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A Fish Out of Water? Trial Lawyers and Mediation Advocacy Skills

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The "Vanishing Trial" and Mediation Advocacy Skills

Tony Rospert

The term "vanishing trial" was coined by Patricia Lee Refo in her groundbreaking study, which found that only 1.8% of federal civil cases were disposed of by trial in 2002.[1] This trend has continued, and in 2015, the number had decreased to less than 1%.[2] A Law360 article applauds the disappearance of jury trials because "lawyers who try cases to juries are 'con men and charlatans' and jurors are 'gullible.'"[3] The author further states that "[t]he skill of trying cases to a jury is dying for good reasons of law, procedure and market alternatives."[4] One of the main reasons cited for the decline in the number of trials is the proliferation of mediation.[5]

If mediation is displacing the jury trial as the preferred forum for resolving legal disputes, what does that mean for trial lawyers and trial skills? The Law360 author views the loss of trial skills as "a disappointment to a certain class of trial lawyers who feel they could convince anyone of anything. But that skill … is of no value."[6]

Indeed, some studies contend that the skills and assumptions required to successfully mediate are actually incompatible with those necessary to achieve success as a trial lawyer.[7] Other commentators believe that advocacy skills in mediation are quite different than those in trial advocacy.[8]

I disagree. Many of the characteristics and skills that make us successful trial lawyers also make us effective advocates in mediation.[9] Trial advocacy skills are readily transferable and advantageous in other advocacy forums, particularly mediation. Notwithstanding the various studies and trends, the skills we have learned and developed as trial lawyers remain critical tools and may become even more important in the face of diminishing trials. We therefore should not draw a distinction between advocacy skills used outside the courtroom and those used within, but recognize that such skills are, in fact, one and the same; it is only the stage upon which we use them that has changed.

Transferable Trial Skills

In-house counsel would be well-served to use trial lawyers in mediation because many of the skills and characteristics indicative of effective mediation advocacy overlap with those used at trial. Too often, clients lose sight of the full value that trial lawyers can bring to the mediation table. Instead, they defer to high-priced litigators who, while highly specialized, may lack the comparative experience essential to informed decision-making.[10] Regardless of the reason, "the lawyer's lack of trial competence introduces an additional element of risk unrelated to the merits and decreases the settlement value of the case."[11]

In turn, we as trial lawyers must refine our skills for the mediation forum. Part of being an effective advocate is the ability to adapt to changing circumstances. Thus, trial lawyers must build on, rather than reject, their trial skills in the mediation context, and use those skills to optimize the effectiveness of their advocacy during a civil discussion about the case.

1 Patricia Lee Refo, "The Vanishing Trial," 30 ABA Litigation Online: The Journal of The Section of Litigation, 1-4 (Winter 2004).

2 See U.S. District Courts: Judicial Business 2015, "Trials Completed, https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2015 (last visited January 22, 2020).

3 J.B. Heaton, "Jury Trials Are In Decline For Good Reason," Law360 (April 18, 2019).

4 Id.

5 Thomas J. Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,'" 1 J. EMPIRICAL LEGAL STUD. 843 (2004).

6 J.B. Heaton, "Jury Trials Are In Decline For Good Reason," Law360 (April 18, 2019).

7 See, e.g., Dorothy J. Della Noce et al., "Assimilative, Autonomous or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection," 3 Pepp. Disp. Resol. L.J. 11 (2002).

8 Richard M. Markus, "Fundamental Misconceptions about Mediation Advocacy," 47 Clev. St. L. Rev. 1 (1999) available at https://engagedscholarship.csuohio.edu/clevstlrev/vol47/iss1/3.

9 See Judge Mark W. Bennett, "Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker 'I Am a Litigator,'" Review of Litigation, Vol. 33, No. 1 (May 1, 2014).

10 Tracy Walters McCormack & Christopher John Bodnar, "Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience," 23 Geo. J. Legal Ethics 155 (Winter 2010).

11 Id.

Preparation

A major attribute that separates trial lawyers from other advocates is our ability to prepare. Preparation allows a trial lawyer to streamline a case for presentation to the trier of fact. Highly effective trial lawyers jettison redundant witnesses, unnecessary exhibits, repetitive questions and causes of action that detract from the principal theory of recovery. This cannot be accomplished successfully without dogged preparation, a skill that is not only critical to trial success, but also is necessary for an effective mediation presentation. Indeed, trial lawyers understand the need to prepare for a jury trial and have developed effective preparation techniques that enable us to react to the unexpected at trial and that will also serve us well in mediation.

Just as for a trial or any other dispute resolution procedure, preparation is critical for effective mediation. Trial lawyers appreciate the need to prepare for mediation in the same manner as if they were preparing for a jury trial. We cannot wait until the last minute to meet with our client and analyze critical arguments that will help us achieve a successful resolution. It is also helpful to prepare a timeline and theory of the case in advance of the mediation. In addition, we should identify the evidence supporting our client's position and hone the arguments we intend to present to the mediator and the opposing party during the joint session. Involving trial lawyers in a mediation session helps instill confidence in the process because we understand the importance of preparation and have "done the homework" to achieve a successful resolution.

Grit

Trial lawyers have what psychology professor and author Angela Duckworth refers to as "grit" – they "work strenuously toward challenges, maintaining efforts and interest … despite failure, adversity, and plateaus in progress."[12] We keep working, keep trying and keep going, appreciating the need to go to great lengths to track down information that will help bring a case to a successful resolution. A trial requires a lot of hard work, and sometimes it can feel like it will drag on endlessly. But we are prepared to fight until the bitter end, never giving up until every avenue has been exhausted and not allowing ourselves to be easily deterred or discouraged by setbacks or losses.

Grit separates trial lawyers from other litigators and allows us to be successful mediation advocates. Like a trial, mediation is rarely a simple process where a resolution occurs without diligent effort and determination. Trial lawyers are successful mediation advocates because we never give up too soon. If a matter can't be resolved the day of the scheduled mediation, we persistently continue the process by caucusing with the mediator later. The fact is that parties are likely to compromise further given time and persistent efforts by their lawyers. Trial lawyers succeed because they are tenacious on the mediation stage and work tirelessly to achieve a successful resolution.

Reasonableness

Great trial lawyers pride themselves on being both zealous and reasonable. Sometimes there is more than one equitable conclusion. A trial lawyer has the skill to figure out which one is more suitable to resolve an issue and is quick to suggest practical solutions to problems that arise in trial; less experienced advocates often create more problems. Trial lawyers have the confidence and experience to suggest workable solutions, no matter how difficult the problem. We see reasonableness as a sign of strength, not weakness.

Mediation is a problem-solving process. "Lawyers with jury trial experience bring 'added value' in terms of understanding the burdens and risks assumed with the trial experience, which makes them (usually) more pragmatic. The experience as an advocate can be invaluable as well, to make them effective in the mediation process."[13] An attorney without trial experience is often a poor evaluator of claims and, as a result, can be unreasonable on the mediation stage. Trial lawyers, on the other hand, have the experience to appreciate the magnitude of the consequences if a case does not resolve at the mediation and can counsel our clients accordingly. We also do not cling to a certain viewpoint or solution to the exclusion of a more appropriate one. Understanding the trial process allows mediation advocates to be more pragmatic, develop reasonable solutions and better counsel clients toward a settlement.

Judgment

Effective trial lawyers keep their cool under pressure and exhibit impeccable judgment. In every phase of a jury trial, a good trial lawyer knows when to hold their cards and stay silent. In discovery, we do not take positions based on weakness or file unnecessary discovery motions. We identify what is needed in the discovery process, decide how to obtain that information and gather it, and then we make decisions based upon sound judgment. During jury selection, a shrewd trial lawyer does not argue with potential jurors; they use their refined judgment to select jurors likely to side with their client. On direct examination, we do not seek to embarrass witnesses or ask repetitive questions. We have the judgment and confidence to know that the jurors understood the testimony and evidence

12 Duckworth, Angela L., Peterson, Christopher, Matthews, Michael D., Kelly, Dennis R., "Grit: Perseverance and passion for long-term goals." Journal of Personality and Social Psychology, Vol 92(6), Jun 2007, 1087-1101.

13 Tracy Walters McCormack & Christopher John Bodnar, "Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience," 23 Geo. J. Legal Ethics 155 (Winter 2010).

the first time.

In the mediation context, deciding whether to resolve the matter or proceed to trial is of critical importance, requiring advice grounded in experience and shaped by an in-depth understanding of the strengths and weaknesses of the client's position. An experienced trial attorney can accurately assess a multitude of factors necessary for choosing the right legal course - judgment that must be counted on to guide the client's decision at mediation. The lawyer's judgment and credibility impacts whether or not mediation will succeed and how satisfied the parties will be with the process and the result.[14]

Trial lawyers excel at resolving disputes because their judgments are grounded in objectivity and flow from an emotionally detached assessment of the circumstances of the case and the client's best interests. We have confidence in our conclusions and know that, after due consideration of the relevant factors, we will usually be right. The exercise of competent judgment is a critical skill, both at trial and in mediation.

Creativity

Trial lawyers often work outside the box to successfully resolve a dispute. Sometimes the answer is not readily apparent, but trial lawyers are masterful at using their creativity to dig deep and develop solutions. Indeed, the mark of a good trial lawyer is the ability to take the facts of a case, dissect them, and identify every strength and weakness. Issue-spotting is a creative process a trial lawyer uses to assess the case from several different angles and then to tailor their arguments as they attempt to make effective points. Creative lawyers are better issue spotters, and they will probably have significant trial experience.

Mediation also requires creative solutions. Each matter is unique, each client must be handled differently and each solution must be carefully crafted. Trial lawyers are effective at mediation because we consider unconventional options to develop an effective approach to resolution. This level of understanding and creativity can lead to long-lasting solutions that work for all parties involved.

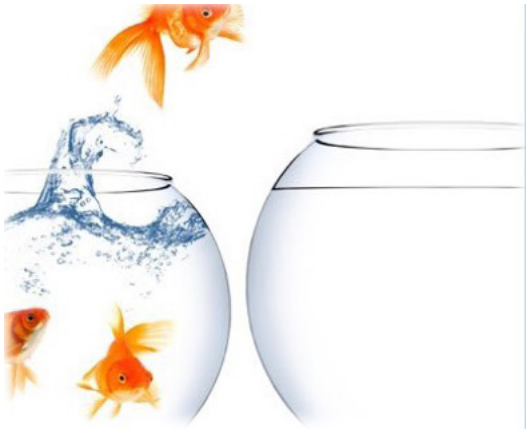
Stalemates at mediation often arise when opposing counsel becomes aggressive, typically due to feeling exposed for a lack of forethought and preparation. Trial lawyers understand the importance of nuance and have the skills to respond effectively to overly aggressive opponents. We do not allow opposing counsel to manipulate the process and become deal breakers instead of deal makers. We are effective mediation advocates because we identify creative strategies to "solve the problem" the parties face and work to achieve a settlement.

Conclusion

Trial lawyers' skills and characteristics make them successful mediation advocates. Clients presumably will pay more to lawyers who can effectively present their cases in the mediation forum and can also "walk the talk" at trial. While the advocacy skills necessary for mediation are similar to those used in a trial, a trial lawyer needs to have the right touch to engage the opposing party in a civil discussion about the merits of the case. Indeed, if we want to distinguish ourselves as something more modern than trial lawyers, our tool belt should contain refined mediation advocacy skills "in addition to, and not in lieu of, trial skills."[15]

14 Id.

15 Id.



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A Fish Out of Water?

Trial Lawyers and Mediation Advocacy Skills

Tony Rospert

The Vanishing Trial: Record Low Number of Cases Disposed of by Trial

- **Federal cases:**
  - 2002: 1.8%
  - 2015: Less than 1%
  - 2020: 44% decrease in the number of trials.
- **New York Office of Court Administration:**
  - 2017: 10%

The Vanishing Trial

- A Law360 article applauds the disappearance of jury trials because "lawyers who try cases to juries are 'con men and charlatans' and jurors are 'gullible.'"
- "The skill of trying cases to a jury is dying for good reasons of law, procedure and market alternatives."
- "No doubt this is a disappointment to a certain class of trial lawyers who feel they could convince anyone of anything. But that skill … is of no value."

The Vanishing Trial

- Attitude Adjustment Needed!

THOMPSON HINE SmartPath

The Vanishing Trial: The New Normal?

- If true, what does that mean for trial lawyers and trial skills?
- Legal commentators contend that the skills required to successfully mediate are actually incompatible with those necessary to achieve success at trial.
- They say that advocacy skills in mediation are different than those used in trial advocacy.

The Vanishing Trial: The New Normal?

DISAGREE

- Many of the characteristics and skills that make us successful as trial lawyers also make us effective advocates in mediation.

Big Picture: Why Is This Important to You?

- Trial skills are not incompatible with mediation advocacy skills.
- Lawyers need to refine their trial skills.
- Use trial skills and the right touch to engage in a civil discussion about the case.

Skills of Top Trial Lawyers

- Preparation
- Grit
- Reasonableness
- Judgment
- Creativity

PREPARATION

"By failing to prepare, you are preparing to fail."

– **Benjamin Franklin**

GRIT

"Grit entails working strenuously to overcome challenges and maintaining effort and interest over time despite failures, adversities, and plateaus in progress."

– **Angela Duckworth**

REASONABLENESS

- "The supreme art of war is to subdue the enemy without fighting."

  – Sun Tzu

JUDGMENT

"Good judgment comes from experience and a lot of that comes from bad judgment."

– Will Rogers

CREATIVITY

"The true sign of intelligence is not knowledge but imagination."

— **Albert Einstein**

Takeaways

In-house counsel- use trial lawyers in mediation

Refine your trial skills to be an effective mediation advocate

It is only the stage that has changed

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

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

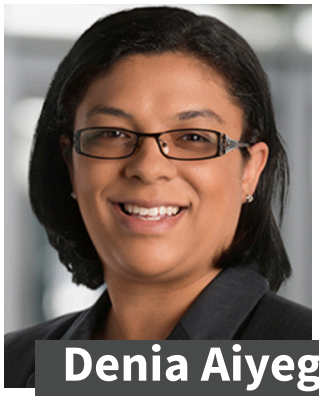
Tony focuses his practice on complex business and corporate litigation involving financial services institutions, private equity firms, real estate development and management companies, commercial and contract disputes, indemnification issues, claims involving representations and warranties insurance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

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

Presentations and Publications
- "The "Vanishing Trial" and Mediation Advocacy Skills," LinkedIn Pulse, March 18, 2020
- "Mediation Opening Arguments Should Not Be A Throwdown," Law360, February 13, 2019
- "Selecting the Right Mediator: Best Practices For Researching and Conducting Due Diligence on Potential Mediators," LinkedIn Pulse, September 12, 2018
- "Selecting the Right Mediator: The Hammer, The Hand Holder, The Marriage Counselor and The Shape-Shifter," LinkedIn Pulse, September 3, 2018
- "Maturing Market for R&W Insurance: Transaction and Claims Experience," Association of Corporate Counsel, October 3, 2019
- "Is Mediation the New Jury Trial? Approaches and Strategies to Effective Mediation," Celesq, May 21, 2019
- "The Art of Argument: Using the Pixar Storytelling Formula to Persuade Judges and Jurors," Celesq, December 14, 2018

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

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



Taking Back Control in Virtual Mediations

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Pinocchio's Revenge: Taking Control of Virtual Mediations
Denia Aiyegbusi

Virtual mediations experienced a baptism by fire during the first twelve months of the COVID-19 pandemic. Mediators scrambled to learn Zoom and Microsoft Teams, while attorneys scrambled to adapt their opening presentations and private caucus strategies. When the dust settled, mediators realized that virtual mediations were an opportunity to eliminate those dangerous opening presentations, to control the pace of the mediation, to direct the flow of the conversation, and to gain access to the decision-makers (who were previously content to "dial in" for the opening caucus and disappear for the day). For some, the power and convenience was intoxicating.

Not surprisingly, when COVID-19 restrictions and travel bans lifted, many attorneys were thrilled to return to "in person" mediations. Despite the success of virtual mediations, they believed that they were more effective sitting across the table from their opponents, and they relished the hours of banter with clients (who were trapped in the same windowless room). It was a return to the familiar, which is always comforting. And so, the percentage of virtual mediations declined.

But, like virtual depositions, virtual mediations are here to stay. Now is the time for attorneys to regroup. Now is the time for a proper post-mortem. Now is the time for us to discuss what did and did not work. So, here are a few pages from my virtual mediation playbook. My hope is that these tips will help you: (a) establish trust with opposing counsel before the virtual mediation; (b) avoid derailing the litigation during the opening caucus; (c) improve communication with your client during the mediation; (d) employ strategies to increase the mediator's effectiveness in the other virtual conference room; and (d) gain strategic advantages during the mediation. Many of these tips involve taking (back) control of virtual mediations from the mediators, who have more experience with these mediations.

Set Ground Rules in Advance of the Virtual Mediation

When mediating a case "in person," there are very few ground rules. Everybody knows how to act during opening caucus. Everybody knows what to expect during private caucuses. The only confounding variable may be the confidentiality agreement, which is required by statute in some jurisdictions, but must be requested in others.

In contrast, virtual mediations introduced a host of new problems, including legal, social, and technical issues. To limit these problems, it is important to discuss the ground rules with not only the mediator, but also your opponent's counsel. Consider getting "on the same page," by addressing the following issues with opposing counsel and the mediator in advance of your next virtual mediation:

> Agree on the video conferencing platform: This seems like a minor issue, but it is important to decide what platform will be used in advance of mediation to ensure all participants have downloaded the correct software and know how to connect their computer's microphone and speakers to the platform. Choosing the platform ahead of time will go a long way in limiting technical issues.

Rule-out participation by audio only: To mimic an "in person" mediation most effectively, it is important that all parties participate via video and are visible on the screen.

Rule-out muting: The opening caucus should be a time when each side can openly share information and have their viewpoint heard by all attendees. No party should be allowed to mute him or herself during the opening caucus.

Agree on availability of the "share screen" feature: Before the opening caucus begins, tell the mediator you may want to share documents or photographs with your opponent. That way, the mediator is prepared to allow you to "take control" of the video conferencing platform and share your screen when needed.

Address wearing masks: Your opponent may or may not be in a geographic area that enforces an indoor mask mandate. To get the most out of your mediation and gauge your opponent's reaction to the various points discussed during the opening caucus, you should address masks ahead of time and determine whether Plaintiff will be masked during the session. Because fabric masks do not allow you to see your opponent's face, and importantly, their facial expressions, if Plaintiff feels more comfortable being masked during the mediation, it may be in your best interest to suggest all parties wear clear face shields instead.

Redefine the Opening Caucus

An increasing number of mediators, clients, and jurisdictions are eschewing opening caucuses, believing that the risk outweighs the reward and preferring to "get right to work."

But consider the possibility that we have been taking for granted the behind-the-scenes process that clients go through for an "in person" mediation. They wake up early. They get dressed hoping to make a good impression (either on opposing counsel or the mediator). They fly or drive to the mediation. They meet with their counsel. They wait in the room for the start of the mediation. They dedicate the entire day to the mediation. In contrast, for a virtual mediation, clients may do nothing more than click "join" at 9:00 a.m. and spend considerably less time focusing on the mediation. Opening Caucuses can be exactly the formality they need to impress upon them that "today is the day" for the case to settle.

Opening Caucuses can also be disastrous. It is always easier for a client to "turn off" their computer than to stand up, say good-bye to counsel, walk out the mediation building, get in their car, and drive/fly home. So, if you are one of the increasingly rare attorneys or clients that favor Opening Caucuses and believe your counsel can always explain the risk better than opposing counsel, here are some tips for redefining the Opening Caucus.

a. Decide Who Will Attend the Opening Caucus.

Virtual mediations provide an opportunity for more people to attend the opening caucus. Whereas the old "in person" paradigm for opening caucuses only involved the usual suspects (counsel and client), virtual mediations are an opportunity to consider the pros/cons of inviting more people to click "join." Consider the advantages and disadvantages of asking the following people to attend the opening caucus:

The Decision-Maker (Claim Adjuster): Someone with "full settlement authority" should participate in every opening caucus. For those of us who do insurance defense work, this is usually the insurance claims adjuster who controls the purse-strings and has the ultimate responsibility of approving the settlement amount and issuing payment.

The Insured: It can go a long way to have your insured-representative, or even the insured-driver, participate in the opening caucus. It is a sign of respect, and it proves that everyone cares about the case and wants to give it the best chance of settling. It may also be important for Plaintiff to hear directly from the person(s) who caused their injury. There can be a world of difference between hearing an attorney apologize and hearing the person apologize who caused an injury. But you must decide whether the risk outweighs the reward. Only you can decide whether it is better for the tortfeasor to be present (and look contrite) versus directly addressing the plaintiff. Ask yourself: Is there any chance the plaintiff will be disappointed or angered by the tortfeasor's apology ("I'm sorry this happened to you.").

Structure Broker: Depending on the value of the case being mediated, it may be a good idea to invite a structure broker to participate in the opening caucus. The opening presentations will undoubtedly provide the broker with additional context for use when running structure proposals during the mediation. And, by having the structure broker attend the opening caucus, you can make it clear that your offers will (eventually) involve structured settlements. But remember: Inviting the structure broker always sends a message about the value of the claim.

Expert Witness: It may be beneficial to invite a liability or damages expert to the opening caucus. Having an expert explain the basis for his/her opinion may help the Plaintiff understand your client's position and your evaluation of the case. Beware though, inviting the wrong expert to participate in the opening caucus could back-fire, causing more harm than good. It will be important for you to weigh the pros and cons of having a specific expert participate in the mediation and it is important to discuss same with your client(s) when making this decision.

b. Start the Opening Caucus by Telling Them Exactly What They Want To Hear.

It is always easier for a person to "tune out" someone on their screen than to ignore someone sitting across the table. Never start the mediation with "shock and awe." If you want the other side to listen to your client's point of view, always start the mediation with common ground.

For a defense attorney, the best way to start a virtual mediation is to tell the Plaintiff exactly what the Plaintiff wants to hear for the first few minutes of the mediation. By acknowledging Plaintiff's strengths and complimenting Plaintiff, you can build trust and credibility… and make it significantly more difficult for the Plaintiff to dismiss what you have to say about the case. When liability is not disputed or there is no viable liability defense (and only with the client's written consent), you could start by telling the Plaintiff that "they did absolutely nothing wrong" and "didn't ask for this to happen and didn't deserve to have this happen to them." And, when liability is disputed, consider starting the mediation by telling the Plaintiff that they "have done everything right since this accident," including (where applicable):

- "You did the right thing to stay in your car and wait for help";
- "You did the right thing to call the police";
- "You did the right thing to go to the hospital and get examined";
- "You hired an excellent attorney";
- "You have done everything your doctors have told you to do" (if no failure to mitigate claim);
- "You have hired all the right experts";
- "Unlike so many, you went back to work" or "you tried to go back to work";
- "You are good, salt-of-the-earth people"; and/or
- "The jury is going to like you."

These types of admissions can make the opening caucus less of an adversarial meeting between opponents and can break down certain walls. After you have spent time complimenting the Plaintiff and acknowledging the strengths of their case, the Plaintiff will hopefully be more likely to listen when you segue to why "this is a difficult case to evaluate" and start reviewing the evidence that supports your evaluation and mediation position.

c. Discuss the Academics of your Analysis.

There is a right way and a wrong way to frame a mediation. After complimenting a Plaintiff and acknowledging the strength of the Plaintiff's case, never undo the good you did by suddenly attacking the Plaintiff's credibility, becoming confrontational, or being "adamant" that Plaintiff is "wrong" and you are "right" about anything.

Instead, always frame the case as a "difficult case to evaluate," which it must be on some level or you would not be mediating the case. Then, "share" with the other side "what makes this a difficult case to evaluate." Walk the other side through certain "hot docs" for use at trial, including charts, diagrams, and timelines outlining the objective evidence that you will use to defend against Plaintiff's allegations. If you decide to confront Plaintiff with any impeachment evidence, be sure to first frame those documents and/or videos as information that only "makes the case more difficult to evaluate."

Finally, after walking Plaintiff through the evidence that makes this case "a difficult case to evaluate,"

always end on a positive note. Reassure Plaintiff that you are participating in the mediation in good faith and are ready to roll up your sleeves and have a productive mediation.

Force the Mediator to Have Skin in the Game.
Once you have "shared" your evaluation and the Opening Caucus ends, the mediator will separate the parties for the start of private caucuses. During the mediator's first private caucus with you and your client, it is important for the meditator to have some "buy in" before going to the other room and visiting with the other side. Use the first private caucus to discuss your client's initial response to the opening demand. Ask the mediator questions that allow him or her to better understand your client's point of view:

> Should Plaintiff's proverbial "shot across the bow" demand be met with an equally ridiculous initial offer?
>
> How long should your client continue to "bid against itself" in response to Plaintiff's outrageous demands?

After discussing these questions with the mediator (and after getting permission from your client), present the mediator with two options for your counteroffer, using the less attractive option to reinforce the message you conveyed at the start of the private session. Once the mediator has the two options, ask the mediator their own recommendation, and then agree to follow the mediator's recommendation.

A mediator who has personally recommended an opening offer will always be more confident presenting that offer (and conveying your client's message) and will always be more determined to solicit more from the other side to prove that "you were right to follow her or his recommendation."

Give the Mediator Homework To Complete In the Other Room.

There is only way to know what the mediator is saying and doing in the other room: give the mediator homework to complete in the other room. Mediators want to be "responsive" to both sides (especially if they want to be hired in the future), and they will do what you ask in the other room, especially if the exercise has a point. After the first two private sessions, many mediators stop talking about the merits and start focusing (myopically) on the numbers.

To continue the conversation about the merits and keep Plaintiff engaged, send the mediator into Plaintiff's room with evidence (i.e., a document, a report, a chart, or a timeline), and ask the mediator to have Plaintiff confirm whether the information contained in that evidence is correct. By sending the mediator into the room with this assignment, you can use the mediator to identify any inconsistencies or inaccuracies, to solicit Plaintiff's response to the evidence, and make certain that the mediator is discussing with the Plaintiff what you want the mediator to discuss in the other room.

Virtual mediations make it particularly easy for a mediator to "share screen" and play any surveillance video clip you forward during a private caucus. Consider asking the mediator to share that surveillance video clip with the other room and "solicit their response." Alternatively, if the importance of the video is obvious (or you want to be more subtle), consider asking the mediator to "discuss in the other room the admissibility of the video." Getting opposing counsel to admit in front of their client that the video is admissible can be a turning point in the mediation and a natural segue for the mediator (unasked) to raise the issue of how the video will affect the verdict.

The False Bracket/Hard Floor Gambit.

If little progress is made by exchanging "hard offers" back and forth with Plaintiff, you may want to try a tactic coined "The False Bracket/Hard Floor Gambit" to cut to the chase and skip a few rounds of negotiation. Here are the steps:

> Step 1: Offer False Bracket to solicit a True Bracket: In response to Plaintiff's most recent demand, offer a false bracket (i.e., "Defendants will go to $500,000 if Plaintiff comes down to $1,000,000"). The bracket is "false" because it indicates to Plaintiff that Defendants are willing to pay up to $750,000 when Defendants are willing to pay more than that amount. The sole

purpose of offering that false bracket is to solicit a true bracket.

Step 2: Offer your Hard Floor to solicit their Hard Ceiling: In response to a false bracket, Plaintiff will almost always respond with a true bracket (i.e. "Plaintiff will come down to $2,000,000 if Defendants come up to $1,000,000"). Upon receipt of this "true" bracket, offer the bottom of your false bracket. Remember, you have already indicated that you would be willing to pay the bottom of your bracket when you made your bracket offer.

If Plaintiff's counsel similarly holds true to his own bracket proposal, Plaintiff will have to come down and demand the top of their bracket because, even though you didn't "earn" the top of his bracket by agreeing to that bracket, Plaintiff has already signaled that his client is willing to settle for that amount by making it the top of the bracket offer.
When done correctly, the False Bracket/Hard Floor gambit can allow you to skip two or three additional rounds of offers/demands. When your side is being more reasonable at the beginning of the mediation, it can also result in the other side being forced to make a disproportionate move.

Cut the Mediator Out of the Loop

If you reach an impasse during the mediation, do not be afraid to cut the mediator out. Stalemates may seem insurmountable at first, but if you are able to isolate the decision maker in the other room and can speak to them directly, you may find that there is common ground on which the mediation can proceed. During an "in person" mediation, it is easier for counsel (or the client) to physically walk down the hallway, knock on the other side's door, and ask to speak with that decision maker for a moment.

During a virtual mediation, do not hesitate to ask the mediator to allow a private call or a break-out session without the mediator. The request alone sends a message to the mediator, and the "players only" meeting may result in significant movement.

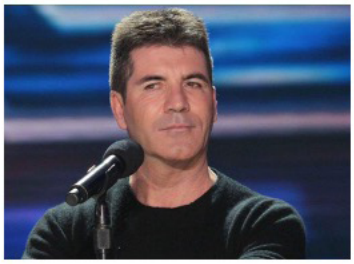
Taking Control

- Redefine Opening Caucus

Establish Ground Rules.

- **Everyone must participate by video.**
- **Clients must be seen on screen.**
- **No muting.**
- **Share screen must be available.**
- **Address masks.**

Start with 5 minutes of what they want to hear.



- Apologize.
- Admit what can be admitted.
- Complement their choices (counsel, experts, doctors).
- Complement their determination (recovery, litigation).
- Acknowledge the strength of their case.

Frame the discussion as academic & show your work!

- **Admit the case is "difficult to evaluate."**
- **Complement your client for allowing you to "share your evaluation."**
- **Promise to "re-evaluate" if mistaken.**
- **Explain your method of "objectively" evaluating.**

MAYRA VALLADARES PAVON
TBI Checklist
(DOI May 12, 2018)

	NO	YES
Abnormal GCS Score – EMS (22 min)		
Abnormal GCS Score – ER (60 min)		
Symptoms		
Blurred Vision		
Dizziness		
Vomiting		
Nausea		
Loss of Consciousness		
> 30 minutes		
> 1 minute		
Reported *Any* LOC at ER		
Initial Examination		
Abnormal Eye Exam		
Abnormal Speech		
Abnormal Memory		
Abnormal Cranial Nerve Exam		
Any Neurological Deficits		
Testing		
Found Objective Evidence of TBI (CT/MRI)		
Ordered Imaging of Brain (CT/MRI)		
Ordered Imaging of Face/Skull		
ER Diagnosis		
Clinical Impression includes "Concussion"		

MAYRA VALLADARES PAVON
TBI Checklist
(DOI May 12, 2018)

	NO	YES
Abnormal GCS Score – EMS (22 min)	X	
Abnormal GCS Score – ER (60 min)	X	
Symptoms		
Blurred Vision	X	
Dizziness	X	
Vomiting	X	
Nausea	X	
Loss of Consciousness		
> 30 minutes	X	
> 1 minute	X	
Reported *Any* LOC at ER	X	
Initial Examination		
Abnormal Eye Exam	X	
Abnormal Speech	X	
Abnormal Memory	X	
Abnormal Cranial Nerve Exam	X	
Any Neurological Deficits	X	
Testing		
Found Objective Evidence of TBI (CT/MRI)	X	
Ordered Imaging of Brain (CT/MRI)	X	
Ordered Imaging of Face/Skull	X	
ER Diagnosis		
Clinical Impression includes "Concussion"	X	

Frame the discussion as academic & show your work!

- Admit the case is "difficult to evaluate."
- Complement your client for allowing you to "share your evaluation."
- Promise to "re-evaluate" if mistaken.
- Explain your method of "objectively" evaluating.
- Describe the evidence (especially impeachment) only as "making it more difficult to evaluate."

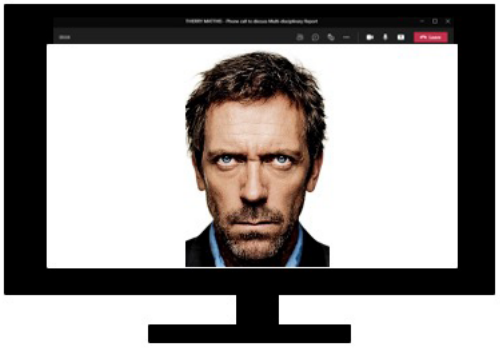
Frame the discussion as academic & show your work!

- Admit the case is "difficult to evaluate."
- Complement your client for allowing you to "share your evaluation."
- Promise to "re-evaluate" if mistaken.
- Explain your method of "objectively" evaluating.
- Describe the evidence (especially impeachment) only as "making it more difficult to evaluate."
- End on a positive note.

Choose wisely who attends the Opening Caucus.

Claim Adjuster | Expert Witness | Trial Counsel | Insured Corp. Rep | Structure Broker

Consider pros/cons of having your expert share basis for opinion.



Taking Control

- Redefine Opening Caucus
- Force the Mediator to Have Skin in the Game

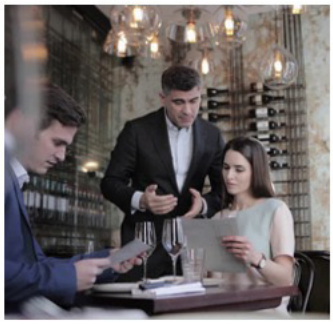
WHEN?

In Response to Opening Demand/Offer.

HOW?

Give the Mediator TWO options.

<u>Note:</u> Use the less attractive option to send a message.



"What do you recommend?"

"Alright, we are going to follow *your* recommendation."

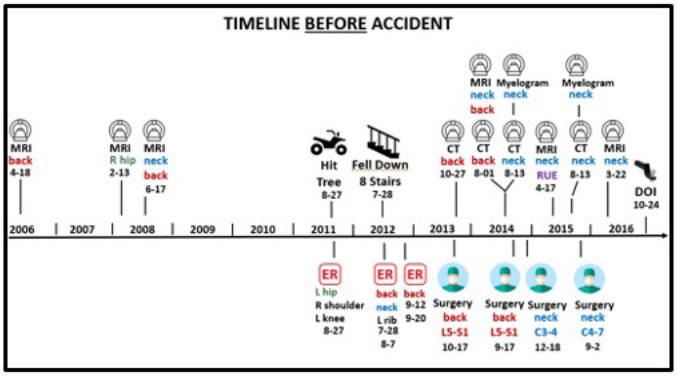
Taking Control

- **Redefine Opening Caucus**
- **Force the Mediator to Have Skin in the Game**
- **Give Mediator Homework for the *Other* Room**

Past Medicals:	**$300,000.00**
Future Medicals:	**?**
Past Earnings:	**$150,000.00**
Future Earnings:	**?**
General Damages	**?**
Opening Demand/Offer	**$3,500,000.00**

Break-down their last demand/offer
Ask mediator to have Plaintiff fill-in *your* chart.

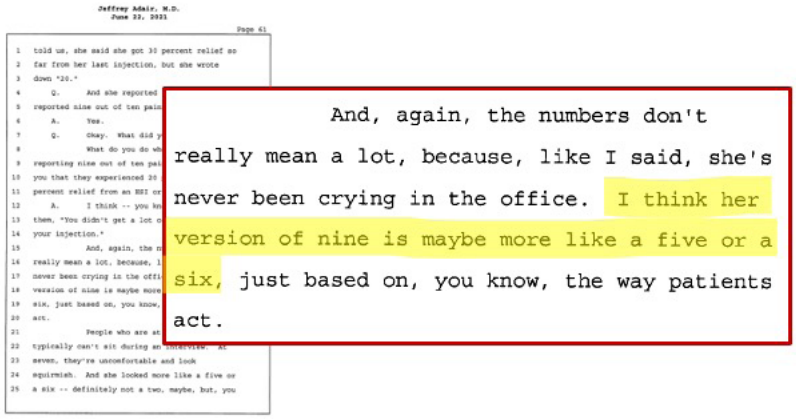
Note: Always be prepared for a reciprocal request.



Confirm the timeline.

Ask mediator to review *your* timeline with Plaintiff.

Note: Make this an academic exercise.



Jeffrey Adair, M.D.
June 22, 2021

Page 61

told us, she said she got 30 percent relief so far from her last injection, but she wrote down "20."

Q. And she reported

reported nine out of ten pain

A. Yes.

Q. Okay. What did y

What do you do wh

reporting nine out of ten pai

you that they experienced 20

percent relief from an NSI or

A. I think -- you kn

them, "You didn't get a lot o

your injection."

And, again, the n

really mean a lot, because, l

never been crying in the offi

version of nine is maybe more

six, just based on, you know,

act.

People who are at

typically can't sit during an interview. At

seven, they're uncomfortable and look

squirmish. And she looked more like a five or

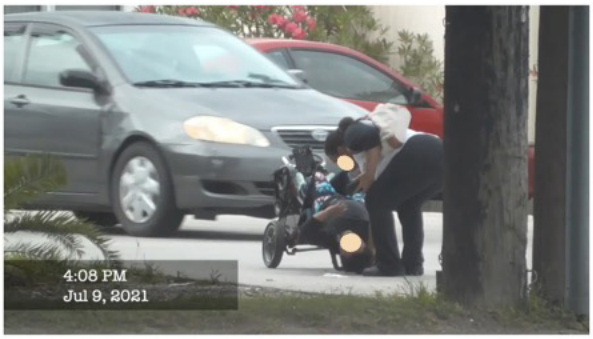
a six -- definitely not a two, maybe, but, you

And, again, the numbers don't really mean a lot, because, like I said, she's never been crying in the office. I think her version of nine is maybe more like a five or a six, just based on, you know, the way patients act.

Solicit *their* Opinions on Evidence.

Ask mediator to discuss Plaintiff's impression of specific witnesses.

Note: Solicit opinion on how it "could affect" the trial.



Solicit *their* Opinions on Admissibility of Evidence

Ask mediator to ask Plaintiff whether the document/video will be admitted.

Taking Control

- **Redefine Opening Caucus**
- **Force the Mediator to Have Skin in the Game**
- **Give Mediator Homework for the *Other* Room**
- **Offer to Share Video, PP Presentations, Experts, & Handouts**

Taking Control

- Redefine Opening Caucus
- Force the Mediator to Have Skin in the Game
- Give Mediator Homework for the *Other* Room
- Offer to Share Video, PP Presentations, Experts, & Handouts
- False Bracket/Hard Floor Gambit

Offer False Bracket to solicit True Bracket.
Offer Hard Floor to force Hard Ceiling.

6.	Defense	Offers $300K	
7.	Plaintiff	Demands $3M	
8.	Defense	Bracket $500K/$1MM	False Bracket
9.	Plaintiff	Bracket $1M/$2M	True Bracket
10.	Defense	Offers $500K	Hard Floor ($200K increase)
11.	Plaintiff	*Can't demand > $2M*	Hard Ceiling ($1M decrease)

Taking Control

- Redefine Opening Caucus
- Force the Mediator to Have Skin in the Game
- Give Mediator Homework for the *Other* Room
- Offer to Share Video, PP Presentations, Experts, & Handouts
- False Bracket/Hard Floor Gambit
- Cut Mediator Out Of Loop

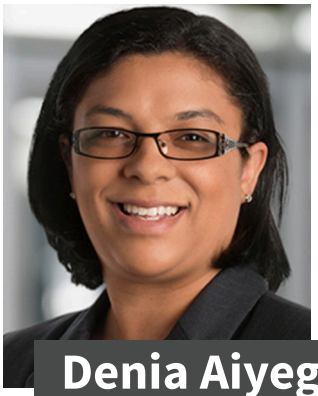
Who is driving the bus?

Competitor

Compromiser

Accommodator

Avoider



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Denia Aiyegbusi

Partner | Deutsch Kerrigan (New Orleans, LA)

Denia Aiyegbusi takes pride in helping her clients creatively solve litigation problems. Denia knows when choosing a law firm, clients look for an attorney who brings unique perspectives to a matter and gives different solutions in handling any client problems that may arise.

Denia is part of the firm's civil litigation department and works on cases ranging from small property subrogation claims, all the way to multi-million dollar traumatic brain injury personal injury cases. She also defends claims of bad faith/extra-contractual ligation, premises liability, products liability and trucking and transportation defense.

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

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

Practices
- Commercial Transportation
- Premises Liability
- Manufacturer's Liability and Products Liability

Industries
- Manufacturing
- Transportation
- Retail and Restaurant

Accolades
- New Orleans CityBusiness "Women of the Year," 2020
- Louisiana Super Lawyers, Rising Stars List, 2016-2021
- New Orleans CityBusiness Ones to Watch: Law

Professional Associations
- Defense Research Institute (DRI) - Diversity Committee; Women in the Law Committee, Annual Meeting Marketing Chair
- Louisiana State Bar Association- Diversity Committee, Co-Chair, 2017-present; Diversity Awards Subcommittee, Co-Chair; Diversity Conclave Subcommittee; Minority Involvement Section
- New Orleans Bar Association
- CLM

Education
- J.D., Loyola University of New Orleans, 2007
- B.B.A., Loyola University of New Orleans, 2004

Panel Discussion: The Art of Jury Selection – A Murder Trial Revisited

Steve Schleicher

Maslon (Minneapolis, MN)
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The Art of Jury Selection – A Murder Trial Revisited
Steve Schleicher and Christina Marinakis

Courtroom pundits often observe that cases are won or lost at jury selection. In my experience, the pundits have it half correct. I have never won a case at jury selection, but I have lost a few. One of those cases, a civil rights prosecution of a police officer, happened when I was a federal prosecutor – years before the world witnessed the murder of George Floyd and the prosecution of Derek Chauvin. Like the Chauvin trial, that case had numerous witnesses, a use of force expert, and a video. But the jury acquitted the defendant of half the counts and hung on the other half. In a post-trial conversation with one of the hold outs for conviction, the former juror said that a small number of his fellow jurors were simply never going to convict.

As advocates, trial lawyers believe that we can persuade anyone to accept our view of the evidence and act on it. We do not. There are people who will never hear your message. They will be receptive only to that evidence which supports their previously held beliefs and will disregard any evidence to the contrary. These are the "unpersuadables."

Every public speaker is advised to "know your audience." Every trial lawyer should choose their audience wisely. Jury selection is the trial lawyer's only opportunity to identify who will never hear their message and remove them from the audience. Effective voir dire is critical. Failure to identify the unpersuadables dooms a case at the outset.

Many trial lawyers attempt to indoctrinate prospective jurors during voir dire. This is reflexive as it is difficult for an advocate to not advocate. I have been unable to resist doing so in many trials – including the aforementioned loss. But advocating your case during voir dire misses the point of jury selection and places you at a tactical disadvantage. The other side's unpersuadables may reveal themselves by loudly agreeing with you, allowing your opponent to develop cause challenges or strike them from the pool. Meanwhile, your unpersuadables may go undetected if they are uninclined to volunteer their biases. Why would they? Attempts at indoctrination, which are fairly transparent, generally involve the advocate providing information to the prospective juror resulting in a monologue rather than a dialogue. The unpersuadables, those who are not going to respond to your most direct arguments during closing, are not going to be somehow programed by subtle indoctrination attempts during voir dire. Anyone who might be receptive to indoctrination during jury selection was already going to be receptive to your arguments at trial. This phenomenon, known as "confirmation bias," was no truer than in the trial of Derek Chauvin for the murder of George Floyd. While many jurors had not fully formed an opinion about the defendant's guilt or innocence, they undeniably approached the case through a lens shaped by a lifetime of experiences and values, as well as media attention from both sides of the aisle. Thus, – without discrediting the powerful testimony and evidence that fueled the verdict – special attention should be given to the art of jury selection that successfully allowed us to avoid having to argue our case to the unpersuadables.

Getting Jurors to Reveal Bias

A. Limit Questions Aimed at Pre-Conditioning

While some questions during the voir dire process may aim to instill your themes, help jurors see the case from your perspective, and seek commitments to follow the law, this technique, known as pre-conditioning, are secondary to the questions that go to the heart of voir dire: those deigned to reveal juror biases. While pre-conditioning or suggestive questioning could have a slight impact in shaping jurors' later thoughts and decisions – a psychological principle known as "priming" – the suggestive influence of an attorney's questions at this stage is actually quite limited. For one, jurors know very little about the facts or arguments that will be at issue, and most believe it is unlikely they will be chosen for the jury (we have all seen the looks of surprise when a juror learns he or she has been selected); therefore, they are not invested in the case enough at this early stage to appreciate or understand how the questions relate to the case. Secondly, the decision you arere aiming to influence – their verdict – is so far beyond the point of voir dire that any priming effects are likely to fade away. Indeed, research by both cognitive and social psychologists have repeatedly shown that priming effects are strongest immediately following the suggestion stimulus, but the effects fade substantially over time (Bryant, J. and Oliver, M.B. (eds.) Media Effects: Advances in Theory and Research, 3rd Edition (2009)). This research has also shown that priming effects are minimal when the suggestion stimulus is short in frequency and duration. Thus, it's highly unlikely that a statement made by counsel during voir dire – or even a jurors' commitment to do something – will have any effect on the deliberations. Therefore, when there is restricted time for voir dire, limit questions that are aimed to pre-condition, and focusing instead on those that reveal juror bias.

