Trial Tactics
for
Today and Tamaya

A Trial Network Litigation Symposium

April 24-27, 2025 **Hyatt Regency Tamaya**

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All Hail Judge HAL 9000

Kathy Ehrhart
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All Hail Judge HAL 9000: The Advent of Artificial Intelligence in the Courts
Katheleen A. Ehrhart

Like it or not, the use of artificial intelligence in the legal industry is on the rise. To date, much of the focus has been on the use of generative artificial intelligence[1] by litigants, in particular, attorneys' abuse or over reliance on GenAI in legal research and brief writing, which has led to court filings including citations to nonexistent case law. This, in turn, has led to new practice guidelines and revisions to ethical rules to both rein in the use of GenAI and to reiterate that attorneys must remain ultimately accountable for their own work product and legal analysis.

Much less focus has been placed on the judicial system itself and what, if any, use of AI judges, law clerks, and court administrators can and should be implementing. While it is unclear how many courts are utilizing various forms of AI or GenAI,[2] there is no question that AI has arrived at the courthouse steps and is knocking on the door.

Already several courts and judicial offices are reporting successful implementation of AI systems making the courts more efficient and equitable and less biased. These early implementers also report that the use of AI has opened up access to the courts, as well as allowed court employees to focus on human interactions rather than ministerial tasks in their work. Reported successful uses of AI include[3]:

- Palm Beach County Court in Florida implemented robotic document-processing systems to analyze document filings and tag and index the documents with case information. The court found the system had a 98-99% accuracy rate and reported that it freed up human employees for more thoughtful jobs with greater skillset growth and earning potential.
- The Miami-Dade County Public Defender's office has implemented AI tools to do legal research and the initial drafting of legal documents for overworked and understaffed legal departments.
- The Los Angeles County Public Defender's office has used AI solutions to manage data across many legacy inhouse systems and regroup information by defendant rather than case number. The office has found this reorganization helped better equip the attorneys to use the information about past cases to tell more humanizing narratives leading to alternative treatments and reduced incarcerations.
- Legal-aid services across the country are using AI to generate pleadings and other filings for high-frequency, low-complexity case types such as workers compensation, landlord-tenant disputes, and consumer-debt filings.

Despite these early success stories, the judicial branch remains cautions about throwing the courthouse doors open to GenAI uses. In a recent survey, when asked about the use of GenAI in their courts, only 15% of respondents including judges, judicial clerks, staff attorneys, and courthouse employees believed that GenAI can be used in a court setting, and only 9% believed that GenAI should be used.[4] In contrast, 17% of respondents believed it cannot be used and 33% felt it should not be used. The vast majority of respondents remained unsure or felt they did not have enough information to answer the question in an informed manner.[5] The primary concerns expressed about using GenAI in court settings unsurprisingly focused on the potential inaccuracies

1 Generative AI ("GenAI") is artificial intelligence that creates content including text, stories, and for purposes of the legal industry—legal documents such as pleadings and court opinions. GenAI generates that content using existing data and sources. An open AI model is a model that is publicly accessible which anyone can modify. These models are designed to be flexible, adaptable and capable of evolving over time. But it also means the models pull from all open sources available, including unverified sources. A closed AI system is a model that is not publicly accessible and prioritizes data security and confidentiality. It maintains strict control over internal data access and the sources driving the created content can be controlled. In simple terms, the user can input what sources it wants the AI tool to use and in so doing control the source material from which the new content is derived.

2 A Google search "AI Overview" reports that as of February 2024 less than 10% of courts are actively utilizing artificial-intelligence technologies citing a Thomson Reuters survey. Ironically, that statistic cannot be found in the cited Thomson Reuters survey report. See generally, "State of the Courts Report 2024"," Thomson Reuters Institute.

3 "Humanizing Justice: The transformational impact of AI in courts, from filing to sentencing," Thomson Reuters Institute, October 25, 2024.

4 "State of the Courts Report 2024" at p. 14, Thomson Reuters Institute. (And yes, this is the same Thomson Reuters report that Google AI "relies upon" or its nonexistent statistic of how many courts are actually using GenAI.)

5 Id.

and untrustworthiness of sources (51%). Additionally, many expressed concern over GenAI not being equal to humans in judgment, reasoning, and emotional depth (19%).[6] The other top concerns were data protection/security (13%), potential for misuse, bias, or fraud (12%), and user error or misinterpretation or failure to check the results (12%).[7]

At the same time those concerns are being voiced, jurisdictions around the country are implementing AI guidelines that not only allow for the use of AI including GenAI but encourage it. Even Supreme Court Justice John Roberts has expressed a view that "I predict that judicial work – particularly at the trial level – will be significantly affected by AI. Those changes will involve not only how judges go about doing their job, but also how they understand the role that AI plays in the cases before then."[8]

The Conference of Chief Justices and the Conference of State Court Administrators with the support of the National Center for State Courts put together an Artificial Intelligence Rapid Response Team (the "AARR Team") to analyze what courts should consider in formulating any policies around the use of Gen AI. The AARR Team's analysis resulted in the issuance of "Guidance for Use of AI and Generative AAI in Courts" in August 2024. Acknowledging many of the same concerns as those expressed in the survey of judicial staff, the AARR Team nonetheless suggested the following as possible uses for Gen AI:

- Summarizing large amounts of text
- Organizing a large amount of information as directed
- Finding specific information in a large volume of data
- Potentially creating a first draft of documents
- Creating writing or visual presentations
- Administrative tasks like composing emails and memorandum.[9]

In practical terms what does this mean for litigants? It means judicial-advisory boards are encouraging judges and clerks to use Gen AI to potentially review and distill large compilations of information for the court and even to draft initial drafts of legal documents including judicial opinions. While that same guidance reiterates that judges must continue to abide by the canons of judicial conduct and always remain responsible for his or her judicial decisions, the encouragement of judges to use GenAI raises many concerns and questions about what that use may mean in terms of how courts analyze legal submissions going forward.

Consider a judge or clerk asking GenAI to summarize all the evidence submitted in support of a summary-judgment or class-certification brief. A summary necessarily does not include every piece of information. How does GenAI determine what details are most important? What details does GenAI decide to leave out or gloss over? Does reliance on an AI summary mean the judge is relieved of his or her job of reviewing all of the evidence submitted?

Consider the court then asking GenAI to not only review and summarize all of the evidence submitted but to then provide the court of a list of all the evidence supporting a specific fact or issue. Can GenAI weigh the evidence submitted by one party against another? Does GenAI understand and can it apply a reasonable inference? Does GenAI assume because something is stated as if it is fact that it may just be argument or not actually supported by the cited evidence?

Consider a judge or clerk then asking GenAI to write the first draft of an opinion. Briefs can easily be uploaded into a closed GenAI system (controlling that GenAI only uses the sources submitted to the court alone) and if asked, GenAI can generate a draft opinion in a matter of minutes. Is using GenAI to create a draft opinion abdication of judicial responsibility? Or is it any different than asking a first-year law clerk to write a first draft? Does GenAI understand precedent and what cited law is or is not precedent? Does GenAI understand the difference between a motion-to-dismiss standard from a summary-judgment standard? What assurances are there that the judge checks the results including whether GenAI correctly understood the law, followed precedent, or recognized when a litigants' argument was unsupported or flawed?

These lingering questions over the use of AI are something the judicial branch will need to answer as its use of GenAI evolves. The AIRR Team guidance acknowledges as much and instructs that despite its suggestions as to how GenAI can be used by courts, much thought must be put into deciding whether it should be used and, if used, what guardrails should be put around use. Given what is at stake, and how easily GenAI can be used to usurp the court's role in analyzing facts, law, and reaching – or at least "summarizing" conclusions – courts must have a policy setting out strict guidelines of whether GenAI can be used and the parameters for using it. In designing such policies, considerations might include[10]:

6 Id. at 15.

7 Id.

8 2023 Year End Report on the Federal Judiciary at 6, Justice John G. Roberts, Jr. Chief Justice of the United States Supreme Court.

9 Guidance for Use of AI and Generative AI in Courts, August 7, 2024 Rapid Response Team at the National Center for State Courts at 17.

10 Guidance for Use of AI and Generative AI in Courts, August 7, 2024 Rapid Response Team at the National Center for State Courts at 11-12.

- The policies' purpose and scope: who it applies to, what technologies it applies to, how GenAI can be used, and requirements for the use of court data within the tool.
- Determination and clear delineation of which areas of practice or process can be improved with AI.
- Training needed for court personnel to gain a basic understanding of GenAI and its capabilities and limitations. This would include knowledge of the AI tool's terms of use and how data will be used, as well as general familiarity with the tool's learning algorithms, natural-language processing, and other AI techniques that might apply to legal tasks.
- Assurances that judges and staff using AI remain responsible and compliant with all ethical rules and applicable laws with consequences if such rules or laws are abused through the use of AI.
- Assurances that AI generated content is not biased and does not reflect discrimination based upon race, ethnicity, gender, age, or other protected classes.
- Assurances no confidential or sensitive information is used beyond what is necessary for authorized business purposes and how to protect the information that is used.
- Analysis of the risks associated with using AI for research and drafting, such as bias and hallucinations.
- Requirements to ensure that judges remain ultimately responsible for their decisions irrespective of technological advancements.

Several jurisdictions have begun the work to put guidelines in place, although many of these guides continue to provide significant discretion to the courts themselves as to when and how courts can use GenAI.[11] But should the court's potential use of GenAI change litigants' behavior? Not necessarily.

Litigants have never had a window into the actual judicial decision-making process. Submissions are made and the judge then issues a ruling. The availability of GenAI as a tool to judges does not change that. There must remain a level of trust that judges will do their job and retain responsibility for making informed decisions based on the facts and law before them. A litigant can however recognize the changing scope of the legal industry and that AI and GenAI may now have a role in the judicial process and look for ways to embrace that change and stay informed about the impact that AI and GenAI may play.

For example, a litigant can invite a conversation about the use of AI by all the case participants, including the parties and the court, as part of an early case-management conference. This provides the opportunity to learn the court's views on usage to the extent the court is willing to share. And an unwillingness by the court to share his or her views may be telling in of itself. But an open conversation will inform everyone involved as to the rules of the game and whether use of AI is on the table. Second, a litigant should stay informed as to AI usage rules and guidelines in the jurisdiction where she finds herself for both litigants and the court. This is good practice anyway, and as time goes on what will or will not be allowed may vary court to court.

Finally, regardless of whether a litigant knows if a court is using AI or not, a litigant can utilize AI tools herself to review her legal submission and those of her opposing party and see how AI analyzes the evidence and arguments. Ask the tool what the strongest arguments are. Ask the tool what the weakest arguments are. Ask the tool if the opposition brief makes arguments that are unanswered by your brief. See how the tool analyzes the evidence submitted. Ask the tool all the same questions a court might ask and analyze the results. It may prompt changes to the arguments that are being made or the emphasis that is being put on certain key facts or issues. By no means should the litigant let AI overrule the litigant's own judgment as to the best arguments to make or evidence to submit. But it can help provide a different perspective to take into account in how the facts and law are presented. Using the AI tools the same way a court might use them can arm the litigant to understand the impact AI tools might have on a potential outcome or, at a minimum, the court's analysis to get to the outcome.

11 The National Center for States Courts has compiled AI guidelines for litigants and courts issued by jurisdictions across the country. https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/tri-ncsc-ai-policy-consortium


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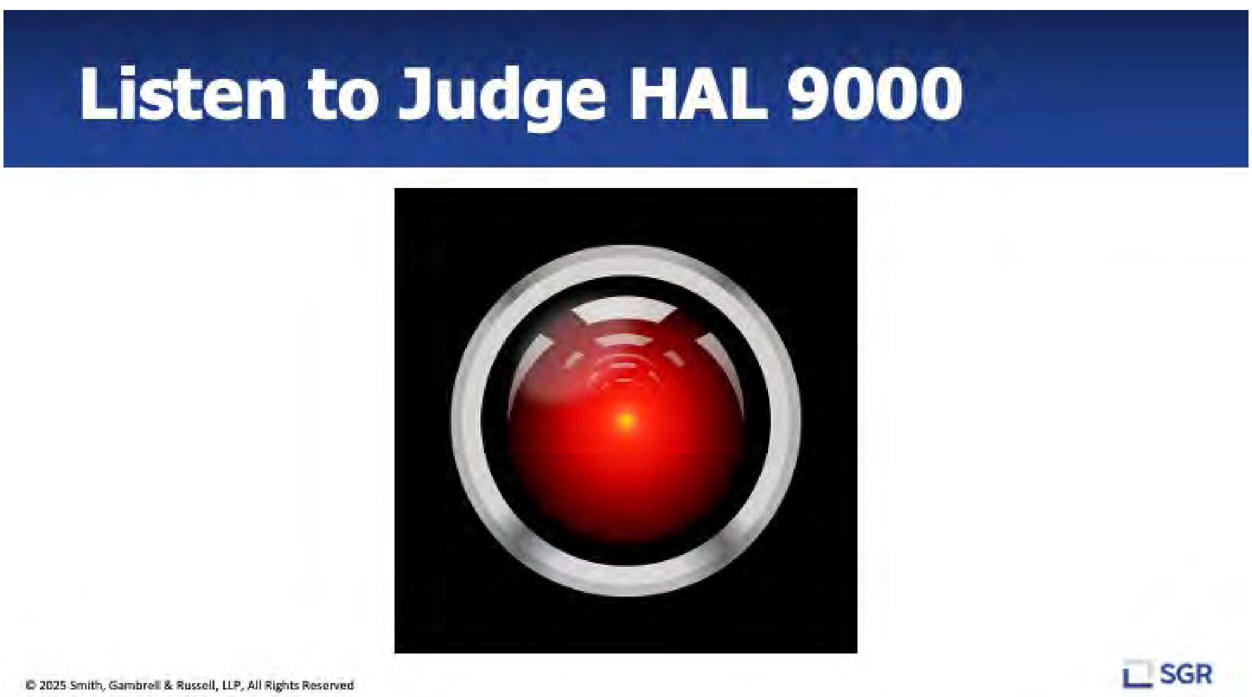
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Litigants Are Learning Their Lessons


DAILY NEWS

World • Business • Finance • Lifestyle • Travel • Sport • Weather

LLM aka Large Legal Mess: Judge wants lawyer fined $15K for using AI slop in filing

Sanctions on Lawyers for Filing Motion Containing AI-Hallucinated Cases

Texas lawyer fined for AI use in latest sanction over fake citations

Judge sanctions lawyers for brief written by A.I. with fake citations

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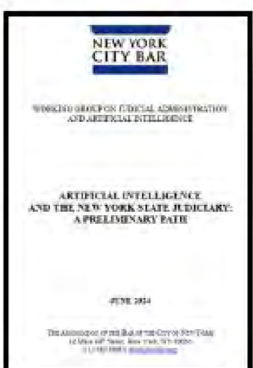
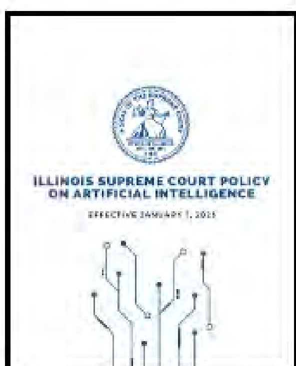
But Courts Are Using AI Too. . .





