available data suggests that while federal class action filings have risen, the volume of class action settlements has decreased. Stricter standards for class certification and courts' recent approaches to issues like Article III standing could certainly be a contributing cause, but the increased scrutiny being applied to class action settlements cannot be ignored.

Since 2018, courts and regulators have taken action, with the Supreme Court amending Rule 23 to put guideposts around the class action settlement process, the Federal Trade Commission (FTC) taking a closer look at the efficacy of class notice, and multiple circuit courts overturning class settlements because the benefit to the class pales in comparison to the fees class counsel negotiated for themselves.

2018 Amendments to Rule 23
Before 2018, Rule 23 did not specify whether class members were to be notified of the settlement before or after it was approved or the ways in which notice could be provided, and it provided no clarity on what parties must submit so the court could make a fairness determination. Perhaps because of the court-by-court approach that was previously being taken, the 2018 amendments have been described as "modest" but "nevertheless important and helpful." Article: The New, Improved Class Action Rule: The December 2018 Amendments to Rule 23, 90 Pa Bar Assn. Quarterly 182, 183. The amendments clarified that class notice can be provided electronically, via mail, or via other appropriate methods, and they front-loaded the settlement process by requiring preliminary approval before notice is provided to the class.

Rule 23 now states that a court should only order notice if the court decides the class can be certified and the settlement is fair and that the parties are responsible for providing the court with the information necessary to make a fairness determination. It also delineates, albeit generally, the factors a court must consider in making a fairness determination, i.e., whether the class is adequately represented, whether the settlement was negotiated at arm's length, whether the relief to the class is adequate, and whether class members are treated equitably in relation to one another. In evaluating the adequacy of the relief, courts are required to consider the costs and risks of trial, the effectiveness of the method in which relief is to be distributed, the proposed attorneys' fee award, and any other agreements reached in connection with the settlement.

2019 FTC Study
As part of its Class Action Fairness Project, the FTC evaluated the effectiveness of class notice. In September 2019, the FTC published a Staff Report entitled "Class Actions: A Retrospective and Analysis of Settlement Campaigns" (Staff Report), and in October 2019, the FTC held a public workshop on precisely the same issue.

The FTC analyzed a sample of consumer class action settlements to determine if the characteristics of the settlement impacted outcomes such as claim filing and check cashing rates ("Administrator Study"). It also fielded an Internet-based consumer research study on the perceptions consumers may have of emailed class action notices ("Notice Study"). For both studies, the FTC emphasized the positive impact of context specific "plain English," a phrase ironically used 19 times in the 83-page Staff Report (sans appendices).

The Administrator Study showed that the claims rate of ~10% was the same when notice was provided using notice packets with claim forms and postcards with detachable claim forms, and while that statistic was not impacted by changes in median compensation or supplemental notice via publication, claims rates were higher in cases where class members were contacted twice or more. Postcards with no detachable claims form and email emerged as inferior methods of class notice with claims rates of 6% and 3%, and the language of the claim form or the information required to submit a claim had no meaningful impact even when they required

statements under penalty of perjury or large amounts of personally identifiable information.

The Notice Study compared various combinations of sender names and subject lines with a focus on opening and comprehension rates. The FTC's findings suggested that individuals are more likely to open an email with a simple subject line like "Notice of Refund" without a dollar amount; however, the same subject line had the lowest comprehension rate. In other words, consumers were more likely to open the email, but less likely to understand that it related to a class action settlement or that they needed to submit a claim form to collect the "refund."

The Notice Study also found that consumers are more likely to open an email from a sender like "Sonoro" with no reference to settlement or class action in the sender's name, but the subject line had more impact, that including a court seal did not move the needle, and that somewhat surprisingly, a long-form email resulted in better comprehension and fewer participants questioning the notice's validity.

Read together, the Administrator Study and Notice Study suggest that email notice may be an ineffective method of providing class notice, and that the settlement is likely to have a higher claims rate if notice is provided via a notice packet or postcard with a detachable claim form. If the parties insist on using email to notify the class, the subject line and sender name should be simple and not refer to a dollar amount or class action settlement, while the email's contents should include formal, legal writing.

Case Law

In recent years, courts, at least at the circuit level, appear to be reviewing class action settlements more skeptically, especially when class counsel will be handsomely compensated.

In Briseño v. Henderson, 998 F.3d 1014 (9th Cir. 2021), the Ninth Circuit rejected a settlement that "presented a Murderers' Row of provisions" that it found to be suggestive of collusion. The "Murderers Row" consisted of: (1) a disproportionate fee award where class counsel would receive 7 times more than the class; (2) a "clear sailing agreement" where the defendant agreed not to contest class counsel's fee award; and (3) a "kicker clause" where any reduction in counsel's fee by the court would revert back to the defendant instead of the class. The Ninth Circuit also noted the paltry results. Despite theoretically valuing the settlement at over $100 million, the defendant paid only $8 million, and only $1 million of that went to the class.

In 2023, notable cases emerged out of the Second and Ninth Circuits. In Moses v. New York Times, Co., 79 F.4th 235 (2d Cir. 2023), the Second Circuit vacated approval of a settlement based on the attorneys' fees of $1.25 million, noting that they were 76% of the $1.65 million settlement fund. The court gave little weight to the fact that class members could choose to receive an access code for a one-month subscription to the New York Times because the access code was a coupon that should have been measured at its redemption value instead of its face value, and for some class members, the access code would be valueless due to the limited nature in which it could be used.

In Lowery v. Rhapsody Int'l, Inc., 75 F.4th 985 (9th Cir. 2023), class counsel requested $6 million in fees, an amount 2.87 times what their fees would have been using the lodestar method because of their "exceptional results." Even after the trial court instead applied a negative multiplier to the lodestar method and awarded only $1.7 million, the Ninth Circuit reversed, finding that the amount of fees should have been based on the actual value to the class, which was only $52,841.05.

In June 2024, the Eastern District of New York denied preliminary approval in a hotly contested class action settlement over the swipe fees charged to merchants by Visa and Mastercard. In a lengthy decision, the court took issue not with the attorneys' fees of $170,000,000 that were negotiated after the other material terms of the settlement, but with various aspects of the proposed settlement including that class members with the most valuable claims would receive the least benefit. Barry's Cut Rate Stores Inc. v. Visa Inc. (In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.), 2024 U.S. Dist. LEXIS 114665 (E.D.N.Y., June 25, 2024); Federal judge rejects $30 billion settlement between Visa, Mastercard and retailers[1]; Visa-Mastercard settlement failed to treat merchants 'equitably.'[2]

Finally, in July 2024, the "Eleventh Circuit surgically reviewed" and vacated a class action settlement because the class notice was insufficient and because the district court overlooked evidence of collusion vis-a-vis an overbroad release and inadequate relief to the class (which got to choose between $35 cash and a $150 GoDaddy voucher that the parties desperately argued was not a coupon) as compared to the $7 million in fees awarded to class counsel. A Closer Look: Appellate Courts Closely Scrutinize Settlements[3]; Drazen v. Pinto, 106

1 https://www.cnn.com/2024/06/25/business/federal-judge-denies-30-billion-settlement-visa-mastercard/index.html (last accessed September 19, 2024).

2 https://www.paymentsdive.com/news/visa-mastercard-settlement-failed-treat-large-small-merchants-equitably/720303/ (last accessed September 19, 2024).

3 https://www.insideclassactions.com/2024/06/03/a-closer-look-appellate-courts-closely-scrutinize-settlements/ (last accessed September 20, 2024).

F.4th 1302 (11th Cir. 2024). The court was openly critical, noting multiple times that the District Court breached the fiduciary duty it owed to absent class members.

Nonetheless, class counsel bore the brunt of the Court's ire. The judges said that they were "not unmindful that Class Counsel contributed to the abuse" and that "Class Counsel, in seeking $10.5 million in fees, were representing themselves." In negotiating those fees, the Court found class counsel to be the absent class members' adversaries and the defendant's advocate, because the receipt of fees depended on counsel's agreement to an excessively broad release to the defendant "and underscores of 'affiliates'" for claims that had not yet materialized.

Conclusion

Courts and regulators have been more stringent in scrutinizing class settlements, reflecting a growing concern over fairness, transparency, and the potential for conflicts of interest. Meanwhile, class defendants who have spent a lot of time and money negotiating a settlement and going through the settlement administration process do not want to learn that their efforts were wasted when the settlement approval is overturned on appeal. There is no surefire way to avoid such a result but agreeing not to contest significant class counsel fees that, if reduced, do not revert back to the class is clearly not the answer. And neither is overstating the value of the actual benefit to the class, attempting to hide a coupon by calling it something else, or providing an ineffective notice or overbroad release.

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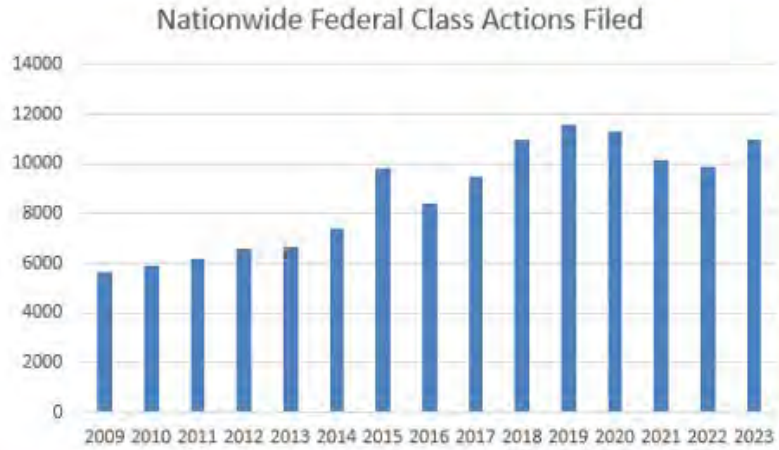
Under the Microscope: Increased Scrutiny Being Applied to Class Action Settlements

Jessica Salisbury-Copper

The Data



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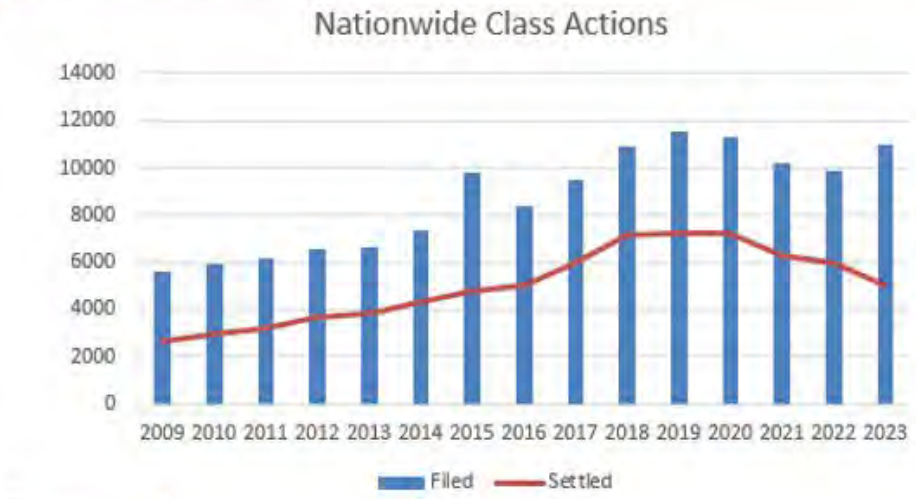

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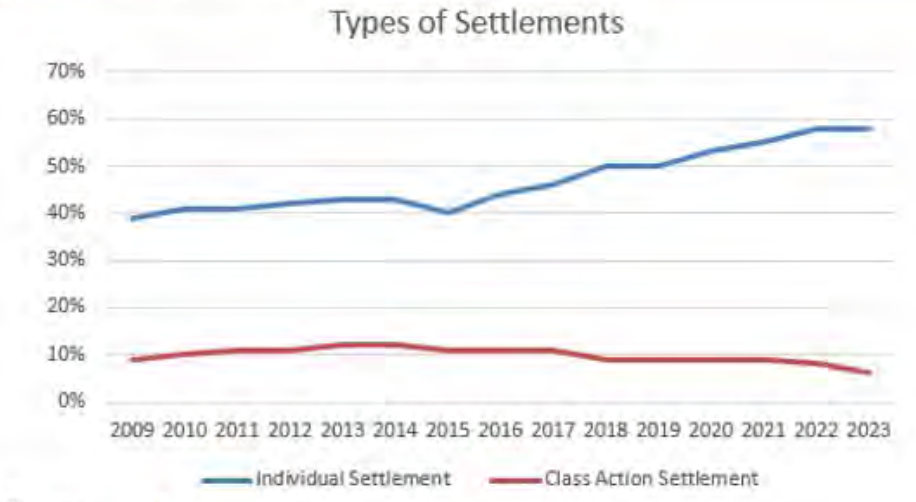


What does this tell us?

- Filings are up and percentage of settlements is the same
- Individual settlements are increasing commensurate with the decrease in class settlements
- Shift began around 2018

Why?

- 2018 Amendments to Rule 2023
- 2019 FTC Staff Report on Class Notice
- Courts Showing Increasing Willingness to Vacate and Remand Unfair Class Actions

Rule 23 Before December 2018

- Approval required
- Notice to the class
- Fairness hearing
- Statement identifying any agreement made

Notice After December 2018

- After preliminary approval
- Can be electronic
- Only if court likely to grant final approval and certify the settlement class

Fairness After December 2018

- Class adequately represented
- Arm's length negotiation
- Equitable treatment among class members
- Adequate relief

Adequate Relief After December 2018

- Costs, risks, and delay of trial and appeal
- Method of distributing relief and processing claims
- Agreements made
- Attorneys' fees and timing of payment

FTC's 2019 Staff Report

- Focused on effectiveness of class notice
  - Administrator Study
  - Notice Study via the Internet
- "Plain English" emphasized throughout

Administrator Study

- Highest claims rate (~10%) = notice packets and postcards *with detachable claims forms*
- Supplemental notice via publication made no meaningful difference but multiple notices did
- Postcards with no detachable claim form (6%) and email (3%) were not as effective

Notice Study

- Ironically focused solely on email
- More likely to open email without "class action" or dollar amount in the subject line
- Understood "plain English" better, but trusted formal legal writing more

Briseño v. Henderson (9th Cir. 2021)

- "Murderers' Row" of terms suggestive of collusion
  - Disproportionate fee award
  - Clear sailing agreement
  - Kicker clause

Moses v. New York Times (2d Cir. 2023)

- Class counsel fees of $1.25 million, or 76% of $1.65 million settlement fund
- Access codes were coupons under a different name and would have been valueless to some class members

Lowery v. Rhapsody Int'l (9th Cir. 2023)

- $6 million in fees were 2.87 times lodestar due to "exceptional results"
- Trial court applied negative multiplier
- Settlement still overturned because the "actual value" of the "exceptional results" was $52,841.05

Swipe Fee Settlement (EDNY 2024)

- $170 million in fees negotiated after material terms and not the basis for rejection
- Rejected due to inequitable treatment – class members with most valuable claims would receive the least benefit

Drazen v. Pinto (11th Cir. 2024)

- Surgical review of class action settlement
- Notice was insufficient and did not comply with Rule 23
- Overbroad release and inadequate relief were evidence of collusion

Drazen v. Pinto

- Class counsel – $7 million in fees
- The class – $35 cash or $150 GoDaddy voucher they desperately claimed was not a coupon
- Repeated reference to the District Court breaching its fiduciary duty

Drazen v. Pinto

- Counsel "contributed to the abuse," "were representing themselves," and were their clients' "adversaries"
- Acted as defendant's advocate –fees depended on release of "underscores of affiliates"

Takeaways / Considerations

- Courts are taking a deeper look at class settlements
- Preliminary approval is not appealable, so a lot of time and money is wasted if a settlement is overturned

Takeaways / Considerations

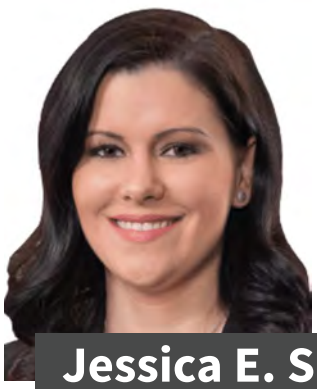
- A coupon by another name is still a coupon
- Avoid coupons with significant limitations
- Be honest about the settlement value
- Negotiate fees after all material terms

Takeaways / Considerations

- Approach clear sailing provisions with caution
- Consider reverting fee reduction to the class
- Avoid inequitable treatment

Takeaways / Considerations

- Send notice packets or postcards with detachable claim forms and articulate to the Court why the method was chosen
- Send multiple notices
- Email and supplemental notice via publication may be a waste of money



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Jessica E. Salisbury-Copper

Partner | Thompson Hine (Dayton, OH)

Jessica's practice focuses on financial services litigation and compliance and complex commercial disputes. Her willingness to dig deep and get her hands dirty allows her to unravel complex situations. Jessica focuses on outstanding client service, which makes her the choice for many of the firm's clients. She is known in the litigation practice group for her intelligence, organizational skills, and dedication to clients who are facing complex litigation issues. Her ability to collaborate and work as part of a team allows her to identify the appropriate Thompson Hine lawyers to support clients' needs in every aspect of running their businesses.

Jessica's financial services practice focuses on individual and class action litigation in mortgage, student loan, credit card, debt collection, auto loan, and servicing matters. She regularly counsels national and local providers of credit on regulatory and litigation matters. Her clients include banks and nonbank lenders, mortgage lenders and servicers, third-party service providers, auto lenders, and debt buyers.

Focus Areas

- Business Litigation
- Product Liability Litigation
- Financial Services Litigation

Experience

- Routinely advising clients when responding to Qualified Written Requests (QWR), Requests for Information (RFI), and Notices of Error (NOE) under the Real Estate Settlement Procedures Act (RESPA), including preparation of draft responses and advice on documents to be provided in response to such requests.
- Representing client in a nationwide class action settlement involving RESPA claims premised on the alleged failure to properly respond to QWRs, RFIs, and NOEs.
- Representing client in settlement of Ohio class action involving alleged violations of Ohio's Retail Installment Sales Act (RISA).
- Successfully representing financial institutions and mortgage servicers, both in individual and class actions in Ohio and nationwide, in a variety of cases arising under Ohio's Uniform Commercial Code, the Ohio Consumer Sales Practices Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Real Estate Settlement Procedures Act, Retail Installment Sales Act, Real Estate Settlement Procedures Act, and the Truth In Lending Act.
- Successfully representing purchasers, suppliers, and manufacturers in product liability and breach of warranty actions in Ohio and nationwide.
- Routinely representing and counseling mental health organization regarding privacy and privilege issues, including responses to and oppositions of requests for information and subpoenas.
- Routinely representing landlords in both commercial and residential leasing disputes and eviction actions.

Distinctions

- Selected for inclusion in The Best Lawyers in America® 2025 for Commercial Litigation
- Selected to the Ohio Rising Stars list, 2014-2024

Education

- Ohio Northern University College of Law, J.D., 2009, with high distinction
- Morehead State University, B.A., 2006, magna cum laude

AI Will Not Take Our Jobs! Building Efficient and Secure Artificial Intelligence Practices

Mark Adkins
Bowles Rice (Charleston, WV)

AI Will Not Take Our Jobs! Building Efficient and Secure Artificial Intelligence Practices
J. Mark Adkins

Embracing AI

A new landscape of relationships between technology and legal professionals is on the rise thanks to artificial intelligence ("AI"). With it comes great concern and a vast need for preparation. Since 1965, scientists have relied upon Moore's Law (named for Intel co-founder Gordon Moore) to show that, on average, the speed and data in which AI operates and collects information doubles every two years.[1] Whether that has held true, AI has undeniably made exponential progress in speed, intelligence, and efficiency—especially in the last five years. Depending upon your view, this could be a wonderful advancement for society as a whole or lead to the ultimate demise of civilization. Regardless, AI is growing at an unprecedented pace, and it is time for the legal community to take the steps necessary to jump on board and start taking advantage of the amazing benefits AI can offer our field.

Since its creation in 1955, AI has been applied to just about every industry, making advancements in computer science, financial trading, and medical research.[2] However, AI doesn't come without its flaws. The various forms of AI boil down to software that must be trained with relevant data and information.[3] If such training involves information that contains bias, the AI in turn will operate with bias.[4] For example, in the legal field, an AI software called COMPAS is a risk-assessment tool used to identify criminal offenders likely to commit future crimes. However, it has been criticized for using biased parameters for its algorithms, which can lead to false accusations or wrongful imprisonment.[5] Another example is the occurrence of AI "hallucinations," when AI produces incorrect outputs with a high degree of confidence. Given these weaknesses, it is our responsibility as participants in the legal industry to implement safe and strategic policies and tools, as discussed below, to ensure AI continues to benefit society rather than diminish it.

Implementing AI Policies

It is becoming commonplace for governments, industries, and individual companies to implement guidelines and standard practices for the appropriate uses of AI.[6] As of February 2024, however, only a portion of states have enacted legislation to regulate the use of AI.[7] With the rapid pace in which AI advances, our legal system is being challenged with keeping up while maintaining adherence to ethical and practical guidelines. Many states have already issued ethics opinions or advisory opinions on how lawyers and the Courts should approach the regular use of artificial intelligence in the practice of law.[8] These opinions/memoranda generally focus on the following: (a) confidentiality, (b) competence/verification, (c) supervision, and (d) legal fees and costs.

As firms begin to incorporate AI into their everyday practice, it is vital they prioritize the necessary time and attention into training both attorneys and staff. Firms should be educating their employees on the tools offered and when it is acceptable to use them. To go a step further, requiring attorneys and staff to understand the fundamental functions of permitted AI and how it is trained can ensure control over the ever-changing technology

1 Carla Tardi, What is Moore's Law and is it True?, Investopedia (April 2, 2024), https://www.investopedia.com/terms/m/mooreslaw.asp.

2 Rockwell Anoyha, The History of Artificial Intelligence, Harvard: Science in the News (August 28, 2017), https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/; see also U.S. Dept. of State, Artificial Intelligence (AI), U.S. Department of State, https://www.state.gov/artificial-intelligence/#:~:text=Artificial%20Intelligence%20and%20Society,%2C%20language%20translation%2C%20and%20more; see also Sophie Bushwick, 10 Ways AI Was Used for Good This Year, Scientific American (December 15, 2022), https://www.scientificamerican.com/article/10-ways-ai-was-used-for-good-this-year/.

3 Sasha Luccioni, AI is Dangerous, But Not For the Reasons You Think, TED (October 2023), https://www.ted.com/talks/sasha_luccioni_ai_is_dangerous_but_not_for_the_reasons_you_think?trigger=15s&subtitle=en.

4 Id.

5 Id.

6 American Bar Association, Highlight of the Issues, (last visited July 9, 2024), https://www.americanbar.org/groups/leadership/office_of_the_president/artificial-intelligence/issues.

7 The following states have enacted/proposed AI legislation: California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia and Washington. US State-by-State AI Legislation Snapshot, BCLP.Client Intelligent, https://www.bclplaw.com/en-US/events-insights-news/us-state-by-state-artificial-intelligence-legislation-snapshot.html

8 The spreadsheet marked "Attachment 1" contains a listing of the states that have issued AI Ethics/Advisory Opinions outlining guidance on AI use in the legal field.

and the potential effects on the firm's practice. The more education provided to employees, the less likely they are to rely on a hallucinations and cause issues for the firm, the court, or the client.

Client confidentiality is the biggest concern when it comes to AI in the legal community. Firms should prioritize working with AI providers to ensure through licensing agreements or other secure means that confidentiality will never be at risk. It is further recommended that attorneys receive express permission from a client before disclosing any client information to AI software for the purposes of working on their case.[9] This can be set out in an engagement letter with language stating that the firm may utilize generative AI tools to assist in legal research, document drafting, and editing, but will abide by the jurisdiction's rules and guidance with respect to such tools and take measures to ensure the accuracy of all content prepared in the client's case. Additionally, firms should discuss with their providers as to whether the AI at issue incorporates formal verifications. Formal verifications are built-in mathematical models for testing the correctness of AI output, and can ensure that there is a secure go-between for the information being derived from AI and the background information being processed.[10] Firms should also implement AI policies and training that are frequently reviewed and updated

.

Another concern that faces the legal community as the implementation of AI becomes more popular relates to job displacement. Though this is a valid concern, if firms are able to get ahead on instituting effective AI policies, there is a greater chance that there will be less of a billable hour issue and more of a reconfiguration within firms to focus more heavily on tasks that require attorney attention.[11] Regarding legal staff, it is very possible to retain employment rates through training and readjustment for incorporating AI into their work rather than replacing their tasks entirely.[12] Notably, it remains vital for attorneys and staff to review the work generated or impacted by AI to make certain that the output reflects a work product that aligns with all ethical regulations and case specific requirements. As an attorney, failing to review work generated by AI could and should be considered a violation of their ethical oath to clients.[13] Thus, while it will be highly beneficial to use AI tools to conduct research, review contracts, or draft legal documents, it will be just as important to have qualified individuals reviewing the output for accuracy.

Artificial Intelligence in the Legal Field

AI is no longer limited to changing the landscape of the legal profession through electronic signatures, spell check, or eDiscovery. Now, innovative and in-depth machine learning platforms are changing the way attorneys practice law.[14] As noted below, Thomson Reuters and Lexis Nexis have been racing to build out and market their complex case analytics and AI drafting tools since roughly 2018. Before that, in 2014, the start-up ROSS called itself "the world's first AI lawyer," and offered an affordable and replicable model for enhancing legal services. ROSS, now defunct, learned from its experience of conducting research, generating legal theories, and cyphering through language, all to gain a better understanding of how to satisfy the legal needs of society.[15] First, ROSS used its own "Natural Language Processing" algorithm to focus a query of your choosing on searching specific outputs.[16] Second, the AI retrieved the relevant case law or passages from its vast collection of legal information specifically tailored to your query.[17] Finally, ROSS ranked the results into an order most relevant to your query by utilizing machine learning,[18] grammatical structure, word embeddings, and procedural posture.[19] ROSS's function and capabilities not only earned it awards and recognition as law firms' "next junior associate," but they also caught the eye of the well-established competition. ROSS was forced to shut down in 2021 after being sued by Thomson Reuters for copyright infringement, alleging that ROSS illegally trained its AI using Westlaw's headnotes (ROSS has countersued, alleging antitrust violations).

ROSS's legal entanglements have not slowed the development of similar services, but the outcome of the ROSS-Thomson Reuters trial will have a major impact on where AI legal services can obtain information and whether Westlaw can maintain control over how its content is used.

Cloud-based legal management systems use AI to streamline legal administrative functions. Subscription

9 The Florida Bar, Proposed Advisory Opinion 24-1 Regarding Lawyers' Use of Generative Artificial Intelligence – Official Notice, Nov. 13, 2023, https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-24-1-regarding-lawyers-use-of-generative-artificial-intelligence-official-notice/ (last visited July 19, 2024).

10 Id.

11 Bloomberg Law, https://pro.bloomberglaw.com/insights/technology/what-are-the-risks-of-ai-in-law-firms/ (last visited July 10, 2024).

12 Id.

13 Id.

14 Nicole Yamane, Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands, 33 Georgetown J. of Legal Ethics 877, 878.

15 Matthew Griffin, Meet Ross, The World's First AI Lawyer, 311 INST. (Jul. 11, 2016), https://www.311institute.com/meet-ross-the-worlds-first-ai-lawyer/ [https://perma.cc/89RH-C9M9].

16 ROSS, https://www.rossintelligence.com/what-is-ai (last visited July 15, 2024).

17 Id.

18 Machine learning "is a way to teach computers how to learn for themselves . . . [through] training." ROSS, https://www.rossintelligence.com/what-is-ai (last visited July 15, 2024).

19 ROSS, supra at note 19.

software like Practice Panther[20] and Clio[21] provide a variety of tools that assist with client management, matter organization, conflict checks, and billing and invoicing. Most management systems provide templates for creating routine legal documents that pull in information from a matter and reduce time spent on entering details manually. These systems can significantly replace time spent on rote administrative tasks with more high-level reviewing, effectively eliminating overhead for solo practitioners or optimizing efficiency in small- to mid-sized firms.

Beyond software that helps manage a variety of firm tasks, tools such as Westlaw's CoCounsel Core[22] and LexisNexis's Lexis+ AI[23] allow those with access to such platforms to search and review documents, summarize complex arguments, draft correspondence, and utilize AI-assisted research. CoCounsel Core is the "world's first AI legal assistant."[24] It works by using machine learning technology to allow you to talk to CoCounsel like a human and gain feedback on specific queries and searches.[25] Lexis+ AI offers conversational search for refined answers, as well as the ability to draft arguments, contract clauses, and client communications in seconds.[26] Furthermore, Lexis+ AI has a feature in which you can upload documents and receive key insights into your analysis.[27] Within LexisNexis, the legal analytics company called Lex Machina can sort and review legal documents based upon a database that is updated every 24 hours.[28] Lex Machina is currently not available to the public, however, firms do have the ability to test out the software through demos.[29]

AI applications such as Casetext,[30] Harvey AI,[31] and Blue J L&E[32] streamline legal research and analysis for attorneys by providing information and understanding of complex legal concepts for the purposes of predicting case outcomes.[33] Casetext can be used to fast-track deposition summaries and preparation, analyze detail for document review, and automate contract revision.[34] Harvey AI is an AI-powered legal research tool that can be used to enhance the research process.[35] Though it is still in beta, it will have the potential to provide high-quality assistance to firms through recommendations, contract analysis and much more.[36] Blue J L&E is an AI tool that can reduce time spent on research and analysis, assist in predicting case outcomes, identify potential weaknesses in arguments, and help prepare for potential clients.[37]

When it comes to discovery, there is a need for time-saving tools to ensure attorneys are able to focus their time on matters that require detailed attention. Accordingly, Relativity is an AI tool that makes the discovery process more efficient through managing the document review process by providing AI insights, redaction of sensitive data or privileged information, and language translation.[38] Everlaw is an AI e-discovery tool that, again, streamlines the discovery process, and is known to frequently provide updates to its software in order to remain on the forefront of the legal field's AI needs.[39] Everlaw can not only act as an e-discovery tool by adding citations to key evidence and organizing case data, but it can also act as a collaborator while prepping for trial by writing case narratives and answering open-ended questions.[40]

Each of these tools, and many more just like them, will enhance the talents and improve efficiency for attorneys and their firms, resulting in better services to their clients. Sasha Luccioni, an AI and environmental scientist, stated that AI is an opportunity to "build[] the road as we walk it and [] decide what direction we go in."[41] As it relates to the legal field, there is so much untouched territory that needs to be claimed and defined. Accordingly, it is now our responsibility to make sure the regulations and policies we leave behind provide the next generations of lawyers the healthiest and most efficient of foundations. As AI continues to double in magnitude, we must remain in control of how such technology impacts our historical legal system and those participating in it.

20 Practice Panther, https://www.practicepanter.com (last visited July 11, 2024).

21 Clio, https://www.clio.com/resources/ai-for-lawyers/ethics-ai-law/ (last visited July 11, 2024).

22 CoCounsel, https://help.casetext.com/en/articles/7040012-what-is-cocounsel (last visited July 15, 2024).

23 LexisNexis, https://www.lexisnexis.com/en-us/products/lexis-plus-ai.page (last visited July 11, 2024).

24 CoCounsel, supra at note 31.

25 Id.

26 LexisNexis, supra at note 32.

27 Id.

28 Lex Machina, https://lexmachina.com/ (last visited July 18, 2024); see also Rankings, https://rankings.io/blog/legal-ai-tools (last visited July 18, 2024).

29 Id.

30 Thomson Reuters, https://casetext.com/ (last visited July 15, 2024).

31 Grow Law Firm, https://growlawfirm.com/blog/ai-for-lawyers-guide (last visited July 15, 2024).

32 Blue J, https://www.bluej.com/ca/bluej-le (last visited July 15, 2024).

33 Grow Law Firm, https://growlawfirm.com/blog/ai-for-lawyers-guide (last visited July 15, 2024).

34 Thomson, supra at note 39.

35 Grow, supra at note 40.

36 Id.

37 Blue, supra at note 41.

38 Relativity, https://www.relativity.com/artificial-intelligence/ (last visited July 18, 2024); see also Rankings, supra at note 37.

39 Everlaw, https://try.everlaw.com/litigation-preparation/ (last visited July 18, 2024); see also Rankings, supra at note 37.

40 Id.

41 Sasha Luccioni, supra at note 4.

State	Reference	Citation to Potential Advisory/Ethics Opinion
American Bar Association	Formal Opinion 512 - Generative Artificial Intelligence Tools - American Bar Assoc.	https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf
California	Practical Guidance For The Use Of Generative Artificial Intelligence In The Practice Of Law	https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf
Colorado	Artificial Intelligence and Professional Conduct - Professional Conduct and Legal Ethics - Colorado State Bar	https://coloradosupremecourt.com/Lawyer/ArtificialIntelligence-and-ProfessionalConduct.asp
Connecticut	Artificial Intelligence Responsible Use Framework (JBAPPM Policy 1013) - State of Connecticut Judicial Branch	https://www.jud.ct.gov/faq/CTJIRequestJobAIPolicyFramework2.1.24.pdf
Florida	Ethics Opinion 24-1	https://www.floridabar.org/eopinions/opinion-24-1/
Georgia	Artificial Intelligence Responsible Use (SS-23-002)	https://gta.georgia.gov/psg/artificial-intelligence-responsible-use-ss-23-002
Illinois	Artificial Intelligence Update - Illinois State Bar	https://www.isba.org/sections/bench/newsletter/2023/12/artificialintelligenceupdate
Indiana	State of Indiana Policy: *State Agency Artificial Intelligence Implementations*	https://www.in.gov/mph/cdc/files/State-of-Indiana-State-Agency-AI-Systems-Policy.pdf
Iowa	Risks and challenges for responsible AI use in the practice of law - Iowa State Bar	https://www.iowabar.org/?pg=IowaLawyerMagazineArticleAction=viewIssueArticle&pubIssueID=33575&pubIssueItemID=193777
Kentucky	Ethics Opinion KBA E-457 - Kentucky Bar Association	https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions_(part_2)/Kba_e457_artificialintelligen.pdf
Maryland	Navigating Ethical Concerns for Lawyers Using AI - Maryland Bar Association	https://www.msba.org/site/site/content/News-and-Publications/News/General-News/Navigating_Ethical_Concerns_for_Lawyers_Using_AI.aspx
Massachusetts	Acceptable Use & Development of Generative Artificial Intelligence - Executive Office of Technology Services and Security	https://www.mass.gov/policy-advisory/acceptable-use-development-of-generative-artificial-intelligence
Michigan	Ethics Opinion JI-155	https://www.michbar.org/opinions/ethics/numbered_opinions/JI155
New Hampshire	Ethics of Using Artificial Intelligence in Practice - Ethics Corner Article - New Hampshire Bar Association	https://www.nhbar.org/using-artificial-intelligence-in-practice/
New Jersey	Preliminary Guidelines On New Jersey Lawyers' Use Of Artificial Intelligence	https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf
New York	Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence	https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf
Ohio	Adopting Emerging Technology Responsibly - Ohio State Bar	https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2024-ohio-lawyer/adopting-emerging-technology-responsibly/
Pennsylvania	Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee Joint Formal Opinion 2024-200 - Ethical Issues Regarding The Use Of Artificial	https://www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf
Texas	Taskforce for Responsible AI in the Law - Report on the 2024 Texas AI and Law	https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=54015
Vermont	Report regarding Artificial Intelligence Code of Ethics and Conflict of Interest Policy, pursuant to 3 V.S.A § 5012(b)(1) and 2022 Act 132 Section 7(a) - State of Vermont Artificial Intelligence Advisory Council	https://legislature.vermont.gov/assets/Legislative-Reports/Council-Report-on-AI-Ethics-Policy.pdf
Virginia	Legal Ethics Topical Information - Guidance on Generative Artificial Intelligence - Virginia State Bar	https://vsb.org/Site/Site/lawyers/ethics.aspx
West Virginia	Legal Ethics Opinion 24-01 - Artificial Intelligence - West Virginia Office of Disciplinary Counsel	http://www.wvodc.org/pdf/AILE024-01.pdf

AI WILL NOT TAKE OUR JOBS!

Building Efficient and Secure Artificial Intelligence Practices *by J. Mark Adkins, Esq.*

Bowles Rice

EMBRACING ARTIFICIAL INTELLIGENCE

- AI and the Legal Profession
- Exponential Progress
  - *Speed*
  - *Intelligence*
  - *Efficiency*
- Get on board!

1

Bowles Rice

EMBRACING ARTIFICIAL INTELLIGENCE

- Flaws in the system
  - *Bias*
  - *Hallucinations*
- Creation of safe, strategic AI policies

Bowles Rice

IMPLEMENTING AI

- Though use is commonplace, few regulations exist
- Many states have issued AI ethics opinions, focused on:
  - *Confidentiality*
  - *Competence/verification*
  - *Supervision*
  - *Legal Fees and Costs*

Bowles Rice

IMPLEMENTING AI

- Training/education
- Client confidentiality
  - *Client permission*
  - *Engagement letter*
  - *Intense vetting of AI tools*
- Formal verifications

Bowles Rice

IMPLEMENTING AI

- Embrace *(cautiously)*
- Implement policies
- Train/readjust
- Maintain confidentiality
- Careful review of AI-generated work

Bowles Rice

AI IN THE LEGAL FIELD

- Cloud-based legal management systems

PRACTICEPANTHER® Clio

Intake Forms | Client Portal | CRM | Time Track | Billing | And more

Bowles Rice

AI IN THE LEGAL FIELD

- Generative AI (GenAI) Assistant
  - Doc review and summary
  - Depo prep
  - Create Timelines
  - Search databases
  - Data extraction

Bowles Rice

AI IN THE LEGAL FIELD

- Legal research
  - Search
  - Drafting
  - Discovery
  - Acquired by Thomson Reuters

casetext

Bowles Rice

AI IN THE LEGAL FIELD

- Legal research
  - Compliance
  - Analysis
  - Case Management
  - Advocacy Strategy

Harvey.

Bowles Rice

AI IN THE LEGAL FIELD

- Legal research
  - Outcome prediction
  - Machine learning
  - Case law

blue J LEGAL

Bowles Rice

AI IN THE LEGAL FIELD

- Discovery
  - Investigations
  - Workflow
  - Search
  - Outlines & Summaries

Relativity

Bowles Rice

AI IN THE LEGAL FIELD

- Discovery
  - Rapid search
  - Trial prep
  - Case assessment
  - Summaries (docs, depos, exhibits, witnesses, etc.)

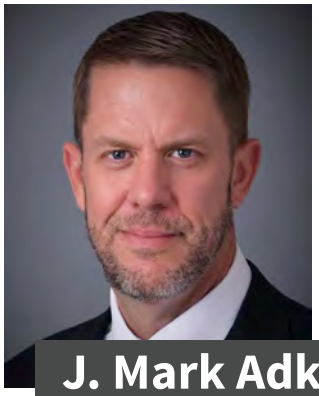
Everlaw

Bowles Rice

THE FUTURE OF AI IS NOW

- Enhance firm talent
- Improve efficiencies
- Define the future

Bowles Rice



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J. Mark Adkins

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Mark Adkins focuses his practice primarily on complex, high-risk commercial litigation in the areas of banking, construction, energy and commercial contract disputes.

With more than two decades of representative experience in litigation work, including numerous tried-to-verdict jury trials, Mark is well positioned to assist clients in the arena of high-risk, "Bet-the-Company" matters.

Mark represents banks, lenders and debt collectors in matters involving bank and consumer litigation issues. He also represents clients in matters involving leasing issues, contracts and property rights related to coal and natural gas. He also has significant experience in multi-million dollar construction litigation matters involving commercial, retail and public construction projects.

In addition to his vast litigation experience, Mark is a member of the Bowles Rice Government Relations group. As a registered lobbyist, he regularly works with members of the West Virginia Legislature and administration on behalf of the firm's clients. Mark served as staff counsel to the West Virginia House of Delegates Judiciary Committee during the 2015 Legislative Session.

Practice Areas
- Business Litigation
- Financial Services Litigation
- Oil & Gas Litigation
- Construction Litigation
- Estate and Trust Litigation
- Professional Liability Defense
- Litigation
- Campaign Finance and Election Law
- Government Relations
- FinTech

Honors
- Ranked by Chambers USA: America's Leading Business Lawyers (Litigation: General Commercial), since 2022
- Named Best Lawyers' 2019 Litigation - Banking and Finance Lawyer of the Year in the southern West Virginia region
- Named to The Best Lawyers in America ® (Commercial Litigation Law; Litigation - Banking & Finance; Litigation - Construction; and Government Relations Practice), since 2011
- Peer-Review Rated AV by Martindale-Hubbell
- Recognized by Super Lawyers (Business Litigation), since 2010
- Named a 2020 "State Litigation Star" in General Commercial, Construction, Trust and Estate by Benchmark Litigation

Education
- J.D., West Virginia University College of Law (1997) - Member, Moot Court Board of Review
- B.A., Centre College (1994)

This is Clearly Not My Fault: Evaluating Tort Claims Against Tangentially Involved Corporations

Jim Campbell

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This is Clearly Not My Fault: Evaluating Tort Claims Against Tangentially Involved Corporations
James M. Campbell, Christopher B. Parkerson, Michelle M. Byers, and Jacob J. Lantry

The defense bar is seeing a noticeable rise in the number of cases where the criminal conduct of an individual causes significant injury or death, and a suit is subsequently brought against a tangentially or indirectly involved corporate defendant. The rationale for these suits is obvious: the primary cause of the harm—the criminal—lacks insurance or other assets sufficient to satisfy the sizable monetary award plaintiffs are looking to recover in a civil suit, so, predictably, the plaintiffs reach for deep pockets to obtain "justice."

Examples of these types of cases are numerous and go beyond the traditional Dram Shop-type liability where we have long seen this dynamic at play:

- a negligence suit against a highway rest stop operator after a drunk driver allegedly living out of his car in the parking lot causes an accident resulting in a death and numerous injuries on the adjacent highway;[1]
- a product liability suit against a vehicle manufacturer following the death of a woman in an accident caused by an intoxicated driver crossing the center line of a two-lane highway;[2]
- a negligent security case against an apartment management company due to the murder of a tenant by a non-resident;[3]
- a negligence suit against an environmental contractor alleging widespread personal injury from water contamination based on decisions made by governmental actors;[4] or
- an automotive product liability suit against a manufacturer for injuries sustained by a pedestrian struck by a drunk driver.[5]

1 DeMond, et al. v. Alliance Energy LLC, et al. (Connecticut Superior Court, 2016).

2 Druzba v. American Honda Motor Co., Inc. (Vermont Federal Court, 2024).

3 Nunez v. Fairlawn Apts II, LLC (Massachusetts Superior Court, 2017).

4 In re Flint Water Cases (Michigan Federal Court, 2023).

5 Maldonado v. Ford Motor Company (Massachusetts Superior Court, 1996).

These cases present unique challenges for trial lawyers and their clients. Defending, evaluating, and trying these cases requires a nuanced understanding of the legal and procedural rules of the relevant jurisdiction to ensure cases are appropriately defended, and clients are fully informed about how the criminal's conduct will impact apportionment of fault and your client's potential exposure.

Understanding Jurisdictional Considerations is Critical to Proper Case Evaluation and Defense Strategy

The primary inquiry during the life of a tort case is almost always the same: what is our potential exposure here? That answer, of course, is driven by the nature of the plaintiff's injuries or damages. However, determining what affect, if any, the legal and procedural role of a third party's criminal conduct has on a client's exposure is paramount in evaluating and defending a case.

To properly assess a client's potential exposure in cases involving an individual's criminal conduct, a number of questions need to be answered upfront:

1. Is the criminal a party to the lawsuit?
2. Can they be made a party to the lawsuit?
3. If they are not a party, is there a mechanism that would allow the jury to assign them some percentage of fault?
4. If they are or can be a party to the lawsuit, will your client's exposure be reduced in any way if both the criminal and your client are found liable?

The answer to each of these questions will necessarily impact the nature and extent of your corporate client's potential exposure and necessarily must impact how you defend and try the case.

To Whom Can the Jury Assign Fault at Trial?

Whether the criminal individual will be on the verdict form in some capacity, or will be the proverbial "empty chair," is crucial in accurately assessing and valuing a case. Depending on the law in the relevant jurisdiction, the presence or absence of the criminal individual as a

party to the lawsuit will often be a strategic decision that will have been made by the plaintiff, and it is important to know which tools to employ to potentially shift fault away from your client to the criminal conduct that caused the harm.

a. Apportionment of Fault to Non-Parties

A mechanism available in certain jurisdictions allows defendants to identify non-parties whose conduct caused the plaintiff's alleged injuries or damages. This mechanism allows a defendant to argue at trial that a non-party should be assigned some percentage of fault for the plaintiff's alleged injuries. This allows a defendant, where a plaintiff purposefully declines to include the criminal as a party to the case, to provide an avenue for the jury to assign fault to the "empty chair" occupied by the criminal individual and minimize, or potentially eliminate, the amount of exposure to your client.

A fifty-state survey of these types of laws is beyond the scope of this article, but we have encountered a number of these mechanisms in our practice and highlight them here. In Connecticut, for example, a defendant can file what is known as an "apportionment complaint" against an unnamed party that the defendant can assert is responsible for some or all of the plaintiff's alleged damages. That apportionment defendant would be on the verdict form at trial and any percentage of fault assigned to it would reduce the first-party defendant's liability.

In New Hampshire, defendants can make what are known as DeBenedetto disclosures before trial, in which a defendant identifies non-parties it believes should be assigned some or all of the fault for the plaintiff's alleged injuries, and recovery against the named defendant is reduced by the percentage of fault allocated to the DeBenedetto parties unless the named defendant is found to be 50% or more at fault.

b. Joint and Several v. Several Liability

A proper understanding of the liability scheme in your jurisdiction is also critical in evaluating and preparing a case for trial. There may be instances in which the criminal individual will be on the verdict form, but such inclusion does not, practically speaking, impact the potential exposure to your client. For instance, in joint and several liability jurisdictions like Massachusetts, a plaintiff can recover the full amount of any judgment from any liable defendant. It would then be up to that defendant to pursue a contribution action from any liable criminal defendant who did not contribute its share of the judgment;[6] however, assuming the criminal defendant is judgment proof, the client should be informed that the full amount of any judgment is likely to be its responsibility.[7] In a several liability jurisdiction such as Connecticut, however, each defendant will be apportioned a percentage of fault and will only be responsible for its share of the total amount.

c. Evaluation and Defense of a Case is Necessarily Dependent on Law and Procedure of Jurisdiction

We have handled each of the cases described in the Introduction to this article, and our initial evaluation and assessment of each case would be dramatically different depending on what law applied-- Massachusetts, where all liable defendants are jointly and severally liable for the entire judgment and the jury is not permitted to apportion fault amongst defendants; Connecticut, where liable defendants are severally liable only for their apportioned share of liability; or New Hampshire, which provides a mechanism for the jury to apportion fault to non-parties identified by a named defendant.