B. Put Jurors at Ease

Making jurors feel comfortable opening up to you is the first step to getting them to speak candidly about their biases. In jurisdictions with liberal attorney voir dire, one technique for putting jurors at ease is to provide a little personal information about yourself – to the extent permitted by the judge – within an example about acceptable bias. For instance, counsel might mention that he coaches his daughter's soccer team, and even though he generally considers himself a fair person, he could not be a completely fair and impartial referee if he were asked to officiate the league's championship game. An example such as this humanizes the attorney while also illustrating that bias is perfectly acceptable in some situations – and being a referee is not all that different from being a juror. The attorney can then get jurors to loosen up by asking them to talk about situations outside of the courtroom where they might have difficulty being fair and impartial.

C. Explain Bias in a Courtroom

In addition to providing examples of everyday biases, attorneys should let jurors know that having difficulty being fair and impartial in this case does not make them unfair people: "We are all fair people and can be great jurors in most cases, but this might not be the case for you." Likewise, it may be helpful to let jurors know that they won't offend you or your client if they have negative opinions to share ("I've heard the lawyer jokes – trust me, I have thick skin").

D. Keep the Client Out of the Courtroom

As much as your client may want to watch the jury selection process, it's best to keep them out of the courtroom during the juror questioning. While they might not be worried about offending a lawyer, many jurors are reluctant to say negative things about your client or aspects of your case if the client is right there in the room with them. Most people want to be polite, and even those who voice negative opinions may filter or rephrase their real thoughts for fear of sounding offensive or being in the uncomfortable position of saying bad things "to someone's face." And remember, voir dire is the time you want jurors to say the worst of what is on their minds so you can get them removed from the panel. The best practice is then to introduce your client or the company representative at the start of voir dire but explain that he or she will step out of the room to give jurors some privacy while they discuss their personal feelings and experiences.

E. Words Matter

A wealth of research indicates that how a question is phrased can influence the responses that are returned. Therefore, it's important to pay attention

not just to the issues you plan to ask about, but how you are going to ask them. For example, to make jurors feel more comfortable responding when conducting a group voir dire, ask "How many of you believe…?" rather than "Does anyone believe…" The former implies that this is a normal way to feel, and that the lawyer expects there to be several members of the jury pool who feel that way. The latter may imply that this is a rare and unacceptable belief and that the lawyer is trying to single out one or two "bad people" who feel that way. "How" can also be used in individual voir dire, such as "How difficult would it be for you to set aside your sympathy?" Though a juror is perfectly free to respond "Not at all," the use of "how" implies that they indeed have sympathy, and that it would be difficult – at least to some degree – to set that aside. Not only will the juror be more likely to admit his or her bias, these questions will allow the juror to use their own words instead of merely responding "yes" or "no" to your questions, making them a stronger candidate for a cause strike.

Additionally, empirical research shows that jurors are less likely to say that they "cannot" or are "unable to" do something than to admit that they would "have difficulty with" or "struggle with" it. Similarly, most jurors are reluctant to admit they would "have a problem" with doing something. Therefore, ask general voir dire questions that use softer language (e.g., "Would you have difficulty sending the plaintiff home empty-handed?" versus "Would you have a problem sending the plaintiff home empty-handed?").

Keep in mind that people are more likely to answer questions in the affirmative rather than in the negative. This is especially true when responding to an authority figure, so when asking individual voir dire, phrase questions such that the desired response – the one that reveals a bias – is a "Yes." (e.g., "Do you believe that corporations should be held to a higher legal standard than individuals in lawsuit?" versus "Do you believe corporations and individuals should be treated equally in a lawsuit?") A "yes" in response to the former could be grounds for a cause challenge, while a "yes" to the latter would unintentionally rehabilitate a juror you may want off the panel.

F. Body Language Matters

The body language of a person posing a question can also influence the response received. For instance, when asking jurors "How many of you believe…" raise your own hand as a demonstration for the expected response. This not only encourages jurors to raise their hands, but again communicates that the lawyer expects at least some jurors to feel that way, normalizing the response. During individual questioning, very subtle head nods while asking the question can influence jurors to provide an affirmative response.

G. Don't Be Afraid of Juror Responses

One of the biggest pushbacks I have heard on these techniques is the fear that jurors will say negative things that will influence other jurors in a group voir dire. First, recall that priming effects fade with time, so things that other jurors say at this stage are likely to be long forgotten by the time the jury decides the case. Second, most beliefs – especially strong ones – are deeply engrained and resistant to change. It's hard enough for jurors to change other jurors' minds during deliberations by providing arguments supported by actual evidence; a juror expressing a belief – often without providing any evidence or facts to support it – is very unlikely to change the opinions or influence the beliefs of others in any way. The only time to be concerned about jurors spoiling the panel with their response is when they might reveal specific facts – not just opinions – about the case or the client that would be inadmissible and not generally known by others (e.g., an unrelated scandal or catastrophic accident involving your client). In this rare situation, spoliation can be avoided by prefacing the question with, "Without explaining why or what you've heard…" Then follow with questions such as, "Who has a negative opinion of my client for any reason?" and "Who has read or heard something that might give you a negative impression of my client?"

Getting Jurors to Admit They Can't Be Fair

Eliciting bias and obtaining cause challenges should be the primary objectives of voir dire. Each juror you are able to remove for cause is essentially equivalent to having an additional peremptory strike that your

opponent does not. Indeed, a successful voir dire should tilt the playing field in your favor by eliminating nearly all of the jurors who are predisposed to reject your theory of the case before you ever get around to exercising your peremptories. In almost every case where I've sat a great jury, it was because we were able to elicit bias against our case or client and get multiple jurors to admit they could not be fair and impartial.

But getting a juror to admit that he or she cannot be fair or is unable to follow the court's instructions is no small feat. The pressures to provide a socially desirable response are heightened by the formality of the courtroom, the presence of other jurors, and the intimidating superiority of the judge. With limited time for voir dire, it's understandable that many attorneys go in for the "kill question" too soon after a juror reveals a potential bias, but the value of a cause strike is worth the time it takes to lead jurors down a hole that will make it almost impossible for them to claim they can be completely fair and impartial. The following sequence of steps is aimed at encouraging jurors to say they cannot be fair after they have revealed experiences or attitudes that make them an undesirable juror for your case. Note that this series of cause sequencing assumes that the juror has already revealed potential sources of bias in a supplemental juror questionnaire or in general voir dire questioning.

Step 1: Put the Juror at Ease

While providing personal examples of bias can help put jurors at ease during the general voir dire, as suggested above, attorneys can help put individual jurors at ease by getting them to talk about themselves generally. For example, "Tell me what makes you good at your job," or "Tell me what makes you a good parent." These seemingly innocuous questions get jurors to open up and also makes them feel good about themselves, while providing insight into the jurors' personality and values. Once a juror has established to others that he or she is a good person, they will be more likely to speak candidly about their negative feelings.

Step 2: Remind the Juror What He or She Said

Reminding jurors exactly what they haveve said earlier in voir dire or on their questionnaires – in the jurors' exact language – also has a dual purpose. For one, it helps establish and strengthen a record for what the juror actually said. This is particularly important where a judge has not carefully read the juror questionnaires or is not taking detailed notes of jurors' responses, as well as for when juror questionnaire responses do not become a part of the appellate record. From a psychological perspective, reminding jurors of what they have said also forces them to commit to the position, such that they would feel like a hypocrite if they were to later recant.

Step 3: Ask the Juror to Elaborate

Getting jurors to elaborate on something that they have previously written or said further strengthens their commitment to that position and digs them deeper in the hole. Phrases that elicit elaboration include simple ones such as, "Tell me more about that," and "What experiences led you to develop that opinion?" Other questions that strengthen juror commitment are those like, "How long have you held that belief?" and "Why was that an important experience for you?"

Step 4: Acknowledge It Would Be Tough to Change

The fourth step in the cause sequencing is to get the juror to further commit to his or her position by acknowledging that it would be difficult to change. Cause sequencing is all about strengthening the juror's commitment to a given position. In psychology, the theory of cognitive dissonance explains that there is a tendency for humans to seek consistency between their actions and beliefs and, when faced with a decision, individuals will tend to act in ways that are consistent with previously expressed opinions rather than fundamentally change their beliefs. Essentially, the more a juror expresses a given belief (e.g., that corporate witnesses would lie under oath to protect profits), and that it would be difficult to change that belief, the more likely it is that the juror would stand by that belief and admit it couldn't be set aside. Questions for this stage would include those such as, "How likely is it that you're going to stick to your guns on this belief?" and "How difficult would it be for me to change your mind about that?" Notice that both of

these questions refer to "how likely" or "how difficult," as opposed whether it would be likely or difficult, because you want jurors to express beliefs in their own words so that they fully take ownership of them – not just provide a simple "Yes" or "No" response.

Step 5: Throw the Softballs

Now that you have gotten the juror to commit to the belief, the next step is to ease the juror into admitting that the belief would affect him or her in this case. While it might be tempting to go for the kill questions at this point (i.e., would that make you unable be fair and impartial?), it is better to artfully lead the juror down that path. Remember, jurors are less likely to say that they "cannot" or are "unable to" do something than to admit that they would "have difficulty with" or "struggle with" something, so use softer language to get the juror to admit they would be affected in this case. Examples include, "Might that experience color how you look at the evidence in this case?", "How difficult would it be for you to just set all that aside and render a verdict solely on what you hear in court?" and "What's the likelihood that belief or experience could influence your views of this case?" Remind jurors of what they have said again in this stage: "Given that you said you think corporations can't be trusted, would it be a struggle for you to treat corporations and individuals equally in this case?" or "Given your own experience with losing your mom to cancer, is it fair to say you'd start out leaning in favor of the plaintiff?"

Step 6: Go In for the Kill

Now that the juror has expressed his or her bias and how it would affect them in this case, you arere better situated to get the juror to agree to the judge's or statute's "magic words." For most judges and jurisdictions, this usually refers to the jurors' ability to be fair and impartial, but some judges have higher standards (e.g., an inability to follow the court's instruction) or lower standards (e.g., providing an "unequivocal assurance" of impartiality). Thus, it is important to know the statutory language and applicable case law in your jurisdiction prior to jury selection.

Even these "kill" questions may be manipulated slightly to maximize your chances of securing the cause challenge, as subtle differences in wording can influence jurors' responses. For example, since empirical research shows that jurors are more likely to give a "Yes" response than a "No" response, regardless of the question posed, pose questions such that the desired response is a "Yes." (e.g., "Would those strong feelings make it too difficult for you to follow the judge's instructions?" versus "Would you be able to follow the judge's instructions?")

Rehabilitation

While securing cause challenges was essential to removing our unpersuadables in the Chauvin trial, equally important was preserving our best jurors. When it comes to voir dire, there are three skills that are necessary for reducing the likelihood of having your best jurors struck for cause.

A. Hiding Your Keeps

The first stage of preserving your good jurors is not to identify them in the first place.

Though perhaps counterintuitive, avoid divulging your good facts during voir dire or in a mini-opening because you run the risk of jurors speaking up in agreement with your position. Sure, you may feel more confident in your case as a result, but these jurors are likely to become prime targets for opposing counsel to challenge – and they are of little use to you if they get stricken.

In a similar vein, use your time to ask questions that seek to identify only those who are likely to agree with the opposition. In most instances, your questions should be one-sided. For example, rather than asking jurors whether they think there should be more or less government regulation of corporations, defense counsel in a civil case would only want to know about those who think regulations should be stricter. In a written questionnaire, the ideal question would be:

Do you think there should be more government regulation of large corporations?

□ Yes, much more □ Yes, somewhat more □ No

In an oral format, defense counsel would want to ask, "How many of you think the government should

do much more to regulate large corporations?" In both of these instances, notice that the goal is to identify the people at the furthest end of the spectrum – that is, not just those who think there should be more regulation, but those who feel there should be much more. This is called, "identifying your strikeable minority."

This is because it is nott enough to simply ask questions that identify traits of your risky jurors; you need to consider the likely distribution of responses. For instance, if more than 50% of the panel is likely to raise their hand in response to your question, the information is less useful to you; you won't have enough peremptories to strike them all, and you probably won't even have the time to follow up with each of them to try for a cause challenge. Rather, your question should seek to identify the worst of the bad – the top 10 or 20%. A question that only a handful of jurors respond to will help you identify your riskiest jurors and know where you will need to focus your efforts or use your precious strikes.

On the flip side, if the vast majority of the panel raises their hands in response to your question, you have actually done your client a disservice, because you have now identified the few jurors who didn't raise their hands as being priority targets for your opposition. If that happens unexpectedly, your best course of action would be to move on quickly so as not to draw attention to the few jurors who dissented. Attempting to avoid these questions in the first place is all part of the strategy to "hide your keeps."

B. Rehabilitating Jurors

Although it is important not to do opposing counsel's work for them by identifying your keeps, a skilled adversary will undoubtedly elicit responses from the jurors likely to respond favorably to your case. Here is where the second stage of preservation comes into play: Rehabilitation is the skill of talking your good jurors off the ledge after they have said something that could be potential grounds for a cause challenge.

By nature of having the last word in voir dire in most jurisdictions, defendants generally have the upper hand when it comes to rehabilitating jurors (although plaintiffs and prosecutors should certainly attempt to "pre-habilitate" their good jurors before the defense has a chance to pose questions). For defendants, it should be fairly obvious by the end of opposing counsel's voir dire which jurors you are at risk of losing for cause, so be sure to reserve some time during your voir dire to target these individuals for rehabilitation – preferably at the end, so you don't inadvertently rehabilitate your risky jurors before you have a chance to identify them and get them to admit they cannot be fair.

Questions typically effective at rehabilitating jurors include asking whether they can listen to the evidence, set aside any experience or opinions, be fair to both sides, and follow the law that the judge provides. For example, if you were the defense lawyer in a malpractice case, you could rehabilitate a likely defense juror by asking the following:

> Q: So, your father was a doctor?
> Q: But you would acknowledge that all doctors are not the same, true?
> Q: And some doctors make mistakes or exercise poor judgment from time to time, would you agree?
> Q: And you don't know any of the doctors involved in this case, correct?
> Q: Will you judge the witnesses who testify in this case by what they say here in the courtroom, rather than based on some opinion you have of doctors in general?
> Q: Can you set aside whatever general feelings you may have about doctors or malpractice lawsuits and judge this case on its merits?
> Q: If the plaintiffs prove their case against the defendant, could you find in their favor?
> Q: The court will give you certain instructions as to what laws you should apply. Will you be able to follow those laws despite any general opinions you may have?
> Q: So, will you be able to give a fair shot to all parties involved? Thank you.

Despite all your best efforts, sometimes the most assurance jurors will provide is an assertion that they will "try" to be fair or "try" to set aside their biases. For some judges, this is enough to deny the cause challenge, but for many judges, and by statutory or case law in some jurisdictions, this equivocation is insufficient to establish that the juror can be impartial. In these instances, you will need to spend a little extra time getting the juror to make the

commitment. Indeed, we used this very technique with jurors in the Chauvin trial:

> So if you were a pilot, and we were about to take off and I asked if you'd be able to land the plane safely: If you said you'd "try your best," then you would understand that we wouldn't feel too comfortable getting on that plane, right? It's a similar kind of thing here. We need a little more reassurance from you than just trying. We need to know, can you listen to the evidence, apply the law that the judge gives you, and be fair and impartial to both sides?

C. Defending a Cause Challenge

Defending a cause challenge involves similar steps to making a cause challenge. That is, defending counsel should cite the prospective juror's relevant verbatim responses from questionnaires and oral voir dire, cite the applicable statute for cause challenges, and this time explain why it does not apply, including – most importantly – explaining why rehabilitation efforts were successful.

In most jurisdictions, there will be supporting case law giving judges wide latitude to reject cause challenges for jurors who have revealed potential bias but subsequently committed to following the law. Many judges are already inclined to deny a cause challenge due to fears of running out of jurors or not completing jury selection within the timeframe promised to the venire members. So when you are armed with case law and sound reasoning for why the judge should deny the challenge, you are in a stronger position to prevail on the argument, forcing opposing counsel to use a peremptory challenge or risk having the challenged juror seated on the jury.

Final Thought

For many of our cases, we are facing an uphill battle when it comes to jury selection. Large corporations rarely have the upper hand when it comes to defending cases against injured or deceased plaintiffs. This makes it even more imperative that we save the few defense-minded jurors from opposing counsel's attempts to rid them from the panel. The techniques described above – though used in a criminal context in the Chauvin trial – are tools that every civil defense counsel should be prepared to implement in voir dire.

The Art of Jury Selection:
A Murder Trial Revisited

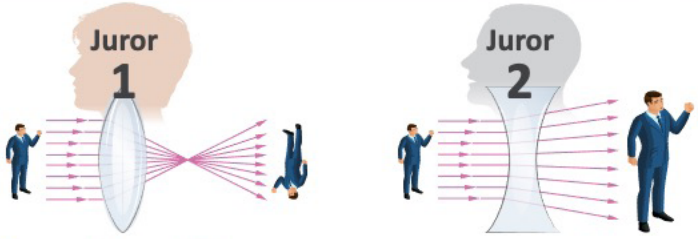
Steven L. Schleicher, Esq.
Partner
Maslon LLP

Dr. Christina Marinakis, Esq.
Jury Consulting Advisor
IMS | Litigation Insights

AGENDA

- Foundations of Jury Selection Psychology
- Preserving Your Best Jurors
- Getting Jurors to Reveal Bias
- Getting Jurors to Admit They Can't Be Fair

JURY SELECTION PSYCHOLOGY: IT'S ALL ABOUT PERSPECTIVE

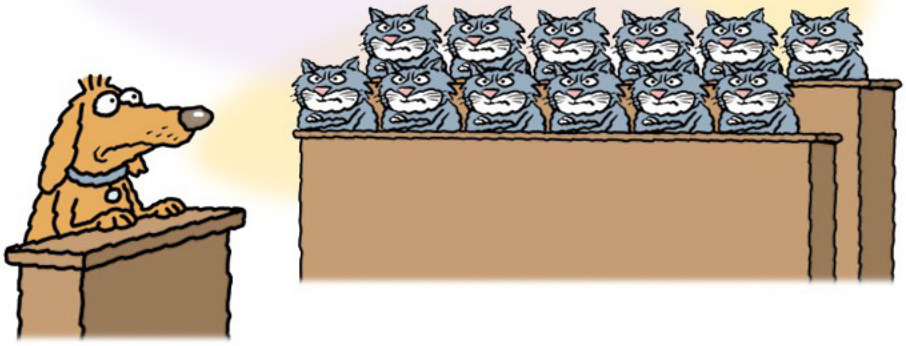


Confirmation Bias:

The tendency to interpret new evidence as confirmation of one's existing beliefs or theories.

- Jurors will filter evidence, interpret ambiguities, and fill in the gaps with their life experiences and attitudes.

CAUSE CHALLENGES: BECAUSE YOU CAN'T STRIKE THEM ALL…



REMEMBER: LARGEST PREDICTIVE FACTORS FOR VERDICT OUTCOMES

JURY ROOM

1. Attitudes/Opinions/Beliefs

…which tend to correlate with:

2. Experiences

…which sometimes correlate with:

3. Demographics

JUROR QUESTIONNAIRES

JURY ROOM

9. Please circle the choice that reflects your honest opinion:

		Strongly Agree	Somewhat Agree	No Opinion	Somewhat Disagree	Strongly Disagree
a.	Discrimination is not as bad as the media makes it out to be.	1	2	3	4	5
b.	Blacks and other minorities do not receive equal treatment as whites in the criminal justice system.	1	2	3	4	5
c.	Police in this country treat whites and blacks equally.	1	2	3	4	5
d.	Police in my community make me feel safe.	1	2	3	4	5
e.	I support defunding the Minneapolis Police Department.	1	2	3	4	5
f.	Minneapolis police officers are more likely to respond with force when confronting black suspects than when dealing with white suspects.	1	2	3	4	5
g.	Because law enforcement officers have such dangerous jobs, it is not right to second guess decisions they make while on duty.	1	2	3	4	5
h.	The criminal just system is biased against racial and ethnic minorities.	1	2	3	4	5
i.	I do not trust the police.	1	2	3	4	5
j.	People today do not give our law enforcement officers the respect they deserve.	1	2	3	4	5
k.	Local police departments try to cover up excessive force rather than correct it.	1	2	3	4	5
l.	I think that news reports about police brutality against racial minorities is only the tip of the iceberg.	1	2	3	4	5

JUROR SUMMARIES - TARGETS

5. Self/someone close victim of crime, police called: Yes; Explain: Our house was burglarized on vacation; Satisfaction w/ police response: Very satisfied
8. Been restrained/put in chokehold: No. I don't recall any formal training on chokeholds.
9a. Discrimination is not as bad as the media makes it out to be: Strongly agree
9b. Blacks and other minorities do not receive equal treatment as whites in the criminal justice system: Strongly disagree
9c. Police in this country treat whites and blacks equally: Strongly agree
9d. Police in my community make me feel safe: Strongly agree
9e. I support defunding the Minneapolis Police Dept: Strongly disagree
9g. Because law enforcement officers have such dangerous jobs, it is not right to second guess decisions they make while on duty: Somewhat disagree
9h. The criminal justice system is biased against racial and ethnic minorities: Strongly disagree
9i. I do not trust the police: Strongly disagree
9j. People today do not give our law enforcement officers the respect they deserve: Somewhat agree
9k. Local police departments try to cover up excessive force rather than correct it: Strongly disagree
9l. I think that news reports about police brutality against racial minorities is only the tip of the iceberg: Strongly disagree
11. Martial arts training/experience: No. Only training I have is defensive tactics training through work.
13. Opinion of Black Lives Matter: Somewhat unfavorable; Explain: This organization promotes anti-police rhetoric, and supports de-funding the police. I am a police officer. I believe all lives matter, including black lives, but I don't support the BLM organization.
14. Opinion of Blue Lives Matter: Very favorable; Explain: I am a police officer.

Part 4: Personal Background

6. Previous cities: Richfield (1 year), Shorewood, High School (5 years), Mound (1 year),

JUROR SUMMARIES - SAVES

5. Listen or watch news: Less than once a week
6. Local Radio or TV News Station: Kare 11
7. Social media news: Every day
8. Social media platforms: Facebook, Twitter, Instagram

Part 3: Police Contacts

2. **Regular contact w/ law enforcement**: Yes; **Explain**: I am a teacher and I have a working relationship with our resource officer.
9a. Discrimination is not as bad as the media makes it out to be: Strongly disagree
9b. Blacks and other minorities do not receive equal treatment as whites in the criminal justice system: Strongly agree
9c. Police in this country treat whites and blacks equally: Somewhat disagree
9d. Police in my community make me feel safe: Somewhat agree
9g. Because law enforcement officers have such dangerous jobs, it is not right to second guess decisions they make while on duty: Somewhat disagree
9h. The criminal justice system is biased against racial and ethnic minorities: Somewhat agree
9k. Local police departments try to cover up excessive force rather than correct it: Somewhat agree
9l. I think that news reports about police brutality against racial minorities is only the tip of the iceberg: Somewhat agree
13. Opinion of Black Lives Matter: Very favorable Explain: I support the movement of Black Lives Matter. I believe there is racial inequality in our nation set up by the systems in place.
14. Opinion of Blue Lives Matter: Somewhat unfavorable; Explain: I do not believe in this movement. A police officer has the choice of their career while a person of color does not have a choice of their race.

VOIR DIRE: KEY PRINCIPLES

JURY ROOM

1. **Be a good representative**

VOIR DIRE: KEY PRINCIPLES

JURY ROOM

1. **Be a good representative**
2. **Preview weaknesses**
   - ✓ Put your worst facts out there
   - ✓ Reserve your strong points
   - ✓ "Throw" your mini-opening
   - ✓ Vanilla Statement of the Case

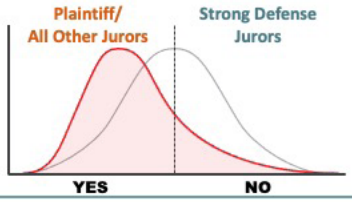
VOIR DIRE: KEY PRINCIPLES

JURY ROOM

1. Be a good representative
2. Preview weaknesses
3. **Ask the right questions – "Hide Your Keeps"**

BAD Question Construction--

"Do you believe diversity is important in the workplace?"



GOOD Question Construction--

"Do you believe there should be racial quotas to ensure diversity in the workplace?"

VOIR DIRE: KEY PRINCIPLES

JURY ROOM

1. Be a good representative
2. Preview weaknesses
3. Ask the right questions
4. **Rehab your best jurors**

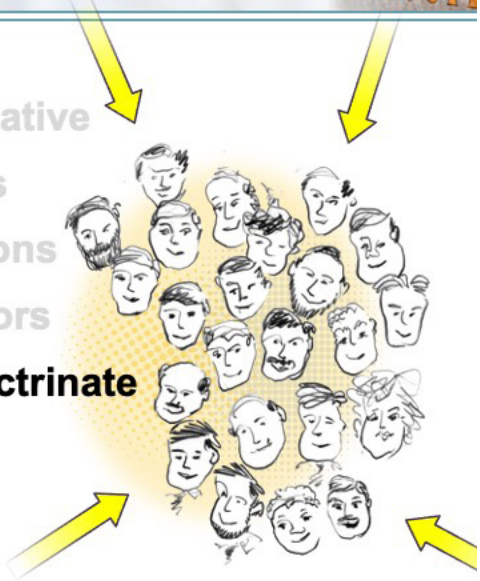
VOIR DIRE: REHABILITATION

VOIR DIRE: REHABILITATION

VOIR DIRE: KEY PRINCIPLES

JURY ROOM

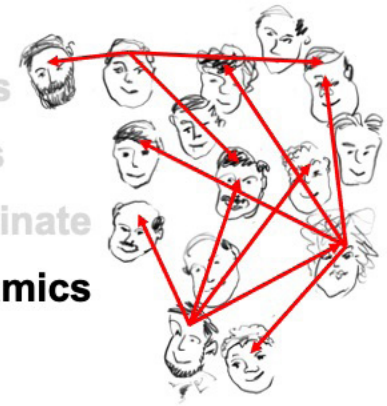
1. Be a good representative
2. Preview weaknesses
3. Ask the right questions
4. Rehab your best jurors
5. **Eliminate, then Indoctrinate**



VOIR DIRE: KEY PRINCIPLES

JURY ROOM

1. Be a good representative
2. Preview weaknesses
3. Ask the right questions
4. Rehab your best jurors
5. Eliminate, then Indoctrinate
6. **Anticipate Group Dynamics**



VOIR DIRE: KEY PRINCIPLES

1. Be a good representative
2. Preview weaknesses
3. Ask the right questions
4. Rehab your best jurors
5. Eliminate, then Indoctrinate
6. Anticipate Group Dynamics
7. **Do your Research**

YOU CAN LEARN A LOT ABOUT PEOPLE FROM THEIR ONLINE POSTS

THE VALUE OF PRECONDITIONING

- **Instill Themes, Plant your Perspective, Seek Commitments**

- **Priming: The Power of Suggestion**
  - When the exposure to an argument or position influences a response

THE VALUE OF PRECONDITIONING

- **Does it work on juries? . . . *Not really***
  - Jurors aren't invested at this stage
  - They don't know how your questions relate to the case
  - Effects of priming fade with time
  - It's hard to change someone's mind
  - Time is better spent elsewhere getting rid of your bad jurors

REVEAL BIAS: PUT JURORS AT EASE

- **Jurors hate public speaking**
- **Make it personal**
  - The impartial parent referee

Practice Tip:
Revisit your example during individual follow-up:
- "Think it'd be a struggle to be a fair umpire in this case?"
- "Tempted to call balls and strikes in favor of the plaintiff?"

REVEAL BIAS: PUT JURORS AT EASE

- **Make it normal**
  - Doesn't mean you're not a fair person
  - Get jurors to give their own examples
- **Make it nonjudgmental**
  - We have thick skin
  - Keep the client out of the courtroom

Practice Tip:
Revisit your example during individual follow-up:
- "Think it'd be a struggle to be a fair umpire in this case?"
- "Tempted to call balls and strikes in favor of the plaintiff?"

REVEAL BIAS: WORDS MATTER

- **Normalize the response:**
  - "How many of you believe… vs. "Does anyone believe..."
  - "Some people believe…"
- **Assume the response: "How difficult would it be for you to..."**

Practice Tip: Use "Anyone believe…." when preconditioning to emphasize that the belief is unacceptable

Practice Tip: Pair this with "other people believe" to preview your themes without exposing your good jurors

Practice Tip: Use "difficulty with" or "struggle with" instead

REVEAL BIAS: WORDS MATTER

- **Ask open-ended questions or get the juror to rephrase in their own words**
- **Phrases to avoid: "cannot," "unable to," "have a problem with."**
- **The answer should be "Yes"**

Practice Tip: Use "Anyone believe…." when preconditioning to emphasize that the belief is unacceptable

Practice Tip: Pair this with "other people believe" to preview your themes without exposing your good jurors

Practice Tip: Use "difficulty with" or "struggle with" instead

REVEAL BIAS: BODY LANGUAGE MATTERS

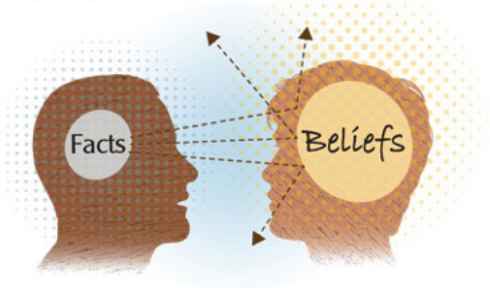
- **Monkey see, monkey do**
  - Raise hands
  - Nod along
- **Normalizes the response**
- **Empathize with the juror**

Practice Tip: Asking for a raise of hands will get more responses than asking jurors to speak up

Practice Tip: Show empathy by mirroring the juror's facial expressions

REVEAL BIAS: DON'T FEAR THE RESPONSE

- **Priming effects fade with time**
- **Beliefs are resistant to change**
- **An expression of unsupported belief will not change or influence others in any substantial way**



Practice Tip: If concerned about a juror revealing specific knowledge or inadmissible facts, preface questions with, "Without explaining why or what you've heard…"

CAUSE SEQUENCING: GETTING THE HORSE TO DRINK

STEP 1: DISARM THE JUROR

- Start with the easy questions
- Get them talking about their positive qualities

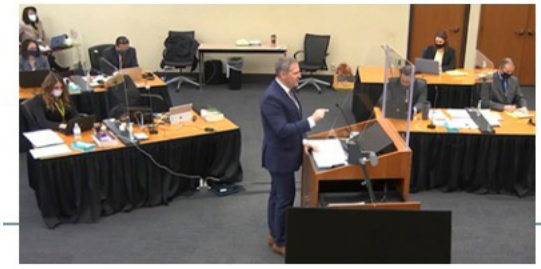
Chauvin Jury Selection - Why Get A Puppy, Asks Prosecutor

Practice Tip: Target the jurors you want to get excused based on their previous responses or internet search results

Practice Tip: Let them show off their good qualities by asking what makes them good at their job

STEP 2: REMIND THE JUROR

- Read back their responses
- Use the juror's exact language
- Establish and strengthen the record
- Force the juror to commit



Practice Tip:
Make sure to have a consultant or colleague next to you to record the jurors' responses verbatim so you can focus on connecting with jurors

STEP 3: ASK FOR ELABORATION

- Strengthen the commitment
- "Tell me more about that."
- "What led you to develop that opinion?"
- "How long have you held that belief?"
- "How much were you affected by that experience?"

Practice Tip:
In a successful voir dire the jurors should be talking more than the attorney; ask open-ended questions

STEP 4: ACKNOWLEDGE IT WOULD BE DIFFICULT TO CHANGE

JURY ROOM

Create *cognitive dissonance*:

- Tendency to seek consistency between actions and beliefs
- When faced with a decision, either act consistently with the belief, or fundamentally change the belief

STEP 4: ACKNOWLEDGE IT WOULD BE DIFFICULT TO CHANGE

JURY ROOM

- "How likely is it that you're going to stick to you guns on this?"
- "How difficult would it be for me to change your mind about that?"

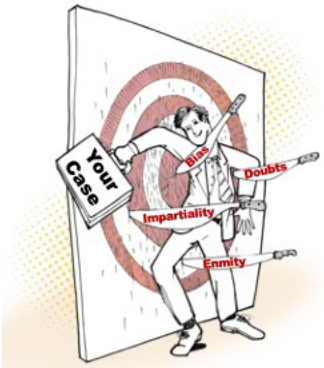
STEP 5: THROW SOFTBALLS

- **Ease them in with softer language**
- **Bring it home to *this case***
- "Could that experience color how you view the evidence in *this case*?"

STEP 5: THROW SOFTBALLS

- "How difficult would it be for you to just set all of that aside and render a verdict solely on the evidence in *this case*?"
- **Remind them what they've said again:** "Given that you said…."

STEP 6: GO IN FOR THE KILL



- Use the "magic words"
- Know the statutory language and case law
- Make sure to word the question so that the desired response is "Yes"

Practice Tip:
Don't rely solely on local counsel or assume the cause standard is the same in every jurisdiction

STEP 6: GO IN FOR THE KILL

- "Would that terrible experience make it too difficult for you to be completely fair and impartial in this case?"
- "Will that experience influence your judgment in the case?"
- "Are you starting the case with some enmity or bias against the defendant?"
- "Do you have some doubts about your ability to be impartial?"

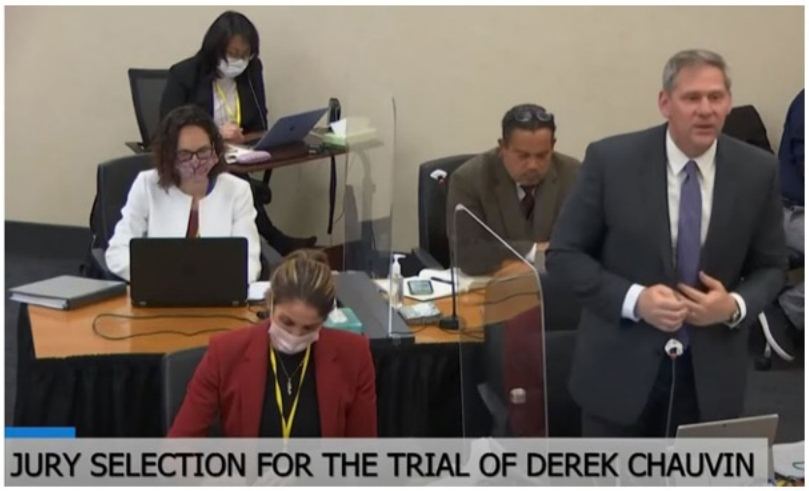
VOIR DIRE: BUT WHAT IF THEY "TRY?"

GAINING A COMPETITIVE ADVANTAGE

Step 1:	Disarm the Juror
Step 2:	Remind the Juror
Step 3:	Ask for Elaboration
Step 4:	Acknowledge it Would be Difficult to Change
Step 5:	Throw Softballs
Step 6:	Go in for the Kill

VOIR DIRE:
STRIKING AND STRATEGIZING

JURY ROOM



QUESTIONS

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Steve Schleicher

Partner | Maslon (Minneapolis, MN)

Steve Schleicher is a renowned trial lawyer with deep experience in high profile cases. He concentrates his work on high stakes criminal and civil litigation, government and internal investigations, and appellate practice—and leads Maslon's Government & Internal Investigations Group.

Steve's extraordinary trial skills are well known throughout the United States and the world. Most recently, he has been recognized for his role as a special prosecutor in the internationally televised homicide trial of former Minneapolis Police Officer Derek Chauvin for the murder of George Floyd. Steve received high praise for his prominent role conducting jury selection and witness examination. His devastating cross-examination of the defense use-of-force expert received national acclaim, and his powerful closing was viewed as a pivotal factor in the trial verdict.

In his white collar criminal defense practice, Steve represents individuals accused of financial crimes involving health care, agriculture, and corporate embezzlement. As a business litigator, Steve served as liaison defense counsel for a leading corn seed developer in a consolidated action involving over 65,000 plaintiffs, and he has represented a leading medical device manufacturer in product liability lawsuits in numerous state and federal courts across the country.

Steve's investigations practice has included a high profile investigation of a private security company holding a contract at a major NFL venue that resulted in its termination; a data security breach and IP theft conspiracy at a major automobile manufacturer; and internal investigations and government compliance on behalf of health care providers, including hospital systems and physicians. Across all, he leverages deep experience and an acute skillset honed through both public service and private practice.

Areas of Practice

- Litigation
- Appeals
- Business Litigation
- Government & Internal Investigations
- Tort & Product Liability

Honors

- Praeses Elit Award, Law Society of Trinity College Dublin, Ireland, 2022
- Selected for inclusion in The Best Lawyers in America®, 2022
- Advocate Award, Civil Litigation Section of Minnesota State Bar Association, 2021 (The award honors those who have made a significant contribution to improving the system of civil justice in Minnesota.)
- North Star Lawyer, Minnesota State Bar Association, 2020 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.)
- Presidents Award, Minnesota State Association of Narcotics Investigators, 2017
- Julius E. Gernes Prosecutor Award, Minnesota State Bar Association Public Law Section, 2017
- Attorney of the Year, Minnesota Lawyer, 2016
- Arson Prosecutor of the Year, International Association of Arson Investigators, Minnesota Chapter, 2004

Education

- William Mitchell College of Law - J.D., cum laude, 1995
- University of Minnesota, Duluth - B.A., magna cum laude, 1992; Criminology and Political Science

Personal Jurisdiction – Product Liability and Confirmation of Arbitration Award

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Personal Jurisdiction - The Impact of the Supreme Court's Holding in Ford Motor Co. v. Montana on Products Liability and Confirmation of Arbitration Awards
Bob Fulton and Tim Ford

Personal Jurisdiction – Products Liability (Ford Motor Co. v. Montana)

In 2014, the Supreme Court decided Daimler AG v. Bauman, a case that changed the landscape of general jurisdiction.[1] The holding in Daimler provided that courts can only exercise general jurisdiction over a corporate defendant if they are "at home," namely their principal place of business or the state of incorporation. This decision greatly limited the scope of general jurisdiction, and plaintiffs were forced to resort back to specific jurisdiction to sue a defendant that was "out of state." The analysis under specific jurisdiction was established in International Shoe[2] and its progeny and involved two questions: (1) does the defendant have sufficient minimum contacts with the forum state and (2) does exercising jurisdiction comport with notions of fair play and substantial justice? After the Daimler decision, Ford and many other product manufacturers took the position that due to the transient nature of goods, specific jurisdiction could not be established over a product manufacturer in a state if the product was not sold, manufactured, or designed in that state.

Fast forward to 2021, and the Supreme Court has once again decided a case that changes the landscape of personal jurisdiction, this time with respect to specific jurisdiction. Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.,[3] was decided by the Supreme Court in March 2021 and was a consolidated case that involved two Ford vehicles that allegedly malfunctioned and were involved in accidents in Montana and Minnesota respectively. Ford moved to dismiss both lawsuits for lack of personal jurisdiction. The central issue before the Court was whether the courts could exercise specific jurisdiction over an out of state defendant for an alleged product malfunction when the product was not sold, manufactured, or designed in that state.

While Ford conceded that it did substantial business in the respective states, the main argument was that this business activity was insufficient to establish specific jurisdiction because Ford's business activity in the forum state did not cause the injury that the plaintiff suffered due to the alleged malfunction. In other words, specific jurisdiction was improper because the cars that allegedly malfunctioned were not sold, manufactured, or designed in the forum states. The Court rejected Ford's "causation-only" approach and stated that specific jurisdiction is proper when the suit either: (1) arises out of or (2) relates to the defendant's contacts with the forum state.

In rendering an 8-0 decision, the Court focused on the second part of the specific jurisdiction analysis and emphasized how the particular accidents related to Ford's contacts with the forum states. Of particular importance, the Court noted the volume of business that Ford conducted in the forum states, that Ford heavily marketed these specific vehicle models in the forum states, that Ford regularly sold, maintained, and repaired cars in the forum states, and that the accidents occurred in the forum states. The Court concluded that these contacts amounted to Ford "systematically serv[ing] a market

1 Daimler AG v. Bauman, 571 U.S. 117 (2014).

2 Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

3 Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

in Montana and Minnesota for the very vehicles that the plaintiffs alleged malfunctioned and injured them in those States."[4]

While the full impact of this decision is yet to be determined, it is almost certain that in this internet age, this decision will find many corporate defendants scrambling to defend lawsuits in states they may never have anticipated being hailed into court in. Specific jurisdiction is now back in the eyes of the beholder, and "[w]hen a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit."[5]

Personal Jurisdiction – Confirmation of Arbitration Awards

The relationship between personal jurisdiction and arbitration becomes apparent after an award is made by the arbitrator. The prevailing party may move to confirm the award in a court of competent jurisdiction. Likewise, challenges to the arbitration award must only be entertained in a court of competent jurisdiction. The process of confirming an arbitration award can become complicated when competing motions with respect to the arbitration award are filed in different forums.

The interplay between specific jurisdiction and the confirmation of an arbitration award became all too relevant when we recently moved to confirm an arbitration award arising from a Florida construction project that was arbitrated, by mutual consent, in Florida by a Florida arbitrator pursuant to American Arbitration Association's Rules. In an effort to evade confirmation and enforcement, the respondent (defendant) in the arbitration, Sayers Construction, challenged Florida state court's ability to obtain personal jurisdiction over Sayers in Florida to confirm the arbitration award, and simultaneously moved to vacate the arbitration award in Sayers' resident State of Texas in Federal court. The purpose of this article is not to identify the proper jurisdiction or forum for confirmation of an arbitration award—such an assessment is too case specific, and there may well be competing forums to consider.[6] Rather we suggest to you—as we learned the hard way—that jurisdictional considerations are complex and that the simple ministerial task of confirming an arbitration award, a process that should take months, can take years.

A. Personal Jurisdiction – Federal Court

If a party raises the defense of lack of personal jurisdiction, the non-moving party bears the burden of proving personal jurisdiction.[7] Although the non-moving party bears the burden, "[w]hen a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing . . . the nonmoving party need only make a prima facie showing, and the court must accept as true the nonmover's allegations and resolve all factual disputes in its favor."[8]

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over defendants.[9] A federal court may exercise personal jurisdiction over a nonresident defendant only if "the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment."[10]

On issues of personal jurisdiction, due process is satisfied if the "nonresident defendant has certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[11] "The 'minimum contacts' inquiry is fact intensive and no one element is decisive; rather the touchstone is whether the defendant's conduct shows that it 'reasonably anticipates being haled into court.'"[12]

The "minimum contacts" inquiry may be further subdivided into contacts that give rise to "general" personal jurisdiction, and those that provide

4 Ford Motor Co., 141 S. Ct. at 1028.

5 Id. at 1022.

6 The Colorado River doctrine allows a federal court to dismiss or stay a federal action in deference to pending parallel state court proceedings, based on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (citation omitted) (internal quotation marks omitted).

7 Luv N'care, Ltd. v. Insta–Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006).

8 Guidry v. U.S. Tobacco Co., Inc., 188 F.3d 619, 625 (5th Cir. 1999); see also ITL Intern., Inc. v. Constenla, S.A., 669 F.3d 493, 496 (5th Cir. 2012).

9 See Fed. R. Civ. P. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"); Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014).