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AI CAN'T REALLY WRITE AN OPINION CAN IT?

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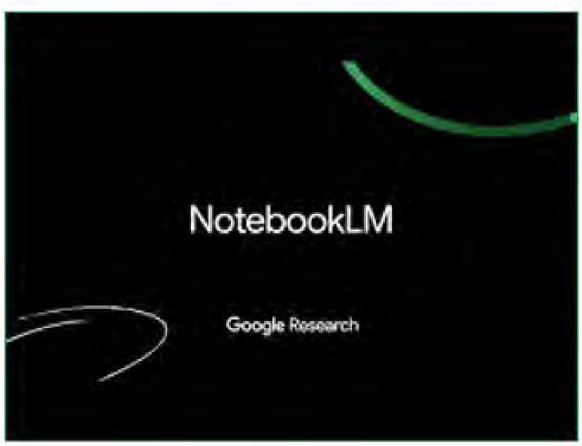
Step 1: Choose A GenAI Tool



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Step 2: Choose A Court Case

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES STROW, individually and on behalf of all others similarly situated, Plaintiff,	)	Case No. 21-cv-5104
v.	)	Hon. Steven C. Seeger
B&G FOODS, INC., Defendant.	)	

MEMORANDUM OPINION AND ORDER

Butter is magic on a stick. As this Court's grandmother used to say, butter makes nothing worse, and makes almost everything better. Spread on a fresh baguette, melted over mashed potatoes, or baked into a flaky croissant, butter makes everything it touches turn to golden goodness. It's the Midas of condiments.

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Step 3: Feed The Tool The Briefs

What are B&G Foods strongest arguments

B&G Foods argues that the plaintiff's claims are implausible because the Crisco® Butter No-Stick Spray label discloses that it does not contain butter [1]. B&G Foods presents several arguments to support this claim:

- **The product is a no-stick spray, and butter is a solid at room temperature** [2]. It is not plausible the plaintiff believed butter could be propelled through a spray can nozzle [3].
- The label states, **"Buttery Flavor For Your Food Without The Butter"** [4]. This statement appears directly above the comparison of the No-Stick Spray and butter's fat and calorie content, upon which the plaintiff allegedly relied [4].
- **The ingredient list does not contain butter** [5].
- The label states **"Natural & Artificial Flavor" right after the word "Butter,"** indicating butter is the flavor, not the content [5].
- The label expressly compares Crisco® No-Stick Spray to

Step 3: Feed The Tool The Briefs

What are Stow's strongest arguments in response to

2 sources

What ICFA element does B&G claim is missing?

NotebookLM can be inaccurate; please double check its responses.

Strow argues that his claims are plausible and that the motion to dismiss should be denied [1]. Specifically, Strow contends the following points in response to B&G Foods' arguments:

- **Butter in liquid form exists** [2]. Strow argues that it is not an "unreasonable or fanciful interpretation" to expect that a product described as "Butter – No Stick Spray" contains butter, because butter can be converted into a liquid phase as butteroil or anhydrous milk fat [2].
- B&G's reliance on disclaimers is inconsistent with Bell [3].
  - **Strow claims that he relied on the front label statement of "Butter – No-Stick Spray"** with a picture of butter [4].
  - The reasonable consumer standard does not assume consumers will test front-label claims by examining

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Step 5: Tell It To Write An Opinion

How should the Court decide the motion?

2 sources

How does Strow defend claims' plausibility?

To decide the motion, the Court must consider whether Strow's claims are plausible, viewing the complaint in its entirety and drawing all possible inferences in Strow's favor [1] [...]. B&G Foods argues that Strow's claims are implausible because the Crisco® Butter No-Stick Spray label discloses that it does not contain butter [5]. Strow argues that his claims are plausible [6].

Arguments for Dismissal (B&G Foods):

- Butter is a solid, not sprayable [7] [...].
- The label states, "Buttery Flavor For Your Food Without The Butter" [7] [...].
- The ingredient list does not contain butter [13].
- The label states "Natural & Artificial Flavor" right after the word "Butter" [7] [...].
- The label compares Crisco® No-Stick Spray to Butter and Oil, noting fewer calories [7] [...].
- Strow could not simultaneously believe he was buying

Step 5: Tell It To Write An Opinion

Arguments Against Dismissal (Strow):

- **Butter in liquid form exists**
- **Strow relied on the front label statement of "Butter – No-Stick Spray" with a picture of butter**
- The reasonable consumer standard does not assume consumers will check the fine print.
- The statement "Natural and Artificial Flavor" does not necessarily negate the presence of some butter.
- The size, color, background, and placement of the disclaimer rendered it inconspicuous.
- Strow brings the cause of action under the ICFA, not the FDCA, because he did not expect the "Butter – No-Stick Spray" would lack butter.
- Strow purchased the product at a premium, to his detriment.

Stow response to motion to dismiss.pdf

Source guide

B. Defendant's Reliance on Disclaimers is Inconsistent with Bell
Defendant's reliance on a variety of disclaimers to show the absence of any deception is
misplaced for several reasons. Def. Mem. at 10-12. First, Defendant's repeated statements that
Plaintiff "read the ingredient list" and "admittedly read and relied upon" disclosures about the
Product's flavoring are unsupported. Def. Mem. at 11 n. 3 citing Campbell v. Drink Daily Greens,
LLC, No. 16-cv-7176, 2018 WL 4259978, *2 (E.D.N.Y. Sept. 4, 2018).
Plaintiff alleged he relied on the front label statement of "Butter – No-Stick Spray" above
"a sizzling pat of butter atop pancakes in a skillet." Am. Compl. ¶ 2. Though the Amended
Complaint referenced other parts of the labeling to support its

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Step 5: Tell It To Write An Opinion

Please write the opinion for the Court

Who are the attorneys for B&G Foods?

Here is a possible opinion for the Court, based on the arguments presented by both sides:

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant B&G Foods, Inc.'s Motion to Dismiss Plaintiff Charles Strow's First Amended Complaint. After careful consideration of the arguments presented by both parties, the Court rules as follows.

BACKGROUND

This case arises from Plaintiff Charles Strow's claim that he was misled by the labeling of Defendant B&G Foods, Inc.'s Crisco® Butter No-Stick Spray. Strow alleges that he purchased the product expecting it to contain butter, based on the product's name and label. However, the product does not contain butter. B&G Foods argues that Strow's claim is implausible because the label clearly indicates that the spray does not contain butter.

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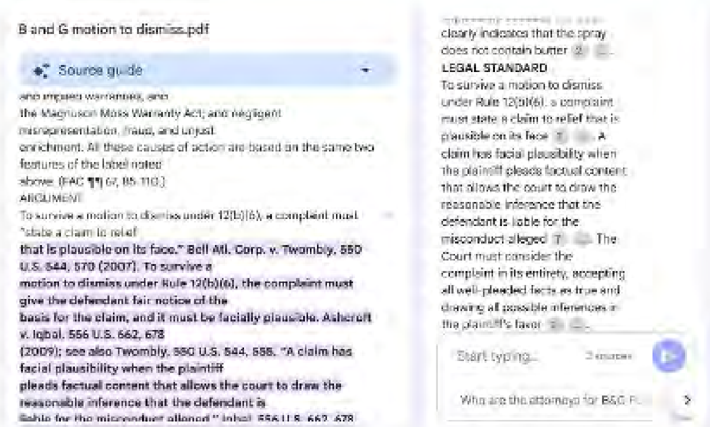
Step 5: Tell It To Write An Opinion



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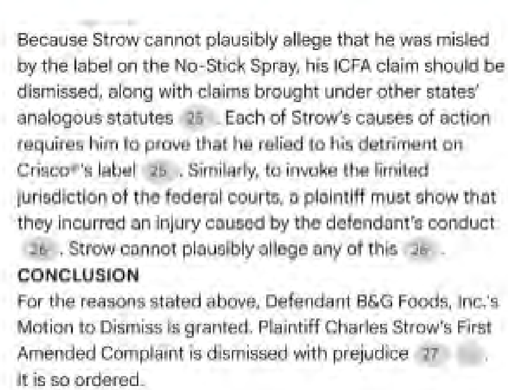
Step 5: Tell It To Write An Opinion



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Step 6: Compare the Results

NotebookLM

Strow argues that a reasonable consumer may not examine the fine print on the back label 18. However, the statement "Buttery Flavor For Your Food Without The Butter" is on the front label, not in the fine print on the back 19.

Because the Court finds that Strow has not plausibly alleged that he was misled by the label, the Court need not address the parties' other arguments.

IV. Conclusion

For the reasons stated above, Defendant B&G Foods, Inc.'s Motion to Dismiss Plaintiff Charles Strow's First Amended Complaint is granted 20.

GRANTED

Actual Court Opinion

So, much like its spray, B&G's motion does not stick. The motion to dismiss the complaint based on the argument that the complaint did not meet the plausibility standard is denied.

Conclusion

For the foregoing reasons, the motion to dismiss is denied.

Date: September 30, 2022

Steven C. Seeger
United States District Judge

DENIED

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So What Are The Court Rules:

- Illinois Supreme Court AI Policy:
  - The use of AI by litigants, attorneys, judges, judicial clerks, research attorneys, and court staff providing similar support may be expected, should not be discouraged, and is authorized provided it complies with legal and ethical standards. Disclosure of AI use should not be required in a pleading. . . **Judges remain ultimately responsible for their decisions, irrespective of technological advancements.**

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So What Are The Court Rules?

- Delaware Supreme Court Interim Policy:

1. Authorized User Remains Responsible. Any use of GenAI output is ultimately the responsibility of the Authorized User. Authorized Users are responsible to ensure the accuracy of all work product and must use caution when relying on the output of GenAI.
2. Informed Use. Authorized Users should not use Approved GenAI without a working knowledge and understanding of the tools. Authorized Users should be trained in the technical capabilities and limitations of Approved GenAI prior to use.
3. Decision Making. Authorized Users may not delegate their decision-making function to Approved GenAI.
4. Compliance with Laws and Judicial Branch Policies. Use of GenAI must comply with all applicable laws and judicial branch policies.

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What Should The Rules Be?

- Clear purpose and scope of the policy: who it applies to, what technologies it applies to, how GenAI can be used, and requirements for the use of court data within the tool.
- Determination and clear delineation of which areas of practice or process can be improved with AI.
- Training designed to give a basic understanding of GenAI and its capabilities and limitations.

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What Should The Rules Be?

- Assurances that judges and staff using AI remain responsible and compliant with all ethical rules and applicable laws with consequences if such rules or laws are abused.
- Assurances that AI generated content is not biased and does not reflect discrimination.
- Protections for confidential or sensitive information.
- Analysis of the risks associated with using AI for research and drafting, such as bias and hallucinations.

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What Should The Rules Be?

- Assurances that judges remain ultimately responsible for their decisions irrespective of technological advancements.

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What Should Litigants Do?

- Stay informed, know the rules
- Ask questions, invite the conversation
- Use the AI tools yourself to gain perspective

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Katheleen A. Ehrhart

Partner | Smith Gambrell Russell (Chicago, IL)

Katheleen Ehrhart is a Partner in the Litigation Practice of Smith, Gambrell & Russell, LLP and Head of the Chicago Reinsurance/Insurance Group. She was a Partner at Freeborn & Peters, which combined with SGR in 2023..

First and foremost, Ms. Ehrhart is a litigator and has tried cases and arbitrations in federal and state courts throughout the United States. As one client has described, "Kathy is a superb litigator . . . She is one of the best litigators I have worked with. She is very intuitive and knows how to get the most out of a witness." Other clients have shared that "(Kathy's) cross-examinations are strict and unfaltering, and she irritates counterparties with her thorough preparation" and that "Kathy is one of those exceptional lawyers who has the ability to not only develop a strategy, but to turn it into compelling trial testimony in an effective way to achieve successful practitioners." In this role, Ms. Ehrhart represents a variety of individuals, corporations, business and professional firms. She is well-versed in and enjoys representing both the Davids and Goliaths of the world.