Ensuring your client understands the practical effect of how your jurisdiction's law and procedure addresses a criminal individual—and how, in turn, it impacts their actual exposure—is critical.

Duty and Foreseeability

Not to be lost in this discussion is the imperative present in every tort case of developing and presenting your client's "due care" story. A defense strategy which exclusively relies on pointing the finger at the criminal is an off-putting to a jury For that reason, it is critical for the defense of these cases not only to focus the blame on the criminal, but to correspondingly demonstrate why your client's conduct, or product design, etc. was safe, reasonable, and appropriate. Telling this story in a compelling way allows the jury to justify issuing a defense verdict in circumstances in which an innocent plaintiff has undoubtedly been the victim of criminal wrongdoing.

In making this argument, it is important to understand whether your client had a duty to prevent or anticipate criminal conduct and stop or mitigate against it. For example, the alleged negligence in the DeMond case was tied to a contract with the State of Connecticut that precluded loitering or alcohol sales at highway rest stops. In ruling that judgment should have been entered for defendant, the Connecticut Supreme Court held that the scope of foreseeability relating to a contractual undertaking "is anchored to the reasonable expectations of the undertaking party arising from the services to be

6 M.G.L. ch. 231B, § 4.

7 For example, while Massachusetts juries do not apportion fault amongst defendants, in a case with both a corporation and a criminally liable defendant, a jury theoretically could find a corporation 1% at fault and the criminal 99% at fault for the plaintiff's injuries, and the corporate defendant would be responsible for paying 100% of the judgment.

performed."[8] Thus, the defendant had no duty to the motoring public on the adjacent highway to prevent the criminal conduct of the individual who allegedly was loitering and drinking on the premises.

Plaintiffs' Mantras

Depending on the jurisdictional considerations discussed above, plaintiffs seek to develop various themes in prosecuting and trying cases they have brought against corporate defendants for harm caused by a criminal primarily responsible for the plaintiff's injuries and damages.

The most common theme is for the plaintiff to distinguish between the accident, (which smart plaintiffs' lawyers will concede was absolutely caused by the criminal), and the plaintiff's injuries, (which they will say were caused or exacerbated by the defendant's conduct). A corollary to that concession is often used jury instruction given by plaintiffs' counsel: If you cannot get past the criminal conduct to focus on how the defendant was a cause of these injuries as well, then I might as well go home.

Effective plaintiffs' attorneys do not shy away from the primary fault of the criminal actor. Instead they focus the jury on the defendant's conduct as being an equal, if not greater, contributor to the plaintiff's injuries and that the corporate defendants are seeking to avoid responsibility by blaming a third-party. Indeed, plaintiffs' attorneys will repeatedly reiterate, particularly in closing arguments, jury instructions on proximate cause that the corporate defendant need not be the only cause of the injuries, it must only be a cause of the injuries.

Practical Considerations and Recommendations for Defendants

One of the most difficult issues in defending cases in which a plaintiff has been injured or killed by a criminal actor is — notwithstanding what is or may seem like specious liability arguments — jury sympathy and the feeling jurors have to find a way to provide "justice" to an injured plaintiff With that backdrop, the jury often has only one party — the corporate defendant — which it can blame, and they are going to be inclined to find fault with whomever they can.

In defending and trying cases like these, while acknowledging the tragedy underlying the plaintiff's claims, it is essential to craft a narrative stressing who is responsible for the plaintiff's injuries or death. Effectively delivering that narrative requires you to book-end your trial presentation — first thing in your opening statement and lastly in your closing argument — with the message that the plaintiff's injuries and damages were caused exclusively by the criminal conduct, not your client.

We know jurors are looking for a villain and looking for someone to blame and punish for some perceived wrong to the plaintiff. You can and should explain that sometimes the answer they are looking for, the villain who caused this harm, is obvious and it is not the corporate defendant on trial.

8 DeMond v. Project Service, LLC, 208 A.3d 626, 649 (Conn. 2019) (emphasis in original).

Clearly Not My Fault

Evaluation of Tort Claims Against Tangentially Involved Corporations

The Cases and The Problem

- Marginal defendant with deep pockets
- Highly responsible non-party

Case Examples

- Drunk driving accident
  - Convenience store allowed an alcoholic to sleep in his car in the parking lot
- Impaired driving accidents
  - Product liability/crashworthiness of the struck vehicle
- Rape and murder in an apartment complex
  - Premises liability of the management company
- Environmental Contamination
  - Professional negligence of a consulting engineer
- Workplace accidents
  - Various products liability and negligence claims to avoid the comp bar

Nuclear Verdict Potential

- Juries are looking to assign accountability
- Bad actor absence at trial deprives the jury of that need
- Denial of wrongdoing by pointing at others creates anger
- Anger results in nuclear verdicts
- MUST get beyond a simple finger pointing at the bad actor
- MUST develop and present the client's "due care story"

Plaintiffs' Mantras

- Accept and embrace the bad actor
- Shared responsibility
- Only entity not to accept responsibility
- Let's go home if you can't get by the bad actor
- Accident versus injury causation in products cases

Case Evaluation

- Trap of focusing on the bad actor
- Evaluate and defend the client's actions
- Bad actor is only a part of the story (maybe)
- CANNOT assume the bad actor will part of the narrative at trial

Case Evaluation Issues

- Jurisdiction dependent
- Duty
- Intervening and superseding cause
- Foreseeability of criminal conduct
- Joint and several liability
- Non-party apportionment
- Sole proximate cause

Evidence of and Apportionment to the Non-Party Bad Actor

- Will the non-party bad actor be on the verdict form?
- What is the admissible evidence as to the bad actor?
- *DeBenedetto* defendants
- apportionment complaint
- *Fabre* defendants
- Fair Share Liability Act (Non-Party at Fault Notice)

Joint and Several Liability

- Consequence of a finding of joint liability with the bad actor?
  - Be careful what you wish for
- Joint and several liability
- Several liability
- Contribution rules of the venue
- Full share; pro-rata share; percentage at fault share

Duty and Foreseeability

- Responsibility for criminal acts
- Application of foreseeability concepts
- Does the client's own policies, procedures, product design, or other conduct contemplate the bad actor's conduct?
  - Motor vehicle designs to minimize injury
  - Standard operating practices that specifically address the conduct at issue
  - Knowledge of regulations and standards violated by the bad actor
  - Contract terms that address the conduct at issue
- Is the due care story in conflict with the legal defense of blaming the bad actor?

Practical Considerations

- "Not our problem" and "they did it" ***without more*** is a potentially dangerous
  - Particularly dangerous with foreseeable and predicted conduct
  - 20/20 hindsight is a particular concern
- Jury has one defendant in the court to blame
  - Peripheral involvement can morph to the core and become foreseeable and preventable cause of the tragedy
  - The jury needs a narrative that allows them to say no to the plaintiff
- Innocent plaintiff with huge damages
  - Jury sympathy will be a major factor

Case Handling Recommendations

- Jury (de)selection and voir dire
- Use of the language of the jury instructions
- Packaging the bad actor's conduct and responsibility
  - First in opening and last in closing
  - The due care story fills the middle
  - Sometimes the answer is obvious

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James M. Campbell

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Jim Campbell focuses his practice on civil litigation and the defense of catastrophic product liability, toxic tort, medical device, pharmaceutical, professional liability, and negligence matters throughout the United States. Jim is President of Campbell Conroy & O'Neil, P.C., and has been with the firm his entire career. With a passion for trial practice, Jim has earned his place as a go-to attorney for clients with high-stakes cases. He has tried more than 100 cases in 15 states and is a Fellow of the American College of Trial Lawyers, a Diplomate of the American Board of Trial Advocates (ABOTA), Fellow of the International Society of Barristers, and a Fellow of the Litigation Counsel of America. His approach includes a thorough analysis of clients' ultimate business objectives to achieve results. Jim is recognized by The Legal 500 as a Nationwide Leading Lawyer for Product Liability and Mass Tort Defense. Similarly, Chambers USA identifies Jim as a nationwide leading lawyer for product liability and Mass Torts. He is listed as one of the Top 10 Most Highly Regarded Individuals in the United States for Products Liability Defense by the Who's Who Legal. Jim is consistently included as one of the Best Lawyers in America for Products Liability Litigation – Defendants. Super Lawyers identifies Jim as among the top 100 lawyers in Massachusetts and New England.

Practice Areas

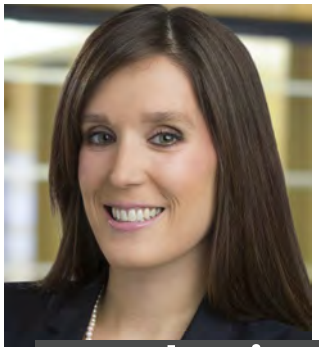
- Appellate Practice
- Class Actions
- Fraud / Bad Faith
- Insurance Defense
- Legal Malpractice
- Medical Malpractice
- Personal Injury / Negligence
- Pharmaceutical and Medical Devices
- Premises Liability
- Products Liability Defense
- Professional Liability
- Toxic Torts / Mass Torts Defense

Honors

- Inducted as a Fellow of the American College of Trial Lawyers
- Diplomate of the American Board of Trial Advocates (ABOTA)
- A "Leading Individual" in Chambers USA in Products Liability & Mass Torts: Nationwide, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018
- A "Star Individual" in Chambers USA in Products Liability: Automotive, 2009, 2010, 2011, 2012
- Recognized by The Legal 500 as a Product Liability and Mass Tort Defense: Automotive/Transport Leading Lawyers nationwide for 2018. This marks the tenth consecutive year that James Campbell has been named to this list
- Among the Top 10 Most Highly Regarded Individuals in Products Liability Defense in Who's Who Legal
- Massachusetts Defense Lawyers Association, Defense Lawyer of the Year, 2016
- Selected by his peers for inclusion in "The Best Lawyers in America" in the field of Products Liability Litigation – Defendants, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018

Education

- 1980, B.A., magna cum laude, Boston College
- 1983, J.D., University of Virginia School of Law



More Warnings, More Problems? Failure-to-Warn Claims in the Digital Age

Stephanie Laws
Maslon (Minneapolis, MN)

More Warnings, More Problems? Failure-to-Warn Claims in the Digital Age
Stephanie M. Laws

Manufacturers have faced failure-to-warn claims since at least the 1960s and 1970s, when states across the country adopted strict liability as a policy-based, cost-sharing mechanism to compensate consumers for product-related harms. Although the elements of failure-to-warn claims have largely remained the same, the world we live in—and the way we communicate—has dramatically changed. We live in a digital age. Over 5 billion people currently have access to the internet[1] and nearly 70% of the world's population has a smart phone.[2] Likewise, there are an estimated 4.8 billion social media users worldwide spending an average of over 2 hours on social media per day.[3] We use smartphones to watch the news, order food, fix our dishwashers, and communicate with each other and the public at large. How this easy access to information impacts consumers and manufacturers when it comes to product liability claims is still evolving.

Failure-To-Warn Claims

A failure-to-warn claim alleges that an end user or bystander is injured by a product as a result of the product's defective warnings and instructions. The product itself need not be inherently unsafe for a claim to arise. Rather, claims may arise if the warnings or instructions by the manufacturer do not adequately advise the end user how to safely use the product. Under the Restatement (Second) of Torts Section 401, to establish a failure-to-warn claim, a plaintiff must show: (1) the defendants had reason to know of the product-related risk; (2) the warnings fell short of those reasonably required, breaching the duty of care; and (3) the lack of an adequate warning caused the plaintiff's injuries.[4] Whether there is a legal duty to warn is a question for the court,[5] but the adequacy of the warning and causation are typically fact questions for the jury.[6] In most jurisdictions, the adequacy of a warning must be evaluated in light of the knowledge and expertise of those who may be reasonably expected to use the product.[7]

Traditionally, product warnings and instructions for use were provided to the consumer at time of purchase via physical user guides and instruction manuals. Given the dramatic transformation in communication norms stemming from the internet and social media, this practice has evolved. Today, simply including a warning label on a product or providing a paper instruction manual may no longer be sufficient to avoid liability for an alleged failure to warn. Notably, most states give at least some weight to consumer expectations when considering product defect claims, including warnings-based claims.

Standards for Traditional Product Labeling

The American National Standard Institute (ANSI) is a private, non-profit organization that oversees the development of voluntary consensus standards for product labeling and warnings in the United States. ANSI's voluntary standards are developed by committees and include input from consumers, industry representatives, and the government, including regulatory agencies overseeing product issues like the Consumer Product Safety Commission ("CPSC").[8] The set of ANSI standards governing product labeling, known as the ANSI Z535 series, provide guidance to manufacturers regarding where and how to warn of potential hazards to ensure that product risks are appropriately conveyed to end users. ANSI standards provide direction across many aspects of product labeling—from the specific colors and font size to be used to more general guidance about design and

1 Lexie Pelchen, Internet Usage Statistics in 2024, Forbes (Mar. 1, 2024), https://www.forbes.com/home-improvement/internet/internet-statistics/#:~:text=There%20are%205.35%20billion%20internet%20users%20worldwide.&text=Out%20of%20the%20nearly%208,the%20internet%2C%20according%20to%20Statista.

2 Federica Laricchia, Smartphones – Statistics & Facts, Statista (Jun. 12, 2024), https://www.statista.com/topics/840/smartphones/#topicOverview.

3 Belle Wong, Top Social Media Statistics And Trends Of 2024, Forbes (May 18, 2023), https://www.forbes.com/advisor/business/social-media-statistics/.

4 Erickson By & Through Bunker v. American Honda Motor Co., Inc., 455 N.W.2d 74, 77-79 (Minn. Ct. App. 1990).

5 Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986).

6 Balder v. Haley, 399 N.W.2d 77, 81 (Minn. 1987).

7 See, e.g., Thornton v. E.I. DuPont De Memours and Co., Inc., 22 F. 3d 284 (11th Cir. 1994).

8 American National Standards Institute, American National Standards (ANS) Introduction. American National Standards Institute, https://www.ansi.org/american-national-standards/ans-introduction/overview#introduction (last visited Sept. 17, 2024).

layout. Manufacturers regularly rely on ANSI standards and use them as a reference when creating the warnings and instructions for their products.

And with good reason. Although compliance with ANSI standards does not forestall failure-to-warn liability, the standards are often used as evidence by both plaintiff and defense experts to opine that warnings were or were not adequate.[9] For example, in Palmatier v. Mr. Heater Corp., a woman brought a failure-to-warn claim against the manufacturer of a propane heater after suffering burns when her clothing ignited while warming herself by the heater.[10] The manufacturer sought summary judgment, arguing the heater and its warnings had been certified by the Canadian Standards Association, which determined it complied with ANSI standards.[11] In response, the plaintiff argued that the heater's warnings did not meet two specific ANSI standards governing the minimum height for the warning's lettering and minimum distance at which the warning must be legible.[12] Based on this competing evidence, the court denied the defendant's motion for summary judgment on the failure-to-warn claim determining "there are factual issues for a jury to resolve as to the adequacy of the heater's warnings."[13] In addition to analyzing the standards themselves, courts likewise consider experts' experience developing and working with ANSI standards when determining whether they are qualified to testify.[14]

Certain categories of products have much more precise and stringent labeling standards. Products regulated by the U.S. Food, Drug, & Cosmetic Act must follow the rigorous and detailed labeling requirements set forth in FDA regulations, rules, and guidance documents.[15] Prescribing information for human pharmaceuticals, for example, must include over a dozen different categories of information in a set order and format, including presenting certain contraindications or serious warnings (i.e. those that can lead to death or serious injury) up front in a boxed warning, followed by additional information on indications and usage, dosage and administration, dosage forms and strength, contraindications, warnings and precautions, adverse reactions, drug interactions, and use in special populations, among other categories.[16] And additional agencies and regulations govern specific other aspects of product labeling, like the National Organic Program overseen by the U.S. Department of Agriculture, which promulgates labeling standards for organic products based on the percentage of organic ingredients they contain.[17]

Shifting Consumer Expectations

Consumer expectations are changing. Based on a 2024 survey presented at the 2024 International Consumer Product Health and Safety Organization Symposium, the majority of individuals now expect product manuals to be available online.[18] Likewise, surveyed individuals reported consulting online manuals and instructions, both at the time of initial purchase (18%) and upon later reference (27%).[19] Further, the vast majority of surveyed individuals (79%) reported having consulted a specific form of digital instructions—videos—when assembling or repairing a product in the past. Notably, those individuals generally reported relying on video instructions not from the manufacturer, but other internet sources, including YouTube (88.5%), Google (43.5%), DIY websites (28.3%), and social media (8.9%).[20]

Digital warnings and instructions can be incredibly beneficial for both manufacturers and consumers, providing a clearer picture to end users regarding how to use certain products, increasing access to information not typically provided in paper form, like multi-language translations, and reaching a broader audience through the internet and social media. Providing digital warnings and instructions also raises new concerns. For example, carefully prescribed safety colors may appear differently on a digital screen, depending on the device. Additionally, even for basic steps like publishing an online manual require manufacturers must have a system for ensure URL links remain current. Concerningly, unlike for traditional paper warnings, there is a lack of clear guidance surrounding standards for providing digital warnings and instructions, despite the expectation that they exist.

Digital Warnings and Instructions

Although the latest official ANSI standards do not

9 See, e.g., Thomas v. FCA US LLC, 242 F. Supp. 3d 819 (S.D. Iowa 2017) (admitting testimony from plaintiff's experts that warnings were inadequate because "there were no warnings of the potential for leg injuries during the deployment of the driver's side [airbag] . . . [in] violation of American National Standards Institute (ANSI) Z-535 Standards."); Bozick v. Conagra Foods, Inc., 19-CV-4045, 2022 WL 4561779 (S.D.N.Y. Sept. 28, 2022) (assessing three competing experts opinions that warnings on PAM Original can that allegedly exploded and burned plaintiff's hand did, or did not, comply with ANSI Z535 standards).

10 Palmatier v. Mr. Heater Corp., 163 A.D.3d 1192, 1193 (N.Y. App. Div. 2018).

11 Id.

12 Id.

13 Id. at 1195.

14 See, e.g., Thomas, 242 F. Supp. 3d at 825-27 (finding plaintiff's experts were qualified to opine on warnings because, among other reasons, both had "designed warning labels pursuant to standards such as ANSI Z535").

15 See, e.g., 21 C.F.R. § 201.56 (general labeling requirements), 21 C.F.R. § 201.57 (specific requirement on content and format of labeling for drugs approved after June 2001), 21 C.F.R. § 201.80 (specific requirements on content and format of labeling for drugs approved prior to June 2001).

16 See 21 C.F.R. § 201.57.

17 See U.S. Dep't of Agriculture, Cosmetics, Body Care Products, and Personal Care Products, National Organic Program, U.S. Dep't of Agriculture (April 2008), https://www.ams.usda.gov/sites/default/files/media/OrganicCosmeticsFactSheet.pdf.

18 Steven M. Hall, Judith J. Isaacson, Raina J. Shah, et al., Consumer Expectations for Owner's Manuals – Safety Information and Online Availability, Applied Safety + Ergonomics (Feb. 2024), https://cdn.ymaws.com/icphso.org/resource/resmgr/2024_annual_presentations/AM2024_ASE_Rimkus.pdf.

19 Id.

20 Id.

address electronic media, a new standard Z525.7, is set to be published soon. This new standard was first announced in 2021 and numerous committee meetings have been held to discuss and refine its contents. This standard is primarily intended to address the applicability of elements of other ANSI Z535 series standards such as series standards, graphical elements, signal words, and safety symbols, to electronic media. The standard is expected to be very flexible, given the potentially wide range of capabilities and limitations of electronic media through which product safety information may be presented. The standard's authors report that annexes will also be created to provide additional commentary on considerations for delivering digital safety information.

A review of the committee notes reveals some of the issues being discussed by the drafting committee and demonstrates the difficulties in drafting the standard. In a March 22, 2021 committee log, committee members considered the delivery of safety messages in dynamic media. Areas of concern included the length of time to review the message and whether any fast-forward option on the media should be labeled as "skip," which the committee feared would imply the material was unimportant, or "next," which may not have the same connotations. The committee ultimately scrapped both options at the recommendation of CPSC staff.[21] In its May 2021 meeting, the committee discussed how the media to be covered by these standards will be in multiple forms, such as audio and video.[22] Consequently, the intent of the standard is the "provide a lot of flexibility."[23] In a subsequent meeting in June of 2021, committee members again focused on the ideal duration of any safety messages and whether they should be determined using an "average" reading speed or an "expected" reading speed. The committee made the decision to refer to "expected" reading speed in the standard. Additionally, the committee discussed the option to pause or rewind safety messages.[24]

Social Media & Misinformation

The prevalence of social media has generated significant concern among manufacturers and regulatory agencies regarding the spread of misinformation. Social media postings published by or controlled by the manufacturer have been considered product labeling by courts and regulatory agencies alike.[25] For its part, in June 2014, the FDA issued draft guidance regarding the correction of independent, third-party misinformation about prescription drugs and medical devices.26 In July 2024, the FDA announced the availability of revised draft guidance regarding addressing misinformation about medical devices and prescription drugs, which is designed to replace the 2014 guidance.[27] Several major industry groups, including Pharmaceutical Research and Manufacturers of America (PhRMA) and the Advanced Medical Technology Association (AdvaMed), have posted public comments as recently as September 2024.[28]

Social media misinformation is particularly concerning in light of the doctrine of foreseeable misuse. Under that doctrine, manufacturers can be held liable for injuries that result from product misuse if the product was misused in a reasonably foreseeable manner.[29] A 2023 California case, Bernal v. Walgreens Co., involved a woman who was injured when a bottle of isopropyl alcohol she had purchased exploded as she attempted to use it to roast chili peppers.[30] Bernal sued Walgreens claiming, among other things, that the bottle did not contain a warning that it could explode if exposed to a potential ignition source or flame.[31] Bernal claimed that it was foreseeable that the isopropyl alcohol would be used as a cooking fuel, pointing to several different online videos presenting instructions for how use the isopropyl alcohol as fuel.[32] The trial court ultimately ruled that Bernal's misuse of the isopropyl alcohol was not foreseeable.[33] The court of appeals affirmed, reasoning Bernal's actions—"soaking the chilis in isopropyl alcohol in an empty tomato sauce can, while dropping in lit matches"—were "inexplicably far a field from the bottle's stated use as an antiseptic."[34] Although most jurisdictions only require manufacturers to warn of risks foreseeable at the time of sale, in some jurisdictions, manufacturers can also be held liable for misuse that becomes reasonably foreseeable after the product is sold. For example, in Temple v. Velcro USA, Inc., the court dismissed a failure-to-warn claim against a Velcro manufacturer related to the wrongful death of a

21 U.S. Consumer Product Safety Comm'n, Meeting of the ANSI Z535.7 Subcommittee on Warnings in Electronic Media, U.S. Consumer Product Safety Commission (Mar. 22, 2023), www.cpsc.gov/s3fs-public/ANSI-Z5357-Subcommittee-Meeting-Log.pdf?VersionId=li.LM9Ha_MtUqBq8JGnNCwOhCLcCeJ7T.

22 Id.

23 Id.

24 Id.

25 See, e.g., Colgate v. Juul Labs, Inc. 402 F. Supp. 3d 728 (N.D. Cal. 2019).

26 Food and Drug Administration, Guidance for Industry: Internet/Social Medial Platforms: Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices, Food and Drug Administration (June 2014), https://www.fda.gov/media/88545/download.

27 Food and Drug Administration, Guidance Document, Addressing Misinformation About Medical Devices and Prescription Drugs: Questions and Answers, Food and Drug Administration (July 2024), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/addressing-misinformation-about-medical-devices-and-prescription-drugs-questions-and-answers.

28 Food and Drug Administration, Comment from Pharmaceutical Research and Manufacturers of America (PhRMA), Food and Drug Administration (Sept. 9, 2024), https://www.regulations.gov/comment/FDA-2014-D-0447-0032; Food and Drug Administration, Comment from Advanced Medical Technology Association (AdvaMed), Food and Drug Administration (Sept. 9, 2024), https://www.regulations.gov/comment/FDA-2014-D-0447-0033.

29 See, e.g., Chavez v. Glock, Inc., 144 Cal. Rptr. 3d 326, 346-47 (Cal. Ct. App. 2012).

30 No. B315399, 2023 WL 4731566, at *1 (Cal. Ct. App. July 25, 2023).

31 Id.

32 Id.

33 Id.

34 Id. at *6

hot air balloon passenger following the failure of a Velcro closure on a hot air balloon, but only after determining that, although the manufacturer had actual knowledge that Velcro was being used as a hot air balloon closure, it had made repeated efforts to communicate the danger of this misuse to the hot air balloon community.[35]

Such a standard creates major concerns for manufacturers whose products feature on social media in bizarre but viral ways. As one well-known example, in early 2018, Tide laundry detergent pods made headlines when the "Tide Pod Challenge" went viral on YouTube and across other social media platforms. The "challenge" encouraged individuals to put the Tide pods, which are small packets of detergent, into their mouths and bite or chew them while videorecording the results. The Tide Pod Challenge reportedly led to several injuries. Tide has since made changes to the packaging and design of the product, enhanced warning labels and even changed its advertising strategies to specifically warn against ingesting Tide Pods.[36] It is yet to be seen whether manufacturers facing bizarre yet "viral" product misuse will be held liable for failure to warn.

35 Temple v. Velcro USA, Inc., 148 Cal. App. 3d 1090, 1092 (Cal. Ct. App. 1983).

36 Lindsey Bever, Teens are Daring Each Other to Eat Tide Pods. We Don't Need to Tell You That's a Bad Idea, Washington Post (Jan. 17, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/01/13/teens-are-daring-each-other-to-eat-tide-pods-we-dont-need-to-tell-you-thats-a-bad-idea/.

More Warnings, More Problems?

Failure-to-Warn Claims in the Digital Age

PRESENTED BY

Stephanie M. Laws

October 24, 2024

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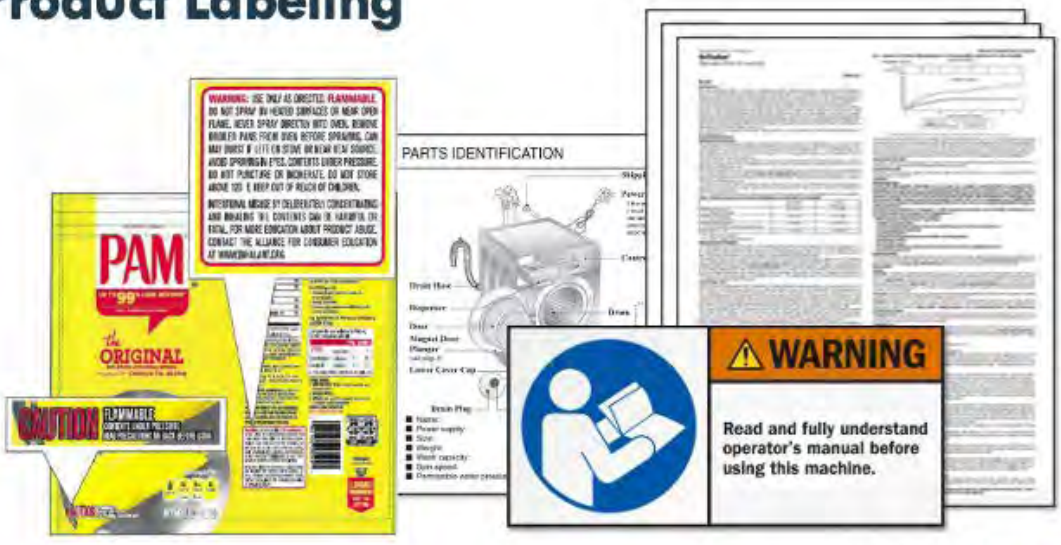
Product Labeling



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Consumer Expectations

Consumer expectations . . . affect how risks are perceived and relate to foreseeability and frequency of the risks of harm . . . Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior.

Restatement (Third) of Torts, §2, comment g

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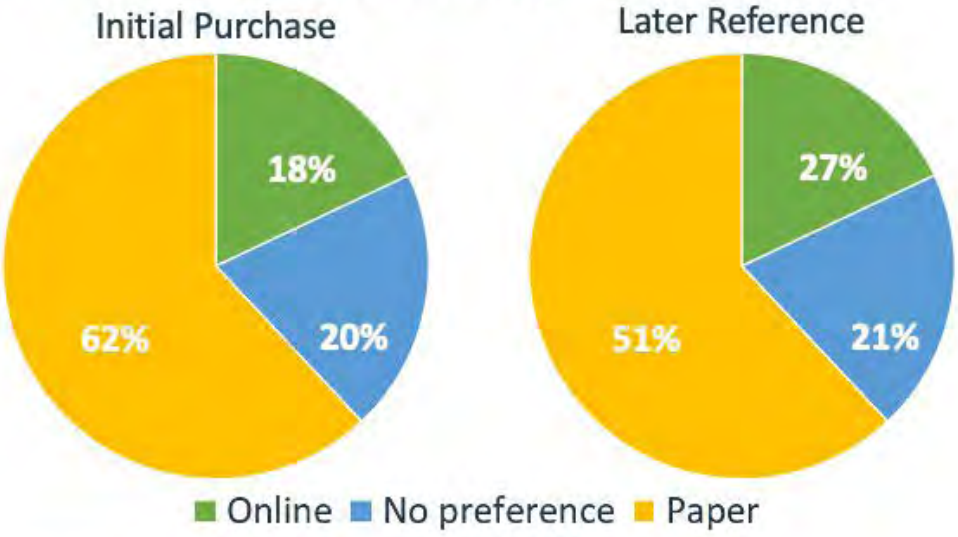
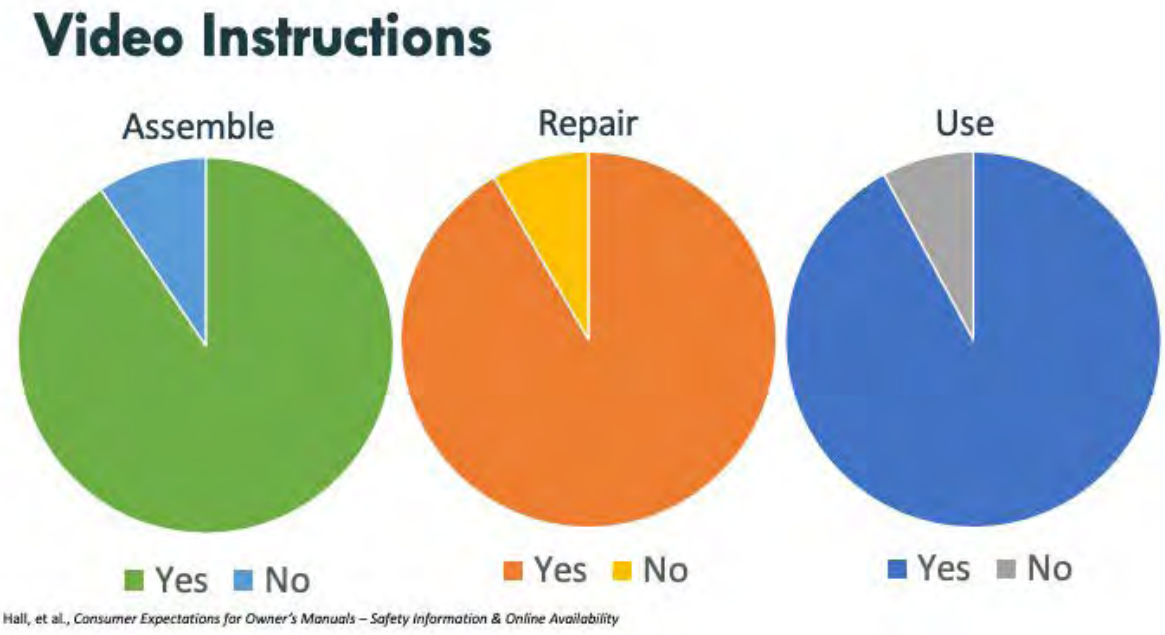
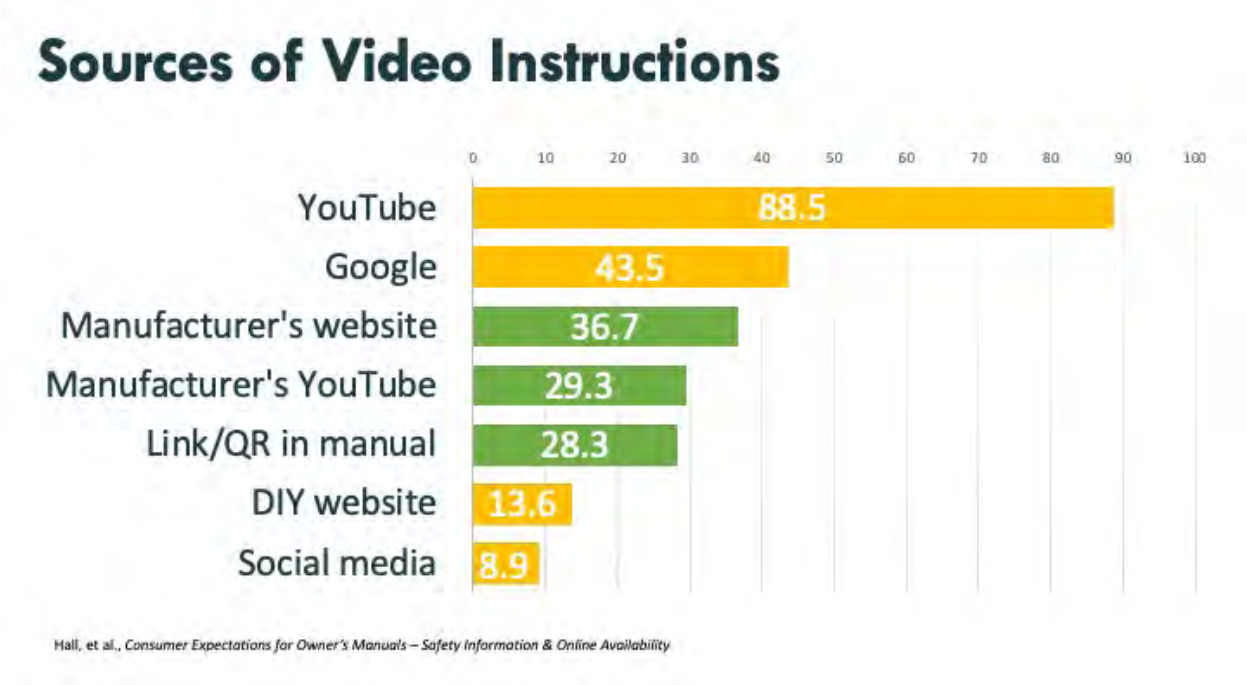
Paper vs. Digital Warnings

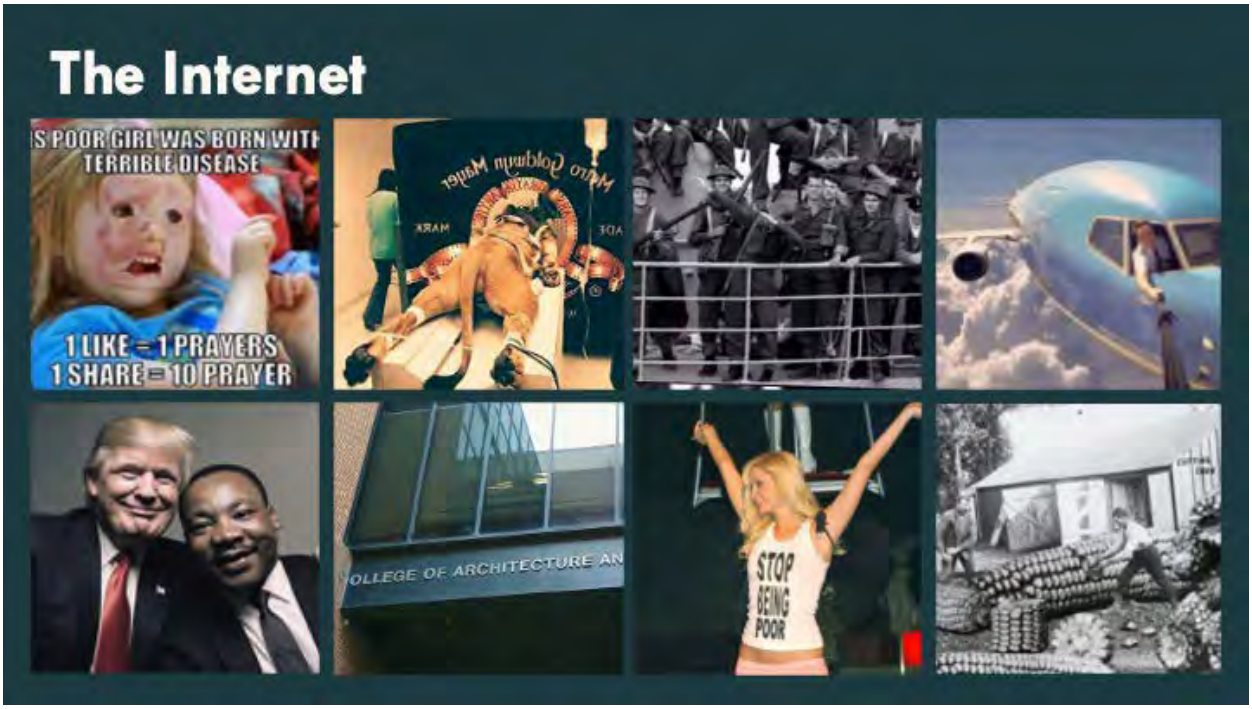


Hall, et al., *Consumer Expectations for Owner's Manuals – Safety Information & Online Availability*

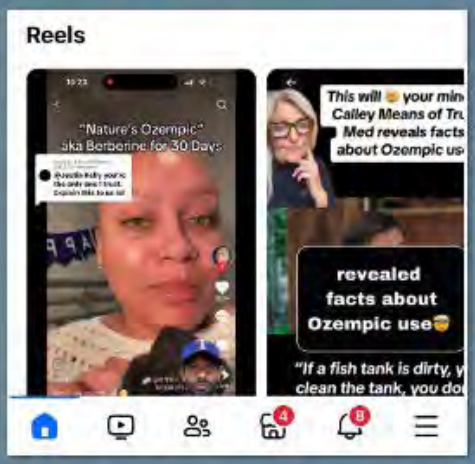


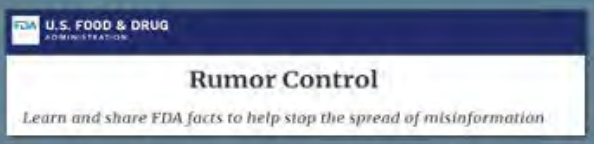
Hall, et al., *Consumer Expectations for Owner's Manuals – Safety Information & Online Availability*


Sources of Video Instructions
0
10
20
30
40
50
60
70
80
90
100
YouTube
88.5
Google
43.5
Manufacturer's website
36.7
Manufacturer's YouTube
29.3
Link/QR in manual
28.3
DIY website
13.6
Social media
8.9
Hall, et al., Consumer Expectations for Owner's Manuals – Safety Information & Online Availability


The Internet
1 LIKE = 1 PRAYERS
1 SHARE = 10 PRAYER
STOP
BEING
POOR

Social Media





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More Than Words

When the green **Nauseated Face Emoji** is paired with the yellow **Face with Tears of Joy emoji** the use of emojis in this context expresses . . . a harshly negative statement that [Gatorade is] **gross or nauseating (via emoji) and undrinkable**.

NAD Fast-Track SWIFT Case #7047

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Foreseeable Misuse?

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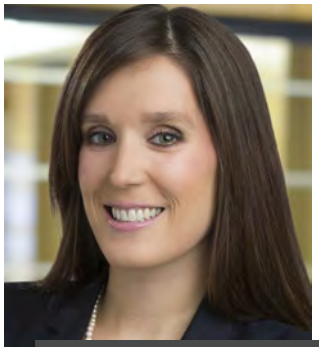

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Stephanie Laws is a practical problem solver who represents businesses in product liability and complex civil litigation in federal and state courts nationwide. She also conducts internal investigations and helps companies respond to government enforcement 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.

Areas of Practice

- Litigation
- Business Litigation
- Investigations & White Collar Defense
- Tort & Product Liability

Honors

- Selected for inclusion in Best Lawyers: Ones to Watch, 2021-2025 (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, 2023-2024 (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.)
- Recognized as a Top Lawyer, Minnesota Monthly, 2024 (The research for the Top Lawyers list, created by Professional Research Services, is based on an online peer-review survey sent to all attorneys in Minnesota.)
- North Star Lawyer, Minnesota State Bar Association, 2017-2022 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.)
- Pro Bono Award, for commitment to pro bono service, Maslon LLP, 2022

Education

- University of Pennsylvania Law School - J.D., cum laude, 2012
- University of Wisconsin-Madison - B.A., magna cum laude, 2007; English

Panel - Game Changers: Legal and Regulatory Developments in Collegiate Sports

Katie Reilly

Wheeler Trigg O'Donnell (Denver, CO)

Game Changers: Legal and Regulatory Developments in Collegiate Sports
Henry Gimenez (Lightfoot Franklin & White)

The NCAA's college sports model has been the subject of sustained legal challenge over the past 15 years, with the NCAA facing numerous, repeated attacks on rules pertaining to student-athlete inducements, benefits and compensation. The settlement agreement reached in the House litigation seeks to stabilize much of the turmoil caused by the past decade-plus of litigation by setting forth a new framework for intercollegiate athletics—one that seeks to balance the provision of increased benefits to student-athletes with the preservation of the breadth and character of college sports. But even if ultimately approved, the House settlement still leaves a number of legal issues unresolved, including the impact of Title IX regulations on revenue distribution under the new model; ongoing legal battles regarding the employment status of student-athletes; and the prospect of a new enforcement structure within or potentially outside the NCAA.

Recap: O'Bannon and Alston
Antitrust challenges to the NCAA's rules on student-athlete compensation first took root in O'Bannon v. NCAA, a 2009 class action concerning the use of student-athletes' names, images, and likenesses ("NIL") in video games, live game broadcasts, and archival footage. 7 F. Supp. 3d 955 (N.D. Cal. 2014). At the time, the NCAA's rules allowed member institutions to offer scholarships up to a full "grant in aid" (defined as the cost of tuition and fees, room and board, and required course-related books) but otherwise prohibited student-athletes from receiving compensation for the use of their NIL. The plaintiffs claimed these rules violated Section 1 of the Sherman Act by illegally restraining their ability to receive a share of any broadcast or other revenue earned from the use of their NIL. The district court agreed, in part. Applying the rule of reason, the court concluded the NCAA's rules were more restrictive than necessary to justify the association's claimed procompetitive goals of preserving "amateurism" and promoting the integration of academics and athletics. As a result, the district court enjoined the NCAA from prohibiting its member schools from providing scholarships that covered the full "cost of attendance" rather than the lesser, previously defined grant-in-aid amount. The Ninth Circuit affirmed that aspect of the district court's judgment. O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

Alston v. NCAA soon followed. In 2014, student-athletes filed another class action challenging the NCAA's compensation rules, this time attacking the grant-in-aid cap itself (now defined to include the full "cost of attendance"). The district court again agreed that the NCAA's rules were unreasonable—and thus illegal under the rule of reason—to the extent they restricted member schools' ability to offer education-related benefits above and beyond a full grant-in-aid.[1] In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019). The district court then enjoined the NCAA from limiting the education-related benefits member schools could offer student-athletes, which the Ninth Circuit once again affirmed. In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020).

The NCAA appealed to the United States Supreme Court, which unanimously affirmed the district court's injunction. In doing so, the Court expressly confirmed that the regulation of college sports is not uniquely immune from the Sherman Act and, thus, that the NCAA's rules are subject to antitrust scrutiny under the rule of reason. NCAA v. Alston, 594 U.S. 69 (2021). Still further, Justice Kavanaugh penned a concurrence in which he expressly questioned whether any of the NCAA's compensation restrictions could survive such scrutiny. Id. at 110.

Post-Alston Litigation and the House Settlement
Student-athletes filed a slew of new antitrust lawsuits challenging the NCAA's NIL and compensation rules while Alston was pending and in the wake of the Court's decision. These include:

- In re College Athlete NIL Litigation (also known as House), No. 4:20-cv-03919-CW (N.D. Cal.),

1 The court did, however, conclude that rules restricting schools' ability to offer non-education-related benefits were justified by the NCAA's asserted interest in preserving amateurism.

challenging the NCAA's NIL rules, which previously prohibited student-athletes from entering into NIL deals with third parties and currently prohibit direct institutional payments for NIL;
- Hubbard v. NCAA, No. 4:23-cv-01593-CW (N.D. Cal.), seeking back-pay for education-related benefits permitted under Alston (so-called "Alston payments"); and
- Carter v. NCAA, No. 4:23-cv-6325 (N.D. Cal.), and Fontenot v. NCAA, No. 1:23-cv-03076 (D. Colo.), both challenging the NCAA's rules prohibiting direct institutional payments to student-athletes beyond scholarships and educated-related benefits.

In May, the parties announced their agreement to a global settlement of the House, Hubbard, and Carter cases. In addition to financial relief, the proposed settlement agreement provides for injunctive relief that, if approved, will substantially alter the NCAA's model for college sports. Most significantly, the new model would allow member institutions to offer increased benefits to student-athletes, including direct institutional payments for NIL, of up to 22% of the average revenue that autonomy conference schools generate from media rights, ticket sales, and sponsorships.[2] The new model would also eliminate the NCAA's existing scholarship limits for all sports in favor of establishing roster limits.

The proposed House settlement also creates a new framework for oversight of third-party NIL deals for the next 10 years. Under the injunctive relief portion of the settlement agreement, student-athletes would retain their ability to receive compensation from third-party NIL deals, which NCAA rules have allowed since July 2021. Such contracts, however, would be subject to reporting and oversight requirements aimed at ensuring they are legitimate NIL deals, not disguised payments for athletic performance ("pay-for-play") that remains prohibited by NCAA rules. In particular, the House settlement places some restrictions on permissible NIL deals involving "boosters" to ensure that such deals have a valid business purpose and reflect fair market value.[3]

2 The autonomy conference schools include those in the Atlantic Coast Conference ("ACC"), the Big Ten, the Big 12, and Pacific 12 ("PAC-12"), and the Southeastern Conference ("SEC").

3 In NCAA parlance, a booster is defined to include any "individual, independent agency, corporate entity . . . or other organization who is known (or who should have been known) by a member of the institution's executive or athletics administration to: (a) have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program; (b) have made financial contributions to the athletics department or to an athletics booster organization of that institution; (c) be assisting or to have been requested (by the athletics department staff) to assist in the recruitment of prospective student-athletes; (d) be assisting or to have assisted in providing benefits to enrolled student-athletes or their family members; or (e) have been involved otherwise in promoting the institution's athletics program. NCAA Bylaw 13.02.16.

Going Forward: Unanswered Questions

Title IX

Title IX requires colleges receiving federal funds to provide equal opportunities for men and women to compete in varsity sports and provide equitable benefits to those athletes. The law, written and enacted decades before today's issues were even on the horizon, does not clearly state how direct institutional payments for student-athletes' NIL should be treated for purposes of Title IX compliance. The House settlement does not address that issue. If or how Title IX regulations apply to revenue sharing permitted under the new college sports model remains an open question that schools must navigate going forward.