10 McFadin v. Gerber, 587 F.3d 753, 759 (5th Cir. 2009).

11 Gardemal v. Westin Hotel Co., 186 F.3d 588, 595 (5th Cir. 1999) (brackets in original) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

12 McFadin, 587 F.3d at 759 (internal citation omitted).

"specific" personal jurisdiction.[13] When a defendant has "continuous and systematic general business contacts" with the forum state, the court may exercise "general" jurisdiction over any action brought against that defendant.[14] When the contacts are less extensive, the court may still exercise "specific" jurisdiction if a "nonresident defendant has purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities."[15]

B. Personal Jurisdiction – Florida Law

In Venetian Salami Co. v. Parthenais, the Florida Supreme Court articulated a well-worn, two-step analysis to determine whether personal jurisdiction exists over a nonresident defendant.[16] A court first determines whether the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of Florida's long-arm statute.[17] If so, the court addresses whether the nonresident has constitutionally sufficient "minimum contacts" such that jurisdiction comports with due process.[18]

If the plaintiff meets the initial pleading requirement, the defendant "then has the burden to file a legally sufficient affidavit" contesting the jurisdictional allegations.[19] If the defendant properly contests the basis for long-arm jurisdiction with an affidavit, the burden shifts back to the plaintiff to refute the defendant's affidavit with its own proof.[20] But if a defendant's affidavits "fail to controvert the pertinent factual allegations of a complaint," the burden does not shift back to the plaintiff, and jurisdiction is appropriate.[21]

C. Case Analysis – Sayers v. Timberline

In Sayers v. Timberline, the parties became embroiled in jurisdictional litigation and appeals in both Florida and Texas. Ultimately, the 5th Circuit in Texas was tasked with addressing competing motions to confirm and vacate filed in the Eleventh Judicial Circuit of Florida and the Western District of Texas respectively.[22] The underlying issue centered on a construction subcontract between Sayers, a Texas general contractor and Timberline, a South Dakota subcontractor. The construction subcontract was a contract to complete work on a project that was located in the State of Florida. During the course of the project, a payment dispute arose and a subsequent arbitration took place in Florida, with the arbitrator rendering an award in favor of Timberline. Timberline moved to confirm the arbitration in state court in Florida and Sayers moved to vacate the arbitration award in federal court in Texas. Timberline filed a motion to dismiss the Texas action and the 5th Circuit was tasked with deciding the issue of "whether a federal district court in Texas had jurisdiction to vacate an arbitration award in Florida."[23]

Sayers argued specific jurisdiction was proper because Timberline solicited business from Sayers in Texas, Timberline mailed payments to Sayers in Texas, and the subcontract had a general Texas choice of law provision. The 5th Circuit rejected Sayers arguments and stated that these contacts were insufficient to establish specific jurisdiction when all of the work under the contract was to be performed in Florida. Furthermore, the court held that while a general choice of law provision in a contract can be probative of the parties' intent, the choice of law or venue provisions in an arbitration clause is more dispositive of the issue.

It is important to note that the FAA treats an arbitration clause in a contract as a separate agreement between the parties. This is important because in the context of personal jurisdiction and arbitration, the Supreme Court has held that if a choice of law provision is located in an arbitration clause, that clause will apply to the arbitration, while a general choice of law provision in a contract applies to the other right and duties of the parties under the contract.[24] Thus, it is important to read the specific choice of law provision in a contract to determine

13 Choice Healthcare, Inc. v. Kaiser Found. Health Plan of Colo., 615 F.3d 364, 368 (5th Cir. 2010).

14 Luv N'care Ltd., 438 F.3d at 469 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, (1984)).

15 Choice Healthcare, Inc., 615 F.3d at 368.

16 Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989).

17 Id.

18 Id.

19 Rautenberg v. Falz, 193 So. 3d 924, 928 (Fla. 2d DCA 2016).

20 See Rollet v. de Bizemont, 159 So. 3d 351, 356 (Fla. 3d DCA 2015).

21 Intego Software, LLC v. Concept Dev., Inc., 198 So. 3d 887, 893 (Fla. 1st DCA 2016) (citing Acquadro v. Bergeron, 851 So. 2d 665, 673 (Fla. 2003)).

22 Sayers Constr., L.L.C. v. Timberline Constr., Inc., 976 F.3d 570 (5th Cir. 2020).

23 Id. at 572.

24 See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995).

whether it is a choice of law provision that will serve to control the rights of the parties in arbitration.

Confirming or vacating an arbitration award can be a tricky process when considering personal jurisdiction. One way to eliminate a lot of the guesswork is to specify the proper jurisdiction governing the arbitration clause. Failure to specify jurisdiction in the arbitration clause can cause a client to find themselves in costly and unexpected out of state litigation. This is equally true when considering the holding in Ford Motor Co., where courts can now exercise personal jurisdiction over product manufacturers, even if the product was not sold, manufactured, or designed in that state.

Personal Jurisdiction

The Impact of the Supreme Court's Holding in Ford Motor Co. v. Montana on Products liability

and

Confirmation of Arbitration Awards

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The Personal Jurisdiction Landscape Prior to Ford Motor Co.

DAIMLER

at home

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Ford Motor Co. v. Montana Eighth Judicial District

- Vehicles were produced outside of the forum states and arrived through private transactions
- Vehicles allegedly malfunctioned and suits were brought

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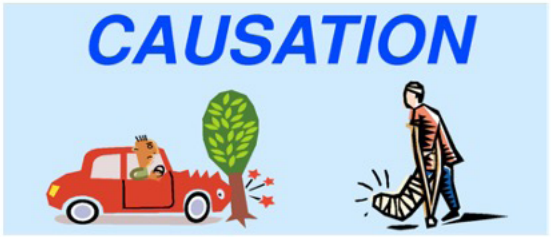
Ford's Causation Only Arguments

- Ford conceded that they do substantial business in the states
- However, Ford argued that this business activity wasn't enough to establish specific jurisdiction because this activity wasn't the cause of the injury in the state



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The Supreme Court's Response

- The Court rejected Ford's causation only approach
- Held Specific jurisdiction is proper if:

(1) the suit <u>arises out</u> of the defendant's contacts <u>OR</u> (2) <u>relates to</u> the defendant's contacts with the forum state

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Ford's Contacts with the States

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The Supreme Court's Holding

- The Court held that Ford's contacts amounted to "systematically serv[ing] a market in Montana and Minnesota for the very vehicles that the plaintiffs alleged malfunctioned and injured them in those States."

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Impact of this Decision

- Many clients are using the internet to sell products and services
- Many products are transient
- Could find themselves defending out of state lawsuits due to product malfunctions even if the product wasn't sold, manufactured or designed in that state

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How does this relate to Arbitration?

- After an arbitration award is issued, have to move to confirm or vacate the award in a court of competent jurisdiction

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What does the FAA and State Law Say about Jurisdiction?

- FAA: look at the arbitration agreement to determine where jurisdiction is proper
- State Law: varies, but most states say to look at the arbitration agreement as well

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What does your Contract Say about Jurisdiction?

- Arbitration clause in contract is a separate agreement – Mastrobuono v. Shearson
- Choice of law provision in arbitration clause applies to arbitration
- General choice of law provision in contract applies to other rights and duties, but not arbitration clause

vs.

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What if the Arbitration Agreement is silent as to jurisdiction?

- Personal Jurisdiction will play a role to determine if the court can entertain the motion to confirm or vacate
- This was the issue the Fifth Circuit and Florida courts faced in Sayers v. Timberline

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Sayers v. Timberline

- **Florida State Court vs. Texas Federal Court: Who has jurisdiction to confirm or vacate the award?**

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Sayers' Contacts with Florida

- **Sayers contracted for work on Florida electrical utility "hardening" project, office in Florida, agreed to arbitrate in Florida with Florida arbitrator**

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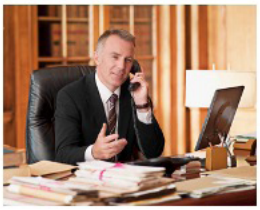
Timberline's Contacts with Texas

- **Solicited business from Sayers, mailed payments to Sayers, the contract had a general Texas choice of law provision**



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5th Circuit's Holding

- **Insufficient to establish minimum contacts by Timberline in Texas because all of the work under the contract was done in Florida**
- **Texas choice of law provision was probative, but venue provision (Florida) in the arbitration clause was more important**

United States Court of Appeals
for the Fifth Circuit

FILED
October 2, 2020
Lyle W. Cayce
Clerk

No. 19-51099

SAYERS CONSTRUCTION, L.L.C.,

Plaintiff—Appellant,

TIMBERLINE CONSTRUCTION, INCORPORATED; HIGH VOLTAGE, INCORPORATED,

Defendants—Appellees.

In short, this is Florida's problem. Not Texas's.

AFFIRMED.[2]

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What to Do

- Eliminate the guess work: specify in the arbitration clause where jurisdiction is proper
- If not, client can find themselves in costly and unexpected out of state litigation

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How this Works Together

- Ford decision – specific jurisdiction over a product manufacturer if the product wasn't sold manufactured or designed in that state
- Clients can find themselves in out of state arbitration related litigation if they have necessary minimum contacts

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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 currently serves on the firm's Management Committee, and on the Diversity & Inclusion and Wellness Committees. He defends 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.

He has tried cases in federal and state courts within Florida and outside of Florida. He is one of the firm's liaisons with the Trial Network.

Active in the community, Bob currently serves as co-chair of the American Heart Association Lawyers with Heart for the Tampa Bay Heart Walk and is active within his church. He was Outstanding Alumnus in 2002 for the Department of Criminology at the University of Florida and for the College of Liberal Arts and Sciences in 2003. Bob was Project Care Volunteer of the Year for Big Brothers/Big Sisters in Hillsborough County for 2001.

When not at work, Bob enjoys being outdoors – hiking, biking, walking and fishing. He is also passionate about watching and following the Florida Gators and the Duke Blue Devils.

Practice Focus

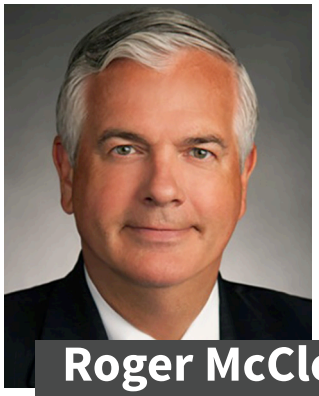
- Automotive
- Products Liability
- Consumer Products
- Industrial/Commercial Products
- Drug & Medical Device
- Personal Injury
- Automotive Liability Litigation
- Litigation
- ADA Accessibility

Honors

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Florida Super Lawyers (2013-2021)
- Florida Trend's Legal Elite (2011-2017)
- Florida Trend's Legal Elite - Up and Comers (2007-2008)
- Super Lawyers Business Edition (2013)
- The Best Lawyers in America© (2018-2022)

Education

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



Are Your Warnings and Instructions Adequate to Withstand Defective Marketing Suits?

Roger McCleary

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Minimizing Exposure to Marketing Defect Lawsuits

Roger L. McCleary and James C. Burnett

It can keep you awake at night. People discover new and inventive ways to hurt themselves while using your company's products. A confluence of random events leads to a serious injury or death involving those products. Meanwhile, hordes of creative plaintiffs' lawyers are outside the proverbial company gates. They scheme to attack your company's warnings and instructions. They develop theories about how your "uncaring" and "reckless" company should have foreseen a risk and avoided killing or maiming their clients by adding a warning for only a few cents per item – rather than "put profits first." They, too, are manufacturers: they manufacture emotional narratives and huge actual and punitive damages claims for juries.

Many Plaintiffs' counsel approach cases as though your company's long-term business plan is to hurt people! It may make no sense to you – but it makes sense to enough juries to make this a scary proposition. If the prospect of being hammered by an enormous adverse award in a marketing case does not keep you awake, perhaps it should.

Hyperbole? Clearly not. Ask Bayer AG (which acquired Monsanto Company in 2018)[1] – hit with a $2.055 billion plus verdict (including $2 billion in punitive damages) in a Monsanto Roundup warnings lawsuit in May of 2019.[2]

Ask McDonalds, famously popped with an almost $3 million dollar verdict (including $2.7 million in punitive damages) in a 1994 verdict premised on failure to warn about the temperature of McDonald's coffee.[3]

These two examples, addressed further below, are just two of many cautionary tales. Product liability marketing defect cases are on the rise - and they can pose a clear and present danger of mega-million dollar verdicts plus.[4]

What can you do to help protect your company or client from the voracious tort lawyers at the gates? This paper will address marketing defect claims in general, with a focus on Texas law, and will offer practical tips on how to minimize exposure to those claims.

Marketing Defect Law Review (Texas.)

To add context to the recommendations that follow, a review of basic marketing defect law principles, focused on Texas law, may be helpful. Like most other states,[5] Texas has adopted section 402A of the RESTATEMENT (SECOND) OF TORTS for strict liability in tort.[6]

In Texas, a plaintiff can bring a marketing defect claim under three general theories of recovery: (1) strict product liability, (2) negligence, and (3) breach

1 See, REUTERS, Bayer to rethink Roundup in U.S. Residiential Market after Judge nixes $2 bln settlement, available at https://www.reuters.com/ business/healthcare-pharmaceuticals/us-judge-rejects-bayers-2-bln-deal-resolve-future-roundup-lawsuits-2021-05-26 (last visited August 24, 2021).

2 See, Pilliod v. Monsanto Co., A158228, 2021 WL 3486893, at *4 (Cal. Ct. App. Aug. 9, 2021).

3 See, Liebeck v. McDonald's Restaurants, P.T.S., Inc., CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994) (awarding $160,000 in compensatory damages, after a twenty percent [20%] reduction for comparative negligence, and $2,700,000 in punitive damages), vacated sub nom, Liebeck v. Restaurants, P.T.S.,, Inc., CV-93-02419, 1994 WL 16777706 (N.M. Dist. Sept. 16, 1994).

4 According to Lex Machina's 2000 Product Liability Litigation Report, product liability case filings (excluding MDL associated cases) rose by 28% from 2018 (43,567) to 2019 (56,041).

5 While this brief review has some general application across most jurisdictions, the applicable law and standards may vary to some degree – and perhaps extensively - in other jurisdictions and should be separately evaluated.

6 See, McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967).

of warranty.[7]

A. Strict Products Liability Warning Claims.

(1) Elements.

Under Texas law, a duty to warn a user of a product arises, and a marketing defect occurs, when a manufacturer knows or should have known of a potential risk of harm presented by the product but markets it without adequately warning of the danger or providing instructions for safe use.[8]

The question of whether a duty to warn or instruct exists is a question of law to be decided by the trial court, not the jury.[9] Further, this question must be decided as of the time the product "leaves the manufacturer" (i.e., is sold), not at the time of the lawsuit or when the claimant is injured.[10] A product supplier is not liable for a failure to warn of dangers that were unforeseeable at the time the product was marketed and sold.[11]

The elements that must be proved to recover for a marketing defect under Texas law are as follows: (1) a risk of harm that is inherent in the product or that may arise from the intended or reasonably anticipated use of the product; (2) the product supplier knows or reasonably should foresee the risk of harm at the time the product is marketed; (3) the product has a marketing defect in its warnings or instructions; (4) the warnings or instructions (or lack of the same) render the product unreasonably dangerous to the ultimate user or consumer of the product; and (5) the failure to instruct or warn is a causative nexus in the product user's injury.[12]

A "defect in warnings" means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known and which failure rendered the product unreasonably dangerous as marketed.[13]

A "defect in instructions" means the failure to give adequate instructions to avoid the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known and which failure rendered the product unreasonably dangerous as marketed.[14]

"Adequate" warnings or instructions means warnings or instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings or instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.[15]

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.[16]

(2) Causation.

Under Texas law, the causal standard for a strict liability marketing defect claim is "producing cause."[17] A "producing cause" means a cause that was a substantial factor in bringing about the injury or occurrence, and without which the injury or occurrence would not have occurred.[18] A producing cause is a cause that is both a substantial factor and a but-for cause of the claimant's injuries.[19] Stated differently, "[a] plaintiff must show that adequate warnings would have made a difference in the outcome, that is, that they would have been

7 Am. Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 435 (Tex. 1997).

8 See USX Corp. v. Salinas, 818 S.W.2d 473, 482 (Tex. App.—San Antonio 1991, writ denied).

9 Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 387 (Tex. 1991) ("In Texas, the existence of a duty to warn of the dangers or instruct as to the proper use of a product is a question of law.").

10 Gen. Motors Corp. v. Saenz on Behalf of Saenz, 873 S.W.2d 353, 356 (Tex. 1993) ("The determination of whether a duty to warn exists is made as of the time the product leaves the manufacturer.").

11 Owens-Corning Fiberglas Corp. v. Malone, 916 S.W.2d 551, 561 (Tex. App.—Houston [1st Dist.] 1996), aff'd, 972 S.W.2d 35 (Tex. 1998) ("In a failure-to-warn case, the plaintiff must establish that the dangers were reasonably foreseeable or scientifically discoverable at the time of exposure before a defendant can be held liable."); USX Corp. v. Salinas, 818 S.W.2d 473, 483 (Tex. App.—San Antonio 1991, writ denied).

12 See USX Corp. v. Salinas, 818 S.W.2d 473, 482-483 (Tex. App.—San Antonio 1991, writ denied); see also, Ranger Conveying & Supply Co. v. Davis, 254 S.W.3d 471, 480 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). (Emphasis added)

13 See Texas Pattern Jury Charge, Products Liability, 71.5. (Emphasis added).

14 Id.

15 Id.

16 Id.

17 See Texas Pattern Jury Charge, Products Liability, 70.1.

18 Id.

19 Id.

followed."[20]

Under Texas law, when a manufacturer fails to give a warning, there is a rebuttable presumption that the user would have read and heeded such warning establishing the producing causation element.[21] "This presumption may be rebutted with evidence that the user was blind, illiterate, intoxicated at the time of the product's use, irresponsible, lax in judgment, or by some other circumstance tending to show that the improper use would have occurred regardless of the proposed warnings or instructions."[22]

The rule is different, however, when the claim is an inadequate warning of an improper use of a product.[23] "If despite the inadequacy of [the warning or] instructions, following them would have prevented the accident, then their inadequacy could not have caused the accident," and the Plaintiff is not entitled to the normal presumption.[24] Stated differently, "no presumption arises that a plaintiff would have heeded a better warning when, in fact, he did not read the warning given, which if followed would have prevented his injuries."[25]

(3) Key Points Regarding Manufacturers' Standard of Care.

While strict products liability claims ostensibly focus on a product defect rather than the conduct of the manufacturer, as in a negligence claim, the foreseeability of risk element implicates a standard of care.

Expertise. In products liability cases involving scope of manufacturer's duty to warn of dangers associated with use of product, a manufacturer is held to knowledge and skill of an expert.[26] This is relevant to determining (1) from a strict products liability perspective, "whether the manufacturer knew or should have known of a danger" (i.e., foreseeability), and (2) from a negligence perspective, "whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product."[27] A manufacturer's status as an expert means the manufacturer must, at a minimum, "keep abreast of scientific knowledge, discoveries, and advances," and the manufacturer is charged with knowledge of the related relevant information.[28]

Testing. Manufacturers also have a duty to test and inspect their products.[29] The extent of research and experiment must be commensurate with the dangers involved.[30]

(4) Well-Recognized Exceptions and Defenses.

Well-recognized exceptions and defenses to a strict liability marketing cases include:

Limitations or a Statute of Repose;[31]

No duty to warn or instruct regarding dangers that are not reasonably foreseeable;[32]

No duty to warn or instruct regarding dangers that are within the ordinary and common knowledge of the community of users;[33]

No duty to warn of obvious dangers; [34]

No duty of component part manufacturer to warn of dangers in the component unless (1) the component itself is defective or (2) it actively participated in the integration of the component into a final system;[35]

Learned Intermediary Doctrine. A manufacturer of a prescription drug has no duty to warn of dangers to an end user when it adequately provided warnings to a doctor.[36] This doctrine applies in certain other contexts

20 Gen. Motors Corp. v. Saenz on Behalf of Saenz, 873 S.W.2d 353, 357 (Tex. 1993).

21 Magro v. Ragsdale Brothers, Inc., 721 S.W.2d 832, 834 (Tex. 1986).

22 Id.

23 Gen. Motors Corp. v. Saenz on Behalf of Saenz, 873 S.W.2d 353, 358 (Tex. 1993).

24 Id. at 359.

25 Stewart v. Transit Mix Concrete & Materials Co., 988 S.W.2d 252, 256 (Tex. App.—Texarkana 1998, pet. denied).

26 See, e.g., Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1089 (5th Cir. 1973)

27 Id.

28 Id.

29 Id.

30 Id. at 1089-90.

31 A statute of limitations creates a time limit for suing in a civil case, based on the date when the claim accrued. A statute of repose puts an outer limit on the right to bring a civil action, which is measured not from the date on which the claim accrues but instead from, e.g., the date of sale of a product or the date of the last culpable act or omission of the defendant.

32 See USX Corp. v. Salinas, 818 S.W.2d 473, 482-483 (Tex. App.—San Antonio 1991, writ denied); see also, Ranger Conveying & Supply Co. v. Davis, 254 S.W.3d 471, 480 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

33 Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991) (holding that manufacturers of alcoholic beverages had no duty to warn of risk of alcoholism).

34 Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 382 (Tex. 1995); Sauder Custom Fabrication, Inc. v. Boyd, 967 S.W.2d 349, 351 (Tex. 1998).

35 Ranger Conveying & Supply Co. v. Davis, 254 S.W.3d 471, 482 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

36 Centocor, Inc. v. Hamilton, 372 S.W.3d 140, 154 (Tex. 2012) ("In certain contexts, however, the manufacturer's or supplier's duty to warn end users of the dangerous propensities of

as well.

Bulk Supplier Exception. A bulk supplier of a product to a distributor and/or manufacturer may not have a duty to warn the actual product user if the original supplier has reasonable assurances that its warning will reach those endangered by the use of its product by the distributor or manufacturer.[37]

No evidence of defect. This defense generally asserts the product is not unreasonably dangerous, and it frequently comes up in the context of challenging the admissibility of claimants' liability experts based on their lack of qualifications to testify about the product at issue or the lack of reliability of the experts' opinions.

The lack of a warning or instruction was not a substantial, but-for cause of the incident.

The claimant is responsible for 51% or more of the cause of the incident (claimant is barred from recovery); [38]

The claimant is responsible for up to 50% of the cause of the incident (claimant's recovery is reduced proportionally); [39]

The incident was caused by a "new and independent cause", or by the conduct of a party or responsible third party other than your company or the claimant (your company's exposure is reduced in proportion).

B. Negligence.

Products liability focuses on the product; whereas, negligence focuses on the manufacturer's conduct.[40]

(1) Elements.

In Texas, to prevail on a claim of negligent failure to warn or instruct claim against the manufacturer, a claimant must prove a legal duty owed to the claimant by the defendant, breach of that duty, and damages to the claimant proximately caused by the breach of that duty.[41] The existence of a duty is a question of law.[42]

In general, if the claimant has established a duty of care exists, to establish breach of that duty, the claimant must show that the defendant failed to use that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances; that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.[43]

In the negligence context, "proximate cause" means establishing both cause in fact and foreseeability.[44] A cause is a cause in fact when it is both a substantial factor in bringing about an occurrence or injury, and without which cause the occurrence or injury would not have occurred.[45] In order for a cause to be foreseeable, the act or omission complained of must be such that a person using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury, might reasonably have resulted from the act or omission.[46]

"Negligence in the product liability context focuses on the acts of the manufacturer to determine if those persons exercised ordinary care in the design, production, and sale of a product."[47] "The issue in a negligent failure to warn case becomes whether a reasonably prudent person in the position of the defendants would warn of all hazards associated with the products."[48] Thus, "a manufacturer has a duty to warn if a reasonably prudent person in the manufacturer's position would warn of hazards associated with the user of its product."[49]

While one must establish a "marketing defect" in a

its product is limited to providing an adequate warning to an intermediary, who then assumes the duty to pass the necessary warnings on to the end users.").

37 Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 592 (Tex. 1986); Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 172 (Tex. 2004).

38 Tex. Civ. Prac. & Rem. Code § 33.001.

39 Tex. Civ. Prac. & Rem. Code § 33.003 (a)(1) and § 33.012(a).

40 Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 181 (Tex. 2004).

41 Lucas v. Tex. Indus., Inc., 696 S.W.2d 372, 376–77 (Tex. 1984); Dewayne Rogers Logging, Inc. v. Propac Indust., Ltd., 299 S.W.3d 374, 385 (Tex. App.—Tyler 2009, pet. denied).

42 Seifried v. Hygenic Corp., 410 S.W.3d 427, 432 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

43 See Lincoln Prop. Co. v. DeShazo, 4 S.W.3d 55, 61 (Tex. App.—Fort Worth 1999, pet. denied).

44 IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 799 (Tex. 2004).

45 Texas Pattern Jury Charge 2.4; IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 799 (Tex. 2004).

46 Texas Pattern Jury Charge 2.4; Travis v. City of Mesquite, 830 S.W.2d 94, 98 (Tex. 1992).

47 Toshiba Intern. Corp. v. Henry, 152 S.W.3d 774, 784 (Tex. App.—Texarkana 2004, no pet.)

48 Munoz v. Gulf Oil Co., 732 S.W.2d 62, 65 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

49 Toshiba Intern. Corp. v. Henry, 152 S.W.3d 774, 784–85 (Tex. App.—Texarkana 2004, no pet.)

products liability action, courts generally do not state that a claimant is required to establish a "marketing defect" claim to succeed on a negligent failure to warn claim.[50] Notwithstanding the apparent lack of an express defect requirement, any finding that the manufacturer "should" have provided a warning or instruction, or a better warning or instruction, implies that the product was defective and unreasonably dangerous in the absence of such a warning or instruction.[51]

(2) Key Points on Manufacturers' Standard of Care.

The same basic points raised above regarding a manufacturer's "standard of care" with respect to strict products liability marketing cases also apply to negligent marketing cases.

(3) Exceptions and Defenses.

The key exceptions and defenses to a negligent marketing claim are intertwined with and very similar to those for a strict products liability marketing defect claim, with the exception, at least technically, that more focus is placed on the conduct of the defendant rather than the product itself.

C. Breach of Warranty.

A claimant may also seek recovery in connection with a warning claim by asserting a cause of action for breach of warranty.[52] In general, a warranty can be express or implied.

In the context of the sale of goods, there are two general implied warranties: the warranty of merchantability[53] and the warranty of fitness for a particular purpose.[54] In general, "[a]n implied warranty is a representation about the implied quality or suitability of a product that the law implies and imports into a contract, 'in view of all facts and circumstances attending the transaction, including the nature of the property, terms of the agreement, and trade usages.'"[55]

Breach of warranty theories are not asserted as frequently as strict product liability and negligence claims because, among other reasons, they are frequently disclaimed and otherwise more difficult to prove. Accordingly, the focus of this of this paper will remain on strict liability and negligent marketing claims.

More on Cautionary Tales.

Monsanto Roundup Litigation.

In 1970, agricultural giant Monsanto formulated glyphosate as a potent herbicide. Monsanto marketed the chemical as Roundup Weed Killer. By 2007, Roundup was used in more than 160 countries, and it was the most used herbicide in the United States.

In January of 2016, a former groundskeeper for a California school, Dewayne Johnson, filed a lawsuit against Monsanto Company claiming his use of Roundup products over many years, with no warnings about the products possibly being linked to cancer, contributed to his development of terminal non-Hodgkin's lymphoma.[56] Mr. Johnson's lawsuit was premised on the 2015 classification of glyphosate as "probably carcinogenic to humans" by the International Agency for Research on Cancer (IARC).[57] IARC's determination was based on data reportedly long available to Monsanto. Mr. Johnson also claimed that Monsanto had not done enough testing on Roundup's formulation, which also included chemicals other than glyphosate, such as a surfactant enhancing the absorption of glyphosate through the waxy surface of a plant or skin.[58] The

50 Harper v. E.I. DuPont de Nemours & Co., 01-94-01191-CV, 1997 WL 69858, at *12 (Tex. App.—Houston [1st Dist.] Feb. 20, 1997, pet. denied); Kallassy v. Cirrus Design Corp., CIV.A. 3:04-CV-0727N, 2006 WL 1489248, at *3 (N.D. Tex. May 30, 2006), aff'd, 265 Fed. Appx. 165 (5th Cir. 2008) ("Both negligent manufacturing and negligent design require a showing of dangerous product.").

51 Hanus v. Tex. Utilities Co., 71 S.W.3d 874, 879 (Tex. App.—Fort Worth 2002, no pet.) ("The central question in both marketing-defect cases and negligent failure to warn cases is when is a warning necessary to avoid creating an unreasonably dangerous product; in other words, under what circumstances is a manufacturer required to provide a warning.").

52 Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez, 995 S.W.2d 661, 664 (Tex. 1999) ("Liability for personal injuries caused by a product's defective design can be imposed under several legal theories, among them negligence, breach of warranty, and strict products liability.").

53 Tex. Bus. & Com. Code Ann. § 2.314.

54 Tex. Bus. & Com. Code Ann. § 2.315.

55 Am. Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 435 (Tex. 1997).

56 See, Johnson v. Monsanto Co., 266 Cal. Rptr. 3d 111, 114 (Cal. Ct. App. 2020)

57 Id. at 118.

58 Between 1997 and 1999, four papers were issued that studied "the genotoxicity of glyphosate and/or Roundup." See, Johnson, 266 Cal. Rptr. 3d at 115. Genotoxicity refers to the possibility of a chemical agent damaging genetic information within a cell, causing mutations that can lead to cancer. A toxicologist who worked for Monsanto at the time noted that these studies were inconsistent with "existing results" regarding glyphosate's genotoxicity and believed the studies "needed attention" because they represented "a new type of finding." Id. Monsanto consulted with a genotoxicity expert to review the four studies. In February 1999 the expert reported that there was evidence of a possible genotoxic effect for both glyphosate and Roundup. Id. The expert ultimately wrote three reports for Monsanto and recommended that further tests be conducted. The evidence at trial was mixed as to whether Monsanto adequately followed up on the expert's recommendation. Id. In September 1999, a Monsanto

EPA had approved the sale of glyphosate-based herbicides since 1974 and in 1991 found there was "evidence of non-carcinogenicity for humans" regarding glyphosate based on animal studies.[59]

On August 10, 2018, a San Francisco jury returned a verdict awarding Mr. Johnson $289 million ($39 million in compensatory damages and $250 million in punitive damages) in his Roundup case.[60]

An avalanche of Roundup cancer lawsuits followed, claiming Roundup caused a variety of cancers.

In another California case, a husband and wife, both diagnosed with forms of cancer they attributed to their use, without wearing protective clothing or masks, of a consumer version of Roundup.[61] The label for this product lacked any warnings about cancer or the use of such protections. The couple claimed they thought Roundup was safe to use, in part because one of them had seen a man in a Roundup commercial spraying the product while wearing shorts.[62] In May 2019, the jury found that Monsanto acted maliciously and awarded the couple $55 million in compensatory damages and $2 billion ($1 billion each) in punitive damages.[63]

Approximately 30,000 claims by Roundup users were pending against Monsanto as of May of 2021.[64] Federal multidistrict litigation is consolidated under MDL No. 2741 under U.S. District Judge Vince Chhabria in the Northern District of California. In June of 2021, Bayer AG, which acquired Monsanto in 2018, agreed to settle the great majority of Roundup lawsuits for almost $11 billion.[65] Monsanto continues to assert that decades of studies show Roundup and glyphosate are safe for human use.[66]

McDonald's Coffee Case.

Most of us have heard of the million-dollar verdict in the famous – even notorious – Liebeck hot coffee case against McDonalds.[67] While this case is "seared" into the minds of many because of the large verdict arising from a fairly common spilled coffee-type incident, many are not familiar with the fact that the case was actually about how McDonalds knew of and failed to warn consumers of the danger arising from coffee hot enough to cause third degree burns. The jury awarded the claimant $160,000 in compensatory damages, after a twenty percent [20%] reduction for comparative negligence, and $2,700,000 in punitive damages.[68]

Importantly, the Liebeck hot coffee case can be seen as a notable example of how a product that is sold with an arguably obvious risk or danger can still be found by a jury to be defective when those risks are not adequately conveyed to the consumer or user.

C. Emerson Elec. Co. v. Johnson, 601 S.W.3d 813, 821 (Tex. App.—Fort Worth 2018), aff'd, 18-1181, 2021 WL 1432226 (Tex. Apr. 16, 2021).

Recently, the Texas Supreme Court affirmed a nearly $15 million verdict in favor of a claimant in a product liability marketing defect case. In Emerson, the claimant, a HVAC technician and professional with 25 years of experience working in the HVAC industry, was seriously injured after an HVAC compressor sold by Emerson exploded. The compressor exploded after it experienced an event called "terminal venting," a situation where an electrical malfunction causes excessive pressure inside the compressor, which weakens the compressor's internal components and can lead to an explosion of oil and refrigerant (and in some

toxicologist wrote an internal email stating that Monsanto "want[s] to find/develop someone who is comfortable with the genotox profile of glyphosate/Roundup and who can be influential with regulators and Scientific Outreach operations when genotox[ ] issues arise. My read is that [the expert who wrote the 1999 reports] is not currently such a person, and it would take quite some time and $$$/studies to get him there. We simply aren't going to do the studies that [the expert] suggests." Id. (emphasis added). Referring to the potential genotoxicity of glyphosate and Roundup, the email also stated, "[w]e have not made much progress and are currently very vulnerable in this area." Id. Although some additional testing was ultimately done, the parties disputed its extent and adequacy. Id. Monsanto consistently defended itself by claiming that the "regulatory consensus" is that glyphosate is safe. Id.

59 See, Pilliod, 2021 WL 3486893 at *2.

60 See, Johnson, supra, at 444.

61 See, Pilliod, supra, at *4.

62 In an internal email written in 2003, a senior toxicologist at Monsanto wrote that Monsanto could not say that Roundup is not a carcinogen, because it had not done the necessary testing on the formulation to make the statement, but Monsanto could say that glyphosate is not a carcinogen and infer that there is no reason to believe Roundup would cause cancer. Monsanto admitted that it never conducted a long-term animal carcinogenicity study on any of the glyphosate-containing formulations that it sold in the United States. Pilliod, 2021 WL 3486893 at *3.

63 Id. at *9 (motion for new trial denied on the condition of plaintiffs' acceptance of reduced awards totaling $56 million to the wife and $31 million to the husband).

64 See, supra n. 2..

65 See, https://www.alllaw.com/articles/nolo/ personal-injury/roundup-lawsuits-history-and-developments.html

66 See, supra n. 2; https://www.alllaw.com/ articles/nolo/personal -injury/roundup-lawsuits-history-and-developments.html.

67 Liebeck v. McDonald's Restaurants, P.T.S., Inc., CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994), vacated sub nom, Liebeck v. Restaurants, P.T.S.,, Inc., CV-93-02419, 1994 WL 16777706 (N.M. Dist. Sept. 16, 1994).

68 Id.

cases ignition).

At trial, the claimant presented evidence he was called by a local food store to replace a compressor. After installing a new compressor and restoring power to the compressor, the claimant testified that he heard a "rumbling" sound. While attempting to isolate the sound and run a test on the compressor, the claimant removed the compressor's cover. The compressor immediately vented, releasing scalding oil and refrigerant that ignited and seriously injured the claimant.

After a jury trial, the trial court entered a judgment for the Plaintiff on the jury's finding that the compressor contained a marketing defect, because there were no warnings of the risk or terminal venting or how to avoid it. This finding was affirmed on appeal.

In considering the adequacy of the warning, the defendant argued that the warning provided, a "symbol" displayed on the compressor meant to warn of the general danger of explosions, was sufficient. However, the court concluded this symbol simply did not warn specifically of the risk of terminal venting and how to avoid such dangers.

The court also addressed the manufacturer's no duty arguments that the risk of "terminal venting" was both known to the claimant, which he admitted, and obvious in the industry.

In countering these points, the claimant successfully argued, and the court of appeals agreed that (1) "Emerson should have warned him about the risks of terminal venting, specifically, the nature of its danger and how to avoid it," and (2) "Emerson should have warned that certain noises indicate that a terminal vent is imminent, so that a serviceperson who heard the noises would recognize the immediate danger and avoid it," were not known by the plaintiff and were not obvious in the HVAC community.

Key evidence relied upon by the claimant was a warning from an Emerson competitor stating that: "[t]o reduce the risk of electrocution or serious burns or death from terminal venting with ignition: ... Be alert for sounds of arcing (sizzling, sputtering[,] or popping) inside the compressor. IMMEDIATELY GET AWAY if you hear these sounds."

Ayers By & Through Ayers v. Johnson & Johnson Baby Products Co., a Subsidiary of Johnson & Johnson Co., 117 Wash. 2d 747, 758–59, 818 P.2d 1337, 1343 (1991)

This case held that a manufacturer of baby oil, marketed as safe, was liable for injuries to a child for failing to warn that the aspiration of the baby oil was dangerous to babies (even though the parents knew that baby oil should only be used for external use) because evidence established that parents would have treated the baby oil more carefully.

Personal Experience.

Fortunately, this one is the good sort of a cautionary tale. Earlier this year my firm obtained a summary judgment in favor of a product manufacturer in a South Texas marketing defect lawsuit involving alleged damage to the claimant's brain and lungs. We were pleased and proud to obtain this result – but I include reference to it because we managed to obtain it result despite major obstacles created by our client's document management program.

The lawsuit was filed in 2019 concerning an incident involving a product manufactured in 1994 by a company acquired by our client in 1997. Under Texas law, a fifteen-year statute of repose for product liability actions provides: "a claimant must commence a product liability action against a manufacturer or seller of a product before the end of fifteen (15) years after the date of the sale of the product by the defendant." [69]

That statute includes an exception providing that if a manufacturer or seller "expressly warrants in writing that the product has a useful safe life of longer than 15 years, a claimant must commence a products liability action against that manufacturer or seller of the product before the end of the number of years warranted after the date of the sale of the product by that seller."[70]

The challenge was that, while it was indisputable that 23 years had passed from the time of manufacture until the date our client was sued, documentation

69 Tex. Civ. Prac. & Rem. Code § 16.012(b).

70 Tex. Civ. Prac. & Rem. Code § 16.012(c).

of the actual sale – or of the sale date - no longer existed. That documentation had not been retained by our client, by the purchaser (claimant's employer), or by the presumed distributor. To make matters even more complicated, no actual warnings for this vintage product could be located or confirmed, and the limited marketing materials located for the era of the product's manufacture used terms such as "safe" and "permanent" regarding the product.

Ultimately, we located a former employee with sales and marketing responsibilities for the manufacturer. Through this individual's carefully prepared declaration, we managed to establish the product was "certainly" sold by no later than 1997. We also overcame claimant's arguments that use of the terms "permanent" and "safe" in regard to the product created an express written warranty the product had a useful safe life of longer than 15 years.

Recommendations.

● Schedule Regular and Periodic Review/Audits of Your Over-All Marketing (Not Just Warnings and Instructions).

Based on the author's experience and judgment, any manufacturer of a product must engage in a regular and periodic review of a products warnings and instructions to consumers to address any known or potential dangers. Knowing what your competitors are saying may also be warranted. However, simply waiting until a lawsuit is filed is dangerous.

In conducting this review, a manufacturer may consider including outside legal counsel. Legal counsel should be able to offer opinions as to the warnings from a legal perspective. Further, having legal counsel involved may protect the results from disclosure if the product is involved in a later lawsuit. Even if they are likely to be privileged, any communications regarding the review should be carefully worded.

● Evaluate What Your Marketing Says and Does Not Say.

Of course your company should evaluate warnings and instructions to address currently identifiable and objectively recognizable hazards that were previously not addressed. However, it is also important to evaluate what your marking actually does say about your company's products. General, blanket statements claiming the product is "safe" or "permanent," for example, invite claims of marketing defect and pose potential challenges to the assertion of statute of repose defenses.

● Pre-Claim: What's the Story?

Your company can take steps NOW to help ensure it has a favorable story to tell when your company is sued. Evaluate how claimants' counsel could spin the current realities of your company's marketing history against your company (e.g., has appropriate product testing been done?). Consider the story you want your company to be able to tell a judge and jury, and take action now to develop a factual record to support that favorable story. You want to change the story that claimant's counsel wants to tell – or at least be in position to offer a credible alternative story.

● Pre-Claim and Post-Claim: Aristotle's Essentials of Advocacy.

It is never too early to consider and apply Aristotle's essentials of advocacy to your pre-claim marketing program evaluation or your defense to pending litigation:[71]

Ethos. Aristotle believed that the advocate must convince the listener of the personal character of the advocate. The company's lawyers must also convince the jury of the client's personal character and that the client has an appropriate ethical or moral position, in keeping with the prevailing sentiments in the community -- or, at the least, that the client's position is the equal of the opposition's.

Pathos. Aristotle believed that the advocate must effectively deal with the emotions of the listeners -- that is, he or she must convince the jury that the company's position is sympathetic or worthy of compassion; or, conversely, that the opposition should not receive the jury's sympathy or compassion.

71 Credit belongs with my good partner at PMM, Jeff Parsons, who developed these points, has long championed and spoken about them, and who has applied them successfully over an extraordinary career.

Logos. Finally, the advocate must convince the jury that the proof logically and reasonably supports the company's position.

● Pre-Claim: Consider Retaining a Qualified Consultant.

You should consider retaining a qualified human factors/warnings consultant, with experience in regard to your particular products, to provide consulting services regarding your warning and instructions. If the consultant's efforts are coordinated and managed carefully, the consultant should be available as a credible witness in support of your company's diligent efforts to provide proper warnings and instructions.

● Pre-Claim: Communications Training.

Your company should train employees in regard to their written communications. They should consider each written communication in the context of how it will be considered by a judge and jury.

● Pre-Claim: Review Document Retention Program.

Your company's document retention program should be assessed and addressed with the defense of marketing defect (and other litigation) in mind. It is often (though not always!) helpful to retain old warnings, instructions, design drawings, sales documents, etc., indefinitely for use in support of the company's defenses – including statutes of repose. Identify the documents your company will want to use in support of the company's story and take the action necessary to retain them.

● Pre-Claim: Treat Soon–To-Be Ex-Employees Fairly.

Whether employees are laid-off in a reduction in force, retiring, or terminated for other reasons, your company should remember these employees are potential future witnesses in support of, or against, your company.

Your company should make every reasonable effort to treat them accordingly. There have been many occasions when ex-employees who would be in a position to help defend my client were unwilling to do so - or were even strong supporters of the claimant - because of their animosity over perceived unfair treatment from the client.

● Post-Claim: Release the Defense Lawyer Kraken!

Let your litigation counsel do what they do best! It is important not to handcuff your litigation counsel in the early investigation and development of the defense of a lawsuit (or, frankly, at any time). I have previously been directed to leave investigation regarding company witnesses and documents to in-house counsel, only to later identify critical sources of evidence – on a barely timely basis – when the autonomous internal investigation was unsuccessful.

● Post-Claim: Find and Retain Potential Human Factors/ Warnings Testifying Experts Immediately.

Good testifying experts – particularly on rather esoteric subjects - are hard to find. Your company and its outside litigation counsel should retain appropriate consulting experts – with a view toward having them as testifying experts – very soon after notification of an incident or service of a lawsuit summons. You should assume your co-defendants are doing so, and you do not want to be without the support of a strong, comfortable testifying expert "chair" when the music stops.

● Post-Claim: Prepare a Draft Jury Charge Promptly.

One of the earliest steps after the filing of suit should be preparation of a draft jury charge with definitions and instructions based on the applicable law. This will help identify key words and themes to uses in the course of discovery and development of the defense.

● Post-Claim: Again, What's the Story?

Hopefully, your company has already laid the groundwork for a good defense story by following the above recommendations. Regardless, promptly after a lawsuit has filed, a simple story, based on simple themes, and a plan for presentation should be developed to guide the handling of the case and

presentation to the jury. They should apply Aristotle's principles of advocacy, and they can be changed as circumstances warrant during development of the case.

● Claimant's Deposition.

In addition to other standard areas for examination for the claimant, it is particularly important to develop the claimant's education, training and experience with the product, or similar products, to demonstrate (among other things) the claimant knew or should have recognized the hazard without the need of an instruction or a warning from the manufacturer. This also can be explored with the claimant's supervisors, trainers, and other co-workers. It is also important to develop evidence that additional warnings or instructions would not have been read or followed. Among other techniques, this often can be developed by asking what the claimant remembers (often not much) about warnings and instructions he/she admittedly did receive, or about other occasions when the claimant did not follow instructions or warnings.

● Emphasize Effective Witness Preparation.

It never ceases to amaze me how often co-defendants' counsel give short shrift to effective preparation of their clients' witnesses. Lack of effective witness preparation is simply a disaster waiting to happen. This preparation should not be left to the day before, much less the morning of, the deposition (as I have learned counsel for other parties do all too often). An initial preparatory session is recommended long before the scheduled deposition, with follow-up sessions as necessary and a final session near the day of the deposition. It often helps to provide company witnesses with a general understanding of the legal issues, your company's story, and key terms – not only to give the witness a perspective to use in responding to questions, but also to determine if the witness has knowledge that undercuts the defense story.

● Prepare for the ANSI Z535 Attack.

ANSI Z535 is a written standard for product liability safety signs and labels. Claimants' warnings experts often cite the following language, easily taken out of context, in support of their opinions of defective marketing:

"A product safety sign or label should alert persons to a specific hazard, the degree or level of hazard seriousness, the probable consequence of involvement with the hazard, and how the hazard can be avoided."[72]

A well-qualified defense warnings expert, particularly one with experience serving on ANSI committees, can help explain this language in the context of the standard. In particular, such an expert can explain the objective of this voluntary standard is simply to provide uniform formatting conventions for safety messages when they are provided – rather than to impose a broad, often impossible to meet obligation upon a manufacturer.

● Do the Right Thing.