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

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

Areas of Practice
- Antitrust and Trade Regulation
- Insurance and Reinsurance
- International Arbitration & Cross-Border Disputes
- Litigation / Trial Practice

Recognitions
- Crain's Chicago Business - Notable GenX Leaders in Law – 2021
- Illinois Leading Lawyers - 2020 (cited in multiple years)
- Illinois Leading Lawyers - Emerging Lawyers - 2017 (cited in multiple years)
- Chicago Daily Law Bulletin and Chicago Lawyer – 40 Illinois Attorneys Under Forty to Watch – 2015

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

Canadian Litigation 101

Adam Stephens
Miller Thomson (Canada)

Cross-Border Litigation: Essential Differences Between U.S. and Canadian Legal Systems
Adam Stephens

Navigating two similar yet distinct legal landscapes
While the United States and Canada share a border and common legal heritage, litigators who venture across this boundary often find themselves in unexpectedly different territory. Litigation in Canada is distinct both substantively and procedurally from that in the United States. Although both countries share a common law foundation (with Quebec's civil law system being the notable exception), important differences exist in their legal systems. From the structure of the courts to the rules of discovery, these differences shape how cases progress through the courts and impact litigation strategies and outcomes.

I. Canadian legal landscape

Court structure: similar hierarchies, different operations
The court system in Canada is a hierarchical, federal and bilingual system that operates under common law in most provinces and civil law in Quebec. It consists of federal and provincial/territorial courts, each with specific jurisdictions. The Province of Quebec, unlike the rest of Canada, uses a Civil Law system. Appeals from the Quebec Court of Appeal are nonetheless heard by the Supreme Court of Canada.

Supreme Court of Canada: final arbiter over all Canadian disputes
At the top of the Court system is the Supreme Court of Canada. It is the highest court in Canada and the final court of appeal. Unlike its American counterpart, which generally limits itself to federal and constitutional questions, the Canadian Supreme Court has authority over civil, criminal, administrative, and constitutional matters from every province and territory.

Appeals to the Supreme Court, outside narrow exceptions, require leave of that Court. It is generally very difficult to obtain leave as the "national importance" requirement is difficult to meet. In recent years, the Supreme Court of Canada has granted leave to less than 10 percent of the applications it receives. Appeals heard by the Supreme Court predominately concern criminal and public law matters, with civil matters representing less than 15 percent of the Court's docket. The Supreme Court's rulings are binding precedent over every court in Canada. This unified system differs from the United States Supreme Court, which hears constitutional issues and issues of federal law, but generally does not hear appeals purely on state law issues. The chart below shows the key differences between the Canadian and US Supreme Court:

Feature	Supreme Court of Canada (SCC)	Supreme Court of the United States (SCOTUS)
Scope of Jurisdiction	All legal matters (criminal, civil, constitutional)	Mainly federal law, constitutional issues
Appeals Process	Some appeals as of right; most require leave	All appeals require certiorari (permission)
Constitutional Review	Interprets Canadian Charter and Constitution Acts	Interprets U.S. Constitution and Bill of Rights
State/Provincial Autonomy	Rules on federal-provincial disputes	Rules on state-federal disputes
Advisory Opinions	Allowed	Not allowed
Appointment Process	Appointed by Prime Minister, retire at 75	Appointed by President, confirmed by Senate, serve for life
Common vs. Civil Law	Mixed (common law & civil law in Québec)	Common law only

Provincial and territorial courts: broad jurisdiction over provincial matters

Each Canadian province and territory maintains its own court system, handling most criminal, civil and family law cases. The Superior Courts within these jurisdictions deal with serious criminal offences, most civil matters and family law matters pertaining to divorce and the division of property. They also hear appeals from the lower provincial courts.

In certain Canadian jurisdictions, there are specialized court divisions to deal with particular types of matters. For example, in Toronto there is the Estates List and Commercial List. As the names would suggest, the Estates List deals with estates matters, while the Commercial List deals with commercial disputes such as bankruptcy and insolvency, secured transactions, shareholder rights, and receivership applications among other issues. These specialized divisions were designed to make the handling of these types of disputes more expert and efficient.

The lower provincial courts have jurisdiction over most criminal cases, small civil claims and various family matters.

Federal Courts

In addition, there are also federal trial and appeal courts, which hear matters which fall into the Federal government's exclusive jurisdiction, such as federal income tax, immigration and telecommunications.

Judges and judicial appointments: merit-based selection

Unlike in the United States, where judges may be either appointed or elected, all Canadian judges are appointed. About half of all judges in Canada are federally appointed, including those of the provincial Superior Courts. The provinces appoint judges for the lower provincial courts. The appointment of judges tends not to be a political matter in Canada. Even for appointments to the Supreme Court of Canada, it is very uncommon for a Judge to be known as a conservative or a liberal or for their "record" to receive attention.

The process for appointment to all courts begins with the recommendations of Judicial Advisory Committees, which include representatives of the bench, the bar and the general public. These committees review applications for judicial appointment and engage in a rigorous process of reviewing the candidates' experience and written work. They also consult broadly with the references provided by the candidate as well as people that have worked with and opposite the candidate.

The Committee relies on standard assessment criteria when evaluating fitness for the bench, which relate to professional competence and experience, personal characteristics and potential impediments to appointment. In addition, at the Federal level, the Committee looks to create a pool of candidates who reflect the diversity of the jurisdiction, considering the representation of Indigenous peoples, persons with disabilities and members of minority communities. Based on this assessment, the Committee will make a recommendation of "highly recommended", "recommended" or "unable to recommend" to the Minister of Justice. For the one-year period ending October 28, 2024, the Federal Judicial Advisory Committees assessed 540 candidates and were "unable to recommend" 63 percent of them. This shows a significant degree of quality-control at the level of the Judicial Advisory Committees.

The Minister of Justice makes judicial appointment recommendations to the Federal Cabinet from the list of recommended candidates only. A candidate who is not recommended may not be appointed. Appointments to the Provincial Courts of Appeal and the Supreme Court of Canada are made by the Prime Minister following a more rigorous vetting process than that followed for appointments to the Superior Courts of Justice.

The judicial appointment process generally attracts high quality candidates. Judges are appointed until age 75, receive "security of tenure," meaning they cannot be removed from office absent exceptional wrongdoing, and receive highly competitive compensation[1] and a very generous pension.

II. Practical Differences Between Litigating in Canada versus the United States

Discovery: broader initial document production, limited oral examination

Initial document discovery is generally broader in Canada compared to the more modest requirements in the United States. In Canada, parties must review their documents at the outset of litigation and exchange affidavits of documents, producing all documents relevant to the material facts at issue, except those protected by privilege. Despite not being produced, privileged documents must still be listed in an affidavit of documents. This contrasts with the U.S. approach, where discovery extends to any information reasonably calculated to lead to admissible evidence.

Oral discovery in Canada is known as an "examination for discovery" rather than a deposition. Examinations for Discovery are generally limited to one representative

1 As of January, 2024, a Superior Court Judge earns approximately $400,000 per year.

per party to the litigation and are time limited. Canadian litigants have the right to examine all adverse parties, but non-parties may only be examined with court approval. When deciding whether to grant leave, courts consider factors such as whether the requesting party could fairly proceed to trial without the examination and whether the sought-after information could be obtained from an adverse party.

When the examined party is a corporation, only one representative may be examined unless additional representatives are permitted by consent or court order. The corporate representative must be prepared to answer reasonably anticipated questions and may need to consult other officers or employees to properly prepare themselves as the "company representative". If they cannot answer a question, counsel may undertake to provide the information later. Undertakings may also be made for further document production. If a party refuses to answer a question during discovery, the requesting party may bring a motion before a judge to compel a response.

All discovery, both documentary and oral, is subject to the principles of proportionality. When considering the proportionality of ordering an answer to a refusal, the court will evaluate the importance of the evidence to the litigation, the time required to answer the question or produce the document, the expenses that would be incurred, if undue prejudice would result from answering the question and whether the information can be obtained from another source.

Time it takes to get to trial

Commercial litigators accustomed to U.S. timelines should prepare clients for extended proceedings in Canada. Undue delay in getting to trial is a significant issue in many Canadian jurisdictions. A 2023 Report by the Advocates Society found that it takes 1.5 years for a motion longer than 2 hours to be heard in Toronto and more than 4 to 5 years for a civil action to proceed from commencement to trial.[2] Moreover, in 2019, the average age of a case making it to trial in Toronto was 5.73 years.[3] As mentioned, specialized divisions of the Superior Court, like the Commercial and Estates lists, are generally able to hear matters more quickly.

In contrast, in the United States, the average time from filing a civil case to trial is a little over two years, although in courts with a greater caseload, the wait can be between three to four years.[4] There is nothing in Canada analogous to the "rocket dockets" – district courts which use strict rules to ensure the speedy resolution of cases. Unless a case is to be heard by one of the specialized courts, litigants in Canada should generally expect that resolution of their matter will take more time than in the United States.

Legal costs: the "loser pays" system

A consequential difference for litigation risk assessment is Canada's approach to legal costs. Canadian courts generally award costs to the successful party after a motion or trial. Usually, the court will order that the unsuccessful party pay partial costs, which is typically between 50-60% of the successful party's actual legal costs. When deciding the amount of costs to order, the court can consider a variety of factors, including the conduct of the parties.

In addition, there are costs rules intended to promote resolution. Where a plaintiff or defendant makes a formal offer to settle a motion or trial, and the result achieved is better than the offer, that party is entitled to greater costs than would have otherwise been the case.

This system is in stark contrast to the procedures applied in much of the United States, where parties bear their own costs. The "loser" pays rule discourages litigation and encourages resolution. However, it also can create access to justice concerns where the risks of an adverse costs order deter people from engaging in litigation.

Damages and remedies: more modest awards in Canada

Clients familiar with U.S. damage awards often need their expectations recalibrated for anticipated Canadian outcomes. Punitive damages are far less common in Canada than in the United States and are generally much smaller in value. For punitive damages to be awarded, the defendant's conduct must be so malicious, oppressive and high-handed that it offends the court's sense of decency. This high bar is only met in the most egregious of cases.

The largest punitive damages award in Canadian history was $1.5 million in the 2023 case *Baker v. Blue Cross Life Insurance Company of Canada*. In contrast, U.S. courts regularly award punitive damages far exceeding this amount.

Pain and suffering damages, also known as non-pecuniary damages, were capped by the Supreme Court of Canada in 1978 at $100,000 to be adjusted for inflation

2 "Delay No Longer. The Time to Act Is Now," The Advocates Society, Published June 29, 2023

3 "Civil Jury and Non-Jury Proceedings Disposed from the Trial Scheduled List with Trial Superior Court of Justice, Civil, Provincial Values, 2019," Ministry of the Attorney General, Published November 25, 2021.

4 "The Need for Additional Judgeships: Litigants Suffer When Cases Linger," United States Courts, Published November 18, 2024.

each year. The cap is now just over $450,000. Receiving the maximum amount of pain and suffering damages is reserved for only the most severe personal injuries.

Jury trials: a rarity in Canadian commercial litigation
Civil jury trials are rare in Canada and are generally limited to specific types of cases, such as defamation or personal injury. Unlike in the United States, there is no constitutional right to a jury trial. Even when a jury trial is permitted, courts have broad discretion to order a judge-alone trial. In Quebec, civil jury trials are not allowed at all.

In civil cases, juries consist of six members, and verdicts do not need to be unanimous—only five jurors must agree. Jury trials are typically avoided in cases involving complex legal or factual issues on the theory that such complexity is better left to a judge alone.

An impact of fewer jury trials is that damage awards in Canada tend to be lower than in the United States, where nuclear verdicts are common.

Use of mediation
While mediation is generally voluntary in the United States, pre-trial mediation is mandatory in most Canadian jurisdictions for civil claims. In Ontario, mediation must occur prior to the pre-trial.

Mediations are confidential and mediators have no authority to impose a resolution. Their fees are split equally between the parties. This process, combined with Canada's legal costs regime, helps to encourage pre-trial settlement. A tiny percentage of cases, perhaps less than five percent, are ultimately tried, the others being resolved prior to trial. A very significant percentage of the resolutions occur at mediation.[5]

Cultural and procedural formalities
Courtroom culture in Canada is generally more formal than in the United States. Lawyers are required to wear gowns when appearing before the court, and they are expected to maintain a respectful and cordial demeanor. However, unlike in the United Kingdom, Canadian lawyers do not wear wigs.

In Canadian courtrooms, lawyers address opposing counsel as "my friend." When the judge enters or exits the courtroom, all present rise and bow. Lawyers must also rise when responding to the judge's questions. Canadian judges do not use gavels, and courtroom proceedings typically remain orderly.

Additionally, pleadings in Canada are usually more restrained, with neutral language that avoids provocative statements.

Foreign jurisprudence
In Canada, when there is a gap in domestic law, it is common for courts to refer to decisions of foreign jurisdictions, particularly those of American and Commonwealth courts. While foreign law is not binding, it is often persuasive and can help fill gaps in Canadian jurisprudence.

This contrasts sharply with the United States, where foreign decisions are rarely cited, and the U.S. Supreme Court has cautioned against relying on them. While the use of foreign jurisprudence is a point of contention in the U.S., it is a standard practice in Canada.

Unique and potentially helpful Canadian remedies
English and Canadian law recognize several powerful legal remedies that may not have direct equivalents in the United States but share analogous principles in certain circumstances. These remedies may be useful to American litigators as they may be available where the circumstances of a case have a connection to Canada.

One such remedy is the **Norwich Order**, which allows a party to compel a third party, such as an internet service provider or financial institution, to disclose information that can help identify a wrongdoer. This remedy is available before an action is commenced and is often used in cases where the identity of the responsible party is unknown, such as in online defamation or intellectual property infringement matters.