Employment of Student-Athletes

The proposed House settlement also does not resolve pending legal battles concerning the employment status of student-athletes.

In a closely-watched case, the Third Circuit recently held that student-athletes may qualify as employees entitled to minimum-wage and overtime pay under the Fair Labor Standards Act ("FLSA"). Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024) (affirming denial of motion to dismiss and remanding for further proceedings). In deviating from prior decisions out of the Ninth and Seventh Circuits, the Third Circuit's decision in Johnson creates a circuit split on the issue and opens the door to further employment-related claims under the FLSA and state wage-and-hour laws. Cf. Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019) (affirming dismissal for failure to state a claim because "the NCAA and PAC-12 are regulatory bodies, not employers of student-athletes under the FLSA"); Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016) (affirming dismissal for failure to state a claim on former athletes' claims against their schools because the athletes were not employees within the meaning of the FLSA).

The Johnson decision comes on the heels of several challenges to the employment status of college athletes under the National Labor Relations Act ("NLRA"). In May 2023, the National Labor Relations Board's ("NLRB") regional office in Los Angeles filed a complaint against the NCAA, the PAC-12, and the University of Southern California, alleging that all three entities have acted as joint employers and violated federal labor laws by failing to treat their student-athletes as employees. That case is currently proceeding before an administrative law judge for a determination on its merits. And, in February 2024, the NLRB's regional director in Boston, Massachusetts ruled that members of Dartmouth College's men's basketball team are university employees under the NLRA, and allowed the team to proceed with an election

to unionize. Dartmouth is reportedly appealing the decision to the full NRLB.

The House settlement provides that, in the event of a final judicial determination that student-athletes are employees, the NCAA and conference defendants may (but are not required to) terminate or seek to modify the injunctive relief settlement for the remainder of its 10-year term.

Enforcement Rules and NIL Collectives

The House settlement framework would empower the conference defendants—either with or without the NCAA's involvement—to create a "designated enforcement agency" responsible for determining whether third-party NIL deals with "boosters" meet requirements for legitimate NIL and fair market value, and to develop and enforce the new rules contemplated by the settlement. But questions remain as to how this new enforcement regime will actually operate, how it will be governed, and what authority it will have. For example, will the NCAA merely build on its existing enforcement staff or will there be a new entity for investigation and enforcement? What adjudicative body will hear and decide infractions cases? Will an independent arbiter be used? What rules will govern the enforcement process? Such questions will have to be addressed.

Initial Rejection of House Settlement

On September 5, 2024, Judge Claudia Wilken, the federal judge overseeing the House litigation, declined to grant preliminary approval of the proposed settlement and instructed the parties to "go back to the drawing board" to resolve concerns she expressed with multiple parts of the proposed deal.[4] Among Wilken's expressed concerns were the settlement's requirement that any money boosters provide to athletes be for a "valid business purpose" and the settlement's application to future college athletes who are not yet members of the class action but would arguably be restricted by its 10-year term. Wilken gave the parties three weeks to confer and report back on how they plan to address the issues she raised.

Conclusion

College sports will likely remain in a state of flux for the foreseeable future. Though it seeks to end one cycle of litigation, the House settlement—if ultimately approved—also paves the way for unprecedented changes in college sports, leaving open existing legal questions and creating new ones.

4 Notably, Wilken was the district judge who sided with Ed O'Bannon in his initial NIL case against the NCAA.


GAME CHANGERS: LEGAL AND REGULATORY CHANGES IN COLLEGE SPORTS
Wheeler Trigg O'Donnell LLP
Katie Reilly


William King
Southeastern Conference
Henry Gimenez
Lightfoot Franklin & White
Adam Wolfe
United Wholesale Mortgage

O'Bannon v. NCAA

- Antitrust class action seeking compensation for use of student-athletes' NIL in video games, live game broadcasts, and archival footage
- Plaintiffs challenged NCAA rules that limited student-athlete benefits to scholarships up to a full "grant-in-aid" (i.e., tuition and fees, room and board, and course-related books)
- District Court enjoined NCAA from enforcing rules prohibiting member institutions from offering benefits up to full cost of attendance
  - Grant-in-aid limitation more restrictive than necessary to further NCAA's interest in preserving "amateurism" and integrating academics and athletics.
- Ninth Circuit affirmed

NCAA v. Alston

- Antitrust class action challenging NCAA cap on the amount student-athletes could receive in scholarships and benefits
- District court enjoined NCAA from enforcing rules limiting the amount schools could offer student-athletes in education-related benefits
  - NCAA interest in preserving "amateurism" justified restriction on non-education related benefits
- Supreme Court affirmed
  - College athletics not immune from Sherman Act
  - Rule of reason applies

Post-*Alston* Challenges

- ***House* (N.D. Cal.)– challenges the NCAA's NIL rules**
  - Seeks damages for previous rule precluding student-athletes from entering into NIL deals with third parties
  - Seeks damages and injunctive relief re: current rule prohibiting direct institutional payments for NIL
- ***Hubbard* (N.D. Cal.)– *"Alston* payments"**
  - Seeks back-damages for Academic Achievement Awards permitted under *Alston*
- ***Carter* (N.D. Cal.) and *Fontenot* (D. Colo.)– challenge pay-for-play prohibition**
  - Seeks damages and injunctive relief re: current rule prohibiting schools from offering benefits beyond scholarships and education-related benefits

The *House* Settlement

- Global settlement of *House*, *Hubbard*, and *Carter* class actions
- $2.78 billion payment by NCAA over 10 years to resolve back damages
- Key terms of injunctive relief/future model:
  - Schools allowed to offer benefits of up to 22% of average power conference revenue from broadcast, sponsorship, and ticket sales
  - Scholarship limits eliminated in favor of roster limits
  - Allows student-athletes to enter into third-party NIL deals, subject to reporting and oversight
    - Deals worth more than $600 must be reported
    - Deals with "boosters" or collectives must be for valid business purpose and reflect fair market value for NIL

Unresolved Issues

- Application of Title IX
- Legal disputes re: employment status of student-athletes
- Enforcement of NIL requirements

Title IX Compliance

- Requires that schools provide equal opportunities for men and women to compete in varsity sports and equitable benefits to those athletes
- Unclear how non-education-related direct institutional payments to student-athletes must be treated for compliance purposes
- *House* court's resolution of Title IX objections in settlement approval process may provide guidance

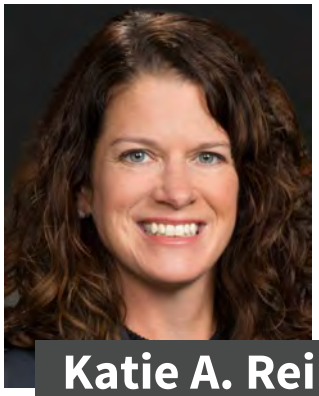
Employment Status – FLSA

- Seventh and Ninth Circuits - student-athletes ≠ employees
  - *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019)
  - *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016)
- Third Circuit – *Johnson v. NCAA*, 108 F.4th 163 (3d Cir. 2024)
  - Rejected MTD argument that student-athletes are categorically exempt from FLSA coverage (i.e., not employees) by virtue of "amateur" status
  - Student-athletes *may* be employees under the FLSA if they can prove:
    - they perform services for another party;
    - the services are "necessarily and primarily" for the benefit of that party;
    - the services are performed under that party's control or right of control; and
    - the services are performed in exchange for express or implied benefits or in-kind compensation.

Employment Status – NLRA

- NLRB case re: USC football and basketball players (men's and women's)
  - Filed by NLRB regional office in Los Angeles against NCAA, PAC-12, and USC
  - Alleges the three entities are joint-employers of student-athletes and violated labor laws by not treating student-athletes as employees
- NLRB case re: Dartmouth basketball (men's)
  - NLRB regional director in Boston ruled that men's basketball players are university employees under the NLRA and had right to unionize


NIL Enforcement
House settlement empowers NCAA and conferences to create dedicated agencies for both reporting and enforcement
Student-athletes must report third-party NIL deals
Member schools must report NIL deals between schools and student-athletes, as well as other payments or personal benefits
Monitor NIL deals with "boosters" to ensure compliance
Settlement agreement does not specify what enforcement agency or regime looks like—or whether NCAA will be involved



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Katie A. Reilly

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

Katie Reilly represents clients in complex commercial litigation, including antitrust matters and class actions in highly regulated industries. For four straight years, BTI Consulting has named Katie a nationwide Client Service All-Stars MVP based exclusively on input from corporate counsel. Chambers USA ranks her for commercial litigation in Colorado. Katie serves on WTO's management committee.

Katie has favorably represented antitrust clients in matters involving monopolization, conspiracy, price fixing, exclusive dealing, and other competition-related disputes, including trade secrets and non-compete actions. She has extensive knowledge of the regulatory hurdles and obligations her clients face, and she develops effective litigation and trial strategies based on her clients' business priorities. Katie also routinely provides antitrust counseling to clients in connection with their formation of joint ventures, development of pricing policies, collaborations with competitors, and other activities potentially involving antitrust laws. Katie's additional commercial litigation experience includes successfully representing clients in business disputes at both the trial and appellate levels. Her experience includes contract disputes, business divorces, consumer fraud, and business tort claims. Katie has extensive healthcare industry experience, as well as real estate, energy, aviation, manufacturing, sports, and telecommunications. Katie also represents municipalities in high-stakes and often contentious disputes involving other municipal entities.

Practice Areas

- Commercial Litigation
- Antitrust & Competition
- Class Actions
- Investigations & Compliance
- Appellate
- Securities Litigation & Enforcement Defense

Honors

- Chambers USA - Band 2, General Commercial Litigation - Colorado, 2021-2024; Band 3, General Commercial Litigation - Colorado, 2020; Band 4, General Commercial Litigation - Colorado, 2018-2019; Up and Coming, General Commercial Litigation - Colorado, 2016-2017
- BTI Consulting - Client Service All-Star MVP, 2020, 2021, 2022, 2023; Client Service All-Star, 2019
- The Best Lawyers in America - Bet-the-Company Litigation, 2024, 2025; Litigation - Antitrust Lawyer of the Year, Denver, 2021, 2023, 2025; Litigation - Antitrust, 2024, 2025; Commercial Litigation, 2018-2025; Antitrust Litigation, 2018-2023; Mass Tort Litigation / Class Actions - Defendants, 2022-2025
- Benchmark Litigation - Under 40 Hot List, 2016-2017; Future Star, 2021-2024
- 5280 Magazine Top Lawyers - Antitrust, 2020-2021, 2023-2024; Civil Litigation, 2021, 2023-2024
- Law Week Colorado - Top Women Lawyers, 2016; "People's Choice" Antitrust Lawyer, 2016-2018, 2020, 2023; "Barrister's Best" Antitrust Lawyer, 2019
- Denver Business Journal - "Forty Under 40," 2012
- Colorado Super Lawyers - Antitrust Litigation, 2017-2024; Top 100, 2018-2024; Top 50 Women, 2018-2024
- Colorado Rising Stars - Business Litigation, 2009-2016

Education

- New York University School of Law - J.D., 2001, cum laude
- University of Virginia - B.A., 1998, Classics and English, with distinction

A [Plaintiff's] World of Pure Imagination

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A [Plaintiff's] World of Pure Imagination
Sean Gugerty and Jeffrey Hines

The modern product liability plaintiffs' bar increasingly relies on sophisticated online and social media advertising to recruit new plaintiffs. Once a critical mass of cases is assembled (usually taking just a few weeks or months), plaintiffs' counsel will press for a mass tort, either a federal MDL or state-level equivalent, or often both at once. They know that, in those settings, discovery will be tilted in their favor, with defendants forced to disgorge millions of records, produce dozens of corporate witnesses. Meanwhile, plaintiffs' counsel's costs are often moderate, with just some of their expert slate (e.g., general causation experts) and a handful of "bellwether" plaintiffs put under the microscope by the defense.

This approach has been tremendously lucrative, securing numerous multi-billion dollar settlements or bellwether trial recoveries in the past decade. Unsurprisingly, that success has pushed enterprising Plaintiff's counsel to try to feed more and more cases into the hopper, hoping to spin straw into MDL gold. As they do so, plaintiffs' counsel are increasingly relying on new theories of liability and shifting their focus on different kinds of products.

A Cause of Action for "Failure to Innovate" - The Gilead Tenofovir Cases

Manufacturers generally have a duty of care to produce products that are reasonably safe and not defective, and to include warnings of risks inherent in the product's use. In many states, this same duty is also extended to the retailers or distributors of a product. A manufacturer or retailer seller may be held liable when it makes a defective product, does not warn of the defect, and the product's use causes harm to the plaintiff.

But what if the product is not defective, but there is a newer version under development? In California, some plaintiff's attorneys have seized on such facts to dream up what amounts to an entirely new tort: a cause of action for failing to innovate and bring to market a new product more rapidly.

In 1991, Gilead Life Sciences, Inc., a pharmaceutical manufacturer, obtained an exclusive license to develop tenofovir as a treatment for HIV/AIDS.[1] Gilead later developed and sold a drug called tenofovir disoproxil fumarate ("TDF") for treatment.[2] TDF was approved for sale by the FDA in 2001.[3] While effective, TDF use did include some inherent risks, such as skeletal and kidney damage—risks that the manufacturer warned of in TDF's labeling.[4]

Around the same time Gilead developed TDF, it also developed a second drug called tenofovir alafenamide fumarate ("TAF").[5] In 2004, Gilead discontinued development of TAF, issuing a public statement that the difference between the two drugs was insufficient to support continued investment.[6]

The plaintiffs, a group of 24,000 people, filed suit against the pharmaceutical manufacturer for their injuries from use of the TDF.[7] Plaintiffs alleged that Gilead was negligent and caused their injuries by deferring development of TAF, which they contend was just as effective but with fewer risks.[8]

Gilead moved for summary judgment, making the logical point that plaintiffs must prove TDF was defective under any recognized theory of liability.[9] A California trial court, however, denied the motion—and California's intermediate appellate court, the California Court of Appeal, affirmed.

1 Gilead Tenofovir Cases, 98 Cal. App. 5th 911, 918 (Cal. Ct. App. 2024).
2 Id. at 916.
3 Id.
4 Id.
5 Id. at 918.
6 Id. at 918.
7 Id. at 916.
8 Id. at 917.
9 Id.

The California Court of Appeal concluded that while proof of defect for a drug or device may be a necessary element for a strict products liability claim, the same does not hold true for negligence claims. The intermediate appellate court focused on the broad formulation of the duty in negligence under the California Code, "that everyone is responsible…for an injury occasioned to another by his or her want of ordinary care of skill in the management of his or her property."[10] The court held that under this standard, "a manufacturer's duty of reasonable care can extend more broadly than the duty to make a nondefective product, thereby permitting recovery even when there is no showing that the injury resulted from a product defect."[11]

The intermediate appellate court then shifted its analysis to whether an exception to its new-found duty was applicable under "foreseeability" and "public policy" factors referred to in California as "Rowland factors.[12] The court concluded that, under the facts of the case, neither factor was met. It was unpersuaded by Gilead's arguments that the new duty would disincentivize or "perversely skew" drug and device development, or result in a flood of new lawsuits.[13] Throughout the opinion, the court stressed that the new duty was a narrow one, applying only when a single manufacturer already possesses an (allegedly) better version of a product and improperly refuses to market it.

If the novel "duty to innovate" becomes embedded in California law, it will not remain a narrow, fact-specific duty for very long. Plaintiffs will easily be able to plead that a defendant "knows" of a safer and equally effective design for a product it currently makes or sells. Thus, any defendant will face additional risk and liability concerns in its internal deliberations over whether and when to bring alternative designs to market. Any problems traceable to an overly-hasty rollout could quickly be pounced on by plaintiff's lawyers. Yet, under the new Gilead ruling, holding back on the new design or formulation could also be a basis for liability. The case thus has the potential to chill research, innovation and development due to a fear of liability.

Thankfully, on May 1, 2024, the California Supreme Court granted review of the case. Both sides have since filed their opening briefs and this matter is currently proceeding into full briefing.[14] Oral arguments should follow in the future.

Targeting Consumer Products and Over-the-Counter Drugs

Another development in product liability is the increasing shift in mass torts to lawsuits against over-the-counter drugs and consumer products. These include traditional product liability suits for alleged personal injuries, "medical monitoring" class actions alleging that the products' use could cause injury in the future (hence, the need for extensive medical check-ups and testing), and no-injury class actions where the only harm alleged is economic loss from purchasing the product.

Plaintiffs have targeted some of the most popular and widely used products and drugs in the United States, including acetaminophen (Tylenol), the heartburn medication ranitidine (Zantac), baby formula, sunscreen, acne products containing benzoyl peroxide, and hair relaxers. These products are so widely used that plaintiffs' counsel can run up much larger case counts—which they can then build upon to secure more advantageous treatment in a mass tort setting and attempt to browbeat defendants into early settlements. Further, plaintiffs suing for OTC drugs or consumer goods can simply claim that they paid with cash, and kept no receipts or records—aside, perhaps, from pill bottles or packages produced at time of deposition, of dubious provenance. Unfortunately, all too many judges are willing to let such weak evidence of product identification go to a jury to sort out.

Conclusion

Even as product liability plaintiffs' new theories of liability are being tested in trial courts and on appeal, they will continue to spread and be tried elsewhere. Manufacturers, retailers, and other potential product liability defendants should be prepared, and consider these new avenues of attack as they make ongoing commercial decisions.

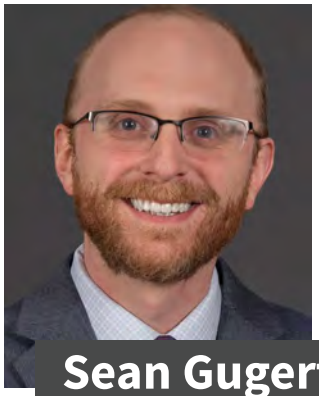
10 Id. at 920 (citing Cal. Civil Code § 1714).

11 Id. at 924.

12 Id. at 934 (citing Rowland v. Christian, 69 Cal.2d 108 (1968)).

13 Id. at 942-45.

14 Id.



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Sean Gugerty

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Sean Gugerty is a partner with Goodell DeVries. His practice is focused primarily on defending healthcare providers and healthcare institutions. Sean has successfully represented these clients in medical malpractice and other claims throughout the Maryland and D.C. judicial system. Sean also represents pharmaceutical manufacturers in product liability litigation in state and federal court, as well as providing advice and analysis on regulatory compliance and risk mitigation.

Sean handles complex litigation in all its phases, including investigation, depositions, motions practice, alternative dispute resolution, and trial. He has prevailed in dispositive motions in both state and federal court, including in the In Re: Zantac multidistrict litigation in the Southern District of Florida, where he was the co-lead counsel for briefing and arguing motions that secured the dismissal of all claims against the generic manufacturer defendants. Sean also briefed and argued motions resulting in the dismissal of the first COVID-19 medical malpractice claim brought in Maryland state court. In addition, Sean has experience briefing and arguing appeals before the Appellate Court and the Supreme Court of Maryland.

Practice Areas

- Medical Malpractice
- Product Liability
- Appellate

Representative Matters

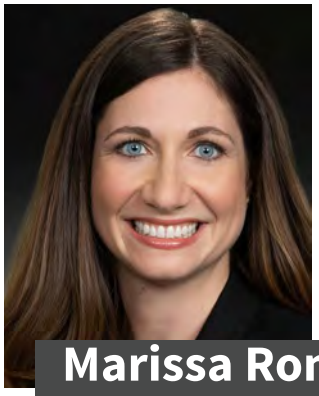
- Ctr. for Environmental Health v. Perrigo Co., 89 Cal. App. 5th 1, 305 Cal. Rptr. 3d 587 (Cal. App. 2023). Sean was lead briefing counsel in demurrers (motions to dismiss) that resulted in an Alameda County court's decision dismissing — as federally preempted — a consumer group's Proposition 65 claims against generic ranitidine manufacturers and retailers. After plaintiff appealed, Sean took a leading role in appellate briefing and argument for the defendants and secured a reported decision affirming the trial court's dismissal ruling.
- In re: Zantac (Ranitidine) Products Liability Litigation, 548 F. Supp 3d. 1225, 2021, 2021 WL 2865869 (S.D. Fla. July 8, 2021). Sean, with Rick Barnes and others, is part of the team that represents Perrigo in the personal injury product liability and medical monitoring and consumer class action MDL No. 2924 related to over-the-counter medicine ranitidine (Zantac) and alleged exposure to N-Nitrosodimethylamine (NDMA). This MDL involves over 100,000 claimants and cases and is considered one of the most complex MDL proceedings in U.S. history. Sean was co-drafting counsel for motions to dismiss filed collectively on behalf of dozens of the generic manufacturer defendants, which ultimately resulted in the MDL court dismissing all causes of action against the generic manufacturers in July 2021 based on federal preemption.

Honors

- Best Lawyers - Ones to Watch; Medical Malpractice Law — Defendants (2021-2022); Health Care Law (2021-2022)
- Maryland Super Lawyers — Rising Star; Personal Injury — Medical Malpractice Defense (2021-2024)

Education

- University of Maryland, School of Law (J.D., with Honors, 2015) - Order of the Coif (2015); Concentration in Health Law; Journal of Health Law & Policy – Notes & Comments Co-Editor; Maryland Law Moot Court Board
- St. Mary's College of Maryland (B.A., summa cum laude, 2011) - Phi Beta Kappa



Artificial Intelligence Will Be a Litigator's Best Friend

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Artificial Intelligence Will Be a Litigator's Best Friend
Marissa S. Ronk & Miles D. Orton[1]

Litigation is a conservative profession, slow to adapt to change, which has prompted a raft of cautionary missives by practitioners about the perils of using AI. While caution is warranted, in this paper we provide an overview of the most promising areas of litigation where AI can immediately or soon be used to more quickly and effectively accomplish routine tasks and reduce client spend.[2]

AI's Strengths Generally Applicable to Litigation
AI's recent advances and opportunities for use in litigation stem from the application of machine learning—the capacity of computers to teach themselves and learn from experience—and improvements in natural language processing, or a computer's capacity to "understand the meaning of spoken or written human speech and to apply and integrate that understanding to perform human-like analysis."[3] These developments have improved AI's ability to analyze and identify patterns and connections within enormous amounts of data and generate clear, cogent summaries of relevant issues. These advances create enormous opportunities to improve the practice of law.

Using AI, however, comes with significant risks. These include hallucinations, in which AI models trained using large language models assert fictitious "facts" with confidence, as well as confidentiality-related concerns regarding the information fed to the AI model. Lawyers' sloppy use of AI risks running afoul of numerous rules of professional conduct, including the duties of competence, communication, confidentiality, and candor, as well as the responsibilities of supervisory lawyers and of all lawyers to avoid engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation".[4]

Specific Ways to Deploy AI in Litigation Immediately or Near-Term

Discovery
Technology Assisted Review ("TAR") has now been a staple of e-discovery practice for nearly two decades, improving over that time and saving countless hours of attorney review for complex cases.[5] TAR uses machine learning to assist attorney reviewers in identifying key materials within large troves of documents and in developing a degree of confidence that they have identified key relevant or privileged materials. TAR does so by relying on iterative cycles of machine suggestions and human review.[6]

The next key leap for e-discovery will be the application of generative AI, which can be used to analyze databases, identify key documents with limited guidance, generate summaries, and provide links to specific documents on key issues. Unlike TAR, generative AI relies on well-crafted prompt engineering to categorize documents according to highly-specific issues.[7] This will be particularly useful during early stages of litigation. Previously, attorneys would have to undergo substantial and costly document review to trace, for example, when a witness first became aware of an issue, who they discussed it with, and what they discussed. Generative AI will be able to provide an initial summary of those issues along with cites to responsive materials much faster and at lower cost. It will also save time on other labor-intensive tasks generally assigned to junior associates, such as drafting narrative justifications for privilege on privilege logs, or assembling

1 This article was written entirely by the two listed human authors, although we did consult some AI products for their "thoughts" while researching.

2 We stick to immediate and near-term uses in this article, because things are likely going to get a lot stranger in the next 10 to 20 years. See, e.g., Ray Kurzweil, The Singularity Is Nearer: When We Merge with AI (2024); Mustafa Suleyman & Michael Bhaskar, The Coming Wave: Technology, Power, and the Twenty-first Century's Greatest Dilemma (2023).

3 Gary E. Merchant, Artificial Intelligence and the Future of Legal Practice, TheSciTechLawyer (Fall 2017).

4 In Colorado, these obligations are codified in Colorado Rules of Professional Conduct 1.1, 1.4, 1.6, 3.3, 5.1, 5.3, and 8.4(c); see also ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (discussing ethical considerations for attorneys involving the use of generative AI tools).

5 E.g., Harry Surden, Artificial Intelligence and Law: An Overview, 35 GA. ST. U. L. REV. 1305, 1329-1331 (2019) (describing the development and use of predictive coding and technology-assisted review in electronic discovery).

6 E.g., Disco's How to Use Generative AI for Document Review, https://csdisco.com/blog/blog-generative-ai-for-document-review (accessed Sept. 11, 2024); Relativity's Generative AI Primer - From Beginning to Breakthrough: Navigating Document Review's AI Evolution, https://resources.relativity.com/navigating-document-review-ai-evolution-lp.html (accessed Sept. 11, 2024).

7 Id.

comprehensive chronologies, as well as further decrease the need for first level attorney review.[8] Generative AI will not replace TAR in the document review process, but augment it, pinpointing portions of a document that impact its recommendations and offering other factors to consider before the reviewer makes a final call on the material's importance.[9] While skilled attorneys will still need to provide quality control input in a hybrid AI-human review process, as well as check the AI's summaries and citations and test their accuracy and completeness, this will obviate the previous need for costly human review of thousands of documents to reach the same results, and give attorneys a faster, earlier roadmap of key evidence.

Legal Research

AI-assisted research tools are already being baked into both Westlaw and LexisNexis, so we will be brief on this application. The key benefits of this application are streamlining and saving time on research. Here too, attorneys will need to verify that AI-assisted research provides the right answers, by testing the AI's results using traditional research techniques.[10] But, like the transition from book research to electronic research only a few decades ago, AI-assisted research promises to be far more efficient than pre-AI research, and thus ultimately less time-intensive for attorneys and less costly for clients.

Drafting

AI should ultimately be deployed in nearly all stages of legal drafting. Short-term, we view its best use to be in analyzing and providing suggestions for materials already written by attorneys, rather than drafting original documents. For example, programs such as BriefCatch, Grammarly, and Co-Pilot now include AI tools that go beyond grammar and spell checking, also offering suggestions for clarity, conciseness, flow, and engagement.

Longer-term, we view AI as a useful tool for drafting outlines, sections, and ultimately entire first drafts of some litigation materials. Today, practitioners commonly identify and draw from high-quality templates to draft litigation materials. AI can draw from a much larger repository of samples and put together initial drafts much more quickly. For example, AI could assist in initial drafting of pleadings, helping plaintiffs ensure that they are satisfying notice pleading requirements and fully pleading all required elements, and helping defendants readily spot pleading deficiencies.

Two key risks caution against the use of AI in creating original drafts of complex litigation materials (for now): confidentiality-related risks and the danger of hallucination. The confidentiality concerns stem from the fact that for open-source AI programs, such as ChatGPT, any information fed to it—either as prompts or uploaded documents—is then used by the program as part of its machine learning process.[11] Lawyers thus risk waiving privilege over anything they feed to the AI.[12] And without having necessary (often confidential) background information, AI-created drafts will be of limited value. Hallucination is another key concern and consists of the AI producing content that is nonsensical or untruthful.[13] Initial attorney drafting is, in our view, the best safeguard against hallucinations worming their way into drafts and should be paired with attorney checks of all AI-edited or generated portions of a draft.

Key parts of drafting litigation materials will, in our view, need to stay firmly in the hands of attorneys. This includes developing the best strategy for a particular motion or document, using judgment to focus on select parts of the evidentiary record or pleading landscape, and applying caselaw and legal principles. This is because litigation requires intimate knowledge of the evidentiary record, opposing counsel and the judge, the key litigation risks and opportunities involved, and collateral consequences of taking potential positions, just to name a few key factors where current AI models appear unlikely to be able to take the lead anytime soon.

Last, AI can also assist law firms in improving knowledge management. Most law firms already have their own repositories of materials the firm's lawyers consider to be high-quality, such as those drafted by eminent practitioners at the firm. The persistent challenge for firms that grow in scale is to connect practitioners with existing

8 Id.

9 Id.

10 Legal research providers are upfront about this necessity. For example, as of September 9, 2024, Westlaw provides this disclaimer as part of its explanation of how its AI-Assisted Research works: "AI-Assisted Research can occasionally produce inaccuracies, so it should always be used as part of a research process in connection with additional research to fully understand the nuance of the issues and further improve accuracy. The AI-generated summary of results above the list of primary law authority can be extraordinarily useful for getting an overview of the issues and pointers to primary authority, but it should never be used to advise a client, write a brief or motion for a court, or otherwise be relied on without doing further research." (emphasis in original)

11 ChatGPT is an example of a large language model ("LLM"), which is a type of generative AI trained on a huge text datasets to allow them to predict and produce responses to queries; for example, the current underlying model, GPT-4, passed a simulated bar exam with a score around the top 10% of test takers. See Open AI, GPT-4 Technical Report (2023), https://cdn.openai.com/papers/gpt-4.pdf; see also Christopher D. Thomas, Lindsay E. McElhattan, & Steven M. Carlo, Legal Literacy and Generative Artificial Intelligence: Comparing the Education Law Knowledge of Practicing Educators and Large Language Models Like ChatGPT, 414 Ed. Law Rep. 783 (2023)

12 For the same reason, when using AI products to improve writing quality, lawyers need to ensure that those products are maintaining confidentiality and privilege. See, e.g., Albert J. Marcella and Gary Renz, Generative Artificial Intelligence: Benefits and Risk to Lawyers, Association of Legal Administrators White Paper (Sept. 2023), https://www.alanet.org/publications/white-papers/generative-artificial-intelligence-benefits-and-risks-to-law-firm; see also Cathina L. Gunna-Rosas, Beyond the Binary: AI, Ethics, and Liability in the Legal Landscape, 10 Tex. A&M J. Prop. L 389, 398-401 (2024) (suggesting that law firms safeguard against malpractice risks associated with confidentiality breaches and unintentional waiver of privilege due to AI use by obtaining explicit informed consent from clients, thoroughly analyzing AI provider service terms and conditions, and implementing training programs for attorneys and team members).

13 Open AI, GPT-4 Technical Report (2023), https://cdn.openai.com/papers/gpt-4.pdf.

resources and ensure that they are not reinventing the wheel. Instead of attorneys needing to, for example, email an entire practice group with a request for information, or run lengthy and sometimes unsuccessful searches of the firm's document repository, once AI is worked into a law firm's knowledge system, these tasks could be simplified. Instead, the attorney could use comparatively simple natural language prompts to ask the AI to assess all available materials and identify the most helpful ones.

Predictive Analytics

AI can also soon be used to assist attorneys in fine-tuning their litigation predictions. Clients often seek answers to the tremendously difficult questions about the odds of success of a particular claim, defense, or motion, or the likely size of a judgment. Attorneys historically develop answers to these questions based on their and their colleagues' experience, their knowledge of the case, and subjective knowledge of the jurisdiction and jury pool. AI will complement these sources of information with predictive analytics based on hard data, such as by parsing the results of similar lawsuits, claims, defenses, or motions. Attorneys will still have a role in ensuring that the AI is correctly identifying and drawing from comparable cases, but AI's ability to parse vast amounts of data orders of magnitudes faster than humans will save time.

Other potential uses of predictive analytics will be in anticipating how a particular judge may decide an issue based on his or her track record. For example, an AI program could be asked to review all orders by a particular judge resolving Daubert challenges to develop a strategy for disqualifying an opponent's expert. AI will be able to much more quickly parse, summarize, and point to specific examples that may be relevant, saving the attorney substantial time.[14]

Trial

Trial is a uniquely relational experience—between the attorneys on both sides, the judge, and the jury. These relationships require emotional intelligence, common sense, and the ability to build rapport and trust, in addition to the factual and legal expertise honed from mastering the evidentiary record and applicable law. We do not view AI as being able to supplant actual attorneys in trying a case. However, AI will be helpful in assisting attorneys in certain trial aspects.

AI can, for example, assist attorneys in jury selection by rapidly identifying and parsing publicly-available information about jurors and offering recommendations on whether they meet a particular juror profile. Attorneys and jury consultants do this research already, but are limited by the compressed timeframe for juror selection. AI tooled to search public social media information or court records could be deployed to identify and summarize far more information relevant to potential juror bias, fast enough to assist attorneys during the juror selection process in real time. This would provide attorneys otherwise-undiscovered information relevant to whether to move for cause or use a peremptory challenge. Taking this a step further and asking AI models to recommend if jurors meet a particular juror profile will introduce a new risk attorneys will need to guard against: bias. LLMs can amplify biases and perpetuate stereotypes.[15] This can foreseeably lead to Batson challenge scenarios, where an AI provides recommendations against selecting certain jurors based on impermissible grounds, such as race.

We also view AI as offering substantial promise in the use of exhibits and the creation of demonstratives. Trial lawyers will still need to devote sufficient time and attention to know the universe of key exhibits, but identifying responsive exhibits or impeachment material on the fly can be made even easier if the evidentiary universe can be fed to an AI and they can provide candidates instantly. Just as a few examples, "show me a list of exhibits and their key language involving [issue] from between [date range]," or "what did [deponent] say about [topic] during her deposition?" are imaginable questions for AI.[16] AI will also likely eventually prove helpful in generating demonstratives much more easily. Natural language prompts will make it easy for attorneys to describe to AI the kinds of demonstratives they'd like created. And AI has the additional benefit of speed: attorneys will be able to make immediate adjustments during trial to further tailor the demonstrative.

Longer-Term Potential Uses

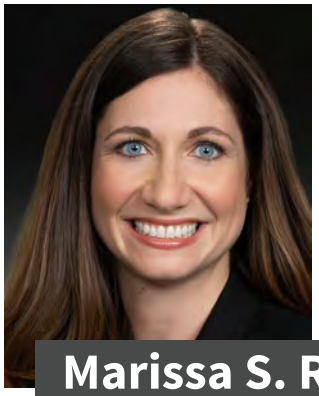
Longer-term, we view AI as deployable in even more complex areas of litigation where attorney skill and judgment are critical and currently non-delegable. This includes, for example, assisting attorneys in developing and assessing complex legal strategies, or suggesting legal strategies that the attorneys might not have even considered. Because litigation is such a relational experience and depends fundamentally on judgment and emotional intelligence, we view AI's longer-term role as supporting and empowering attorneys as a valuable co-pilot, rather than replacing attorneys entirely. The entire legal industry, however, will need to train itself to use

14 AI is not at this stage yet, although we anticipate it will be soon. ChatGPT, for example, admitted that it did not have direct access to specific court opinions, including those written by a specific federal District Court judge we asked it about. But assuming that one or more AI services will eventually be able to consume and analyze the entire non-sealed universe of federal court filings, this is a foreseeable next-stage use.

15 Open AI, GPT-4 Technical Report (2023), https://cdn.openai.com/papers/gpt-4.pdf.

16 Court reporting services are already offering automatic AI-generated deposition summaries. These summaries currently miss important nuances—including, but not limited to, the credibility of a witness—but are helpful for broad-brush overviews.

these powerful new tools; attorneys that stick with the pre-AI status quo will ultimately fall behind and disserve their clients.



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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.

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

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

Articles
- Co-Author, "Trial by Webcam: Tips From a Firsthand Experience," Law360, (May 28, 2020).
- Author, "Colorado Supreme Court, following US Supreme Court's 'Bauman,' Rejects Broad General-Jurisdiction Theory," Washington Legal Foundation's The Legal Pulse, (October 31, 2016).
- Co-Author, "The Affordable Care Act and Colorado's Collateral Source Rule," Denver Law Journal, (June 21, 2016).

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, 2025; Ones to Watch - Mass Tort Litigation / Class Actions - Defendants, 2021-2023; Ones to Watch - Product Liability Litigation - Defendants, 2021, 2022, 2024, 2025; Ones to Watch - Litigation - Labor and Employment, 2024, 2025
- Benchmark Litigation - Future Star, 2021-2023; 40 & Under Hot List, 2023, 2024

Education
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The Growing Risk Posed by Public Interest Litigation

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The Growing Risk Posed by Public Interest Litigation: Strategies for Mitigating and Defending Against Public Interest Claims
Steve Schleicher, Jason Lien, and Haley-Rose Severson

Public interest litigation related to deceptive trade practices and misleading statements, particularly within the context of environmental, social, and governance ("ESG") standards, has surged in recent years as NGOs and private firms increasingly challenge corporate claims about sustainability and social responsibility. This trend is paralleled by a growing focus on the legal risks associated with the deployment of artificial intelligence ("AI") technologies, where issues like consumer privacy, transparency, and civil rights are coming to the fore. As both ESG and AI litigation become focal points for enforcing corporate accountability, companies must adopt proactive compliance measures, rigorously challenge the legal basis of their claims, and strategically manage both legal and reputational risks to mitigate the impact of such lawsuits.

Deceptive Trade and Misleading Statement Litigation
Public interest litigation concerning deceptive trade practices and misleading statements has seen a significant increase that are being driven by heightened awareness and enforcement of ESG standards. NGOs and private firms are leveraging litigation to challenge companies on alleged misrepresentations related to their environmental and social impact statements and practices.

ESG litigation has become a focal point in the realm of public interest lawsuits. According to a 2024 Annual Litigation Trends Survey, there has been a noticeable uptick in cases where companies are sued for making misleading statements regarding their ESG practices. This includes claims related to "greenwashing," where companies exaggerate or falsely represent the environmental benefits of their products or services. Such litigation not only seeks to hold companies accountable for their claims but also to push for greater transparency and honesty in corporate communications about sustainability efforts.[1]

Two recent cases from the District of Columbia vividly illustrate this growing trend in litigation. In Corp. Accountability Lab v. Hershey Co., the plaintiff brought a lawsuit against The Hershey Company, alleging that Hershey's marketing of its chocolate products as "sustainable" and "responsible" is false and deceptive. According to the complaint, the cocoa used in Hershey's products is sourced from supply chains that contribute to severe and unsustainable labor abuses, which are prevalent in the cocoa industry. Similarly, in Earth Island Institute v. Coca-Cola Co., the Earth Island Institute filed a lawsuit against The Coca-Cola Company, alleging that the company's marketing practices are false and deceptive because Coca-Cola portrays itself as a sustainable and environmentally friendly corporation despite still using plastic packaging. This alleged greenwashing, according to the complaint, misleads consumers regarding the environmental impact of Coca-Cola's operations.[2]

NGOs have also targeted financial institutions in their deceptive trade practices claims, particularly in cases where banks or investment firms are accused of misleading clients about the environmental impact of their investments. For instance, the recent lawsuit against BNP Paribas marks the first climate lawsuit against a commercial bank, where the bank is accused of financing fossil fuel projects despite public commitments to reduce carbon emissions.[3]

Environmental Litigation
Environmental litigation remains a cornerstone of public interest lawsuits, with NGOs and government agencies increasingly turning to the courts to enforce environmental regulations and challenge policies that they view as

1 Norton Rose Fulbright, 2024 Annual Litigation Trends Survey (Jan. 2024), https://www.nortonrosefulbright.com/en-us/knowledge/publications/4097006f/2024-annual-litigation-trends-survey. (last visited September 22, 2024).

2 Corp. Accountability Lab v. Hershey Co., No. 2021-CA-003981 (D.C. Super. Ct. Oct. 27, 2021); Earth Island Institute v. Coca-Cola Co., No. 2021-CA-001846 (D.C. Super. Ct. June 4, 2021).

3 Isabella Kaminski, Climate Campaigners Sue BNP Paribas Over Fossil Fuel Finance, The Guardian (Feb. 27, 2023), https://www.theguardian.com/business/2023/feb/27/climate-campaigners-sue-bnp-paribas-over-fossil-fuel-finance. (last visited September 22, 2024).

harmful to the environment.

The surge in climate-related litigation, particularly cases brought by NGOs, reflects a growing trend where public interest groups seek to hold corporations and governments accountable for contributing to climate change. These cases often focus on forcing regulatory changes or securing damages for environmental harm. For instance, lawsuits against companies for failing to disclose climate risks or for misleading the public about their environmental impact have become more prevalent, highlighting the intersection of environmental protection and consumer rights.[4]

Beyond climate change, NGOs have attempted to enforce existing environmental laws and regulations through litigation. These lawsuits often challenge government actions or inactions, pushing for stricter enforcement of environmental standards. This trend is particularly pronounced in cases where NGOs believe that regulatory agencies have failed to protect public health and the environment. Such litigation not only seeks to rectify specific instances of environmental harm but also to set broader legal precedents that reinforce the rule of law in environmental governance.[5]

NGOs are also resorting to litigation as a strategy to safeguard property rights. In Friends of the Rail Bridge v. North Dakota Dep't of Water Resources, an NGO attempted to prevent the removal of a historical railroad bridge and construction of a new rail bridge by alleging that the state of North Dakota owned the historical bridge and asserting that the railroad did not have the legal authority to replace it. While the North Dakota Supreme Court affirmed a dismissal of this case for lack of subject matter jurisdiction, the case highlights how NGOs have begun to utilize the courts to impose additional hurdles on property development by invoking preservation concerns.[6]

The movement of public interest lawsuits can also be seen in the form of shareholder derivative actions where alleged misleading statements about environmental impacts are claimed to affect company practices and shareholder interests. Energy producers have faced such claims, such as ExxonMobil, where shareholders alleged the company misrepresented climate risks. Similarly, ClientEarth's derivative action against Shell alleged concerns over climate management. These actions reflect a growing emphasis on the use of shareholder rights to address corporate environmental and governance issues.[7]

There is a growing emphasis on this strategic litigation as a tool for advancing social change in environmental and human rights cases. Courts appear to be receptive to claims that address systemic issues and broader societal impacts, reflecting a shift from traditional individual-focused litigation to cases that tackle larger, collective grievances. The rise can also be seen through cross-border litigation, where activists and organizations leverage international legal frameworks to address issues that transcend national boundaries. This trend underscores a broader movement toward using litigation not only as a means of redress but as a mechanism to seek policy reform and societal transformation.[8]

Impact of Fee-Shifting Statutes on Public Interest Litigation

The financial viability of public interest litigation has been influenced by developments in fee-shifting statutes, which can either encourage or deter lawsuits depending on how they are structured.

The introduction of "loser pays" provisions in some jurisdictions have deterred some public interest litigation. These provisions, which require the losing party to pay the legal fees of the winning party, can deter NGOs and private firms from pursuing litigation. Legal commentators have highlighted the potential threat these provisions pose to public interest litigation, arguing that they could undermine the ability of NGOs to challenge powerful corporate or government interests.[9]

In contrast, there have been calls to reform fee award structures to better support public interest litigation. Advocates argue that fee-shifting statutes should incentivize meritorious lawsuits by ensuring that NGOs and private firms can recover their costs when they succeed. The Goldwater Institute has proposed reforms that would reverse the current trend, limiting prohibitive financial penalties.[10]

Public Interest Litigation and AI

The intersection of public interest litigation and AI is evolving at a rapid pace, as legal challenges are

4 See supra at fn 1.

5 Id.

6 Friends of the Rail Bridge v. North Dakota Dep't of Water Resources, 995 N.W.2d 461 (N.D. 2023); Friends of the Rail Bridge v. North Dakota Dep't of Water Resources, 2024 WL 480848 (N.D. 2024).

7 Meg Candler, Shell faces new round of ESG litigation, Vizibl (Mar. 6, 2023), https://www.vizibl.co/blog/shell-faces-new-round-of-esg-litigation. (last visited September 22, 2024); Ramirez v. Exxon Mobil Corp., 334 F.Supp. 3d 832 (N.D. Tex. 2018).

8 Tara K. Giunta & Jonathan C. Drimmer, ESG Litigation & Enforcement Risks, Bloomberg Law (Jan. 2023), https://www.bloomberglaw.com/external/document/X94H5O2S000000/esg-professional-perspective-esg-litigation-enforcement-risks. (last visited September 22, 2024).

9 Deborah J. La Fetra, When "Loser Pays" Threatens Public Interest Litigation, Goldwater Institute (April 15, 2019), https://www.goldwaterinstitute.org/when-loser-pays-threatens-public-interest-litigation/. (last visited September 22, 2024).

10 Deborah J. La Fetra, Fee Awards Turned Upside Down (March 26, 2019), Goldwater Institute, https://www.goldwaterinstitute.org/policy-report/fee-awards-turned-upside-down/. (last visited September 22, 2024).

beginning to focus on the deployment of AI technologies by corporations and their impact on consumer privacy, transparency, and civil rights. Recent cases against companies like Google and Peloton highlight the complex legal landscape that is emerging as AI becomes more pervasive in business practices.

Public interest litigation related to AI often revolves around the alleged misuse of AI technologies that infringe on consumer privacy. A key area of concern is the use of AI in customer service and training tools, where companies are accused of unlawfully recording and analyzing communications without proper consent. A recent case against Google exemplifies this trend. Plaintiffs alleged that Google's AI-driven customer service technology violated wiretapping laws by recording and analyzing customer calls without their explicit consent. Although Google succeeded in having the lawsuit dismissed, the case underscores the legal risks associated with using AI to monitor and analyze customer interactions. The dismissal was based on the court's finding that Google's actions did not meet the specific legal definition of wiretapping under the relevant statutes. However, the case highlights the growing scrutiny of AI tools that manage sensitive consumer data and the potential for litigation if these tools are perceived to overstep legal boundaries.[11]

A similar case has been brought against Peloton, where plaintiffs alleged that the company's AI-powered training chat tool unlawfully intercepted and recorded user communications. Like the case against Google, this lawsuit argues that Peloton's use of AI constitutes wiretapping under state and federal laws, as the company allegedly recorded and analyzed conversations without the users' knowledge or consent. The court's decision to allow the case to proceed reflects an increasing willingness to scrutinize AI applications under existing privacy laws, particularly when such technologies are used in contexts where consumers may have an expectation of privacy.[12]

The rise in public interest litigation involving AI presents several challenges for the legal system. Traditional privacy and wiretapping laws were not designed with AI in mind, leading to debates over how these laws should apply to modern AI technologies. Courts are now tasked with interpreting outdated legal frameworks in the context of highly sophisticated AI tools, creating a patchwork of rulings that could lead to inconsistent outcomes.

Regulatory bodies are also beginning to consider more comprehensive frameworks to address the unique challenges posed by AI. These frameworks may include stricter consent requirements, enhanced transparency obligations for AI-driven processes, and more rigorous standards for data handling and privacy. As these regulatory efforts develop, they are likely to influence both the strategies of public interest litigators and the defenses employed by companies deploying AI technologies.