Finally, it is not just the trite title of a movie. Whether it is how employees are treated, whether to incur the expense of performing certain product testing, whether to provide a warning, or some other related issue, when the company's attitude and approach is to "do the right thing," it makes it much easier to defend the company at trial – even if the company happens to get it wrong.

72 ANSI Z535.4, American national Standard for Product Safety Signs and Labels (1991).

Minimizing Exposure to Marketing Defect Lawsuits

Roger McCleary
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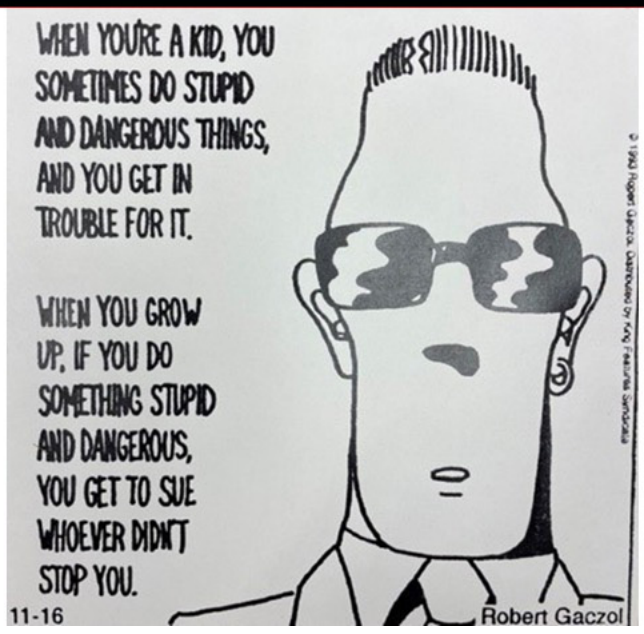
The Trial Network
In-House and Outside Counsel: In Sync and In Person
Kiawah Island
November 4, 2021

How true!



Key Points and Simple Take-Aways on Warnings:

- Warnings can "expire"
- Regular attention and focus recommended
- To extent not already underway, defense to warnings claims starts now – not after suit filed!
- Help us help you.

A Cautionary Tale: Monsanto Roundup Litigation

(Pilliod v. Monsanto Co., A158228, 2021 WL 3486893 (Cal. Ct. App. Aug. 9, 2021)

- May of 2019
- Bayer AG: $2.055 billion plus verdict (including $2 billion in punitive damages) in a Monsanto Roundup warnings lawsuit

A Cautionary Tale: Infamous McDonalds Hot Coffee Case

- $2.9 Million Verdict (including punitive damages!)
- Failure to Warn Claim: arguably obvious danger – do they really need to warn anyone that coffee is sold hot?

Barbarians at the Gates!

Perspective on Marketing Defect Law: Basic Principles Review (Texas)

- Strict Products Liability Warning Claim Elements:

(1) a risk of harm that is inherent in the product or that may arise from the intended **or reasonably anticipated use** of the product; (2) the product supplier knows or **reasonably should foresee the risk of harm** at the **time the product is marketed**; (3) the product has a marketing defect in its warnings or instructions; (4) the warnings or instructions (or lack of the same) renders the product **unreasonably dangerous** to the ultimate user or consumer of the product; and (5) the failure to instruct or warn is a **causative nexus** in the product user's injury.

Marketing Defect Law: Basic Principles Review (Texas)

- Strict Products Liability Warning Claim: Adequate Warnings

"Adequate" warnings or instructions means warnings or instructions given in a form that could reasonably be expected to catch the attention of a **reasonably prudent person** in the circumstances of the product's use; and the content of the warnings or instructions must be comprehensible to the average user and **must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person**.

Marketing Defect Law: Basic Principles Review (Texas)

- Strict Products Liability Warning Claim: Unreasonably Dangerous Product

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the **ordinary knowledge common to the community** as to the product's characteristics.

Marketing Defect Law: Basic Principles Review (Texas)

- Strict Products Liability Warning Claim: Causation/Producing Cause

A "producing cause" means a cause that was a **substantial factor** in bringing about the injury or occurrence, and **without which the injury or occurrence would not have occurred**.

A producing cause is a cause that is both a substantial factor and a but-for cause of the claimant's injuries.

Marketing Defect Law: Basic Principles Review (Texas)

- Strict Products Liability Warning Claim: Rebuttable Presumption

Under Texas law, when a manufacturer fails to give a warning, there is a rebuttable presumption that the user would have read and heeded such warning.

Marketing Defect Law: Basic Principles Review (Texas)

- Products Liability Warning Claim: Standard of Care (Implicated in Foreseeability for Strict Products Liability)

A. Expertise - manufacturer is held to knowledge and skill of an expert. Relevance:

(1) from a strict products liability perspective, whether the manufacturer knew or should have known of a danger (i.e., foreseeability);

(2) from a negligence perspective, whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product.

Marketing Defect Law: Basic Principles Review (Texas)

- Products Liability Warning Claim: Standard of Care (Implicated in Foreseeability for Strict Products Liability)

A. Expertise - A manufacturer's status as expert means the manufacturer must, at a minimum, **keep abreast of scientific knowledge, discoveries, and advances, and the manufacturer is charged with knowledge of the related relevant information**.

(See, e.g., Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1089 (1973))

Marketing Defect Law: Basic Principles Review (Texas)

- Products Liability Warning Claim: Standard of Care (Implicated in Foreseeability for Strict Products Liability)

B. Testing. Manufacturers also have a duty to test and inspect their products.

- The extent of research and experiment must be "commensurate with the dangers involved."

(See, e.g., Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1090 (1973))

Marketing Defect Law: Basic Defenses (Texas)

- Statute of Limitations or Repose
- No duty:
  - danger not reasonably foreseeable
  - danger within the ordinary and common knowledge of the community of users
  - danger obvious
  - component is not defective and did not participate in integration into defective system
  - Learned Intermediary Doctrine
  - Bulk Supplier Exception
- No evidence of defect
  - Experts not qualified or reliable

Marketing Defect Law: Basic Defenses (Texas)

- No causation
- Comparative responsibility
  - 51% + bar to recovery
  - < 51% reduces damages proportionally
  - responsibility reduced in proportion to findings against co-defendants, settled parties, and responsible third parties

Marketing Defect Law: Basic Principles Review (Texas)

- Negligence Products Liability Warning Claim Elements:

(1) a legal duty owed to the claimant by the defendant,

(2) breach of that duty, and

(3) damages to the claimant proximately caused by the breach of that duty.

Marketing Defect Law: Basic Principles Review (Texas)

- Negligence Products Liability Warning Claim Breach of Duty and Proximate Cause:
  - Did defendant fail to use that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.
  - "Proximate Cause" means establishing both cause in fact and foreseeability.
    - Cause in Fact: a substantial factor in bringing about an occurrence or injury, and without which cause the occurrence or injury would not have occurred.
    - Foreseeability: a person using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury, might reasonably have resulted from the act or omission.

Monsanto Roundup Litigation: A Cautionary Tale

- Origin: January 2016 cancer lawsuit by California school goundskeeper Dewayne Johnson
- EPA approved sale of glyphosate based herbicides
  - found evidence of non-carcinogenicity based on animal studies
- 2015: International Agency for Research on Cancer (IARC) classified glyphosate as "probably carcinogenic to humans" based on previously available data

Monsanto Roundup Litigation: A Cautionary Tale

- Monsanto toxicologist noted that new studies were inconsistent with "existing results" regarding glyphosate's genotoxicity and believed the studies "needed attention"
- Monsanto consulted with a genotoxicity expert
  - reported evidence of a possible genotoxic effect
  - recommended further testing
- Mixed evidence re follow-up

Monsanto Roundup Litigation: A Cautionary Tale

- 2018: San Francisco jury awarded Mr. Johnson $289 million ($39 million in compensatory damages and $250 million in punitive damages).
- 2019: Pilliod verdict in California for $55 million in compensatory damages and $2 billion ($1 billion each) in punitive damages.
- 30,000 plus claims/MDL
- June 2021: ≈ $11 billion deal

Infamous McDonalds Coffee Case: A Cautionary Tale

- Facts: what temperature was the coffee? Discovery showed 180-190° F.
- No warning coffee could cause third degree burns.
- $2.9 million verdict (including punitive damages!)

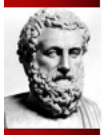
Recent Personal Experience

- Lawsuit filed in 2019 regarding product manufactured in 1994.
- **Statute of Repose**: (b) . . . [A] claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product by the defendant.
- **Exception**: If manufacturer or seller expressly warrants in writing that the product has a useful safe life of longer than 15 years, claimant must commence action before the end of the number of years warranted after the date of the sale of the product by that seller.

Recommendations

- **Schedule Regular and Periodic Review/Audits of Your Over-All Marketing (Not Just Warnings and Instructions).**
  - Not just commercial exposure
- **Evaluate What Your Marketing Says and Does Not Say.**
- **Pre-Claim Perspective: What's the Story?**
  - Objectivity
  - Current program - devil's advocate/apply critical eye
  - Future - story you want told/Rocking chair perspective
  - Simplicity – Occam's razor
    - Principle: In explaining a thing no more assumptions should be made than are necessary.
    - Practice: Most simple explanation is best.

Review Marketing in Context of Essentials of Advocacy



- **Pre-Claim and Post-Claim: Aristotle's Essentials of Advocacy:**
  - ***Ethos.*** Must convince jury of the personal character of the advocate/client and that client has an appropriate ethical or moral position.
  - ***Pathos.*** Must deal with the emotions of the jury -- convince the jury that the company's position is sympathetic or worthy of compassion; or, conversely, that opposition should not receive sympathy or compassion.
  - ***Logos.*** Must convince jury that the proof logically and reasonably supports the company's position.

Recommendations

- **Pre-Claim: Consider Retaining a Qualified Consultant.**
- **Pre-Claim: Communications Training.**
- **Pre-Claim: Review Document Retention Program.**
- **Pre-Claim: Treat Soon-To-Be Ex-Employees Fairly.**
- **Post-Claim: Release the Defense Lawyer Kraken!**
- **Post-Claim: Find and Retain Potential Human Factors/ Warnings Testifying Experts Immediately.**
- **Post-Claim: Prepare a Draft Jury Charge Promptly.**
- **Post-Claim: Again, What's the Story?**
- **Claimant's Deposition.**
- **Emphasize Effective Witness Preparation.**

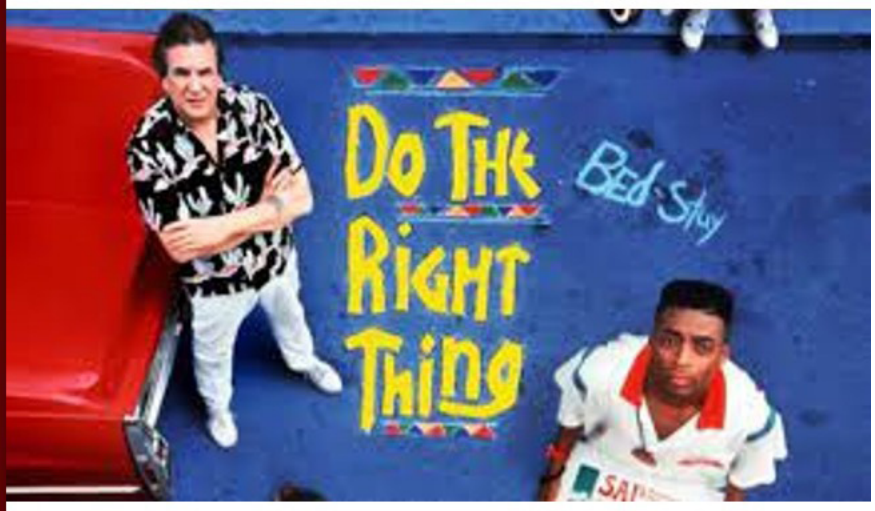
Recommendations

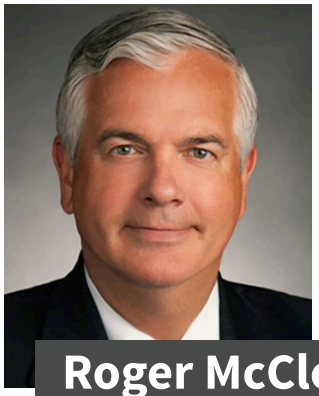
- **Prepare for the ANSI Z535 Attack:**

"A product safety sign or label should alert persons to a specific hazard, the degree or level of hazard seriousness, the probable consequence of involvement with the hazard, and how the hazard can be avoided."

- **Qualified Expert:**
  - **Voluntary standard**
  - **Provides uniform formatting convention**
  - **Not a legal obligation**

Final Recommendation





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Roger McCleary

Vice-Chairman & Shareholder | Parsons McEntire McCleary (Houston, TX)

A history of extraordinary results characterizes Roger McCleary's litigation practice in the over 30 years he has handled complex commercial and personal injury litigation. Roger has handled commercial and personal injury matters in state and federal courts across the U.S. and has successfully handled dozens of trials in a wide variety of matters. A significant portion of his experience is in complex business, construction, energy, insurance coverage, products liability, and other commercial and personal injury litigation. Roger has frequently spoken on advocacy and litigation management topics at legal seminars. Roger served as the 2012 Chair of The Network of Trial Law Firms.

Expertise

- Commercial Litigation
- Energy
- Insurance

Representative Cases

- Successfully resolved misappropriation of trade secret claims against oil field product manufacturer
- Successfully represented international energy service company in June 2016 federal court jury trial of wrongful death and personal injury claims arising from Black Elk Gulf of Mexico platform explosion
- Won defense verdict in jury trial over breach of contract/DTPA claims against major bank and won counterclaim verdict awarding attorney's fees
- Favorable settlement of AAA $17+ million contract dispute between general contractor client and project owner over alleged defects and delays regarding engineering and construction of mining operation
- Obtained summary judgment dismissing $50 million commercial claim alleging fraud, conspiracy, unjust enrichment, and seeking declaratory judgment against insurance company
- Won $20 million complex D&O insurance policy coverage dispute and obtained 5th Circuit ruling insulating insurer from any obligation to reimburse defense costs or to indemnify regarding consolidated securities fraud class action and shareholder derivative litigation
- Obtained verdict in favor of major homebuilder in six week jury trial concerning residential subdivision built next to Superfund toxic waste dump site
- Won defense verdict in jury trial over refinery construction defect claims
- Won defense verdict in Matagorda County, TX jury trial of claims against insurance agency and agents over alleged policy average misrepresentations
- Won defense verdict in Galveston County, TX jury trial over product liability wrongful death claims arising from burns decedent suffered during maintenance of offshore production equipment
- Obtained 5th Circuit ruling that the millions bankruptcy court ordered paid to fraudulent creditor were not covered under an executive and organization liability insurance policy because payment was for "ill-gotten gains"
- Won defense verdict in jury trial over product liability burn claims stemming from a boiler explosion

Honors and Awards

- American Board of Trial Advocates, Elected Member
- Named "Texas Super Lawyer," Texas Monthly

Education

- Southern Methodist University Dedman School of Law - J.D., 1984
- Southern Methodist University - B.A., cum laude, 1981

Virtual Trials and Arbitrations: The New Normal?

Kathy Ehrhart

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Virtual Trials and Arbitrations: The New Normal?
Katheleen A. Ehrhart

Many trial lawyers never dreamed they would find themselves cross examining a key witness through a computer screen or making a closing argument to a lineup of small Zoom boxes showing the faces of the triers of fact. Yet, now almost two years into the global pandemic, many trial lawyers find themselves doing exactly that. Not only have trial lawyers found themselves navigating a trial or evidentiary hearing through a remote setting, but courts, and arbitrators are becoming more comfortable with remote proceedings and finding benefits to holding these proceedings remotely. This naturally raises the question of whether remote proceedings, be it full remote or some sort of live/remote hybrid proceeding, is here to stay.

The use of virtual platforms presents certain difficulties that in-person hearings and trials do not. For example: How do you guard against witnesses communicating with others or looking at documents or information they should not have while testifying? How do you present and examine witnesses on lengthy and complicated documents? How do you deal with the loss of human interaction in terms of being able to read the courtroom or control a witness during an examination? Or what do you do to compensate for the loss of being in the same room and easily communicating with clients, witnesses, and each other? Do you change your approach in order to hold the attention of a trier of fact, jurors in particular, and what do you do if you lose their attention?

The rise of Zoom, Goto Meeting, and other similar online platforms haveincreased trial lawyers' comfort levels and adeptness at communicating and presenting in a virtual setting. Building off of that and reaching agreement on some basic principles can help parties problem solve for many of the difficulties virtual proceedings present.

Agreement on Ground Rules and Safeguards

The parties can agree to level the playing field and make sure everyone participates either separately or remotely, or that if some individuals can participate together the same rules apply across the board. For example, the parties may agree that all witnesses will testify remotely, but attorney teams can be in the same room with each other during the virtual proceedings. Similarly, attorneys may all agree to be in the room with the judge while witnesses (or some witnesses) are remote. A panel of arbitrators may prefer to participate together, or each participate from their own individual offices or homes as long as they have a virtual chat room to use for deliberations during the hearing. What matters is that the parties reach agreement so everyone follows the same rules and everyone has the same expectations.

Similarly, the parties should reach agreement on proper safeguards against outside influences on testimony. This may include admonishing all witnesses that they must be alone and cannot look at any materials other than what is provided to them during the course of their testimony. Witnesses can also be asked under oath to confirm they are alone and not looking at documents or other devices. Finally, witnesses can be asked to use their camera to show there is no outside materials near them while they testify.

With regard to documents, while many individuals have becomecomfortable sharing documents over remote platforms, even the best witness may find it is cumbersome to try and testify about a lengthy document that is being displayed to them through screen sharing. Parties should consider providing hard copies of documents to witnesses and arbitrators in advance so that they all have access to the full document if needed and there is no risk that an attorney unfairly takes a portion of a document out of context during an examination. If documents are shipped ahead of time, however, the attorney may want to put safeguards in place to ensure a witness does not look at the material ahead of time.

Compensating for the Loss of Direct Human Interaction

Perhaps the biggest consideration for a virtual proceeding is how does the a trial lawyer can account for the loss of human interaction and its impact on her trial presentation as an advocate, i.e., reading the room and knowing when a point has been made or controlling a difficult witness with intonation and body language. Again, how the virtual platform is used is critical. The video boxes showing the triers of fact can be pinned so that the examining attorney can always keep an eye on them to read their expressions and judge for herself if the point has been made much like as if they were all in the same room.

As for controlling a witness or having a dominant presence in the room during an argument, a lot can be managed based upon how the attorney places herself on camera. Using a camera on a tripod rather than a camera built into a computer gives more flexibility to better model how she stands and moves during an examination just as if she were in an in-person proceeding. These types of small tweaks in the use of technology and leveraging different options available for a virtual proceeding can have a significant impact and allow an attorney to model the environment and conditions as if the proceeding was being conducted in-person.

Special Considerations for Jury Trials

Jury trials raise unique concerns that bench trials and arbitrations do not in terms of assessing whether to do a virtual versus in-person proceeding, namely holding the attention of jurors and a juror's ability to assess credibility over a computer screen. While some courts have moved forward with virtual jury trials, the majority of courts have stayed jury trial proceedings until the courts can implant safety precautions to protect the health and safety of jurors, witnesses, and all other participants.

Some of these precautions, however, raise their own issues that must be weighed in considering the benefit of a remote or in-person proceeding (if the choice is even available). For example: If the court requires jurors to be vaccinated, does that requirement skew the jury pool? Do mask requirements impede the ability to effectively communicate? Do social distancing requirements make it harder to present the client's case? Court requirements may not give parties much choice in the proceeding protocols, but these are all issues that must be considered.

Benefits to Proceeding Remotely

But are there benefits to using a virtual platform that make the issues worth solving for? The short answer is yes. There are many benefits to a virtual proceeding for clients and litigators to consider. First and foremost, remote proceedings lower the costs of trial and arbitration when travel would otherwise be involved but is eliminated by proceeding virtually. For arbitrations, the cost savings can be significant. Arbitration hearing space costs and travel and lodging expenses are all eliminated. Trial (when it is a bench trial) and arbitration hearing time is also easier to schedule as no one has to consider the lost time of travel or being away from their home or office. Hearing and trial time can also be built around smaller windows of availability because the need for several consecutive full in-person days is no longer paramount. It is also easier to schedule witnesses with limited availability when all the other needed participants only have to click on a button to participate rather than attend an in-person proceeding.

Remote proceedings also make the concept of "unavailable witnesses" less of an issue. While it is unclear if remote availability will eventually change the subpoena power of courts, cooperating

witnesses may be more willing to testify at trial if they can do so remotely. While live in-person testimony may be preferable to a witness appearing remotely, when the option for virtual testimony is the only means by which a witness is willing to testify versus reading in his or her deposition designation, then virtual proceedings provide an added benefit.

The flexibility of scheduling and potential cost savings makes virtual proceedings a serious option for parties to consider as COVID restrictions are lifted and more in-person proceedings move forward. Virtual proceedings may even prove preferrable in the short-term as it may allow parties to get a case tried sooner given the courts' backlogged dockets.

Consider the Use of Hybrid Proceedings

Litigants may also want to consider hybrid proceedings. For example, parties may move forward with a several day in-person proceeding but use a virtual proceeding for such things as harder to schedule witnesses or to finish the trial or hearing if it does not finish in the original allotted time. Closing arguments can also be done remotely after an in-person trial or hearing, slightly delayed after the close of evidence to allow extra time for a more focused presentation for the trier of fact.

The trier of fact will also matter significantly in the assessment of whether to consider a remote or hybrid approach. Arbitrators appear to be more amenable to remote proceedings, likely because arbitrations are less formal, and the proceedings are often governed by party agreement. With bench trials, a judge's attention and ability to oversee a remote proceeding is now an important factor in assessing an assigned judge and whether to consider seeking a different judge, if such an option is available.

Whether a proceeding should be remote versus in-person raises many questions and few that have simple answers. Litigants will have to raise these many issues with their clients to assess the specifics of their case and the pros and cons of choosing one form or another or some combination of them. Those assessments will be necessary becauseremote and hybrid proceedings appear to remail a viable option to consider going forward.

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FREEBORN & PETERS LLP

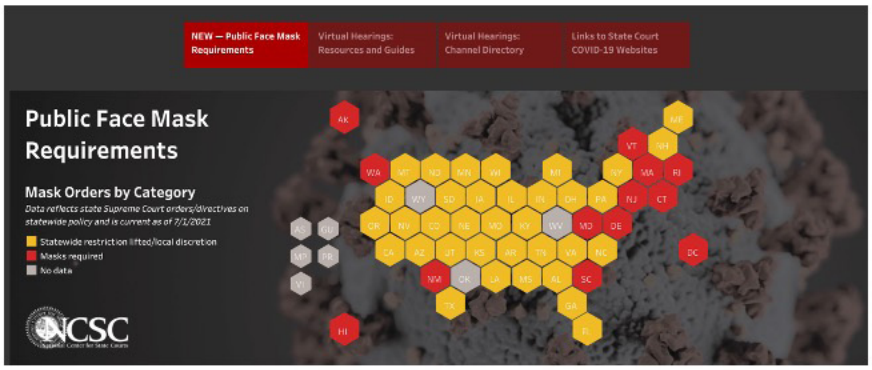
Virtual Trials and Arbitrations: The New Normal?

November 5, 2021

Presented by:
Katheleen A. Ehrhart
Partner, Freeborn & Peters LLP

In-Person Proceedings Still Restricted

In-Person Proceedings Still Restricted



In-Person Proceedings Still Restricted

- Federal court: https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic
- State courts: https://www.ncsc.org/newsroom/public-health-emergency with links to individual state court websites

Is A Virtual Proceeding an Option?

- Different Forums; Different Considerations
  - Arbitration: "trial by agreement"
  - Bench Trial: the importance of the quality of judge
  - Jury Trial: the added layer of complexity with jurors

The Potential Downside of Virtual Proceedings

- Loss of in person experience
  - The human effect
  - Credibility
- Loss of control
  - Over witnesses
  - Over the trier of fact
- Harder to manage exhibits
- The expert wild cards
- Public accessibility

Problem Solving In A Virtual World

- The importance of doing due diligence
- Even the playing field
- Protocols, protocols, and more protocols
- Get on your feet!!!

But What Are the Benefits?

- Cost savings
- Flexibility in scheduling
  - Hearings as a whole
  - Witnesses time
- No more unavailable witnesses
- Public accessibility

The Hybrid Approach

- The best of both worlds: partially in-person and partially remote
  - Hard to schedule or otherwise unavailable witnesses
  - Experts
  - Closing arguments
- Alternative if in-person cannot go forward
- Completing the case if it does not finish as originally scheduled

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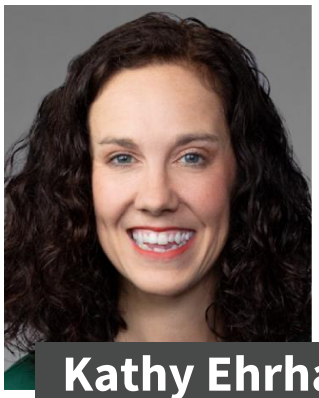

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Kathy Ehrhart

Partner | Freeborn & Peters (Chicago, IL)

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

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

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

Kathy is a Partner in the Litigation Practice Group, member of the Insurance/Reinsurance Team and Co-Leader of the Insurance Brokerage Group. Before joining Freeborn, Kathy was a Partner at Kirkland & Ellis LLP focusing on similar matters.

Areas of Focus
- Antitrust
- Class Actions
- Insurance Brokerage
- Insurance Coverage Disputes
- Labor and Employment Litigation
- Product Liability
- Professional Liability
- Reinsurance Disputes
- Securities Litigation

Honors and Awards
- Illinois Leading Lawyers - 2020 (cited in multiple years)
- Illinois Leading Lawyers - Emerging Lawyers - 2017 (cited in multiple years)
- Chicago Daily Law Bulletin and Chicago Lawyer – 40 Illinois Attorneys Under Forty to Watch – 2015

Speaking Engagements
- Speaker, "Wading into Flood Insurance," AIRROC Chicago Regional Education Day (June 12, 2018).
- Speaker, Women in Law & Leadership Summit: Chicago (June 6, 2018).
- Speaker, "Head Injuries and Sports: Emerging Claims Issues," AIRROC Membership Meeting (March 2013).

Education
- J.D. University of Chicago Law School - with honors
- B.S. University of Illinois at Urbana-Champaign - Broadcast Journalism 1997 Bronze Tablet (Highest Honors - Top 3%)

Paving the Way Towards an Early Victory and Keeping It

Jessie Zeigler

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Paving the Way Towards Early Victory: Effectively Utilizing Summary Judgment
Jessalyn H. Zeigler, Courtney A. Hunter and Casey R. Malloy

Summary judgment can be a vehicle to an early victory: it can either completely end litigation, or, in more complex cases, it can efficiently narrow the topics for trial. It may greatly reduce the time and expense of litigation, but it also is a means of educating the court: it is an opportunity to tell your client's story to the judge prior to trial or to your opponent prior to settlement negotiations. Despite the potential for summary judgment to play a pivotal role in litigation, recent research suggests that moving for summary judgment is the exception rather than the rule. This trend may be due to the varying summary judgment standards across jurisdictions, but litigators and their clients should not dismiss the idea of filing the motion.

A "well-known trilogy of summary judgment cases"[1] forms the basis of the modern "no reasonable jury"[2] rule in federal court, but these cases have varying applications across jurisdictions.[3] The federal rules direct trial courts to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact."[4] This means that where "no reasonable jury" would side with the non-movant, a pre-trial ruling on the merits is proper.[5] But state courts' application of this standard varies widely, and counsel must ensure that they are fully informed as to the applicable standard for each court prior to and during discovery in order to be prepared for summary judgment when the time comes.

Summary Judgment in Federal Court

Recent studies reflect that summary judgment may well be underutilized in federal court. By way of example, the Institute for the Advancement of the American Legal System examined ten district courts from across the United States in 2018 and found that summary judgment motions were filed "in approximately 13.7% of cases."[6] This is lower than may be expected; one reason for litigants' hesitancy to file these motions is the time and expense required to successfully draft and argue them, particularly given the "no reasonable jury"[7] standard. In the face of uncertain success, corporate counsel funding their own legal expenses may be especially hesitant to approve this undertaking. Such motions, however, should always be considered given the opportunities such a motion often provides.

Even if the motion is not ultimately successful, a motion for summary judgment provides a party with the opportunity to provide the court with its version of events, and may well be the first opportunity a defendant has to give the court a comprehensive outline of its defenses and theories of the case.[8] Summary judgment is an opportunity for litigators to tell their story to the court without interruption. Depending on the case's schedule, a summary

1 Jeffrey O. Cooper, Summary Judgment in the Shadow of Erie, 43 Akron L. Rev. 1245, 1247 (2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986))

2 Scott v. Harris, 550 U.S. 372, 380 (2007); see also Fed. R. Civ. P. 56(a).

3 Jeffrey O. Cooper, Summary Judgment in the Shadow of Erie, 43 Akron L. Rev. 1245, 1247 (2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986))

4 Fed. R. Civ. P. 56(a).

5 Scott v. Harris, 550 U.S. 372, 380 (2007)

6 Brittany K.T. Kauffman and Logan Cornett, Efficiency in Motion, Summary Judgment in the U.S. District Courts, Institute for the Advancement of the American Legal System, University of Denver

7 Scott v. Harris, 550 U.S. 372, 380 (2007); see also Fed. R. Civ. P. 56(a).

8 See, e.g., Michele L. Maryott, The Trial on Paper: Key Considerations for Determining Whether to File A Summary Judgment Motion, Litigation, Spring 2009, at 36, 40 ("Although your witnesses answered deposition questions truthfully and accurately, the summary judgment motion still offers the first real opportunity to tell your client's whole story.").

judgment motion may be filed in advance of settlement negotiations or pretrial evidentiary disputes, which may provide a movant the significant opportunity to argue its case as the court also considers related issues. While the judge may not adjudicate all of a case on summary judgment, she may take a sympathetic view toward a party who filed such a motion in good faith and told a compelling story.

Furthermore, the assumption that filing a motion for summary judgment is unlikely to end in success may well be incorrect. In Scott v. Harris, the U.S. Supreme Court emphasized that "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[9] Trial courts were explicitly instructed that when "opposing parties tell two different stories, one of which is blatantly contradicted by the record," the trial court "should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." See id. Of course, different districts, and the judges within them, take different approaches toward dispositive motions that result in comparatively higher or lower likelihoods of success for the moving party. Compare Mitchell v. Schlabach, 864 F.3d 416, 421 (6th Cir. 2017) (district court affirmed in disregarding factual allegations precisely because video evidence blatantly contradicted them) with Blaylock v. City of Philadelphia, 504 F.3d 405, 414 (3d Cir. 2007) (declining to disregard two varying versions of events where the court had "only two police photographs, and an argument by the defendants not that the two men depicted are similar in appearance, but that one of the men depicted in the photographs must be similar in appearance to a third person whose picture we do not have.").

If corporate counsel is unsure of whether a motion for summary judgment could be successful, one tactic for determining the risk of filing the motion is to examine the district court's recent stance on summary judgment motions. For example, the Middle District of Alabama tends to grant summary judgment at a relatively high rate. Bloomberg Law's advanced analytics tool shows that, over the past five years, 67.1% of motions for summary judgment were granted and an additional 15.5% were granted in part and denied in part in the Middle District of Alabama. On the other hand, the Southern District of West Virginia less frequently grants summary judgment. Over the past five years, 33.4% of summary judgment motions were granted and another 36.3% were granted in part and denied in part in that jurisdiction. Using this type of data from sources such as Bloomberg Law or Westlaw can inform a party's decision on whether to file for summary judgment.

In sum, litigators and corporate counsel should carefully consider whether their trial strategy should include filing a motion for summary judgment. While success on such a motion may not be certain, the brief will provide counsel with an important opportunity to present the court – as well as opposing parties– with their narrative, regardless of the subsequent success of the motion. Summary judgment therefore provides parties with an opportunity to eliminate claims against it or prevail on its own claims, as well as set the stage for subsequent settlement negotiations or trial.

The Importance of Varying State Standards

State courts – much like federal courts – also generally use summary judgment as a pre-trial mechanism to rid their dockets of meritless cases, narrow the scope of disputes, and encourage settlement. Nonetheless, the standards governing state standards for summary judgment varies from jurisdiction to jurisdiction. Counsel should be well-versed in jurisdictional variances prior to deciding whether to file a motion for summary judgment.

Some jurisdictions, such as Florida, have adopted the federal standard,[10] but not all jurisdictions are as accommodating. This is true even if the relevant state rule tracks the language of the federal rule.[11] California provides an excellent example of this. California's Code of Civil Procedure instructs that a "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact."[12] On its face, the language tracks the federal rule, mirroring the "no

9 Scott v. Harris, 550 U.S. 372, 380 (2007)

10 Wilsonart, LLC v. Lopez, 308 So. 3d 961, 964 (Fla. 2020) (the Supreme Court of Florida was "persuaded that Florida should adopt the federal summary judgment standard").

11 Wilsonart, LLC explicitly noted the similarities in Florida and federal rules. See id. At the same time, the Florida Supreme Court also found the shift in the application of its standard in the best interests of its state, including the litigators within the state. See id.

12 Cal. Civ. Proc. Code § 437c

genuine dispute" language. In practice, however, summary judgment motions in California state court are substantively different from those in federal court, and are generally much harder to obtain. This is because California, despite the clear language of its rule, actually requires the moving party to prove that "a cause of action has no merit."[13] This standard is difficult: California courts have historically viewed summary judgment as a "drastic measure which should be used with caution so that it does not become a substitute for trial."[14] Nonetheless, even in California, litigants should still not be shy about moving for summary judgment in the appropriate circumstances, and should still consider utilizing the motion if the particular circumstances of their case calls for it.[15]

These differences across jurisdictions are not highlighted to warn litigators against moving for summary judgment in state court: rather, they are highlighted to caution litigators to consider the relevant jurisdiction, and how its applicable standards for summary judgment might influence the decision to file such a motion. While the trend in state courts recently has been to liberalize the summary judgment standard so that it more closely aligns with the standard articulated in Federal Rule of Civil Procedure 56, significant differences remain in some states. Litigators who find themselves in state court, but may be more accustomed to utilizing summary judgment in federal court, should invest the time necessary to familiarize themselves with standard in the applicable jurisdiction to ensure they make the right tactical decision for their client.

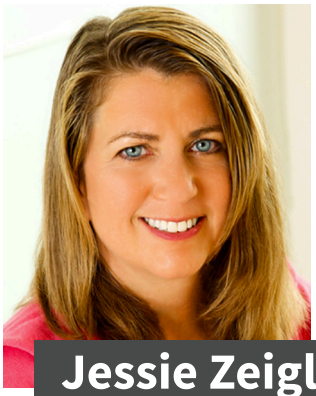
Conclusion

Summary judgment provides an opportunity to bring litigation to conclusion before spending significant resources on a trial, while also permitting parties with a crucial opportunity to tell their story to the court and opponent prior to trial. The standard for obtaining summary judgment, however, does vary from jurisdiction to jurisdiction, and thus counsel should expend the time necessary to familiarizing themselves with the relevant procedural rules prior to filing their motion. In most instances, it will likely be the case that counsel and clients will benefit from forming their litigation strategy with an eye toward summary judgment.

13 Marron v. Superior Ct., 108 Cal. App. 4th 1049, 1057, (2003)

14 Marketing West, Inc. v. Sanyo Fisher (USA) Corp. 6 Cal. App. 4th, 603, 310 (1992)

15 Indeed, recent California Supreme Court jurisprudence hints that even California may be moving towards the federal standard in the future, although it hasn't made the leap quite yet. See Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co., 6 Cal. 5th 931, 945, (2019) (citing Perry v. Bakewell Hawthorne, LLC, 2 Cal. 5th 536, 540 (2017))



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As both 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 opioid cases, 2,500 Fen-Phen cases, and victories on behalf of automobile industry clients that saved hundreds of millions of dollars, Jessie has returned successful results 100% of the time in the cases she has handled.

Jessie recently served as local counsel in a precedent-setting opioid litigation and win at the Tennessee Supreme Court, defending an international pharmaceutical company in court rooms across Tennessee, Kentucky and Virginia in litigation that has made national headlines. She also argued the first ever Tennessee Supreme Court Zoom hearing (held during the pandemic) and, along with a joint defense group, won a huge victory for her product manufacturer client, and product manufacturers generally, in a ruling that held that a product manufacturer cannot be held liable in Tennessee for failing to warn about the risks of another product manufacturer's products. In addition, she successfully obtained summary judgment in nine consolidated cases on behalf of a tree company against allegations of negligence and nuisance in wildfire litigation in which the plaintiffs sought approximately $45 million in claims.

Recognized by Chambers USA, 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 companies.

Related Services

- Products Liability & Torts
- Litigation & Dispute Resolution
- Environmental
- Utilities – Telecom, Energy & Water
- Life Sciences
- Digital Health
- Healthcare Law

Accolades

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- Benchmark Litigation — Local Litigation Star: Tennessee (2019-2021)
- Best Lawyers® — Nashville Litigation: Environmental "Lawyer of the Year" (2021)
- The Best Lawyers in America© — Environmental Law; Litigation: Environmental; Natural Resources Law (2007-2022)
- Nashville Business Journal — "Women of Influence, Trailblazer Category" (2015)
- Nashville Bar Association — President's Award (2014)
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Back to Work - Business and Healthcare in a Post COVID World

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Back to Work - Business and Healthcare in a Post-COVID World
Henry Willett

If the myriad of changes that businesses have been forced to address throughout the COVID-19 pandemic proves anything, it is that the adaptability of employees and workplaces is determinative of survival and, in certain instances, success. When the world essentially shut down at the beginning of the pandemic, businesses had to immediately pivot, transitioning to working remotely and taking steps to minimize the risks of spreading the COVID-19 virus in the workplace. Many of these initial "temporary" accommodations quickly became "permanent" changes for various businesses, employers, and the healthcare industry. Indeed, we may never fully return to "normal." Yet, just when the world thought that COVID-19 was behind us, the spread of COVID-19variants appears to be risingand discussions have moved to vaccine and testing mandates and the implications of such policies on the health and welfare of the population, the rights of individuals to make decisions concerning their well-being, and job security.

The reprieve we experienced in the late-Spring and Summer gave us a sneak peek into a post-COVID world with respect to: returning to the office; transitioning to a remote workforce; and implementing hybrid work-from-home/office policies. In making decisions about what approach best suits a particular business, we have seen a number of influencing factors such as the industry type, employee/customer expectations, and the ever changing regulatory/legal landscape, discussed in greater detail below.

For the businesses that are in the process of returning to in-person work or have already made the transition back to the physical office, continued concerns over the spread of COVID-19 require employers to implement policies that not only address how to safely return employees to the office and to interact with customers, but, in some instances, these policies may require employees to choose between returning to work and protecting their health or their right to choose whether or not to get vaccinated. Regardless of what side of the vaccine debate an employer lands on, employer policies need to include safety protocols for minimizing the risk of exposure to COVID-19 in the workplace and must consider accommodation requirements that may apply under the Americans with Disabilities Act ("ADA").

The dilemma for healthcare employers is amplified by concerns for the health and safety of its workers, and patients, who may be forced to directly interact with those who tested positive for COVID-19. In the early stages of the pandemic, this reality caused many healthcare providers to immediately pivot, where feasible, to telehealth visits. Regulatory agencies responded, and in many cases led, by removing previously existing impediments to the provision of telehealth services.[1] Now, with hope of a post-COVID world still within our grasps, regulators and the healthcare industry must decide if these changes implemented because of the COVID-19 should remain in place.

1 Removal of impediments includes, "loosening of restrictions on telehealth in the Medicare program, including allowing beneficiaries from any geographic location to access services from their homes. HHS has waived enforcement of HIPAA for telemedicine, while the DEA has loosened requirements on e-prescribing of controlled substances" and "CMS is temporarily waiving the Medicare requirement that providers be licensed in the state they are delivering telemedicine services when practicing across state lines, if a list of conditions are met." See "Opportunities and Barriers for Telemedicine in the U.S. During the COVID-19 Emergency and Beyond," Weigel, et al, Kaiser Family Foundation, https://www.kff.org/womens-health-policy/issue-brief/opportunities-and-barriers-for-telemedicine-in-the-u-s-during-the-covid-19-emergency-and-beyond/ (May 2020).

Employer Vaccine Policies

The topic of vaccine mandates is a topic of increasing debate. As it stands, a vaccine mandate by an employer is enforceable if implemened within the framework provided by the Equal Employment Opportunity Commission ("EEOC") and if the mandate policy complies with the ADA. But there already are legal challenges to vaccine mandates that may, at a minimum, change the framework for when individuals can qualify for exemptions to an employer's mandatory vaccination policy.

Anticipating public and employee pushback, some employers have sought to continue early efforts to encourage and incentivize employees to get vaccinated, stopping short of mandating vaccinations. This approach is expected to be used by the Occupational Safety and Health Administration ("OSHA") as part of a new rule that will apply to employers with more than 100 employees.

The executive branch has instructed OSHA to create a new rule that will require all employers with 100 or more employees to require weekly negative COVID-19 tests from all unvaccinated employees.[2] The clear objective of this rule is to incentivize employees to get vaccinated without issuing an actual vaccine mandate. This is part of an effort by the federal government to increase the general population's vaccination rates.

Recent executive orders issued by President Biden include vaccine mandates for executive branch employees. Additionally, another executive order extended the federal employee vaccine mandate to "employees of contractors that do business with the federal government."[3] This executive order, however, does not directly require vaccinations for federal government contractors. Instead, it states that executive departments and agencies must ensure that their contracts with any contractors or subcontractors include a clause that requires the contractors or subcontractors to comply with "all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force."[4] Additional guidance will be provided by this Task Force regarding the definitions that apply to these contractors and subcontractors, detailed protocols that will be required for contractors and subcontractors, and any exceptions that may apply. It is expected that this Task Force guidance will include vaccine policies and possibly mandates.

The EEOC's current guidance on vaccine mandates states that such requirements are not in violation of the ADA, if the employer's policies comply with the following framework:

> Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. 1630.2(r). This determination can be broken down into two steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.
>
> To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge

2 See President Biden's COVID-19 Action Plan, which states that OSHA is developing this new rule: https://www.whitehouse.gov/covidplan/

3 Quoting President Biden's COVID-19 Action Plan in reference to Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021).

4 Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021).

about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis.[5]

Likewise, vaccine mandates have been issued or are contemplated for healthcare providers. It is expected that the Centers for Medicare and Medicaid Services ("CMS") will take action to require COVID-19 vaccinations for healthcare workers in most healthcare settings and facilities. The White House has stated that the healthcare worker vaccination requirement will expand on the existing CMS requirement for vaccinations in nursing facilities. The scope of the expanded vaccination requirement is expected to include hospitals and other CMS-related settings.[6]

Legal Challenges to Vaccine Mandates

Challenges to vaccine mandates have been largely unsuccessful but provide insight into public opinion. According to a study from June 2021 by the Kaiser Family Foundation, there is an almost equal split in public opinion on whether employers should require COVID-19 vaccinations, with 51% in favor of required vaccinations unless there is a medical exemption.[7] This study was prior to the Food and Drug Administration ("FDA") approval for the Pfizer COVID-19 vaccine, which may have had an effect on this percentage since the study also found that approximately three in ten unvaccinated adults were willing to get the vaccine once it received full FDA-approval.[8] Regardless, the take-away likely remains the same: there is not universal support for vaccine mandates.

A vaccine mandate from a Texas hospital system gave rise to a lawsuit which was ultimately dismissed by the Federal District Court for the Southern District of Texas.[9] Other lawsuits have been initiated and more are expected against employer mandates and against the federal government for its vaccine mandates. While many of these cases will turn on questions of authority and scope, similar to the issues raised in the Texas hospital case, the underlying concern driving such suits appears to be whether anyone, the government or an employer, should be able to require individuals to submit to a vaccination or alternatively lose their livelihoods. The court's opinion in the Texas case stated the following regarding the terminated employee's decision, "Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else."[10]

It should be noted that employers are permitted to ask employees about their vaccination status. Any medical information obtained about employees, however, must remain confidential. Additionally, under the ADA, an employer may require

5 This information is quoted from a statement made by the EEOC on December 16, 2020, and updated on May 28, 2021, and can be accessed on the EEOC webpage: "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

6 See https://www.whitehouse.gov/covidplan/

7 See https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-june-2021/ (June 30, 2021)

8 Id.

9 Bridges v. Houston Methodist Hosp., S.D. Tex., No. 4:21-CV-01774 (June 12, 2021).

10 Id.

vaccinations of all employees if it is considered a universal qualification standard for all employees and if the standard is job-related and consistent with business necessity.