Another significant remedy is the **Mareva injunction**, which is designed to prevent a defendant from dissipating assets before a judgment can be enforced. This pre-emptive measure is particularly useful in fraud or contract disputes where there is a risk that a defendant might transfer assets beyond the reach of the court. The ability to freeze assets ensures that a successful claimant will have a meaningful remedy once a judgment is obtained. **The Anton Piller** order is an extraordinary remedy that permits a party to conduct the equivalent of a civil search warrant. It allows a plaintiff to seize evidence without prior notice to the defendant. This order is granted in rare circumstances, typically in intellectual property or trade secret cases, where there is a serious risk that the defendant may destroy crucial evidence if given advance warning. While the order is highly invasive, courts impose strict safeguards to balance the interests of justice with the rights of the affected party.

5 Andrew Monkhouse and Tiffany He, "Why We Need to Implement Province-Wide Mandatory Mediation in Ontario," Ontario Bar Association, Published March 29, 2022.

Conclusion

The differences between litigating in Canada versus the United States are meaningful. The litigation process will generally take longer to reach trial in Canada compared to the United States, however, there may be a greater emphasis on pre-trial resolution in Canada. When matters do proceed to trial, damage awards in Canada are typically more modest than in the U.S. Understanding these differences is important in order to manage the expectations of US citizens engaged in Canadian litigation and can also be relevant where a decision has to be made on whether to commence a claim in Canada or the United States.

MILLER THOMSON

A COMPARATIVE ANALYSIS OF LEGAL SYSTEMS

Litigating in the U.S. vs. CANADA

Key Differences

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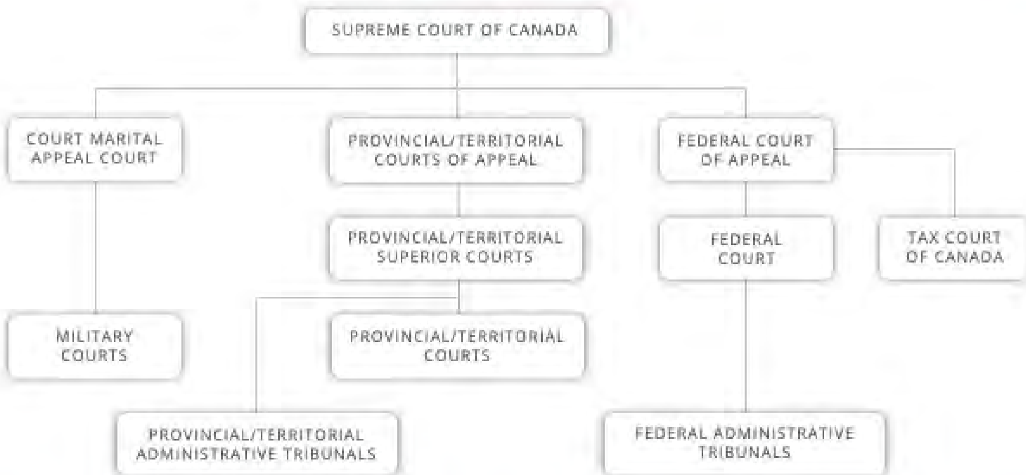
VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON WATERLOO REGION TORONTO VAUGHAN MONTRÉAL

Overview

2

Court Structures



Court Structure

Supreme Court of Canada is the ultimate court of appeal for all courts.

Leave is granted to matters which are of public importance and have a national dimension.

US and Canadian Supreme Courts

FEATURE	SUPREME COURT OF CANADA (SCC)	SUPREME COURT OF THE UNITED STATES (SCOTUS)
Scope of Jurisdiction	All legal matters (criminal, civil, constitutional)	Mainly federal law, constitutional issues
Appeals Process	Some appeals as of right; most require leave	All appeals require certiorari (permission)
Constitutional Review	Interprets Canadian Charter and Constitution Acts	Interprets U.S. Constitution and Bill of Rights
State/Provincial Autonomy	Rules on federal-provincial disputes	Rules on state-federal disputes
Advisory Opinions	Allowed	Not allowed
Appointment Process	Appointed by Prime Minister, retire at 75	Appointed by President, confirmed by Senate, serve for life
Common vs. Civil Law	Mixed (common law & civil law in Québec)	Common law only

5

Provincial and Territorial Courts

- Provincial Court systems responsible for most criminal, civil and family law cases
- Superior Courts deal with serious criminal offences, most civil matters and family law disputes pertaining to divorce and the division of property
  - Specialized Divisions in Certain Jurisdictions (Estates, Commercial Courts)
- Lower provincial courts have jurisdiction over most criminal cases, civil claims and various family matters

6

Federal Courts

Federal trial and appeal Courts hear matters within the Federal Government's exclusive jurisdiction

- Federal income tax, immigration, telecommunications

7

Judges and Judicial Appointments

- No elected judges – all Canadian judges are appointed.
- Candidates reviewed by the JAC who make a recommendation.

8

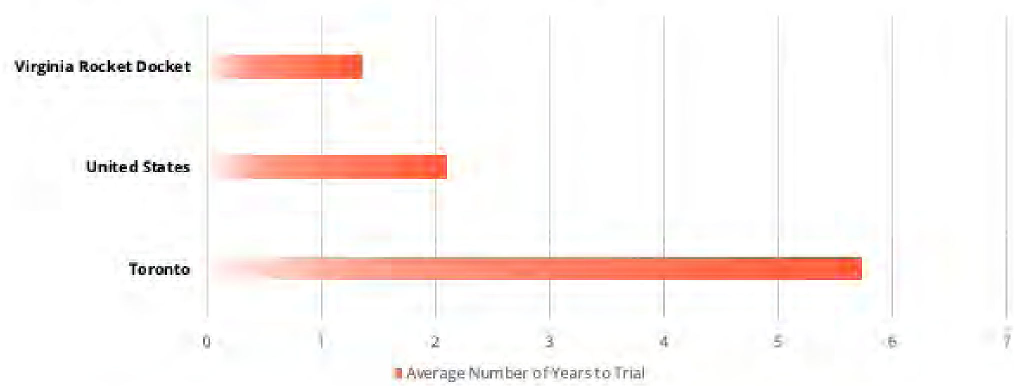
Judges and Judicial Appointments

There has been a pronounced effort to diversify the judiciary

		GENDER			DIVERSITY					
	Total	Male	Female	Other	Indigenous	Racialized Individual	Ethnic/Cultural Group or other	Individual with Disability	2SLGBTQI+ Individual	Woman
Candidates Assessed	540	260	280	0	18	88	118	11	35	280
Candidates Highly Rec.	95	43	52	0	1	9	18	1	7	52
Candidates Recommended	106	45	60	0	4	12	11	0	3	61
Candidates Unable to Rec.	339	172	167	0	13	67	89	10	25	167
Newly Appointed Judges	88	38	50	0	4	11	12	2	4	50

Time From Filing to Trial

AVERAGE NUMBER OF YEARS TO TRIAL



Civil Jury Trials

Limited to certain civil matters: defamation and personal injury.

No right to a jury trial.

11

Discovery Process

Time Limits on Examinations

Only one corporate representative.

Subject to proportionality.

12

Legal Costs (except Quebec)

- Loser-pays System.
- Most times, Courts award costs on a partial indemnity basis (50-60%).
- Rejecting a reasonable settlement offer can result in costs on a substantial indemnity basis (80-90%)
- In very limited cases, full indemnity costs

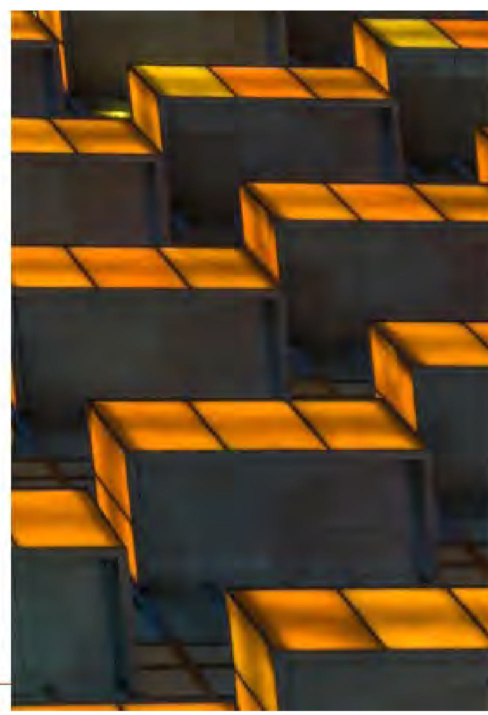
13

Damages & Remedies

Punitive Damages - "malicious, vindictive or reprehensible conduct."

- Largest award was "only" $1.5 million.

Cap on Pain and Suffering is about $450,000



14

Use of Mediation

Pre-trial mediation mandatory in most jurisdictions.

Significant proportion of cases that go to mediation settle.

15

Foreign Jurisprudence

- Used frequently when there is a gap in domestic law.
- Persuasive - not binding.

16

Remedies—Connection to Canada?

Norwich Orders

Compels third parties to disclose information prior to statement of claim being issued;

- banks can be compelled to disclose customer records without telling client!

Mareva Injunction

Prevents a defendant from dissipating assets before Judgement;

- worldwide application; used in fraud or contract disputes to freeze bank accounts

Anton Piller Orders

Civil Search Warrant; ex parte seizure of stolen goods or data

17

Conclusion

18

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Adam Stephens, currently Chair of Disputes and on the firm's Executive Committee, brings to clients a wealth of experience as a commercial litigator. He expertly handles cases in various areas, including shareholders' rights, contract disputes and real property law. As a trusted advisor, Adam is recognized for providing practical and strategic advice to his clients.

Adam actively engages with the legal community through publications and lectures. He presents on litigation skills training and on areas of the law, such as contractual obligations, leasing duties and procurement matters.

Adam is a member of the Advocates' Society, the Ontario Bar Association, and the Canadian Bar Association. Additionally, he has been named a Fellow of the Litigation Counsel of America. He has been recognized by Lexpert, Best Lawyers in Canada and Benchmark Canada.

Expertise
- Arbitration & Mediation
- Commercial Litigation
- Contractual Disputes
- Shareholders Disputes
- Lloyd's of London and international insurance

Industries
- Automotive
- Charity & Not-For-Profit
- Life Sciences
- Real Estate
- Municipal, Planning & Land Development

Recognition
- Fellow, Litigation Counsel of America
- The Best Lawyers in Canada –Corporate and Commercial Litigation, 2021-2025
- The Canadian Legal Lexpert Directory – Litigation – Corporate Commercial, 2023, 2025
- Benchmark Canada, Litigation Star: General Commercial, 2019 – 2024

Education
- LL.B., Dalhousie University, 2001
- B.A., McGill University

“Some Harm” Carries Many Risks: Adverse Employment Actions After Muldrow v. City of St. Louis

Lauren Fisher White
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Adverse Employment Actions in Light of Muldrow v. City of St. Louis: “Some Harm” and Significant Risk Under Title VII, the ADA, and ADEA
Lauren E. Fisher White and Paige R. Skinner

On April 17, 2024, the Supreme Court of the United States handed down *Muldrow v. City of St. Louis, Missouri,* 601 U.S. 346 (2024). The St. Louis Police Department replaced Sergeant Jatonya Muldrow with a male and laterally transferred her from Commander of her division to a uniformed position. *Id*. at 346. In her new position, Muldrow’s rank and pay did not change, but her responsibilities, perks, and schedule did. *Id*. For example, Muldrow no longer worked with high-ranking officials and instead supervised the day-to-day activities of patrol officers. *Id*. She also lost access to her government-issued vehicle and had an irregular schedule that included weekends. *Id*. Muldrow argued that her transfer was based on her sex and altered the terms and conditions of her employment. *Id*. The Missouri Eastern District Court held that the changes impacting Muldrow were minor and immaterial, such that they could not constitute discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”). The Eighth Circuit affirmed the district court’s ruling. Muldrow then appealed to the Supreme Court, which granted cert. *Id.*

Since Title VII’s enactment in 1964, the Supreme Court has continuously defined and re-defined what actions constitute employment discrimination. For example, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that employment practices that appear neutral but disproportionately affect a protected group can be discriminatory, even if there is no intent to discriminate. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-66 (1986), the Supreme Court expanded the definition of discrimination under Title VII to include harassment. In *Harris v. Forklift Systems* 510 U.S. 17 (1993), the Court clarified the standard for a hostile work environment under Title VII, holding that the offensive conduct does not have to cause psychological harm to constitute discrimination, but must be severe or pervasive enough to create an abusive work environment. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998), the Supreme Court held that a Title VII plaintiff must establish some “disadvantageous” change in an employment term or condition. In *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 658 (2020), the Supreme Court broadly stated that discrimination meant “treating a person worse.”

As the Supreme Court periodically provided guidance as to what constitutes discrimination, lower courts struggled to establish the boundary between inconsequential harm and harm that could lead to an actionable claim. By 2024, the First, Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuit Courts of Appeals were split as to the degree of injury required to establish a Title VII discrimination claim, whether “serious,” “significant,” or “material.” The Supreme Court in *Muldrow* sought to resolve this split, holding that to make out a discrimination claim under Title VII, the plaintiff is not required to show that they suffered “significant” harm because of the alleged discrimination. *Id*. at 354-55. Instead, under the *Muldrow* decision, plaintiffs need only show that they suffered “some” harm in order to establish their *prima facie* case of discrimination. *Id*. This new standard “lowers the bar Title VII plaintiffs must meet” and, in the year since the *Muldrow* decision, decisions have already demonstrated far-reaching impact and application of this decision. *See id*. at n. 2.