Strategies to Defend Against Public Interest Litigation

One of the most effective strategies for defending against ESG-related public interest litigation is proactive compliance and transparency. Companies should implement comprehensive ESG policies and ensure that these policies are not only robust but also communicated to stakeholders with accuracy and precision. Regular audits and third-party verification of ESG claims can help mitigate the risk of being targeted for greenwashing claims or other deceptive practices. As highlighted in the 2024 Annual Litigation Trends Survey, companies that can demonstrate a genuine commitment to ESG standards and that provide clear, transparent reporting are better positioned to defend against litigation by showing that they have taken all reasonable steps to comply with legal and ethical standards.[13]

Another critical defense strategy is to challenge the legal basis of public interest litigation claims. Companies can argue that the plaintiffs lack standing or that the claims do not meet the statutory requirements under the relevant consumer protection or environmental laws. For instance, in cases involving allegations of greenwashing, companies can defend themselves by showing that the contested statements are either accurate or constitute non-actionable "puffery." By rigorously challenging the legal foundations of the claims, companies may succeed in having the lawsuits dismissed at an early stage, and thus, avoid protracted and costly litigation.[14]

Fee-shifting statutes and "loser pays" provisions, can serve as a potent defense tool in public interest litigation. These statutes can serve as an effective deterrent to plaintiffs in pursuing litigation unless they are highly confident in the merits of their case. Companies can invoke these statutes to shift the financial burden of the litigation onto the plaintiffs, thereby discouraging frivolous or speculative lawsuits. The Goldwater Institute notes that such provisions could significantly impact the viability of public interest litigation, especially where the outcomes are uncertain.[15] However, companies must

11 Allison Grande, Google Ditches Wiretap Suit Over AI Customer Service Calls, Law360 (June 21, 2024), https://www.law360.com/articles/1850364. (last visited September 22, 2024).

12 Dorothy Adkins, Peloton Must Face Wiretapping Suit Over AI-Training Chat Tool, Law360 (July 5, 2024), https://www.law360.com/articles/1855556. (last visited September 22, 2024).

13 See supra at fn 1.

14 Tara K. Giunta & Jonathan C. Drimmer, ESG Litigation & Enforcement Risks, Bloomberg Law (Jan. 2023), https://www.bloomberglaw.com/external/document/X94H5O2S000000/esg-professional-perspective-esg-litigation-enforcement-risks. (last visited September 22, 2024).

15 See supra at fn 9.

also be mindful of potential reforms that could alter the application of fee-shifting statutes, making it essential to stay updated on legislative developments.[16]

In some cases, it may be more advantageous for companies to engage in strategic settlements rather than pursuing litigation to its conclusion. Settling a case early can minimize reputational damage, reduce legal costs, and allow the company to focus on its core business activities. Strategic settlements can also include non-monetary terms that address the plaintiffs' concerns, such as commitments to enhance ESG practices or to increase transparency in corporate reporting.

Given the public nature of ESG-related lawsuits, companies must also focus on managing their reputation alongside their legal defense. Effective communication strategies can help mitigate the negative impact of litigation on a company's public image. This involves not only responding to the litigation in a measured and transparent manner but also proactively engaging with stakeholders to reinforce the company's commitment to ESG principles. By controlling the narrative, companies can reduce the potential reputational damage that often accompanies public interest litigation.

Conclusion

As public interest litigation continues to expand with a focus on deceptive trade practices in ESG claims and the increasing risks associated with AI technologies, companies must remain vigilant in their approach to compliance and legal defense. The rise in lawsuits related to these areas highlights the importance of transparent and accurate corporate practices. Companies can defend against such litigation by adopting robust ESG and AI policies, challenging the legal foundations of claims, and managing their reputations strategically. Ultimately, these strategies not only help mitigate legal risks but also contribute to building a culture of trust and responsibility in the corporate sector.

16 See supra at fn 10.

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

Recognized by Chambers USA for construction law in 2016-2024, he is described as "an esteemed trial lawyer with a wealth of experience assisting with litigation mandates relating to construction defects and insurance coverage issues." Prior to joining Maslon in 2002, Jason honed his trial and appellate skills as a Naval Officer with the United States Navy Judge Advocate General's Corps, where he led hundreds of courts-martial, administrative hearings, and military appeals.

In addition to his litigation practice, Jason served as a member of Maslon's Governance Committee from 2017 to 2019 and as the committee's vice chair from 2018 to 2019. Jason was selected for inclusion on the 2015-2024 Minnesota Super Lawyers® lists and prior to that was recognized on the Minnesota Rising Stars lists. Jason was also recognized as a Thomson Reuters® Stand-Out Lawyer for 2024.

Areas of Practice

- Litigation
- Appeals
- Business Litigation
- Competitive Practices & Antitrust
- Construction & Real Estate Litigation
- Insurance Recovery
- Tort & Product Liability

Honors

- Recognized in Chambers USA: America's Leading Lawyers for Business, Construction, Minnesota, 2016-2024
- Recognized as Thomson Reuters® Stand-Out Lawyer, 2024 (Based on Thomson Reuters® survey of more than 2,000 senior in-house counsel for client satisfaction, client advocacy, and legal skills.)
- Recognized on Minnesota Super Lawyers® list, 2015-2024 (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.)
- Selected for inclusion in The Best Lawyers in America®, 2021-2025
- North Star Lawyer, Minnesota State Bar Association, 2015 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.)
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2006-2009, 2011-2012 (Minnesota Rising Stars is a designation given to only 2.5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)

Education

- University of Minnesota Law School - J.D, cum laude, 1998
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Courage in the Courtroom: Overcoming Bias and Confronting Intimidation

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Courage in the Courtroom: Overcoming Bias and Confronting Intimidation
Rachel M. Lary

We all have a process to prepare for trial. But how often do we attend to our emotional and mental preparation? Formulating a mental strategy is equally as crucial as formulating a legal one. And just like the legal strategies, the mental game plan shifts with each case. You must know your opponent. And you must know yourself.

Identify Your Buttons.
Your opponent is studying what vulnerabilities lie just below your surface. They might try to exploit your vulnerabilities to rattle and unsettle you. The first step is identifying and recognizing your vulnerabilities, i.e. your "buttons." If you fail to acknowledge them, you cannot develop a mental strategy to manage them. We all have these. Some are rooted in "imposter syndrome" and insecurities, others from stereotypes we've strived to overcome. Understanding what triggers your emotional response – a racing heart, clouded judgement or anger – is essential.

The "buttons" may relate to your limited trial experience, your lack of familiarity with the jurisdiction or judge, or even your gender. Imagine how often young lawyers are told they're doing things differently, or out-of-state lawyers are reminded they're outsiders, or female lawyers are told not to get upset.

These scenarios feed into self-doubt: am I too young and inexperienced? I really am the outsider and not on my home turf that I know so well. Do I know what I'm doing? Am I too emotional?

We all have an inner voice that feeds our self-doubt. The first step to a strong mental game is recognizing your inner voice of doubt.

Expect your Opponent to Turn it Off.
We have often lived with the case and the opponent for several years before facing a jury. Many times, the opponent has identified and pushed every button that we have, leaving us to carry that baggage into trial. The jury, of course, is unaware of the discomfort your opponent has caused you and your client. They don't know of the derogatory remarks your opponent has flung your way, the sanctions filed against you, or the general disrespect you've endured. Just like it is up to the jury to reach their own conclusions with respect to the case, it is up to them to form their own opinion of your opponent.

Effective opponents can switch off their unpleasant traits the moment they step in front of a jury. Brace yourself for your opponent to do exactly that and turn off those traits in the courtroom. And if your opponent can effectively "turn it off," then your jury may like your opponent. The last thing you want is the jury to think you are the unreasonable party. Step in front of the jury with a clean slate and a fresh mindset—treating your opponent as an entirely new entity.

The good news is that very few opponents manage to effectively "turn it off." As we know, trial days are long and stressful, and it's usually only a matter of time before their true colors show. Once those traits are revealed, you'll feel vindicated. The jury will witness the same reprehensible behavior you have endured for the length of the case. The jury will not like it, and if you have kept a clean slate, they won't hold it against you.

Be Still and Breathe.
So how do you maintain your cool? How do you create a clean slate mindset? Alan Eagle and Eric Potterat's book "Learned Excellence: Mental Disciplines for Leading and Winning from the World's Top Performers" offers a solution used by top athletes to manage stress in high-pressure situations. In a sense, trial lawyers are similar to athletes. We are in the arena, the game is high stakes, and the pressure to achieve victory is great. One of the tools offered in the book to athletes equally applicable to attorneys is simple: breathe.

While easier said than done as adrenaline is coursing through your body, and especially difficult in the face of a

relentless opponent, it is hugely beneficial. As adrenaline surges and creates energy, the body wants to dispel the extra energy through movement. Unlike an athlete, we do not get the benefit of movement. So, you have to learn to harness this energy instead.

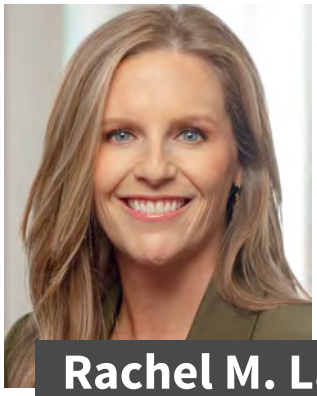
During a recent trial I found repeating the mantra: "Be Still and Breathe" to be incredibly calming. I repeated it in my head and on paper. As I grew more and more composed, my opponent became more erratic, aggressive and manic. His movements were in stark contrast to my calm stillness. There is strength and power in quiet resilience. Once you are physically and mentally still, your whole demeanor changes and you command the room, because you have harnessed the energy.

Not all control needs to be dramatic. Even the smallest gesture can convey power if you're otherwise still in the face of chaos. These slight movements—even a step towards the witness or a glance at the jury—gain importance due to the energy you've harnessed.
To hold that type of energy, you must recognize it, harness it and then use it.

Keep Your Focus, But Dare Greatly
Roosevelt's 1910 "Man in the Arena" speech speaks to challenges we face as trial lawyers in the courtroom:

> It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, who face is marred by dust and sweat and blood; who strives valiantly; ... who at the best knows in the end the triumph of high achievement, and how at the worst, if he fails, at least fails while daring greatly.

It takes courage to step into the arena of a courtroom. It is not a place for the weak. Preparing a mental strategy to maintain your mental and emotional strength can set you apart. It helps you stay focused on what is important. It can change the dynamic in the room. It can shift the power. Investing in the development of a mental game plan, you can take comfort in knowing no matter the outcome, you dared greatly.



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Rachel M. Lary

Partner | Lightfoot Franklin & White (Birmingham, AL)

Rachel Lary never shies away from a challenge.

A talented litigator, Rachel takes a tailored approach to each matter she handles and is always up for a challenge. These traits have served her well in litigating a broad spectrum of cases, including business disputes, product liability claims, medical malpractice, and trust and estate disputes.

Aware of what is required to take a case through to trial, Rachel works toward developing a persuasive story for each stage of litigation. She enjoys uncovering key details, crafting a narrative that embraces the truth, dealing with the hard facts and persuading a court or jury to find in her client's favor.

Practice Areas

- Automotive
- Commercial Litigation
- Pharma & Medical Device
- Medical Malpractice
- Product Liability
- Trust & Estate Disputes
- White-Collar Criminal Defense & Corporate Investigations

Representative Matters

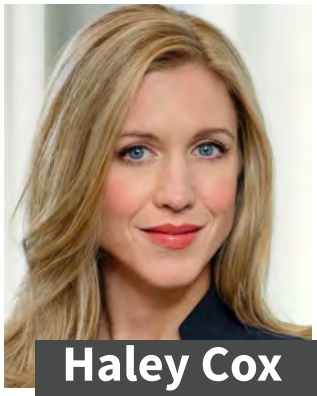
- Securing a judgment as a matter of law (JMOL) on behalf of a hospitalist in a wrongful death matter, successfully arguing that the patient's estate failed to present substantial evidence showing the hospitalist breached applicable standards of care in treating the patient post-surgery.
- Serving as lead counsel in the successful defense of a cardiologist in Alabama against wrongful death claims with a team of female lawyers. The wrongful death medical malpractice claim alleged that the physician improperly prescribed a drug that caused toxicity and the patient's death. At the close of plaintiff's case before the jury, the trial court granted the motion for judgment as a matter of law and dismissed the claims against the cardiologist.
- Representing a Fortune 500 company against claims arising from an accident involving catastrophic injuries to a minor in which the plaintiff presented a life care plan valued at more than $70 million. After summary judgment briefing concluded, obtained a very favorable settlement on behalf of the client.

Awards

- The Best Lawyers in America© by BL Rankings — Commercial Litigation, Corporate Compliance Law, Trusts and Estates, Personal Injury, Product Liability Litigation (2018-2024)
- Benchmark Litigation, "Future Star" (2024)
- B-Metro magazine, "Top Women Attorneys" (2020)
- Birmingham Business Journal, "NextGenBHM Award" (2020)
- Birmingham Business Journal, "Rising Star in Law" (2019)
- Birmingham Business Journal, "Women to Watch" Award (2021)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Business Litigation (2014-20)

Education

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



Developing the Next Generation: Succession Planning for Clients and Outside Counsel

Haley Cox

Lightfoot Franklin & White (Birmingham, AL)

Developing the Next Generation of Trial Counsel
Haley Cox

As the legal landscape continues to evolve, law firms face the challenge of preparing their younger attorneys to take over client relationships and ensure the long-term success of the firm. At Lightfoot, Franklin & White, LLC, we strive to develop the next generation of trial counsel to serve our valued clients, with the goal of creating lasting and strong partnerships. This article will explore the essentials of strategic succession planning, focusing on creating an environment conducive to mentorship, fostering cross-functional collaboration, leveraging technological advancements, and emphasizing robust client relationships, based on a clear vision for both the firm and its clients.

Firm Goal: Developing Future Trial Counsel
The success of a law firm hinges on the strength of its client relationships. Firms must build a robust roster of attorneys who are not only skilled in their legal practice but are also deeply integrated into the client relationships that drive the firm's success. One key to success is working to create "firm clients"—clients who are attached to the firm itself, rather than to only individual lawyers. This approach ensures continuity of service and strengthens the long-term prospects of both our clients and the firm. Accomplishing this requires a well-defined strategy focused on a combination of culture-based hiring, efficient teamwork, and intentional development opportunities for younger lawyers.

The Recipe for Building a Firm for the Future: Culture-Based Hiring
A strong commitment to culture produces lawyers who are well-positioned for succession. When a firm prioritizes hiring attorneys who align with the firm's values, it is easier to train and develop newer lawyers to understand the importance of teamwork, integrity, and client service. This foundation is critical because when lawyers embody the firm's ethos, they can more seamlessly integrate into client relationships.

Lean, Efficient Teams
Another way to promote effective succession planning is to create lean, efficient teams on cases. This structure not only ensures a high-quality and efficient service delivery to clients, but also provides ample opportunities for younger lawyers to expand their horizons and grow. Operating on this framework, every lawyer, whether a seasoned professional or a novice, has significant responsibility in dealing with client touchpoints. This creates an empowering environment where young lawyers can take control of pivotal tasks early in their legal career. Furthermore, this team collaboration opens exciting avenues for these young professionals, ingraining in them a culture of creative problem-solving and innovation side by side with clients. By truly integrating associates and young partners into client teams, a firm can nurture diverse perspectives and ideas, broadening the skill sets of young lawyers while encouraging them to use their voices. We place great emphasis on this cross-pollination of ideas as it is crucial in keeping our firm adaptable, forward-thinking, and ready for the future.

Substantive Work for Younger Lawyers
One of the greatest challenges for law firms is providing substantive work to younger attorneys. Too often, firms hesitate to push important tasks down the ladder for fear of mistakes. However, the only way to develop strong trial attorneys is by providing real opportunities to handle substantive legal matters early and often. This means entrusting young lawyers with significant responsibilities in cases, allowing them to gain valuable experience under the supervision of more senior attorneys.

A Mix of Casework to Build Experience
A diverse array of cases ensures that younger lawyers gain experience across different legal contexts. Whether it is high-stakes litigation or smaller matters, these opportunities allow younger attorneys to enter the courtroom and face real challenges—there is no substitute for in-the-arena experience. While it may be difficult for an associate or young partner to "cut her teeth" in bet-the-company litigation, if a firm is willing to take on smaller matters or offer special rates for lower

stakes litigation, younger lawyers can grow and learn by doing.

Direct Client Contact for Young Lawyers
For succession planning to work, firms must make a concerted effort to ensure that younger lawyers have direct contact with clients. This is crucial not only for the development of the attorney but also for establishing long-term relationships between the client and the firm. Clients appreciate the opportunity to get to know the younger attorneys handling their cases, and it helps build trust that the firm is focused on their needs, both now and into the future.

Senior Lawyers Pushing Younger Lawyers to the Forefront
It is critical for senior attorneys to mentor the next generation and push younger lawyers to the forefront. This is done by consciously giving younger attorneys a chance to lead portions of cases, particularly in client-facing roles, and by advocating for those attorneys when interacting with clients. Senior attorneys should explicitly ask clients for opportunities to place younger lawyers in leadership positions within their matters.

Investment in Training and Development
Training is a central component of developing younger attorneys. Firms must invest both time and resources in attorneys' growth, or it will not happen. This includes formal training sessions, mentorship programs, and on-the-job learning.

Anti-Hoarding Culture
An important element in an effective succession-planning strategy is dedication to an anti-hoarding. In many firms, senior lawyers are reluctant to share clients with younger attorneys, fearing a loss of control or credit. This can be combatted by fostering a collaborative environment where everyone benefits from the success of the team. Critically, for this to work, firms must hold senior attorneys accountable for passing work down and giving younger attorneys important opportunities.

Client Goal: Developing a Deep Bench
From the client's perspective, succession planning is just as critical. Clients need to know that their legal team will remain strong even as senior lawyers move toward retirement. This requires a clear plan for transitioning leadership, with younger lawyers who understand the business, the cases, and the client's overall strategy.

The Client's Dilemma
Clients are often caught in a dilemma when it comes to succession planning. On one hand, they recognize the need to develop the next generation of outside counsel to succeed aging partners. On the other hand, clients are under increasing pressure to manage legal costs, which can make it difficult to justify the expense of training and development for younger attorneys. Moreover, senior lawyers at some firms may resist sharing work with younger colleagues, as they worry about losing the credit (and money) associated with their long-standing client relationships.

Another challenge is the need for clients to feel confident that the lawyers handling their matters have the necessary experience. As such, clients often prefer to work with experienced partners to mitigate any potential risk, even if that means bypassing younger, less experienced lawyers.

Solutions: A Partnership Between Firms and Clients
The solution to this dilemma lies in a long-term partnership between firms and clients, with both parties working together to ensure a smooth transition to the next generation of trial counsel. Here are some strategies we've found effective:

Firms Absorbing Some of the Costs
Law firms must be willing to absorb some of the costs associated with developing younger lawyers. Clients are understandably reluctant to pay for the training and development of junior attorneys, but firms that are serious about long-term client relationships should view this investment as essential.

Clients Paying Reasonable Costs
While firms should take on some of the financial burden, clients must also be willing to pay reasonable costs for the development of their next generation of outside counsel. A balanced approach benefits both sides in the long run.

Clear Succession Plans
Firms need to have a clear strategy for succession planning and should collaborate with their clients to ensure that they are comfortable with the plan. By involving clients in the process, firms can build confidence in the next generation of lawyers and reassure clients that their legal needs will continue to be met.

Open Communication
This entire process requires open lines of communication between the firm and its clients. Regular discussions about the succession plan, the roles younger lawyers will play, and the client's evolving needs are essential to the plan's success.

Creativity in Training and Development
Both firms and clients can be creative in how they approach training. Clients can steer smaller cases toward younger

lawyers to give them hands-on experience, while law firms can offer tailored training programs specific to the client's industry. Additionally, some clients may choose to train their outside lawyers on their internal processes, which benefits both parties by creating a more seamless working relationship.

Conclusion: Investing in the Future

At Lightfoot, Franklin & White, we understand that developing the next generation of trial counsel is an investment in our clients' future and our own. By fostering a culture of collaboration, investing in training, and maintaining open communication with our clients, we can ensure that our young lawyers are well-prepared to take on the challenges ahead. In doing so, we not only secure the future of the firm but also strengthen our commitment to providing top-tier legal services to our clients for years to come.

Developing the Next Generation

Lightfoot

Haley Cox

Lightfoot

Firm Goal:
Develop the next generation of trial counsel to serve our valued clients and to ensure continued success of the firm.

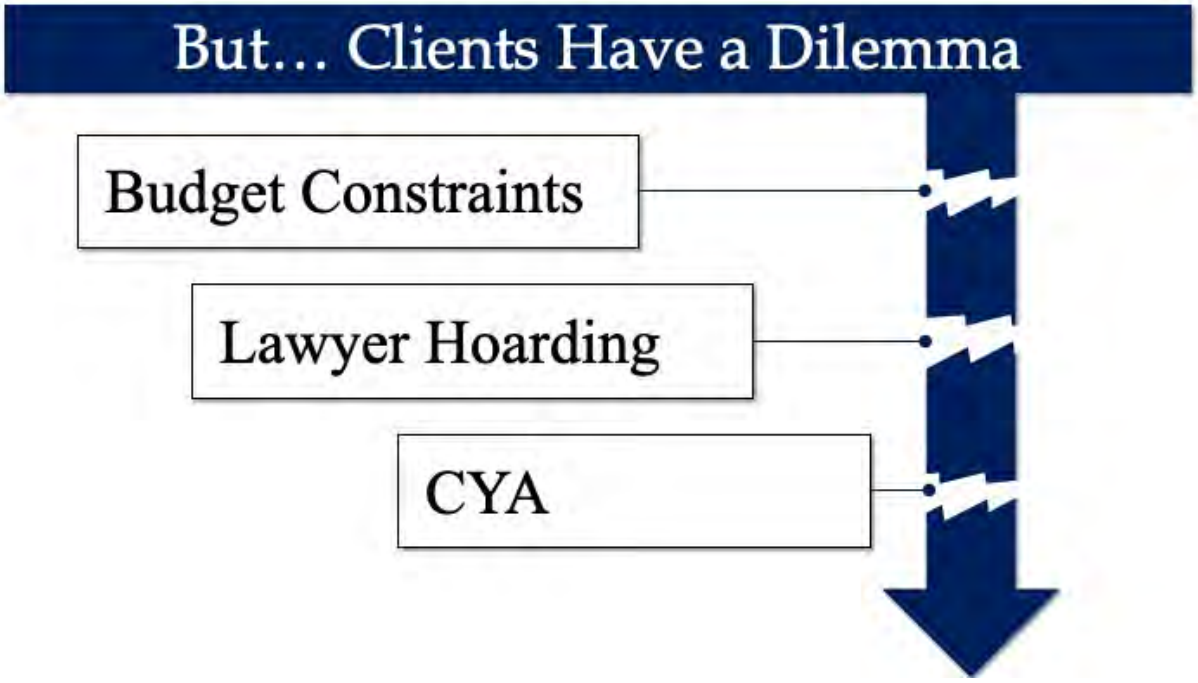
a/k/a **Create FIRM clients.**

Secret Sauce

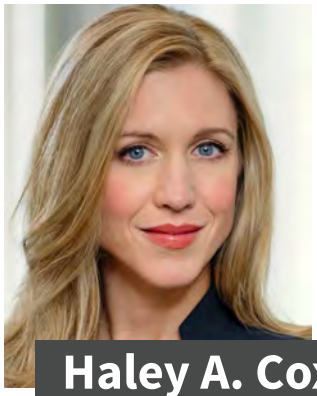
- Culture-Based Hiring
- Lean Teams
- Push Work Down
- Case Mix
- Intentional Client Contact
- Push Young Lawyers Out Front
- Invest Time & Money
- And the biggie: Anti-Hoarding

Client Goal:
Have a clear plan for who your lead / relationship partners will be as the current generation of outside counsel moves toward retirement.

a/k/a **Develop a deep bench who knows your business.**




Strategic Plan for Succession
Aligned Goals
Communication
Commitment
Investment
Creativity



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Haley Cox knows from experience that winning takes work and attention to detail.

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

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

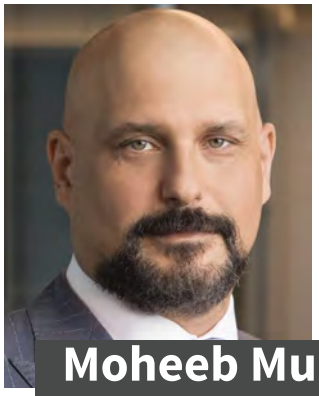
For more than 10 years, Haley has been instrumental in recruiting the next generation of Lightfoot lawyers to serve the firm's clients. She is committed to carrying out Lightfoot's mission of hiring only the most talented, driven and diverse lawyers, and then training them the right way. In addition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

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

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

Awards
- Benchmark Litigation, "Top 250 Women in Litigation" (2020-23)
- Benchmark Litigation, "Litigation Star" (2022-24)
- Benchmark Litigation, "Local Litigation Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability (2021)
- The Best Lawyers in America© by BL Rankings — Personal Injury Litigation, Product Liability Litigation (2022-24)
- Birmingham Business Journal, "Leader in Diversity" (2022)
- Birmingham Business Journal, "Best of the Bar" (2021)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Litigation Defense (2014-21)

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



ETHICS – Who's the Boss? Navigating the Tripartite Relationship Among Lawyers, Insurers, and Insureds in Litigation

Moheeb Murray
Bush Seyferth (Troy, MI)

Who's the Boss? Navigating the Tripartite Relationship Among Lawyers, Insurers, and Insureds in Litigation
Moheeb Murray

The relationships among policyholders, insurance companies, and the counsel they hire, commonly known as the "tripartite relationship,"[1] present unique ethical questions. Attorneys hired by insurance companies to represent policyholders are sometimes placed in a difficult ethical quandary. Without a doubt, they have to act in the best interests of their client. But it is not always clear whether, in addition to the insured, if the insurer is a client, at what point in time the client relationships are formed, and for what purposes. The attorney therefore faces a delicate balancing act. This dilemma is particularly apparent when the interests of the policyholder and insurance company diverge, spawning questions regarding attorney-client privilege, who is making strategic case decisions, whether and how to settle a case, along with other ethical considerations.

Differing Views on Who Is the Attorney's Client

At the core of most questions regarding privilege and conflicts in the tripartite relationship is understanding: who is considered the insurer-hired attorney's client? Generally, the approaches to the tripartite relationship fall in three categories: (1) the dual-client, (2) primary-client, and (3) sole-client approaches. But not all jurisdictions are clear about which view an attorney should follow, if any of them. And even if a jurisdiction has a defined approach, the implications of who is an attorney's client can be vexing.

In dual-client jurisdictions, the policyholder and insurance provider are both considered the attorney's clients because they each benefit from the attorney's services.[2] The dual-client approach is the majority view. Examples of states recognizing the dual-client-approach, though with various nuances, are Alabama, Alaska, Florida, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Utah, Vermont, and Wisconsin.[3] Generally, under this approach, the attorney owes equal duties of care and equal duties of confidentiality and loyalty to the insurer and insured. Attorneys in these jurisdictions must therefore balance the insurer's and insured's interests, at least until those interests directly conflict and in which case separate counsel may be required.[4]

The primary-client approach (also called the "third-party payor theory" or "one-and-a-half-client theory") is a twist on the dual-client approach. In general, under this approach, the policyholder is viewed as counsel's primary client, but there is at least some level of obligation to the insurer, even if the insurer does not have an express representation agreement with the lawyer. For instance, in Paradigm Ins. Co. v. Langerman Law Offices, P.A., the Arizona Supreme Court held that an attorney-client relationship can form between an insurer and attorney absent an express agreement between them and that an attorney can owe a duty of care to an insurer even if it is not a client.[5] There, the insurer sued for malpractice the counsel it appointed to represent its insured after the attorney failed to investigate the existence of another insurer's applicable policy and failed to timely tender the defense.[6] The attorney argued that there could not be

1 The concepts discussed in the article can also apply to indemnitor/indemnitee relationships outside of the insurance context where one party is paying for the defense of another, such as under a commercial contract indemnification provision.

2 Ethical Considerations within the Tripartite Relationship of Insurance Law – Who is the Real Client? 74 Def. Couns. J. 172 (2007).

3 See, e.g., Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1331 (9th Cir. 1995) (interpreting Alaska law); Lee v. Med. Protective Co., 858 F. Supp. 2d 803, 806 (E.D. Ky. 2012) (interpreting Kentucky law); Mitchum v. Hudgens, 533 So. 2d 194, 198 (Ala. 1988); Bank of Am., N.A. v. Super. Ct., 151 Cal. Rptr. 3d 526, 536 (Ct. App. 2013); Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 93 Cal. Rptr. 2d 534, 542–44 (Ct. App. 2000); Pa. Ins. Guar. Ass'n v. Sikes, 590 So. 2d 1051, 1052 (Fla. Dist. Ct. App. 1991); Coscia v. Cunningham, 299 S.E.2d 880, 881 (Ga. 1983); Huang v. Brenson, 7 N.E.3d 729, 739 (Ill. App. Ct. 2014); Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 161 (Ind. 1999); Teague v. St. Paul Fire & Marine Ins. Co., 10 So. 3d 806, 832 (La. Ct. App. 2009); McCourt Co. v. FPC Props., Inc., 434 N.E.2d 1234, 1235 (Mass. 1982); Moeller v. Am. Guarantee & Liab. Ins. Co., 707 So. 2d 1062, 1070 (Miss. 1996); State Farm Mut. Auto. Ins. Co. v. Hansen, 357 P.3d 338, 343 (Nev. 2015); Lieberman v. Emp'rs Ins., 419 A.2d 417, 423–25 (N.J. 1980); Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 45–46 (N.C. Ct. App. 2005); United States Fid. & Guar. Co. v. Pietrykowski, No. E99-38, 2000 WL 204475, at *3–4 (Ohio Ct. App. Feb. 11, 2000); Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 607 (Utah 2003); In re Illuzzi, 616 A.2d 233, 236 (Vt. 1992); Juneau Cnty. Star-Times v. Juneau Cnty., 824 N.W.2d 457, 467 (Wis. 2013).

4 See e.g., Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 608 (Utah 2003); Paradigm Ins. Co. v. Langerman L. Offs., P.A., 24 P.3d 593, 597 (Ariz. 2001); Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 452 (Minn. 2002).

5 Paradigm Ins. Co. v. Langerman L. Offs., P.A., 24 P.3d 593, 599 (Ariz. 2001).

6 Id.

any duty to the insurer absent an express agreement to represent the insurer. The court disagreed, holding that absent a conflict, there is a "special relationship" between the insurer and the counsel it assigns to represent its insured because the insurer is "in some way dependent" on the lawyer it hires.[7]

In reaching it decision, the court pointed to an insurer's dependence on the lawyer to zealously represent the insured so the insurer can honor its contractual obligations and to minimize the amount the insurer must pay under the policy.[8] In California, courts have recognized that "[i] n the absence of a conflict of interest between the insurer and the insured that would preclude an attorney from representing both, the attorney has a dual attorney-client relationship with insurer and insured."[9] But if a conflict arises, counsel must observe her duties of loyalty and confidentiality to the insured as the "primary" client, stop representing the insurer, and not disclose adverse information to the insurer.[10]

In sole-client jurisdictions, it is clear that the attorney's only "client" is the policyholder, regardless of who is paying for representation.[11] The attorney must be careful always to act in the policyholder's best interest, not the insurer's. This is the minority view, but it has a growing following. Among the states recognizing this approach are Arkansas, Colorado, Connecticut, Hawaii, Kansas, Michigan, Minnesota, Montana, New Hampshire, New York, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia.[12] This view is the simplest to understand from the ethical vantage point because there is clearly only one client, but it still creates many practical problems for how and to what extent counsel can keep the insurer informed about the progress of a matter.

Each jurisdiction may have nuances in which approach it recognizes and the contours of how it applies the approach. Because there is some indication that more jurisdictions are adopting a sole-client approach, it is important to stay abreast of the law of the jurisdiction where the legal representation will be provided to understand counsel's ethical obligations.

Privilege Considerations: Privilege in Dual-Client Scenarios

In dual-client jurisdictions, since the insurer and insured are both considered the attorney's clients, the communications between them are privileged. And the privilege survives even if the attorney shares with the insurer her communications with the insured and vice versa. Of course, the communications must still be confidential and for the purpose of seeking or providing legal advice, and the tripartite-relationship participants must not disclose the communications outside of their triad. But if a conflict arises after the tripartite relationship begins, the question of privilege within the relationship becomes more complex.

Courts in some jurisdictions hold that the privilege will continue to exist as to parties who are outside of the insurer-insured relationship under a common-interest or joint-defense doctrine.[13] And if the insurer and insured each have separate counsel after the conflict arises, then their communications with their respective attorneys from that point forward are privileged from each other.[14] But what of privileged communications shared before the conflict arose? They would still be known by and potentially usable by the insurer or insured against the other. Thus, counsel with "dual clients" should, throughout an engagement, continually be evaluating the cross-sharing of privileged information between the insurer or insured against the potential for any conflict that could arise where the disclosure of the information could become damaging to one or the other.

Privilege in Sole-Client Scenarios

In sole-client jurisdictions, courts have held that there is no special privilege between the insured and insurer that mirrors attorney-client privilege. Nonetheless, Michigan and other jurisdictions have recognized that the relationship between the insurance company and the attorney is unique from other third-party relationships.[15]

7 But if the insurer continues to manage the litigation, then it will not have the right to sue the attorney for malpractice if the attorney makes a misstep. Amber Czarnecki, Ethical Considerations Within the Tripartite Relationship of Insurance Law - Who Is the Real Client?, 74 Def. Couns. J. 172, 177 (2007).

8 Id.at 154.

9 State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co., 72 Cal. App. 4th 1422, 1429, 86 Cal. Rptr. 2d 20, 24 (1999).

10 Purdy v. Pac. Auto. Ins. Co., 157 Cal. App. 3d 59, 76, 203 Cal. Rptr. 524, 533 (Ct. App. 1984) ("The attorney's primary duty has been said to be to further the best interests of the insured"); see also State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1995-139.

11 See Pennsylvania Nat. Mut. Cas. Ins. Co. v. Perlberg, 819 F. Supp. 2d 449, 454 (D. Md. 2011).

12 See, e.g., Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 108 (2d Cir. 1991); In re A.H. Robins Co., 880 F.2d 694, 751 (4th Cir. 1989); U.S. Underwriters Ins. Co. v. Tauber, 604 F. Supp. 2d 521, 532 (E.D.N.Y. 2009); Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F. Supp. 2d 951, 957 (E.D. Va. 2005) (discussing Virginia law); Essex Ins. Co. v. Tyler, 309 F. Supp. 2d 1270, 1272 (D. Colo. 2004) (discussing Colorado law); Gibbs v. Lappies, 828 F. Supp. 6, 7 (D.N.H. 1993); Paradigm Ins. Co. v. Langerman L. Offs., P.A., 24 P.3d 593, 599 (Ariz. 2001); First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671 (Ark. 1990); Higgins v. Karp, 687 A.2d 539, 543 (Conn. 1997); Finley v. Home Ins. Co., 975 P.2d 1145, 1153 (Haw. 1998); Hackman v. W. Agric. Ins. Co., No. 104,786, 2012 WL 1524060, at *15 (Kan. Ct. App. Apr. 27, 2012); Kirschner v. Process Design Assocs., Inc., 592 NW.2d 707, 711 (Mich. 1999); Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 452 (Minn. 2002); In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806, 814 (Mont. 2000); Feliberty v. Damon, 527 N.E.2d 261, 265 (N.Y. 1988); Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270, 272 (S.C. 2019); Petition of Youngblood, 895 S.W.2d 322, 328 (Tenn. 1995); Safeway Managing Gen. Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 168 (Tex. App. 1998); Stewart Title Guar. Co. v. Sterling Sav. Bank, 311 P.3d 1, 3 (Wash. 2013); Barefield v. DPIC Cos., 600 S.E.2d 256, 270 (W. Va. 2004).

13 Nationwide Mut. Ins. Co. v. Bourlon, 617 S.E.2d 40, 47 (N.C. App. 2005).

14 Progressive Exp. Ins. Co. v. Scoma, 975 So. 2d 461, 466-467 (Fla. Dist. Ct. App. 2007); see also Hollis, L., Navigating the Tripartite Relationship – Insured, Insurer and Outside Counsel.

15 Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 519, 475 N.W.2d 294, 297 (1991).

So, to facilitate communications among the attorney, policyholder, and insurance company, courts have recognized the communications as protected from outsiders under the common-interest doctrine.[16] This allows attorneys to discuss litigation with the insurance company without waiving privilege, provided that the insurance company and policyholder share the same goals.[17] Like attorney-client privilege, the common-interest doctrine is limited in scope. It applies only "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."[18]

Despite its usefulness, the common-interest doctrine may become problematic when the policyholder's and insurer's legal interests diverge. For example, the court in U.S. Fire Ins. Co. v. City of Warren held that the common-interest doctrine did not apply where there was a coverage dispute.[19] There, the court did not require the policyholder to turn over privileged documents to its insurance provider, because the parties' disagreement about the extent of coverage demonstrated they did not share a common interest.[20]

As another example, the common-interest doctrine did not apply where an insurance provider sought privileged documents in an action brought by a policyholder against it.[21] The policyholder sued the insurance provider for failing to commit itself to coverage.[22] During discovery, the insurance provider sought privileged materials related to the underlying claim in which the policyholder was involved.[23] The court reasoned that although the parties may have shared an interest in keeping the damages in the underlying litigation low, they did not "share an interest in characterizing how that damage occurred, what type of damage has occurred, or how [the policyholder] responded to the damage."[24]

Regardless of whether the common-interest doctrine applies, attorneys must remain loyal to their sole client, the policyholder, without being influenced by the insurer.[25] According to the ABA Model Rules of Professional Conduct, attorneys cannot allow third parties that supply payment to "direct or regulate the lawyer's professional judgment."[26] Instead, they should "proceed in the best interest of the insured."[27] So in the end, attorneys in sole-client jurisdictions ultimately have an unwavering duty to the policyholder,[28] despite any temptation to consider the goals of the insurer that is funding the litigation.[29]

Work-Product Protection

Work-product protection shields documents from discovery that have been created in anticipation of litigation.[30] Although work-product protection typically relates to documents produced by attorneys, it can also apply to documents prepared or produced by the insurer, where the insurance company is considered an insured's representative for purposes of the claim.[31]

As with attorney-client privilege, if the attorney has dual clients or the insurer and insured share a common legal interest, work-product protection is not waived when policyholders share files with insurance providers.[32] In D'Alessandro Contr. Group, LLC v. Wright, for example, the court explained that the defendant did not waive work-product protection by sharing litigation files with its indemnitor where the two had a joint-defense agreement.[33] The court rejected the argument that since the indemnitor may later become an adversary, work-product protection was waived.[34] Instead, the court focused on the relationship in the current action, and emphasized that both parties aimed to win the litigation, and, thus, the work product was protected under the common-interest doctrine.[35]

Potential Types of Conflicts in the Tripartite Relationship

The Model Rules of Professional Conduct present several scenarios where conflicts of interest arise for an attorney hired by an insurance company to represent an insured. For context, the following rules are the keys to consider: MRPC 1.7(a): "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client

16 See, e.g., State Farm Fire & Cas. Co. v. Admiral Ins. Co., 225 F. Supp. 3d 474, 481 (D.S.C. 2016).

17 Id. at 481-482.

18 Id.

19 U.S. Fire Ins. Co. v. City of Warren, No. 2:10-CV-13128, 2012 WL 2190747, at *6 (E.D. Mich. June 14, 2012).

20 Id.

21 Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 410 (D. Del. 1992).

22 Id.

23 Id.

24 Id. at 418.

25 See 438 Mich. 512, 519.

26 Model Rules of Professional Conduct 5.4(c).

27 Restatement 3D of the Law Governing Lawyers, § 134 at 410 (2000).

28 See 438 Mich. 512, 519.

29 See, e.g., Mallen & Levit, Legal Malpractice, § 263, pp. 356–357 (2020).

30 Messenger v. Ingham Co Prosecutor, 232 Mich App at 637-638, quoting Black's Law Dictionary (6th ed), citing Fed R Civ P 26(b)(3).

31 244 Mich. App. at 171.

32 See D'Alessandro Contr. Group, LLC v. Wright, 308 Mich. App. 71, 84.

33 Id.

34 Id. at 85.

35 Id. at 84.

consents after consultation."

MRPC 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."

MRPC 1.8(f): "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and (3) information relating to the representation is protected as required by rule 1.6."

MRCP 5.4(c): "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Considering these rules, the following are some of the types of conflict situations that can arise in tripartite relationships.

Reservations of Rights

Reservations of rights can create a conflict of interest between insurance providers and policyholders. Insurers often send reservation-of-rights letters to policyholders as a means of maintaining their ability to withdraw their coverage for all or part of a claim.[36] A reservation-of-rights letter informs the policyholder that the insurer reserves the right to deny coverage later in the proceedings, despite its initial agreement to provide a defense and indemnity.[37] These letters are generally used when coverage issues remain unresolved and provide a way for insurance providers to uphold their obligation to defend policyholders without having to continue to fund litigation that falls outside the scope of the coverage plan.[38] The insurance company may, if circumstances warrant, later deny coverage and withdraw from covering litigation expenses.

Insurance providers may have less interest in providing the best possible defense for the policyholder because it anticipates finding that coverage does not extend to the litigation at hand.[39] Conflicts of interest can also arise for the defense attorney, as she could arguably be inclined to "steer a case toward a coverage result favorable to the insurer."[40]

To mitigate this conflict, insurers can retain independent counsel to represent the policyholder.[41] And in some states, they are required to do so, but the insurer may still have a say in selecting the policyholder's counsel. For instance, in Michigan (a sole-client jurisdiction), an insurer has the right to select the independent counsel, provided that it acts in good faith and the attorney chosen is, in reality, independent from the insurance company.[42] This allows insurance providers to fund litigation without influencing decisions, as it effectively acts as a means of reimbursement for litigation expenses that the insured would otherwise have to first incur and then seek recoupment.[43]

Divergent litigation strategies for insurer and insured

A primary source of conflict can be who controls the defense strategy, particularly when the motivations for pursuing one strategy over another diverge. For example, the court in Illinois Masonic Med. Ctr. v. Turegum Ins. Co. required the insurance provider to hire independent counsel to avoid a conflict of interest.[44] In the underlying suit, a patient sued a hospital for negligent treatment during multiple visits.[45] Some of the visits occurred after the insurance policy had been terminated, and therefore the insurance company would not have to cover any successful negligence claims for those visits.[46] The hospital successfully argued that the insurance company's interests would be served by finding negligence occurred during the visits that occurred after the policy terminated, which goes against the hospital's interests of a finding of no negligence during any visit.[47] The insurance company had a clear motive for providing a weaker defense, and therefore, the court ruled that independent counsel was necessary.[48]

Also, the insurer may want to control the defense to manage costs and ensure consistency with its policies or larger financial goals, while the insured may want more control to ensure a vigorous defense. For instance, conflicts can arise over settlement decisions. The insurer

36 Douglas R. Richmond, Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel, 73 Neb. L. Rev. 265, 272 (1994).

37 Id.

38 Id.

39 73 Neb. L. Rev. at 272.

40 Id. at 273.

41 Frankenmuth Mutual Ins. Co., Inc. v. Eurich, 152 Mich. App. 683, 688 (1986).

42 In Central Michigan Board of Trustees v. Employer Reinsurance Corp., 117 F. Supp. 2d 627 (E.D. Mich. 2000).

43 See Jamie R. Carsey, Brian D. Heskamp, Jennifer C. Wasson, Is Three Company or a Crowd? Conflicts and the Tripartite Relationship, 2009 Insurance Coverage Litigation Committee CLE Seminar, March 4-7, 2009 (2009), https://www.potteranderson.com/media/publication/105_JCW_20Is_20Three_20Company_20Or_20A_20Crowd_20--_20FINAL_20VERSION_20_2_.pdf. (last visited September 23, 2024).

44 Illinois Masonic Med. Ctr. v. Turegum Ins. Co., 522 N.E.2d 611, 616 (Ill. App. 1988).

45 Id. at 612.

46 Id.

47 Id. at 616.

48 Id.

may prefer to settle a claim quickly to minimize costs, while the insured, such as a professional in a malpractice case, may want to fight the claim to protect her reputation or avoid future liability. These differing goals can put the attorney in an ethical bind if she is in a dual-client situation.

Attorney learns facts that could affect coverage

Whether in a sole- or dual-client jurisdiction, an attorney is prohibited under the Model Rules of Professional Conduct from aiding or abetting a client perpetrating a fraud on an insurance company. MRPC 1.2. So, if the attorney learns that the insured has engaged in fraud in procuring the policy or in connection with the claim, the attorney faces an unwaivable conflict and must withdraw from representation. MRPC 1.16(a)(1). But the attorney also remains bound by MRPC 1.6, which requires that the attorney maintain her client's confidences, even after withdrawal. Therefore, the attorney must seek to withdraw in a way that avoids disclosure of the fraud to the insurer. But the comments to MRPC 1.6 suggest that when withdrawing from representation, an attorney may "withdraw or disaffirm any opinion, document, affirmation or the like," and MRPC 1.6 thereby authorizes an "indirect or discreet disclosure" through a "noisy withdrawal." MRPC 1.6, Cmt. 16.

In other situations, during the course of representation, the attorney defending an insured against liability may learn facts that, while not indicating fraud, could be determinative on the question of whether the insured is entitled to coverage. For example, the attorney might learn facts demonstrating the claim is excluded under the insurance policy. In sole-client scenarios, the attorney must be careful to not disclose the information to the insurer. But the attorney faces a potential conflict, at least in dual-client scenarios, because the attorney has two clients with divergent interests.

Across several jurisdictions, if a conflict of interest arises for the defense counsel on a coverage issue, the insurance company would have to hire independent counsel for the policyholder.[49] For example, the court in Employers Casualty Co. v. Tilly explained that a policyholder should be made aware of potential conflicts and given the opportunity to obtain other counsel.[50] There, the attorney hired to defend the policyholder was also gathering evidence for the insurance company to deny coverage.[51] The policyholder was unaware of this underlying motive and even allowed the attorney to question him and his employees, since he mistakenly believed it was for his own benefit.[52] The court held that the policyholder should have been made aware of this conflict and potentially obtain new counsel.[53] As a result, the insurance company was estopped from denying coverage.[54]

Reporting to insurer/disclosure of insured's confidential information

Another conflict can occur regarding the flow of information. The insurer often needs detailed information to make decisions about coverage and defense and will ask for reports about case assessments or strategy decisions. But the insured may be concerned about sharing sensitive information or documents containing such information that could be used against her in coverage disputes (see above) or that she would simply not want to disclose, such as a health condition, a personal family matter, or something about the insured's employment or finances that could be embarrassing or cause legal trouble for the insured. The attorney has a duty to maintain the client's confidences under MRPC 1.6, so an instruction by an insured not to disclose certain information could put the attorney in a pickle if the insurer needs or asks for that information to make case management decisions.