Certain exceptions to vaccine requirements by employers must be made for religious or health-related concerns in order to remain in compliance with ADA requirements. Accordingly, an employee has the ability to request a "reasonable accommodation" under the ADA to qualify for an exemption to an employer's vaccination requirement policy. The circumstances under which such accommodations may be required depend on the employee's ability to perform work, the type of business, and the expected work of the employee. The Job Accommodation Network ("JAN") website aids employers and employees by recommending accommodations that may be feasible for certain disabilities, specific to an individual's employment position.[11]

The Use of TelehealthServices Now and in a Post-COVID World

Almost half of all full-time and part-time employees in the U.S. initially transitioned to working remotely, and though that number has drastically decreased, the option for employees to work remotely still remains feasible for many businesses.[12] Unfortunately, the same cannot be said for healthcare providers and facilities. The pandemic has increased the need for nurses, physicians, and other healthcare providers to work in-person in an industry that was already facing labor shortages before the emergence of COVID-19. While the need for healthcare personnel to directly address the surge in hospitalizations has increased, so has the need and opportunity for the provision of remote services.

In March 2020, drastic steps were taken to allow for increased telehealth services. CMS released a statement that telehealth visits would be covered by Medicare,[13] the Department of Health and Human Services Office for Civil Rights ("OCR") announced that it would relax the otherwise stringent Health Insurance Portability and Accountability Act of 1996 ("HIPAA") requirements for providers' use of telehealth services, and the Department of Health and Human Services Office of Inspector General ("OIG") implemented more flexible policies on cost-sharing for telehealth services covered by federal healthcare programs.[14] Healthcare providers since have increased the use of telehealth services to reduce the risk of exposure to COVID-19 at healthcare facilities. This also has been a vital tool for reducing the strain on healthcare facilities that have needed all available resources and patient rooms to treat COVID-19 patients. As the use of telehealth has increased, the federal government and state regulatory bodies have attempted to refine policies to permit its expanded usage.

OCR has permitted healthcare providers to use telehealth services in good faith without the risk of penalties related to HIPAA violations. HHS published a list of companies who have stated that they will provide HIPAA-compliant programs or applications for telehealth services and are willing to enter into HIPAA-compliant business associate agreements.[15] OCR's ongoing review and assessments of these programs and applications enable telehealth services without losing the protections for private medical and health information afforded under HIPAA. For now, the flexibility to use many of the telehealth programs is only permitted during the COVID-19 pandemic.

In addition to flexible HIPAA policies, telehealth services have been made more accessible and practical through federally subsidized programs covering telehealth visits. In general, most telehealth services should be covered by Medicare for the same amount as would be paid for the same in-person services.[16] Private health insurance companies have also adjusted coverage policies to address and permit increased access to telehealth services.

11 [Cite]

12 See https://news.gallup.com/poll/329501/majority-workers-continue-punch-virtually.aspx

13 These steps were issued as temporary accommodations to allow for more telehealth services. The archived press release from March 17, 2020 can be accessed here: https://www.cms.gov/newsroom/press-releases/president-trump-expands-telehealth-benefits-medicare-beneficiaries-during-covid-19-outbreak

14 These steps were issued as temporary accommodations to allow for more telehealth services. The archived press release from HHS on March 17, 2020 can be accessed here: https://public3.pagefreezer.com/browse/HHS%20%E2%80%93%C2%A0About%20News/20-01-2021T12:29/https:/www.hhs.gov/about/news/2020/03/17/secretary-azar-announces-historic-expansion-of-telehealth-access-to-combat-covid-19.html

15 The lists of common non-public facing technology applications and HIPAA-compliant technology programs and applications from HHS can be found on its telehealth webpage: https://telehealth.hhs.gov/providers/policy-changes-during-the-covid-19-public-health-emergency/hipaa-flexibility-for-telehealth-technology/

16 See https://www.medicare.gov/coverage/telehealth

The continued use of telehealth services is expected for some healthcare services more than others. One of the main reasons for the discrepancy is the effectiveness of telehealth visits. Some argue that using telehealth servicescan potentially decrease in quality of care for patients. Certain symptoms and indicators that providers would generally examine during in-person visits may be difficult to assess through a telehealth visit. However, the areas of healthcare practice that have found adequate or similar effectiveness for telehealth services will likely continue to use these services post-pandemic. Some of the more common healthcare services that have used and expect to continue using telehealth services include psychiatry, radiology, and other remote monitoring uses.[17] Factors that will influence how and when telehealth services will continue to be used likely will include patient preferences, quality and effectiveness of care, and the provider's ability to bill for healthcare services in the same manner as they would for an in-person visit.

Conclusion

Employers who are considering the best approach for developing a return-to-office plan, remote working, or hybrid policy for their business are facing many challenges. The changing legal landscape may impact an employer's willingness to have employees return to in-person work simply because policies relating to COVID-19 can be burdensome to enforce. For many others, the legal considerations provide a helpful framework for how employers can bring employees back to the workplace in a safe manner. Ultimately, developing new workplace policies depends on each business's specific industry, type of business, size, number of employees, productivity standards, flexibility to adjust from pre-pandemic procedures, and other relevant considerations.

Similar safety concerns for workers and patients are driving many healthcare employers to implement the use of telehealth services for certain physical or mental health services. The future of telehealth will depend on the quality of patient care, which will likely influence regulations on how providers can safely and effectively use telehealth services. With a world that is moving towards virtual and remote platforms in many other aspects of daily life, it seems inevitable that the healthcare industry will continue to rely telehealth services.

Through the necessities presented during a global pandemic, business and healthcare employers have adjusted and adapted at an unimaginable pace. Unfortunately, difficult decisions remain for many employers, as the world gradually transitions to a post-COVID world.

17 "More Than Convenience: How Leaders are Leveraging Telehealth to Achieve Their Strategic Plan," Modern Healthcare (June, 2021).

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Practice Areas

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- Virginia Super Lawyers - Civil Litigation Defense, 2014-2021; Legal Elite (Virginia Business); Civil Litigation, 2010, 2015-2020; Young Lawyer, 2009, 2011-2014
- Virginia Rising Stars - Civil Litigation Defense, 2007-2008, 2010-2013

Publications and Presentations

- Co-author with Belinda D. Jones, "When Your Evidence Goes Up in Flames," American Bar Association's Mass Torts Litigation Committee publication, Mass Torts Litigation, Summer 2010
- Presenter, "A Rock and a Hard Place: Dilemmas That Face Young Lawyers," Virginia Bar Association Summer Meeting CLE, 2012
- • Panelist, "Demonstrative Evidence: What Kinds of Bells & Whistles are Jury-Appropriate?" American Bar Association Litigation Section's Aviation Litigation CLE, 2010
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The Dangers of Imposing Consumer Arbitration Agreements with Class Action Waivers

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The Dangers of Imposing Consumer Arbitration Agreements with Class Action Waivers

Juan S. Ramirez

In 2011 the United States Supreme Court decided AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) ("Concepcion"), which served as a watershed moment for Courts grappling with challenges to the enforceability of arbitration clauses containing class action waivers. Concepcion clarified that the Federal Arbitration Act ("FAA") prevented state law from "conditioning the enforceability of arbitration agreements on the availability of class wide arbitration procedures." Id. at 336, 348–352. In other words, mandatory, individual arbitration is enforceable as a matter of federal law.[1] Concepcion left many within the business and legal communities questioning whether the Court had sounded the death knell of the consumer class action as we know it.[2] The series of decisions that followed ushered in an era of blissful optimism by companies all too eager to turn the tide of consumer class actions through arbitration. The pendulum, it seemed, had finally swung in favor of the "good guys."

Prior to Concepcion, courts routinely struck down class waivers in arbitration agreements, finding them unconscionable under state law or illegal under state statutes. Concepcion addressed this head-on, concluding that California's "Discover Bank" rule—finding unconscionable arbitration and class waiver provisions in contracts of adhesion—was preempted by the FAA. Id. at 351. In the wake of Concepcion, arbitration became one of the most effective means to avoid class actions. As businesses began inserting arbitration clauses into consumer contracts ranging from consumer appliances,[3] to exercise equipment,[4] to personal electronics,[5] the plaintiffs' bar took note. It did not take long for them to move the pendulum back in their direction with the advent of mass arbitration.

This article addresses: 1) the emerging threat of mass arbitrations in the post-Concepcion and Epic Systems era; 2) real world examples of just how dangerous this emerging threat can be and how quickly companies' arbitration clauses are turned against them; and 3) practical steps companies should consider to mitigate the risk.

Mass Arbitration

Loosely defined, "mass arbitration" is the coordinated filing of, or threat to file, numerous individual arbitration demands, often at once by numerous claimants against a single respondent where the claimants all make similar allegations.

A. How Mass Arbitration Works

Mass arbitration is a lawyer-driven phenomenon created by a few enterprising plaintiffs' firms that have successfully cracked the code on how to thrive in the post-Concepcion era of rigorous enforcement

1 The Supreme Court's decision in Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018) all but cemented this view in the employment context, holding that arbitration agreements required as a condition of employment did not run afoul of the FAA's saving clause or §7 of the National Labor Relations Act guaranteeing workers' right to engage in concerted activities.

2 See, e.g., Jonathan Gertler and Christian Schreilber, AT&T Mobility LLC v. Concepcion: The Death Knell for Class Actions?, Plaintiff Magazine (June 2011), https://www.plaintiffmagazine.com/recent-issues/item/at-t-mobility-v-concepcion-the-death-knell-for-class-actions#:~:text=2011%20June-,AT%26T%20Mobility%20v.,employment%20and%20consumer%20class%20actions.; see also Brian T. Fitzpatrick, Supreme Court Case Could End Class-Action Suits, SFGate.com, Nov. 7, 2010, http://www.sfgate.com/cgi-bin/article.cgi?f+/c/a2010/11/06/INA41G6I3I.DTL ("If [Concepcion] is decided the way many observers predict, it could end class-action litigation in America as we know it . . . [I]f people don't sue, businesses know they can cheat people out of small amounts with impunity.").

3 See https://www.bluestarcooking.com/wp-content/uploads/2018/01/Refrigeration-Warranty-4.1.2019.pdf, last visited May 23, 2021.

4 See https://www.onepeloton.com/terms-of-service, last visited May 23, 2021.

5 See https://www.dell.com/learn/us/en/uscorp1/terms-of-sale-consumer, last visited May 23, 2021

of class waivers. If the hallmark of bilateral arbitration is the ability to achieve relatively low-cost, efficient, merits-based resolutions of individual claims, mass arbitration is its polar opposite. See, e.g., Concepcion, 563 U.S. at 345 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." (internal quotation marks omitted)). Mass arbitration turns the traditional arbitration model on its head by using the coordinated threat of purportedly individual arbitrations to seek global resolutions of numerous claims based solely on the transaction costs of arbitration, irrespective of the merits.

B. Why Are Mass Arbitrations So Dangerous?

The short answer is fees. Mass arbitration attacks derive their strength, efficacy and leverage from the exploitation of exorbitant, non-refundable fees imposed on corporations and required by arbitral bodies to be paid up front. By contrast, the major arbitration providers like the American Arbitration Association ("AAA") and JAMS strictly limit the fees that claimants have to pay in consumer and employment arbitrations. For instance, consumer fees are capped at just $100 in AAA proceedings involving twenty-five or more claimants against the same respondent, while the respondent company is immediately constrained to pay at least $2,975 and as much as $4,475 per arbitration, depending on the number of arbitrations filed and whether the arbitration is based on documents only or requires an evidentiary hearing.[6]

A similar framework exists in the employment context where employee fees are capped at $200 to $300, while companies are obligated to pay filing and administrative fees ranging from $2,575 to $2,800, depending on the number of arbitrations filed, plus arbitrator compensation, regardless of whether the case has merit and before respondent companies are afforded an opportunity to make an assessment.[7]

JAMS arbitration rules similarly cap consumer fees at $250, while the company is required to pay a filing fee of at least $1,500, plus arbitrator compensation and a case management fee equal to 12% of the arbitrator's compensation.[8] Plaintiffs' firms also take advantage of the fact that many companies typically add consumer-friendly provisions to their contracts beyond what is required of them in order to insulate themselves from allegations that "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable." American Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (citing Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights")). The small number of firms operating in this space have essentially weaponized this well-intentioned practice, leaving their corporate targets with little to no recourse—short of a full-blown arbitration—against even the most conclusory allegations of wrongdoing. This is hardly efficient, but then that's the point. Plaintiffs' firms have seized upon a creative way in which to restore the balance of bargaining power and leverage they seemingly lost in 2011.

Case Studies

DoorDash and Intuit provide cautionary tales of the dangers posed by mass arbitrations and the courts' reluctance to intervene.

A. "This Hypocrisy Will Not Be Blessed"

In Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020), 6,250 couriers filed individual arbitration demands with the AAA pursuant to DoorDash's arbitration clause. Id. at 1064. The couriers alleged that DoorDash misclassified them as independent contractors. Four thousand couriers (the "Abernathy couriers") paid the AAA filing fee of $300 each to commence proceedings (totaling $1.2 million). DoorDash, however, refused to pay its share of the filing fees of approximately $12 million, citing filing deficiencies. DoorDash's refusal

6 Consumer Arbitration Rules; Costs of Arbitration, https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf.

7 Employment/Workplace Fee Schedule, https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

8 Arbitration Schedule of Fees and Costs, https://www.jamsadr.com/arbitration-fees; Consumer Arbitration Minimum Standards, https://www.jamsadr.com/consumer-minimum-standards/; see also, Arbitration Schedule of Fees and Costs, https://www.jamsadr.com/arbitration-fees; https://www.jamsadr.com/employment-minimum-standards/ (capping employee fees at $400, while the company pays a filing fee of at least $1,500, plus arbitrator compensation and a case management fee equal to 12% of the arbitrator's compensation).

prompted the Abernathy couriers to commence an action to compel arbitration. While Abernathy was pending, a separate group of couriers filed a class action in California Superior Court under the caption Marciano v. DoorDash, Inc., No. CGC-18-567869 (S.F. Super. Ct.) ("Marciano"). Seeking to avoid the steep price tag of a mass arbitration, DoorDash entered into a class settlement with the Marciano plaintiffs and moved to stay Abernathy pending the preliminary and final approval of the settlement.

Suffice it to say the court was not amused. The court denied DoorDash's motion to stay and instead granted the Abernathy couriers' motion to compel arbitration for the 5,010 deemed to have valid arbitration agreements. Judge William Alsup issued a scathing rebuke of DoorDash's arbitration avoidance/settlement tactics:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.

Id. at 1067-68 (emphasis added). Judge Alsup's words should serve as a warning to companies choosing to engage in extensive motion practice in order to avoid the consequences of their own contracts mandating arbitration.

B. Intuit's Nightmare Scenario: How a Presumptive Win Became a Loss

In March 2021, Intuit made headlines for all the wrong reasons when U.S. District Judge Charles Breyer denied its motion for preliminary approval of a $40 million class action settlement. See Arena v. Intuit, Inc., No. 19-cv-02546-CRB (N.D. Cal. March 5, 2021) (ECF No. 214).[9] The case involved low-income customers who alleged they were misled by the company into paying for Intuit's tax preparation software when they were in fact entitled to use the Company's free filing option.

Intuit first sought to compel arbitration when confronted by a class action lawsuit comprised of approximately 19 million consumers, despite already facing 9,000 individual arbitrations at the time of its motion to compel. Significantly, each arbitration subjected Intuit to paying up to $3,000 in fees for claims valued less than $100. Judge Breyer denied Intuit's motion to compel after concluding that Intuit's hyperlinked terms of service were insufficiently conspicuous so as to put consumers on notice.[10] See Arena v. Intuit, Inc., 444 F. Supp. 3d 1086 (N.D. Cal. 2020). Ironically, Intuit's fortunes took a turn for the worse when the Ninth Circuit reversed Judge Breyer's order denying Intuit's motion to compel, giving Intuit a presumptive "win." See Dohrmann v. Intuit, Inc., 823 Fed. App'x 482 (9th Cir. 2020). This development, however, could hardly be characterized as a win. Within a few short weeks Intuit's arbitration troubles grew exponentially worse, from 40,000 filed arbitrations to 125,000, leaving a class settlement as the company's sole refuge to avoid disaster. And therein lies the danger of mass arbitration. As an astute Judge Breyer noted, "[i]t is unclear whether Intuit considered this possibility when Intuit drafted the arbitration clause or litigated its enforceability. The Intuit case is proof positive that the pendulum has indeed shifted as companies such as Amazon, Uber and Lyft have all sought to remove their arbitration provisions from their contracts in favor of returning to courtroom litigation. The harsh lesson of Intuit is that companies should take a very hard look at their contracts and make an informed decision on whether to keep or cut arbitration clauses given this emerging threat.

9 In denying Intuit's motion, Judge Breyer reasoned that the settlement provided "inadequate compensation" and subjected the estimated 19-million-person class to unduly burdensome opt-out procedures. Id. at 2.

10 The Keller Lenkner firm filed 31,000 arbitration demands the day before Judge Breyer ruled on Intuit's motion.

Mitigating the Threat

While the threat of mass arbitration attacks may be here to stay, it is worth remembering that arbitration clauses with class waivers are a function of contract law. Companies can and should use them to their advantage, first by performing a robust assessment of their risks, and second, by amending existing agreements to restore a modicum of balance and predictability. Although not exhaustive, the list below provides steps companies should consider to mitigate this emerging threat:

Require robust pre-filing requirements. Establishing procedures that facilitate a robust exchange of information and an obligation to engage in pre-arbitration dispute resolution. Not only does this facilitate an opportunity to assess the merits, it allows companies to settle small dollar claims that pale in comparison to filing fees.

Require claimants to file individual demands. Consider drafting provisions requiring each claimant to file his or her own demand and expressly prohibit claimants from engaging in processes that permit the filing of a single demand on behalf of thousands of claimants.

Delegate critical issues to the court instead of the arbitrator.[11] These include the enforceability and scope of the agreement, the interpretation of the class waiver and compliance with the pre-filing requirements.

Consider giving claimants the right to file in small claims court. Claimants opting instead to file in small claims court will significantly lessen companies' financial burden of paying fees up front before they even have a chance to contest the merits.[12]

Consider altering cost-sharing provisions and fee shifting for frivolous claims. Remember, claimants' counsel's game is volume and ratcheting up litigation costs in an effort to obtain a superior bargaining position. Fee shifting and cost-sharing mechanisms should compel counsel to more thoroughly vet claims prior to filing en masse.

Reserve the right to settle claims on a class wide basis. The lessons of Intuit and DoorDash are instructive. An express reservation of a right to settle claims on a class wide basis should silence arguments (and court admonishments) that the company somehow waived its right to do so.

Attempt to negotiate favorable procedures to alter AAA/JAMS payment obligations for mass filings. Also consider tribunals offering greater flexibility.[13]

Consider dropping arbitration from your contracts altogether. Companies should work with counsel to perform a risk assessment regarding the potential for becoming the target of a mass arbitration.

Conclusion

The process of bilateral arbitration, intended as a low-cost alternative to traditional litigation, is increasingly being weaponized by creative firms in order to force corporate defendants to the settlement table. The mass filing of hundreds or thousands of individual arbitration demands poses a serious financial threat to companies, which are constrained to pay non-refundable filing fees up front, often without an opportunity to assess the merits of the claimants' case. Corporate defendants should carefully weigh the costs and benefits of requiring arbitration agreements and practical steps aimed at mitigating this emerging risk.

11 See, e.g., Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (holding when the parties' arbitration agreement delegates arbitrability questions to an arbitrator, "a court possesses no power to decide the arbitrability issue.").

12 Companies may find additional recourse in the AAA Consumer Rules providing in pertinent part, "[i]f a party's claim is within the jurisdiction of a small claims court, either party may choose to take the clam to that court instead of arbitration . . . [a]fter a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA, a party can send a written notice to the opposing party and the AAA that it wants the case decided by a small claims court. After receiving this notice, the AAA will administratively close the case." AAA Consumer Rules, Rule R-9(b).

13 The International Institute for Conflict Prevention and Resolution's ("CPR") Employment-Related Mass Claims Protocol is an example of this. (https://www.cpradr.org/resource-center/rules/pdfs/ERMCP-2021.pdf.) The Protocol applies "[a]ny time greater than 30 individual employment-related arbitration claims of a nearly identical nature are, or have been, filed with CPR against the same Respondent(s) in close proximity one to another." The primary feature of the Protocol is a test cases process in which a limited number of cases are arbitrated (the default is ten cases), followed by a mediation process to attempt to resolve all of the outstanding cases. If the mediation fails, then there are options to proceed with the claims in court or through arbitration. If the mediation is successful, individual claimants may still opt out and choose to pursue individual arbitration. The mediation process may also be restarted if the respondent and thirty or more claimants wish to do so.

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

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

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

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

Legal Memberships, Activities and Honors
- Kimberly-Clark, General Counsel's "X" Award for Excellent Results
- Nominated for 2020 First Chair Award for Top In-House Talent
- United States Chamber of Commerce Tort Reform Advisory Council - Member, 2013-present
- Defense Research Institute
- Wisconsin Association of African American Lawyers, Director, 2009-2010
- Wisconsin Law Journal "2010 Up & Coming Lawyer"

Publications and Speaking Engagements
- Panelist, "Reaching Across the Border: The Impact of International Class Actions," DRI Class Actions Seminar, Washington D.C. (2013).
- Panelist, "Keeping the Jury Engaged: Demonstrative Exhibits That Educate and Entertain," DRI Product Liability Conference, Las Vegas (2012).

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

Selecting the Right Mediator for Your Case

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Selecting the Right Mediator for Your Case
Ashley Webber

Mediation is a standard part of all litigation today. Whether court ordered or voluntary, almost all cases will be mediated prior to trial. Mediation is often the best chance for the parties to present their sides in a "friendly" environment in order to manage the risk associated with continued litigation. However, the key to success for almost all mediations is having the right mediator for your case. Below are some helpful tips and areas to consider when picking the mediator for a particular case in order to maximize the opportunity.

The first step is an obvious one, but often it is overlooked. It is crucial that in-house counsel and their outside lawyer are on the same page with respect to what is needed for mediating the particular case. This begins with a thorough discussion between the client and counsel about the objectives for mediation. Is it more important to get the case settled or is this an opportunity to educate the other side about the strengths of the defense? Either way, the entire team should be prepared to evaluate the strengths and weaknesses of their case, understand the risk involved, and be willing to be flexible as the mediation progresses. A fruitful discussion about the potential mediators prior to selecting one and making it a "team decision" will instill faith in the neutral and result in a more productive day. Keep in mind that as a client, there will be frustrations from attending a mediation and quickly learning that the mediator is less than ideal for the case, parties and strategy involved. Given the time associated with mediation, and knowing that it may be your best opportunity to limit risk, this must be avoided at all costs. As a lawyer, the last thing you want is using someone who the client does not trust or value on the day of mediation. Remember, it is your reputation stake, so it is best to vet the mediator together.

Once the initial conversation between the client and in house/outside counsel about objectives takes place, it is time to start vetting mediators and narrowing down to a list of three or four potential options. The single most critical factor from in-house lawyers and outside lawyers I talked to was the mediator's background. First, you have to look for a mediator that will be able to "talk shop" with both sides. Therefore, having a mediator that was a former judge or a litigator who practiced the type of case you are mediating will be imperative, especially if your case involves a nuanced area of the law (product liability, employment law, commercial issues). Having a mediator with an understanding for the basis of the case at issue is going to be much more helpful than one who is spending the day trying to understand the basics. Depending on how nuanced the case is, you may want to look outside your state or jurisdiction for the right fit. Also, do not hesitate to reach out to potential mediators and get an understanding of their familiarity with the venue, the judge handling the case, or the specific issues. Again, it is an opportunity to limit risk and is a large time commitment for everyone involved, so it is important to get it right. While cost is typically not a major factor in deciding a mediator, it is important to recognize that the more specialized the mediator is to the case at issue, the more he or she may charge. However, it is typically money well spent to have a mediator that knows the issues you are dealing with and is not just there to pass numbers back and forth.

Another background factor to consider is the mediator's familiarity with the venue. Will he or she be able to effectively explain to both sides what impact a particular county or district will have on assessing the value of a case? For instance, if you are litigating in a tiny town in South Georgia or West Texas, you may want a mediator that can educate the parties on how those juries look, what the judges in that county typically do, and the ranges of verdicts. If, on the other hand, you are mediating in a large city like Atlanta or Dallas, this is likely less of a factor.

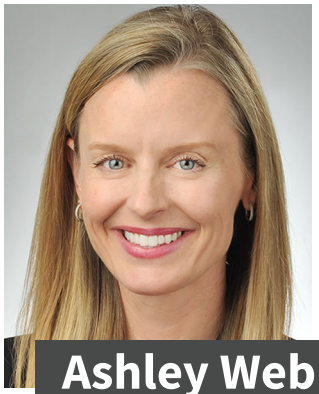
Typically, mediators who do prep work before the mediation are much more effective on the day of the mediation. Look for a mediator who takes your position paper seriously and reads up on the issues beforehand. Having a call with the mediator a day or two before the mediation to answer any questions, start setting the stage for your position, and discussing the nuances of your case will also go a long way. Mediators who come prepared and know what the issues are can get into the mediation quicker, plus it instills confidence in the client and the lawyers if it is obvious the mediator is taking the matter seriously.

Once you have decided on a few options for potential mediators, it can be useful to ask your opposing counsel for 4-5 suggestions of mediators they think would be good for the case. If the opposing counsel has faith in a mediator, it is much more likely they will listen to that person throughout the day. If one or more of the mediators identified by opposing counsel aligns with mediators you have considered, that is a good place to narrow who you will choose. This can also be helpful when working with an attorney you have not encountered in the past, since a mediator who has worked with him or her can prepare you for their style and approach at the mediation. The more you can anticipate the various landmines, the better. For example, if an attorney is known for starting with high, outlandish demands but ultimately will settle for a reasonable amount, knowing this can diffuse the "drama" at the beginning of the day and keep emotions tamed.

Deciding whether to give or waive opening statements is another area where you can lean heavily on an experiencedmediator. It is invaluable to have a mediator who can give the parties a recommendation on whether opening statements would be beneficial based on the mediation statements and parties involved. It is sometimes difficult to determine whether an opening statement will upset the other side and stall negotiations, but a well-prepared and knowledgeable mediator should be able to use his or her experience to let the parties know what information, if any, needs to be shared in the group session.

Finally, you want to choose a mediator who will go the distance. Whether that means staying at mediation until midnight or following up for weeks after an unsuccessful end, you want a mediator committed to putting the settlement over the finish line. The best mediators are those who know when the inperson session is becoming unproductive and will not hesitate to suspend for the day and send the parties home. Often, that balance will allow the parties space to decompress and become reasonable, and a mediator who can see and facilitate that will almost always be able to resolve the case.

Since mediation is such a crucial part of our practice, it is important to do the necessary research, interviewing and background work to get the right mediator for the job. Having someone with these strengths can be the difference between settling a case at the right time or spending unnecessary resources continuing to litigate. Done the right way, selecting a mediator can create an ally and partner in the quest to resolve your case.



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Ashley C. Webber is a partner in the firm's civil litigation section. Ashley has a diverse practice that includes products liability, premises liability, professional malpractice, environmental liability, automobile/trucking litigation and mass tort defense. She has significant experience in litigating catastrophic injury and wrongful death cases in both state and federal courts and has handled several matters at the appellate level. Ashley defends some of the world's largest heavy equipment manufacturers, lift truck manufacturers, automobile manufacturers, automotive parts suppliers and power management companies. She also defends one of the nation's largest pharmaceutical companies in a wide variety of matters. In addition to practicing in Georgia, Ashley has litigated and resolved cases in Alabama, Massachusetts, North Carolina, South Carolina, Texas and Virginia.

Ashley is a member of the American Bar Association, where she is actively involved in the Women in Products Liability (WIPL) subcommittee. She is also a member of several additional industry organizations including PLAC, Network of Trial Law Firms, Georgia Defense Lawyers Association (GDLA) and Defense Research Institute (DRI).

Practice Areas

- Automobile Litigation
- Catastrophic Injury & Wrongful Death
- Environmental Law
- Premises Liability
- Products Liability
- Professional Liability

Awards/Recognitions

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Georgia Super Lawyers Rising Star, 2012-2018
- The Best Lawyers in America©, 2021-Present

Speaking Engagements

- Ashley Webber Speaking at The Trial Network Litigation Management SuperCourse - The Sanctuary at Kiawah Island Golf Resort, 11.05.2021
- Ashley Webber to Present at Network of Trial Law Firms Conference - New York City Bar Building, 08.03.2018
- Ashley Webber Speaking at 51st GDLA Annual Meeting - Hammock Beach Resort, 06.15.2018
- All About the Benjamins: Evaluating and Settling New Claims - 01.26.2017

Education

- Georgia State University College of Law (J.D., 2004)
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Classing-Up Your Class Action Act

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Classing-Up Your Class Action Act – The Supreme Court Gives and Takes From Class Action Litigants During the 2020-21 Session
Greg Marshall

The Supreme Court's most recent term was a truly unique one. It began just a month before a contentious presidential election, the death of one of the Court's most iconic justices (Justice Ruth Bader Ginsburg), and the nomination of Justice Amy Coney Barrett, expanding the conservative wing to six. Amidst the turmoil, the Court managed to give and take a little from everyone in the arena of class action litigation. Here we profile the term's most significant decisions affecting class action litigation and what they mean for defendants.

The Supreme Court guts Telephone Consumer Protection Act class actions in Facebook v. Duguid

Businesses using automated technologies to call and text consumers breathed a collective sigh of relief in April, as the Supreme Court confirmed in *Facebook v. Duguid*[1] what defense lawyers have been arguing for years – equipment that is merely capable of storing and dialing telephone numbers is not an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act (the "TCPA"). Rather, the equipment must also use "a random or sequential number generator." That is the type of equipment that concerned Congress.

Enacted in 1991, the TCPA imposed restrictions on abusive telemarketing practices. In particular, ATDS technology allowed companies to dial blocks of telephone numbers automatically, which could tie up the lines of emergency services and businesses alike. In response to this then emerging technology, Congress made it unlawful to make certain calls using an ATDS, and created a private right of action allowing consumers to recover up to $1,500 per unlawful call, creating the potential for truly staggering liability in class actions.

Fast forward 25 years. Like many businesses concerned with consumer data and privacy, Facebook has a security feature that automatically sends users texts when an attempt is made to access their accounts from unknown devices or browsers. Such technology has a lot of utility, serving the interests of consumers and businesses alike. Facebook sent such texts to Mr. Duguid, who did not have a Facebook account, and did not give Facebook consent to call or text him. This, Duguid argued, violated the TCPA.

Under section 227 of the TCPA, an ATDS is equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers. To be sure, Facebook's equipment did store and text numbers, but it did not use a "random or sequential number generator." On the question of whether equipment like Facebook's met the ATDS definition, the circuits were split.

Closely parsing the text of section 227, the Supreme Court concluded that the clause "using a random or sequential number generator" modified both verbs that preceded it ("store" and "produce"). 141 S.Ct. at 1169. Simply auto calling stored numbers was not enough to make the equipment an ATDS, if the numbers were not produced "using a random or sequential number generator."

1 Facebook, Inc. v. Duguid, 141 S. Ct. 1161 (2021).

This interpretation aligns with the context of the TCPA, the Supreme Court said, which made it unlawful to call emergency telephone lines or multiple lines of the same business at the same time, for example. Id. at 1171. Expanding the definition to include any equipment that merely stores and then dials telephone numbers (like modern cell phones) would "take a chainsaw to these nuanced problems." Id.

Long plagued by TCPA class actions presenting truly mind-boggling statutory damages (often hundreds of millions of dollars), responsibly-acting businesses have much to celebrate with this decision. Going forward, using technologies like predictive dialers and automated text systems will not expose businesses to TCPA liability, provided those technologies do not store or produce numbers using a random or sequential number generator, as many do not.

Subject to restrictions imposed by other laws (like debt collection or state TCPA-like laws, for example), businesses may now use certain automated technologies to call or text cell phones without consent, even for marketing purposes and cold call solicitations, provided that the numbers are not on the national Do-Not-Call registry, of course.

There remains many reasons to proceed with caution, however, as the TCPA still has plenty of bite. The TCPA covers more than just ATDS calls. The provisions covering pre-recorded and artificial voice calls remain, as do the TCPA's limitations on calls to numbers on the national Do-Not-Call registry, the violations of which will likely continue to fodder class actions with crippling damages claims for years to come.

And just as before, businesses should consider taking great care in selecting and contracting with venders providing telemarketing services, or any services that involve calls or texts using automated means, if their equipment uses "a random or sequential number generator." Careful contracting, record keeping, auditing, and indemnification remain key to limiting TCPA exposure before and after *Facebook*.

The Supreme Court Snaps Defendants' Winning Streak on Personal Jurisdiction Challenges in Ford v. Montana

Ending defendants' ten (10) year reign on personal jurisdiction challenges, the Supreme Court cabined the defense friendly rationales of the cases that came before in Ford v. Montana.[2] While the decision was a set-back for defendants, the Court gave defendants a fist-bump by reinforcing the same anti-forum shopping sentiments that underpinned the Court's 2017 Bristol-Myers Squibb Co. ("BMS") decision,[3] which will certainly aid class action defendants seeking to shut down litigation tourism.

The Ford decision arose from a pair of cases that presented the same basic facts. They were both car accident cases, in which the plaintiffs lived and were injured in the state where they filed suit. The disconnect with the forum, and the reason Ford challenged personal jurisdiction, was because the vehicles were purchased second hand and out of state. That is, there was no connection between Ford's conduct - designing and selling the vehicles in question - and the forum.

A few years ago, cases like this one never would have generated personal jurisdiction challenges, but the progeny of the Court for the past few years in particular allowed Ford to make the "logical extension" argument that led to this Supreme Court showdown.

The Court's 2014 decisions in Daimler AG v. Bauman and Walden v. Fiore[4] together limited general "all purpose" jurisdiction to a defendant's state of incorporation or principal place of business, and specific jurisdiction to a defendant's meaningful forum contacts. And the Court's 2017 decision in BMS required "a connection between the forum and the specific claims at issue." 137 S. Ct. at 1781.

So why didn't the logic of these decisions not win the day for Ford? Because unlike BMS, the plaintiffs were injured and sued in their home state. They were not "tourist plaintiffs" shopping the best forum.

2 Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017 (2021).

3 Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty., 137 S. Ct. 1773 (2017).

4 Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014).

The Court made that point early and often, starting in the first paragraph: "The accident happened in the State where suit was brought. The victim was one of the State's residents." 141 S. Ct. at 1022. From there, the Court had little trouble finding Ford's substantial forum contacts enough to satisfy the BMS "arise from or relate to" inquiry, even without a direct causual link between the conductdesigning and selling the vehicle in questionand the forum.

In retrospect, the Court's unanimous decision finding personal jurisdiction was not surprising. The Court was simply not going to tell these plaintiffs who lived and were injured in the state where they filed suit to go sue somewhere else, not when they were both injured by the product of a manufacturer who pervasively marketed and sold the very same products in the forum. As the Court said, they "brought suit in the most natural State." Id. at 1031.

Still, the Court left defendants with something important, as this decision can by no means be read to give succor to forum shoppers who so often vex defendants. The Court even went so far as to call out the plaintiffs in BMS for what they were: "In short, the plaintiffs [in BMS] were engaged in forum-shopping¾suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State." Id. at 1031. Thus, in-state product use and injury remain paramount to the Court's specific personal jurisdiction analysis.

The Court also left many battles to fight, with little bright line analysis, allowing a wide berth for defendants to test the bounds of the "relate to" inquiry. The Court in Ford made clear that it's not a causation test¾that's what the other half of the phrase "arise from or relate to" means. 141. S. Ct. at 1026. And we know from Ford that a national manufacturer who pervasively markets and sells product in the forum will suffice. So the substantial battle ground going forward lies in the broad field between.

The Supreme Court hardens the concrete requirement for Article III injuries in TransUnion LLC v. Ramirez

Resting on a pithy rule - "No concrete harm, no standing" - the Supreme Court's 5-4 decision in TransUnion LLC v. Ramirez[5] promises to intensify the already-pitched battles over Article III standing invited by the Court's prior 2016 decision in Spokeo Inc. v. Robins,[6] and may limit the size of class actions while narrowing the damage theories class action plaintiffs may advance.

The Ramirez suit was a class action arising under the Fair Credit Reporting Act ("FCRA"). At stake was whether consumers in various postures of having false or misleading information about them transmitted by TransUnion and misused by third parties had Article III standing to sue TransUnion.

Reversing the Ninth Circuit, the Court held that no class member had standing unless TransUnion actually sent their credit report with the false or misleading information to a third party. The Court's majority explained that even assuming TransUnion violated FCRA's obligation to use reasonable procedures to maintain credit files on all class members, only those whose reports were actually disseminated had a sufficiently concrete injury to confer standing.

To the Court's majority, the mere maintenance of potentially defamatory materials on TransUnion's database in assumed violation of the FCRA was not a concrete injury that could establish Article III standing. The majority reasoned that these plaintiffs could not establish a harm closely related to those serving as a basis for civil liability in American law, a test grounded in Spokeo.

An important part of the decision is what the Court said about the risk-of-future-harm theory of damages. Citing Spokeo's oft-quoted passage that a material risk of harm can "satisfy the requirement of concreteness," Ramirez argued that even if misleading information appearing in credit files is not itself concrete enough for an Article III injury, the risk that misleading information would in the future be transmitted to third parties was sufficiently concrete.

But the Court shrugged off that argument, noting that its 2013 decision in Clapper v. Amnesty International USA - the source of the relevant language in Spokeo - involved injunctive relief,

5 TransUnion LLC v. Ramirez, No. 20-297, 2021 WL 2599472, -- S. Ct. -- (2021).

6 Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

which is inherently forward-looking, that a plaintiff must "demonstrate standing separately for each form of relief sought," and that standing to seek injunctive relief does not necessary endow plaintiffs with standing to seek retrospective damages.

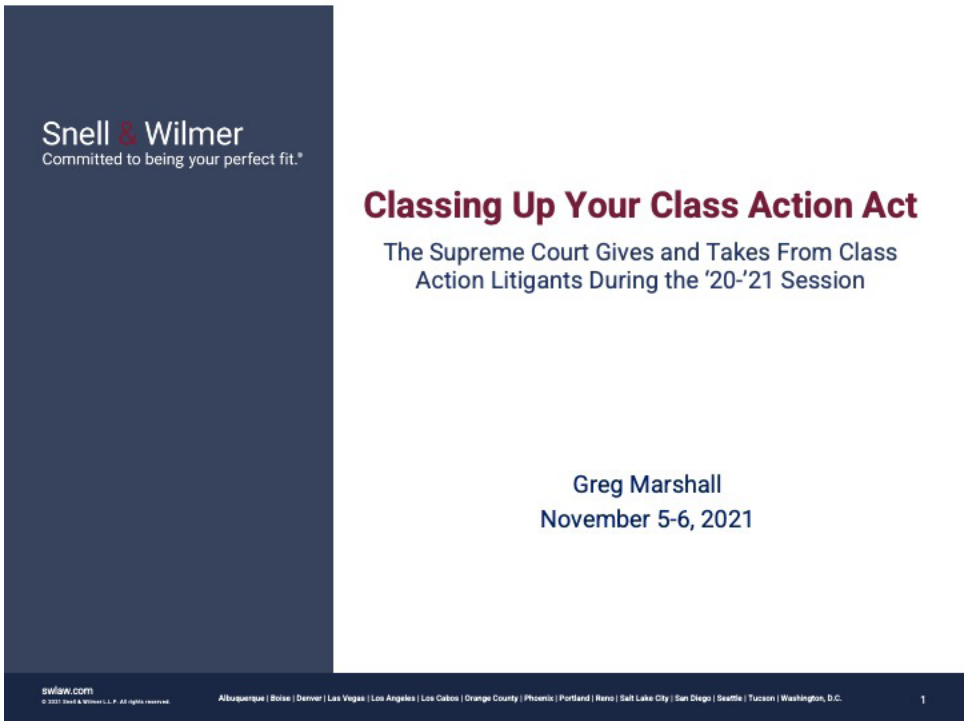
The Court reiterated that any risk of future harm must cross the line from speculative to imminent and substantial, and suggested that when plaintiffs are not even aware of the risk, as was apparently the case for much of the Ramirez class, it is insufficiently concrete. Because risks are often inherently of unrealized conditions, this may be a significant limitation on the potential that a risk may itself be sufficiently concrete to support standing.

With consumer data breach and privacy class actions so often premised on the risk of future harm, it is hard to see how Ramirez will not have a profound dampening effect on their viability going forward. Take for example the Ninth Circuit's 2018 decision in In re: Zappos.com,[7] in which hackers breached the servers of online retailer Zappos.com and allegedly stole millions of customers' personal identifying information. The supposed damage upon which that suit was based was the risk of a future fraud or identify theft, not a presently existing injury, and on that basis was permitted to proceed.

Ramirez necessarily throws the viability of Zappos.com into sharp question, for in addition to the fact that the risk of future damages in data breach cases will often be more speculative than certainly impending, the only reasons putative class members would even know of any risk of future harm is through legally required notices by the very businesses victimized by the cyber-attacks, which notices should not themselves be the proximate source of the supposed class injury.

Even if Ramirez merely realizes the promise of the rule of Spokeo, it now provides an example for lower courts to follow of when injury is insufficiently concrete to justify Article III standing. This will necessarily usher in a wave of new motions to dismiss claims for lack of standing, particularly in litigation in which federal statutory rights are at issue.

7 In re: Zappos.com Inc. Consumer Data Security Breach Litigation, 888 F.3d 1020 (9th Cir. 2018).



Facebook v. Duguid

The Supreme Court Guts TCPA Class Actions

What is the TCPA?

- Enacted in 1991
- Imposes restrictions on abusive telemarketing practices
- Private right of action (up to $1,500 per unlawful call or text)

What is an ATDS?

Equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers

What Happened?

- Facebook's authentication security feature
- Facebook's equipment did store and text numbers, but it did not use a "random or sequential number generator"

The Series Qualifier Cannon

Regardless of whether the equipment is used to store or produce, a "random or sequential number generator" must be used

What Does It Mean for Defendants?

- Predictive dialers and automated text systems okay
- Do-Not-Call registry
- Careful contracting, record keeping, auditing, and indemnification

Ford Motor Co. v. Montana

Defendants' Decade Long Winning Streak Snaps!

What is Personal Jurisdiction?

- General "all purpose" jurisdiction – Affiliations with the forum state be so "continuous and systematic" that the corporation is rendered "essentially at home in the forum state"
- Specific "case limited" jurisdiction – Focuses on "the relationship among the defendant, the forum, and the litigation"

The Cases that Came Before

- 2011 – *Goodyear Dunlop Tires Operations, S.A. v. Brown* – Rejecting general jurisdiction in stream of commerce cases involving foreign subsidiaries
- 2014 – *Daimler AG v. Bauman* – General jurisdiction generally limited to defendant's state of incorporation or principal place of business

The Cases that Came Before (*cont.*)

- 2014 – *Walden v. Fiore* – Defendant's contacts must be with the forum, not just with plaintiff
- 2017 – *Bristol-Myers Squibb Co. v. Superior Court* – Specific jurisdiction cannot be based on contacts with other plaintiffs in the forum.

What Happened?

- Plaintiffs lived in the forum
- Plaintiffs were injured in the forum
- But the vehicles were purchase second hand, out of state

The "Arise From / Relate To" Test

- Arise From = Causation test
- Relate To = Some relationship that will support jurisdiction without a causal showing

What Does It Mean for Defendants?

- Rebuke of "tourist plaintiffs"
- The new battle ground = "relate to"
- Application to putative class members?

TransUnion LLC v. Ramirez

The Supreme Court Hardens the Concrete

Why Standing Is Important?

- "Cases" and "controversies"
- Separation of powers
- Limits who can bring an action

Three "Irreducible" Elements of Standing

- Injury-in-fact – a "concrete and particularized" harm to a "legally protected interest"
- Causation – a "fairly traceable" connection between the injury-in-fact and the actions of the defendant
- Redressability – a non-speculative likelihood that the injury can be remedied by the requested relief

What Happened?

- The OFAC list – What's in a Name?
- Verdict form – TransUnion should "completely revamp" this practice
- The Fair Credit Reporting Act – failure to follow reasonable procedures
- $40 million ($32 million in punitive damages)

What Does "Concrete" Mean?