Unfortunately, as noted in Justice Alito’s concurring opinion, the Court did not provide any straightforward standard or test for determining what might constitute “some” harm, leaving interpretation of the standard up to the lower courts. *Id*. at 362-63. The Supreme Court’s unanimous opinion did not elaborate much beyond stating, “Title VII plaintiffs must show that the event they challenge constituted a ‘harm’ or ‘injury,’ but that the event need not be ‘significant’ or ‘substantial.’” Because of this, lower courts have continued to grapple with assigning meaning to the new standard in discrimination cases. Many lower courts have already applied the *Muldrow* “some” harm standard in permitting employment discrimination claims that would have been dismissed pre-*Muldrow* to go forward. Employers wary of the lowered threshold for actionable harm are justifiably concerned that liability might arise from employment actions with non-economic impacts, such as exclusion from DEI programs, changes in job duties, increased commute time, written or even verbal warnings, and even allegations of scorn or ridicule. Below is a discussion of how the lower courts have interpreted "some" harm in the Title VII context (as to race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), and national origin claims), as well as other anti-discrimination laws—namely, the Americans with Disabilities Act of 1990 (the "ADA"), the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967 (the "ADEA"), and even the Fair Credit Reporting Act ("FCRA"). Under the broad interpretation of harm in *Muldrow* and its progeny, plaintiffs bringing employment discrimination claims will have an easier time advancing their claims than before. Employers cognizant of the potential for increased litigation should take proactive steps, as discussed in the conclusion, to reduce the substantial risk arising from the "some harm" standard.

Application of "Some Harm" Standard

I. First Circuit

***Rios v. Centerra Grp. LLC*, 106 F.4th 101 (1st Cir. 2024).**

Rios was a security guard with Centerra who had diabetes and ultimately brought ADA failure-to-accommodate, discrimination, and retaliation claims. *Rios,* 106 F.4th at 110. The district court granted summary judgment to Centerra on all claims, which Rios challenged on appeal. *Id.* Rios argued that he experienced adverse employment actions when supervisors told him not to eat at his post, not to park his car in the spots near the guard rest house, and not to use the guard rest house bedroom to change his clothes. *Id.* at 112. The court stated that none of these incidents resulted in any formal discipline, emphasized that Rios was permitted to continue eating at his post, and stated that "[a] mere admonition by a supervisor without any formal consequences is not an adverse employment action because it does not represent any disadvantageous change in the terms or conditions of the plaintiff's employment." *Id.* at 112-113 (citing *Muldrow*). Similarly, Rios alleged that a supervisor's failure to provide pointers at an off-duty practice session at a shooting range was an adverse employment action, but another officer offered him some pointers. *Id.* at 113. The court found that what Rios described was not "some harm" that left him "worse off." *Id.* As for Rios' termination, though—allegedly for falling asleep on the job—the court did find that Rios had properly alleged an adverse employment decision.

In affirming the decision of the district court, the First Circuit Court of Appeals found that Rios either could not establish his prima facie case as to all of his counts or that his former employer had articulated a legitimate, non-discriminatory reason for termination. This case is important because it demonstrates that the *Muldrow* "some harm" standard does not encompass <u>all</u> negative treatment from employer to employee. In *Rios*, the First Circuit interpreted *Muldrow* to require the plaintiff to demonstrate that a consequence of the employer's action was a change in the terms or conditions of the employee's employment, causing harm to the employee. Here, Rios was unable to do so.

II. Second Circuit

***Mitchell v. Planned Parenthood of Greater New York, Inc.*, 745 F. Supp. 3d 68 (S.D.N.Y. 2024).**

The *Mitchell* court stated that "for decades, courts in this Circuit understood an 'adverse employment action' under federal law to be 'a materially adverse change in the terms and conditions of employment.'" *Mitchell*, 745 Supp. 3d at 90 (citations omitted). The court declined to limit *Muldrow's* application to job transfers in the context of Title VII, holding both that (1) it applied to Title VII discrimination cases not involving transfers, and (2) it applied to discrimination claims under the ADEA and ADA, given the similarity of those statutes to Title VII. *Id.* at 91 (collecting citations). The *Mitchell* court examined every one of plaintiff's allegations that could have constituted "some harm" and ultimately concluded that the plaintiff failed to allege that any harm to him was motivated by discriminatory intent, such that his discrimination claims were dismissed. *Id*. at 91–96.

***Newton v. Kohl's, Inc.*, No. 5:21-CV-268, 2024 WL 4986303 (D. Vt. Nov. 12, 2024).**

In *Newton*, the court held that *Muldrow*'s holding extended to non-transfer Title VII cases, as well as ADEA and ADA claims. *Id*. at *6. The *Newton* court, on a motion for summary judgment, examined whether a written warning, which likely would not have constituted an adverse employment action prior to *Muldrow*, could meet that standard after *Muldrow*. The court noted that *Muldrow* had not removed the general rule that a plaintiff must still demonstrate a negative change to the terms and conditions of her employment, *id.* at *7, and discussed a 1998 10th Circuit case, *Roberts v. Roadway Exp.*, 149 F 3d 1098 (1998), in which the court held that each written warning constituted an adverse employment action because the more warnings an employee received, the more likely he or she was to be terminated. *Id.* The *Newton* court also examined precedent relating to paid suspension, which the Second Circuit had generally held did not constitute an adverse employment action so long as the suspension was a reasonable application of the employer's disciplinary policies. *Id.* (citing *Joseph* *v. Leavitt*, 465 F. 3d 87, 91 (2d Cir. 2006). The court referenced multiple other circuits which had recognized that *Muldrow* may have disturbed that rule and found that a jury could find that Newton's paid suspension caused her "some harm." *Id.* at *8. The court found particularly persuasive that her suspension affected her reputation as a supervisor because "it wasn't a secret that [she] had been suspended," and she experienced a lot of pressure because of the increased workload that came after her absence. *Id.*

***Ciotti v. City of New York*, No. 23 CIV. 10279 (ER), 2025 WL 308022 (S.D.N.Y. Jan. 27, 2025).**
Ms. Ciotti, a police officer with the New York Police Department (the "NYPD"), alleged gender and disability discrimination, among other claims, against the NYPD and one of their officers. *Ciotti*, 2025 WL 308022 at *1. Ms. Ciotti alleged that she suffered an adverse employment action when the NYPD "subjected [her] to unnecessary medical treatment, including urine testing and counseling, and . . . placed [her] on involuntary leave." *Id*. at *13. In the context of its motion to dismiss, the NYPD cited pre-*Muldrow* caselaw suggesting that involuntary leave and forced medical treatment were not considered adverse employment actions, but the district court found those legal conclusions to carry no weight after *Muldrow*. *Id*. The court held that "[u]nder *Muldrow*–which imposes a lower burden–the Court finds that Ciotti has adequately pleaded that she was subject to adverse employment actions." *Id*. Because Ciotti "experienced a loss that left her 'worse off'" and was subject to "repeated unwanted, and indeed harassing counseling sessions–as well as subjecting her to repetitive and utterly unnecessary urine testing," she successfully asserted an adverse employment action. *Id.* The court permitted Ciotti's discrimination claims to move forward. *Id.* at *25.

III. Third Circuit
***Johnson v. Pittsburgh Public Schools*, No. 2:22-CV-00146-CCW, 2024 WL 4362454 (W.D. Pa. Oct. 1, 2024).**
Ms. Johnson, a 56-year-old teacher at Pittsburgh Weil Elementary School, was asked to teach all subjects during the 2020-2021 school year to the third grade as part of a "self-contained" virtual classroom, despite teaching only math the prior school year. *1. Ms. Johnson requested "help" with the self-contained classroom from the school's principal twice—in June 2020 and in August 2020—but only received assistance with planning for her reading and language arts subjects. *Id.* Johnson took FMLA leave and ultimately resigned. *Id.* Ms. Johnson claims that the teacher who replaced her, Ms. Paolino, was treated more favorably than she was because the administration provided Ms. Paolino with two additional teachers to assist her—one to teach math and another to teach social studies, while Ms. Paolino taught the remaining subjects. *Id.* Importantly, she also alleged that other classrooms in other grades received additional teachers. *Id.*

On a motion to dismiss, Pittsburgh Public Schools challenged the second and fourth elements: that Ms. Johnson suffered an adverse employment action, and that she plausibly alleged facts supporting an inference of age discrimination. *2. PPS, citing pre-*Muldrow* Third Circuit precedent, argued that any difficulty Ms. Johnson experienced was not significant enough to constitute an adverse employment action. *Id.* The district court disagreed and applied *Muldrow*, stating that a plaintiff need only "show *some* harm respecting an identifiable term or condition of employment." *Id.* (quoting *Muldrow*, 601 U.S. at 355).

While the district court ultimately dismissed Ms. Johnson's claims because it found that she had not plausibly alleged that her adverse employment action occurred under circumstances giving rise to an inference of age discrimination, this case underscores that the bar for demonstrating an adverse employment action is very low: Ms. Johnson was more experienced than her co-workers, and was given additional responsibilities. If Ms. Johnson had presented <u>any</u> evidence that she was treated differently because of her age, her claim likely would have proceeded.

IV. Fourth Circuit
***Rageh v. Univ. of N. Carolina*, No. 1:24-CV-336, 2024 WL 5056448 (M.D.N.C. Dec. 10, 2024).**
Dr. Rageh, who was over 40 years old during his ophthalmology fellowship with UNC, alleged that his supervising physician, Dr. Zhang, provided him with fewer training opportunities than younger residents, eventually refusing to train him. *2. In his EEOC charge, Dr. Rageh alleged that Dr. Zhang only allowed him to take notes during surgeries while she permitted the younger residents to participate. *Id.* Dr. Rageh also alleged that, according to another physician, Dr. Zhang expressed concerns about his age before his fellowship even started. Relying on *Muldrow*, the court determined that this denial of training constituted harm sufficient for Dr. Rageh's age claim to proceed beyond the motion to dismiss stage. *Id.*

While the court permitted his ADEA claim related to loss of training to proceed, it dismissed his claim that UNC shortened and terminated his fellowship because of his age. *Id.* at 4. Damages will be difficult to establish under the "failure to train" claim alone.

***Grant v. N. Carolina Dep't of Transportation*, No. 5:23-CV-702-D, 2024 WL 2789388 (E.D.N.C. May 30,**

2024)
Ms. Grant alleged that the North Carolina Department of Transportation discriminated against her because of her age, among other claims. Applying *Muldrow*, the court assumed without deciding that Grant plausibly alleged the following adverse employment actions: (1) requiring Grant to miss approved North Carolina Performance Management Process courses on May 2 and May 3, 2023, (2) reducing her job responsibilities, including editing and viewing spreadsheets and handling out-of-state civil summons, (3) receiving poor treatment and additional supervision from Hayworth, (4) being “demoted” to report to other managers, (5) receiving additional assistance with her designated job assignments from three other employees, and (6) undergoing a fitness-for-duty evaluation. *Id.* at *3. The district court granted the NCDOT’s motion to dismiss, regardless of Grant’s ability to demonstrate that she had suffered an adverse employment action, because Grant failed to plausibly allege any evidence adequate to create an inference that NCDOT took the challenged employment decisions because of her age. *Id.* at *4.

V. Fifth Circuit

Harris v. Amazon.com Inc., N.D. Tex. No. 3:22-CV-2279-K-BN, 2024 WL 4958265 (N.D. Tex. Nov. 14, 2024), report and recommendation adopted, N.D. Tex. No. 3:22-CV-2279-K-BN, 2024 WL 4960009 (N.D. Tex. Dec. 3, 2024)

Harris, proceeding *pro se*, alleged that Amazon discriminated against him on the basis of his sex and retaliated against him for making a sex discrimination claim. 2024 WL 4958265 at *1. Amazon successfully moved to dismiss Harris’ complaint, in part arguing that he had not pleaded an adverse employment action, and Harris appealed. *Id.* The Fifth Circuit, sitting *en banc*, vacated the district court’s judgment and remanded to allow the district court to address Amazon’s motion to dismiss not under the “ultimate employment decision” standard for adverse employment action, but instead under the broader reading of Title VII in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) and *Harrison v. Brookhaven Sch. Dist.*, 82 F.4th 427 (5th Cir. 2023). *Id.* Subsequent to remand, the Supreme Court of the United States decided *Muldrow. Id.* at *5.

In considering whether to permit Harris’ claims to proceed, the magistrate judge carefully examined every action Harris claimed to be adverse. *Id.* at *1. Harris alleged that while women at the Amazon facility were assigned to be packers, men were assigned to be packers or tote runners. *Id.* Harris was originally assigned to be a packer, but when he became a tote runner, he was required to move a cart weighing roughly 500 pounds, which he would have to push approximately 1/8 of a mile ten hours per day. *Id.* He alleged that he travelled between 12 and 20 miles per day. *Id.* According to Haris, his managers told him that tote running was “too hard for women.” *Id.* Harris developed injuries as a result of his work as a tote runner. *Id.* at *2.

After stating that the Fifth Circuit had thus far declined to address the precise level of minimum workplace harm necessary to sustain a discrimination claim, the judge discussed in detail *Muldrow* and Fifth Circuit precedent on adverse employment actions. *Id.* at *5. The court found that Harris met the “now-lower bar to allege a discriminatory adverse action,” disagreeing with Amazon’s assessment that all Harris had alleged were de minimis workplace trifles. *Id.* at *6. Amazon’s motion to dismiss was denied as to the discrimination claim, and Harris’ claims were permitted to proceed. *Id.*; *see also Harris v. Amazon.com Inc.*, N.D. Tex. No. 3:22-CV-2279-K-BN, 2024 WL 4960009 (N.D. Tex. Dec. 3, 2024) (adopting the magistrate judge’s report and recommendations).