Divergent interests on limiting litigation costs and expenses

Disputes over the reasonableness of attorney fees and expenses can also lead to conflicts. The insurer may attempt to manage litigation costs by scrutinizing fees and expenses or seeking to limit discovery or case workup. Or the insured may have unrealistic demands about the time that the attorney should devote to the case since the insured is not paying the cost.

Attorney interest in repeat business from insurer

Oftentimes, defense counsel will establish relationships with the insurance companies that hire them. Attorneys are aware that the insurance company, rather than the policyholder, will supply future work. So, they may be inclined to keep the insurance company happy.[55] One area where this is particularly problematic is the need for insurance companies to get legal guidance on coverage disputes. It is important for defense counsel to avoid involvement in coverage disputes while representing the insured, especially in cases where they may aid the insurance company in finding that the policyholder lacks

49 See U. S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 939 (8th Cir. 1978), Nat'l Cas. Co. v. Forge Indus. Staffing Inc., 567 F.3d 871, 874 (7th Cir. 2009) (citing Am. Family Mut. Ins. Co. v. W.H. McNaughton Builders, Inc., 843 N.E.2d 492, 498 (Ill. App. 2006)), Progressive Nw. Ins. Co. v. Gant, 957 F.3d 1144, 1152 (10th Cir. 2020) (citing Hackman v. W. Agric. Ins. Co., No. 104786, 2012 WL 1524060, at *11 (Kan. Ct. App. Apr. 27, 2012)).

50 Employers Casualty Co. v. Tilly, 496 S.W.2d 552, 559 (Tex. 1973).

51 Id. at 554.

52 Id. at 560.

53 Id. at 561

54 Id.

55 See, e.g., Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 715-716 (1984), Employers Casualty Co. v. Tilley, 496 S.W.2d 552, 558-560 (Tex. 1973).

coverage.[56] Aiding in this kind of investigation would breach the duty that the defense counsel owes to the policyholder, as they would be hindering his or her client's interests.[57]

Conflicts when demands exceed policy limits

An attorney may also face a conflict where the attorney determines there is a reasonable chance that a claimant could obtain a verdict or arbitration award exceeding the policy's coverage limit. In that scenario, the insurer may still have an incentive to litigate the case to try to obtain a verdict lower than the policy limits, but leaving the insured exposed to potential personal liability.

Burning-Limits Policies

Some policies are structures such that the cost of defense, such as attorneys' fees, are deducted from the policy limits as a case progresses. Thus, while at the same time helping the insured with the defense, counsel's work is also reducing the amount of coverage available to pay a judgment or settlement. This tension can create a conflict for an attorney because her course of action affects the insured's and insurer's interests on how to best defend a case.

Conclusion

Each of the preceding examples show, there are some potential conflicts inherent to the tripartite relationship and some that can arise in the midst of a representation. It is therefore critical that an attorney understand from an engagement's outset to whom she owes duties as her client. She should then have open and clear discussions with the insurer and insured at the engagement's outset, and throughout as needed, about the nature of the parties' so everyone understands to whom the attorney owes duties of loyalty and confidentiality, potential ways those duties could be tested over the course of the tripartite relationship, and how they might be resolved in accordance with applicable law and ethical rules if they arise.

56 See 1 New Appleman Insurance Bad Faith Litigation § 3.05 (2nd 2024) (referencing Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223 (Sup. Ct. 1976), Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688 (1984), Fid. & Cas. Co. v. McConnaughy, 228 Md. 1, 9–14 (Md. Ct. Spec. App.1962), Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973)).

57 E.g., Restatement LGL § 16, cmt. e (duties of loyalty "prohibit the lawyer from harming the client); Ellen S. Pryor & Charles Silver, Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases, 78 Tex. L. Rev. 599, 634–36 (2000); The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke L.J. 255, 280–83 (1995).

WHO'S THE BOSS?

NAVIGATING THE TRIPARTITE RELATIONSHIP AMONG LAWYERS, INSURERS, AND INSUREDS IN LITIGATION

MOHEEB MURRAY
Bush Seyferth PLLC

bsp LAW

Core Dilemma

- Tripartite relationship
- Who is the attorney's client?
- Unique ethical challenges
- Balancing the interests of the insured and insurer

Key Ethical Questions

01 Who makes strategic decisions in litigation?

02 What are the attorney-client privilege concerns?

03 How to handle conflicts of interest between the insured and the insurer?

Who is the Attorney's "Boss"?

Dual-Client Approach

Primary-Client Approach

Sole-Client Approach

Dual-Client Approach

- Both the insurer and insured are clients.
- Majority view (Alabama, Alaska, Florida, etc.)
- The attorney owes equal duties to both.
- Conflict resolution could require separate counsel if interests diverge.

Privilege in Dual-Client Scenarios

- Both insurer and insured hold attorney-client privilege.
- Common-interest or joint-defense doctrines apply.
- But no privilege applies if the insurer and insured end up in a dispute.

Primary-Client Approach

- The policyholder is the primary client, but there is still some obligation to the insurer.
- "Third-party payor theory"
- Duty to the insurer despite the lack of express representation agreement.
  - **Case Example:** *Paradigm Ins. Co. v. Langerman Law Offices, P.A. (Ariz.)*

Sole-Client Approach

- The attorney's only client is the insured.
- Minority view, but growing (Michigan, Texas, Colorado, etc.)
- Clear obligations from an ethical standpoint.
- But practical challenges for information sharing with the insurer.

Privilege in Sole-Client Scenarios

- Communications between the attorney and insured are privileged.
- Disclosure to the insurer can be a waiver.
- No special privilege between the insurer and the insured.
- But common-interest doctrine allows the sharing of information to further common goals.
- Conflicts may arise if goals diverge.

Conflicts in the Tripartite Relationship

- Several potential conflict scenarios can arise.
- MRPC provides guidance on when conflicts are triggered, but how to resolve them is not always clear.

Conflict Example: Reservation of Rights

- Insurers might use reservation-of-rights letters to potentially withdraw coverage later.
- Creates conflicts of interest between the insurer and the insured.
- Independent counsel may be required.

Conflict Example: Facts Impacting Coverage

- Attorneys are prohibited from aiding fraudulent claims.
- Withdrawal requirements under MRPC 1.6 and 1.16.
- "Noisy withdrawal" and the ethics around client fraud.

Conflict Example: Divergent Strategies

- Primary source of conflict over who controls defense strategy.
- Case Example: *Illinois Masonic Med. Ctr. v. Turegum Ins. Co.*
- Settlement strategy divergence: insurer vs. insured interests.

Conflict Example: Litigation Costs

- Disputes over attorney fees and case workup strategies.
- Tension between cost control and client demands.

Conflict Example: Demands Over Policy Limits

- Demand exceeding limits puts the insured's personal assets at risk.
- Tension between the insurer's litigation goals and the insured's personal liability exposure.
- Advise the insured to obtain independent counsel.

Conflict Example: Burning-Limits Policies

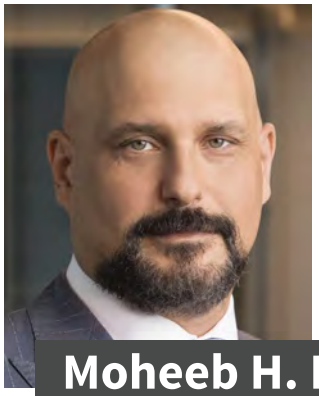
- Defense costs reduce available policy limits.
- Conflict arises between covering defense costs and protecting judgment limits.

Conflict Example: Reporting Insured's Confidential Information

- Insured may restrict disclosure of sensitive information.
- Attorney's duty to client confidentiality (MRPC 1.6).
- Potential conflict in dual-client scenarios.

Key Takeaways

1. Know who's the "boss" in your jurisdiction.
2. Set expectations for communications and decision-making early on.
3. Stay alert to potential developing conflicts.
4. Have a plan for resolving conflicts or withdrawing, if necessary.



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Practice Areas

- Business and Commercial
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- Securities / Finance
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Honors and Awards

- Chambers USA Guide, Insurance (Michigan) Band 1 (2024)
- 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, Top 100 (2023 – present)
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- University of Michigan Law School, J.D., cum laude, 2001
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ETHICS – Navigating Privilege and Ethical Issues in Internal Corporate Investigations

David Lacy
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Navigating Privilege and Ethical Issues in Internal Corporate Investigations
David Lacy

On June 6, 2023, following a high school graduation ceremony in Richmond, Virginia, students gathered at an adjacent park to celebrate with their families and friends. Within minutes, graduating senior Shawn Jackson was shot dead. Police arrested another student on the scene and subsequently charged him with murder.

The School Board of the City of Richmond, which organized the graduation, engaged a local law firm to conduct an investigation. The law firm reviewed over 100 documents, interviewed over 25 witnesses, and generated a 32-page report with thousands of pages of exhibits, including interview transcripts.

A divided School Board refused to publicly disclose the report, citing the attorney-client privilege. Multiple local news outlets sued under the Virginia Freedom of Information Act. Following a one-day bench trial and an in camera review, the court held that the report was not privileged and ordered the School Board to produce it.[1]

The report revealed that Jackson was allowed to participate in the graduation even though high school staff members were aware that he was subject to threats of neighborhood violence:

Information provided for this Review supports the proposition that [Jackson's] participation in graduation occurred without any consideration of or adherence to required authorizations, and without proper vetting and consideration of the safety concerns that were known by several members of [the high school's staff].

On July 20, 2024, Jackson's mother filed a lawsuit on Jackson's behalf against the School Board and others seeking compensatory damages in excess of $10 million. Not surprisingly, the complaint borrows liberally from the report and its exhibits.

The report's release was a victory for government transparency and community awareness. The attorneys defending the School Board in the lawsuit might view the report's disclosure differently, however.

Organizations often turn to outside counsel to investigate sensitive issues, hoping to protect information under attorney-client privilege.[2] But, just because a lawyer handles the investigation does not mean the investigation—and its findings—are privileged. This article highlights issues counsel should consider to maximize confidentiality and privilege protection before embarking on an internal investigation. In the process, the article explores ethical responsibilities to the client and unrepresented witnesses.[3]

Internal Investigations and the Attorney-Client Privilege

As a general proposition, the attorney-client privilege provides absolute protection from disclosure if it applies and has not been waived.[4] Therefore, if a client is contemplating an internal investigation, it is critical that the client consider at the outset whether the privilege could potentially apply, and if so, measures that should be taken to maximize the privilege's application and minimize the risk of waiver.

As its name suggests, the attorney-client privilege can only apply if an attorney is involved in the investigation, but an attorney's involvement alone is insufficient to trigger the privilege;[5] the investigation must be conducted

1 See Lee BHM Corp. v. Sch. Bd. of Richmond, Case No. CL23-5464, 2024 Va. Cir. LEXIS 4 (Richmond Cir. Ct. Jan. 16, 2024).

2 "In recent decades [ ] such investigations evolved beyond the anticipation of litigation. Corporations, universities, and other collective entities have commissioned internal investigations to evaluate potential violations of institutional policy as well as law, and sometimes consider much less well-defined issues." Patrick O'Donnell, Esq., The Ethical Internal Investigator, The Champion, July 2024 (hereinafter "O'Donnell"), at 40.

3 In all cases, it is critical to evaluate controlling law in the relevant state or federal judicial circuit.

4 See, e.g., In re Allen, 106 F.3d 582, 600 (4th Cir. 1997) ("[I]f a party demonstrates that attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure.") (citation omitted).

5 See, e.g., Marceau v. I.B.E.W., 246 F.R.D. 610, 613 (D. Ariz. 2007) ("The fact that attorneys were retained to prepare the Report and that the Report is marked as an attorney-client privileged document are not dispositive of the issue. Rather what controls is the purpose of the activity."); Woodmen of the World Life Ins. Soc. v. U.S. Bank Nat. Ass'n, 2012 WL 354798, *6

for the purpose of procuring or providing legal advice.[6] As the court in the Richmond shooting case explained, "The purpose of the privilege is to encourage full and frank communication between attorneys and their clients, 'thereby enabling attorneys to provide informed and thorough legal advice.' It follows that the privilege 'protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.'"[7]

Not all advice from a lawyer constitutes legal advice. Simply put, "[t]he privilege 'does not protect ordinary business advice.'"[8] Furthermore, "[f]actual investigations by themselves do not constitute the rendering of legal advice or assistance."[9]

The Richmond shooting case illustrates this foundational principle. The resolution proposing the investigation was driven by a faction of the School Board—seemingly without assistance from counsel—who were concerned with discovering facts, not obtaining legal advice. Notably, the Board member who moved to hire the law firm referred to the investigation as an "audit,"[10] a process often associated with business decisions, as opposed to legal advice.[11] As the court observed, "Clearly nothing within the four corners of the [Board's] resolution sought legal advice. The resolution is very straightforward in what the School Board wanted from the investigation, and legal advice was not included."[12]

It appears from the court's decision that the School Board gave little thought at the outset as to whether the investigation could or would be privileged. The Board unquestionably could have engaged the law firm to provide legal advice on its potential civil liability arising out of the shooting.[13] In fact, if an issue is sufficiently important to warrant an investigation, it usually means the issue presents some kind of legal question for which the client can justifiably seek legal advice. The client would still have to demonstrate that procuring such legal advice was the primary or predominant purpose for the investigation,[14] but at least the client would have something to argue.

Ultimately, the point is that when considering whether to conduct an investigation, there is much to consider at the front end. Failing to address privilege issues until after the purpose and scope of the investigation have been decided, or after the investigation has begun, can prove fatal.[15] As the Richmond court observed, "when considering after-the-fact claims of privilege, 'courts analyze such ex post facto evidence with some skepticism.'"[16] Therefore, when contemplating an investigation, the client should involve counsel as early in the deliberations as possible.

If the client seeks the protections of the attorney-client privilege, the purpose of the investigation should be memorialized in writing before the investigation begins. Memorializing the lawyer's role as a legal advisor does not guarantee privilege protection, but as one commentator observes, "a badly worded description of the lawyer's role can doom any privilege claim."[17] Accordingly, the

(D. Neb. Feb. 2, 2012) ("The court finds U.S. Bank fails to make a sufficient showing that the investigation was committed to Goodwin Procter, a professional legal advisor, for legal advice rather than as an independent investigation to aid FAF Advisors in determining the extent of Busse's reallocation activities and their impact on investors in an effort to reimburse those affected.").

6 See, e.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resol. Tr. Corp., 5 F.3d 1508, 1515 (D.C. Cir. 1993) ("[T]he privilege protects only those communications made for the purpose of obtaining legal advice from the lawyer[.]") (internal quotations omitted); In re Polaris, Inc., 967 N.W.2d 397, 407 (Minn. 2021) ("There is general agreement among courts that the protection of the attorney-client privilege applies only if the primary or predominant purpose of the attorney-client consultation is to seek legal advice or assistance.") (internal quotations omitted). Accord 1 Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide (hereinafter "Spahn"), § 13.1, p. 245 (Va. Law Foundation, 2013) ("The privilege only protects communications primarily motivated by legal advice[.]").

7 Lee BHM, 2024 Va. Cir. LEXIS at *8-9 (emphasis in original; quoting Walton v. Mid-Atl. Spine Specialists, P.C., 280 Va. 113, 122 (2010) and Fisher v. United States, 425 U.S. 391, 403 (1976)).

8 In re Polaris, supra, 967 N.W.2d at 407 (quoting Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982)). See also Guo Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 13 (D.D.C. 2021) ("From the factual record discussed above and the Report itself, the Court concludes that Clark Hill's true objective was gleaning Duff & Phelps's expertise in cybersecurity, not in obtaining legal advice from its lawyer.") (internal quotations and brackets omitted); Becker v. Willamette Cmty. Bank, No. 6:12-CV-01427-TC, 2014 WL 2949334, *3 (D. Or. June 30, 2014) ("While a corporation is certainly free to seek business advice from counsel, business advice does not become legal advice simply because it is rendered by counsel.") (citing McCormick on Evidence, 6th Ed., Vol. 1, § 88).

9 Lee BHM, 2024 Va. Cir. LEXIS at *6 (quoting 1 Paul R. Rice, et al., Attorney-Client Privilege in the U.S. § 7:1 (Dec. 2023)).

10 Id. at *3.

11 See, e.g., Cruz v. Coach Stores, Inc., 196 F.R.D. 228, 231 (S.D.N.Y. 2000) (privilege held inapplicable because "the purpose of the 'investigative audit' was not solely, or even primarily, to enable its counsel to render legal advice to Coach."); Marceau, supra, 246 F.R.D. at 614 (privilege held inapplicable because "this was an audit designed to study and propose solutions for on-going management issues facing the company").

12 Id. at *14 (emphasis in original).

13 The information uncovered by the investigation no doubt would help with the future provision of legal advice to the Board, but that fact is insufficient to invoke the privilege. "[I]t is not enough for the party invoking the privilege to show that a communication to legal counsel relayed information that might become relevant to the future rendering of legal advice. Instead, the communication must also either explicitly or implicitly seek specific legal advice about that factual information." Harrington v. Freedom of Info. Comm'n, 144 A.3d 405, 415 (Conn. 2016) (citations omitted).

14 See, e.g., In re Chase Bank USA, N.A. Check Loan Cont. Litig., No. 3:09-MD-2032 MMC JSC, 2011 WL 3268091, *2 (N.D. Cal. July 28, 2011) ("In the same way that a non-privileged communication does not become privileged by the presence of an attorney, it likewise does not become privileged by the mere suggestion of a legal issue ancillary to the main purpose of the communication."). See also Cruz, supra, 196 F.R.D. at 231 (finding investigation not motivated by legal advice in part because it "was commissioned not only by Coach's General Counsel but by her superior, Coach's Chief Administrative Officer, who promptly acted on its results by removing those employees implicated in financial improprieties . . . .").

15 See In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1245–46 (D. Or. 2017) (rejecting privilege claim where outside counsel was not hired until after the client hired a forensics vendor and the investigation had already commenced; "Here, Premera had already hired Mandiant, which was performing an ongoing investigation under Premera's supervision before outside counsel became involved. Premera has the burden of showing that Mandiant changed the nature of its investigation at the instruction of outside counsel and that Mandiant's scope of work and purpose became different in anticipation of litigation versus the business purpose Mandiant was performing when it was engaged by Premera before the involvement of outside counsel. Premera has not made that showing.").

16 Lee BHM, supra, 2024 Va. Cir. LEXIS at *8 (quoting Spahn § 22.6, p. 538). See also Wadley v. Univ. of Iowa, No. 420CV00366SMRHCA, 2022 WL 18780000, *6 (S.D. Iowa June 24, 2022) (internal investigation of culture of university's football program; "As a preliminary matter, the Court holds Defendants have failed to show that the HB law firm was engaged to provide legal services . . . The Court agrees that other than the language of the [engagement] Agreement, Defendants have not provided evidence to support their claim that the HB documents are covered under the attorney-client privilege.").

17 See Spahn § 14.302, p. 262.

engagement letter should expressly state that it is seeking counsel's legal advice on specific, identified issues.

Another key upfront consideration is how the investigation might be used in the future. Using the investigation to make a business decision undercuts the client's ability to demonstrate that the purpose of the investigation was to procure legal advice.[18] Furthermore, in some contexts, the fact that there was an investigation, and the details of what the investigation entailed and how it was used, may provide a defense to liability.[19] Additionally, the client may have an institutional interest in disclosing an investigative report to quell public concerns.[20] Disclosure can give rise to waiver issues; however,[21] which pursuant to the doctrine of subject matter waiver might spread beyond simply the investigation report itself.[22] If the client anticipates disclosing the investigation in the future, the investigation should be conducted with an eye towards it being disclosed to the client's adversary. Alternatively, the client should consider conducting separate, parallel investigations, one privileged and one not privileged.[23]

Consideration should also be given at the outset to whether the investigation should be conducted by outside counsel or in-house counsel.[24] Using in-house counsel to conduct the investigation might save time and money, but "[a]pplication of the privilege can be difficult . . . when the client's attorney is in-house counsel who wears 'two hats' by performing a dual role of legal advisor and business advisor."[25] Thus, "involving outside lawyers makes it more likely that a company can demonstrate that the corporate investigation involved legal rather than business concerns."[26]

Whoever conducts the investigation, if the client seeks privilege protection, it is important to reinforce the privileged-nature of the investigation at every turn, recognizing that the client may be forced to defend privilege protection in a later proceeding. For example, if one employee of the client is seeking information requested by counsel for the investigation from another employee, the email should state at the top, "Attorney-Client Privilege, Information Requested By Counsel."[27] A label, or lack thereof, is not dispositive of whether a communication is protected by the attorney-client privilege,[28] but using a "privileged" label helps demonstrate that the communication is privileged.[29]

The attorney should also identify the privileged nature of the investigation when interviewing certain witnesses. In its seminal Upjohn decision, the Supreme Court held that the privilege can apply to employee interviews conducted as part of an internal investigation,[30] provided that the communications "concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."[31] Consequently, the privilege might not attach if counsel fails to advise the employee that the interview is for the purpose of the employer obtaining legal advice.[32]

Lastly, the client should only disclose investigation

18 See Cruz, supra, 196 F.R.D. at 231 (finding investigation not motivated by legal advice in part because it "was commissioned not only by Coach's General Counsel but by her superior, Coach's Chief Administrative Officer, who promptly acted on its results by removing those employees implicated in financial improprieties . . . .").

19 See, e.g., Saunders v. Metro. Prop. Mgmt., Inc., 806 F. App'x 165, 169–70 (4th Cir. 2020) (employer not liable under Title VII where it took prompt remedial action in the form of a "timely" and "reasonably thorough" investigation into complaint of harassment).

20 See, e.g., Wadley, supra, 2022 WL 18780000 at *7 ("At the hearing, defense counsel stated that Iowa released the Report to make the concerns public and to create a safe place where others could come forward and discuss their concerns with an independent third-party."). One commentator aptly warns, "[s]ometimes, organizations announce and promise, at the outset, to disclose the results of an 'independent' investigation, long before they know what the investigation will turn up and how such disclosure might affect their interest." O'Donnell at 41.

21 See, e.g., Harding v. Dana Transp., Inc., 914 F. Supp. 1084 (D.N.J. 1996)

22 See, e.g., Wadley, 2022 WL 18780000 at *7 (holding that university waived privilege applicable to investigation materials after it publicly disclosed the investigative report; "Defendants cannot have it both ways"). See also In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1196–97 (10th Cir. 2006) (collecting cases addressing the doctrine of "selective waiver"); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426–27 (3d Cir. 1991) (Agreement between litigant and DOJ that documents produced in response to investigation would not waive privilege does not preserve privilege against different entity in unrelated civil proceeding); Bowne v. AmBase Corp., 150 F.R.D. 465, 478–79 (S.D.N.Y.1993) (non-waiver agreement between producing party in one case not applicable to third party in another civil case).

23 See, e.g., In re Target Corp. Customer Data Sec. Breach Litig., No. MDL142522PAMJJK, 2015 WL 6777384, *2 (D. Minn. Oct. 23, 2015) ("Target asserts that following the data breach, there was a two-track investigation. On one track, it conducted its own ordinary-course investigation, and a team from Verizon conducted a non-privileged investigation on behalf of credit card companies. This track was set up so that Target and Verizon could learn how the breach happened and Target (and apparently the credit card brands) could respond to it appropriately. On the other track, Target's lawyers needed to be educated about the breach so that they could provide Target with legal advice and protect the company's interests in litigation that commenced almost immediately after the breach became publicly known. On this second track, Target established its own task force and engaged a separate team from Verizon to provide counsel with the necessary input, and it is for information generated along this track that Target has claimed attorney-client privilege and work-product protection.").

24 The attorney-client privilege "applies to individuals and corporations, and to in-house and outside counsel." Deel v. Bank of Am., N.A., 227 F.R.D. 456, 458 (W.D. Va. 2005) (citation omitted). See also In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758 (D.C. Cir. 2014) ("[A] lawyer's status as in-house counsel does not dilute the privilege.") (internal quotations omitted).

25 S.F. Pac. Gold Corp. v. United Nuclear Corp., 175 P.3d 309, 319 (N.M. App. 2007) (citation omitted).

26 Spahn § 22.7, pp. 540-541.

27 "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Upjohn Co. v. United States, 449 U.S. 383, 390 (1981).

28 See Est. of M.R. v. Oregon Dep't of Hum. Servs., No. 3:23-CV-00702-SB, 2024 WL 1526497, *6 (D. Or. Apr. 9, 2024)

29 See, e.g., In re Grand Jury Proc., No. M-11-189, 2001 WL 1167497, *28 n. 51 (S.D.N.Y. Oct. 3, 2001) ("Further evidencing the privileged nature of these documents is that a majority of the communications are marked with a privilege legend.").

30 Most federal courts have held that the privilege can apply to communications with former employees. See In re Allen, 106 F.3d 582, 605–06 (4th Cir. 1997) (collecting cases). This approach is not universal, however. See generally, Corcoran v. HCA-HealthONE LLC, No. 21-CV-02377-NRN, 2022 WL 1605296 (D. Colo. May 20, 2022) (collecting state and federal cases addressing whether the attorney-client privilege applies to communications to the client's former employees).

31 See Upjohn, supra, 449 U.S. at 394.

32 See Deel, 227 F.R.D. at 461 (rejecting privilege claim; "The defendant's fatal flaw, however, was that it did not clarify to the employees completing the questionnaire that it needed the information to obtain legal advice."); Cruz, supra, 196 F.R.D. at 231 (same). But see In re Kellogg Brown & Root, supra, 756 F.3d at 758 (holding that "nothing in Upjohn requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in Upjohn employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. KBR employees were also told not to discuss their interviews 'without the specific advance authorization of KBR General Counsel.'") (internal citations omitted).

materials and findings to employees on a need-to-know basis.[33] Wide circulation can prove fatal to a privilege claim.

Internal Investigations and Ethical Considerations

Representing organizational clients, such as the School Board in the Richmond case, can be tricky.[34] Although not necessarily reflected in the Richmond court's decision, evidence at trial revealed significant strife between the various Board members about whether to conduct the investigation, the scope of the investigation, and whether to publicly release the investigative report.[35] In these situations, counsel must be mindful that her duties flow to the organization, not its members: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[36]

The Richmond decision does not indicate that the strife among the School Board members affected the law firm's investigation. In general, counsel must resist any attempt by a member of the organization to narrow or alter the scope or results of the investigation—perhaps to avoid discovery of embarrassing or scandalous information affecting that member—if doing so conflicts with counsel's duties to the organization. "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization."[37]

Another major concern attendant to representing an organization is clearly defining the client. This concern is especially pronounced in the context of internal investigations. Company employees interviewed for the investigation might assume counsel also represents them. The Upjohn warning discussed above, sometimes called the "corporate Miranda warning,"[38] is designed to eliminate any confusion about the real client's identity.

The Upjohn warning requires the organization's lawyers to make clear to employees at the outset that "the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure."[39] Failure to clearly advise employees that counsel does not represent them could result in employees reasonably concluding that they are the client, which could in turn create a conflict for counsel,[40] or worse.[41] For this reason, counsel should memorialize its Upjohn warning to each witness.[42] Furthermore, the warning should be clear and unequivocal, not "watered-down," creating "a potential legal and ethical minefield."[43]

Another organizational-client issue that can arise in the internal investigation context concerns money. Absent the client's informed consent in writing, "a lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer."[44] As one commentator observes, "Does the issue to be investigated implicate a decision-maker at the client who has selected the lawyer for past matters and would likely do so in future ones? This might put the lawyer's own pecuniary interests against those of her client, who may count on the lawyer to provide an unflinching account of the decision-maker's actions."[45]

Lastly, in the Richmond shooting case, the investigating law firm "represented to interviewees that their communications would be confidential."[46] That

33 See, e.g., In re Grand Jury Proc., supra, 2001 WL 1167497 at *28 (holding that investigation materials were privileged; "The communications related to the corporate review were disseminated only among the employee members of the Doe Corp. Team, the individuals charged with acting upon counsel's advice.").

34 See, e.g., United States v. Ruehle, 583 F.3d 600, 601–02 (9th Cir. 2009) (noting the "treacherous path which corporate counsel must tread under the attorney-client privilege when conducting an internal investigation").

35 See Joint Pretrial Bench Memorandum Regarding Access to Investigative Report at 2-5, Lee BHM Corp. v. Sch. Bd. of Richmond, Case No. CL23-5464 (Richmond Cir. Ct. Jan. 8, 2024).

36 See American Bar Association Model Rules of Professional Conduct (hereinafter "Model Rules"), Rule 1.13(a).

37 See Model Rule 1.13(b).

38 See Ruehle, supra, 583 F.3d at 604 n.3.

39 Ruehle, 583 F.3d at 604 n.3 (citing Upjohn, 449 U.S. at 393–96). Accord Com. v. Schultz, 133 A.3d 294, 314 (Pa. Super. Ct. 2016) ("'Upjohn warnings' have evolved that specifically inform a corporate employee that corporate counsel represents the corporation and not the individual, and that the corporation possesses the attorney-client privilege.") (citing Grace M. Giesel, Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony, 65 U. Miami L. Rev. 109 (2010)).

40 See In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 340 (4th Cir. 2005) ("[T]he court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees.").

41 See Ruehle, 583 F.3d at 606 (district court referred outside counsel to the state bar for possible discipline arising from counsel's failure to properly advise company's CFO that they only represented company and not him during internal investigation and subsequently disclosing CFO's interview statements to prosecutors). See also Model Rule 1.13(f) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); Model Rule 4.3 ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

42 See Ruehle, 583 F.3d at 604 n.3 ("Ruehle testified that he did not recall receiving any [Upjohn] warnings. As discussed infra, the district court seems to have disbelieved the Irell lawyers who took no notes nor memorialized their conversation on this issue in writing, and it apparently credited Ruehle's testimony that no such warnings were given. We cannot say that this finding is clearly erroneous on the record before us.").

43 In re Grand Jury Subpoena: Under Seal, 415 F.3d at 340.

44 Model Rule 1.7(a)(2).

45 O'Donnell at 41.

46 See Lee BHM Corp., 2024 Va. Cir. LEXIS at *14.

representation proved inaccurate once the report and its exhibits, including interview transcripts, were publicly disclosed. The court nevertheless "attribute[d] no bad faith on the part of [the] investigating attorneys in this regard, as they represented only what they believed."[47] The court's statements were fortunate. "In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person."[48] Accordingly, promises of confidentiality to interviewees, stated in absolutist terms, might give rise to an ethical violation. The better approach is to qualify the confidentiality promise so that the interviewee understands that the client might be compelled to disclose the interviewee's statements, voluntarily or involuntarily.

47 Id.

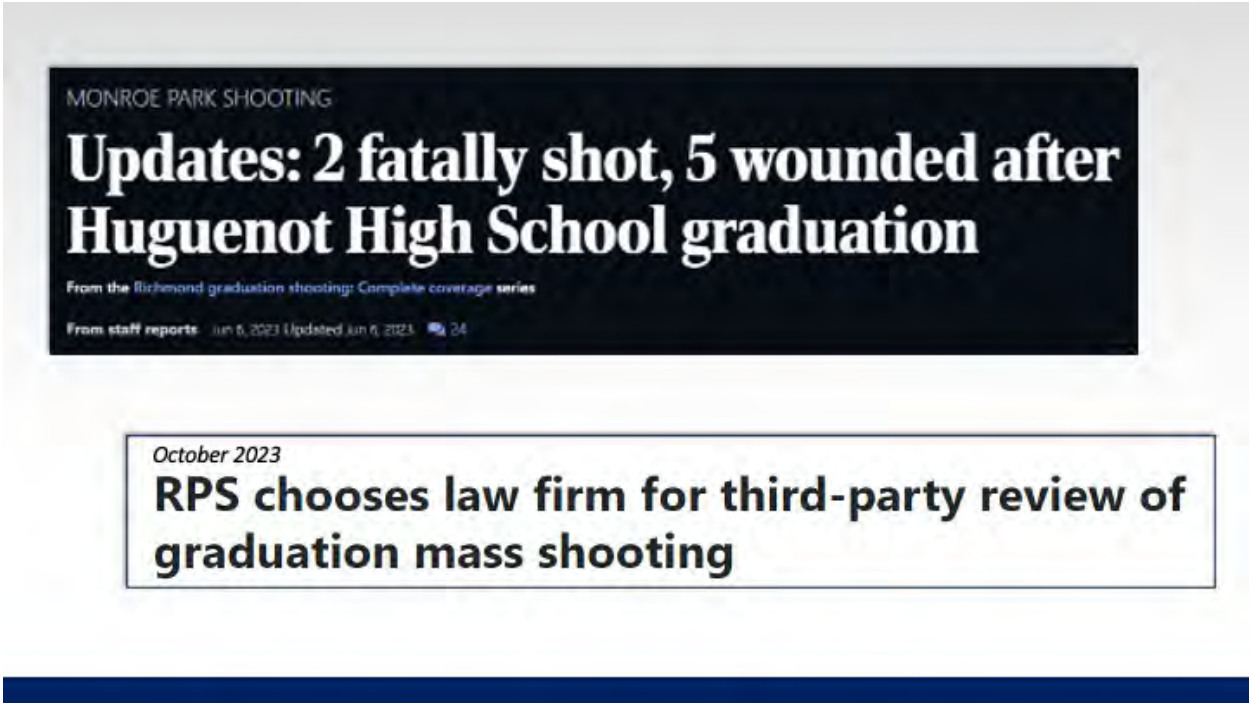
48 See Model Rule 4.4(a).

Internal Investigations

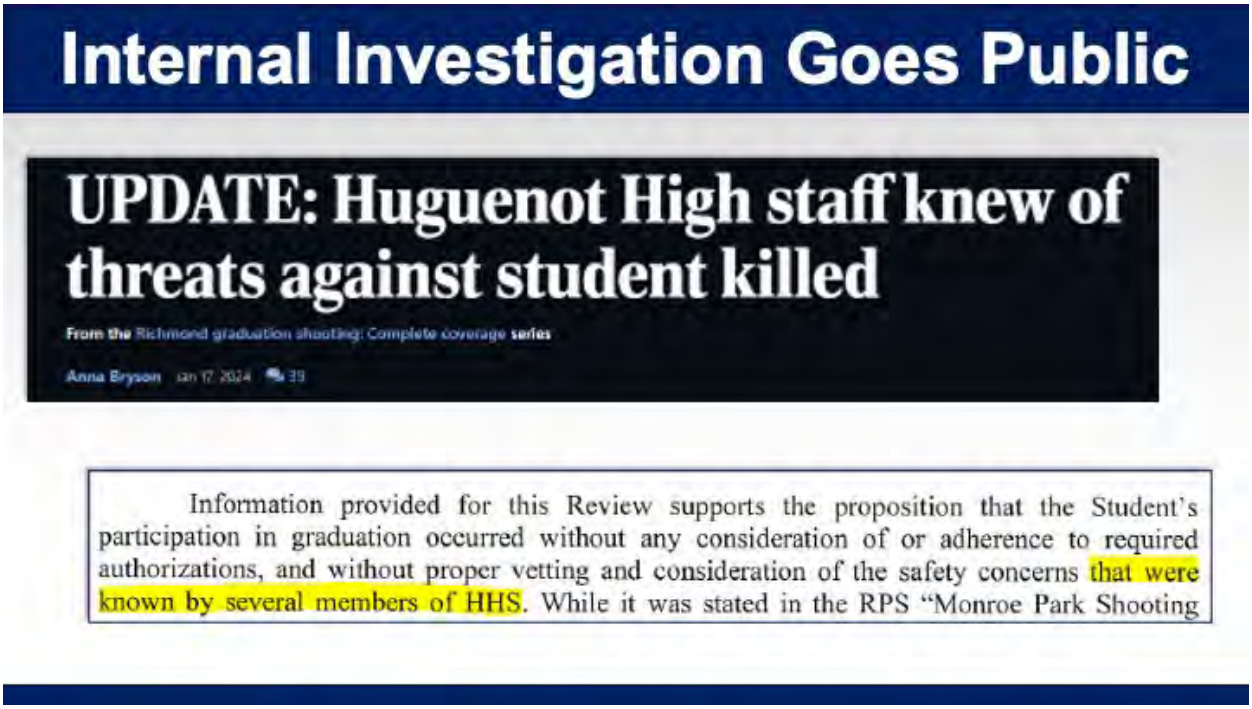
Navigating Privilege and Ethical Issues

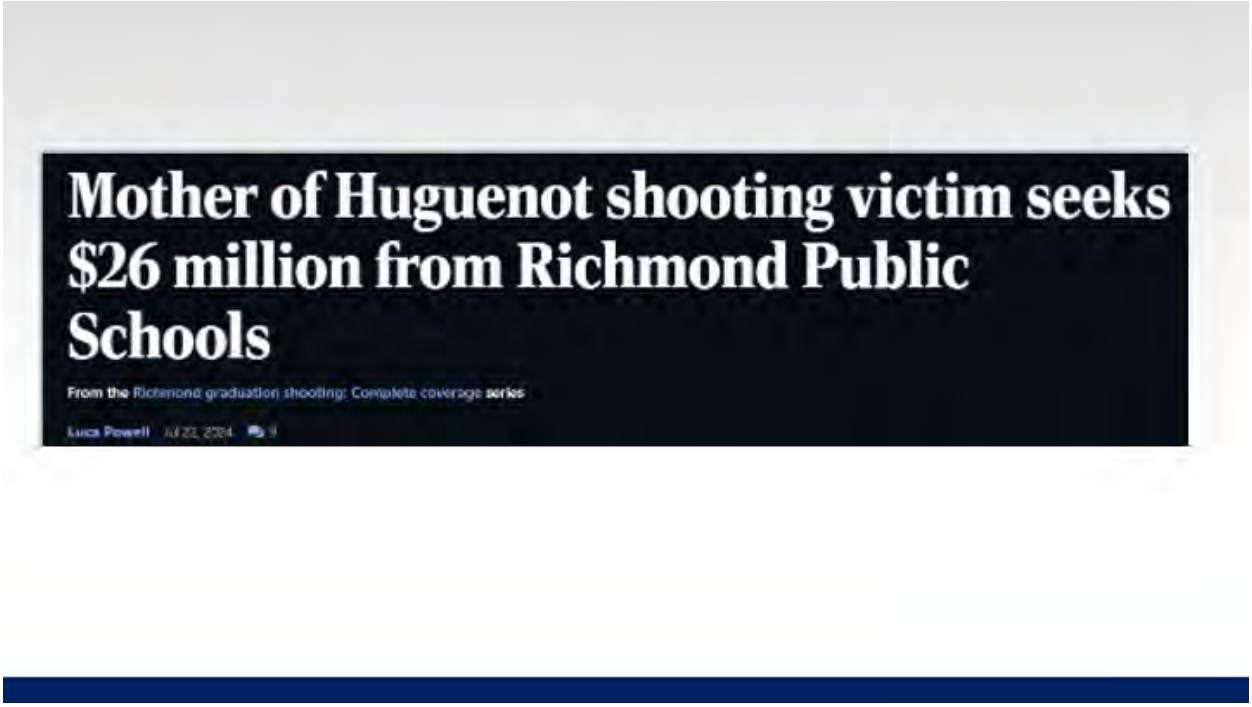
David B. Lacy
October 26, 2024

CHRISTIAN & BARTON




Richmond School Board votes against releasing graduation shooting investigation
From the Richmond graduation shooting: Complete coverage series
Anna Bryson
Judge rules school board must release investigation into Huguenot graduation shooting
Luca Powell


Internal Investigation Goes Public
UPDATE: Huguenot High staff knew of threats against student killed
From the Richmond graduation shooting: Complete coverage series
Anna Bryson
Information provided for this Review supports the proposition that the Student's participation in graduation occurred without any consideration of or adherence to required authorizations, and without proper vetting and consideration of the safety concerns that were known by several members of HHS. While it was stated in the RPS "Monroe Park Shooting



Why Wasn't Report Privileged?

"The report, taken as a whole, was not created for the primary purpose of providing legal advice[.]" *Lee BHM Corp. v. Sch. Bd. of Richmond*, 2024 Va. Cir. LEXIS 4, at *15 (Richmond Cir. Ct. Jan. 16, 2024)

Legal Advice vs Business Advice

"[T]he privilege protects only those communications made for the purpose of obtaining legal advice from the lawyer[.]" *Linde Thomson Langworthy Kohn & Van Dyke, PC v. Resol. Tr. Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993)

"The privilege does not protect ordinary business advice." *In re Polaris*, 697 N.W.2d 397, 407 (Minn. 2021)

"Factual investigations by themselves do not constitute the rendering of legal advice or assistance." *Lee BHM*, 2024 Va. Cir. LEXIS at *6

Up Front Considerations

- Purpose of Investigation?
- How Will Client Use Investigation?
- Dual Investigations?
- In-House vs Outside Counsel?
- Defense Counsel vs Investigation Counsel?

Examples

- *In re Target Corp. Customer Data Sec. Breach Litig.*, 2015 WL 6777384 (D. Minn. Oct. 23, 2015) (data privacy breach—dual investigations)
- *Wadley v. Univ. of Iowa*, 2022 WL 18780000 (S.D. Iowa June 24, 2022) (internal investigation of culture of university's football program)

Organizational Clients

"We here explore the **treacherous path** which corporate counsel must tread under the attorney-client privilege when conducting an internal investigation . . . ." *United States v. Ruehle*, 583 F.3d 600, 601 (9th Cir. 2009)

Organizational Clients

- ABA Model Rule 1.13(a) – the entity is counsel's client
- ABA Model Rule 1.13(b) – counsel must put the entity's interests above the employees' interests
- ABA Model Rule 1.7(a)(2) – counsel must put the entity's interests above counsel's own interests

Organizational Clients

- *Upjohn* "corporate *Miranda* warning"
- Memorialize in writing

Upjohn Ethical Considerations

"[T]he court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees."

In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 340 (4th Cir. 2005)

Upjohn Ethical Considerations

"Because [the law firm's] ethical misconduct has compromised the rights of Mr. Ruehle, the integrity of the legal profession, and the fair administration of justice, the Court must refer [the law firm] to the State Bar for discipline."

United States v. Nicholas, 606 F. Supp. 2d 1109, 1121 (C.D. Cal.)

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David B. Lacy, a partner with the firm's Litigation department, represents a wide variety of business entities and individuals in complex business and commercial disputes, such as employment disputes, products liability, premises liability, media law, medical malpractice, patent infringement and warranty litigation. Mr. Lacy spends a significant part of his practice advising clients in employment litigation matters, including non-competition covenants, discrimination claims, trade secrets and securities arbitration. He also assists media clients on prepublication, access and defamation matters.

Practice Areas

- Trials / Appeals / Alternative Dispute Resolution
- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Products Liability and Torts
- Medical Malpractice
- Communications and Media

Experience

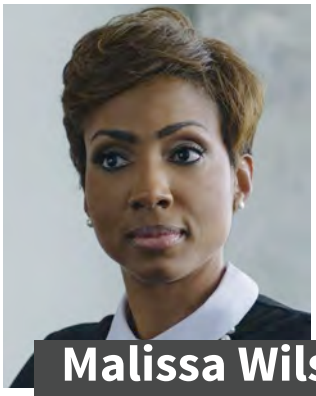
- Defense of numerous employers and individuals in claims involving restrictive covenants, including non-competition, non-solicitation and no-hire covenants.
- Defense of employment discrimination actions, including sex, race, age and disability discrimination.
- Defense of broker-dealers and financial advisors in NASD/FINRA arbitration proceedings.
- Defense of business conspiracy, trade secret and interference with contract claims.
- Defense of forklift manufacturer against claims of breach of warranty and negligence.
- Defense of landlord in complex wrongful death and premises liability action.
- Defense of security company against claims of assault and vicarious liability.
- Defense of automobile manufacturer in Lemon Law actions.
- Defense of broadcasters against defamation claims arising out of investigative journalism television segment.
- Defense of newspaper against defamation claims arising out of article reporting individual's criminal record.
- Defense of newspaper and television reporters against criminal charges of obstruction of justice and breaching police barricade.
- Intervention to unseal closed wrongful death settlements.
- Defense of developer against architect's claims of copyright infringement.
- Representation of biomedical company in patent infringement case against competitor

Recognitions

- Virginia Super Lawyers - General Litigation, 2019-2024
- Legal Elite (Virginia Business) - Civil Litigation, 2016; Young Lawyer, 2015
- Virginia Rising Stars - General Litigation, 2014-2015

Education

- College of William & Mary, J.D., 2005 - Board Member, William & Mary Moot Court Team; Director, 2005 William B. Spong Moot Court Invitational; Recipient, Dean's Certificate, 2005
- Southern Methodist University, B.A., Political Science, 2001



ETHICS – It's Time to Play… Name That Ethical Rule!

Malissa Wilson
Forman Watkins & Krutz (Jackson, MS)

Commonly Violated Rules of Professional Conduct
Malissa Wilson

Recently, Gallup reported on a poll ranking 23 professions by their perceived honesty and ethics.[1] Lawyers were viewed as more honest than car salespeople and members of Congress but less ethical than chiropractors and clergy.[2] Alarmingly, only 16% of Americans believe lawyers have high ethical standards, and this number is declining.[3]

The legal profession is largely self-regulated.[4] However, this independence comes with significant responsibility. To guide lawyers, the American Bar Association (ABA) established the Model Rules of Professional Conduct, which define ethical behavior and provide mechanisms for accountability. [5] These rules serve as a framework, but no legal guidelines can fully encompass all the ethical considerations that should guide a lawyer. Although there are differences among jurisdictions, every state has adopted some form of the ABA's rules, which will serve as the foundation for discussing common ethical violations.[6]

Rule 1.1 Competence
Rule 1.1 mandates that lawyers provide competent representation, requiring the necessary legal knowledge, skill, thoroughness, and preparation.[7] While seemingly straightforward, this rule covers a wide range of ethical responsibilities.[8] Lawyers must demonstrate the skills expected of a law school graduate, including thorough research, adequate preparation, and legal writing.[9] They should understand relevant laws and procedures or know where to find answers to legal and procedural questions and potentially redirect clients to more experienced attorneys, if necessary.[10]

Inexperienced lawyers often struggle with competence, so mentorship from seasoned attorneys is essential for developing their skills and strengthening the profession.[11] Competence is not static; lawyers must continually update their knowledge, particularly with rapidly advancing technology.[12] As of February 2024, 40 jurisdictions require technological competence as part of lawyers' ethical obligations.[13]

A recent case illustrates the importance of Rule 1.1. New York attorneys Steven Schwartz and Peter LoDuca were fined $5,000 each for filing documents that cited fake AI-generated cases.[14] Schwartz, working in a jurisdiction where he was not barred, used ChatGPT to generate cases, which were entirely fabricated.[15] Mr. Schwartz was "operating under the false assumption and disbelief that [ChatGPT] could produce completely fabricated cases."[16] LoDuca, relying on his long-standing professional relationship with Schwartz, signed and filed the document without verifying the citations.[17] The situation worsened when the attorneys doubled down and lied to the court instead of admitting their mistake.[18] The judge emphasized that their conduct violated multiple ethics rules, but the issue could have been avoided by adhering to Rule 1.1.

1 Megan Brenan & Jeffrey M. Jones, Ethics Ratings of Nearly All Professions Down in U.S., Gallup (Jan. 22, 2024), https://news.gallup.com/poll/608903/ethics-ratings-nearly-professions-down.aspx.