- Real impact on real persons, and not abstract
- Plaintiffs must have a "personal stake"
- First time violating a federal statute wasn't enough

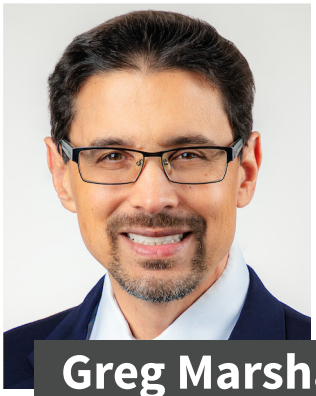
The Risk of Future Harm Theory

- Injunctive versus money damages
- The "exposure" to harm *itself* must be concrete
- Must plaintiffs know of the risk?

What Does It Mean for Defendants?

- Has a “silver bullet” defense been strengthened?
- Is standing now a factual inquiry requiring discovery?
- Are plaintiffs going to bring more class actions in state court?


Snell & Wilmer
Classing Up Your Class Action Act
23



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Greg Marshall

Partner | Snell & Wilmer (Phoenix, AZ)

Greg Marshall co-chairs the firm's Commercial Litigation and Financial Services Groups and has more than 20 years of experience defending companies in Arizona, Colorado, New Mexico, and around the country.

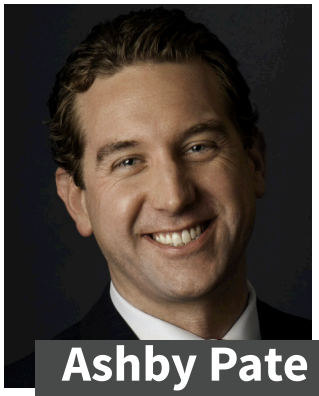
Financial Services Litigation
Greg's practice focuses on the defense of banks and lenders. His clients include national and regional banks, credit unions, mortgage lenders and servicers, FinTech companies, credit card issuers, automobile finance servicers, and money transmitters. His practice includes class actions and managing defense programs for pattern litigation. Greg has substantial experience litigating and trying claims involving deposit accounts, check fraud, mortgage fraud, Ponzi schemes, and lien priority disputes. He also has substantial experience defending claims arising under the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Reporting Act (FCRA), the Unfair Debt Collection Practices Act (UDCPA), state unfair and deceptive acts or practices (UDAP) statutes, and has advised clients regarding CFPB complaints, and rules and interpretations, including guidance issued during COVID.

Commercial and Product Liability Litigation
Greg has tried commercial and product liability cases to verdict in state and federal courts and in arbitration. Greg's commercial litigation practice includes prosecuting and defending claims on behalf of businesses in a wide variety of civil and regulatory matters, including qui tam, class action, and multi-district litigation (MDL). Greg's class action experience includes defending claims under the Telephone Consumer Protection Act (TCPA) and data privacy, including claims arising under the California Consumer Privacy Act (CCPA). Greg's product liability litigation practice includes defending consumer and industrial product manufacturers in a wide variety of industries, including developing defense programs for pattern litigation.

Areas of Practice
- Class Action Litigation
- Commercial Litigation
- Financial Services Litigation
- Insurance and Licensure
- International
- Non-Profit Law
- Product Liability Litigation
- Automotive

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

Education
- Emory University School of Law (J.D.) - Dean's Fellow; Order of the Barristers; Order of the Advocates
- University of Arizona (B.A., cum laude)



ETHICS: Be the Light - The Importance of Storytelling and Human Connection in Trial Advocacy

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Be The Light
R. Ashby Pate

The Story Behind the Story

Trial lawyers are storytellers. Unlike writers though, trial lawyers do not get to choose the stories we tell. We do not have the luxury of assigning favorable characteristics to our witnesses, or molding a judge's ideological background, or framing the narrative for a dramatic climax. We do not write our story arcs or pencil in our happy endings. Thus, the trial lawyer's job is different and even more difficult than that of the author, the screenwriter, the musician, and the poet. It is our job to tell a story that has already occurred and to make the reader—the jury or a judge—sympathize with the antagonist. Telling linear stories with logic and reason may be our natural tendency as lawyers, but it is simply the wrong way to do it in a jury trial. We need to get in touch with our inner poet and strive to connect, emotionally, with our audience.

Researchers across all disciplines agree on two things: (1) human beings crave connection; and (2) the art of storytelling is the most essential way to foster human connection. This is because we, as humans, yearn for a shared history, a shared purpose, and a shared narrative. We want to share our stories and hear others in return.

Yet when it matters most, when our clients' welfare is on the line, when we seek to define the outcome of our case by putting it in the jury's hands, we all too often ignore that human connection. We retreat to formulas: the pallid introduction, the essential elements of the legal claim, and the PowerPoint templates that we've all seen used before. We rely on the way it has always been, and we ignore the way it ought to be. What lawyers don't understand is that lawsuits are rarely mere problems to be solved. Instead, they are paradoxes to manage. That's where stories come in to give us the metaphorical vocabulary to do so.

Storytelling. It's at the heart of what we do as lawyers. But how can we do it better?

Content

Hi, My Name Is…
The first few moments of any presentation are critical. This is where the audience forms their first impressions—whether you're credible, whether you're interesting or unique or inspiring. This is the time for you to connect with your audience and not only tell them why they should care about what you have to say, but to show them why they should care. All too often we waste these few precious seconds with a "Hi, my name is so and so, and I'm going to talk about so and so and you should care because A, B, and C."

For lawyers especially, the first few moments of a presentation is the only chance we'll get to capture our audience's attention. It is one of only a handful of times in which we are directly engaged with our audience and where we are not bogged down by legal procedure. It is an opportunity for us to use our human strengths and talents to draw a connection between what we believe and what we hope to convince our audience to believe. This is the time for the unexpected.

In today's presentation, I opened up by playing a song. I did it to get your attention. And, because it's

not what anyone expected, it took you by surprise. I suspect it worked. So, you listened, perhaps a little nervously, until I put my guitar down and started speaking. And for the next eight minutes, I told you about an old blues musician named Huddie Ledbetter and his experiences as a young musician. And by the end of my speech—when it came time to tell you my story and persuade you to form a certain conclusion—you knew what I was trying to tell you without my ever having to do so.

Theme

The theme to your story is more than a bullet on a slide. It should appear early on and reappear often as you remind your audience of why they should care about what you have to say. The theme is the glue that binds everything else together, and without a theme, a presentation is nothing more than a recitation of facts. In my presentation, I stressed the theme of bringing human connections to your practice. I did this by drawing parallels in your mind between Huddie Ledbetter's story and my own. I did it by holding up my hand and showing you the other side of it—over and over again.

Arc

The beginning and end of any good story share a common bond. In my presentation, it was the power of the message behind "Midnight Special." You heard it when I started, and you heard it when I finished. In Forrest Gump, it was a white feather being tossed around aimlessly in the sky, at the beginning and the end, just as Tom Hanks was thrust around into random events throughout the course of the film. The best themes are those that catch the audience by surprise.

Presentation

PowerPoint is one of the most effective tools a presenter has, but it also can be among the most distracting. To use PowerPoint effectively, remember the following:

A slide should appear only for as long as it is relevant. You want the audience to be listening to you, which means you want the audience to be looking at you, which means you don't want the audience to be looking at a slide while you're talking about something unrelated to it. Intersperse blackout slides throughout your presentation to naturally draw the audience back to you when you don't want them looking elsewhere.

A black background is your friend. Not only is it easier on the eyes than a white background, but it allows you to seamlessly transition to blackout slides without distracting the audience.

Control the show and know it well. In today's day and age, there is simply no excuse for having someone else control your slides. Not only does it distract your audience when you break up your conversation to instruct an assistant to switch slides, but it puts a series of roadblocks in front of what could otherwise be a seamless presentation. By using a remote clicker and blackout slides throughout the presentation, you can use PowerPoint to illuminate your message without distracting from it.

Fades are your friend. Our eyes are designed to detect movement. When a PowerPoint presentation instantly changes from one slide to another, you run the risk of your audience either not noticing the change or becoming distracted by it. A subtle fade between slides creates just enough movement to notify the audience that something is happening and either diverts their attention back to you or the subsequent slide.

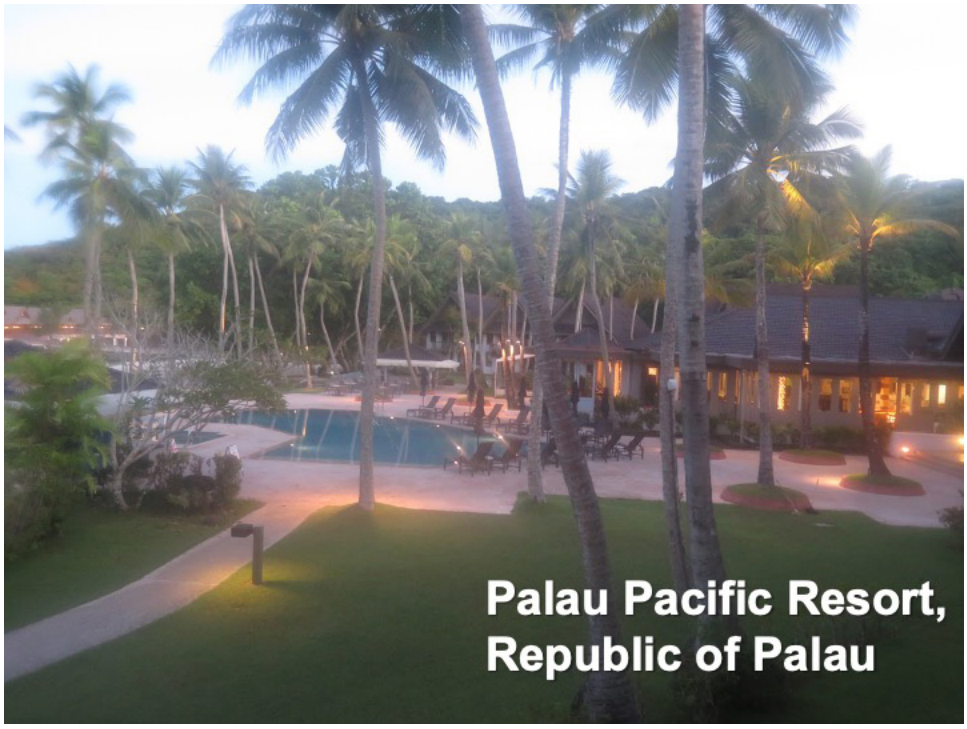
Bullets, not bulletins. The text on a slide should correspond to the topic about which you are speaking—it should not contain a summary of what you are saying. The human mind cannot process both the written and spoken word at the same time, and when you present a block of text while you're speaking about it, you're asking the audience to do both.

Conclusion

Lawyers and judges have the unique power to create meaningful human connection in their work—if only they'd rethink how they approach they tell their stories.

In this presentation, Justice Pate illustrates the power of human connection through his unique "story," which includes his own experience in the criminal justice system as a young man, all the way to his appointment to serve as an Associate Justice

of the Supreme Court of Palau, a remote—and disconnected—island nation in the western North Pacific. Weaving stories of his time in Palau, where he helped bring an end to the nation's practice of solitary confinement, he shares how the power of human connection changed his own life and illustrates what can happen when lawyers and judges realize that the law's highest calling is not to disconnect, but to reconcile—not to lock people up, but to set them free.


Palau Pacific Resort,
Republic of Palau


Farewell
Dinner


Fellows Brian O'Neill &
Joseph Matthews


Associate Judge
Ken Govendo
(Saipan)
Former President
Johnson Toribiong
(Palau)


Judge Vernon Perez
(Superior Court of Guam)
Melissa Atkinson
(Wife of Fellow
Mike Atkinson)


President of Palau
Tommy Remengesau, Jr.


MOSESE T. WAIBUTA
Public Defender (Fiji)
Assistant Attorney General (Fiji)


Fellow Ted Schmidt
Palau Bar Members

Island Times

Palau

President Ma to meet mainland Chi-

2016 ABL Season commences on Nov. 23

Lawyers' gathering bring in legal giants from the US

Resource persons include lawyer who tried Exxon Valdez oil spill case and ex-US Associate Independent Counsel

BY JOSE RODRIGUEZ T. SENASE
Reporter

A law symposium being hosted by Palau brought in some of the best legal minds in the United States (US).

The Advanced Trial Advocacy Symposium started on Wednesday, November 4, 2015

ATKINSON ROBBINS MATTHEWS O'NEILL


Fellow Brian O'Neill
Saipan Lawyer Brian Nicholas


Fellow Tom Orloff

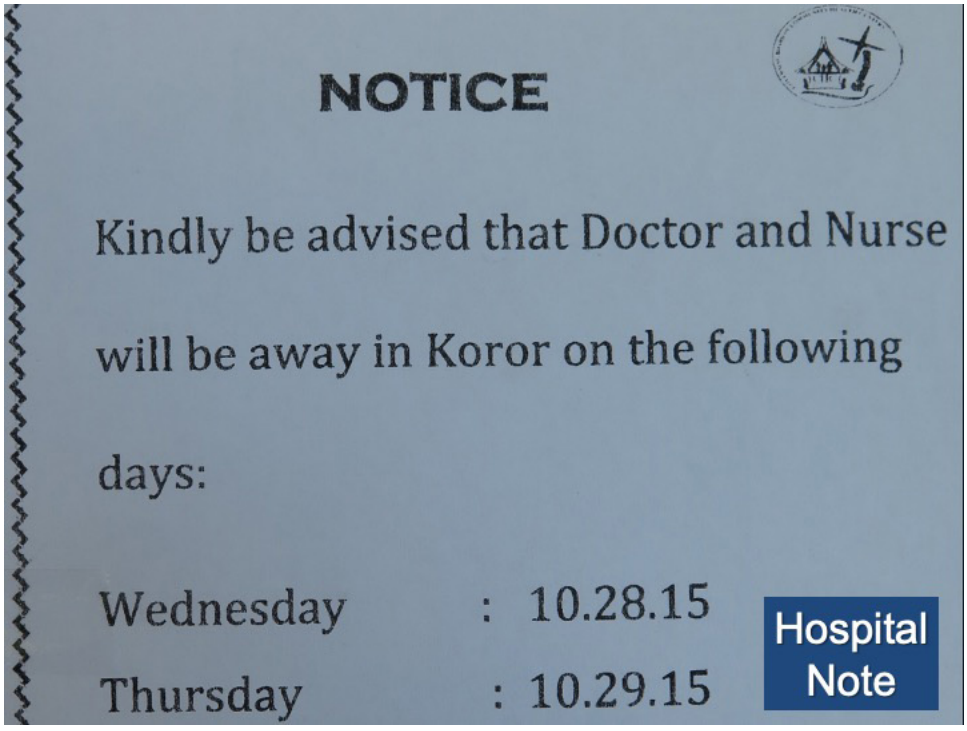

Fellow Joe Matthews


Palau's Rock Islands


Palau's Rock Islands


Palau is a LONG WAY AWAY

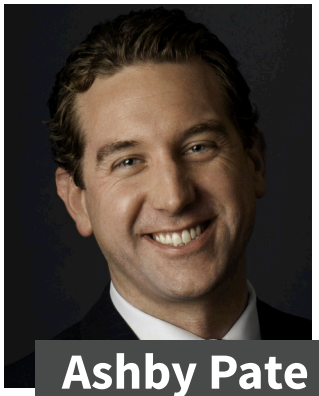

Palauan Family Home


NOTICE
Kindly be advised that Doctor and Nurse will be away in Koror on the following days:
Wednesday : 10.28.15
Thursday : 10.29.15
Hospital Note


PELELIU WORLD WAR II
MEMORIAL MUSEUM
Battle of Peleliu


PALAU
SUPREME COURT
Supreme Court


be the light.



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Ashby Pate

Partner | Lightfoot Franklin & White (Birmingham, AL)

Ashby Pate is a trial lawyer with unique courtroom experience and a history of handling controversial matters. Ashby may have one of the most interesting resumes of any Alabama lawyer.

A former justice on the Supreme Court of the island nation of Palau, Ashby presided over hundreds of cases as a trial and appellate judge there — and he helped create that country's first-ever jury trial system. He also served as a judicial clerk for U.S. District Court Judge U.W. Clemon, one of Alabama's civil rights pioneers. He was the editor-in-chief of the Law Review for Samford University's Cumberland School of Law, and he later earned an LL.M. from the University of East Anglia in Norwich, England, where he graduated first in his class and was awarded the Sir Roy Goode Prize in international law. He is also one of only 50 distinguished lawyers and judges in Alabama currently serving on the American Law Institute, where he contributes to many of the restatement projects published by that prestigious organization. Ashby draws on all of this unique experience in his general commercial defense practice, which focuses on international disputes, appellate work, pharmaceutical and medical device litigation, and product liability.

A true advocate at heart, Ashby is frequently involved in some of the firm's most important — and sometimes controversial — matters. For example, he was appointed co-prosecutor in the widely publicized judicial ethics trial of Alabama's "Ten Commandments" judge, Chief Justice Roy Moore. Ashby delivered closing arguments in the trial, arguing that an Administrative Order issued by the Chief Justice constituted defiance of the U.S. Supreme Court's same-sex marriage decision in Obergefell v. Hodges. In a unanimous verdict, the Alabama Court of the Judiciary suspended the chief justice from office for the remainder of his elected term, without pay.

Practice Areas

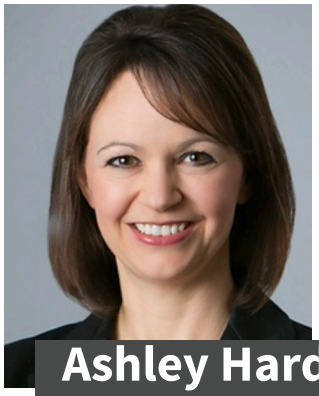
- Appellate
- Arbitration & Mediation Services
- Class Actions
- International Disputes
- Life Sciences
- Complex Government Litigation & Investigations

Awards

- Alabama State Bar Leadership Forum (2018)
- Benchmark Litigation, "Future Star" (2021)
- The Best Lawyers in America© by BL Rankings — Appellate, Commercial Litigation (2021-22)
- Birmingham Business Journal, "Top 40 Under 40" (2017)
- Birmingham Magazine, "Top Birmingham Attorneys" (2018)
- Birmingham Magazine, "Top International Law Attorney"(2013)
- Cumberland School of Law , "Alumnus of the Year" (2017)
- United Nations Judicial Summit in Hong Kong, delegate (2015)

Education

- Norwich Law School (LL.M., first in class; highest distinction, 2010)
- Samford University, Cumberland School of Law (J.D., magna cum laude, 2007)
- University of Colorado, Boulder (B.A., summa cum laude with highest distinction, 2000)



ETHICS Panel Discussion: Employment and Ethical Considerations for Lawyers on Social Media

Ashley Hardesty Odell

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Employment and Ethical Considerations for Lawyers on Social Media
Ashley Hardesty Odell

There are billions of active social media users in the world right now, using multiple platforms like Facebook, Twitter, Instagram, TikTok, YouTube, and LinkedIn. That is a sizable fraction of the world's population, and likely includes a majority of employees, opposing counsel, clients, judges, and jurors. At this point, not having a social media presence can seem like more of an eccentricity than a passive resistance—like using a land line or dial-up internet, or even driving a stick shift. More than any other professional service industry, the legal profession utilizes social media for promotion and marketing of legal services—but not without the occasional errant post.

If you are an employer, an internet search for employees' or job applicants' public social media accounts is an obvious screening tool that can be highly (and sometimes unfortunately) revealing. The same is true of clients looking to retain counsel. At its most useful, social media will affirm who has the good judgment to not share information that they would not want an employer or client to see. At its worst, social media will expose objectionable behavior or content harmful to an employer or client, prompting ethical citations. Certain actions in response to a person's social media can be warranted but can also lead to litigation. This article will provide some explanation for lawyers to avoid pitfalls of social media from both an ethical and employment perspective.

For instance, can a law firm terminate an associate who posts a picture of themselves doing a keg stand? Can a legal department terminate a staff lawyer who posts an angry rant about having to work late on a confidential project? Can lawyers be cited for ethics violations for their seemingly innocuous social media post about the state of the judiciary? There is an entire universe of unknown facts needed to answer these questions. However, there are some foundational principles to consider, such as what qualifies as "protected speech" under our Constitution.

What does the First Amendment protect?

There is a common misconception that the First Amendment to the United States Constitution grants every person the right to say, post, or tweet every fleeting thought that comes to mind. The idea that there may be negative consequences to one's late-night, profanity-laden rants often generates a "freedom of speech" protestation. In reality, the First Amendment does not guarantee anyone the right to the freedom to post. The freedom of speech is actually a broad—but not absolute—freedom from government censorship. Private individuals and employers have no sweeping Constitutional obligation to protect anyone's speech. This distinction is important because public employers must take a different approach to employees' speech than private employers.

When can a government employer regulate employee speech?

A public employer, such as a public school or other government agency, is prohibited by the First Amendment from taking adverse action against an employee because of the employee's speech… to a point. If a government employee's speech

was made in the course of his or her employment, then the speech may not be protected by the First Amendment. The government employer must have the ability to evaluate its employees doing their jobs, after all. If the speech was outside of the scope of employment, like an off-hours internet post, then the employee does enjoy some Constitutional protection from censorship, particularly when it comes to matters of public concern. However, the government employer has an interest in efficient and effective operation and can restrict employee speech as necessary to protect that interest. How does this play out? A government employer can take action against an employee when his or her speech is damaging to the mission of the government body, like when police officers or public school teachers use Twitter or Facebook to publicly attack a group of people they are entrusted to protect.

Employment considerations for private law firms and corporate legal departments.

The free speech clause of the United States Constitution does not apply to private employers. Without the First Amendment analysis that is inherent to government employers, private employers have much wider latitude for disciplining or terminating employees for their social media speech.

However, private employers should be mindful that they cannot take adverse employment action based on an employee's membership in or association with a protected class. Many states also recognize an exception to the at-will employment doctrine, prohibiting employers from taking adverse employment action that would contravene public policy. While the First Amendment may not provide a substantial public policy protecting speech generally on social media platforms, the speech itself may do so. For example, if an employee posts on Instagram about information relevant to an OSHA investigation, he or she may be engaging in protected whistleblowing activity and should not be disciplined or discharged as a result of those activities. Employers also should be aware of Section 7 of the National Labor Relations Act, which gives employees the right to engage in "concerted activity" for the purposes of collective bargaining. That protected concerted activity could occur over social media, and employers cannot interfere with it. On the other hand, employers can monitor employees' social media and take employment action if an employee violates any of the employer's other policies, particularly anti-harassment and anti-discrimination policies, confidentiality policies, or if an employee publishes statements harmful to the organization that the employee knows are untrue. And exercising the right to terminate an employee based on their social media posts has been upheld in many cases. For example, the United States District Court for the Western District of Pennsylvania upheld the termination of an employee who made posts on her personal Facebook page during non-working hours advocating mass violence toward demonstrators protesting the police shooting of an African American man in Pittsburgh. Ellis v. Bank of New York Mellon Corp., 837 Fed. Appx. 940 (3d Cir. 2021). The employee's Facebook account was set to "public," meaning the post was viewable by people other than the employee's "friends" on Facebook. Ellis v. Bank of New York Mellon Corp., 2020 WL 2557902, *1-2 (W.D.Pa. May 20, 2020). The employer received numerous complaints and questions as to whether the company shared the employee's values, and "reputational risk" can be a legitimate non-discriminatory reason for termination. Id. at *12.

In another Pennsylvania case, a woman was held ineligible for unemployment benefits after she was fired for posting that she would have sliced a co-worker's throat during a workplace incident if it hadn't happened at work. Cummins v. Unemployment Comp. Bd. of Review, 207 A.3d 990 (Pa. 2019). A Missouri Walgreens employee was similarly disqualified from unemployment after being terminated for posting a pornographic video along with sexually lewd comments purportedly about two female co-workers on his Facebook page in violation of the company's Social Media and Personal Web Sites policy.

One way to proactively manage employment issues with employees on social media is to adopt a clear social media policy and apply it consistently. Indeed, the employee in Ellis v. Bank of New York Mellon Corp., supra, was terminated for violating the employer's Use of External Social Media Policy. A social media policy should inform the employee (1) that the employer monitors their public social media

platforms, (2) whether social media platforms may be used for business purposes, and, if so, the scope of such permitted use, and (3) that use of employer computers and technology should not be used for engaging in personal social media activities. The scope of an employee's permitted use of social media should be limited to legitimate business purposes, and employees should be reminded that the employer's other policies apply to their use of social media. Employees should be reminded that they can be disciplined for violating the policy, but that the employer has broad discretion in administering appropriate discipline depending on specific circumstances of each case. The social media policy should specifically acknowledge the employee's right to protected activity under Section 7 of the National Labor Relations Act. If an employer is considering taking any employment action based on an employee's social media presence or violation of the social media policy, it should carefully consider whether the employee could argue they are being treated differently than other employees who engage in similar activities outside of the realm of social media.

Even without a social media policy, an employer may have a valid reason to terminate or discipline an employee based on his or her social media content, subject to the caveats above, for activities including, without limitation, (1) using social media to harass or threaten, or to perpetrate a crime; (2) using social media during work time; (3) tarnishing employer's reputation (except when the speech can be considered "protected activity"); (4) lying to the employer (e.g., posting pictures of self on a cruise while on sick leave); (5) sharing employer's confidential information or trade secrets; or (6) posting content that is disruptive to a government employer's operations or mission. An employer may not terminate or discipline an employee based on his or her social media content for protected activities, (e.g., whistleblowing). Further, adverse employment action based on social media activity may not be upheld where the employer is not following protocol in social media policy, not applying the policy consistently, or where the employer is retaliating against the employee for reasons unrelated to the content or otherwise acting with a discriminatory motive.

Finally, while employers are free to access publicly available social media accounts, some states restrict employers' ability to request employees' or applicants' usernames and passwords to personal social media accounts, to access their accounts in the employer's presence, or to otherwise compel employees to grant access to their accounts.

Ethical considerations for lawyers on social media.

A lawyer's use of social media generally implicates three ethical principles: (1) maintaining confidentiality, (2) maintaining competencies, and (3) maintaining the integrity of the profession.
An obvious ethical concern arises when a lawyer posts attorney-client protected information on social media. Model Rule of Professional Conduct 1.6 requires attorneys to protect a client's confidential information. The duty of confidentiality to clients prohibits lawyers from "reveal[ing] information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation…." There are enumerated exceptions for disclosure of information, but subsection (c) states that "a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

As noted above, lawyers can and should use social media to promote themselves. However, lawyers can cross the line. For example, a Georgia lawyer was reprimanded after posting privileged information in response to a former client's negative online review. In re Skinner, 740 S.E.2d 171 (Ga. 2013). Another lawyer was disciplined in Illinois and Wisconsin for "blogging" about her clients. In re Peshek, M.R. 23794 (Ill. May 18, 2010), In re Disciplinary Proceedings Against Peshek, 798 N.W.2d 879 (Wis. 2011).

The inadvertent disclosure of privileged information can also occur if a lawyer comments about hearing or trial outcomes, if they post pictures with client material in the background, or even if they use geo-tagging while visiting clients or potential clients. And clients should be advised not to share information about the representation online, as it could be

interpreted as a waiver of privilege. See Lenz v. Universal Music Corp., 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010).

Lawyers also must maintain competencies in technology, meaning they must be ready to use social media effectively as a litigation tool in investigating parties, witnesses, and jurors. For example, the Ninth Circuit held that a lawyer's failure to find the recantation of a sexual abuse victim posted on social media constituted ineffective assistance of counsel to the accused. Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013).

While social media is an effective investigation tool that lawyers are expected to utilize competently, the rules of professional conduct still apply. Lawyers may not use deception to gain information. Specifically, "false-friending" someone to gain information about witnesses or jurors is prohibited by Rule 8.4 of the Model Rules of Professional Conduct (prohibiting dishonesty or misrepresentation), and potentially violates Rule 4.2 of the Model Rules of Professional Conduct (lawyer ex parte contact with a represented party or witness). And lawyers should be careful when accessing accounts on certain platforms where the user can learn who is viewing or attempting to view their profile (i.e., Twitter and LinkedIn). Some ethical committees may consider this impermissible contact with a juror. But see ABA Formal Opinion 466 (April 2014) (lawyers may review a juror's social media presence provided there is no contact with the juror, and "[t]he fact that a juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b))."

Lawyers also must be mindful that the duty to preserve evidence extends to social media. This means they must advise their clients to preserve relevant evidence that may exist in their social media archives. And lawyers certainly may not direct clients to remove social media content. A leading Virginia trial lawyer was suspended for five years after directing his paralegal to instruct his client (the widower in a wrongful death case) to remove Facebook posts depicting the widower in photos with young women, wearing a shirt that said: "I ♥ Hot Moms." See e.g. Lester v. Allied Concrete Co., CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011); Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 21, 2011).

Professionalism is expected from all lawyers. However, the comfort level for "sharing" information online from person to person is far ranging, and a post that seems unbecoming or in poor taste to one person seems completely innocuous to the next. That is the difficulty in evaluating social media issues that implicate a lawyer's duty to maintain the integrity of the profession.

For example, in Pittsburgh, a prosecutor was admonished for posting a "selfie" with a police officer, each holding weapons with evidence tags, with the caption "You should take the plea." The prosecutor's office issued a statement describing the post as "contrary to office protocol with respect to the handling of evidence."

And a Kansas lawyer took the duty to zealously advocate too far with his Facebook private messages to the unrepresented biological mother of his client's child in an adoption proceeding. The lawyer was suspended for six months for "conduct prejudicial to the justice system" and "conduct reflecting adversely on the lawyer's fitness to practice." In re Gamble, 301 Kan. 13, 338 P.3d 576 (2014). Similarly, an Indiana divorce lawyer was arrested and charged with a felony after posting this to his client's ex-husband on Facebook:

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

As technology and social media platforms evolve, so must the lawyers who use them. Even in the ever-changing digital world, there are some best practices to guide a lawyer's use of social media. First, understand that communicating on social media is the same as any other communication, and the ethical rules surrounding communications

apply equally to those that occur on social media. Second, keep personal social media and business-related social media separate, and be thoughtful about "friending" clients, opposing counsel, and judges. Be thoughtful about how your posts might be perceived by others. Finally, even if you are not an active "poster," develop competencies in using social media as a tool to ethically advance your clients' interests.

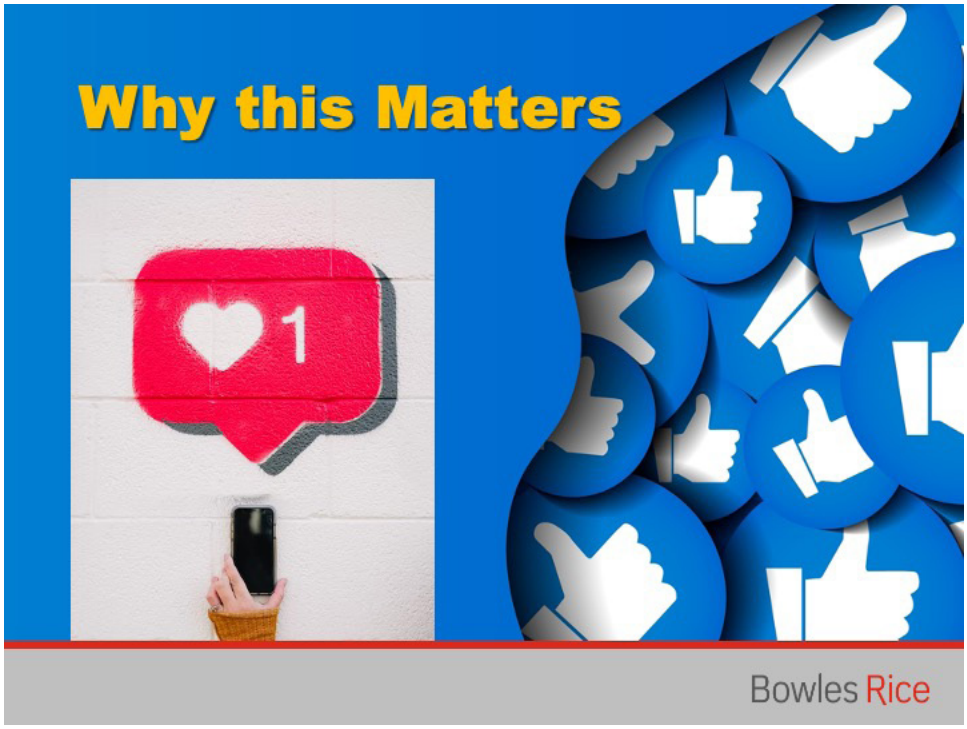
Conclusion

Like it or not, social media is here to stay, and lawyers must be prepared to use it without stepping into the many pitfalls it presents.


ETHICS Panel Discussion
Employment and Ethical Considerations for Lawyers on Social Media
215 1 10
Ashley Hardesty Odell, Esq. (she/her/hers)
Bowles Rice


Moderator and Panelists
Ashley Hardesty Odell
Aaron Boone
Panelist 2
Panelist 3
Bowles Rice


Plan for Discussion
• Why this Matters
• Ground Rules
• Case Studies
• Q&A
Bowles Rice


Why this Matters
1
Bowles Rice

Why this Matters

- Facebook users: 2.85 Billion
- Instagram users: 1 Billion
- Twitter users: 300+ Million

Bowles Rice

Ground Rules

Bowles Rice


Ground Rules
• There is no First Amendment right to freely post on social media.
Bowles Rice


Ground Rules
• Standards for discrimination and other principles of employment law apply to treatment of employees using social media.
Bowles Rice


Ground Rules
• Lawyers have a duty to understand and use social media effectively, properly, and in compliance with the rules of ethics.
Bowles Rice

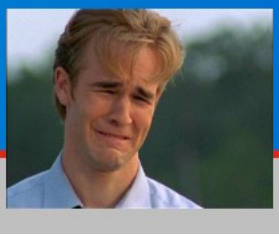

Case Studies
• Employment Considerations
• Whistleblower Blows Top
• Discri-*man*-ation
• Ethical Considerations
• I ♥ Evidence
• Oversharing
Bowles Rice


Employment Scenario One
• Whistleblower Blows Top: Certified nursing assistant at a nursing home posts on Facebook.
Bowles Rice


Employment Scenario One
• Peuplie v. Oakwood Retirement Village, Inc., 472 P.3d 213 (Ct. App. Ok. 2019).
• Termination upheld.
Bowles Rice

Employment Scenario Two

- **Discri-*man*-ation:** White male employee claims discrimination after being fired for responding to negative customer review on Facebook, calls customer a "moron."



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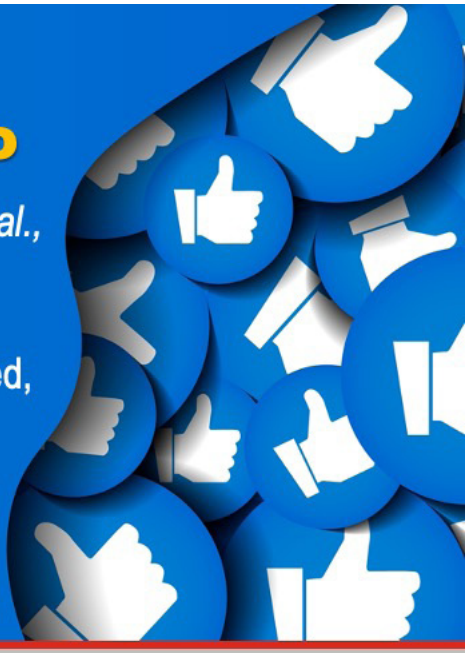
Employment Scenario Two

- *Redford v. KTBS, LLC et al.*, 135 F.Supp.3d 549 (W.D.La. 2015)
- Summary judgment denied, because of evidence that female employees were treated differently.



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Ethics Scenario One

- **I ♥ Evidence:** Lawyer for widower in wrongful death case instructs client to remove photos from Facebook that depict him with young women while wearing this t-shirt:

Bowles Rice

Ethics Scenario One

- *Lester v. Allied Concrete Co.*, CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011); *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 21, 2011).
- Lawyer suspended for five years.

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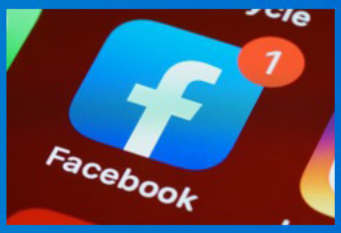
Ethics Scenario Two

- **Oversharing:** Divorce lawyer posts on his client's ex-husband's Facebook page



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Ethics Scenario 2

- *Lawyer Charged with Felony Intimidation over **Facebook** Message to Client's Ex-Husband* (Martha Neil, ABA Journal, May 23, 2014)
- Charged with felony intimidation.

Source: http://www.abajournal.com/news/article/divorce_lawyer_charged_with_intimidation_over_facebook_message_to_clients

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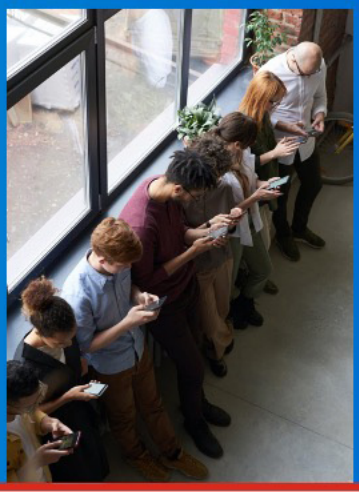
Lessons Learned

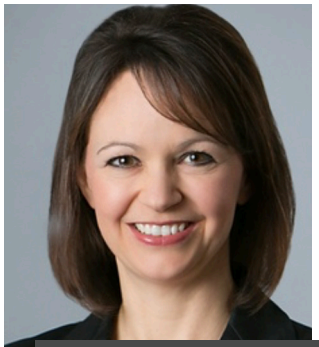
- Social media policies are essential.
- Social media = communications.
- Think twice about your "friends" and "followers."
- Do not put your head in the sand.

Bowles Rice

Q&A



Bowles Rice



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Ashley Hardesty Odell focuses her practice on labor and employment law, and enjoys counseling and advising employers on many workplace issues, including discrimination and harassment, wage and hourly issues, employee handbooks, workplace safety and employment agreements.

Ashley also has experience litigating many types of matters in both state and federal courts. She continues to manage other litigation matters involving business disputes, commercial collections, construction litigation, property damage and personal injury defense. Her strong evaluation, management and advocacy skills allow her to routinely resolve her clients' disputes efficiently, avoiding unnecessary litigation costs.

She serves as practice group leader for litigators in the firm's Morgantown, Wheeling, Southpointe and Martinsburg offices. She also leads both the firm's Insurance Defense Group and the Extracontractual/Bad Faith and Coverage Team. She was a co-author of the West Virginia section of Defense Research Institute's 2015 State by State Insurance Bad Faith Law Compendium. She is also a member of the firm's Recruiting Committee.

Since 2013, Ashley has been recognized as a Rising Star for Business Litigation by West Virginia Super Lawyers. In 2016, she was selected as a West Virginia Wonder Woman by West Virginia Living magazine. The award recognized women "who, through hard work and determination, have made West Virginia a better place to live." She was also selected as a 2008 "Generation Next: 40 Under 40" award winner and as a 2010 Generation West Virginia Regional All-Star. In 2014, she received the Young Alumni Award from West Virginia University. She has served as president of the Monongalia County Bar Association, and is a graduate of Leadership Monongalia.

Practice Areas

- Extra-Contractual / Bad Faith and Coverage Litigation
- Labor and Employment
- Deliberate Intent and Workplace Safety
- Insurance Defense
- Education Law
- Litigation
- WE Mean Business: Women Executives and Entrepreneurs

Honors

- "Young Guns" Class of 2020, West Virginia Executive Magazine
- Fellow, Leadership Council on Legal Diversity, 2019
- Recognized among West Virginia's Wonder Women, presented by West Virginia Living, 2016
- Recognized by West Virginia Super Lawyers as a Rising Star (Business Litigation), 2013-2018
- Margaret Buchannan Young Alumni Award, WVU Alumni Association, 2014
- Generation West Virginia Regional All Star award winner, 2010
- "Generation Next, 40 Under 40" award winner, 2008
- West Virginia University Mountain Honorary
- Queen Silvia LXIII, WV Forest Festival, Elkins, West Virginia

Education

- J.D., West Virginia University College of Law (2003)
- B.A., West Virginia University (2000) - Leadership Scholarship

Understanding Implicit Bias to Improve and Protect Your Workplace

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Understanding Implicit Bias and Microaggressions to Improve and Protect Your Workplace
Nikki Nesbitt

The question of whether the behavior of an employer constitutes discrimination has historically turned on rather overt actions or communications that are not all that difficult to interpret. In recent years, however, our society has started to pay more attention to pervasive examples of understated, indirect, and subtle actions often labeled as "microaggressions." Multiple definitions of the word "microaggressions" exist, but the theme of implicit bias against marginalized groups runs through them all:

> "A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority."[1]
>
> "A comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group (such as a racial minority)."[2]
>
> "Commonplace daily verbal, behavioral or environmental slights, whether intentional or unintentional, that communicate hostile, derogatory, or negative attitudes toward stigmatized or culturally marginalized groups."[3]

More and more, plaintiffs are citing microaggressions as a basis for employment discrimination claims. A September 2021 canvas of Lexis for the term ,"microaggressions" coupled with "employment" in federal discrimination cases brought up 22 hits. All but two of these cases was decided between 2019 and 2021, and over half were in 2021 alone.

Based on a reading of these cases, plaintiffs have not yet gained significant traction in arguing that microaggressions alone are a proper basis of a discrimination claim, but it is clear that the concept will continue to pervade employment claims. Accordingly, employers should be working towards understanding, preventing, and addressing microaggressions to avoid being swept up in the inevitable litigation storm.

What makes implicit bias and microaggressions so challenging for trial courts to interpret is that they are variable and hard to fit into the widely accepted standard for proving discrimination under Title VII. The familiar McDonnell-Douglas standard contains a typical burden-shifting analysis that requires a plaintiff first to show that she is a member of a protected class, performed her job to her employer's expectations, and suffered an adverse employment action while a similarly-situated person outside her protected class received better treatment. If the plaintiff does this, the burden shifts to the employer to come forward with a legitimate, nondiscriminatory reason for the criticized action. If the employer does this, the burden shifts back to the plaintiff to establish some genuine dispute of fact about whether the employer's stated reason was a pretext for discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Plaintiffs have asserted that implicit bias and microaggressions can establish, per the last prong, that the stated

1 https://www.google.com/search?q=microaggression+definition&sxsrf=AOaemvIQHy-42HBB_M_HDbDDDbIIjyTWf0Q%3A1632600431692&ei=b4FPYaX3KNOe5NoP4r-Co0As&oq=microaggression+definition&gs_lcp=Cgdnd3Mtd2l6EAxKBAhBGABQAFgAYK-8WaABwAngAgAEAiAEAkgEAmAEA&sclient=gws-wiz&ved=0ahUKEwjl6qjG9przAhVTD1kF-HWIYCroQ4dUDCA8 (last accessed Sept. 25, 2021)

2 https://www.merriam-webster.com/dictionary/microaggression (last accessed Sept. 25, 2021)

3 https://en.wikipedia.org/wiki/Microaggression (last accessed Sept. 25, 2021)

reason for taking employment action was really a pretext for discrimination.

Microagressions are also difficult to fit into the standard for proving Section 1981 harassment or hostile work environment claims. This standard requires a plaintiff to establish that he was subject to unwelcome harassment that was "severe or pervasive to a degree that altered the conditions of employment and created a hostile or abusive work environment.," Gates v. Bd. of Educ. of Chicago, 916 F.3d 631, 636 (7th Cir. 2019). Plaintiffs have argued that microaggressions can be so significant as to rise to the level of pervasiveness required by this standard.

Not surprisingly, the courts are not consistent in their interpretations of these arguments, and we are likely to be facing opinions that are fact-specific and not very precedential for years to come. This paper briefly summarizes the overall judicial outlook and makes suggestions for handling microaggressions from a practical standpoint.

Microaggressions As Interpreted in the Case Law

Some courts are content to pass over arguments concerning microaggressions because other facts in the case are substantial enough to outweigh them. Others have tried to tackle them directly.

As an example of the former, in Bell v. Ardagh Group S.A., 2021 U.S. Dist. LEXIS 52123, 2021 WL 1049774 (S.D. Ind. March 19, 2021), the court determined that the although the plaintiff was able to establish "insensitive" behavior ,Äì specifically, one white co-worker referred to an African American coworker (not the plaintiff, but someone else) as "the black girl with short hair"; another individual referred to a different African American employee as a "gangster"; and various individuals assumed that the plaintiff knew or was related to all of the other African American employees within the department - these facts were offset by the explicit performance-based reasons identified by the employer for taking action. Id. Lexis at *7, 14-15.