VI. Sixth Circuit

***Milczak v. Gen. Motors, LLC*, 102 F.4th 772 (6th Cir. 2024).**

The district court, pre-*Muldrow*, found that Milczak’s two reassignments—which did not utilize his skills, required him to manage notoriously difficult employees, denied him the opportunity for overtime, and required him to work later hours by himself—were not adverse actions, because neither rose “to some level of objective intolerability.” 102 F.4th at 787. The Sixth Circuit referenced *Muldrow* in finding that requiring “intolerability” was improper, citing the new standard as “some ‘disadvantageous’ change in an employment term or condition” or “worse off.” *Id.* The court found that ***all*** of the harm alleged by the plaintiff constituted adverse action under *Muldrow*. *Id.* While General Motors voiced concern that this standard would result in too much employer conduct being characterized as adverse employment actions, the Sixth Circuit emphasized that “Milczak must still show that he was transferred *on account of his age*. *Id.* Ultimately, the court found that he was unable to do so. *Id.*

***Ahmed v. Sch. Dist. of City of Hamtramck*, No. 2:22-CV-11127, 2024 WL 4234641 (E.D. Mich. Aug. 26, 2024).**

The *Ahmed* court examined—in the context of a motion to dismiss after denying the plaintiff’s motion to file an amended complaint—whether a school district’s temporarily placing a superintendent on paid administrative leave pending an investigation constitutes an adverse employment action. 2024 WL 4234641 at *6-9. It noted that *Muldrow* overturned Sixth Circuit precedent finding that paid administrative leave was not an adverse employment action, emphasizing that the Supreme Court in *Muldrow* lowered the bar for establishing adverse action. *Id.* at *6.

The court carefully considered whether the paid administrative leave alleged in Ahmed’s complaint could be an adverse action. *Id.* at 7-8. It emphasized that in this instance the plaintiff was not actively at work when she was placed on leave; rather, she was on a medical leave of absence and was not removed from her position. *Id.* at *8. The only thing that plaintiff lost was her ability to do her job, and that loss was only temporary. *Id.* The court reasoned that paid administrative leave was a “carveout” in employment discrimination law, designed to permit employers to investigate claims without fear that the accused will bring a discrimination claims. *Id.* at *9. Ahmed alleged that the school district handed out her paid administrative leave discriminatorily, though. *Id.* at *10. The court found that Ahmed failed to allege that her white male predecessor was a proper comparator, as his circumstances were not sufficiently similar to hers. *Id.* The court dismissed Ahmed’s discrimination claims, stating that, “Plaintiff has failed to allege that she was subject to an adverse employment action, meaning that she does not make a plausible claim that she was discriminated against by the School District.” *Id.*

The *Ahmed* case is on appeal to the Sixth Circuit.

VII. Seventh Circuit

***Brody v. Costco Wholesale Corp.*, No. 23-CV-293-JDP, 2025 WL 278318 (W.D. Wis. Jan. 23, 2025).**

Mr. Brody, who is deaf, worked in Costco stores and applied for several forklift driver positions. Costco offered him one night shift forklift driver position, which he alleged was discriminatory and retaliatory, as non-deaf employees were assigned to day shift and Mr. Brody had recently made a complaint of discrimination against a manager. The court adopted the *Muldrow* standard, stating that “an employer’s conduct qualifies as an adverse action if it causes the employee ‘some injury respecting her employment terms or conditions” that left the employee ‘worse off.’” *Id*. at *5 (quoting *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346, 359 (2024)). The court considered whether Costco’s offering Mr. Brody the night shift position rendered him “worse off,” in the context of Mr. Brody having held other night shift positions with Costco and the position to which he applied including both day and night shifts. The court considered that day and night shift receive the same pay and number of hours, but the night shift has slightly less driving than the day shift. *Id*. at *6. In this fact-intensive scenario, the court found that Mr. Brody’s being awarded the night shift position was insufficient to establish an adverse action under *Muldrow*. *Id*.

VIII. Eighth Circuit

***Florek v. Creighton Univ.*, No. 8:22CV194, 2024 WL 4581466 (D. Neb. Oct. 18, 2024).**

Creighton University argued that Florek failed to make her prima facie case because she failed to show “material adverse consequences,” but the Eighth Circuit confirmed that *Muldrow* abrogated the previous standard in favor of “some harm.” *Id*. at *18-19 (citing *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346, 359 (2024)). For Florek to prove her prima facie case under the ADA, the court stated that she “must show a ‘difference in treatment that injured’ her equal participation in Creighton’s pharmacy program.” *Id*. at *19-20. The court found that a professionalism citation that required Florek to complete a corrective action plan and “generally placed her in a worse position compared to classmates” was adverse action, as well as her ultimate dismissal from the pharmacy program. *Id*.

IX. Ninth Circuit

Xu v. LightSmyth Techs., Inc., 9th Cir. No. 23-35423, 2024 WL 4562748 (9th Cir. Oct. 24, 2024)

The Ninth Circuit remanded a pre-Muldrow district court decision finding that an adverse employment action would have to have a “material” or “tangible” impact. 2024 WL 4562748 at *1. The district court had concluded that defendant’s decision to change her role from Supply Chain Manager to Manufacturing Technician and its providing a negative performance review did not constitute adverse employment actions, because plaintiff did not experience a significant role change and it appeared to the court that the performance review was neither “significantly more negative” than prior reviews nor was it undeserved. *Xu v. Lightsmyth Techs., Inc.*, 2023 IER Cases 179762 (D. Or. May 25, 2023), aff’d in part, vacated in part, remanded, 9th Cir. No. 23-35423, 2024 WL 4562748 (9th Cir. Oct. 24, 2024). Certainly under *Muldrow*, a transfer without a reduction in pay can be an adverse employment action, but the Ninth Circuit’s referencing the negative performance review in its instruction to the district court suggests that a negative performance review—if it harms the employee—can be an adverse action as well.

***Waite v. Honolulu Liquor Comm’n*, D. Haw. No. CV 23-00356 MWJS-RT, 2024 WL 4851600 (D. Haw. Nov. 21, 2024)**

The parties disputed whether two actions could constitute an adverse employment action for purposes of Title VII: (1) Waite’s placement on administrative leave with pay, and (2) his changes in responsibilities upon his return to the office. 2024 WL 4851600 at *4. The district court cited *Muldrow’s* “some harm” standard as being applied by lower courts deciding that administrative leave—even with pay—may be an adverse employment action. *Id.* (citations omitted). Additionally, Waite’s change in responsibilities, and particularly that he was prevented from resuming investigations and assigned tasks such as refueling and washing agency vehicles, were sufficient to plausibly meet the “some harm” standard under *Muldrow. Id.* at *4.

X. Tenth Circuit

***Staton v. DeJoy*, No. 1:23-CV-03223-SBP, 2025 WL 42821 (D. Colo. Jan. 7, 2025).**

In *Staton* the district court applied *Muldrow* to claims arising under the Rehabilitation Act and found Ms. Staton’s well-pleaded, exhausted allegations—being threatened with discipline, “red-flagged,” and generally subjected to heightened scrutiny at work; and being denied requests for inspection of, and assistance with, her mail route—suffice to show, at the pleading stage, a “negative[ ] impact[ ]” on “her work environment” and, thus, “some harm” to the terms and conditions of her employment. 2025 WL 42821 at *8 (citations omitted). The court acknowledged that “some of these claims seem like mere workplace disputes,” but “if they were motivated by discriminatory animus”—and Ms. Staton alleged they were—“they are actionable.” *Id.* (citations omitted); *see also Muldrow*, 601 U.S. at 365 (Kavanaugh, J., concurring in the judgment) (“[T]he text of Title VII does not require a separate showing of some harm. *The discrimination is harm*.”) (emphasis added).

XI. Eleventh Circuit

Pearson v. Kansas Dep’t of Corr., D. Kan. No. 23-2288-DDC, 2024 WL 4948884 (D. Kan. Dec. 3, 2024)

In *Pearson* the plaintiff alleged that the cumulative effect of the defendant’s failure to address her claims of gender harassment compelled her to undertake a self-imposed remedy, her begrudging request to accept another post, to avoid Captain Perez, even to the detriment of losing time with her children. *8. In other words, she argued that her constructive involuntary transfer constituted an adverse employment action. *Id.*

When reviewing the defendant’s motion to dismiss, the district court stated that, if plaintiff could prove that the defendant had forced her to transfer positions, that “might well qualify under *Muldrow* as an adverse employment action.” *8. It reasoned that plaintiff’s new position had less flexible hours and required her to work on some weekends and holidays. *Id.* The court also emphasized that the plaintiff’s burden in establishing constructive discharge is substantial—she must show that the conditions of her employment were objectively intolerable—and that burden was unaffected by *Muldrow*. *Id.*

Given that plaintiff was unable to plausibly allege that the conditions of her employment were objectively intolerable, the court dismissed her claims on that ground. *9. Had she been able to do so, the court indicated that her pleadings as to adverse employment action likely would have met the “some harm” standard under *Muldrow*. *8. In *Davis*, the Eleventh Circuit applied *Muldrow* to retaliation claims arising under Title VII, the ADA, and the Fair Credit Reporting Act (“FCRA”). 2024 WL 3507722 at *4. Specifically, the *Davis* court reasoned that, in order for a plaintiff to proceed with a retaliation claim under an opposition theory, he must allege that he held a reasonable belief that he was opposing conduct made unlawful under the relevant discrimination statute. *Id.* at *2. The district court found that plaintiff could not state a prima facie case of retaliation, because his subjective believe that written reprimands constituted discrimination under the statutes was unreasonable on its face—a showing of discrimination required as “serious and material change in the employees’ terms, conditions, and privileges of employment,” and a written reprimand could not meet that standard. *Id.*

Muldrow was decided by the Supreme Court during the pendency of the appeal in *Davis*. *Id*. at *3. The *Davis* court vacated the district court’s dismissal of Davis’ Title VII, ADA, and FCRA retaliation claims and remanded the case back to the district court, instructing the lower court to “determine, in the first instance, whether Davis has stated a plausible claim under the more lenient *Muldrow* standard.” *Id*. at *3-4.

XII. DC Circuit

***Van Horn v. Del Toro*, No. 23-5169, 2024 WL 4381186 (D.C. Cir. Oct. 3, 2024).**

In granting summary judgment for the defendant, the district court relied on the pre-*Chambers* standard that, in order to demonstrate an adverse employment action, a plaintiff must show objectively tangible harm. *See* 2024 WL 4381186 at * 2 (citing *Chambers v. District of Columbia*, 35 F.4th 870, 873–82 (D.C. Cir. 2022) (*en banc*)). The Circuit Court for the District of Columbia extended the application of *Muldrow* to the federal-sector context, determining that each of the three forced transfers asserted by plaintiff constituted adverse employment actions. 2024 WL 4381186 at *2. The court emphasized that it did not matter, for purposes of the adverse action analysis, that two of the three transfers were never effectuated. *Id.* at *3. Given that this was an alleged constructive discharge case, the court instructed the district court to consider on remand whether the plaintiff could make out her constructive discharge claim based on these adverse employment actions.

Turner v. Buttigieg, D.D.C. No. CV 23-1665 (LLA), 2024 WL 4346332 (D.D.C. Sept. 30, 2024)

Ms. Turner alleged that in August 2022, her supervisor gave her a performance rating of “exceeds expectations,” rather than her usual rating of “outstanding,” due to her race and sex. 2024 WL 4346332 at *7. The district court found that this reduced rating met the lowered threshold for adverse employment actions under *Muldrow*, because it represents a change that negatively impacted her work environment. *Id.* at *8. While the Department of Transportation argued that this was merely a trivial harm, not actionable under Title VII, the court responded that if the DOT lowered Ms. Turner’s evaluation due to discriminatory animus, that would actionable. *Id.* It relayed a hypothetical from *Chambers v. District of Columbia*:

> [I]magine “an employer that provides doughnuts every week for employees but hangs a ‘whites only’ sign over the doughnuts.” 35 F.4th at 878. Being subjected to such a blatantly discriminatory workplace policy (even if the policy is doughnut distribution) is itself a harmful condition of employment. *See id*. To hold otherwise would “frustrate[ ] Title VII’s purpose of ending discrimination in the workplace.” *Id.* [*Turner v. Buttigieg*, WL 4346332, at *8.]

Given that the Department of Transportation failed to allege in its opening brief that Ms. Turner failed to alleged a sufficient causal connection between her protected traits and her lower evaluation rating for purposes of her disparate treatment claims, the court could not address that element of Ms. Turner’s prima facie case. *Id.* It denied the DOT’s motion to dismiss.

Conclusion

The *Muldrow* standard has lowered the threshold for plaintiffs bringing discrimination claims, whether under Title VII, the ADA, the Rehab. Act, FCRA, or the ADEA, such that cases will be less likely to be resolved on a motion to dismiss and employer risk (and legal fees) will increase as a result.

This new standard might prompt employers to pay closer attention to decisions that affect the terms and conditions of an employee’s employment, involving human resources in decisions that previously would have been solely within the decision-making power of supervisors. Given that the *Muldrow* bar for “adverse employment action” is so low, employers could consider whether their resources would be better used preventing—through training—or swiftly remedying the conduct underlying the “causation” element of the prima facie case. For example, it will be more important than ever for managers to be “mandatory reporters” of discriminatory comments, so that employers can perform investigations, more closely monitor the work environment, and consider intervening when proposed action could be construed as discriminatory.

“Some Harm” Carries Many Risks:

Adverse Employment Actions After *Muldrow v. City of St. Louis*

Presented by

Lauren Fisher White

CHRISTIAN & BARTON LLP
ATTORNEYS AT LAW

Outline

- Proving discrimination claims generally;
- The *Muldrow* case;
- The effect of *Muldrow* on employment litigation; and
- Practical steps for risk reduction going forward.

"Discrimination"

To establish a prima facie case of discrimination under Title VII, a plaintiff must demonstrate:

(1) The employee is a member of a protected class,
(2) was qualified for the position,
(3) experienced an **adverse employment action**, and
(4) circumstances support a reasonable inference of discrimination

"Discrimination"

ADA:

(1) The employee has a "Disability,"
(2) is a "Qualified Individual," and
(3) has suffered an **adverse employment action** because of that disability."