2 Id.

3 Id.

4 Model Rules of Pro. Conduct Preamble & Scope.

5 Id.

6 Alphabetical List of Jurisdictions Adopting Model Rules, American Bar Association, (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/?login.; (this page has not been updated since California became the 50th state to adopt the ABA rules).

7 Model Rules of Pro. Conduct r. 1.1.

8 Model Rules of Pro. Conduct r. 1.1 ann.

9 Model Rules of Pro. Conduct r. 1.1 cmt. 2.

10 Model Rules of Pro. Conduct r. 1.1 ann.

11 See In re Estrada, 143 P.3d 731, 744 (N.M. 2006) (finding that supervising attorneys have an ethical responsibility to ensure new lawyers are adhering to the Rules of Professional Conduct).

12 Model Rules of Pro. Conduct r. 1.1 cmt. 8.

13 Kevin J. Doran, Using Artificial Intelligence for Your Trial Presentation, 41 GPSolo 56, 57 (January/February 2024).

14 Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 448 (S.D.N.Y. 2023).

15 Id. at 449.

16 Mata, supra note 5, at 451.

17 Id. at 450.

18 Id.

Rule 1.3 Diligence

Although it is the shortest of the rules, Rule 1.3, like the competence requirement, covers a broad scope. It simply states that "a lawyer shall act with reasonable diligence and promptness in representing a client." [19] Given its broad scope, violations of Rule 1.3 often accompany other ethical breaches.[20] One state has even combined the diligence and competence requirements due to their close relationship.[21] Still, Rule 1.3 has several distinct characteristics that lawyers must observe.

Time management is a crucial aspect of diligence. Even extraordinary circumstances, like a pandemic, do not excuse a lack of diligence, as Arkansas lawyer Brian Wick learned. Relying on a public library for his practice, Wick struggled when the library closed during the pandemic and he could no longer use its computers.[22] By the time he secured his own computer, he had failed to timely serve process on behalf of his client.[23] When he requested a continuance, the court denied it, stating that "Mr. Wick had an obligation to develop a plan that would allow him to "prevent neglect" of his client's case, and there is no indication that he did so."[24]

Similarly, Georgia attorney Dennis Robert Kurz failed in his duty of diligence. On Valentine's Day in 2019, he missed a scheduled court date because he took his fiancée to lunch, consuming alcohol during the meal.[25] When alerted by his paralegal that his client was already at court, Kurz rushed there but arrived disoriented and unprepared.[26] The judge noticed the alcohol on his breath and confronted him.[27] Kurz admitted his mistake and poor decision-making. While the judge granted a continuance, the incident was noted during an investigation into Kurz's potential financial misconduct.[28,29]

The State Disciplinary Board recommended a three-month suspension for violating several rules, including Rule 1.3.[30] Kurz admitted his failure, acknowledging that his poor scheduling and appearance in court after drinking violated his duty of diligence.[31] Considering mitigating factors, including Kurz's agreement to undergo an alcohol and drug evaluation, the Supreme Court of Georgia issued a public reprimand instead of a suspension.[32]

Rule 1.5 Fees

At its core, Rule 1.5 requires that the cost of legal representation be both transparent and reasonable given the circumstances.[33] It outlines factors to consider when determining the reasonableness of a fee, including time, labor, difficulty, and skill required.[34] The customary fee for similar services, the amount in dispute, and the relationship with the client are also key considerations.[35] Lawyers must clearly communicate the scope of their representation and associated costs to the client in a timely manner.[36] To avoid misunderstandings, it is advisable to document the terms of engagement in writing.[37] This could be as simple as a document detailing "the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation."[38]

Rule 1.5 also provides detailed guidelines for contingency fee arrangements, which must be in writing. These agreements should specify how the fee will be determined, including percentage allocations, expense deductions, and whether those deductions occur before or after the fee is calculated.[39] Clients must be informed of any expenses they will be responsible for, regardless of the case's outcome. Lawyers should be aware that some jurisdictions impose additional limitations on contingency fees.[40]

Contingency fees are prohibited in certain cases, such as domestic relations matters where payment depends on securing a divorce or the amount of alimony, and in criminal defense cases.[41] Rule 1.5 also governs fee-sharing between lawyers from different firms.[42]

19 Model Rules of Pro. Conduct r. 1.3.

20 See Raymond A. Hein, Avoiding Ethical Breaches: Imperatives in the Area of Personal Injury Practice, 2012 Trial Rep. (Md.) 13, 14 (2012); Mark W. Gifford, Summarizing Lawyer Discipline, 34 Wyo. Law. 14 (October 2011); § 6.1. Incompetence, malpractice, and formal discipline, 21 La. Civ. L. Treatise, Louisiana Lawyering § 6.1; J. Nick Badgerow, The Lawyer's Ethical, Professional and Proper Duty to Communicate with Clients, 7 Kan. J.L. & Pub. Policy 105, 112 (Spring 1998).

21 See TX ST RPC Rule 1.01.

22 Crosby v. Little, No. 5:20-CV-5046, 2020 WL 5657890, at *2 (W.D. Ark. Sept. 23, 2020), aff'd, No. 20-3229, 2021 WL 4806672 (8th Cir. Oct. 15, 2021).

23 Id.

24 Id.

25 In re Kurz, 877 S.E.2d 245, 245 (Ga. 2022).

26 Id. at 245-46.

27 Id.

28 Id.

29 Id.

30 Id. at 245.

31 Id. at 247.

32 Id. at 248.

33 Model Rules of Pro. Conduct r. 1.5(a).

34 Model Rules of Pro. Conduct r. 1.5(a) (1).

35 Model Rules of Pro. Conduct r. 1.5(a)(2-6).

36 Model Rules of Pro. Conduct r. 1.5(b).

37 Model Rules of Pro. Conduct r. 1.5 cmt. 2.

38 Id.

39 Model Rules of Pro. Conduct r. 1.5(c).

40 Model Rules of Pro. Conduct r. 1.5 cmt. 3.

41 Model Rules of Pro. Conduct r. 1.5(d)(1).

42 Model Rules of Pro. Conduct r. 1.5(e).

While Rule 1.5 is designed to protect clients from unreasonable fees, critics argue that it has "largely been conflated into an admonition against unconscionable fees, making it difficult for clients to prevail in claims involving unreasonable, but not unconscionable fees," especially absent some additional basis for discipline.[43] For example, attorney Richard Ledingham charged his 88-year-old client $120,275.25 for 674 hours of estate planning work that an expert said should have taken no more than 30 hours and cost a maximum of $15,000. [44] Ledingham, who was also an accountant, insisted his billing was accurate and well-documented.[45] However, his lack of remorse concerned the court, especially since this was not his first offense; five years earlier, he had been suspended for three months for violating Rule 1.5.[46] The New Jersey Supreme Court ultimately disbarred him, agreeing with the Review Board that his billing was "gross, "exaggerated," and "utterly unreasonable."[47]

In another case, Illinois attorney Stephanie Gerstetter, who had only been barred for three years, was suspended for 60 days after submitting false billing records totaling 86.4 hours, overbilling a client by more than $40,000.[48] Unlike Ledingham, Gerstetter showed deep remorse and accepted responsibility for her actions, which the Attorney Registration and Disciplinary Commission considered in determining her punishment.[49]

Rule 1.6 Confidentiality

Rule 1.6 states that a lawyer cannot reveal information related to a client's representation without the client's informed consent.[50] This rule is crucial to the legal profession and is further protected by law through attorney-client privilege.[51] However, confidentiality and privilege are not the same: confidentiality is a broad, ongoing ethical duty, while privilege specifically applies during legal proceedings under the rules of evidence.[52] The expectation of confidentiality is fundamental to building trust between lawyers and clients, and this duty extends beyond the end of representation, even after the client's death.[53]

There are exceptions to confidentiality. Lawyers may disclose confidential information if it is necessary to prevent death or substantial bodily harm.[54] If a client uses a lawyer's services to commit a crime or fraud that could harm someone's finances or property, confidentiality is forfeited.[55] Other exceptions include legal proceedings involving both lawyer and client, compliance with court orders, and resolving conflicts of interest.[56,57]

Lawyers must also make reasonable efforts to protect confidential information from unauthorized access, particularly in the context of cybersecurity.[58] While transmitting confidential information over the internet is generally acceptable if proper precautions are taken, law firms, due to the volume of sensitive information they handle, are prime targets for hackers.[59] Although law firms are not required to be completely impervious to breaches, taking reasonable precautions is necessary to comply with Rule 1.6.[60,61]

Technology, however, has made breaches of confidentiality easier. For example, Nevada attorney Robert Draskovich responded to a negative anonymous review on Avvo.com by revealing his former client's name, case number, and details about the criminal charges.[62] He argued that Rule 1.6 allows lawyers to reveal information to defend themselves in a controversy, but the Supreme Court of Nevada disagreed and reprimanded him, finding his actions in clear violation of Rule 1.6.[63,64]

Similar cases have occurred, such as Oregon attorney Brian Conry, who responded to negative reviews by disclosing his former client's name and convictions, again violating Rule 1.6.[65] These incidents highlight that breaching confidentiality on social media is a significant ethical risk for attorneys. The issue became so widespread that the ABA issued a formal opinion clarifying that negative reviews do not justify the disclosure of

43 Keith William Diener, A Battle for Reason: The Unconscionable Attorney-Client Fee Agreement, 2016 Prof. Law. 129 (2016). See also Gabriel J. Chin & Scott C. Wells, Can A Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases, 41 B.C. L. Rev. 1 (1999) (arguing that Rule 1.5 is almost never enforced absent some element of dishonesty or misconduct).

44 In re Ledingham, No. DRB 19-021, at *4-5, N.J. Disciplinary Rev. Bd (N.J. August 13, 2019), https://drblookupportal.judiciary.state.nj.us/DocumentHandler.ashx?document_id=1118627.

45 Id. at *9.

46 In re Ledingham, 914 A.2d 1288 (N.J. 2007).

47 Ledingham, supra note 49, at 17-19.

48 In re Gerstetter, No. 6329724, at *2-3 (IL Attorney Registration and Disciplinary Comm. Aug. 14, 2021), https://www.iardc.org/DisciplinarySearch/Search

49 Id. at *4.

50 Model Rules of Pro. Conduct r. 1.6(a).

51 Model Rules of Pro. Conduct r. 1.6 cmt. 3.

52 Id.

53 Model Rules of Pro. Conduct r. 1.6 cmt. 2.

54 Model Rules of Pro. Conduct r. 1.6(b)(1).

55 Model Rules of Pro. Conduct r. 1.6(b)(2).

56 Model Rules of Pro. Conduct r. 1.6(b)(5-6).

57 Model Rules of Pro. Conduct r. 1.6 cmt 13-14.

58 Model Rules of Pro. Conduct r. 1.6(c).

59 Paula L. Green, Hackers Working for Lucrative Cyber Attack Industry See Law Firms as Rich Targets, New York State Bar Association (Jan. 19, 2024), https://nysba.org/hackers-working-for-lucrative-cyber-attack-industry-see-law-firms-as-rich-targets/.

60 ABA Comm. On Ethics & Pro. Resp., Formal Op. 483 (2018).

61 Id.

62 In re Draskovich, No. 82457, 2021 WL 5755180 at *1-3 (Nev. Dec. 1, 2021).

63 Id. at *2.

64 Id. at *3-4.

65 In re Conry, 491 P.3d 42, 46 (Or. 2021).

confidential information.[66]

Rule 1.7 Conflict of Interest

Rule 1.7 specifically addresses conflicts of interest involving current clients, focusing on the expectation of loyalty in the attorney-client relationship. A lawyer's attention should be solely on the client's interests, without balancing those interests against another's. Generally, a lawyer is prohibited from representing a client if doing so involves a concurrent conflict of interest.[67] This occurs when "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities" to anyone else.[68]

While conflicts of interest arising from representing opposing parties in the same lawsuit are not waivable, there are exceptions that allow a lawyer to represent a client despite a concurrent conflict. To do so, the lawyer must believe they can provide competent and diligent representation to each affected client, the representation must not be prohibited by law, and the situation must not involve one client making a claim against another.[69] Additionally, each client must give informed consent in writing. [70] Informed consent requires the lawyer to disclose relevant circumstances and the potential adverse effects of the conflict, which varies depending on the nature of the conflict and associated risks.[71] Clients can revoke their informed consent at any time. [72]

Lawyers have a duty to establish reasonable procedures to identify conflicts of interest as early as possible and take appropriate measures, such as obtaining informed consent from all affected clients or withdrawing from representation. [73] Even when representation is not directly adverse, a conflict may arise if the lawyer's ability to advise the client is materially limited by other loyalties.[74] Personal interests of the lawyer, including sexual relationships with clients (unless the relationship predates the representation), must not negatively impact their representation. [75,76]

Conflicts of interest can sometimes be particularly severe. For example, Washington lawyer Donald Peter Osborne was disbarred for making himself the residual beneficiary of his elderly client's $600,000 estate after her husband died and she became ill.[77] The drafting of the will occurred under suspicious circumstances: no one else was present during his discussion with the client, the only witness was Osborne's assistant, and the other signatory was not in the room.[78] Despite claiming a friendship with the client, none of her longtime friends knew of him, and he failed to advise her to seek independent counsel.[79] The court found this to be a clear violation of Rule 1.7 and upheld his disbarment as the appropriate sanction. [80]

Conclusion

The ABA Model Rules of Professional Conduct provide a framework for ethical behavior in the legal profession. The rules are designed to ensure that lawyers act with competence, diligence, and integrity in representing their clients. Violations of these rules can result in serious consequences, including suspension, disbarment, and criminal charges. Lawyers must be aware of their ethical obligations and strive to uphold the highest standards of professionalism in their practice.

I would like to thank Alexis R. Cobb, 2L at the University of Mississippi Law School, for her invaluable contributions to this article.

66 ABA Comm. On Ethics & Pro. Resp., Formal Op. 496 (2021).

67 Model Rules of Pro. Conduct r. 1.7(a).

68 Model Rules of Pro. Conduct r. 1.7(a)(1-2).

69 Model Rules of Pro. Conduct r. 1.7(b)1-4.

70 Model Rules of Pro. Conduct r. 1.7 cmt 18.

71 Id.

72 Model Rules of Pro. Conduct r. 1.7 cmt 21.

73 Model Rules of Pro. Conduct r. 1.7 cmt 3.

74 Model Rules of Pro. Conduct r. 1.7 cmt 8-9.

75 Model Rules of Pro. Conduct r. 1.7 cmt 10-11.

76 Model Rules of Pro. Conduct r. 1.7 cmt 12.

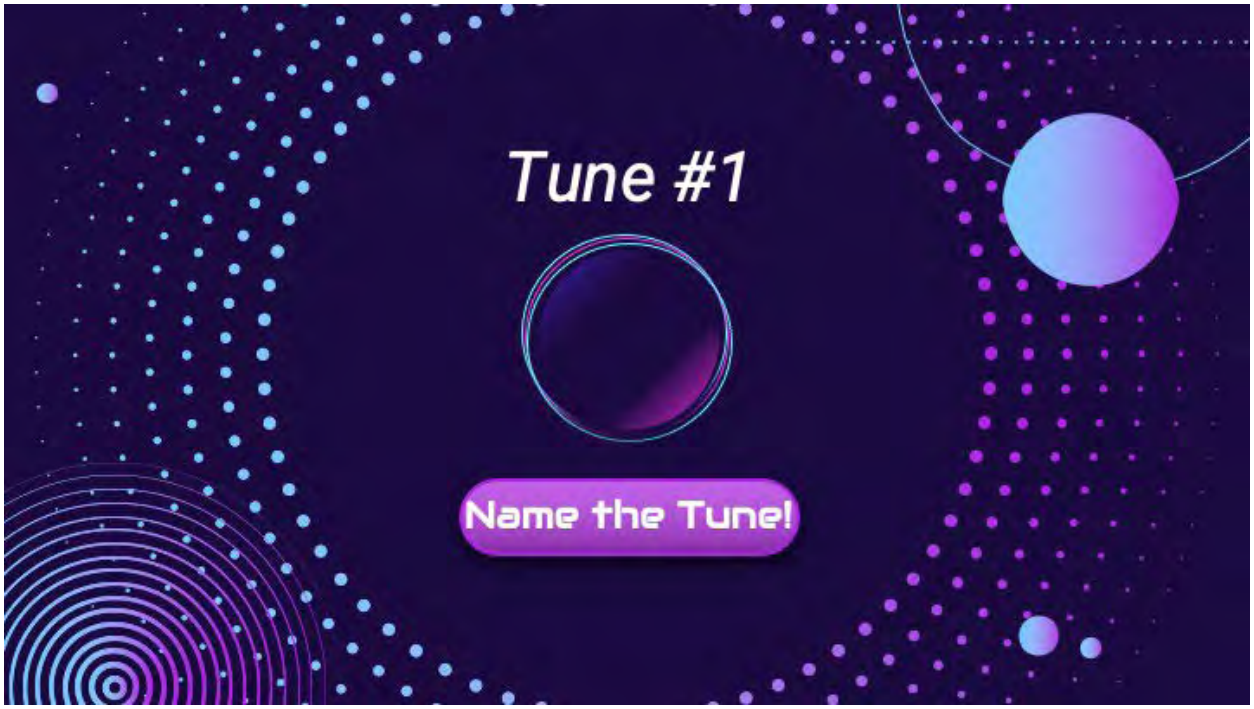
77 In re Osborne, 386 P.3d 288, 290 (Wash. 2016).

78 Id. at 291.

79 Id.

80 Id. at 294.


NAME THAT TUNE
ETHICAL
RULE


Tune #1
Name the Tune!

"For the Love of Money"

By The O'Jays
Released April 1974

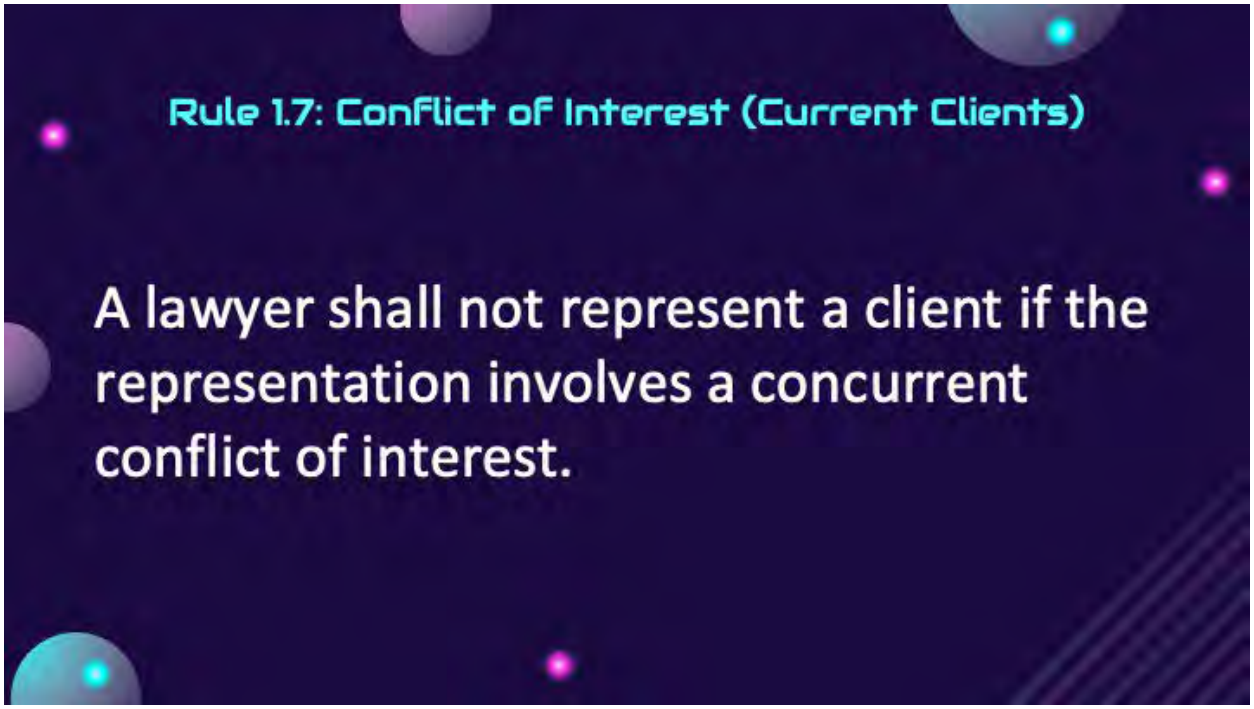
Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.


Big Law Associate suspended for 60 days for falsely billing 86.4 hours, causing a client to be overcharged by $40,176.


Tune #2
Name the Tune!

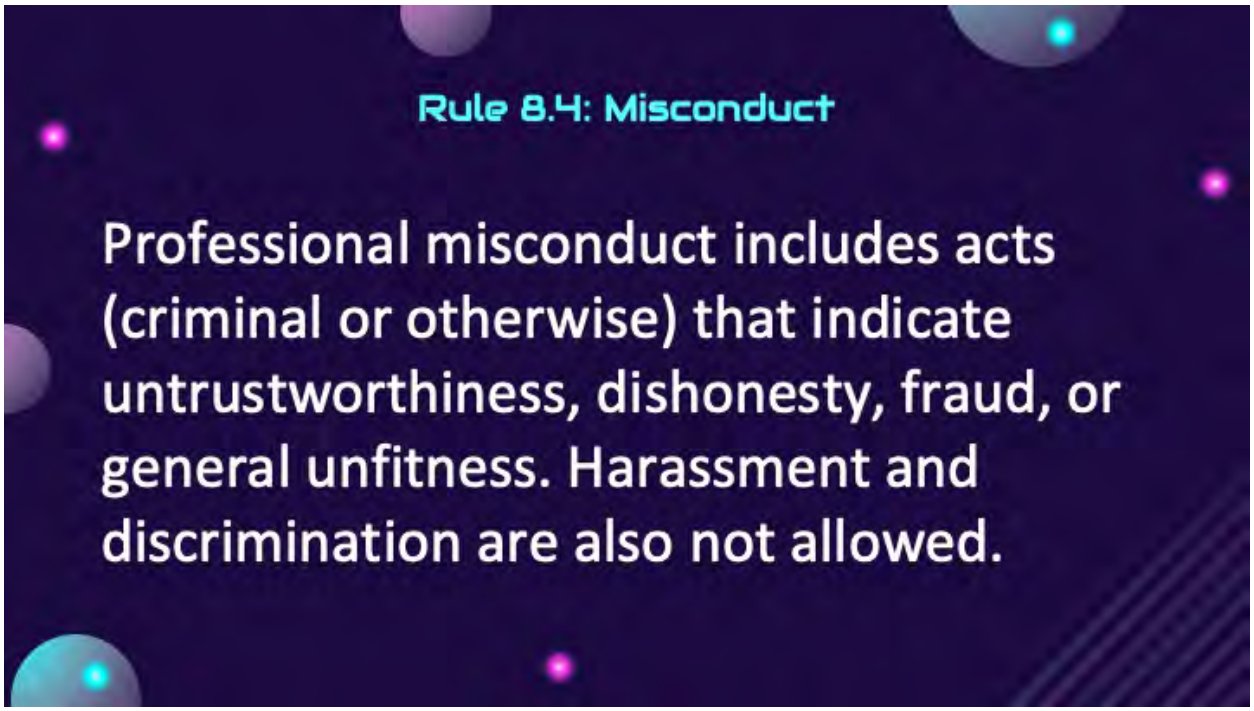

"Love the One You're With"
By Stephen Stills
Released November 1970
CROSBY STILLS NASH


Rule 1.7: Conflict of Interest (Current Clients)
A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.


New Zealand Lawyer made himself the sole beneficiary of his sick, elderly client's estate.


Tune #3
Name the Tune!


"Bad"
By Michael Jackson
Released August 1987
BAD


Rule 8.4: Misconduct
Professional misconduct includes acts (criminal or otherwise) that indicate untrustworthiness, dishonesty, fraud, or general unfitness. Harassment and discrimination are also not allowed.


Florida lawyer disbarred after a crime spree in which he robbed five banks in about three weeks; sentenced to 40 months.

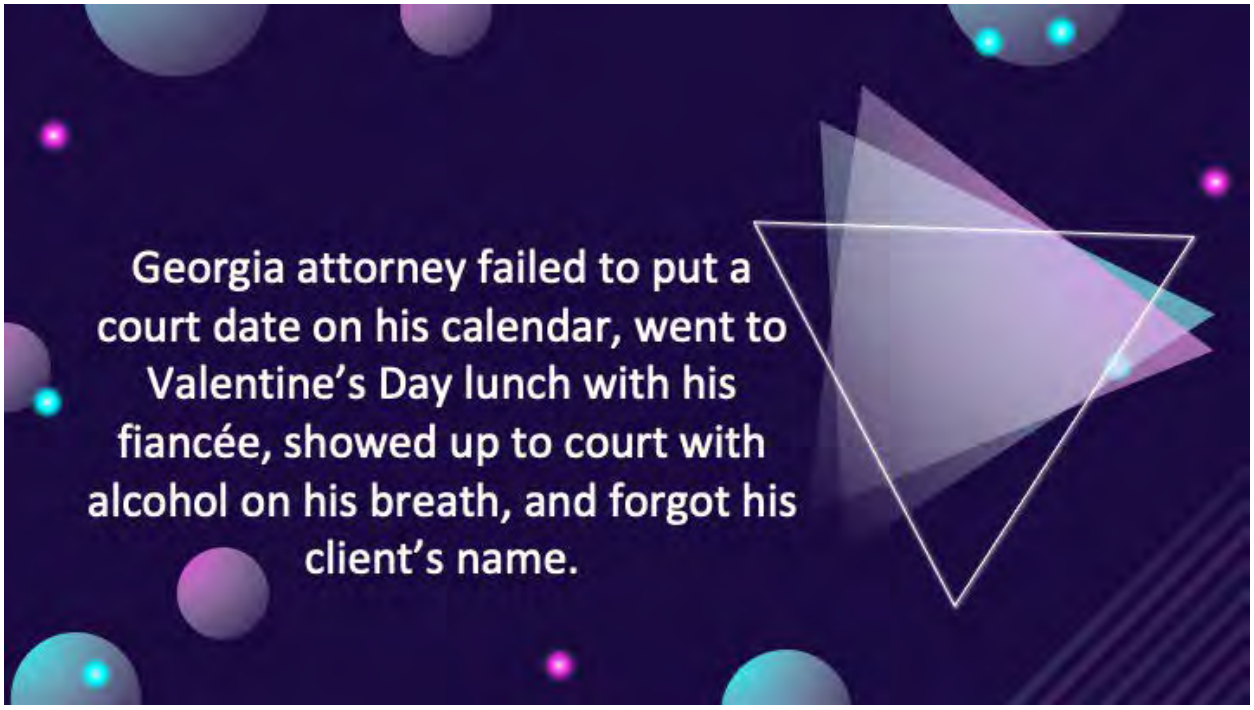

Tune #4
Name the Tune!

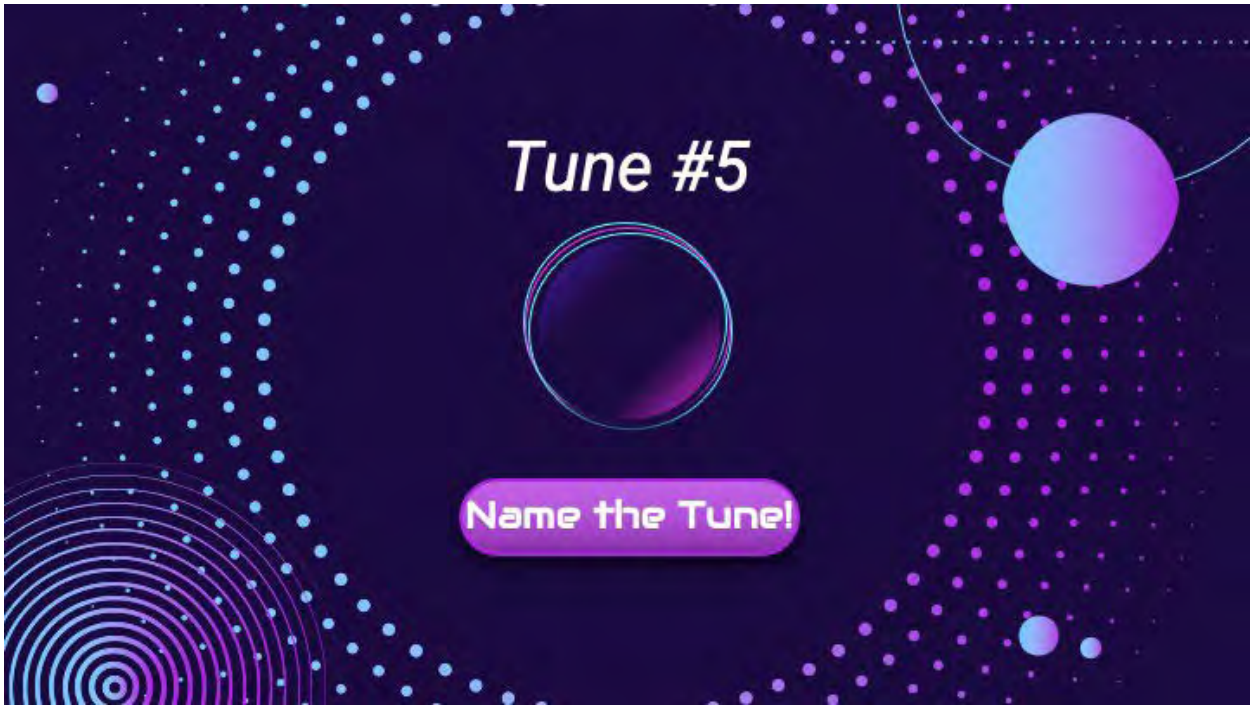
"Eye of the Tiger"

By Survivor
Released May 1982

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.


Georgia attorney failed to put a court date on his calendar, went to Valentine's Day lunch with his fiancée, showed up to court with alcohol on his breath, and forgot his client's name.

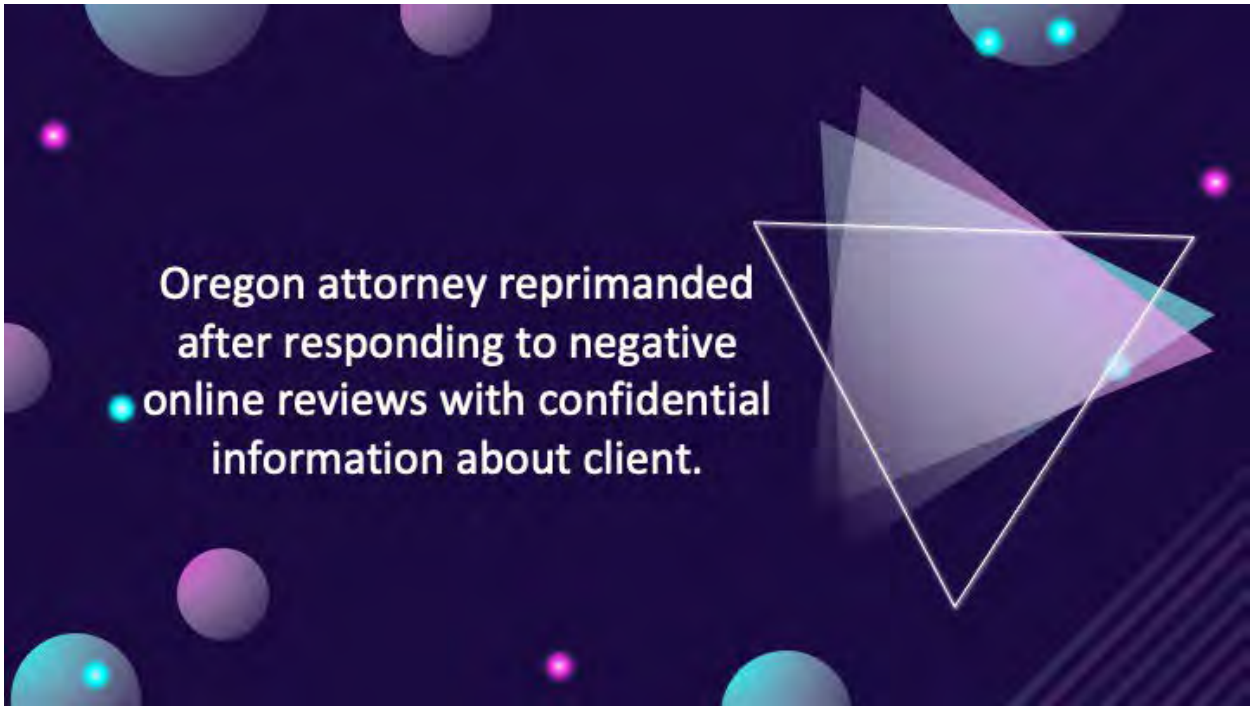

Tune #5
Name the Tune!

"Do You Want to Know a Secret"

By The Beatles
Released March 1963

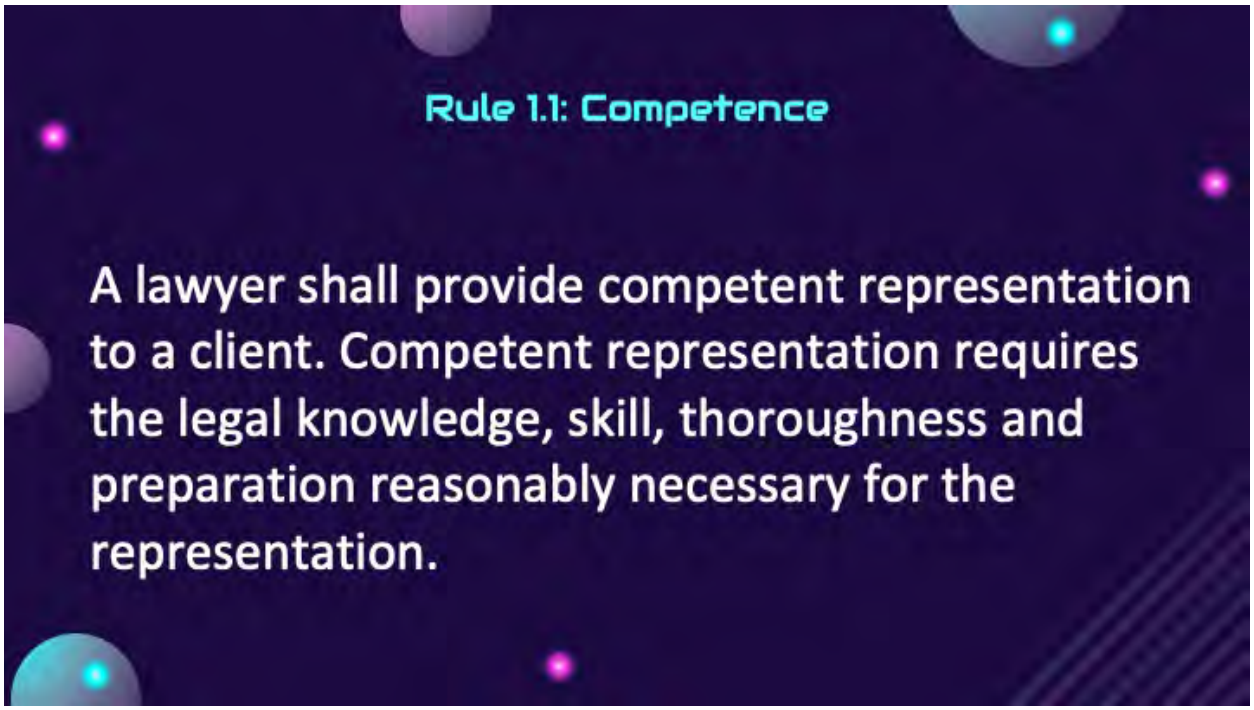
Rule 1.6: Confidentiality of Information

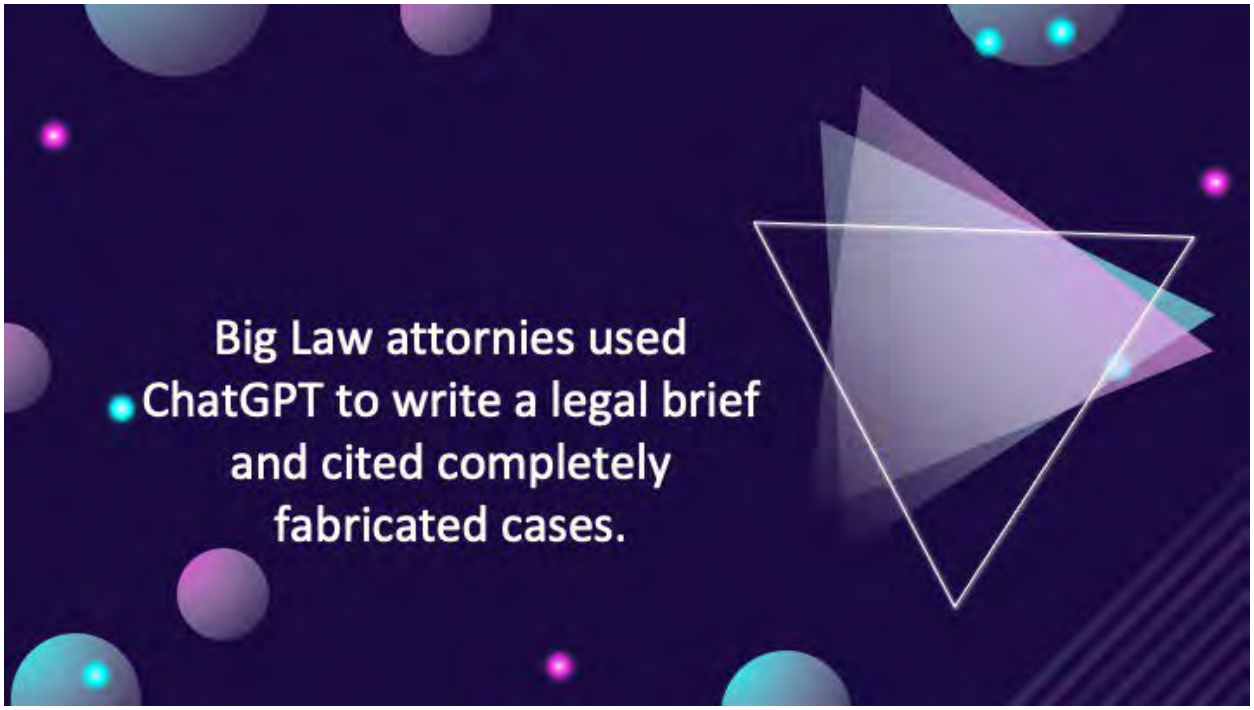
A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the lawyer has reason to believe it is necessary.


Oregon attorney reprimanded after responding to negative online reviews with confidential information about client.

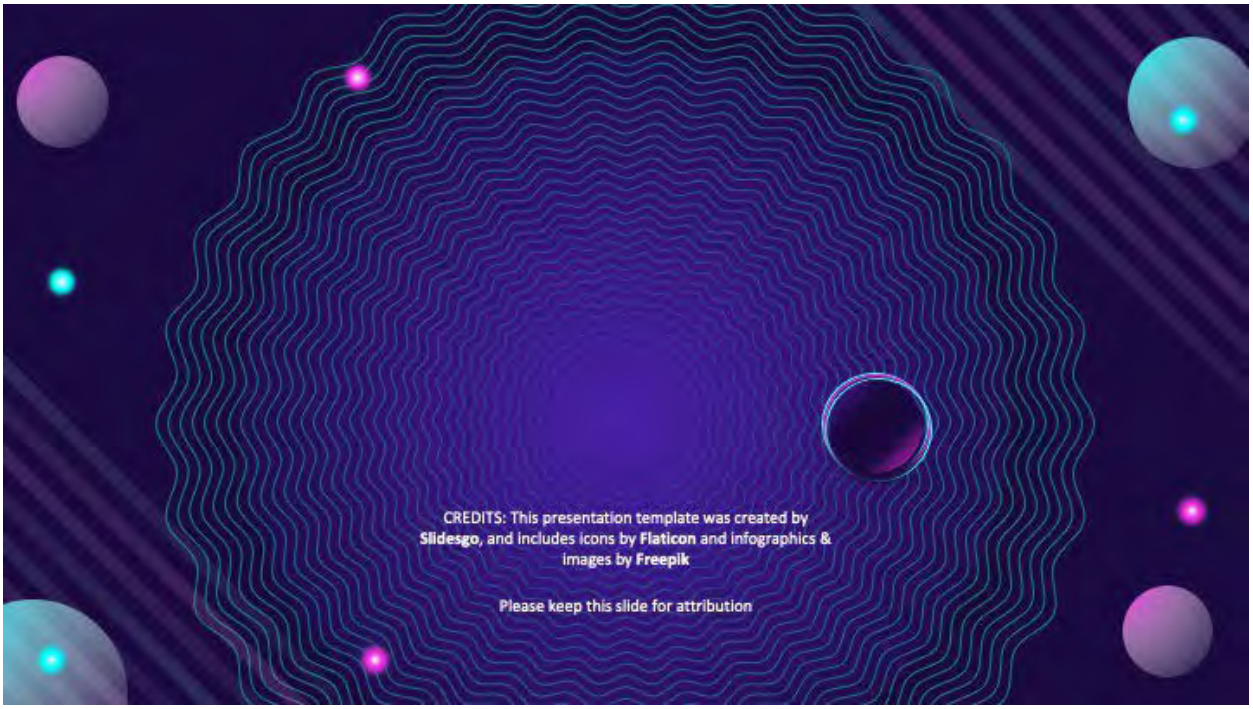

Tune #6
Name the Tune!


"What a Fool Believes"
By The Doobie Brothers
Released July 1978
BROTHERS
This Photo by Unknown Author is licensed under CC BY-SA


Rule 1.1: Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.


Big Law attornies used
ChatGPT to write a legal brief
and cited completely
fabricated cases.


Giuliani Disbarred In New York Over Election Falsehoods
Lawyers Faces Disciplinary Commission After Substitution
Jutsu Goes Awry
Lawyer who hinted about accused priest is sanctioned $400K for violating protective order
'Incompetent' lawyer allegedly made himself sole beneficiary of client's estate
'Forgetting' Wasn't A Strong Enough Defense For Florida's Supreme Court
Judge refuses to toss suit claiming lawyer, a Civil War buff, played 'Dixie' and watched disturbing racist videos at work
Feuding Austin lawyers accused of racist, lewd and anti-gay remarks
Pro-Trump attorney arrested after hearing over leaking Dominion documents
Fla. Ex-Judge Who Inflated Campaign Finances Disbarred
NJ Atty Disbarred For 'Grossly Neglecting' Clients
Lawyer who missed deposition while viewing solar eclipse should pay $7,800 sanction, litigant says
Alex Jones' lawyer Norm Pattis defends using n-word after dropping pants in comedy routine that was recorded
Fla. Justices To Disbar Atty Accused Of Swindling NFL Players
Disbarred NJ Atty Charged With Stealing From Dead Client
Alabama Prisoner Seeks U.S. Supreme Court Review of Attorney Conflict of Interest Case
Lawyer's Racist Posts Test Conflict of Interest Standards
Serial Food Label Attorney Gets Sanctioned for Frivolous Filings
DC Court Disbars Former Netflix VP Fo 'Flagrant Dishonesty'
Baton Rouge lawyer permanently disbarred for 'litany of unethical and egregious misconduct'
Mich. Tax Atty Disbarred For Allegedly Stealing Client's $6.5M
Unauthorized 'rummaging' through opponent's Dropbox leads to sanction against this law firm
'Always wrong': Analyst slams Trump lawyer Alina Habba's 'glaringly obvious' incompetence
Calif. Atty Won't Contest Claim He Stole Up To $282M
Ex-Fisher Phillips Atty Surrenders License Before Murder Trial
NY Disbars 'Copyright Troll' Atty For Ignoring Orders, Lying
Accusation that naked 'idiot' lawyer injured Phish fan while rushing stage leads to legal discipline for writer
New Orleans lawyer fined for alerting school to priest's past sexual misconduct
Federal judge excoriates lawyer, accusing her of abandoning clients, unethical behavior
Court upholds Michael Avenatti conviction for defrauding porn star Stormy Daniels
Ga. Atty Disbarred For 'Systemic Abandonment' Of Clients
Britney Spears' Lawyer Says Jamie Spears Shared Private Medical Information
Judge fines lawyers $5,000 for submitting 'gibberish' cases generated by ChatGPT, then lying about it
Elon Musk's Lawyer Might be Sanctioned for Showing Up Uninvited and Being Annoying
Lawyer is suspended after calling opposing counsel 'completely idiot' and litigant 'obviously delusional'
'Simply Inexcusable': Ex-Girardi Attys Ripped For Hiding Theft
NY Attorney Sanctioned for Posting Nude Photos on Public Docket
Lawyer Dresses as Thomas Jefferson in Court, Gets Disbarred for "Inexplicable Incompetence"
Racist lawyer: 'I am not racist'
The Hilariously Stupid Emails Between Trump's Lawyer & The Judge Over His Closing Argument Request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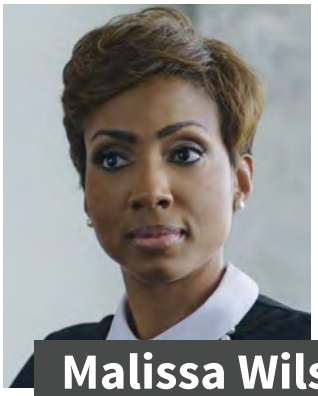

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Malissa Wilson

Partner | Forman Watkins & Krutz (Jackson, MS)

Before becoming an attorney, Malissa worked as a journalist and public relations practitioner in crisis communications. Though she is not a working journalist covering stories anymore, as an attorney, Malissa offers clients her ability to lay out and present the story-line of their cases clearly and efficiently to a judge or juror as demonstrated by her successful trials in state and federal court and oral arguments before the state supreme court. With her experience in crisis communications, she offers a calm and honest confidence that clients will find indispensable in the midst of tough litigation. A firm believer of the golden rule, Malissa handles every case how she would want an attorney to handle a case for her, always going the extra mile and never backing down from a challenge.

Malissa brings to the firm nearly 20 years of litigation and trial experience. Additionally, Malissa is a Mississippi Bar Certified Mediator. Before joining FormanWatkins, Malissa was employed as a Special Assistant Attorney General for the Office of the Mississippi Attorney General in the Civil Division and as a Senior Assistant City Attorney for the City of Houston (Texas) in the Labor, Employment and Civil Rights Division. She has served as in-house counsel for a national insurance company overseeing cases in Texas, Oklahoma and Mississippi and for the state's largest public employer, The University of Mississippi Medical Center. In addition to handling employment matters, she has also worked in areas of Workers Compensation, Insurance Defense, Toxic Tort, Civil Rights and Media Law. Malissa's diverse background and vast array of knowledge make her a key asset to the creative, efficient work ethic of FormanWatkins. Ultimately, clients can expect a thorough job well done when working with Malissa, and will not find a kinder advocate.