Similarly, in Henderson v. Montgomery Ct. Cmty College, 2021 U.S. Dist. LEXIS 135658, 2120 WL 3077549 (E.D. Pa. July 21, 2021), the court suggested it would be difficult to establish that microaggressions were severe enough to meet the standard for establishing a hostile work environment:

> Patterson argues that throughout her four years at MC3 she was subjected to a variety of microaggressions, including complaints about her clothing and hair, that presumably amounted to a hostile work environment. . . . [But] even accepting the characterization of each of these encounters as true, there is no genuine dispute that, when viewed together, they in any way reached the level of severity that would interfere with her ability to perform her job duties or were so extreme as to amount to a change in the terms and conditions of her employment.
>
> Id. Lexis at *52-53

Other courts, however, have noted that microaggressions can rise to the level of discrimination, at least theoretically. In Mammen v. Thomas Jefferson University, 2021 U.S. Dist. LEXIS 161460, 2021 WL 3782950 (E.D. Pa. Aug. 26, 2021), the same court that decided Henderson suggested microaggressions can hypothetically support a discrimination claim:

> Defendants cling to [Plaintiff's] use of the word "microaggressions," insisting that microaggressions . . . do not constitute discrimination under the law. But there is no need to explore the distinction between "microaggressions" and overt discrimination here. . . . This is, clearly, a complaint of differential treatment based on gender.
>
> Id. Lexis at *11-12.

The Southern District of Indiana was even more explicit in noting that although the legal standards as they currently exist seem to call for more overt examples of discrimination than microaggressions, this may soon change:

> In light of recent events and the continuing movement to reevaluate and redefine societal standards of acceptable behavior, recognize the harms caused by racial hostilities and microaggressions, and encourage tolerance and acceptance, it may well be time to revisit the

> legal requirements for what an individual must endure before his or her work environment can be deemed objectively hostile as a matter of law. This Court, however, is not empowered to conduct such an inquiry or alter those requirements, and instead must apply them as they currently exist.
>
> Paschall v. Tube Processing Corp., 2021 U.S. Dist. LEXIS 71173, 2021 WL 1390350 (S.D. Ind. Apr. 13, 2021) n. 4.

Advice by Anti-Discrimination Experts Concerning Microaggressions

In light of this outlook, many anti-discrimination experts are on a mission to encourage employers to educate themselves about this issue to create a workplace free of microaggressions.

Most experts identify the biggest challenge in this area as helping employers understand what microaggressions actually are. While anyone can read the definitions, applying those definitions in practice is remarkably challenging to do. Secondarily, developing a policy or procedure for what to do in the face of microaggressions can be challenging and ever-changing, but anti-discrimination experts, trainers, and writers have come up with useful advice that can be employed in most workplace settings.

Tip #1. Understand how microaggressions are occurring and create policies for prevention.

Workplaces are social places, which makes policing all employees' interactions both impossible and, to some degree, counterproductive. But certain kinds of interfaces should be flagged for all employees as fraught for microaggressions.

First, employers should be aware of how supervisors are directing work to or away from targeted groups. For example, women who may be experts in their field or working at a high level within an organization may experience male colleagues asking them to take notes at meetings or interrupting them when they speak. Likewise, experienced African American and other non-white employees may encounter supervisors over-explaining a project or assuming that they need extra instruction. Given that these things often occur entirely unconsciously, it is up to employers to establish a process for work assignment and oversight that keeps the focus on attributes removed from race, religion, sex, and gender so that there is no room for implicit bias to influence the decisionmaking. Caporuscio, Jessica, What to Know About Microaggressions in the Workplace, Medical News Today, July 22, 2020.[4]

Second, no matter how innocent or light-hearted, jokes aimed at a person's race, gender, or other status are hazardous and should be avoided. "Overall, it is important to recognize that jokes about anyone's race, gender, ethnicity [or] sexual orientation are never ok. They perpetuate the racism and sexism that exists in this society, and even though they might seem harmless, they reinforce discrimination and prejudice." Agarwal, Pragya, How Microaggressions Can Affect Wellbeing In The Workplace, Forbes, Mar. 29, 2010.[5] Employers should make clear that jokes and commentary involving ethnicity or other protected status are just not permitted at all.

All employers should take stock of their workforce and their processes to identify vulnerabilities to microaggressions. They should create policies for workplace interactions that delineate what communications are appropriate and which are impermissible. In doing so, they should encourage employees to offer insight about their own experiences in a non-judgmental and non-hostile setting.

Tip #2. Provide guidance on how employees facing microaggressions can best respond.

It can be difficult for a person experiencing a microaggression to decide whether to ignore the behavior, address it in real time, or report it to someone else. The same dilemma can occur for people who witness microaggressions occurring to someone else. Employers should provide guidance to all in the workplace about how to appropriately manage these situations.

Employers should, of course, defer to an aggrieved

4 https://www.medicalnewstoday.com/articles/microaggressions-in-the-workplace (last accessed Sept. 25, 2021)

5 https://www.forbes.com/sites/pragyaagarwaleurope/2019/03/29/how-microaggressions-can-affect-wellbeing-in-the-workplace/?sh=194760b873cb (last accessed Sept. 25, 2021)

individual on how to manage his or her own reaction to a microaggression, but the goal is to be a supportive enough workplace that calling out improper behavior is expected, not out of bounds. For instance, when a woman is interrupted in a meeting by a disrespectful male colleague, the woman (or a witness) should feel comfortable asking the male colleague to allow her to finish her point. To the extent an aggrieved employee prefers a less public calling-out, the employer should provide an unambiguous process for this. The point is to encourage employees to identify behavior that they believe is microaggressive. Facilitating an open dialogue about microaggressive behavior and implicit bias is a path toward anti-discrimination and deterrence of unwanted conduct. It is up to the employer to set the tone.

Tip #3. Educate employees about how to acknowledge and correct a microaggression they caused.

Many - if not most - microaggressions are not intended to cause another to feel further marginalized, and yet being told that they made an insensitive or inappropriate comment can make many inadvertent offenders feel defensive, annoyed, or angry. This kind of reaction only contributes to the communication problem.

Employers can help avoid this by establishing clear expectations and frameworks for responding to complaints about microaggressions. Employees should be advised to listen, not defend or conflate their own point of view with the aggrieved person whose perspective they likely cannot appreciate. ‚ÄúMost of us have not lived through mass genocide, so we cannot draw legitimate parallels between our lives and those of its survivors, nor pretend to understand how they feel about it.‚Äù Alonso, Alexander, Tips for Discussing Racial Injustice in the Workplace, SHRM, June 10, 2020.[6] Employers should be clear in promoting listening, discussion, and taking appropriate accountability in response to a criticism. They should make clear that dismissiveness, defensiveness, and debate are improper means of responding. Employers must clarify for all employees that the whole purpose of encouraging open dialogue about microaggressions is to chart a course for eliminating discrimination from the workplace.

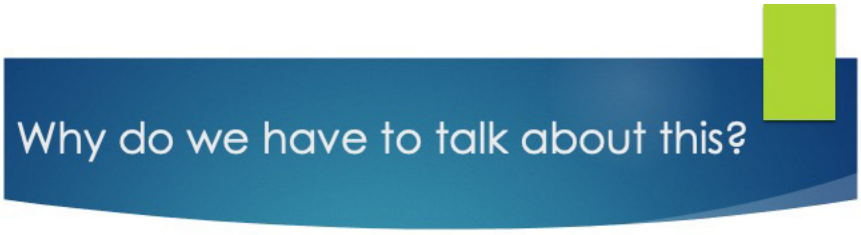
Tip #4. Engage experts in anti-discrimination to provide customized advice.

Trainings, workshops, conferences, and customized sessions on microaggressions abound. This should be part of all mandatory anti-discrimination and diversity training. The Society for Human Resource Management (SHRM) is a good starting point for resources in print, video, and in-person consultation.

Conclusion

Employers should anticipate that discrimination claims based in whole or in part on microaggressions and implicit bias will increase. To avoid them, and to make the workplace more cohesive, employers should be taking actions now to educate themselves on the concept to better prevent, deter, and acknowledge microaggressions.

6 https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/tips-for-discussing-racial-injustice-in-the-workplace.aspx (last accessed Sept. 25, 2021)



To raise awareness –

you may not know how much this matters

Why do we have to talk about this?

And because implicit bias and microaggressions have a direct impact on the practical and legal health of the workplace

What are we talking about?

An instance of indirect, subtle, or unintentional discrimination against members of a marginalized group.

What are we talking about?

Everyday exchanges that send denigrating messages to a certain individual because of who they are.

What are we talking about?

Something a speaker probably would not have said had the other individual not been part of a marginalized group.

Examples of microaggressions – not very subtle

- Withholding responsibility or opportunity

  Not assigning a project out of concern employee will not work hard enough, make the right impression, etc.
- Assumptions about ethnicity:

  "Where are you from?"
- Comments about physical appearance:

  "Do you get sick of wearing the hijab everyday?"

Examples of microaggressions – more subtle

- Social references

  "I love Indian food"
- Genuine compliments

  "Your new braids look pretty"
- Jokes intended to be complimentary

  "Your kids are probably total overachievers"

Why are **micro**aggressions a **macro** deal?

Death by a thousand cuts

Why are **micro**aggressions a **macro** deal?

Legal considerations

- Hostile work environment
- Pretext for adverse legal action

Why are microaggressions a macro deal?

In light of recent events and the continuing movement to reevaluate and redefine societal standards of acceptable behavior, recognize the harms caused by racial hostilities and microaggressions, and encourage tolerance and acceptance, **it may well be time to revisit the legal requirements for what an individual must endure before his or her work environment can be deemed objectively hostile as a matter of law.**

Paschall v. Tube Processing Corp., 2021 U.S. Dist. LEXIS 71173, 2021 WL 1390350 (S.D. Ind. Apr. 13, 2021) n. 4

Why are microaggressions a macro deal?

Practical and ethical considerations

- Offending the recipient
- Interference with inclusion
- Creating preventable cumulative hostility
- Fostering more overt discrimination

Prevention

DEVELOP A CLEAR POLICY

- Define the concept
- Educate employees on it
- Explain why it matters to your workplace
- Provide clear examples

Prevention

DEVELOP A CLEAR POLICY (cont'd)

- Encourage all employees to be aware
- Encourage those aggrieved to speak out
- Establish HR as safe place for reporting
- Develop fair approaches to violations
- Build this into existing anti-discrimination language

Tips for avoiding inadvertent microaggressions

- Talk less
- Listen more
- Be aware of how language is being received, not how it was intended

Goal: develop open communication

Tips for calling out someone's microaggression

- Be an advocate, not a critic
- Confront the comment respectfully
- Or, report to HR
- Avoid labeling the speaker for all time

Goal: bring awareness, rather than alienate

Responding to a direct microaggression

- "That kind of question / comment . . . ."
- "What I'm hearing you say is . . . ."
- "Why is that important to you?"

Goal: move the conversation forward, build better trust

Addressing your own microaggression

- Hear the critique
- Acknowledge the error
- Apologize

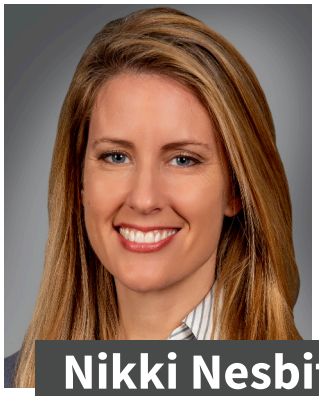
Addressing your own microaggression

DON'T

- Get annoyed
- Invalidate the critique
- Explain it away
- Avoid talking altogether

Conclusion

GOODELL DEVRIES



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Nikki Nesbitt

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

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

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

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

Honors and Awards
- Best Lawyers in America; Commercial Litigation, 2016 - Present
- Chambers USA; Healthcare, Maryland, 2017
- The Daily Record - Leading Women Award, 2011
- Maryland Super Lawyers; Civil Litigation: Defense, 2021
- Maryland Super Lawyers - Rising Stars; Civil Litigation: Defense, 2009 - 2014

Representative Matters
- D.C. Office of Human Rights (2020): Obtained order of "no probable cause" in discrimination action brought against hospital by patient who claimed she received inferior medical treatment and was discharged too soon as a result of her race.
- District of Columbia Superior Court (2019): Obtained defense verdict for hospital and its special police officers in connection with an excessive force claim brought by a visitor. The elderly plaintiff claimed she was wrongfully taken to the ground and handcuffed following an altercation with two special police officers, resulting in injury to her shoulders. The jury returned a verdict in favor of the hospital and the officers after a four-day trial.
- D.C. Office of Human Rights (2018): Obtained order of "no probable cause" in discrimination action brought against hospital by patient who claimed she was denied public housing as a result of hospital's malicious and discriminatory failure to provide documentation of her eligibility.

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

Panel Discussion: More than Lip Service - A Client-Driven Diversity Program Giving Law Firm Attorneys the Inside Track

Emily Harris

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Legal Diversity Program Gives Lawyers a 'Voice at the Table'
Ryan McManis, Vice President and Deputy General Counsel, Lumen Technologies

The Eye-opening Impact of a Judge's Observation.

In November 2019, Lumen launched a new program designed to encourage its law firms to give greater opportunities to diverse attorneys.

In the days immediately following the merger of Level 3 and CenturyLink, I vividly remember wondering why anybody would have trusted me with the role that I was given. I had just inherited a new team, a new set of cases and a job that I had asked for, but in reality, wasn't sure I was capable of doing. Yet, there I was: without a choice other than jumping in the deep end and swimming as hard as I could. Luckily, I'm built for buoyancy. In those first few months after the merger, I learned a lot about my team, about myself and about how all of us are capable of driving positive change if we become comfortable embracing the uncomfortable.

No situation brought this concept home for me more than the consumer litigation I inherited when the deal closed. It was entirely new to me. I didn't know the subject matter, I didn't know the witnesses, and I didn't know the lawyers. In short, as much as I often joke about being "the dumbest guy in the room," this time, I truly was "the dumbest guy in the room." I was uncomfortable. I was nervous. I was on the verge of being scared. Or maybe I was scared. But in those early moments of this new journey, I realized that I had a great opportunity to prove myself as a lawyer, to prove myself as a leader, to put my own stamp on my team, and to hopefully make things a little better. Looking back, I didn't know what that meant at the time, but I knew this new platform – which would ultimately become the Lumen of today – presented a tremendous opportunity to create change.

I recall watching a hearing in federal court that commenced this set of cases. The MDL (or grouping of cases) encompassed what at the time seemed immense – 19 class actions covering 37 states, 17 million current and former customers, and alleged damages of $12 billion dollars; a securities class action alleging over $1 billion dollars in damages; and a host of derivative lawsuits demanding that the company change the way it did business. It kicked off in a courtroom full of lawyers whom I didn't hire, whom I didn't know, and who were arguing about a case that was bigger than anything I had ever managed.

Following the arguments on that first day of a case that would end up lasting years, the judge narrowed his focus to a common – but rarely mentioned – occurrence in courtrooms across the country: that the day was dominated by white males.

In his remarks, the judge highlighted that almost every one of the 20 or so lawyers in the room was white and most were men. He made it very clear that he valued diversity in his courtroom, that he valued diversity in the profession, and that he wanted everyone to understand his expectations for diversity on the legal teams standing in front of him. In that moment, the judge's words sent a powerful message about the value of action over words. The candor of his remarks was uncomfortable for everyone to hear, but there was no question that the next time this group appeared before him, it

would not be the same. And it wasn't. And it hasn't been since. That message is what helped bring my team together, what helped me embrace the uncomfortable, and what ultimately became the basis for the diversity initiative that my team created and kicked off late last year.

The Power of Conversation to Drive Change.

Lumen regularly uses outside firms for our significant legal work. In those early days, my team became much more demanding about how those firms staffed our cases and really pushed for diverse teams, especially on our most significant cases. We pushed for female lawyers, for lawyers of color and for general diversity of thought and experience.

One early experience in the effort to push for diversity continues to stand out to me. At one of the large firms we use quite a bit, there was a relatively young, female, Asian attorney. She is fantastic at what she does: smart, kind, shrewd and a true fighter. Yet, she wasn't getting the meaningful work she deserved. She was getting work, but she had to fight for every assignment of any substance. She had to fight for every rung on the career ladder that she was trying so hard to climb. Even with us pushing for her to assume more substantive roles, she had to fight. And honestly, I don't think it was because anyone was trying to hold her back; I just think it was because that's how it had always been. As is true in many firms responsible for high liability matters, the senior partner controlled every detail. Every assignment started and ended with him. Not because he didn't want this woman to succeed, I know that he did, but because he didn't want his clients to lose. And it was hard for him to cede control – to anyone. It was because that's how the system works in many large law firms and the way that it has always worked, which is not a good thing. Watching this dynamic forced me to really look at what was happening in the legal community that has given me so many great opportunities. The problem wasn't just at this firm. It was everywhere. And it needs to change. And while I can't change everything, I knew I needed to work on changing this one thing.

I examined what I could do to transform our relationships with the law firms we use. I also examined how the privileges I have, specifically my background and race, gave me the opportunity to influence real change in the system. I began to better understand that my successes – many for which I've worked very hard – were also made possible due to those privileges. That was uncomfortable to think about, yet it was also personally rewarding to think of using those advantages to influence and change the system. I don't feel guilt for what I have, but I do feel an obligation to not take it for granted and to do whatever I can to improve the system for those who haven't had similar experiences. In my role at Lumen, I found myself in a position to take action to effect change with our outside counsel.

On closer examination, my team and I, from the perspective of being the client, saw the talent that was overlooked at many of our outside law firms because of long-standing, institutional bias in law firms. In response, we tested how much power Lumen, as a large and important client, truly had to effect change. In that one example mentioned above, we saw that the system wasn't letting the younger female Asian attorney flourish, and that we at Lumen were not getting full access to her talent and the talent of so many others.

So, we requested, suggested and sometimes demanded that she be provided more substantial assignments. We insisted that she attend and participate in court hearings, depositions and meetings. We made her the primary contact on her issues, eliminated the middleman and let her lead. Her assignments quickly got meatier and her successes followed one after the next.

Fast forward two years, and she is now a partner at that huge law firm. I don't kid myself into thinking that it is because of me or my team that she made partner – she's a great lawyer and she would have made partner without our help. But we hope that our actions – instead of just "lip service" – contributed in some meaningful way. We forced the issue. And we really didn't give the firm a choice but to give us what we asked for: her talent. That was an important lesson that laid the foundation for what would ultimately become our new diversity and inclusion partnership with our outside counsel.

Once that foundation was laid, the next year brought

the purpose of the program into shape. During that time, I met and hired a great lawyer in Minnesota. Jerry Blackwell, at Blackwell Burke, is one of the best lawyers I've ever worked with, and I'm proud to call him a friend. Jerry exemplifies the "actions over words" mentality. As I was getting to know Jerry, many of our early conversations focused on his efforts to get a pardon for a Black man wrongfully convicted of rape in Duluth, Minnesota 100 years ago. The man's name was Max Mason, and it is a truly horrible story. I encourage you to look up his story. Jerry eventually won the first posthumous pardon in Minnesota history for Mr. Mason. Jerry saw a wrong in the world, decided to address it and took action. In the end, as complicated and tremendously hard as it was to get that pardon, it really boiled down at its core to Jerry's simple choice of doing something instead of doing nothing.

Jerry's example, and his willingness to have honest and raw conversations about everything, including race and equity, started to change the way that I looked at the world around me. He pushed me to ask questions of myself, to take stock of the answers, and to change the way I thought and acted if I didn't like what I was finding.

Right about that time, in early 2020, the social unrest erupting across the country created a true sense of urgency for us to take real action, to use our position as a leading technology company and a large consumer of legal services to make a difference. It encouraged me to have honest conversations with other diverse people whom I knew. It amazed me how willing everyone was to have these conversations, and how open people were about their stories, their challenges and their feelings, even when the topics were uncomfortable. With each conversation, the uncomfortable became slightly more comfortable, and that pushed me one step further along in the development of our program.

I started piecing together the common themes from this patchwork of conversations. I read everything that I could find about diversity initiatives, about career development and about creating equity. With each article I read, what I was hoping to achieve started to crystallize. I wanted to move beyond the commitments to simply put diverse lawyers in the room, and instead to empower those lawyers to acquire the client relationships that keep them in the room. This meant helping them develop not just the marketing skills to get a client, but to acquire some of the skills necessary to keep clients, to grow clients and to become the trusted advisor that clients absolutely need when the worst cases come in.

Launch of Lumen's new diversity program.

With the idea formed, I thought about the successful attorneys whom I knew, whom I liked, and who were my go-to hires following years of experience with them before and after the merger. Then I called those people and talked about my vision for a program that I thought could make a difference. I listened and tweaked and listened some more. I brainstormed with my team. In the end, we developed what is now our pilot partnership with six firms that we regularly use and really trust, but more importantly, with six lawyers we knew would champion these efforts and drive our success.

Their individual backgrounds and stories are amazing. Jerry is a special prosecutor in the George Floyd murder trial. Grant Woods at Gallagher Kennedy in Phoenix is a two-time Attorney General and led civil rights initiatives for attorneys general across the country during his tenure. Katie Reilly from Wheeler Trigg O'Donnell in Denver and Emily Harris from Corr Cronin in Seattle are proven diversity champions and reached the very top level of management in their firms, not to mention being among the best lawyers with whom I've ever worked. Bill Codinha from Nixon Peabody has had a legendary career doing everything from being a prosecutor, to running congressional investigations on POWs and Whitewater, to working miracles on behalf of Lumen. Phillip Sykes from Butler Snow in Jackson, Mississippi is not only a terrific lawyer, arbitrator and person, but also one of the first to encourage me to push this program forward and is a true diversity champion in his firm and community. The value and commitment each of these attorneys from different corners of the country bring to our program is phenomenal.

Once these six partners teamed up with us in the pilot program, the real work began. Each partner was asked to select a promising, diverse, mid-level lawyer from his or her firm. Lumen committed to

More than Lip Service

A Client-Driven Diversity Program Giving Law Firm Attorneys the Inside Track

Harvard Business Review: Why Diverse Teams are Smarter (2016)

Diverse teams consistently:

- Focus on a wider variety of facts
- Process those facts more carefully
- Innovate more often

Diversity in the Law: Who Cares? American Bar Association (2016)

- "Because the public's perception of the legal profession often informs impressions of the legal system, a diverse bar and bench create greater trust in the rule of law."
- "Diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes."

McKinsey & Company: Diversity Wins (2020)

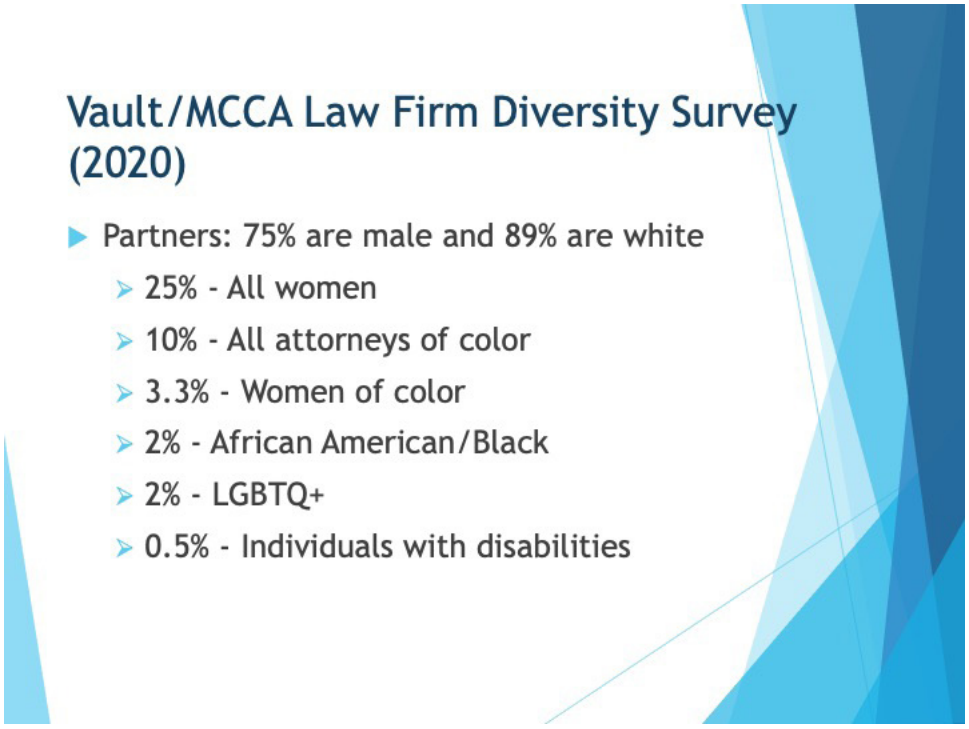
Diversity is a good economic decision.

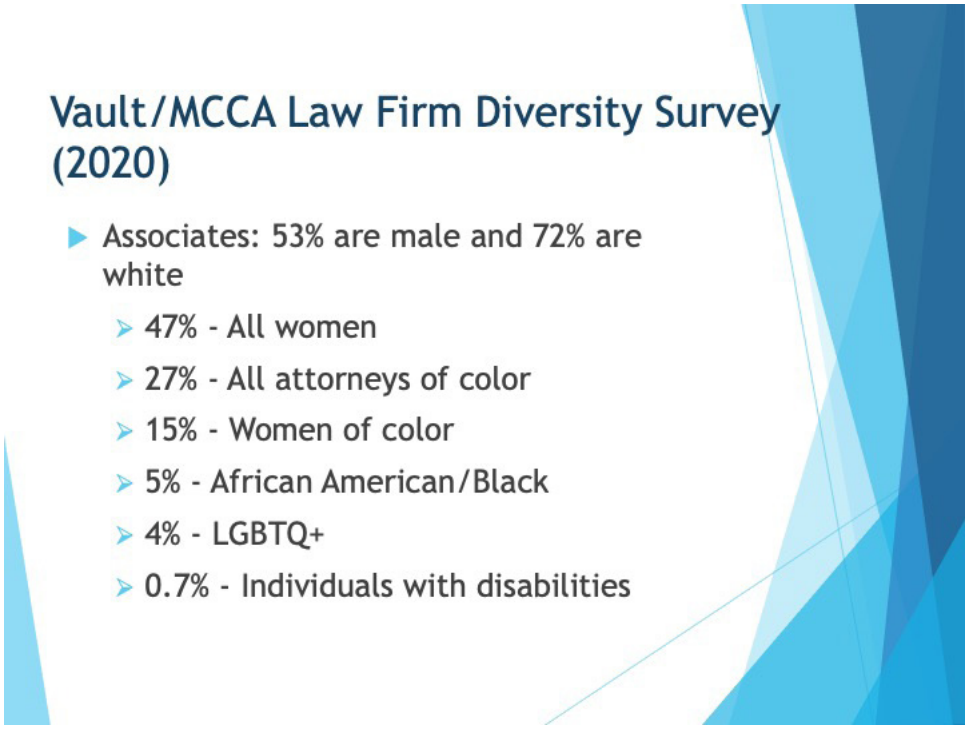
Gender Diversity:

- Top companies in gender diversity 25 % more profitable.

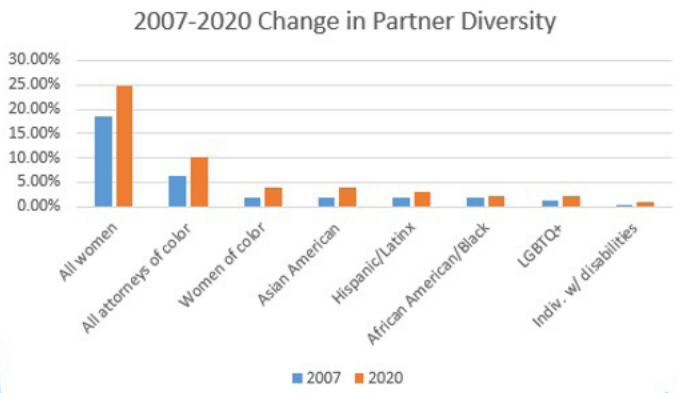
Ethnic and Cultural Diversity:

- Top companies in ethnic and cultural diversity 36 % more profitable.


Vault/MCCA Law Firm Diversity Survey (2020)
Partners: 75% are male and 89% are white
25% - All women
10% - All attorneys of color
3.3% - Women of color
2% - African American/Black
2% - LGBTQ+
0.5% - Individuals with disabilities


Vault/MCCA Law Firm Diversity Survey (2020)
Associates: 53% are male and 72% are white
47% - All women
27% - All attorneys of color
15% - Women of color
5% - African American/Black
4% - LGBTQ+
0.7% - Individuals with disabilities

Vault/MCCA: Slow Progress



A Potential Answer to Slow Progress:

- Focus on historical systems rooted in exclusionism
- Create strategic plans to bypass roadblocks created by historical systems

Client-Driven Diversity Programs

- Novartis International
  - At least 30% of billable associate time and 20% of partner time is provided by diverse professionals.
- Coca Cola
  - At least 30% of time billed for new matters should be from diverse professionals. Specifically, half of this time, or 15%, should be billed by Black lawyers.
- Microsoft
  - Incentive-based program that provides bonuses to participating firms, calculated as 3% of their annual fees, for achieving and/or exceeding diversity representation goals.

Lumen-Driven Diversity Program

Genesis of Program:

- External pressure
- Self-reflection
- Recognition of Roadblocks
- Need to do something, not just say something

Lumen-Driven Diversity Program

- Pilot Program: 6 Law Firms, including:
  - Corr Cronin
  - Nixon Peabody
  - Wheeler Trigg O'Donnell
- Goal: Give diverse associates pathways to power inside their firms and with clients

Pathways to power:

- Client relationships and client satisfaction
- Referral sources in legal and business community
- Origination of business from existing clients
- Origination of business from new clients
- Generate work for yourself and others in the firm
- Experience, superior work product and good judgment
- Respect and trust within firm and from peers

Lumen-Driven Diversity Program

- Components:
  - Senior partner agrees to step back while committing to mentor diverse associate on a significant Lumen matter
  - Associate handles significant matters independently as point person, including client calls and strategy sessions

Lumen-Driven Diversity Program

- Components:
  - Associate is given inside access to Lumen to develop client relationships
  - Associate is given insights to company decision-making
  - Development of referral networks

Lumen-Driven Diversity Program

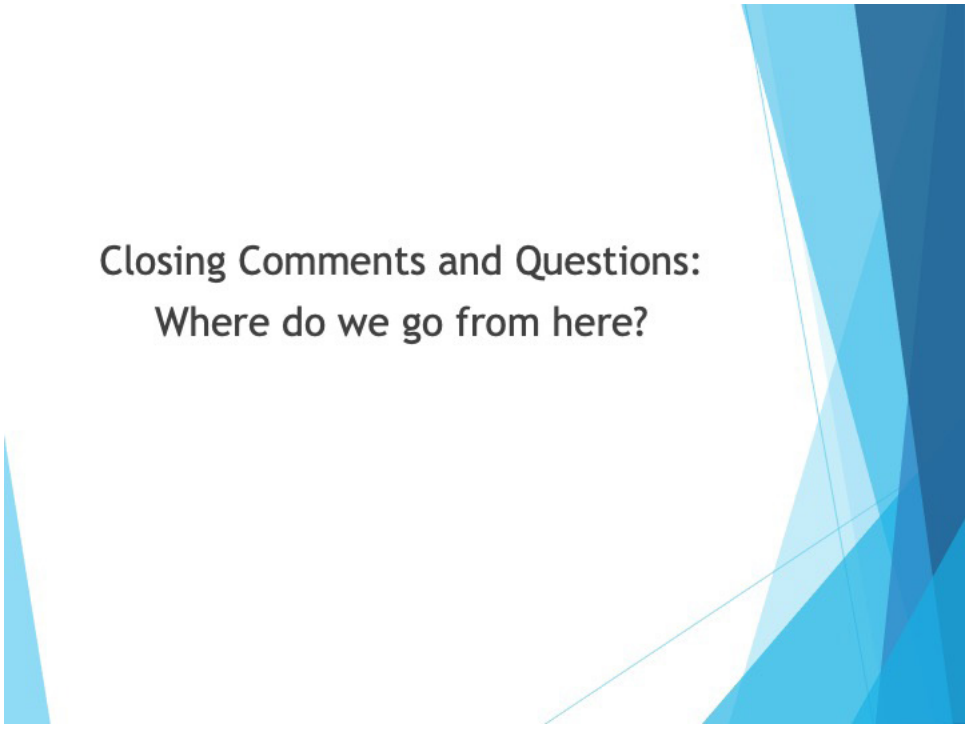
Corr Cronin: Lucio Maldonado

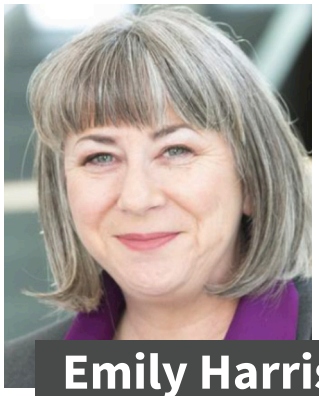
Nixon Peabody: Tarae Howell

Wheeler Trigg O'Donnell: Shawn Neal

Lumen-Driven Diversity Program

Challenges and Lessons Learned


Closing Comments and Questions:
Where do we go from here?



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Emily Harris

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

Prior to joining Corr Cronin in 2004, Emily was a litigation associate at O'Melveny & Myers LLP in Los Angeles, and she clerked for the Honorable Thomas G. Nelson on the United States Court of Appeals Ninth Circuit. Emily has been recognized as a Rising Star and a Super Lawyer by her peers in Seattle's legal community. She also was recently recognized as a 2022 Best Lawyer in America. Emily is licensed to practice in Washington and California.

Featured Cases

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

Presentations and Publications

- Class Action Trends and Legal Developments, Network of Trial Law Firms, San Diego, California, November 2019
- Ethical Duties for Lawyers Working with Expert Witnesses, Landslides in Washington, Law Seminars Int'l, Seattle, Washington, March 2017
- Occam's Razor: Simplicity as an Effective Trial Tool, Network of Trial Law Firms, Napa, California, April 2015
- Class Action Jury Trials: Going the Distance, Network of Trial Law Firms, Naples Florida, May 2013

Education / Background

- J.D., Loyola Law School of Los Angeles
- M.A., Annenberg School for Communications, U.S.C.
- B.A., Communications Studies, University of California, Santa Barbara
- Associate, O'Melveny & Myers LLP
- Law Clerk, Judge T.G. Nelson, Ninth Circuit Court of Appeals

The Role of the Human Factors Expert in Catastrophic Personal Injury Products Liability Lawsuits

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The Role of the Human Factors Expert in Catastrophic Personal Injury Products Liability Lawsuits

Eric Probst and Lauren Eichaker – S-E-A Ltd.

When facing the challenges of overcoming strict liability while defending products liability lawsuits, defendants and their counsel often rely on the Roman political and philosopher Cicero's adage, "when you have no basis for an argument, abuse the plaintiff." In doing so, they often alienate the jury because arguments such as, "the plaintiff should have paid better attention," or "the plaintiff should have looked where she was walking," often fall on deaf ears. However, what if these arguments could be backed up with scientific data and empirical evidence? What if the defense could use studies to argue and convince the jury that the cause of the injury might be human error? Human behavior—fatigue, inattention, distraction, impairment, and perception and reaction—are statistically significant contributors of accidents in the home, workplace, and on the nation's roadways. This article discusses why product manufacturers should engage human factors experts to provide technical insight on how a plaintiff's behavior could have contributed to an accident and the roles they can play as defense team members in product liability lawsuits.

The Human Factors Expert.

Design engineers are responsible for the design of warnings on the products we use. They do not design products in a vacuum without contemplating how an individual will use the product, or a third-party non-user will interact with it. When evaluating these concepts in the workplace and other settings, design engineers rely on the hazard control hierarchy to eliminate or mitigate the risk associated with the product. For non-workplace products, design engineers account for the intended foreseeable use and potential misuse of their products. However, they do not do this alone. Enter the human factors expert.

Human factor experts study human capacity—our behavior and performance when interacting with products, technology, and our environment. The science of human factors evaluates the mental, perceptual, and physical capabilities and limitations as they relate to how a person uses a product or reacts to it in a variety of settings (highway, office, factory floor). Human factors scientists typically have backgrounds in psychology or industrial engineering that provide them with insight into human perception and reaction to their surroundings.

Human factors experts are behind almost every product we use and encounter. These scientists assist industrial engineers to design safe products from the user's viewpoint, or how a third-party non-user of the product might encounter it. They assist with the design and placement of warnings on equipment to prevent user error and injury, but also to promote efficient use by explaining how, in eye-catching language, a snow blower or hedge trimmer must be used. The critical human factors these scientists evaluate when designing a product are human perception, attention and distraction, learning and memory, fatigue, and risk perception. These issues are at the heart of many product liability and personal injury lawsuits.

The Role of the Human Factors Expert in Products Liability Cases:

a) Why?

Defense counsel (and their clients) often moan—and somewhat appropriately—that "last thing I need to do is identify and hire another expert. I already have an engineer, an accident reconstructionist, and an orthopedic surgeon and economist. Who else do I need?" What defense counsel should not forget, or, better stated, should realize, is that human error plays a staggering role in an overwhelming majority of accidents, with case studies attributing between 80-90% of all serious injuries (or 28 a day) to human error.[1] The National Highway Institute for Safety Administration found distracted driving killed 3,142 people in 2019, and defined "distracted driving" to include, broadly, "any activity that diverts attention from driving, including talking or texting on your phone, eating and drinking, talking to people in your vehicle, fiddling with the stereo, entertainment or navigation system."[2] If driving under the influence is added, 10,142 more drivers, passengers, and other motorists lost their lives in 2019.

Human error is not limited to drunk driving or driving while texting. Human factors concepts are expansive and include: conspicuity,fatigue, sleep deprivation, lighting, memory and knowledge, product design, risk perception, vision and hearing, and warning adequacy.

With this background and insight, human factors experts can evaluate whether the user's perception and reaction to the alleged risk and use of the product resulting in the injury was human-error or design-flaw driven.

b) Early Case Assessment

It is never too early to evaluate the defense of a claim for potential settlement. Assembling a team of experts to evaluate the case before critical defense dollars are spent, is a wise investment. The subtleties of human error in product liability cases require a long examination into whether the manufacturer has a science-based defense, or if it must rely on the Cicero "attack the plaintiff" argument. A human factors expert can advise whether a driver could have seen the conspicuity tape on a tractor trailer, or whether the location of a warning label on a punch press effectively communicated the risk to the user. Human factors specialists also can opine how a user's experience with a product influences the user's awareness or disregard of the risk associated with using or encountering the product. The expert's analysis of this information, combined with the investigation analysis conducted by the defense accident reconstructionist, can help counsel determine whether a comparative negligence defense exists and its potential strength. Ideally, the client should understand the viability of such a defense before suit is filed, but it should know it before considerable discovery has been conducted and significant defense costs incurred. During these times, cases can often be settled, especially catastrophic ones.

c) Deposition Preparation

A human factors expert also can assist with deposition preparation. Because human error plays a role in most accidents, the deposing lawyer requires a set of questions that target the human factors or human errors behind how the plaintiff used the punch press, read the warning label, or paid attention to other motorists and highway surroundings. The defense human factors consultant can develop a line of questioning beyond the traditional "who, what, where, why, and how." The consultant has the science to support the defense, but needs the facts from the deposition transcript to connect the dots to opine that human error, and not a product defect, caused the accident.

Further, human factors experts can identify flaws in a plaintiff's accident reconstructionist's recreation of an accident, which often provide no analysis of the human factors involved. The human factors expert knows what information is needed to support the defense strategy and can develop a wish list of information needed to strengthen the defense case and cross examine the plaintiff's expert at deposition and trial. The expert can assist with the line of questioning that will elicit testimony to set up a Daubert challenge.

1 https://www.safetyandhealthmagazine.com/articles/13159-safety-leadership-neuroscience-and-human-error-reduction.

2 https://www.nhtsa.gov/risky-driving/distracted-driving.

d) The Daubert Motion

The first questions that should be asked when preparing for a plaintiff's human factors expert deposition are basic: is the witness qualified to testify as a human factors expert, and is the human factors expert opining on topics outside the discipline and science of human factors? The defense expert can evaluate the opposing party's report and answer these questions, determining whether the plaintiff's expert's opinions and conclusions are grounded in human factors methodology, or stray beyond the expertise and qualifications of the expert. Human factors experts should not be allowed to masquerade as design engineers and testify that the product is defective. Ondrushek v. Altec Industries, Inc., 2017 WL 6025407 (D.Md 2017) (human factors expert lacked expertise and qualifications to testify on design and warning label issues in alleged defective forklift, and failed to provide facts, data, and information to support her opinions). Likewise, a court should not permit a civil engineer to testify about perception and reaction times, fatigue, and conspicuity, concepts that are the domain of the human factors expert. Cf. Higginbotham v. KCS Intern. Inc., 85 Fed. Appx. 911 (4th Cir. 2004) (court struck expert for lack of expertise and experience in manufacturing specific product). The defense expert can arm the lawyer with topics and questions to expose the plaintiff's expert's weaknesses. From these points, the Daubert motion can be prepared.

These same questions should be asked of the potential defense human factors expert during the vetting stage: what are your qualifications and expertise in the field, and proposed methodology to testify as a human factors expert? Keeping the defense expert "within the lane" of the expert's experience as a human factors specialist is critical. Human factors scientists are not design engineers. The human factors expert cannot testify that the manufacturer properly designed the product, or provided adequate warnings. Lawyers are often skeptical of the human factors discipline. Considerable time must be spent during the vetting stage to ensure the expert's methodology and opinions match how the injuries occurred and the expert's experience and qualifications.

e) Convincing the jury

The most significant role the human factors expert can play is to convince the jury members they do not know everything they think they know about human behavior or how the plaintiff interacted with the product and their environment. Laughery, Sr., et al., "What do Human Factors/Ergonomics Experts Have to Tell Juries That They Don't Know—But May Think They Know," Proceeding of the Human Factors and Ergonomics Society 55th Annual Meeting (2011). We think we know everything—we are egocentric to survive—but before this intrudes into the jury room, the defense human factors expert has to intervene. The expert can explain the subtleties of every aspect of the crash, slip and fall, or accident, and how human behavior, or error, better explains the outcome rather than a defective product.

f) Case example

Knowledge of human factors plays large role in accident reconstruction. For example, the input of a vehicle's driver currently effects the pre-crash, crash, and post-crash trajectory of the vehicle. Accident reconstructionists use knowledge of perception reaction time, steering inputs, and safety technology use in order to gain insight into the "what", "when", "where" and "how" of incidents. Case examples, and peer-reviewed studies are documented in the literature, as well as interdisciplinary teams of crash researchers.

Crash injury research engineering network (CIREN) is a database that contains information about crashes that cause serious injuries; it is managed by the National Highway Transportation Safety Administration (NHTSA) and contains case examples that demonstrate this concept. Shown below is CIREN case 590123577 (Figure 1). What started out as a minor lane-change error (red circle) where two vehicles nudged into each other turned into a rollover incident (Figure 1). The accident reconstruction revealed that the minor nudge between vehicles caused the case vehicle (V1, black) to begin a left-right over corrective steering maneuver that resulted in a rollover.

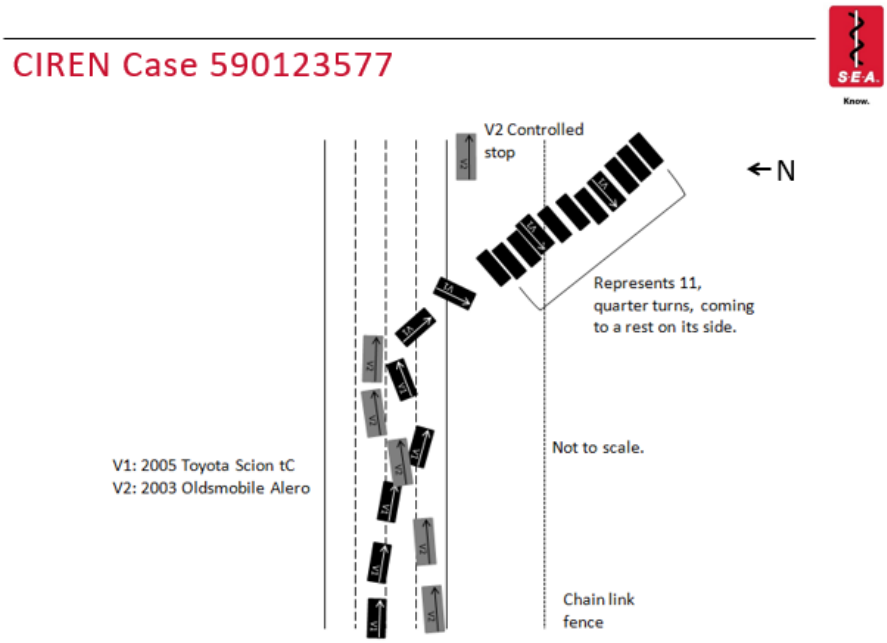
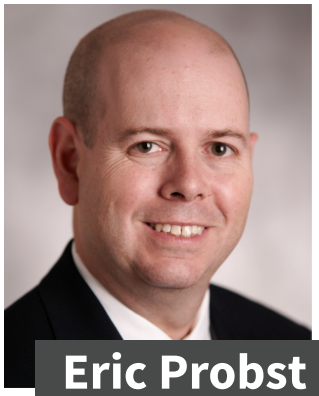


Figure 1 CIREN case 590123577 and accompanying figure presented at the 2019 Rocky Mountain Bioengineering Symposium. Minor impact location circled in red.