ADEA:

(1) The employee is 40 or older,
(2) suffered an **adverse employment action**,
(3) was performing the job at an acceptable level, and
(4) younger employees were treated more favorably.

“Adverse Employment Action”

Under Title VII, it is prohibited for an employer “to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin.”

42 U.S.C. §2000e-2(a)(1).

“Terms, Conditions, or Privileges”

- Shift assignments
- Availability of overtime
- Job assignments
- Availability of WFH
- Standards for grooming
- Other “perks”

What is the threshold for legal harm?

"Terms, Conditions, or Privileges"

"Adverse Employment Action"

"ultimate employment decision"

"substantial"

Harm

relating to the terms, conditions, or privileges of employment

"significant"

"serious"

"tangible"

"material"

"not *de minimis* workplace trifles"

"materially adverse"

"Adverse Employment Action"

- *Chambers v. District of Columbia*, 35 F.4th 870, 872, 876-77 (D.C. Cir. 2022)
  - Overruled precedent requiring "material adversity" or "objectively tangible harm"
- *Hamilton v. Dallas County*, 79 F.4th 494, 501-02 (5th Cir. 2023)
  - Overruled precedent requiring "ultimate employment decision"

Muldrow v. City of St. Louis

- 8th Cir: "materially significant disadvantage"
  - Transfer
    - Rank and pay remained the same
    - Lost take-home vehicle
    - Schedule less regular
- Lower court decision:
  - Not adverse action

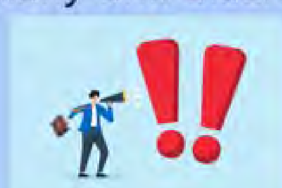
Muldrow v. City of St. Louis

- SCOTUS Holding:
  - "Discriminate against" means treat worse
  - Employee must show "some harm"
- Concurrences:
  - Thomas: "more than trifling" standard
  - Alito: holding will result in confusion
  - Kavanaugh: discrimination is harm

The Aftermath of *Muldrow*

<u>Expanded application</u>

- Not just transfer cases: *every* potential adverse action impacting terms, conditions, or privileges of employment
- Not just Title VI: *many* anti-discrimination laws



The Aftermath of *Muldrow*

- Adverse Actions:
  - Performance and disciplinary documents
  - Paid suspensions (circuit split)
  - Small but meaningful job modifications
- NOT Adverse Action:
  - Admonishments without consequences
  - Insufficient constructive discharge claim

Litigation Strategy

- Focus on causation:
  - Title VII: inference of discrimination?
  - ADA: action taken because of disability?
  - ADEA: disparate treatment of older and younger employees?
- Focus on damages

Risk Reduction

- More HR oversight:
  - Involvement when an employee may be harmed by a job change
- Focus on Prevention:
  - Training: what constitutes “discrimination?”
  - Mandatory reporting
  - Investigations

Equal treatment for all!

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Lauren Fisher White chairs the firm's Labor and Employment practice group and is a partner in its Litigation group. She counsels company owners, human resource executives, and boards of directors on complex employment matters, ranging from executive onboarding and departures to contested terminations and resulting litigation.

Ms. Fisher White serves as a trusted advisor to non-profit, government, and for-profit entities, from startups to publicly traded companies. Her skill in navigating difficult personnel situations with clients, coupled with her thorough understanding of the legal framework underlying such matters, makes her an invaluable resource for the firm's many clients that regularly consult with her. For example, Ms. Fisher White regularly counsels clients on the viability of independent contractor designations or risks associated with disciplinary actions and equips them with language tailored to minimize risk while achieving the desired business result.

Ms. Fisher White brings her extensive employment knowledge to her litigation practice, where she represents clients in state and federal courts. She also regularly engages with members of the firm's corporate group, managing the employment side of business mergers or divestitures, and serves in a consulting capacity with companies seeking to modify their business structure to maintain compliance with the Fair Labor Standards Act or other employment laws. She assists in the investigation of and response to claims of harassment, discrimination and retaliation, and revises employee handbooks to account for updates to Virginia and federal law. Ms. Fisher White is an engaging speaker who provides regular employment law training to managers and supervisors, equipping them with the knowledge necessary to identify and report claims and aiding her clients' defense against future litigation.

Practice Areas
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- Non-Competition and Trade Secrets
- Trials / Appeals / Alternative Dispute Resolution

Representative Matters
- Advised employers on complex issues such as harassment and discrimination claims, leave under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act(FMLA), worker misclassification, and pay equity.
- Counseled clients on the enforceability of restrictive covenants, such as non-competition, non-solicitation, confidentiality, and trade secret clauses, and represented clients in negotiation and litigation involving such covenants.
- Guided employers through COVID-related regulations, including vaccine mandates, exemption requests, and Virginia Department of Labor and Industry audits and whistleblower complaints.
- Provided strategic guidance to clients regarding key employee issues, such as workforce reorganizations and the development of wellness and diversity, equity, and inclusions programs.

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- Washington & Lee University, J.D., 2010 - Cum Laude; Managing Editor, Journal of Civil Rights and Social Justice
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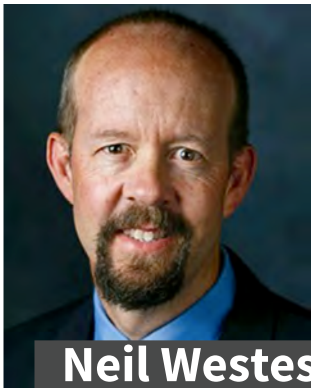

Clean Up Your Act: A Closer Look at Held v. Montana

Neil Westesen
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A Clean and Hhealthful Environment - How Montana Solved Global Warming…. NOT!
Neil Westesen

Engraved on the Montana State Seal are the words "oro y plata." (Silver and Gold) along with a depiction of pick and shovel. Montana became a State in 1889 almost exclusively because it was home to wildly successful gold, silver, and copper mines.

Montana's first Constitution was drafted in 1889 during a convention chaired by one of the original Copper Kings, William Andrews Clark. Clark was famously elected to the United States Senate, but the Senate refused to seat him based on bribery charges. In short, he bought his election. The 1889 Constitution was described as being "like the mansions of this time—massive, rambling, and adorned with gingerbread."

For almost the next 100 years, Montana was dominated by copper mining and the Anaconda Copper Company. The "Company," as it was known, controlled Montana's economy and the State's politics. The Company had its own fleet of newspapers to manage political discourse. It directly or indirectly employed most of the workers in the State. When it threatened to shut down its businesses unless legislation was passed to allow local judges to be substituted, the State legislature immediately convened an emergency session and granted the relief requested. The Company eventually became the 4th largest corporation in the world with interests spread across the globe. Critically, the Company also used the State's air and water as a dumping ground for all the byproducts of natural resource extraction and smelting. By 1972, the Company was struggling. The Berkely Pit, a massive open pit mine that had shallowed whole neighborhoods in Butte, was on its way to becoming a giant Superfund site.

In this 1972 environment, sixty-five percent of Montana voters agreed that the Constitution needed to be completely rewritten. A Constitutional Convention was assembled during a high-water mark for Democrats in the State. It included 58 Democrats, 36 Republicans, and 6 Independents. Nineteen of the 100 delegates were women. Remarkably, all 100 delegates ultimately signed the completely rewritten constitution. The voters of the State then narrowly ratified the new document.

The 1972 Constitution contained 35 separate inalienable rights, many of which reflected the State's unique history. "All political power is vested in and derived from the people." The public has a broad right to know. "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions." There is a right to be left alone. "The right of individual privacy is essential to the well-being of a free society."

The 1972 Constitution reflected both national politics and the unique history of Montana. 1972 saw the first global summit on the environment. The environmental movement was just gaining traction. Public service announcements from Woodsy Owl urging the public to "give a hoot, don't pollute" flooded the airways. In Montana, gold, silver, and copper mining were no longer quite so revered.

Having witnessed the results of a hundred years of mining, the new Constitution also provided an inalienable right "to a clean and healthful environment." An entire Article of the Constitution is devoted to the Environment and Natural Resources. The Constitution declares that "The State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations" and "the legislature shall provide for the administration and enforcement of this duty," including providing "for the protection of the environmental life support system from degradation" and securing "adequate remedies to prevent unreasonable depletion and degradation of natural resources." It is the tension between those rights, evolving state politics, and global climate change that ultimately caused the Montana Supreme Court's landmark decision in *Held v. the State of Montana*. In 2023, *Held* became the first climate change lawsuit in the nation to go to trial, and in

December of 2024, the Montana Supreme Court upheld the Plaintiffs' inalienable right to a "stable climate system." How Montana is going to solve a global problem remains an unanswered question.

On March 13, 2020, a group of 16 youths between the ages of 2 and 18 at the time, sued the State of Montana, the Governor, and multiple state agencies alleging that a diverse array of State actions had contributed to global climate change since the 1960's, and that those actions had harmed them physically and psychologically. They sought injunctive relief "to effectuate reductions in GHG emissions in Montana consistent with the best available science" under the supervision of a court-appointed special master. The Plaintiffs blamed the impact of climate change on two Montana statutory provisions, including a 2011 state law that prohibited state agencies from "including a review of actual or potential impacts beyond Montana's borders" when conducting a review of State action under Montana's Environmental Policy Act. MCA Section 75-1-201(2)(A).

During discovery, the parties conducted thirty-six depositions, exchanged twenty-two expert reports, served over 50,000 pages of documents, and responded to dozens of interrogatories. The Plaintiffs were represented and funded by state and national environmental organizations, including Our Children's Trust.

In pretrial proceedings, the District Court dismissed the request for a court ordered overhaul of Montana's energy system so the only claim that went to trial was whether the statute in question prohibiting consideration of global impacts beyond Montana's borders violated the clean and healthful environment provisions of Montana's Constitution. After a seven-day judge trial conducted from June 12 to June 20, 2023, on August 24, 2023, the District Court issued a 103-page order holding that it was the statute that had caused the Plaintiffs' climate change injuries, concluding that invalidating the statute would redress those injuries, and subsequently declaring the law unconstitutional and enjoining the State from acting in accordance with it.

Most of the District Court's Order was concerned with the science and impacts of global climate change. The Defendants chose not to dispute those impacts. This was not a case where the defense was to deny that climate change was real or to pretend that humans had nothing to do with it. Rather, the defense focused on questions of justiciability, redressability, and standing.

The Defendants argued that "Not every problem posing a threat…can be solved by…judges." *Juliana v. United States*, 947 F.3d 1159, 1174 (9th Cir. 2020). Recognizing this fact, the Montana Constitution vests courts with the important, but limited, power to decide only justiciable cases and controversies. To establish case or controversy standing, a plaintiff in Montana, and in most states, has to prove (1) a past, present or threatened injury to a property or civil right; (2) causation; and (3) redressability. *Brown v. Gianforte*, 488 P.3d 548 (Mont. 2021). No court, and especially no Montana court, possesses jurisdiction to "determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Broad Reach Power, LLC v. Montana Dep't of Pub. Ser. Regul., Pub. Serv. Comm'n*, 520 P.3d 301, (Mont. 2022). In *Held* and in every case the plaintiff has the burden of establishing standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Standing is an essential check on the separation of powers. It requires that courts "respect their 'proper—and properly limited—role…in a democratic society.'" *M.S. v. Brown*, 902 F.3d 1076, 1087 (9th Cir. 2018) (quoting *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

Standing should mean something, and especially in the context of significant social issues like global warming. Were standing a mere formality, "individuals and groups could invoke the authority of a …court to forbid what they dislike for no more reason than they dislike it." *American Legion American Humanist Ass'n*, 139 S.Ct. 2067, 2099 (Gorsuch, J. concurring in judgment.)

The Defendants argued that declaring unconstitutional one narrow provision of the Montana Environmental Policy Act would not alleviate global climate change, and the Plaintiffs had submitted no evidence that it would. Instead, the Plaintiffs presented lots of evidence that they had been psychologically and physically injured by global climate change, but they never proved either causation or redressability linked to the state law in question. The Montana statute did not cause their injuries. Global warming did. And declaring the state law unconstitutional would not redress their injury, much less stop global warming.

Like the National Environmental Policy Act or NEPA, MEPA is a "procedural" statute that does "not require an agency to reach any particular decision in the exercise of its independent authority." *Bitterooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 401 P.3d 712 (Mont. 2017). Despite the fact that MEPA is purely procedural, the District Court concluded that "there is a fairly traceable connection between the State's disregard of GHG emissions and climate change, pursuant to the MEPA Limitation, GHG emissions over which the State has control, climate change impacts, and Plaintiffs' proven injuries."

To be redressable, any plaintiff's injuries must be "of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State by & Through Stapleton*, 434 P.3d 241 (Mont. 2019). Plaintiffs must show "that it is 'likely, as opposed to merely speculative, that [their] injuries will be redressed by a favorable decision.'" *Lujan v. Defs of Wildlife*, 504 U.S. 555, 561 (1992). Here, in discussing the allegations of injury and causation, the District Court blamed Montana for emissions that were not emitted within Montana and that could not be regulated by Montana. For example, the District Court held the State responsible for the combustion of 80 million tons of CO2 that resulted from fossil fuels that were neither extracted from nor burned in Montana, but instead were merely transported through Montana by interstate rail, highway, and pipeline.