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- First Amendment Law
- Personal Injury
- Political Law
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- The Best Lawyers in America®, 2023: Litigation – Labor and Employment
- The Best Lawyers in America®, 2021: Litigation – Labor and Employment, Workers' Compensation Law – Employers
- Selected as one of Mississippi's 50 Leading Businesswomen by the Mississippi Business Journal (2019)
- Martindale-Hubbell® Silver Client Champion Rating
- Martindale-Hubbell NotableSM Peer Review Rating
- Selected as one of Mississippi's Top Ten Leaders in Law by the Mississippi Business Journal (2017)
- Leadership Jackson, class of 2005

Education

- University of Mississippi, J.D., cum laude
- Columbia University, Master of Science, Journalism
- Texas Southern University, B.A., Journalism, magna cum laude

Under Siege: Strategies for Upholding Confidential Settlement Agreements

Bob Fulton
Hill Ward Henderson (Tampa, FL)

Under Siege: Strategies for Upholding Confidential Settlement Agreements
Bob Fulton

After years of protracted litigation, you have negotiated a sum to settle all of plaintiff's claims. Your client is happy the battle is over, and plaintiff is relieved to be done with the litigation process. But when you send the settlement agreement and release to plaintiff's counsel, they balk at the confidentiality and non-disparagement provisions, claiming they restrict the lawyer's right to practice law.

As confidentiality and non-disparagement provisions have become standard in settlement agreements, so has pushback from opposing counsel about their inclusion. This trend is unsurprising given plaintiff's lawyers have an incentive to keep settlement figures public for advertising purposes, as evidenced by a 30% increase in advertisements aired by trial lawyer groups between 2017 and 2021.[1] Conversely, defendants value confidentiality and non-disparagement provisions because they prevent both bad publicity and a cavalcade of additional claims. Thus, there is a growing tension between plaintiff's bar and defendant's bar regarding what provisions can be in an agreement, and whether those provisions bind the lawyer and/or their firm.

This article examines the common grounds lawyers raise in contesting confidentiality and non-disparagement provisions, explores ethical opinions and legal precedent discussing these provisions, and offers solutions to effectively manage this growing pushback.

Confidentiality Provisions

a. Restriction on the Right to Practice Law

The first and most common ground asserted in protesting a confidentiality provision is that the lawyer shall not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[2] This language is from American Bar Association Model Rule of Professional Conduct ("Model Rule") 5.6(b) and has been adopted in almost every U.S. jurisdiction.[3] Comment 2 to that rule states that "Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." On their face, the rule and its comment do not prevent parties from keeping the terms of a settlement private. Instead, it appears that the rule prevents a lawyer from entering an agreement to not represent other persons in the future when settling the current claim.[4] However, many lawyers believe that the rule not only prohibits the lawyer from representing other persons in connection with a similar claim to the one that is being resolved, but also prohibits agreements that have the "indirect" effect of making an attorney's services unavailable to others.[5] This argument has garnered varying amounts of support in ethics opinions across the country.[6]

One of the most cited ethics opinions on this topic is the D.C. Bar's Legal Ethics Opinion 335. In that opinion, the D.C. Bar stated that confidentiality provisions preventing disclosure of any public fact from a lawsuit contravened D.C. Rule 5.6 (which is identical to Model Rule 5.6).[7] For example, the D.C. Bar determined that it was improper

1 See Study: Trial Lawyers Spent $1.4 Billion on Advertising in 2021, AM. TORT REFORM ASS'N (Feb. 22, 2022), https://www.atra.org/2022/02/22/study-trial-lawyers-spent-1-4-billion-on-advertising-in-2021/. (last visited September 22, 2024).

2 ABA Model R. Prof'l Conduct. 5.6(b).

3 See State Adoption of the ABA Model Rules of Professional Conduct and Comments, (June 15, 2017) AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/adoption_mrpc_comments.pdf. (last visited September 22, 2024). (reflecting that 49 of 50 states adopted some form of the Model Rules of Professional Conduct as of June 15, 2017).

4 See Adams v. BellSouth Telecommunications, Inc., 372 F.3d 1250, 1259 n.11 (11th Cir. 2004) (stating that practice restriction against same defendant squarely violated Florida's ethics rules); Fla. Bar. v. St. Louis, 967 So.2d 108, 125 (Fla. 2007) (disbarring lawyer and ordering disgorgement of fees after lawyer negotiated agreement with defendant for purported future legal work, with the true purpose of creating conflict so that the lawyer's firm could not represent future plaintiffs against that same defendant).

5 See James C. Sturdevant, Provisions that should be prohibited in settlement agreements, PLAINTIFF MAG. (Oct. 2018), https://plaintiffmagazine.com/images/issues/2018/10-october/reprints/Sturdevant_Provisions-that-should-be-prohibited-in-settlement-agreements_Plaintiff-magazine.pdf. (last visited September 22, 2024). ; see also Anne Richardson, Fighting onerous confidentiality clauses in settlement agreements, PLAINTIFF MAG. (Oct. 2016), https://plaintiffmagazine.com/images/issues/2016/10-october/Reprints/Richardson_Fighting-onerous-confidentiality-clauses-in-settlement-agreements_Plaintiff-magazine.pdf. (last visited September 22, 2024).

6 See N.M. Ethics Comm. Op. 1985-5 (1985); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 730 (2000); N.H. Ethics Comm. Adv. Op. 2009/10-6 (2009); Tenn. Bd. of Prof'l Resp., Formal Op. 2018-F-166 (2018).

7 D.C. Bar Legal Ethics Op. 335 (2006).

for a lawyer to enter an agreement requiring the parties to keep public information confidential or to not make statements about the case, the name of the opponent, or allegations set forth in the complaint.[8] The D.C. Bar reasoned that these agreements could prevent "the lawyer from representing future clients since the only way for the lawyer to ensure that he does not use information that he has learned is to decline to represent anyone else in a similar case."[9]

The D.C. Bar also believed that these agreements restrict the lawyer's right to practice by "effectively preventing him or his firm from representing clients in certain kinds of cases against the settling party," and restricts "the public's access to lawyers who, because of their background and experience, might be the best available talent to represent future litigants in similar cases, perhaps against the same opponent."[10] However, the D.C. Bar determined that confidentiality of settlement terms themselves did not contravene Rule 5.6 because "the terms of a settlement constitute non-public information learned by a lawyer in the course of the representation, which, if the client requests be held inviolate, are 'secrets' within the definition of D.C. Rule 1.6(b)."[11]

Other ethics opinions have followed the D.C. Bar's approach, determining that confidentiality provisions in settlement agreements cannot include a prohibition on the disclosure of public facts regarding a case, but can protect the "disclosure of the terms of a specific settlement, including the amount of the payment."[12] Thus, it appears that there are few ethics opinions opining that lawyers can enter into agreements that keep only the terms of a settlement confidential.

Of course, "the legal validity of a particular agreement is an issue separate from whether the agreement comports with the Rules of Professional Conduct,"[13] but courts may be "willing to consider ethical considerations in determining whether a particular agreement is enforceable."[14] However, courts typically favor settlement agreements to conserve judicial resources,[15] including private confidential settlements.[16]

b. Confidentiality Provisions Bind the Plaintiff, not the Lawyer

Another ground lawyers assert in contesting confidentiality provisions is that those provisions only apply to their client—not to the lawyer or their firm. This argument makes drafting settlement agreements more difficult, and as discussed below, might require opposing counsel to sign separate documents. Courts have weighed contract principles in determining the validity of this argument.

Florida's Fourth District Court of Appeal ruled that an attorney was not bound by settlement agreements containing a confidentiality clause the client signed, but which the attorney did not.[17] In Hanson, the subject lawyer represented clients against multiple businesses, resulting in an agreement signed by the parties but not by the attorney.[18] Thereafter, the lawyer represented another individual against the same businesses without officially appearing in the case, but the lawyer's name was included in a settlement agreement as one of the individual's attorneys.[19] The lawyer did not sign that agreement either.[20] Both agreements had provisions specifying that the parties, their counsel, and their attorneys would be bound by confidentiality, but neither agreement had attorney signature blocks.[21]

After the lawyer disclosed confidential information from the previous settlement, the businesses moved for summary judgment claiming that the lawyer was bound by the agreement.[22] The Fourth District reversed the trial court's grant of summary judgment, stating that a person who is not a party to a settlement agreement is ordinarily not bound by its terms, even if the plain language of the agreement included the attorney's name as "attorney" or "counsel."[23] Indeed, the court determined that the language of the agreements showed that the parties intended for the lawyer to be bound, but not that the non-party lawyer intended to be bound.[24] Moreover, the Fourth District looked to other jurisdictions

8 Id.

9 Id.

10 Id.

11 Id.; see also Tenn. Bd. of Prof'l Resp., Formal Op. 2018-F-166 (2018) ("Most ethics opinions conclude that negotiating for, agreeing to, and, ultimately, including a confidentiality provision precluding the dissemination of the fact of or terms of the settlement agreement (provided that the information is not publicly known) is not prohibited under the applicable Rules of Professional Conduct.")

12 Pa. Bar Ass'n Legal Ethics and Prof'l Responsibility Comm. Op. 2016-300 (2016). See also Ethics Comm. of the Bar Ass'n of San Francisco, Op. 2012-1 (2012); S.C. Bar Ass'n Ethics Advisory Op. 16-02 (2016).

13 Fla. Bar. Ethics Op. 04-2 (2005); see also Lee v. Florida Dep't of Insurance, 586 So.2d 1185 (Fla. 1st DCA 1991) (ruling that administrative law judge did not have jurisdiction to declare contracts void and stating in dictum that using rule 4-5.6 as a basis for invalidating a private contractual provision is beyond the scope of Florida's ethical rules).

14 See Fla. Bar. Ethics Op. 04-2 (2005); see also Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995) (ruling that a contingent fee contract entered into by a Florida Bar member must comport with the ethical rule governing contingent fees to be enforceable).

15 See Does 1-2 v. Déjà vu Services, Inc., 925 F.3d 886 (6th Cir. 2019); Tovar v. Russell, 238 So. 3d 835 (Fla. 4th DCA 2018); Murchison v. Grand Cypress Hotel Corp., 13 F.3d 1483 (11th Cir. 1994); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) ("In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scare judicial resources.").

16 See Doe 1 v. Superior Court, 132 Cal. App. 4th 1160, 1171 (2005).

17 Hanson v. Nat'l Legal Staffing Support, LLC, 383 So. 3d 812, 814 (Fla. 4th DCA 202

18 Id. at 813.

19 Id.

20 Id.

21 Id.

22 Id. at 814.

23 Id. (citing Maxwell v. Edwards, 345 So. 3d 323, 325 (Fla. 4th DCA 2022)).

24 Id. at 815.

for guidance, and stated that those jurisdictions agreed that non-signatory lawyers were not bound by a settlement agreement, even if they negotiated the agreement or signed merely "as to form and substance."[25]

The Supreme Court of California, however, ruled that the notation that lawyers approved a settlement agreement "as to form and content" does not preclude a factual finding that "counsel both recommended their clients sign the document and intended to be bound by its provisions."[26] In that case, the subject settlement agreement had a confidentiality provision that included both the parties and their attorneys.[27] The parties' lawyers signed under a notation that they approved the agreement as to form and content.[28] Thereafter, one of the lawyers provided confidential information to the website "LawyersandSettlements.com."[29] That lawyer and his firm were sued for breach of contract, among other claims.[30]

The California Supreme Court held that the phrase "approved as to form and content" has a fixed meaning within the legal community that counsel has read a document and "perceives no impediment to his client signing it," but that an attorney's signature on an agreement with substantive provisions can still reflect an intent for the attorney to be bound.[31] Thus, whether a lawyer intended to be bound required "examination of the agreement as a whole, including substantive provisions referring to counsel."[32]

Accordingly, attorneys must be careful in drafting settlement agreements, determine if the agreement itself has terms that bind opposing counsel and their firm, and make sure they receive a proper signature (or an appropriate alternative) that prevents a lawyer from later sharing the settlement figure.

Non-Disparagement Provisions

Like confidentiality provisions, lawyers will argue that non-disparagement provisions violate Model Rule 5.6(b) and do not bind the lawyer.[33] As mentioned above, whether a non-disparagement provision binds the lawyer is a question of contract law. But as to Model Rule 5.6, ethics opinions have found that non-disparagement provisions do not restrict a lawyer's right to practice, depending on the scope of the provision.[34] Connecticut Informal Ethics Opinion 2013-10 states in relevant part:

> Accordingly, a non-disparagement clause may not restrict a lawyer's use of information gained in one case in another case and cannot bar a lawyer from accusing the defendant of wrongdoing in that other litigation. For example, if a non-disparagement agreement that restricts a lawyer from drafting a complaint for another client against the same defendant that accused the defendant of wrong-doing, such a clause would clearly violate Rule 5.6(2). However, non-disparagement clauses can be drafted in such a manner so as to not violate Rule 5.6(2). So long as such clauses do not restrict the lawyer's ability to vigorously represent other clients, they may validly restrict the attorney's right to disparage the defendant outside of that sphere – such as for advertising or publicity purposes.

Interestingly, the Connecticut ethics opinion specifically identified the applicability of non-disparagement clauses for advertising or publicity purposes.[35] The opinion also identified a main concern with non-disparagement provisions: they cannot be used to prevent a future client from suing the same defendant at a later date. Of course, opposing counsel will again argue that these provisions have an indirect effect on their ability to practice law. Indeed, the Wisconsin State Bar's Professional Ethics Committee in its "Ethical Dilemmas" report stated that a non-disparagement clause prohibiting a lawyer from advertising that they handle or have handled a particular type of matter violated the applicable version of Model Rule 5.6.[36] But generally, ethics opinions have determined that "[a] non-disparagement clause or confidentiality clause that is limited to an attorney's public statements regarding the specifics of a particular case, made not in the context of legal advocacy for another client, are generally applicable under the Rules."[37]

Non-disparagement clauses are infrequently litigated but court cases have held that they must be constructed with the scope and the context of the agreement in mind. For example, the Supreme Court of New Jersey recently held

25 Id. (citing Milliner v. Mutual Securities, Inc., No. 15-cv-03354, 2021 WL 2645793 (N.D. Cal. June 28, 2021); RSUI Indem. Co. v. Bacon, 282 Neb. 436, 810 (2011)).

26 Monster Energy Co. v. Schechter, 444 P.3d 97, 100 (Cal. 2019) (emphasis omitted).

27 Id.

28 Id.

29 Id. at 100–101.

30 Id. at 101.

31 Id. at 104.

32 Id. at 105.

33 Sturdevant, supra n. 5.

34 See Pa. Bar Ass'n Legal Ethics and Prof'l Responsibility Comm. Op. 2016-300 (2016); Conn. Informal Ethics Op. 2013-10 (2013).

35 See Pa. Bar Ass'n Legal Ethics and Prof'l Responsibility Comm. Op. 2016-300 (2016); see also Ill. State Bar Ass'n Prof'l Conduct Advisory Op. 1-2014 (2014) ("A non-disparagement clause that is limited to an attorney's public statements made not in the context of legal advocacy for a client, e.g., advertising and promotional statements, does not violate Ind. R. Prof. Cond. 5.6(b) or Ind. R. Prof. Cond. 3.4(f).").

36 Timothy Pierce and Aviva Kaiser, Ethical Dilemmas: Does a Non-Disparagement Clause Violate the Rules of Professional Conduct?, STATE BAR OF WIS. (Jan. 21, 2015), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx. (last visited September 22, 2024).

37 Pa. Bar Ass'n Legal Ethics and Prof'l Responsibility Comm. Op. 2016-300 (2016); see also Md. State Bar Ass'n Comm. on Ethics Docket No. 2021-03.

that a non-disparagement clause was unenforceable for public policy reasons because it violated N.J.S.A. 10:5–12.8(a), New Jersey's "Law Against Discrimination."[38] Thus, lawyers should make sure that a non-disparagement provision is appropriate and comports with any prevailing state or Federal statute (especially if settling an employment dispute). In addition, just as with confidentiality provisions, lawyers must confirm that the agreement includes both the parties and their counsel, and that opposing counsel has signed the agreement (or a reasonable alternative).

Effective Solutions

With these common grounds in mind, lawyers have different options available to make sure that the terms a settlement do not end up on a billboard or on opposing counsel's website.

First, consider using a carefully drafted attorney acknowledgement which states that opposing counsel and their firm agree to adhere to the confidentiality provisions of the settlement agreement. This document will clearly reflect the intent, via signature of opposing counsel, for that lawyer and their firm be bound by the confidentiality provision(s) of the agreement. This document should include attorney signature blocks for each attorney that worked on the case, should cite to the agreement's confidentiality provisions, and not be noted as to form and substance in regard to the confidentiality provisions.

Second, consider asking opposing counsel to draft a letter stating that they and their firm agree to the terms of the agreement, and specifically the confidentiality provisions. This is another way to have a clear representation of opposing counsel's intent to be bound by those provisions and allows for opposing counsel to agree in a document separate from the original agreement.

Third, consider including language in the settlement agreement that requires the plaintiff to instruct their lawyer to keep the settlement confidential. When a client requests that their lawyer keep information from a settlement agreement secret, that information falls within the scope of Model Rule 1.6 and should remain undisclosed. However, it still may be beneficial to have opposing counsel sign an acknowledgement or draft a signed letter indicating that they are abiding by the confidentiality provisions of the settlement agreement to have clear evidence that the lawyer or lawyers themselves wish to be bound.

Conclusion

In short, lawyers need to be mindful when drafting confidentiality and non-disparagement provisions. These provisions are a useful tool to reduce marginal claims and protect a client's reputation but can fail if drafted too broadly. Additionally, lawyers must be proactive in obtaining an attorney acknowledgement, a letter from opposing counsel, or some other alternative that will clearly show that opposing counsel and their firm are bound by the agreement. If not, the settlement that took years to achieve might end up on billboards and the internet.

38 Savage v. Township of Neptune, 257 N.J. 204, 208, 313 A.3d 69 (2024).

Under Siege

Strategies for Upholding Confidential Settlement Agreements

Bob Fulton

HWH | HILL WARD HENDERSON

The two contested provisions:

- Confidentiality Provisions
- Non-Disparagement Provisions

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Why is there pushback?

Between 2017 and 2021, there was a 30% increase in advertisements aired by trial lawyer groups

Lawyers rely on settlement and judgment amounts for advertisements

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ABA Model Rule 5.6(b)

AMERICAN BAR ASSOCIATION

A lawyer shall not participate in offering or making:

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

HILL WARD HENDERSON

- Cannot include public case information in confidentiality provisions
- Terms of settlement are fine

HWH | HILL WARD HENDERSON

Who is bound by the confidentiality provisions?

HWH | HILL WARD HENDERSON

Florida's Fourth District Court of Appeal held:

- Non-party lawyer was not bound without a signature, even when the agreement listed that lawyer as Plaintiff's counsel

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What about non-disparagement provisions?

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Connecticut Informal Ethics Opinion 2013-10:

- Can restrict an attorney's right to disparage a party, so long as it does not restrict the lawyer's ability to represent other clients

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What are my options?

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Solution 1

Attorney Acknowledgement

HILL WARD HENDERSON

ATTORNEY ACKNOWLEDGMENT

The undersigned, counsel for **Releasing Parties**, acknowledges this **Agreement** was read by **Releasing Parties** before the **Agreement** was signed. The undersigned counsel, by their signature below, acknowledge this settlement to include and satisfy any and all interest they and/or their law firms have or may have in this matter, except as limited herein. Counsel for the **Releasing Parties** approve this **Agreement as to FORM ONLY** but agree to adhere to the provisions in Section 12 of this **Agreement**.

[redacted] December ____, 2023

ATTORNEYS FOR RELEASING PARTIES

[redacted] December ____, 2023

ATTORNEYS FOR RELEASING PARTIES

HILL WARD HENDERSON

Solution 2

Opposing Counsel Letter

HILL WARD HENDERSON

[redacted]

Sent via email: bob.fulton@hwhlaw.com
Robert Fulton, Esquire
Hill Ward Henderson
101 E. Kennedy Blvd, Suite 3700
Tampa, FL 33602

Re: [redacted]

Dear Mr. Fulton:

The undersigned, counsel for [redacted] acknowledges that this Complete Release, Indemnity, Confidentialy, and Settlement Agreement was read by Plaintiff/Releasor and approved by counsel for Plaintiff as to form before it was signed. The undersigned attorney, by his signature below, acknowledges this settlement to include and satisfy any and all interests the undersigned attorneys and/or their law firms, as well as all other counsel representing Plaintiff in this matter, whether counsel of record or not, have or may have in this matter, and he hereby agrees to those terms of the Complete Release, Indemnity, Confidentialy, and Settlement Agreement that pertain to such counsel and/or such counsel's law office.

Please do not hesitate to contact me, should you have any questions or concerns. We look forward to your response.

Sincerely,

[redacted]

HILL WARD HENDERSON

Solution 3

Require Plaintiff to Instruct their own Lawyer

HWH | HILL WARD HENDERSON

Releasing Parties agree to direct, and does hereby direct, their attorney and all members, partners, and employees of such attorneys' law office or law firm to comply with the confidentiality provisions in this **Agreement**.

HWH | HILL WARD HENDERSON

813.227.8491
bob.fulton@hwhlaw.com

Robert M. Fulton

Managing Shareholder | Hill Ward Henderson (Tampa, FL)

Early in his career, Bob Fulton was retained as state-wide counsel for an automobile manufacturer, which speaks to his ability to become a trusted advocate and counselor for his clients.

Bob has been with the firm for 30 years and currently serves as Managing Shareholder. His practice primarily involves the defense of companies in products liability, catastrophic personal injury and wrongful death claims. Throughout his career, Bob has defended national and international clients in numerous automotive, trucking, consumer products and power tool products liability cases throughout Florida and in several other states. He also has represented retailers and home builders in premises liability matters. He prides himself on being responsive to clients and on bringing cases to a successful conclusion through settlement or trial, whichever is best for the client.

Practice Focus

- Automotive
- Products Liability
- Consumer Products Liability Litigation
- Industrial & Commercial Product Liability
- Drug & Medical Device
- Personal Injury
- Automotive Liability Litigation
- Litigation
- ADA Accessibility
- Corporate Compliance and Investigations

Experience

- Regional counsel for automobile manufacturers, heavy truck manufacturers and power tool/consumer products companies in products liability, catastrophic personal injury and wrongful death cases

Honors

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Chambers USA: America's Leading Lawyer, Litigation: Product Liability (2022-2024)
- Florida Super Lawyers (2013-2024)
- Florida Trend's Legal Elite (2011-2017, 2022)
- Florida Trend's Legal Elite - Up and Comers (2007-2008)
- Super Lawyers Business Edition (2013)
- The Best Lawyers in America® (2018-2025)
- TAMPA Magazine's Top Lawyers (2023) - Personal Injury Litigation (Defendants); Product Liability Litigation (Defendants)
- Benchmark Litigation: Litigation Star (2024)

Education

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

Panel - Disarming Nuclear Verdicts in an Evolving Jury Pool

Charlie Stoia

Porzio Bromberg & Newman (Morristown, NJ)

A New Focus for Defense Voir Dire: Safetyism
Jill Leibold, Nick Polavin, and Jennifer Cuculich (IMS Legal Strategies)

As we speak, plaintiff attorneys are leveraging the spread of "safetyism"—a widespread expectation of 100% safety, 100% of the time—to obtain nuclear verdicts. This isn't just another "reptile" strategy that preys on jurors' fear in the moment. Rather, it targets jurors' learned emotional thinking patterns more broadly. It's not just about fear; it's also about sympathy and, worse, anger.

Plaintiff attorneys no longer need to focus on the jurors' close community. They can exploit the widespread presence of unrealistic safety expectations, anti-corporate biases, and distrust of government agencies to focus on anything and everything more that the corporation could have done to prevent the claimed harm—regardless of whether such actions were even feasible. Coupled with the emotional nature of today's jurors, this can lead the jury to eschew assessments of the plaintiff, the plaintiff's injuries, and actual causation in favor of decrying the corporate defendant and its alleged actions.

In an attempt to isolate the problem and identify solutions for defendants, Drs. Jill Leibold and Nick Polavin published an article on 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: Safetyism and Conspiracies Are Affecting Juries, In-House Defense Quarterly, p. 17-21; Leibold & Polavin, The Rise of Safetyism Has Entered the Courtroom; Law360, May 3, 2023.).

Jurors subscribing to safetyism always expect corporations to "do more," even if they cannot specify how more safeguards would have prevented a plaintiff's injury. Attorneys and consultants continue to hear mock jurors hone in on possibilities and "what ifs" instead of probabilities and facts. Safetyist jurors will almost always side with the plaintiff and can be unflinching in deliberations.

Thus, the first line of defense is to hit plaintiff attorneys where they live. If they seek to appeal to safetyists, defense counsel must remove as many of those safetyists as possible from the venire. Identifying such jurors in voir dire and targeting them for cause or peremptory strikes is an essential step in obtaining a defense verdict or, at the least, avoiding nuclear damages.

A Brief Background on Safetyism Among Jurors
Safetyism, a term coined by authors Jonathan Haidt and Greg Lukianoff, is presented as the culmination of our societal progression toward hyper-protective mindsets. In The Coddling of the American Mind, they 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.

While Haidt and Lukianoff presented their analysis within the context of college campuses, jury researchers have witnessed ballooning jury verdicts and concerning trends in mock- and trial-juror feedback that appear to align with such mindsets. Drs. Leibold and Polavin thus recently pursued further research to assess the relationship between the likelihood of a plaintiff verdict and the strength of jurors' safetyism factors (DRI For the Defense, A Strange New Litigation World: Safetyism, Plaintiff Verdicts, and High Damages, Sept. 2023). The results revealed that heightened risk aversion, reliance on intuition, and distrust of government agencies to keep people safe were indeed significant predictors of a pro-plaintiff juror. Safetyism therefore offers a helpful lens to categorize the changes we've witnessed in the jury pool—and a means to optimize defendants' voir dire by

targeting key predictors of a safetyist juror.

Target Safetyism in Voir Dire

While no single voir dire question will be a magic bullet to identify every potential safetyist plaintiff juror, using a constellation of responses to related topics can provide guidance for strikes and cause challenges. As noted above, our recent research revealed a number of attitudes regarding safety expectations and risk aversion as the strongest predictors of plaintiff-friendly jurors. These attitudes should be prioritized in voir dire to weed out strong safetyist jurors. In particular, the following topics can be turned into useful voir dire questions:

Safety Attitudes

- Has stopped use of a product due to potential health and safety risks
- Companies should ensure their products are 100% safe 100% of the time
- Manufacturers are still at fault if a product is misused and someone is harmed as a result
- Manufacturers have the responsibility to research and prevent every possible misuse of their products
- Medicines should warn about every possible side effect, no matter how small
- Products should warn about every possible risk of injury, no matter how remote

Notwithstanding questions about the particular product in the case, however, risk aversion can be somewhat trickier to determine in voir dire or on a jury questionnaire. Luckily, our analyses indicated that there may be a simpler way to ascertain a juror's risk aversion: ask about their trust in government agencies. We discovered that risk aversion is highly correlated with a lack of trust in the EPA, FDA, and other regulators. Therefore, defense attorneys can use these topics to gather additional information to identify potential safetyists:

Distrust of Government Agencies

- Distrust government regulatory agencies (e.g., EPA, FDA) to keep people safe
- Corporations have too much influence on government agencies
- The EPA/FDA/USDA, etc. are too business-friendly
- Government agencies, such as the EPA and FDA, do not research products and medicines thoroughly before approving them
- Most government agencies are too understaffed and underfunded to do a good job

Go the Extra Mile for Cause

Nothing is free in life…except for cause challenges. Sure, it takes some work to get them granted and will vary from judge to judge, but the opportunities are there, and they can make or break the quality of a jury.

A key step to a cause challenge is getting jurors to explain their views openly. The more they explain why the issue matters to them and how strongly, the better the chances of that cause challenge being granted. There are always jurors who will continue to insist they can be fair, but the more they reveal, the better counsel can decide whether to target them with a precious peremptory strike, if it comes to it.

To achieve cause, jurors often need extra encouragement to share their potential negativity toward the defendant, government agencies, inability to accept risk, and other case-specific experiences. In that regard, attorneys must give jurors permission to be critical and negative. Allowing them to connect with the questioning attorney by granting them freedom to communicate without the weight of their fears or anxieties moves them one step closer to admitting they could not treat the defendant fairly. There are many venues where politeness can be deeply culturally embedded, which makes the permission to criticize even more important in those regions (e.g., Hawaii and much of the South). Tell jurors, "I want to let you all know that I am here to hear your views, because voir dire is literally about speaking truth. There are no bad answers, and you absolutely cannot hurt my feelings. I have very, very tough skin. I want you to be brutally honest about your feelings and thoughts. It is why we're here right now and it will help me understand how to get the most fair jury for my client." Also, thank them for their negative answers and let them know you appreciate their honesty. Then, if voir dire continues for hours, remind them of your permission to speak their mind, even if they share negative views in response to your questions.

"Mirroring" is another handy technique to encourage jurors to expand on something they've said, especially since it leverages their own words. Mirroring can be as simple as repeating the last three or so words that a juror said (although more advanced questioners can identify preceding phrases that may be more on target for the case) and repeating them, word for word, but as a question. Embrace any momentary silence afterward—jurors typically will fill that silence with a more robust answer. However, if voir dire time is tight, add "Can you tell me more" to the end of those mirrored words, giving the juror explicit permission to continue talking.

When it comes to those jurors who are still reluctant to volunteer information, once a safetyist is identified, ask the panel as a whole "Who agrees with juror 5?" Sometimes, a reluctant juror will be more inclined to simply raise their hand or acknowledge they feel the same way as a juror who has expressed their feelings and beliefs as opposed

to doing it themselves.

Once a safetyist juror is identified, seal the deal by asking more specific questions to try and lay a good predicate to support a strike for cause. While the various states and jurisdictions differ on the standard to strike a juror for cause, when a juror clearly articulates that they will rely on their beliefs to decide a case regardless of what the evidence may show, it offers a stronger argument for cause.

Conclusion

While safetyists pose big problems for corporate defendants, they are not a guaranteed presence on the jury. A winning defense still begins with targeted and effective voir dire, and it can be tailored directly to identify jurors with strong safetyist attitudes. By staying one step ahead of plaintiff attorneys and understanding the evolving beliefs and expectations that accompany today's jurors, defendants can still lay the groundwork for courtroom success.


IMS Consulting & Expert Services
Together, we win.
The "Safetyism" Problem
Jill Leibold, Ph.D.
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Agenda
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2

Agenda

The Problem

Current verdict atmosphere and juror belief/feeling structures

Goals

Discuss long and short-term solutions to juror "Safetyism" ideology

Topics

- Beginnings of Safetyism
- Core fallacies of Safetyism
- Fallout of Safetyism
- Solutions

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The Current Problem

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The Problem

- Nuclear verdicts
- Stronger anti-corporate attitudes
- Distrust of government
- Reversing the burden of proof
- Possibilities over probabilities

I don't care about the data; if it happens once, it has happened one too many times.

If it's going to be on the market, it needs to be 100% safe.

If it has the ability to hurt someone, it's defective.

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The Problem

- This isn't REPTILE
- Damages as "justice and power" over corporations
- (Younger) Millennial & Gen Z jurors
- Increased external locus of control
- Increased expectations of safety standards
- Decreased trust in (real) science
- Increased tribalism

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Today's Safetyism: An Entitlement That Has Evolved Over 40 Years

- 1979: Three Mile Island
- 1980s: Risk Calculation Becomes Risk Perception (Slovic, "Risk Free Society")
- 1990s: Risk As Feeling—risk defined by how a perceived risk makes you feel (Social Cognition – misers, ease)
- 2000s: Risk As Fear—Emotional "Reasoning" as legitimate
- 2010s: Risk Perceived as Avoidable (Technology)
- 2020s: Safetyism—Zero-Risk as Emotional Entitlement

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Today's Safetyism

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Three Thought Fallacies

"What doesn't kill you, makes you weaker."
Fragility: total avoidance of harm, discomfort

"Always trust your feelings."
Emotional thinking as legitimate, before reason or science

"Life is a battle between good and evil people."
Tribalism: no discourse, no compromise

Source: The Coddling of the American Mind by Greg Lukianoff & Jonathan Haidt

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Effects of Safetyism

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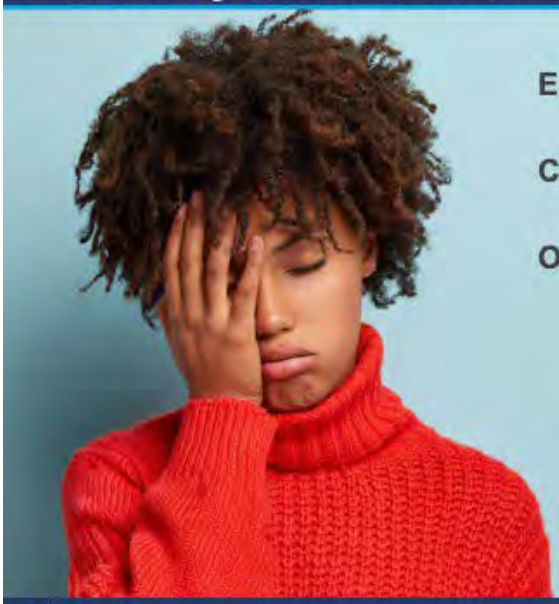
11

The Fallacy of Emotional Reasoning



Emotional reasoning

Feelings guide interpretation of reality

Catastrophizing

Focus on worst possibility and make it most likely

Overgeneralizing

Base global negatives on single incident

- All or nothing thinking
- Labeling, categorizing everyone/everything
- Focus on negatives
- Outward blame (external locus of control)

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Tribalism

- Us vs. them
- Pandemic effects
- Conspiracies
- Anti-government
- Anti-corporation
- Plaintiff jurors are angry, want to punish, see more danger, and use damages to reduce danger

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2023 Case Studies: Herbicide Lawsuits

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Scenarios

Herbicide Scenario:

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.

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Analyses

Participants responded with a verdict, as well as an indication of how strongly they desired to award damages and how angry they felt toward defendants.

These responses were submitted to linear regression analyses:

- measuring safetyism
- intuitive thinking
- risk aversion
- attitudes toward government agencies
- political leanings
- several demographics as potential predictors.

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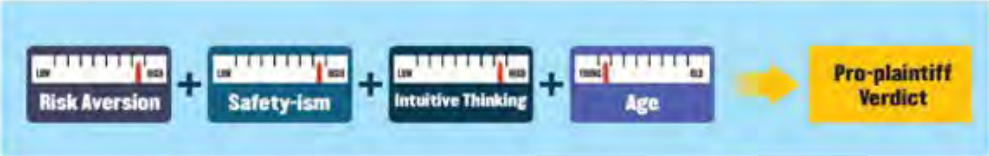
Herbicide Results

- 46% voted for the plaintiff, 44% favored Chemegent, and 10% remained neutral.
  - Pro-plaintiff juror: More safetyists, greater reliance on intuition, greater risk aversion, and younger age.
  - Pro-defense jurors: Fewer safetyists, utilized greater fact-based thinking, accepted more risk, and were older.



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Herbicide Results - Damages

Compensatory Damages

- 20% extreme desire for Chemegent to compensate the plaintiff, 38% had a moderate desire.
- Higher safetyism, greater reliance on intuition, greater risk aversion, and younger age predicted greater desire to award the plaintiff damages.

Anger Toward the Defendant

- Younger age and greater reliance on intuition were the strongest predictors of anger toward the defendant.
  - *but*, low safetyism respondents with high intuitive thinking experienced anger toward Chemegent that was no different than high safetyism respondents.

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Herbicide Additional Findings

Desire to Punish

- Pro-plaintiff jurors, 71% desired to award punitive damages.
  - Only greater risk aversion and younger age significantly predicted a stronger desire to punish Chemegent.

Additional Findings

Additional significant findings offer insight into potential jurors' decision-making:

- Less trust in government agencies.
- Believed jury damage awards for diseases such as cancer deserve more money than other types of cases.
- Safetyism significantly correlated to many political opinions:
  - More positive views of Democratic Senators, President Biden, and Vice President Harris correlated to greater safetyism.

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Implementing Findings in Voir Dire & Jury Selection

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Voir Dire Issues

Risk Aversion and Safety Attitudes

- I have decided not to use a product because I was concerned about its health and safety risks.
- Companies should take every possible measure to ensure their products are 100% safe 100% of the time.
- If I read that a product could possibly increase the risk of cancer, I would stop using that product.
- If someone misuses a product, it shouldn't be the manufacturer's fault if they are harmed as a result.
- Products and pharmaceuticals should warn about every possible side effect, no matter how small.
- A manufacturer has the responsibility to research and prevent every possible misuse of its product.
- Companies should take every possible measure, no matter the cost, to ensure their products are always safe.

Voir Dire Issues

Distrust of Government Agencies

- I trust government regulatory agencies (e.g., EPA, FDA) to keep us safe.
- Large corporations have connections within the FDA and EPA so they can manipulate these agencies to do what they want.
- The government can't be trusted to keep people safe.
- Corporations have too much influence on government agencies.
- The EPA is too business-friendly.
- Government agencies, like the EPA and FDA, do not research products and medicines thoroughly enough to ensure anything that is approved is adequately safe.

Translated to Voir Dire

Risk Aversion and Safetyism

[Note: frame as many questions using "FEELS" instead of believes… this is about finding the jurors who think feelings are facts.]

- Who here has decided not to use a product because you were concerned about its health and safety risks?
- Who here feels like if someone misuses a product, the manufacturer is still at fault because they should have thought of and prevented that type of misuse to keep people safer?
- Who feels like products, especially safety products, should warn about every possible risk, no matter how small ?
- Who feels like companies should take every possible measure, no matter the cost, to ensure their products are always 100% safe?

Translated to Voir Dire

Distrust of Government Agencies

- Is there anyone here who feels they may have some distrust for government regulatory agencies (e.g., EPA, FDA) to keep us safe?
- Who here feels like the government generally cannot be trusted to keep people safe?
- Does anyone feel like these days large corporations have too much influence on government agencies?
- Who here feels like government agencies that are meant to keep people safe do not research products thoroughly enough to ensure anything that is approved is adequately safe?

Immediate Steps – Corporate Level

- Voir Dire Mocks
  - Prepare for the changed atmosphere
  - Test responses to questions
  - Practice cause sequencing
- Corporate Witnesses
- Strategic Publicity, Communications
  - Comms regarding safety updates
  - Prepare, respond, recover

Immediate Steps

Theme Development

- Correlation Does Not Imply Causation
- Follow the Science
  - (Offer olive branches between the two camps)
- Facts, Not Feelings
- Probabilities Not Possibilities (No room in the law for "possibilities")
  - **Credible** evidence, not all issues presented
- We're Here for Justice (procedural); Justice looks different here
  - You can protect justice
- Reasonable = Probability; Reasonable = Credible; Reasonable = Justice

Together, we win.™

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Charles J. Stoia

Principal | Porzio Bromberg & Newman (Morristown, NJ)

For almost 35 years, Charlie has represented litigants in commercial, insurance and environmental matters in the state and federal courts of New Jersey and New York. His extensive litigation and trial experience has earned Charlie a reputation as a hard-nosed litigator who is not afraid to take significant cases to trial. Charlie prides himself on determining his clients' individual goals in litigation and directing the litigation to achieve those specific goals. He has achieved success for clients handling commercial litigation matters while utilizing creative fee structures.

Practice Areas
- Litigation

Industries
- Chemical

Representative Matters
- Successfully represented a multi-national company in insurance coverage litigation valued at more than $250 million against dozens of insurers involving multiple sites across the United States.
- Obtained an arbitration award in favor of a national airline in defense of a contractual indemnity claim alleging liability for environmental damages estimated at over $25 million.
- Represented the majority shareholder of a publicly traded company who sold his controlling ownership in the company for $7.5 million. When the purchaser failed to pay the balance of the sale price due under a promissory note, Charlie obtained a $5.4 million judgment against the surety company that issued a bond to secure the promissory note. When the judgment proved uncollectable, he successfully settled and obtained a jury verdict against the insurance brokers who negligently placed the promissory note with a surety company that was not authorized or admitted to issue surety bonds in New Jersey.
- Obtained dismissal on motion, without any discovery, in an action alleging that two pipeline companies were responsible for an alleged $25 million in damages resulting from MTBE contamination of drinking water wells on Long Island.
- Successful at trial in defense of an environmental contamination matter seeking $7 million alleging that client who operated a vapor degreaser at the site was responsible for costs to investigate and clean up environmental contamination.
- Won a verdict at trial against a former employee who was found liable for stealing the employer's confidential client list and using the list to improperly solicit clients.

Recognitions
- New Jersey Super Lawyers® (2009-2024)
- The Best Lawyers in America® – Commercial Litigation (2015-2025)

Education
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- University of South Florida B.A., 1984

It's a Small World After All: Litigation in a World in Crisis

Jessie Zeigler
Bass Berry & Sims (Nashville, TN)

It's a Small World After All: Litigation in a World in Crisis
Jessie Zeigler

The world economy has become intricately linked and interdependent, a phenomenon that has been underscored by recent global events. The COVID-19 pandemic, geopolitical conflicts, environmental catastrophes, and labor strikes have all cast a spotlight on the vulnerabilities inherent in our global supply chain. These events have had a domino effect of disrupting a wide range of industries. For instance, the automotive sector was hit hard by shortages of semiconductors, leading to production halts and delayed deliveries of new vehicles.[1] Similarly, the energy sector has faced challenges due to fluctuating oil prices and supply constraints influenced by international disputes.[2] In the realm of technology, companies have grappled with the scarcity of critical components, which has slowed down the production of consumer electronics and affected product launches.[3] These disruptions have not only caused logistical headaches but have also had profound legal and business consequences.

Legal Implications of Supply Chain Shocks

The legal ramifications of supply chain disruptions are significant. For example, a natural disaster may prevent a natural gas supplier from making on-time deliveries to a producer, leading to a cascade of contractual breaches and dissatisfaction by the producer's customers and end-consumers.[4] Contractual breaches have become a focal point as businesses struggle to meet their obligations amidst unforeseen challenges. Terms once overlooked as standard language are now being legally scrutinized as parties seek to enforce their rights and obligations in the face of non-performance.[5] Thus, understanding force majeure clauses, the doctrines of commercial impracticability and frustration of purpose, and the rights related to the extension of time and termination is crucial for companies looking to navigate these challenges effectively.

Force majeure clauses are designed to protect contracting parties from "an event or effect that the parties could not have anticipated or controlled."[6] Parties unable to perform their contracts due to COVID-19 or the war in Ukraine, for example, have invoked force majeure provisions with mixed results.[7] For example, with respect to supply chain challenges, some courts have refused to allow a distributor whose nonperformance can be attributed to its choice of an unreliable manufacturer to rely on a force majeure clause.[8]

Whether a particular situation is within the scope of the clause is a fact-intensive question that depends on the nature of the event and the language of the provision.[9] As such, it is crucial for companies to draft force majeure

1 Hyunjoo Jin, Automakers, chip firms differ on when semiconductor shortage will abate, Reuters (Feb. 4, 2022, 8:08 AM), https://www.reuters.com/business/autos-transportation/automakers-chip-firms-differ-when-semiconductor-shortage-will-abate-2022-02-04/.

2 Qi Zhang et al., The impact of Russia–Ukraine war on crude oil prices: an EMC framework, 11 Human. & Soc. Sci. Commc'n 8 (2024).

3 Debby Wu, Vlad Savov & Takashi Mochizuki, Chip Shortage Spirals Beyond Cars to Phones and Consoles, Bloomberg (Feb. 7, 2021, 7:31 PM), https://www.bloomberg.com/news/articles/2021-02-05/chip-shortage-spirals-beyond-cars-to-phones-and-game-consoles.

4 See Mieco LLC v. Pioneer Nat. Res. USA, Inc., 2023 WL 2064723 (N.D. Tex. Feb. 15, 2023), reconsideration denied, 2023 WL 3259492 (N.D. Tex. May 4, 2023).

5 Denis Demblowski, ANALYSIS: Force Majeure Emerges as a Major Force, Bloomberg Law (discussing boilerplate nature of force majeure clauses prior to pandemic), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-force-majeure-emerges-as-a-major-force.

6 MD Helicopters Inc. v. Boeing Co., No. CV-17-02598-PHX-JAT, 2019 WL 3840974 (D. Ariz. Aug. 15, 2019) (quoting Force-Majeure Clause, Black's Law Dictionary (11th ed. 2019)). A standard force majeure clause might define a qualifying event to include

fires, floods, earthquakes, embargoes, shortages, strikes, epidemics, quarantines, war, acts of war (whether war be declared or not), terrorist acts, insurrections, riots, civil commotion, acts of God, or acts, omissions, or delays in acting by any Governmental Authority, in each case to the extent beyond the reasonable control of the non-performing Party. . . ."

Avon Co. v. Fareva Morton Grove, Inc., No. 22-cv-4724, 2022 WL 2208156, at *3 (S.D.N.Y. June 21, 2022).

7 Compare BAE Indus., Inc. v. Agrati - Medina, LLC, No. 22-cv-12134, 2022 WL 4372923 (E.D. Mich. Sept. 21, 2022) (increased steel prices attributed to COVID-19 and Ukraine war did not qualify as force majeure events under clause specifying that "changes in cost or components will not constitute a force majeure event" unless notice of nonperformance is given within ten days); with Dental Health Prod., Inc. v. Sunshine Cleaning Gen. Servs., Inc., 657 F. Supp. 3d 1151, 1159-60 (E.D. Wis. 2023) (seller's failure to deliver medical gloves to buyer during COVID-19 was excused under force majeure provision of the parties' contract for purchase of gloves that expressly included "inability to obtain supplies" and "pandemic" as grounds to excused breach of contract liability).

8 BD Med. Supplies LLC v. Bluestem Mgmt. Advisors, LLC, 685 F. Supp. 3d 1062, 1072 (D. Kan. 2023) (defendant's motion for summary judgment based on force majeure when "a reasonable factfinder could attribute Bluestem's non-performance entirely to its choice of manufacturer—a force well within Bluestem's control").

9 Colin C. Holley, A Closer Look at the Coronavirus Pandemic as a Force Majeure Event, Am. Bar Ass'n (Mar.31,2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee- newsletters/closer_look_coronavirus_pandemic/.

provisions with precision, intentionally including scenarios that could impact their operations. For instance, a technology firm might include specific language to cover trade restrictions or political tensions with the country producing critical components.

It is also crucial that a company seeking to invoke a force majeure clause strictly comply with its notice requirements. Even when a situation falls within the scope of the parties' force majeure clause, courts do not permit a party to assert the clause as a defense unless the party has provided the required notice.[10]

Common law doctrines such as commercial impracticability and frustration of purpose may come into play when contracts lack a force majeure clause.[11] Impracticability occurs where performance of a contract becomes excessively burdensome due to unforeseen contingencies, whereas impossibility results where an unanticipated event destroys the primary purpose of the contract.[12] For example, a business may argue that a sudden embargo on raw materials from a particular country has made it impracticable to manufacture their products.