Conclusion.

Defense human factors experts are important team members. They can assist counsel in developing liability and damages strategies, and whether cases should be targeted for pre-suit resolution. Beyond these roles, human factors experts provide significant value to a defendant's legal team—without inflicting the abuse advocated by Cicero—that human behavior, and not product design, caused the accident and injuries.



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Eric Probst understands the litigation and business issues keeping clients up at night because he has been there too. He serves as national coordinating litigation counsel for a publicly-traded commercial-transportation industry member and has served as outside general counsel for a national luxury-item construction company. Knowing how litigation impacts businesses' "bottom lines" and reputations, Eric counsels his clients on the critical decisions to file, defend, or resolve a claim. This results-oriented litigation approach is not "one size fits all" but client-specific. His clients, whether publicly-traded or privately-held, look to Eric as their trusted partner, as do his peers. Eric's reputation has garnered him the respect of other lawyers who trust their clients with Eric as their local counsel.

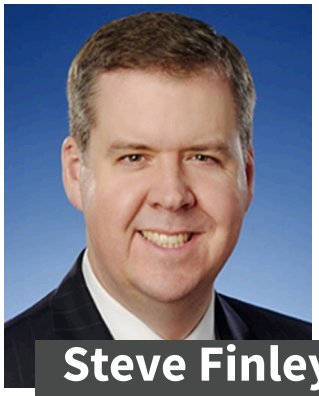
Eric is co-chair of the firm's Litigation Practice Group, a role in which he leads and manages the work of more than a dozen similarly-minded, practical litigators.

Practice
- Class Actions
- Business Law
- Litigation
- Product Liability
- Toxic and Environmental Tort
- Transportation and Motor Carrier
- Class Actions

Industries
- Chemical
- Manufacturing
- Professional Services
- Real Estate and Construction
- Transportation

Honors and Awards
- Recognized in BTI Client Service All-Stars 2020.
- "AV" rated by Martindale-Hubbell.
- Recognized on the New Jersey Super Lawyers "Rising Stars" List, 2009; New Jersey Super Lawyers List, Business Litigation, (2012 - 2021).
- Recognized in Best Lawyers in America, Mass Tort Litigation/Class Actions - Defendants, (2017 - 2022); Product Liability Litigation - Defendants, 2021-2022.

Education
- Seton Hall University School of Law, Newark, NJ, J.D., cum laude, 1994 - Member, Moot Court Board; Director, Juvenile Justice Clinic
- College of the Holy Cross, Worcester, MA, B.A., 1991 - Honors History Program; Senior Thesis: "The Development of and Reaction to the Union Program to Enlist Negroes into Union Armies," April 1991; Dean's List, 1990–1991; Big Brother/Little Brother Program



Lessons from the Pandemic and Product Liability Litigation

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Lessons from the Pandemic for Product Liability Litigation
Stephen J. Finley

The COVID-19 pandemic is a story of illness and death; treatment and recovery; rules and regulations. The pandemic has touched everyone, and all aspects of life. These wholesale changes directly impact the way we live, learn, work and interact with each other, and will necessarily impact the way we think about law and policy. Litigants, jurors and judges now view claims and defenses through their experiences since March, 2020. The pandemic has particular impact for product liability practitioners and their clients, not only in terms of claims that concern directly COVID-19, but also traditional product liability claims. This article considers the latter: how might the COVID-19 pandemic impact the litigation of traditional product liability claims?

New and Widespread Familiarity with Protective Equipment and Injury Avoidance

Terms such as exposure limits and personal protective equipment ("PPE") have long been common in product liability cases. Many product liability cases, particularly asbestos litigation and other toxic tort suits, turn on the length of exposure to an allegedly toxic substance or defective product and whether the protective measures employed were sufficient to prevent injury. For example, under its benzene standard, OSHA has imposed upon employers the obligation to ensure "that no employee is exposed to an airborne concentration of benzene in excess of five (5) [parts per million] as averaged over any 15 minute period." 29 C.F.R. 1910.1028(c)(2). This short term exposure limit sets the maximum exposure levels for benzene in the workplace. Prior to the pandemic, experience with concepts such as short term exposure limits and PPE was limited, and these terms rarely were part of the public discourse.

That dynamic changed in March, 2020, when officials from The White House, Centers for Disease Control and other federal, state and local agencies briefed the public on a daily basis about the importance of proper use of personal protective equipment, ensuring the availability of safety equipment to prevent the spread of COVID-19 and the necessity of limiting the duration of interactions with others. Indeed, one of the justifications for the broad "stay-at-home" orders of March and April, 2020 was to ensure that limited supplies of PPE were available to healthcare workers involved in the treatment of COVID-19 patients. These daily briefings and widespread media coverage reinforced the notion that proper use of protective equipment can prevent injury and improve outcomes. More recently, officials within the Federal Government have acknowledged that the limited availability of proper PPE contributed to the deaths of healthcare workers in the early days of the pandemic. As a result, there is a renewed awareness that proper protective measures can prevent injury and save lives. This renewed awareness may translate to a greater expectation among judges and jurors that appropriate protective measures will be available, and greater consequences for those who fail to employ them.

Moreover, the Centers for Disease Control continues to instruct that individuals who have experienced close contact with a COVID-19 positive person may have certain obligations to get tested or quarantine. Just as the OSHA benzene standard

provides a time limit for allowable exposure, government guidance has generally provided that it is only exposures to a COVID positive person of 15 minutes or more that trigger an expectation to test and/or quarantine. These pronouncements from public healthy authorities are now well known, and convey that it is not only the fact of an exposure, but also the duration of the exposure that is relevant to the risk of injury and the need to take precaution, reinforcing the principles underlying key product liability defenses.

Access to New Sources of Proof

The COVID-19 pandemic has given rise to new and potentially invaluable sources of proof in litigation. For example, contact tracing data may reveal information about a plaintiff's travel, activities and interactions with others. Employee health screenings, now commonplace in many workplaces, contain information about activities, such as whether a person attended a social event during a particular time period or travelled far from their home. Such information could directly refute contentions that a plaintiff can no longer travel, socialize or engage in other activities.

Employee health screening questionnaires frequently ask employees to provide daily reports of symptoms and provide information regarding their current health status. OSHA has issued a "Sample Employee COVID-19 Health Screening Questionnaire" that inquires of employees' current symptoms and which has served as a template for health screenings in place at workplaces across the country.

Have you experienced any of the following symptoms of COVID-19 within the last 48 hours?		
• Fever or chills	Yes	No
• Cough	Yes	No
• Shortness of breath or difficulty breathing	Yes	No
• Fatigue	Yes	No
• Muscle or body aches	Yes	No
• Headache	Yes	No
• New loss of taste or smell	Yes	No
• Sore throat	Yes	No
• Congestion or runny nose	Yes	No
• Nausea or vomiting	Yes	No
• Diarrhea	Yes	No

See https://www.osha.gov/sites/default/files/publications/OSHA4132.pdf. Similar screenings are also utilized in many of the nation's schools.

Just as social media has proven to be a valuable source of information about a plaintiff's physical condition and daily activities, the detailed, abundant information about a plaintiff's movement, activities and health that can be found in employee health screenings could be highly probative of a plaintiff's damages claim. Employee health screenings may be probative of a plaintiff's ability to engage in activities of daily living and may also bear on whether an individual experienced a pre-existing condition or prior injury. Health screening data might also suggest alternative causation arguments.

To date, no rule or standard has been enunciated regarding the discovery of contact tracing and employee health screening data. However, requests for employee COVID-19 health screening information should be incorporated into discovery demands and subpoenas to employers in personal injury product liability cases.

The CARES Act imposed new reporting requirements

upon medical device manufacturers. Several states have also promulgated data collection and reporting requirements upon healthcare providers and nursing homes with regard to COVID-19. Data reporting requirements range from delays in delivery of medical equipment, to testing rates in communal care settings, to vaccine rates for employees in healthcare settings. Product manufacturers can expect that requests for information mandated by regulations and statutes enacted due to COVID-19 may become commonplace in litigation.

COVID-19 Lawsuits will Influence Product Liability Law

Almost as soon as the pandemic began, lawsuits were filed for alleged failures to protect employees and customers from COVID-19. Many of these cases remain in their early stages, but where motions have been decided, the claims have not met with success. The outcome of these lawsuits will not only forge the new law of COVID-19 liability, they will also impact the law of product liability.

In Kuciemba et al. v. Victory Woodworks Inc., No. 3:20-cv-09355 (N.D. Cal. May 7 2020), the court dismissed a claim that a wife contracted COVID-19 due to the alleged failure of her husband's employer to provide a safe workplace. The court held that the claim was barred by California's workers' compensation law; that plaintiff had failed to plead a viable claim for exposure through her husband's work clothes or items the couple shared in their home; and any duty to ensure a safe workplace did not extend to non-employee family members who were not present at the workplace during the relevant time. The Kuciemba Court chose not to create a "take home" claim for COVID-19 exposure, despite the fact that California recognizes "take home" liability in other settings.

At least one court has held that there is no claim for the "fear" of developing COVID-19. In Weissberger, et al. v. Princess Cruise Lines, Ltd., Case No. 2:20-cv-02267 (C.D. Cal. Jul. 14, 2020), passengers aboard a cruise ship that experienced an outbreak of COVID-19 brought suit for fear of developing COVID-19, even though none of the plaintiffs actually received a positive test or experienced symptoms of the disease. Plaintiffs sought damages for their emotional distress stemming from their fear of contracting COVID-19, along with punitive damages. The court ruled that the plaintiffs could not state a viable claim "based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease."

In another case brought against a cruise line, Rumrill v. Princess Cruise Lines Ltd., 2:20-cv-03317 (C.D. Cal., Aug. 20, 2020), the court held that passengers who developed COVID-19 symptoms only after they disembarked a cruise ship could not sufficiently allege a causative link between exposure to COVID-19 aboard ship and development of symptoms only after the voyage.

While defendants have secured early victories limiting the scope of any duty of care to prevent infection with COVID-19 and preventing expansive claims for fear of injury alone, political actors are seeking to expand liability. In my home state of Pennsylvania, a state senator has submitted legislation seeking to impose civil liability upon parents who refuse to enforce their child's compliance with school mask mandates. The proposed legislation, which has not been acted upon, would impose civil liability upon parents who refuse to ensure compliance with school mask mandates if their child transmits COVID-19 to another student. The proposed Pennsylvania legislation is unlikely to advance, but nevertheless demonstrates efforts will be undertaken to impose liability for the spread of COVID-19. Such efforts, if successful in the context of COVID-19, could also expand into efforts to impose broader duties in other areas.

Each of these questions will be litigated and adjudicated in the context of COVID-19 related claims. However, the outcomes of claims brought by individuals who developed COVID-19 are certain to have impact beyond the cases themselves. Litigation of disputes directly concerning COVID-19 will lead to consideration of issues of duty, due care and causation. Consistent decisions holding that a plaintiff cannot state a claim by merely alleging some unspecified contact with COVID-19 will reinforce a plaintiff's obligation in pleading and proving a claim in other types of cases. A relaxing of the pleading requirements for COVID-19 claims (which is not evident in the case law) could, in the same way, lead

to a lessoning of a plaintiff's burden in pleading and proving that a particular product caused an alleged injury. The holding in the Kuciemba case precluding a "take home" claim for COVID-19 exposure is consistent with the rule that a manufacturer has no duty, or a limited duty, to a claimant who did not actually use that manufacturer's product. A contrary ruling would have not only allowed the plaintiff's claim to proceed in that case, but could have chipped away at an important limitation on product liability claims.

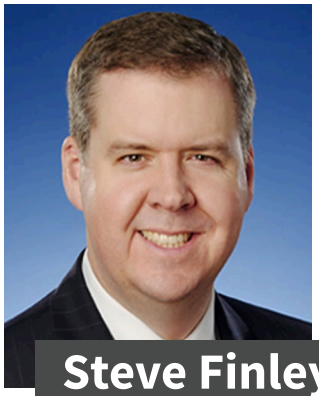
COVID-19's Impact on Damages Claims

Entirely separate and apart from claims where a plaintiff alleges they contracted COVID-19 due to the negligence or defective product of another is the question of whether COVID-19 will impact damages sought in product liability lawsuits. For example, will plaintiffs seek to recover the cost of COVID testing as part of their damages claim? Will plaintiffs contend that they require more frequent testing and monitoring for COVID-19 because of their injuries? Will plaintiffs contend that certain injuries leave them either at greater risk for development of COVID-19 or more susceptible to complications due to injuries to their chest, lungs or other injuries should they develop COVID-19? Although the pandemic has created new opportunities for remote work, some plaintiffs may contend that they are unable to return to work because of their susceptibility to COVID-19. There is little doubt that plaintiffs in product liability cases will attempt to drive up the value of their damages with creative use of COVID-19 considerations.

Juror Perception is Being Shaped by the Pandemic

The pandemic has required each of us to reevaluate our risk tolerance and our priorities. Routine activities like grocery shopping and attending social gatherings – activities that previously escaped any weighing of risk by even the most mindful person – now require contemplation of the risks encountered, weighed against the importance of the activity. Some have adjusted their risk tolerance and, as the pandemic continues, acknowledge that "there is risk in everything." These attitudes will inform juror behavior.

Jury trials were suspended in many jurisdictions during the COVID-19 pandemic, so the pandemic's impact on juror perceptions may not be known for some time. Will jurors, many of whom have become accustomed to wearing masks and taking other steps to protect themselves from COVID-19, hold injured persons responsible for their injuries if they fail to utilize protective equipment and follow safety instructions? Will jurors consider evidence derived from employee health screenings, or will jurors find such information invasive or perhaps not reliable? Will the widespread ability to work from home lead jurors to become more receptive to defense arguments that a plaintiff can retrain and return to the workforce in a remote work or hybrid position? With many becoming sick or dying despite wearing masks, observing social distancing or vaccinating against COVID-19, will jurors develop a mindset that some will become injured or die, even when all efforts are taken to protect against injury? The answers to these questions and the impact on the litigation of product liability claims will be known only as the COVID-19 pandemic progresses and as cases are decided.



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Mr. Finley is a litigator who dedicates his practice to the defense of cases involving wrongful death, catastrophic personal injury, and major property loss. He defends companies involved in complex litigation, including multidistrict litigation, mass tort litigation, class action lawsuits, and serial lawsuits. A frequent author on emerging issues in products liability law, he has represented defendants facing novel products liability claims, such as publishers and patent holders.

In addition to his product liability practice, Mr. Finley handles the prosecution and defense of commercial matters, including breach of contract disputes and business tort claims.

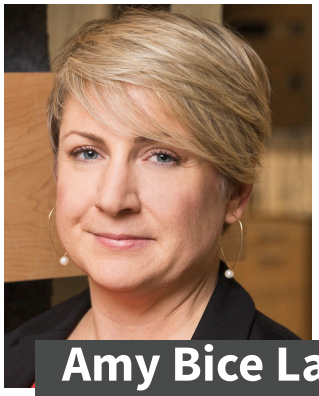
While in law school, Mr. Finley was an intern in the Chambers of the Honorable Jacob P. Hart, United States Magistrate Judge for the Eastern District of Pennsylvania. He also served as Co-Editor-in-Chief of the Villanova Journal of Catholic Social Thought and was President of the St. Thomas More Society. As an undergraduate, Mr. Finley served as a staff intern in the White House Office of Faith-Based and Community Initiatives during the Bush Administration.

Practices
- Commercial & Criminal Litigation
- General Products
- Pharmaceutical & Medical Device
- Products Liability

Industries
- Biotechnology & Pharmaceutical
- Manufacturing & Consumer Products, Including Electronics

Experience
- Representation of a retail distributor of nutritional products in Pennsylvania and New Jersey in a variety of matters, including consumer fraud and personal injury claims.
- Representation of a leading manufacturer of safety equipment in wrongful death and catastrophic personal injury claims. Mr. Finley has obtained summary judgment or favorable settlements in each of these cases.
- Defense of the nation's largest propane distributor in multiple matters around the country, including wrongful death, personal injuries, and major property damage claims.
- Representation of various manufacturers, owners, and operators of cranes in numerous wrongful death and toxic tort claims.
- Representation, with broader Gibbons team, of leading manufacturers of consumer products in a variety of product liability cases in Pennsylvania and New Jersey.
- Representation of a manufacturer of agricultural and construction equipment in cases involving wrongful death and catastrophic personal injury in Pennsylvania's state and federal courts.
- Defense of members of the petrochemical industry in toxic tort cases claiming wrongful death and personal injury stemming from exposure to benzene and other chemicals.

Education
- Villanova University School of Law (J.D.)
- Catholic University of America (B.A.)



Practical Steps for Moving Your Firm's Diversity, Equity, and Inclusion Efforts in the Right Direction

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Transitioning from Words to Action: Practical Steps for Moving Your Firm's Diversity, Equity, and Inclusion Efforts in the Right Direction
Amy Bice Larson

The topic of diversity in the legal industry has reached new levels of interest and importance in 2021. This can be seen in changing corporate legal department policies, media coverage, and general industry discussion. As diversity, equity, and inclusion (DE&I) becomes an even greater focal point across all industries, it is critical for law firms to do more than talk about these topics. For both employees and clients, well-intended DE&I proclamations are simply not enough. How can your firm move from talking about aspirational goals of what you wish would change to actual efforts that move your firm in the forward direction? This article compiles some of the best practices of several law firms and organizations who have set sincere and significant goals to seek greater diversity, equity, and inclusion.

Clearly Identify DE&I Values

To make measurable progress in DE&I, you must identify the values you are trying to promote and exemplify. An essential first step is putting the firm's DE&I values to paper in some way. This could be in the form of a value statement or perhaps a revision of your firm's guiding principles. This is not an exercise in "What are we going to do?" but instead "What does diversity, equity and inclusion mean to us?" For example, part of that statement may be "We are committed to growing leaders who exemplify our passion for diversity." Importantly, a value statement underlines that diversity, equity and inclusion is a core value, not an effort.

Once you have a value statement, you can assess how to progress toward achievement. But without one, your firm cannot know what steps to take without defining the direction you want to move.

Create a DE&I Committee with Sufficient Resources

Once the firm's DE&I value statement is solidified, how can your firm make movement toward those principles? A DE&I committee can create, find, lead, participate in, and assess initiatives that reflect those values. Consider whether this committee should include participants from all levels of leadership in the firm. This committee will need support, respect, and resources. A strong and supported committee signals to the firm that DE&I is valued, even if efforts in that direction are changing and evolving. Allocating adequate resources to initiatives that center on the firm's values allows a DE&I committee to create long-term solutions, not performative acts.

Consider Creating Employee Resource/Affinity Groups

Another way to engage with employees is to develop employee resource/affinity groups. These groups can help foster meaningful connections between employees, build a strong community, and foster frank conversations about DE&I in the workplace (and beyond). Consider forming employee resource groups for Women (those who self-identify as female), Parents, Historically Underrepresented Groups[1], LGBPTTQQIIAA+ (Lesbian, Gay, Bisexual, Pansexual, Transgender, Transsexual, Queer, Questioning, Intersex, Intergender, Asexual, Ally)[2]

1 Emory University Office of Diversity, Equity, and Inclusion, Common Terms, https://equityandinclusion.emory.edu/resources/self-guided-learning/common-terms.html

2 County of San Mateo LGBTQ Commission, LGBTQ Glossary, https://lgbtq.smcgov.org/lgbtq-glossary

employees, or any other groups at your firm who may want or need to meet to offer support to one another. These groups can also work with the DE&I committee to inform decision making and better advocate ways to represent their communities. They can also provide tools and tips for all employees to be better allies. Along with the DE&I committee, these groups can help sponsor events, which, in turn, serve as opportunities for firms to honor the contributions and successes of diverse communities and as an opportunity for group members to lead events. Group members can also participate in active recruiting of diverse attorneys and staff.

Conduct Internal DE&I Training

An inclusive firm is always looking to expand efforts in educating and training its employees on diversity and inclusion topics. A few possible options include holding firm-wide "Lunch and Learn" programs on topics such as Black History Month, Autism Awareness, Ramadan, and International Women's Day. On a monthly basis, try sending out an internal newsletter with a DE&I section to highlight holidays and observances of religious and cultural events, or consider discussing mental health and mindfulness to address the reality of practicing law in 2021.

Try hosting an outside speaker to discuss diversity and inclusion, particularly those topics that are challenging and sensitive. For example, host a speaker to discuss implications of non-binary gender pronouns, the history of Asian-American racism, or the history of law enforcement in America. This could also be a series of ongoing sessions for all employees about addressing unconscious biases and creating psychologically safe meetings and environments.

In short, there are many ways for employees to participate, firms can choose efforts that advance their own work and future goals.

Participate in External DE&I Efforts

It is critical for firms to participate in and sponsor external events to educate not only employees, but the greater community. For instance, seek participation in panels or sponsor events that focus on improving equity and inclusion. Look into partnerships with minority-owned organizations in your community and be sure to provide a platform to network with your firm's lawyers at meetings or events.

Within the legal profession, there are numerous national organizations that support an inclusive legal community, such as the Leadership Counsel on Legal Diversity (LCLD)[3] and the National Association of Minority and Women Owned Law Firms (NAMWOLF)[4] to name just a couple. In addition to national organizations, look for local organizations dedicated to furthering DE&I in the legal profession. Many of these local organizations have programs dedicated to educating, recruiting, and promoting diverse attorneys. Find a few of these local organizations that fit your firm's values and goals and try to take an active leadership role that will help your firm contribute to and learn from what these organizations have already built.

It is also important to make a concerted effort to support diverse lawyers in their endeavors within the community. Work with local diverse affinity organizations to determine what opportunities there may be for lawyers to get involved in pro bono work centered on racial equality or civil rights issues.

Work to Attract, Recruit, and Maintain a Diverse Workforce

Prioritizing DE&I creates a workplace where people are encouraged to bring their individual and entire self to the office. Diverse backgrounds foster creativity and drive innovation, which enables law firms to provide a higher level of service to their clients.

To add diverse members to your team, the firm needs to start with ensuring that the pool of candidates is diverse. Recruit from diverse colleges and law schools or start a scholarship fund that endows a scholarship for diverse law students. Try staffing a table at a diverse recruiting fair or other similar events. In addition, lawyers can participate and serve in leadership positions in local and national affinity bar associations to secure diverse lateral referrals. Consider local pipeline organizations that

3 The Leadership Council on Legal Diversity, https://www.lcldnet.org/

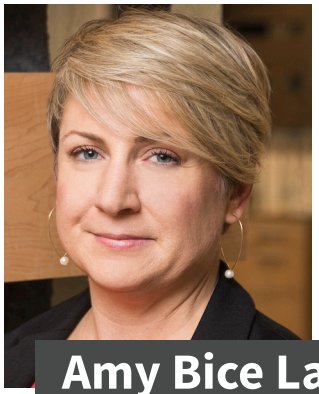
4 The National Association of Minority and Women Owned Law Firms, https://namwolf.org/

foster and advance diversity in the profession, such as mock trial programs for middle school students or paid internship programs for high school students with a particular interest in legal careers. In hiring and advancement, try following the Mansfield Rule[5], which requires that at least 30 percent of candidates for any position to be diverse (i.e., women, persons of color, LGBTQ+ persons, and persons with disabilities).

Conclusion

Though there is much to be done to create a diverse and inclusive legal community, there is also growing support, recognition, and even requirements from clients that firms staff their cases with diverse teams. While there is no end point or set destinations to DE&I efforts, firms can take concrete steps to move in a direction that furthers their DE&I values. DE&I efforts should consistently be reevaluated and address new concerns or challenges that develop over time. With focus and resources, your firm can incorporate DE&I into its fabric.

5 Diversity Lab, Mansfield Rule 4.0 https://www.diversitylab.com/mansfield-rule-4-0/



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Amy Bice Larson has extensive experience in product liability cases. Her practice focuses on handling catastrophic cases involving product liability. She represents clients at all stages of litigation, from coordinating complex discovery as national discovery counsel for a major automotive manufacturer through representation at trial. Additionally, she has counseled clients in matters involving federal agencies, including the Federal Trade Commission and the National Highway Traffic Safety Administration. Amy serves on the firm's DE&I committee. She is passionate about the firm's measurable commitment to diversity, equity and inclusion.

Services

- Advanced Technologies
- Business and Commercial
- Class Actions
- Discovery / Employee Depositions
- Product Liability

Representative Matters

- Co-counsel in a Texas federal court jury trial on behalf of automotive manufacturer involving catastrophic injuries to minor passenger in an SUV and claim of restraint system defect: No cause.
- Assisted in Arizona jury trial on behalf of automotive manufacturer involving severe injuries to driver of a pickup truck and claim of sensing system defect: No cause.
- Serves as national discovery counsel for a major automotive manufacturer.
- Successfully argued numerous motions for protective order regarding the scope of depositions of corporate representatives, including orders to prevent deposition of apex-level executives.
- Obtained an order for trade secret protection of highly proprietary manufacturer product data in a product liability action in Texas.
- Negotiated terms of complex protective orders, including special orders to protect highly confidential financial information.
- Assisted in managing and resolving multi-year, large-scale federal investigation response for Fortune 500 company involving cybersecurity practices.

Honors and Leadership

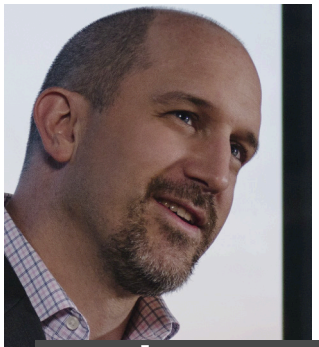
- Inclusion in The Best Lawyers in America©: Product Liability Litigation – Defendants (2022)
- National Truman Scholar
- Served as treasurer for the campaign of a successful judicial candidate for the Texas First Court of Appeals.
- Regular contributor and participant in panels and events for Diversity, Equity and Inclusion in the legal industry.

Publications and Presentations

- "Words Matter: Understanding the Significance of Pronouns" The Federal Lawyer, Volume 68, Issue 5, co-author (September/October 2021).
- "Total Recall: Navigating the Phantom 'Defect' Claim" DRI Strictly Automotive Seminar (September 2021).
- "Diversity: From Adversity to Unity" Michigan Lawyers Weekly Webinar (March 2021).

Education

- Brigham Young University J. Reuben Clark School of Law, J.D., cum laude, 2003
- Brigham Young University, B.A., Political Science, 1999



BYOD, not BYOB - E-Discovery in the Workplace

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BYOD, not BYOB – E-Discovery in the Workplace
Joshua Metcalf

Everybody loves a BYOB policy. For those that might not be familiar with the phrase, it roughly translates to some iteration of "Bring Your Own Bottle" or "Bring Your Own Booze." Regardless of the wording, the benefits are the same. It is cost-efficient, as patrons are not forced to pay the inflated costs of alcohol at a restaurant looking to make an easy profit. And it caters to individuals' specific tastes as they are not limited by the drink selection of a restaurant.

But (unfortunately) this article is not about how to make the best drink selection for a night out at your favorite restaurant.[1] Rather, it is about BYOD policies, a much less palatable topic. BYOD stands for "Bring Your Own Device." Succinctly, a BYOD policy allows employees of a business to use their own personal smart devices for business-related activities, rather than providing employees with company-owned devices or requiring employees to solely utilize corporate devices to conduct company business. Such personal devices include cell phones, laptops, tablets, and any other smart devices that could be used to conduct business-related activities. The idea of BYOD has been around for more than a decade,[2] and with the advent of increasingly sophisticated (and affordable) personal devices, the trend has continued to grow tremendously. However, the growth of BYOD policies has also led to the growth of a plethora of new problems for businesses to consider. Indeed, in an increasingly digital society, businesses must weigh the costs and benefits of implementing a BYOD policy. This article will begin by exploring the benefits of and potential issues with enacting a BYOD policy. It will then examine the different standards courts have established for determining when businesses must turn over business-related material stored on personal devices when faced with litigation. And finally, it will offer suggestions for forging a BYOD policy that helps businesses comply with court orders, while protecting the privacy rights of its employees.

The Benefits of and Potential Issues withBYOD[3]

Implementing a BYOD policy is not necessarily the right move for every company. For example, companies that often deal with classified information are likely not suited for such a policy. Additionally, companies with a small number of employees who use their devices to discuss company business on a regular basis might be better suited to invest in company devices for those employees. Regardless of a company's specific situation, every company should weigh the costs and benefits of implementing a BYOD policy before deciding to move forward.

Benefits

Some of the benefits of a BYOD policy include increased productivity, increased flexibility, and financial savings. A BYOD policy increases productivity in two ways. First, employees will generally be more comfortable using their own technology rather than being forced to adapt to a new device. For example, everyone is familiar with the classic Apple versus Android debate: users of

1 If you mistakenly thought that you had stumbled across such an article, see Brian Freedman, BYOB Like a Pro, Wine Enthusiast (May 16, 2016), https://www.winemag.com/2016/05/16/byob-like-a-pro/.

2 Beginner's Guide to BYOD, Arrk Group (last visited Aug. 11, 2021), https://www.arrkgroup.com/thought-leadership/beginners-guide-to-byod/.

3 Many of the pros and cons discussed below are identified by Russell Beets in his discussion, BYOD (Bring Your Own Device) Policies and Best Practices, LITSMART (Nov. 17, 2017), https://www.ktlitsmart.com/blog/byod-bring-your-own-device-policies-and-best-practices; Beginner's Guide to BYOD, Arrk Group (last visited Aug. 11, 2021), https://www.arrkgroup.com/thought-leadership/beginners-guide-to-byod/.

one device are loathe to be forced into using the other device. Second, a BYOD policy increases productivity by making employees more available and responsive to alerts from work. Employees are apt to pay more attention to their personal devices, especially when they are outside of the office. In turn, employees are more likely to quickly respond to work-related communications.

A BYOD policy also increases flexibility by allowing employees to easily transition from working in the office to working outside of the office. This has become especially important in the last two years due to COVID-19. First, due to the increasingly ubiquitous nature of smart technology, most employees have access to smart devices at home that enable them to work remotely. Not only does this save companies the expense of having to provide smart devices for their employees to use at home, but it also prevents the hassle of having to check in and check out such devices and monitor their use. Furthermore, as noted above, employees are more comfortable in using their own technology, making it easier for them to transition to work at home or on the go.

Finally, and perhaps most notably, a BYOD policy may result in substantial financial savings for companies. Most obviously, a BYOD policy saves money by keeping companies from having to buy devices for their employees. However, the savings extend far beyond the one-time purchase of a product. Companies may spend less money on the infrastructure required for maintaining a group of devices, such as software and hardware expenditures and IT staff to monitor and fix any problems that may arise with the devices. Furthermore, employees are more likely to take care of their own personal devices, and companies are usually not responsible even when personal devices break. Thus, a company will save money on repairs and not having to update its employees' devices periodically.

Potential Issues

However, there are also some potential issues that come with enacting a BYOD policy. Two of the biggest problems associated with BYOD policies for companies are security risks[4] and legal risks. First, even properly-enacted BYOD policies may present security risks, as personal devices are more susceptible to data being stolen, lost, and/or leaked. It is common for personal devices to lack data encryption capabilities, which makes it easier for malicious actors to access sensitive business information on personal devices. Indeed, it becomes even easier for malicious actors to gain access to such information when employees download unsecure apps or click on unsecure links. While this problem is not completely removed when using company-owned devices, it is less likely as there are typically staff dedicated to preventing such malicious attacks and fighting them when they occur. With a BYOD policy, however, the onus weighs more heavily on the owner of the personal device to prevent such breaches.

BYOD policies may also present legal risks to companies. This risk is most pronounced when companies become subject to litigation. When parties request electronically stored information like e-mails and text messages, it is easy for companies to comply when the information is located on company owned devices. However, collecting relevant information becomes more difficult when employee communications are involved and those communications are spread across a number of different personal devices. The first question that arises is whether the company has sufficient "control" over such devices to gain access to the information.[5] Furthermore, privacy laws can make it more difficult for companies to access the information.[6]

Because of these security and legal risks, it is vital that, if companies choose to implement a BYOD policy, they take the time to carefully craft a policy with terms that will address these concerns.

Standards for ESI Discovery of Personal Communications

Prior to discovery, parties must generally disclose a copy of all electronically-stored information that

4 Many of the security risks discussed in this section were developed from Device Security Guidance: Bring Your Own Device (BYOD), National Cyber Security Centre (June 29, 2021), https://www.ncsc.gov.uk/collection/device-security-guidance/bring-your-own-device.

5 See infra Part III.

6 See Tanya Lesiuk, Employee Data Privacy Laws US – Are You Up to Speed?, Factorial-Blog (May 12, 2021), https://factorialhr.com/blog/data-privacy/#legallyhold.

they have in their "possession, custody, or control" and may use to support their claims or defenses.[7] Similarly, during discovery a party may request another party to produce any electronically-stored information within the other party's "possession, custody, or control."[8] While companies generally have "possession, custody, or control" over e-mails, text messages, and other forms of communication on company issued devices or that reside on company servers,[9] it is less clear when companies have control over communications on their employees' personal devices. Some courts have seemingly held that a company does not possess or control text messages from employees' personal phones, and therefore, the company cannot be compelled to disclose such text messages.[10] However, most courts take a more nuanced view and apply either a three-factor test or "practical ability" test to determine whether a company has control over communications on its employees' personal devices.

Many courts consider three different factors in determining whether a company has control over its employees' communications.[11] First, courts look at whether the communication took place on devices that were issued to employees by the company.[12] Second, courts look at whether the company has a legal right to obtain the communication from their employees.[13] Generally, this includes any communications that an employee is contractually bound to turn over to the company.[14] And third, courts look at whether the personal devices were used for business purposes.[15] This last factor seems to be particularly important to many courts and is often determinative of the issue.[16] For example, the United States District Court for the Northern District of Ohio recently held that "[w]hile Federal courts are divided on what circumstances render an employee's personal device subject to the 'possession, custody, and control' of its employer, generally the plaintiff must show that personal devices were used for business purposes."[17] Other courts, however, have treated the three factors like a balancing test, weighing the presence and absence of certain factors against each other.[18] For example, the United States District Court for the Western District of Washington recently applied this approach finding that even though there was evidence that the defendant's employees had discussed work-related material on their personal devices, "the personal cell phones were not issued by [the defendant], and the plaintiff has not established that the devices are routinely used for business purposes or to what extent."[19] Thus, the court determined that the defendants did not have control over their employees' communications on their personal devices.[20] These cases also point out another important aspect of the three-factor approach: the burden is on the party seeking production to show that the other party has control over the relevant communications.[21] Thus, courts that apply the three-factor approach will typically not accept mere "speculation" that a party's employees use their personal devices for business purposes.[22] Under the "practical ability" test, "[d]ocuments are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action."[23] To determine whether a company has the "practical ability" to obtain relevant information from a non-party employee, courts look at a number of different factors. One of the main factors these courts consider is whether the company can terminate the employee if he or she fails to cooperate in

7 Fed. R. Civ. P. 26(1)(A)(ii).

8 See Fed. R. Civ. P. 34(a)(1)(A).

9 See, e.g., Lalumiere v. Willow Springs Care, Inc., No. 1:16-CV-3133-RMP, 2017 WL 6943148, at *2 (E.D. Wash. Sept. 18, 2017); Stinson v. City of New York, 10 Civ. 4228(RWS), 2016 WL54684, at *5 (S.D.N.Y. Jan. 5, 2016).

10 See RightCHOICE Managed Care, Inc. v. Hosp. Partners, Inc., No. 4:18-cv-06037-DGK, 2019 WL 3291570, at *2 (W.D. Mo. July 22, 2019) (ordering the defendant to turn over text messages from company phones but not messages "stored on the personal phones of employees"); Lalumiere, 2017 WL 6943148, at *2 ("[A] company does not possess or control the text messages from the personal phones of its employees and may not be compelled to disclose text messages from employees' personal phones.").

11 *See, e.g., Krishnan v. Cambia Health Solutions, Inc.*, No. 2:20-cv-574-RAJ, 2021 WL 3129940, at *2 (W.D. Wash. July 23, 2021); *Goolsby v. Cnty. of San Diego*, No. 3:17-cv-564-WQH-NLS, 2019 WL 3891128, at *4 (S.D. Cal. 2019); *Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013).

12 Krishnan, 2021 WL 3129940, at *2.

13 Id.

14 See Matthew Enter., Inc. v. Chrysler Grp., LLC, No. 13-cv-04236-BLF, 2015 WL 8482256, at *3 (N.D. Cal. Dec. 10, 2015) (stating that documents are not discoverable "if the entity that holds them "could legally—and without breaching any contract—continue to refuse to turn over such documents").

15 Krishnan, 2021 WL 3129940, at *2

16 See, e.g., Union Home Mortgage Corp v. Jenkins, No. 1:20cv2690, 2021 WL 1110440, at *9 (N.D. Ohio Mar. 23, 2021).

17 Id. (quoting Goolsby, 2019 WL 3891128 at *4).

18 See, e.g., Krishnan, 2021 WL 3129940, at *2.

19 Id.

20 See id.

21 See id. ("Plaintiff, as the party seeking production, must establish that Defendants have control of the requested text messages."); Goolsby, 2019 WL 3891128, at *4 ("[G]enerally the plaintiff must show that personal devices were used for business purposes.").

22 See Goolsby, 2019 WL 3891128, at *4.

23 Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co., 14-CV-04394 (AJN) (BCM), 2016 WL 5408171, at *5-6 (S.D.N.Y. Sept. 27, 2016).

discovery.[24] Often, this factor alone is sufficient for compelling a company to turn over the employee's business-related communications from his or her personal device.[25] However, the absence of this factor is not dispositive of whether a company has the practical ability to obtain relevant information from an employee. Other factors courts consider include whether the employee has a fiduciary duty to turn over the documents, whether there is a "continuing economic relationship" between the company and the employee, and whether the employee was "acting as an 'agent'" of the company with respect to the events at issue in the litigation.[26] Finally, courts will consider "the most practical test of all" – whether the company has asked the employee to turn over the information at issue.[27]

These different standards show the importance of constructing a sound BYOD policy. By implementing a BYOD policy and having employees sign a document acknowledging and agreeing to the policy, companies create clarity with their employees, but they must also realize that they may be creating a 'legal right' to obtain information from their employees. In such situations, courts may be more likely to compel companies to turn over their employees' business communications on their personal devices. Furthermore, even without a signed policy, many courts have forced companies to turn over business communications on employees' personal devices if they find that employees regularly engaged in such communications or that the company has the 'practical ability' to obtain such communications. The last section of this article will offer some practical guidance on creating a BYOD policy that will help companies comply with discovery requests if and when courts compel them to turn over communications on their employees' personal devices.

Forging a BYOD Policy[28]

The first step in crafting any BYOD policy is deciding if such a policy is right for a company. As discussed earlier, companies that deal with classified information or companies that have few employees conducting business-related communications on a daily basis might be better off purchasing company devices for their employees. Once it is determined that a BYOD policy will meet the company's needs, the second step is to draft a formal, written BYOD policy. This policy should be clear and easy to understand, avoiding technical and legal jargon. It should be up front with employees about how the policy will affect their privacy and clearly state what data the company might access. Additionally, the policy should make employees aware that certain communications (like e-mails) will be housed on a company-managed system. The policy should also clearly establish security measures to protect company data and communications. At a minimum, the policy should require employees to protect their devices with a unique PIN and set their devices to erase after a specified number of failed password attempts. It should also require employees to report the loss or theft of any personal device that contains company information. In terms of litigation, the policy should clearly state that employees are required to preserve all relevant business communications when a litigation hold is put in place. Relatedly, employees should understand that they may be required to turn over their device to the company or other parties to extract that relevant litigation information. Finally, the policy should let the employees know what the penalties are for violating the BYOD policy, up to and including termination of employment.

Once a company has drafted its policy, the company should provide every employee who will be covered by the policy a hard copy and have each covered employee sign a form acknowledging their receipt and understanding of the policy. Simply including a BYOD policy in a handbook or posting it on a company website may not sufficient. Having employees sign

24 Id. at *6.

25 See id.

26 Id.

27 Id. at *7.

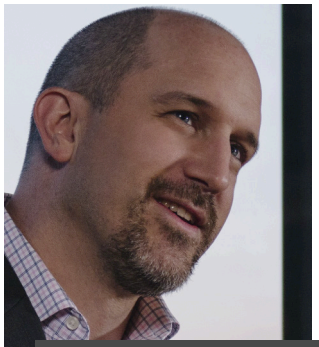
28 For a general discussion, see the following sources: Doug Austin, 5 Considerations for Creating an Effective BYOD Policy, IPRO (last accessed Aug. 13, 2021), https://ipro.com/resources/articles/considerations-for-creating-an-effective-byod-policy/; Device Security Guidance: Bring Your Own Device (BYOD), National Cyber Security Centre (June 29, 2021), https://www.ncsc.gov.uk/collection/device-security-guidance/bring-your-own-device; Hasti Valia, 7 BYOD Security Best Practices, Ilantus (Oct. 18, 2019), https://www.ilantus.com/blog/7-byod-security-best-practices/; Bill Frost, Guide to Creating a BYOD Policy for Small Businesses, Business.org (June 8, 2018), https://www.business.org/services/phone/guide-to-byod-bring-your-own-device/; Russell Beets, BYOD (Bring Your Own Device) Policies and Best Practices, LITSMART (Nov. 17, 2017), https://www.ktlitsmart.com/blog/byod-bring-your-own-device-policies-and-best-practices.

the policy is important for two reasons. First, it helps ensure that employees actually read the policy and prevents them from later arguing that they did not know what was in the policy. And second, it gives companies a contractual basis for gaining access to their employees' personal devices. Furthermore, a company should let employees know that those who have not signed the company's BYOD policy are not authorized to use their personal devices for company purposes. This is important for making a good-faith argument to a court that non-compliant employees do not have business-related information that must be turned over during discovery.

Once employees have signed the policy, the company should facilitate putting it in to motion by providing employees guidance and training. This training should include how to put proper security measures in place, how to preserve data and disable applicable auto-delete functions, and other guidance on how to protect company information. Companies might also consider designating certain apps for workplace communication on private devices.[29] These devices not only help increase productivity, but also provide a single location where companies will have to look for business related communications on personal devices.

Finally, companies should realize that they are not relieved of all of their responsibilities after implementing a BYOD policy. Companies should have a plan in place to help protect their employees' personal devices. They should consider purchasing (or providing reimbursement for employees who purchase) software and/or applications that encrypt data and protect devices from malicious attacks. Furthermore, if a court compels a company to turn over communications from its employees' personal devices, the company should have a plan in place to minimize or eliminate the disclosure of any non-relevant personal information. Also, companies should consider what will happen when employees leave: how will the company preserve any communications that might be sought in future litigation? And finally, companies must continuously review and update their BYOD policies. As technology continues to improve, companies should constantly be looking for ways to improve their BYOD policies by helping their employees separate personal communications from business communications.

29 See Sarah Ribeiro, The 9 Best Chat Apps to Help Teams and Small Businesses Succeed, Flock Blog (Apr. 15, 2020), https://blog.flock.com/8-best-chat-apps-teams-small-business.



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Amy Bice Larson has extensive experience in product liability cases. Her practice focuses on handling catastrophic Devoted and driven, Joshua Metcalf never slows down. Always giving 100% of his effort to his work, Joshua has been organizing the defense of complex cases nationwide for fifteen years, building a respected reputation in that time. Having learned the need for attention to detail during his tenure at the Virginia Military Institute, Joshua uses his strong desire to serve and his relentless work ethic to offer his clients a detail-focused but efficient representation, which emphasizes creative strategies and a thorough deconstruction of his opponent's case. Vowing never to be outworked or out-prepared, Joshua offers clients a strong legal voice and an organized defense to help them identify the issues that really matter to them and to their cases, and to implement appropriate plans to ensure success from both a legal and business perspective. With an insatiable intellectual curiosity, Joshua loves digging into complex medical and scientific issues, and enjoys collaborating with the talented members of his team to produce a consistently excellent product for his clients. For Joshua, business is personal and, as his clients can attest, a close working relationship and regular communication is at the heart of any engagement with Joshua and his team. Joshua carries this same focused intensity with him away from work, which is reflected in his commitment to his community and his dedication to his wife and four children.

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