However, courts have been reticent to excuse performance based solely on increased costs or market fluctuations, as seen in some cases related to the pandemic.[13] Courts have required the party relying on the affirmative defense of impracticability to present evidence regarding its attempts to locate an alternative source for the goods at a comparable price.[14] Furthermore, particularly as the pandemic waned on, courts became receptive to the argument that supply chain disruptions are not unforeseeable.[15]

Extensions of time and termination rights have become critical tools in light of recent events.[16] Extensions of time may grant parties additional time to perform their obligations without incurring penalties or damages, while termination rights may enable parties to end the contract if certain conditions are met or breached. These provisions can provide a safety net, allowing businesses to weather changing circumstances without immediate legal repercussions, or escape a relationship poised to doom customer relations. For instance, a distributor might negotiate for extended delivery timelines to accommodate potential delays, or a retailer might secure the right to terminate a contract if a supplier repeatedly fails to meet delivery schedules.

Finally, companies should be mindful of the representations that they make to customers regarding their ability to provide goods, especially when supply chain challenges are prevalent, and a customer is likely to rely on such statements. A distributor's representations regarding its relationship with manufacturers or a manufacturer's representations regarding its production capabilities, for example, can serve as the basis for a fraud claim.[17]

Business Implications of Disruptions to Supply Chains

Beyond shoring up contractual language, businesses should develop comprehensive contingency plans to prepare for future supply chain disruptions. These plans should include:

- Diversification of Supply Sources: Companies should avoid over-reliance on a single supplier or geographic region. For example, an electronics manufacturer might source components from multiple countries to prevent a single point of failure in their supply chain.
- Inventory Management: Strategic stockpiling of essential items can serve as a buffer against supply interruptions. However, this must be carefully managed to avoid excessive carrying costs or issues with product obsolescence.
- Supplier Relationships: Fostering strong partnerships with suppliers can lead to more effective collaboration during crises. Consider whether joint planning and risk-sharing agreements could be beneficial.
- Technology and Automation: Leveraging advanced technologies can enhance supply chain transparency and agility. Automation can help reduce dependence on human labor, which is particularly valuable in the face of labor shortages.
- Insurance: Companies should ensure that their

10 See Avon Co. v. Fareva Morton Grove, Inc., No. 22 Civ. 4724, 2023 WL 6198802, at *4 (S.D.N.Y. Sept. 21, 2023) ("Force majeure clauses are narrowly construed, and where a contract requires notice for the invocation of a force majeure defense, notice must be given to excuse performance.").

11 See Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 855 (N.D. Ill. 1990) (force majeure clause supersedes common law doctrines of impossibility or impracticality). But see Drummond Coal Sales Inc. v. Kinder Morgan Operating LP "C", 836 F. App'x 857, 864-68 (11th Cir. 2021) (analyzing and rejecting all three defenses).

12 Romans v. Orange Pelican, LLC, No. 22-cv-4169, 2023 WL 2933050, at *6-7 (N.D. Ill. Apr. 13, 2023) (comparing commercial impracticability and frustration of purpose doctrines).

13 "[I]nvocation of the pandemic as grounds for application of the doctrines of frustration of purpose or impossibility is an approach this Court has squarely rejected—even, at times, where the business of the party seeking application of such doctrines was temporarily suspended." Pentagon Fed. Credit Union v. Popovic, 217 A.D.3d 480, 481, N.Y.S.3d 364 (2023). But see Mycone Dental Supply Co. v. Generic Mfg. Corp., No. 22-5791, 2023 WL 3742827, at * (D.N.J. May 31, 2023) (setting aside default judgment because "impossibility or impracticability of performance could be complete defense" when defendant alleged failure to perform under contract was due at least in part to supply chain challenges).

14 Guilbert Tex, Inc. v. United States Fed Grp. Consortium Syndicate, No. 220CV11420SVWAGR, 2022 WL 1599867, at *8 (C.D. Cal. Apr. 22, 2022) ("However, Defendants fail to meet their burden to show a genuine dispute of fact as to impracticability. Defendants present no evidence that they even attempted to find an alternative source of masks or that masks purchased from another source would have been more expensive than those from US Fed Group.").

15 See, e.g., BD Med. Supplies LLC v. Bluestem Mgmt. Advisors, LLC, 685 F. Supp. 3d 1062, 1077 (D. Kan. 2023) ("Because Bluestem had reason to know that COVID-19 could cause problems for plaintiff's glove order, defendants cannot use COVID-19 to excuse Bluestem's non-performance."); Les Indus. Wipeco, Inc. v. Bluestem Mgmt. Advisors, LLC, No. 21-2289, 2023 WL 4295364, at * (D. Kan. June 30, 2023) ("Wipeco further argues that it placed its glove orders nearly a year into the COVID-19 pandemic and that any supply chain issues were fully foreseeable.").

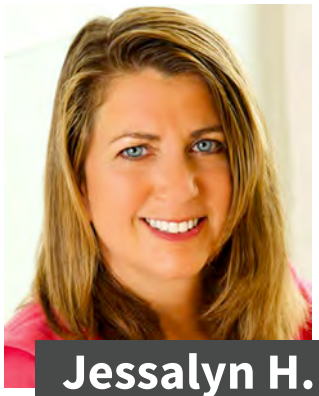
16 See Rob Francis, Supply chain disruption: are contractual disputes just an "ever given"?, Dentons (Jan. 20, 2022), https://www.dentons.com/en/insights/articles/2022/january/20/supply-chain-disruption.

17 685 F. Supp. 3d at 1077–79 (denying summary judgment with respect to fraud claim based on distributor's representations regarding its relationship with glove factories).

insurance coverage is comprehensive, including protection against business interruptions and other supply chain-related risks.

Conclusion

In conclusion, the complexities of our global economy necessitate a proactive and strategic approach to managing supply chain risks. Legal considerations, such as the careful drafting of contracts and understanding of relevant doctrines, are essential. Simultaneously, businesses must develop adaptive strategies to prepare for and respond to disruptions. By doing so, they can safeguard their operations and maintain their competitive edge in an unpredictable world.



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As a seasoned litigator and crisis management strategist, Jessie Zeigler has represented clients in some of the nation's most high-profile cases over the last 25 years. From her defense of precedent-setting opioid cases, high-stakes wildfire litigation and class action defense across numerous industries, Jessie has returned successful results nearly 100% of the time in the cases she has handled.

Recognized by Chambers USA (in both the Environment and Litigation: General Commercial categories), Benchmark Litigation, and others as a leader in the field, Jessie is widely regarded as one of the top product liability and environmental lawyers in the country. As chair of the Products Liability & Torts Practice at Bass, Berry & Sims, Jessie leads a cross-office team in representing clients ranging from Fortune 500 companies to privately-owned businesses.

Related Services

- Products Liability & Torts
- Litigation & Dispute Resolution
- Environmental
- False Claims Act
- Digital Health
- Utilities – Telecom, Energy & Water
- Business Disputes
- Healthcare Law

Accolades

- Chambers USA — Litigation: General Commercial (2023-2024); Environment (2020-2024), Recognized Practitioner (2016-2019)
- Benchmark Litigation — Local Litigation Star: Tennessee (2019-2024)
- Best Lawyers® — Nashville Product Liability Litigation: Defendants "Lawyer of the Year" (2025); Nashville Litigation: Environmental "Lawyer of the Year" (2021)
- The Best Lawyers in America© — Environmental Law; Litigation: Environmental; Natural Resources Law; Product Liability Litigation: Defendants (2007-2025)
- Expert Guides: Women in Business Law — Product Liability Category (2021-2022)
- Nashville Business Journal — "Best of the Bar" (2023)
- Nashville Business Journal — "Women of Influence, Trailblazer Category" (2015)
- Nashville Bar Association — President's Award (2014)
- Mid-South Super Lawyers (2009-2023)
- Top 50 Women Mid-South Super Lawyers (2011-2012, 2016, 2020-2021, 2023)
- Top 50 Nashville Super Lawyers (2021, 2023)
- Top 100 Tennessee Super Lawyers (2020-2021, 2023)
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- Vanderbilt Law School - J.D., 1993; Order of the Coif
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Differentiating Your Defense: Knowing How and When to Resolve Claims

Brad Marsh
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Differentiating Your Defense: Knowing How and When to Resolve Claims
Brad Marsh, Christopher Parkerson, and Christopher Hennessy

The adversarial system is the bedrock of the American judicial system. Yet this classic image of a defendant battling it out with a plaintiff in the court room belies many of the subtleties required of a modern defendant who might not be facing down a plaintiff alone or who does not want to go to trial. In litigation with multiple codefendants, what is in the best interest for the client might not necessarily be seeking victory at all costs at every stage. Instead, a wise defendant knows what battles to win, where to give ground, and most importantly, when to leave the case, especially before incurring the risks and costs of trial.

Trial Pitfalls
Before discussing the potential benefits of settling cases and off-ramping them early, it is important to highlight the potential dangers associated with staying in a case. The American Tort Reform Association has released their annual edition of Judicial Hellholes, covering what it considers to be the most egregious jurisdictions for plaintiff favoritism. Here are a few examples cited to illustrate the dangers of allowing a case to be decided by a jury. Georgia, which retained its top spot, had 39 verdicts of at least $10 million from 2019 through April 2023, including a $1.7 billion punitive damages award, with additional verdicts of $32.5 million, $40 million, and $80 million in June and August 2023.[1] This, in part, is caused by Georgia allowing "anchoring" by plaintiffs' attorneys.[2] "Anchoring" is the practice of asking for high damages to inflate verdicts.

While Georgia represents the extreme of what can happen when a case is pursued to trial, it still highlights the dangers of leaving liability determinations and damage awards to juries. Thus, it is critical for trial lawyers to have an overall trial strategy that focuses on achieving the best outcome for the client, and not one where the goal is to achieve victory at all costs.

The Winning Mindset
Too often, trial lawyersare focused on scoring wins at all costs. While trial advocates broadly no longer view "a negotiation as a second-best substitute for trial," they still can be caught up in that need to win.[3] However, in trying to win each individual battle, they may lose sight of the best interests for their clients. In short, they don't know where they are going, and may end up in front of a jury when they did not mean to.

The key to off-ramping a case before a jury trial is having the appropriate mindset. This mindset is not necessarily a "winning" one. Instead, it keeps the best interests of the client at the forefront. While it seems obvious, it is easy for trial lawyers to get lost scoring points and focusing on conceding nothing and striving to have a victory in every circumstance. The need to win every battle may result in losing the war.

Instead, a winning mindset may require counsel to take "losses." Not battling for every small piece of ground may seem to be conceding too much in a traditional adversarial mindset, however the long-term benefits of doing so may create the best result.

Four People at the Table
To off-ramp from a case before it arrives before a jury, four different parties all have to come to an agreement: the attorney, the defendant, the plaintiff, and plaintiff's attorney. Since an agreement needs to be reached, managing not just opposing counsel, but also their client and the trial lawyer's own client is paramount.

The main difficulty with this approach is that "[m]anaging conflict is like herding cats: disputants often do not follow directions, become upset, and can change direction at unexpected times."[4] These difficulties are only magnified

1 Judicial Hellholes 2023–2024, American Tort Reform Foundation 5-6 (2024).

2 Id. at 6.

3 See Jonathan M. Hyman, Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates be Wise Negotiators, 34 UCLA L. Rev., 863, 863–64 (1987).

4 Harry L. Munsinger & Donald R. Philbin, Jr., Why Can't They Settle? The Psychology of Relational Disputes, Cardozo J. of Conflict Resolution 311, 312 (2017 (discussing psychology of parties in relational mediations).

when in active litigation as people "become irrational when faced with conflict," and is full of uncertainly and stress which "only magnify[ies] their behavior."[5] In addition, since things are in active litigation, while a trial lawyer is attempting to reach a settlement, at the same time, they must prepare to resume to conflict at any moment.[6]

Communication
Throughout the trial process, a trial lawyer must consider how best to communicate with various parties. Sometimes it is difficult to switch from heated exchanges with opposing counsel to more rational settlement discussions.[7] From prelitigation discussions with opposing counsel, through post-summary judgment proceedings, one must consider the impact language has on convincing your opponents to come to the table to discuss settlement. Conversations with opposing counsel offer an opportunity to lay the foundations for successful resolution of the case.

Certainly, client's interests must be represented throughout the process, however, being cordial with opposing counsel and responding to reasonable requests for extensions and information without trying to battle them over every point will set your client up as the reasonable party. This becomes especially important when counsel for other parties are themselves trying to win every point no matter the cost.

Larger Picture
Consider the larger picture. As discussed above, trying to win every battle might result in losing the war once the case is before a potentially hostile jury in a hell-hole jurisdiction. Assessing the likelihood of success as opposed to reaching a negotiated settlement is a difficult task.[8] Not only do client expectations need to be managed, but opposing counsel may embellish their likelihood of success to you and their client.[9] Even when this is not the case, the path to arrive at settlement is full of dangers and the risk that the negotiations may end without a resolution.

As a way of avoiding the pitfalls of these difficulties, recognizing when to concede defeat on certain issues may be best for the client in the long term. This is easier said than done, especially since litigation is emotional, often distrust is rampant, and each side can be enraged with the other.[10] In this environment, it cannot be emphasized enough that being seen as the reasonable party is more important than winning every minor dispute in order to get the parties to the negotiation table.

Flexibility
Be flexible. Amid preparation for motion practice or a trial a plaintiff could approach with an offer or can be open to settle the case. Do not let the need to win get in the way of ending the case. For motion practice, having an issue go before a judge carries its own risks, and, especially in state court, even the most well-briefed issue may not carry the day. Therefore, when the opportunity arises to potentially end matters, at least hear the offer out and see what the client is willing to give. While it may be higher than an initial offer, given recent jury verdicts it can still be significantly less.

Controlling your own client can also be challenging. It can be difficult for a trial lawyer to "prod the client in what is so often the wise direction of settlement."[11] Clients take lawsuits personally.[12] Being flexible means not only finding every opportunity to pivot to settle, but to convince the client that this is the correct opportunity to do so. At the end of the day, sometimes it is too great a risk to entrust the fate of a client "to the inscrutability of a judge or the vagaries of a jury."[13]

Sample Considerations
The opportunity to offramp can occur at any stage of litigation. Below are some considerations one should consider at each stage of the case. While many of the considerations may seem obvious, those obvious points are what will help ground and reset the mindset that it is not about winning at all costs, it is about outcomes.

I. Prelitigation
Prelitigation offers the opportunity to determine who the likely parties to the suit are and begin laying the foundations of off-ramping. Begin by keeping open communications with opposing counsel. Keeping communication open also encourages parties to share information with each other without discovery disputes. The more information exchanges early on, the greater ability to assess the claim before proceedings even begin.

Remember, while no other party is on your side, it is important to avoid an "us v. them" attitude.

II. Initial Pleadings and Written Discovery
The initial pleadings offer the first formal opportunity to

5 Id.

6 James C. Freund, Putting in a Good Word for Compromise, 39 Alts. To the High Cost of Litig. 169, 182 (2021).

7 James C. Freund, Calling All Deal Lawyers–Try Your Hand at Resolving Disputes, 62 Bus. Law. 37, 38 (2006).

8 Id. at 41,

9 Id. at 42.

10 Id. at 41.

11 Id. at 38.

12 Id.

13 Freund, supra note 11, at 183.

establish for both the court and the other parties your reasonableness.

Construct the answer to the complaint carefully. While placing blame for the suit on the other parties may be tempting, in the long run such wording may come back to haunt the client. By not casting blame entirely on other parties, while at the same time demonstrating a relative lack of fault, a well-pled answer sets up off-ramping from the case. Overall, the careful answer shows that the client is not blaming any other parties, rather the blame lies elsewhere. A companion to the answer, a well written brief in support of a motion to dismiss establishes the narrative of the case. The focus is not to place blame on any other parties, rather it shows the lack of fault on the client's part. This tool also allows the client to convey their version of events at an early stage of the proceedings, differentiating themselves from other potential codefendants. Remember, the likelihood of success for this motion will be low. Motions to dismiss, especially in state court, generally fail unless the suit is totally frivolous. Plaintiffs also tend to amend their pleadings to correct the deficiencies in their pleadings that are highlighted by the motion to dismiss. Regardless, for the long-term goal of off-ramping, it is not necessary to win at this stage.

Like the motion to dismiss, the responses to initial discovery requests should be framed to show a lack of fault on the part of the client, rather than casting blame on other parties.

Finally, be willing to keep communicating with opposing counsel, especially if some or all of the codefendants are not willing to. Even if the first offer to settle is not reasonable, that channel of communication is open and shows a willingness to end the proceedings before trial.

III. Depositions and Experts

A deposition is an opportunity to minimize your client's role in the case. Frame depositions to support your theory of the case. Other witnesses can be used to redirect fault from the client. There is no need to blame the other parties, but a lack of fault from the client creates opportunities for different inferences of fault to develop.

Similarly, expert depositions offer even more opportunities to weaken the opposing party's case. Their experts can become your experts. A well prepared and carefully run deposition can have their experts supporting a lack of liability for your client. Your experts can also be used to minimize the impact that the opposing experts have. These then are combined with Daubert motions to reduce the evidence a plaintiff can rely on and continue to undercut the strength of the claim.

Remember the ultimate goal is not to win at this stage. If a Daubert motion or something similar removes all evidence of the claim against your client, that is an added bonus. The goal is to chip away at claims to make them more likely to settle. The Daubert motion might not have been successful, but if it undercut the expert enough that it can push the parties toward settlement.

IV. Motion for Summary Judgment

The key at the summary judgment stage is to remember the goal. It is not necessarily to win, but to find the best outcome. Sometimes, it works out that the motion will be successful and remove the claim. But, the more likely outcome is that some parts of the claim, if not all, survive. Do not fall into the trap of trying to have the whole case tossed if you cannot make a reasoned argument for it. This reduces your credibility, and a court is less likely to grant the motion on the strong claims if those claims are mixed in with particularly weak claims.

A strong motion for summary judgment or partial motion is a negotiation tactic. A strong, pending motion give your adversary an opportunity to convince their client that the case may be worth settling. A good motion shows how the claim against your client can be reduced, which in turn makes the overall claim weaker. A pending motion is an easier time to try to negotiate a settlement because the outcome is still uncertain. Leverage the uncertainty and risk of loss to the plaintiff.

V. Motion in Limine

Motions in limine present yet another an opportunity to soften the other party's case and to bring them to the table for negotiation. If an important witness or piece of evidence is not able to come in, a party is more likely to negotiate. Note, the key here is to again consider the mindset for the best outcome. Will not having this piece of evidence make it worth trying to resolve the case at trial? Regardless of this piece of evidence, how would the client and the client's defenses present to a jury?

It may seem like going to trial is inevitable, however the prior efforts to be reasonable can build up. When the emphasis is not to win every battle, but to show relative lack of fault, the opposing party may be willing to attempt settlement. Even if this motion is lost, the client may be more willing to enter into settlement talks to avoid a jury trial.

VI. Eve of Trial

The key to this mentality is recognizing that with the foundation built throughout the process of being open to communications and being reasonable, it is always possible to offramp. Always try to find the individual between the client, the plaintiff, and plaintiff's counsel who seems reluctant to settle and see what it takes

to bring them to the table. At this point may just not be possible to settle and a jury trial is inevitable. But keeping that mindset of do what is best, not always seek every victory gave the most possible chances to try to end proceedings favorably for the client.

Conclusion

Much of the mentality to try to off-ramp a case before a jury trial seems obvious. As trial lawyers though, the need to win every argument is baked into training and how we are taught to practice law. While this mentality may serve well in the difficult cases where no parties wish to speak to one another, it can come at the detriment of the client in many others. Instead of trying to win at all stages, allowing compromise to occur and acting reasonable may bear more fruit, and the client can avoid a nuclear verdict.

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C. Bradford Marsh focuses on the defense of catastrophic injury, property damage and commercial cases. His practice is diverse and includes products, premises, professional malpractice and general liability cases. Brad represents automobile, electrical and heavy equipment product manufacturers, along with individual and corporate clients in Georgia and across the United States.

Based on four decades of litigation experience, Brad is well equipped to handle his clients' many different matters. He has handled more than 50 jury trials, as well as numerous appeals. Although he has extensive trial experience, his strong negotiating skills have led to favorable resolutions in high exposure matters, saving his clients significant amounts of time and resources.

Brad is a member of many industry organizations and is often asked to write for and speak to these groups. He has also provided testimony at the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States regarding changes to the Federal Rules of Civil Procedure.

For many years Brad has served on the Review Panel for the State Bar of Georgia's Disciplinary Board and served as chair in 2004. He has also served on the Formal Advisory Opinion Board of the State Bar of Georgia and was elected chair in 2014. Brad was recently appointed by the State Bar President to serve on the Institute of Continuing Judicial Education Board of Trustees and the State Bar of Georgia Committee on Professionalism.

Practice Areas

- Automobile Litigation
- Catastrophic Injury & Wrongful Death
- Commercial Litigation
- Construction Law
- Employment Counseling & Litigation
- Environmental Law
- Medical Malpractice
- Nursing Home/LTC Litigation
- Premises Liability
- Products Liability
- Professional Liability
- Trucking and Transportation Litigation

Awards / Recognitions

- 2024 Chief Justice Thomas O. Marshall Professionalism Award
- Georgia Super Lawyer, 2005-Present
- The Best Lawyers in America©, 2016-Present
- "Lawyer of the Year," The Best Lawyers in America©, 2017, 2020, 2024
- Fellow, Litigation Counsel of America
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The New Standard for Accommodating Religious Beliefs in the Workplace

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Groff v. DeJoy: The New Standard for Accommodating Religious Beliefs in the Workplace
Melissa Muro LaMere

Title VII requires employers to reasonably accommodate an employee's "religious observance and practice" unless the employer shows that such accommodation would cause "undue hardship on the conduct of the employer's business." Under the previous de minimis standard for showing undue hardship, employers were not obligated to provide a religious accommodation if it posed more than a "de minimis cost" on the employer. The "de minimis cost" standard set a low bar for employers to meet—especially in comparison to the much higher standard under the Americans with Disabilities Act (ADA), which requires a showing that the accommodation imposes "significant difficulty or expense" to satisfy the undue hardship standard.

In Groff v. DeJoy, the U.S. Supreme Court ruled that employers must reasonably accommodate employee religious beliefs unless doing so would result in a substantial increase to the cost of doing business. This article explores how the Supreme Court's ruling alters the prior de minimis standard and provides a brief summary of relevant opinions applying the new standard across the country.

Trans World Airlines, Inc. v. Hardison: the de minimis standard
In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), an employee belonging to the Worldwide Church of God requested not to be scheduled on Saturdays to observe the Sabbath. Id. at 67. Hardison, like other employees, was subject to a seniority system included in a collective-bargaining agreement. Id. The airline originally granted Hardison's request because his seniority permitted him to be transferred to a different shift. Id. at 68. However, after Hardison requested and received a transfer to a different building with a separate seniority list, the airline could no longer accommodate the request because Hardison had insufficient seniority to bid for a shift where he did not need to work on Saturday. Id. Hardison was later discharged for refusing to report to work after the airline declined his proposal to only work four days a week. Id. at 69. Hardison then brought an action against the airline, alleging religious discrimination in violation of Title VII. Id.

The Supreme Court ruled that the airline made reasonable efforts to accommodate Hardison's religious observances, reversing a decision from the Eighth Circuit. Id. at 84. In the opinion, the Supreme Court held that the airline was not required to violate its seniority system and that the alternative plans of replacing Hardison with supervisory personnel or paying premium wages constituted an undue hardship to the airline. Id. The Supreme Court specifically held that "undue hardship" means "more than a de minimis cost" to the employer.

Under Hardison, undue hardship has been found to exist where, for example, the proposed accommodation would:

• "violate federal law" See Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830-31 (9th Cir. 1999) (holding that employer was not required to accommodate applicant's religiously based refusal to provide his social security number where employer sought it to comply with Internal Revenue Service and Immigration and Naturalization Service requirements);

• "impair workplace safety" See EEOC v. GEO Grp., Inc., 616 F.3d 265, 273 (3d Cir. 2010) ("A religious accommodation that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison.");

• "diminish efficiency in other jobs" See Brown v. Polk Cty., Iowa, 61 F.3d 650, 655 (8th Cir. 1995) (en banc) (holding that allowing employee to assign secretary to type his Bible study notes posed more than de minimis cost because secretary would otherwise have been performing employer's work during that time); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 13435 (3d Cir. 1986) (no undue hardship where "efficiency, production, quality and morale . . . remained intact during [employee's]

absence");

• "cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work" See Bruff v. N. Miss. Health Serv., Inc., 244 F.3d 495, 501 (5th Cir. 2001) (requiring coworkers of plaintiff mental health counselor to assume disproportionate workload to accommodate plaintiff's request not to counsel certain clients on religious grounds would involve more than de minimis cost); EEOC v. BJ Servs. Co., 921 F. Supp. 1509, 1514 (N.D. Tex. 1995) (stating employer "was not required to deny other employees their vacation days so that they could work in place of [plaintiff]" and that cost of hiring an additional worker was more than de minimis).

Groff v. DeJoy: New Standard, or Clarification?

The Supreme Court agreed to take up the issue again in Groff v. DeJoy, 600 U.S. 447, 143 S. Ct. 2279, 216 L. Ed.2d 1041 (2023). In that case, a Christian letter carrier alleged that the U.S. Postal Service ("USPS") failed to accommodate his religious objection to delivering packages on Sundays. The USPS offered to find employees to swap shifts with him; but, on numerous occasions, no co-worker would trade shifts with him. Groff requested that the USPS exempt him from Sunday work; but the USPS declined, stating that his requested accommodation would cause an undue hardship. Groff did not work when scheduled on Sundays; and, as a result, USPS instituted progressive discipline proceedings. During the disciplinary process, USPS proposed another alternative: pick a different day of the week to observe the Sabbath.

Groff eventually resigned in 2019, and sued USPS under Title VII of the Civil Rights Act of 1964, claiming USPS failed to reasonably accommodate his religion because the shift swaps did not fully eliminate the conflict. The district court concluded the requested accommodation would pose an undue hardship on USPS and granted summary judgment for USPS. Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *10, 12 (E.D. Pa. Apr. 6, 2021). ("[A]n employer does not need to wholly eliminate a conflict in order to offer an employee a reasonable accommodation."). The district court further noted that Groff was offered the chance to swap shifts with other employees and concluded the USPS offered Groff a reasonable accommodation, even if he was "not happy" with it because voluntary shift swapping could be a reasonable accommodation. Groff appealed the court's decision, which the Third Circuit affirmed. Groff v. DeJoy, 35 F.4th 162, 175–76 (3d Cir. 2022).

The Supreme Court sided with Groff in a unanimous opinion issued in June 2023. Groff v. DeJoy, 600 U.S. 447, 143 S. Ct. 2279, 216 L. Ed.2d 1041 (2023). The Court explained that now, "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." Groff, 143 S. Ct. at 2295. In evaluating whether certain facts meet that clarified standard, the Supreme Court stated that, "courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'" Id.

In clarifying the standard, the Supreme Court emphasized that certain kinds of costs are irrelevant in evaluating undue hardship. For example, the Supreme Court explained that "not all impacts on coworkers are relevant," but only "worker impacts" that go on to "affec[t] the conduct of the business." Id. at 2296. And "it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary." Id. at 2297. "[N]o undue hardship is imposed by temporary costs of voluntary shift swapping, occasional shift swapping, or administrative costs." Id. at 2296. The Supreme Court noted that employers might be required to consider other accommodations, "including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees." Id. at 2297. Although the Supreme Court removed some categories of costs from consideration, it left others untouched, including non-economic costs. See Id. at 2290 (citing Trans World Airlines, 432 U.S. at 83 n.14, 97 S.Ct. 2264 (considering violation of seniority rights, which are non-economic costs and cited favorably by Groff)).

The Supreme Court ultimately rejected bright-line rules in evaluating what amounts constitute "substantial cost" under Title VII. Instead, the Court held that it is "appropriate to leave it to the lower courts to apply [its] clarified context-specific standard, ..." Groff, 143 S. Ct. at 2297. The Supreme Court stated that "courts should resolve whether a hardship would be substantial in the context of an employer's business" as a matter of "common sense." Id. at 2296.

Selected Cases Applying Groff v. DeJoy

The following is a summary of select cases applying the standard from Groff v. DeJoy to Title VII religious accommodation cases nationally.

Lee v. Seasons Hospice, No. 22-CV-1593 (PJS/DJF), 2023 WL 6387794 (D. Minn. Sept. 29, 2023):

- Hospice employees sued under Title VII, Minnesota Human Rights Act, and ADA for COVID-19 vaccine mandate.
- Employer argued it suffered undue hardship due to legal risk associated with potential non-compliance with anticipated CMS regulation requiring vaccine mandate at healthcare facilities.
- Court denied employer's motion to dismiss on basis of undue hardship defense because court found application of defense is a fact-intensive inquiry.

Brokken v. Hennepin Cnty., No. CV 23-1469 (JRT/DJF), 2024 WL 1382150 (D. Minn. Mar. 29, 2024)

- Former public defender resigned after refusing COVID-19 vaccine mandate and accommodation of weekly testing. Sued under Title VII, among other claims.
- Employer moved to dismiss.
- Plaintiff objected based on bodily autonomy beliefs and the court found no conflict between beliefs and work requirements because of testing option. "[W]hile employers must make reasonable accommodations for employees' bona-fide religious practices, employers need not suffer 'undue hardship.' … The Supreme Court recently redefined undue hardship to mean "substantial increased costs in relation to the conduct of [the employer's] business."
- Court granted motion to dismiss because employee failed to plead an adverse employment action (she quit) and undue burden of remote work accommodation was too great even at motion to dismiss stage on the specific facts presented.

Bordeaux v. Lions Gate Ent., Inc., No. 222CV04244SVWPLA, 2023 WL 8108655 (C.D. Cal. Nov. 21, 2023)

- Actress was terminated after refusing to comply with COVID policy.
- Employers moved for summary judgment, and district court granted motion on undue hardship grounds.
- "[C]ourts must apply the [undue hardship] test in a manner that takes into account all the relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer."
- Non-economic impacts on coworkers can be considered, so long as those impacts are not the result of employee animosity to a particular religion, to religion in general, or the notion of accommodating religious practice.
- Relevant considerations in determining whether undue hardship exists: coworker safety, costs associated with replacing cast and crew that became sick, cost of production delays, logistical issues due to exposure.
- "The Supreme Court's Groff opinion was intended as a clarification, and not as a significant revision to the relevant body of law on this topic."
- "Numerous courts have found the possibility of an unvaccinated individual getting others sick to be a non-speculative risk that a court may consider when performing an undue hardship analysis."

DeVore v. Univ. of Kentucky Bd. of Trustees, No. 522CV00186GFVTEBA, 2023 WL 6150773 (E.D. Ky. Sept. 20, 2023)

- Former university employee sued over COVID policy requiring vaccine or weekly testing. Employee sought remote work accommodation or additional staff member.
- Duties of employee's role included being the "face" of the office and being present to answer questions and advocate for students, faculty, and staff.
- Court granted employer's motion for summary judgment and held employer had established undue hardship.
- "[A]n employer can show an undue hardship by showing that an accommodation would substantially burden the employer's overall business."
- "[I]mpacts on coworkers are relevant only to the extent that they affect the employer's overall business, and coworker animosity to a religious practice cannot amount to an undue hardship."

Bushra v. Main Line Health, Inc., No. CV 23-1090, 2023 WL 9005584 (E.D. Pa. Dec. 28, 2023)

- Physician sued health care system where he worked as a contractor for religious discrimination based on COVID-19 vaccine requirement.
- Employer moved for summary judgment, court granted motion based on undue hardship due to health and safety of patients and staff, and applicable CDC guidelines.
- "The employer must demonstrate that the accommodation 'would result in substantial increased costs in relation to the conduct of its particular business.'"
- "The court takes judicial notice that COVID-19 caused a deadly global pandemic at a scale unseen in a century. As of this writing, the disease has killed over one million people in the United States since February 2020."

Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-CV-02462-JMS-KMB, 2024 WL 1885848(S.D. Ind. Apr. 30,

2024)

Former teacher brought action alleging that public school employer's decision to terminate his employment for refusing to follow school's guidelines for addressing transgender students by their chosen first names and pronouns in school's database was result of discrimination on basis of his religious beliefs and retaliation for seeking accommodation, in violation of Title VII.

The United States District Court for the Southern District of Indiana summary judgment in corporation's favor, and United States Court of Appeals for the Seventh Circuit affirmed.

The United States Court of Appeals for the Seventh Circuit subsequently denied petition for rehearing and rehearing en banc but vacated its prior opinion and judgment and remanded for District Court to apply clarified standard applicable to Title VII religious accommodation cases in light of new Supreme Court precedent.

The district court stated granted the employer's motion for summary judgment, finding it had established undue hardship:

> "As the Supreme Court held in Groff, analyzing undue hardship must be done in the context of an employer's particular business. And as the Court has explained, that context is [employer's] mission to foster a supportive learning environment for all students. The Court thus analyzes to what extent the [employee's preferred] [a]ccommodation so undermined the [employer's] legitimate mission as to create a substantial increased cost, and hence an undue hardship. . . . And, given that Mr. Kluge does not dispute that refusing to affirm transgender students in their identity can cause emotional harm, this harm is likely to be repeated each time a new transgender student joins Mr. Kluge›s class (or, as the case may be, chooses not to enroll in music or orchestra classes solely because of Mr. Kluge's behavior). As a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of all of its students, it is incurring substantially increased cost to its mission to provide adequate public education that is equally open to all."

Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-CV-02462-JMS-KMB, 2024 WL 1885848 (S.D. Ind. Apr. 30, 2024)

Hebrew v. Texas Dep't of Crim. Just., 80 F.4th 717 (5th Cir. 2023)

- Former public employee, a follower of the Hebrew Nation religion who had worked as a correctional officer for the Texas Department of Criminal Justice, brought a Title VII suit against former employer and related parties, alleging religious discrimination and failure to accommodate his religious practice in connection with termination after former employee had refused to cut his hair and beard in violation of his religious vow to keep his hair and beard long.
- Employer alleged accommodation imposed undue hardship because of safety risks related to employee's long hair and beard.
- Court rejected employer's arguments, finding that employer permitted women employees to have long hair and allowed men to have shorter beards, which interfered with safety equipment in same way as plaintiff's long beard.

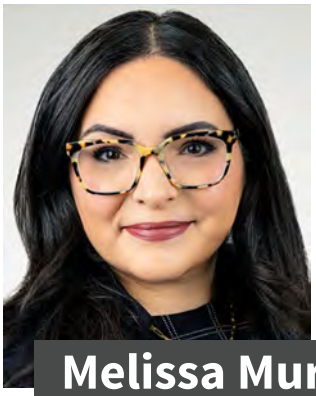
V. v. Vilsack, 2024 WL 1155256 (E.E.O.C. Mar. 7, 2024)

Complainant alleged his employer, the Department of Agriculture, discriminated against him based on his religion when it did not exempt him from a mandatory training about the need to treat all customers and employees with courtesy and respect, including members of the LGBTQI+ community. The employee filed an appeal with the Equal Employment Opportunity Commission (EEOC)

The EEOC affirmed the Agency's decision, and discussed the undue hardship at length:

> An accommodation may impose an undue hardship on the conduct of an employer's business if it interferes with the employer's efforts to meet its other legal obligations under Title VII or other equal employment opportunity laws. Thus, the Commission has recognized that it would pose an undue hardship to provide religious exemptions from training on EEO laws and internal anti-discrimination policies because "an employer needs to make sure that its employees know about and comply with such laws and workplace rules." EEOC's Compliance Manual, Section 12, Religious Discrimination (Jan. 15, 2021) at Example 55; see also Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606-08 (9th Cir. 2004) (holding that it would have constituted undue hardship for employer to accommodate employee by eliminating portions of its diversity program to which employee raised religious objections; to do so would have "infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce"). Indeed, Title VII requires employers to take steps to prevent discriminatory harassment, and they may be held liable if they fail to do so. See Vance v. Ball State University, 570 U.S. 421, 448-49 (2013) (plaintiff

can “prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place”).



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Melissa Muro LaMere is an employment and business litigation attorney, licensed to practice in California, Arizona, and 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.

Services

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

Representative Experience

- Represented healthcare client in dispute with former employee alleging disability discrimination, retaliation, and failure to accommodate claims
- Extensive experience defending business clients before EEOC and state agency in response to allegations of discrimination from current and former employees
- Represented American medical device company in its defense of allegations of trade secrets misappropriation, tortious interference with a contract, civil conspiracy, and copyright infringement
- Represented American medical device company in the Eight Circuit Court of Appeals, arguing for affirmation of a District Court ruling involving whether an executed offer letter, employee agreement, and repayment agreement comprised a single contract, such that the forum clause in employee agreement governed disputes arising out of or related to any of the three documents

Awards and Recognitions

- The Best Lawyers in America®: Ones to Watch, Commercial Litigation & Litigation – Labor and Employment (2021-2025), Product Liability Litigation – Defendants (2025)
- 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)

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- 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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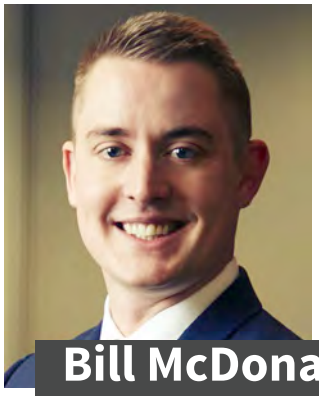

Whose Surrogate Is It Anyway?

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The Insider's Lens – Demonstrative Evidence and Surrogate Studies in Litigation
Justin Weiner and William McDonald III

Demonstrative evidence is a tool harnessed by litigants to ultimately make an impression on the jury. Parties use demonstrations to help the jury establish context for the facts ultimately at issue in the case. Exhibits can include graphs and charts, reconstruction animations, and – namely relevant in the products liability sphere – surrogate studies. This article will discuss the hurdles that litigants must jump to get demonstrative evidence admitted.

Generally, demonstrative exhibits are used to explain or illustrate testimony or other evidence that is already in the record. Tritek Technologies, Inc. v. U.S., 67 Fed. Cl. 727, 729 (2005). In practice, it has grown to take on two connotations. First, it is broadly used to describe any physical, non-fact specific evidence under the sun. Under these circumstances, the term is very vague. This often leads to confusion when it is time to decide whether the evidence will be available to the jury during deliberations. Baugh ex rel. Baugh v. Cuprum S.A. de C.V., 730 F.2d 701, 706 (7th Cir. 2013) citing Finley v. Marathon Oil Co., 75 F.3d 1225, 1231 (7th Cir. 1996). More narrowly defined, and most relevant for the scope of this article, demonstrative evidence is a "persuasive, pedagogical tool created and used by a party as part of the adversarial process to persuade the jury." Baugh ex rel. Baugh v. Cuprum S.A. de C.V., 730 F.3d at 706. In this framework, demonstrative evidence plays a supporting role. It is used to help a jury understand the fact-specific evidence that has already been admitted. Id. at 706-7.

Surrogate studies can be a type of demonstrative exhibit fitting squarely into the second category. In the product liability world, they are a tool "employed by biomechanical engineers to understand the interaction between a person and a product." Lyons v. Leatt Corporation, 322 F.R.D. 327, 334 (N.D. Ind. 2017). They are conducted by studying how surrogates, or persons "of similar size to [the victim]", "interact with the product, with the goal of determining how the victim's injuries were caused." Bunch v. Pac. Cycle, Inc., 2014 WL 8850054, at *2 (N.D. Ga. Apr. 14, 2014). Researchers look at what motions were necessary to cause the victim's injuries, and how the surrogate interacts with the product in several scenarios. Based on these observations, researchers can determine whether the victim's injuries were caused by the product used in a normal fashion, or if they resulted from misuse. Id. at *7-*10. These studies are particularly relevant in automobile crash testing and modeling. Id. at *8. When using surrogate studies, great care must be taken to ensure as much accuracy as possible to best relate the surrogate study to the case facts.

To be admissible, demonstrative evidence must be authenticated by testimony, and it must have some relation to the case. McCormick, Evidence § 179. As they are generally entrusted to exercise reasonable control over witness examination and presenting evidence, trial court judges are also entrusted to control the admissibility of demonstrative evidence. Note to Fed. R. Evid. 611(a). District court judges air on the side of admission so long as the demonstrative exhibit is "relevant and probative." To have probative value, the conditions of the experiment must have been substantially similar to the conditions of the real-life transaction. United States v. Baldwin, 418 F.3d 575, 579–80 (6th Cir. 2005). However, perfect identity between actual and experimental conditions is not required, and dissimilarities between the two "affect the weight of the evidence, not its admissibility." Id. citing Persian Galleries, Inc. v. Transcon. Ins. Co., 38 F.3d 253, 258 (6th Cir. 1994) (emphasis added). In the Persian Galleries case, the court was tasked to determine whether discrepancies in a videotaped reenactment of a theft rendered the demonstration inadmissible under the substantial similarity test. The court admitted the demonstration and opined that the "alleged discrepancies between the reconstructed crime site and the conditions as they may have existed on the night of the theft reflect, not upon the admissibility of the evidence, but rather upon its credibility, an assessment assigned exclusively to the discretion of the jury." Persian Galleries, Inc. v. Transcon, Ins., 38 F.3d at 258.

When "demonstrative evidence is offered only as an illustration of general scientific principles, [and] not as a reenactment of disputed events," it is not required to pass the muster of the substantial similarity test. Muth v. Ford Motor Co., 461 F.3d 557, 566 (5th Cir. 2006). Courts only require this type of demonstrative evidence to "not be misleading." Id. One way for a general scientific principle demonstration to be misleading is if it "resembles the disputed accident", for this is why the substantial similarity test exists in the first place. Id. In Muth v. Ford Motor Co., Ford sought to admit a video depicting its theory of the car accident at issue. It argued that the video was offered only to show general scientific principles. The court ruled that the demonstrative evidence was inadmissible because it resembled the facts of the case, presented its own contested theory of the accident, and was too prejudicial and misleading. Id. at 567.

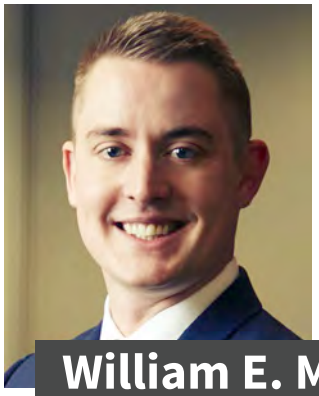
In addition to considering the substantial similarity test, "[c]ourts must carefully weigh whether the [demonstrative] exhibits are unduly prejudicial." This is because the jury will interpret demonstrative exhibits as "real-life recreations" of substantive evidence. Rodriguez v. Vill. of Port Chester, 535 F. Supp. 3d 202, 219 (S.D.N.Y. 2021). As with all evidence, courts may exclude a relevant demonstrative exhibit if "its probative value is substantially outweighed by… unfair prejudice, confusing the issues, or misleading the jury." Id. citing Fed. R. Evid. 403. However, exclusion of the demonstration is not the only option. A court may also admit the evidence and give a limiting jury instruction. Rodriguez v. Vill. of Port Chester, 535 F. Supp. 3d at 219.

Parties seeking to admit demonstrative evidence must also lay a foundation of "fairness and accuracy". U.S. v. Walema, 194 F.3d 1319 (Table) at *1 (9th Cir. 1999) citing United States v. Myers, 972 F.2d 1566, 1579 (11th Cir. 1992). One way to lay this foundation is to provide testimony that the demonstrative evidence is a fair and accurate depiction of the original incident. Id. For example, if a demonstration is prepared by someone who relied heavily on hearsay, that demonstration is not likely a fair and accurate depiction of the original. Redwind v. Western Union, LLC, 2016 WL 1732871, at *15 (D. Or. May 2, 2016).

In addition to considering potential admissibility issues, litigants must also ponder disclosure of demonstrative evidence relied upon or created by any of their experts. Authority is split on this issue. Some courts hold that demonstrative evidence is held to the standard of Fed. R. Civ. P. 26. Under this standard, "[a]ny and all proffered evidence (demonstrative or not) is admitted or excluded based on the same rules of evidence… any exhibits that will be used to summarize or support an expert opinion must be included in a timely expert report." Dahlberg v. MCT Transp., LLC, 571 Fed.Appx. 641, 647 (10th Cir. 2014) (emphasis in original) (internal quotations omitted). Courts who follow this model typically find a failure to disclose the demonstrative exhibits prejudicial because it deprives the opposing side of the ability to question the expert about methodologies. Lasher v. Wipperfurth, 2018 WL 10911500, at *2 (D. Colo. Nov. 3, 2018).

On the other hand, other jurisdictions hold that demonstrative evidence is not subject to the same scrutiny as other forms of evidence. Courts following this approach generally find that "[d]emonstrative exhibits do[ ] not fit comfortably within the disclosure requirements… since [they] would not normally exist at the outset of the case." Rodriguez v. Vill. of Port Chester, 535 F. Supp. 3d at 217. Courts operating within this framework do still agree that there is a "great desirability of making [demonstrative evidence]… available to the defense a reasonable time before trial." U.S. v. Dioguardi, 428 F.2d 1033 (2d Cir. 1970). See also Vandenheuvel v. Fitzpatrick Elec. Supply Co., 2004 WL 1080178, at *2 (Mich. Ct. App. May 13, 2004).

Demonstrative evidence can be of great value to litigants, especially those involved in highly technical and fact-specific matters. But this tool becomes ineffective when parties fail to adhere to the procedural requirements required to admit the demonstration into evidence, leaving the jury's depiction of the incident up to the typical "he said, she said" nature of litigation. Given the incongruity of court practice, any party seeking to admit demonstrative evidence would be well-served to take great caution in admitting its exhibits.



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William ("Bill") McDonald, III focuses his practice on commercial, financial, and product liability litigation. Bill achieved a total defense jury-verdict in a product liability trial as lead counsel for a major automotive manufacturer involving claimed damages over $100M, and has second chaired an arbitration to a successful award of over $3M.

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Representative Matters

- As lead counsel obtained a full defense verdict in South Bend, Indiana on multiple automotive product liability claims including defective and unreasonably dangerous design, failure to warn, and failure to instruct and a punitive damage claim against a major automotive OEM.
- Secured complete dismissal without payment in automotive product liability suit against major automotive OEM involving three fatalities in Michigan State Court.
- Currently serving as lead national air bag coordinating counsel for a major OEM.
- Lead responsibility for coordination of discovery and depositions, including company witnesses, experts and 30(b)(6) depositions, in the Takata MDL for a major OEM.
- Prepared discovery and dispositive motions in the Takata MDL for a major OEM.
- Coordinated depositions of plaintiff's putative class representatives in the Takata MDL for a major OEM.
- Prepared and conducted dozens of 30(b)(6) depositions and expert depositions for major companies, including major OEM clients.

Honors and Awards

- Inclusion in The Best Lawyers in America©: Product Liability Litigation – Defendants (2025)
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- DBusiness Top Lawyers (2023 – Present)
- Michigan Lawyers Weekly, Leaders in the Law (2022)
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