In evaluating standing and redressability, the Court was required to do more than recite vague generalities about global warming being a "real" problem. "[R]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into …court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). *See also Aji P. by & through Piper v. State*, 480 P.3d 438, 449 (Wash. App. 2021) (concluding that the "Youths' claims present a political question to be determined by the people and their elected representatives, not the judiciary."). Nevertheless, the District Court never made any findings about how many additional tons of GHG emissions in Montana were actually traceable to the state law in question. Nor did the District Court make any findings about how much those traceable emissions impacted global temperatures. Nor whether the emissions, much less the global temperatures, would be impacted by any type of judicial decision. The Court simply concluded, without any empirical analysis, "[W] hat happens in Montana has a real impact on fossil fuel energy systems, CO2 emissions, and global warming."

The District Court allowed testimony regarding the cumulative CO2 emissions in Montana since 1960, even though the statute in question was not enacted until 2011. As the 9th Circuit recognized in *Juliana*, most of the global GHG emissions about which the Plaintiffs complained have already occurred. "[M]any of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources." *Juliana*, 947 F.3d at 1170. Whether greenhouse gas emissions will decrease in the future depends on the speculative future actions of billions of third parties, not just those few in Montana. Standing should not turn on speculation about "the unfettered choices made by independent actors not before the court." *Lujan*, 504 U.S. at 562 (cleaned up).

Indeed, the District Court based part of its redressability analysis on the judicial conclusion that Montana could feasibly transition to an 80% renewable energy system by 2030 and a 100% renewable system "no later than 2050, but as early as 2035." Undertaking such a transformation would, as the 9th Circuit warned in *Juliana*, require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world." *Juliana*, 947 F.3d at 1171. Nevertheless, the District Court found it within its power to dictate what type of energy system should power the State.

Policymaking through the legislative, rather than the judicial, process is the appropriate vehicle for solving global warming and addressing the Plaintiffs' injuries. "[S]ome questions—even those existential in nature—are the province of the political branches." *Juliana*, 947 F.3d at 1173. Even the Montana Constitution recognizes this important distinction. It divides the "legislative, executive and judicial" powers and bars anyone "charged with the exercise of power properly belonging to one branch" from exercising "any power properly belonging to either of the others." Mont. Const. Article III, Section 1. As the *Juliana* court explained, "The Plaintiffs experts opine that the federal government's leases and subsidies have contributed to global carbon emissions. But they do not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease the growth" or "prevent further injury to plaintiffs." *Juliana*, 947 F3d at 1170-1171.

If the cessation of every federal government climate-impacting activity was not sufficient to redress the plaintiffs' injuries in *Juliana*, declaring one narrow statute in Montana unconstitutional would seem to similarly fail. "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005).

In *Held*, the District Court adopted the approach that "every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries." Doc. 405 at 6. This "every ton matters" approach made the standing conclusion that much simpler. If prohibiting state agencies from even considering GHG emissions in permitting decisions led to even one more ton of GHG being emitted, global warming would be incrementally worse and the Plaintiffs irreparably harmed.

The basic problem Plaintiffs faced with redressability for their alleged injuries caused by GHG emissions is that the phenomenon of global warming is caused by the buildup of GHG gasses in the *global* atmosphere. It is not scientifically possible to tie GHG emissions from any particular permitted activity in Montana to impacts at any specific location and any subsequent injury to any specific plaintiff. As Plaintiffs' expert Dr. Running explained, "It doesn't matter to the atmosphere where it's burned. It can be burned here or it can be burned at the other end of the planet. It all ends up in the atmosphere and is mixed all together in a matter of weeks, so it really doesn't matter where." Trial Transcript 107:2-7. Annual global GHG emissions are on the order of 40 billion tons of CO2. China alone emits around 9 to 10 billion tons of CO2 per year. Even using the inflated total of 166 million tons being somehow tied to Montana, the State's contribution is a fraction of the global total and eliminating it will simply not solve the problem.

The same expert endorsed the idea that you "can't start a fire without a spark." Eliminating GHG emissions in Montana might spur a global movement that would somehow solve the global problem. He was asked, "If the judge ordered that we stop using fossil fuels in Montana, would that get us to the point where these Appellees are no longer being harmed, in your opinion?" His response, "We can't tell in advance because what has been shown in history over and over and over again is when a significant social movement is needed it often is started by one, or two, or three people." Trial Transcript 178:5-17. The theory was that a Montana state district court could be the "shot heard around the world" and therefore redressability was established.

The Plaintiffs injuries were all linked to global climate change, not to the particular Montana statute. For example, "Plaintiffs Olivia and Grace are distressed by feeling forced to consider foregoing a family because they fear the world that their children would grow up in." The District Court concluded that because "every additional ton of GHG emissions exacerbates Plaintiffs' injuries" and that those "injuries will grow increasingly severe and irreversible without science-based actions to address climate change," standing and causation were established.

On appeal, the Plaintiffs described their lawsuit as follows:

> Sixteen Montana children and youth, seeking to protect their fundamental and inalienable rights, brought this case challenging state laws and government conduct that endanger them and undermine their ability to live save, healthy, dignified, and productive lives. At a seven-day trial in June 2023, Plaintiffs proved that Defendants control and perpetuate Montana's fossil-fuel based energy system, which results in dangerous emissions of greenhouse gas ("GHG") pollution, every ton of which is causing and contributing to the worsening climate crisis and preventing climate recovery.

Plaintiffs' Brief at 1. In assessing Montana's Constitution and the interplay with MEPA, the Plaintiffs pointed out that MEPA is the procedural tool that serves to "bring the Montana Constitution's lofty goals into reality…." *Park Cnty. Env't Council v. DEQ*, 2020 MT 303, Paragraph 70. The Plaintiffs had each expressed personal harm caused by global climate change.

> Living through extreme weather events, witnessing the destruction of Montana's environment and natural ecosystems, preparing to evacuate their homes, being forced to seek refuge indoors to avoid smoke-filled skies, and losing cultural and familial traditions and practices are traumatic for Rikki, Lander, Badge, Sariel, Georgi, Grace, Olivia, Clair, and Mica, and cause them to experience feelings of despair, depression, and stress, making it hard to sleep at times.

Plaintiffs' Brief at 20. Given these injuries, "every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries." Plaintiffs' Brief at 20. The Plaintiffs then focused on the fact that state agencies "issue air quality permits for facilities that burn fossil fuels and emit GHG emissions, including coal and gas-fired power plants, and oil and gas refineries. Defendants permit coal, oil and gas mining and extraction on state, private and federal land. Defendants also certify and approve pipelines to transport oil and gas." Plaintiffs' Brief at 25. All of these actions eventually lead to GHG emissions and hence contribute to global warming and the Plaintiffs' injuries.

By prohibiting state agencies from even considering GHG emissions when reviewing permitting decisions, the legislature had deprived the Plaintiffs of their constitutional rights. As the Montana Supreme Court previously explained:

> The Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought. MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby

> minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.

Park County at Paragraph 70. Montana's emissions are not insignificant. Its 166 million tons of CO2 emissions are comparable to Argentina (47 million residents), the Netherlands (18 million residents) or Pakistan (248 million residents.) The District Court found that Montana is responsible for 70 million tons of CO2 emissions annually from fossil fuels that the State has authorized extraction of even if burned elsewhere, which is more than many countries including Brazil, Japan, Mexico, Spain, or the United Kingdom. Even considering only the fossil fuels burned in Montana, the State is responsible for 32 million tons of CO2 emissions every year, which is more than the emissions of half the countries in the world. Plaintiffs' Brief at 35.

The Plaintiffs argued that standing and redressability could be established with a simple likelihood that the court could provide meaningful relief of *some* kind. *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). A plaintiff "need not show that a favorable decision will relieve his *every* injury, *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982), but only that it "would at least partially redress" the harm. Plaintiffs' Brief at 41. The remedy need not be curing climate change. It just had to be some consideration of GHG emissions when evaluating permitting decisions. As "the strongest environmental protection provision found in any state constitution," Montana's constitutional environmental protections are "both anticipatory and preventative" and do "not require that dead fish float on the surface of our state's rivers and streams before the Constitution's farsighted environmental protections can be invoked." *Park County*, citing *MEIC*. Plaintiffs' Brief at 61. As the Montana Supreme Court stated in *Park County*, the unambiguous text of the Constitution seeks "to ensure that Montanan's inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books." *Park County* at Para. 62.

On December 18, 2024, retiring Chief Justice Mike McGrath issued a decision on behalf of the Montana Supreme Court affirming the District Court and finding that the statute prohibiting consideration of greenhouse gases beyond the State's borders was unconstitutional. Justice McGrath began by recounting the undisputed fact of climate change.

> The world is experiencing a fast rise in temperature that is unprecedented in the geologic record, with the average global temperature increasing by 2.2 degrees F in the last 120 years. Montana is heating faster than the global average and the rate of warming is increasing. Overwhelming scientific evidence and consensus shows that this warming is the direct result of greenhouse gas (GHG) emissions that trap heat from the sun in the atmosphere, primarily from carbon dioxide (CO2) released from human extraction and burning of fossil fuels such as coal, oil, and natural gas.

Opinion at Para. 3. The Supreme Court then focused on the unique provisions in Montana's Constitution.

> We have held that the right to a clean and healthful environment is a fundamental constitutional right under the Montana Constitution. (citations omitted). Thus, a statute that implicates the right to a clean and healthful environment must be strictly scrutinized and will only be upheld if the State establishes a compelling state interest which is narrowly tailored and is the least onerous path to achieve the State's objective.

Opinion at Para. 17. The Court reviewed the 1972 Constitutional Convention and the origins of the "clean and healthful environment" language. Quoting Delegate McNeil, the Court found:

> Subsection (3) mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life support system" is *all encompassing, including but not limited to air, water, and land*; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it *cannot be degraded*.

Opinion at Para. 23 (emphasis in original). The delegates wanted an environment that was better than survivable. "If all we have is a survivable environment, then we've lost the battle. We have nothing left of importance." The framers intended to adopt "[T]he strongest constitutional environmental section of any existing state constitution." Opinion at Para. 24. The framers put the language in both the preamble and in the text to "recognize that this [right] is, for the time in which we're living and for the foreseeable future, one of the inalienable rights that we hope to assure for our posterity." Id.

> The Supreme Court then focused on how climate change was impacting Montana.

> Plaintiffs showed that climate change *does* impact the clear, unpolluted air of the Bob Marshall wilderness; it *does* impact the availability of clear water and clear air in the Bull Mountains; and it *does* exacerbate the

> wildfire stench in Missoula, along with the rest of the State. The District Court made extensive, undisputed findings of fact that GHG emissions are drastically altering and degrading Montana's climate, rivers, lakes, groundwater, atmospheric waters, forests, glaciers, fish, wildlife, air quality, and ecosystem.

Opinion at Para. 29 (emphasis in original).

Ultimately the Court concluded that the framers of the Montana Constitution would have never sanctioned an approach that prohibited consideration of GHG emissions.

> We reject the argument that the delegates—intending the strongest, all-encompassing environmental protections in the nation, both anticipatory and preventative, for present and future generations—would grant the State a free pass to pollute the Montana environment just because the rest of the world insisted on doing so. The District Court's conclusion of law is affirmed: Montana's right to a clean and healthful environment and environmental life support system includes a stable climate system, which is clearly within the object and true principles of the Framers inclusion of the right to a clean and healthful environment.

Opinion at Para. 30. The Supreme Court never answered *how* Montana is to solve a global problem, but purposefully ignoring the problem is simply not allowed.

The Court then turned to standing and concluded that while alleging generally or in the abstract that a statute is unconstitutional is not sufficient to confer standing, alleging that a particular statute violates a particular plaintiff's constitutional rights will suffice. Opinion at Para. 33. The Court concluded that climate change is causing harm, "assuring [Plaintiffs] and future Montanans a 'harmful' rather than a 'healthful' environment as guaranteed by the Constitution." Opinion at Para. 36. When the State refuses to consider climate change in permitting decisions, it impacts the Plaintiffs' constitutional right to a clean and healthful environment.

Faced with redressability problems, the Supreme Court refused to do nothing in the face of climate change.

> The State repeatedly tries to redirect our focus to *global* climate change and the staggering magnitude of the issue confronting the world in addressing it. The State argues that it should not have to address its affirmative duty to a clean and healthful environment because even if Montana addresses its contribution to climate change, it will still be a problem if the rest of the world has not reduced its emissions. This is akin to the old ad populum fallacy: "If everyone else jumped off a bridge, would you do it too?" Plaintiffs may enforce their constitutional right to a clean and healthful environment against the State, which owes them that affirmative duty, without requiring everyone else to stop jumping off bridges, or adding fuel to the fire. Otherwise, the right to a clean and healthful environment is meaningless.

Opinion at Para. 49 (citations omitted). The fact that the world keeps "jumping off bridges," and adding "fuel to the fire," making anything done in Montana irrelevant to solving the actual problem that created the injury, apparently did not trouble the Court. The Court concluded that even though it could not redress climate change, it could redress the constitutional injury posed by having a constitutional right on the one hand and a statute requiring that the right be ignored on the other.

> It may be true that the MEPA Limitation is only a small contributor to climate change generally, and that declaring it unconstitutional will do little to reverse climate change. But our focus here, as with Plaintiffs' injuries and causation, is not on redressing climate change, but on redressing their constitutional injuries: whether the MEPA Limitation unconstitutionally infringes on Plaintiffs' right to a clean and healthful environment.

Opinion at Para. 51.

> Plaintiffs allege that the MEPA Limitation causes a violation of their constitutional rights, which is their injury. Declaring *that* law unconstitutional and enjoining the State from acting in accordance with it will effectively alleviate *that* constitutional injury—that the State is acting in opposition to its affirmative constitutional duty through the MEPA Limitation—even if other statutes not at issue here also cause constitutional injuries.

Opinion at Para. 52 (emphasis in original).

The existence of the statute alone causes injury. Invalidating the statute cures that injury, even if the actual global warming caused harm complained of is unaffected. The Montana Supreme Court ultimately threw out the statute.

> The MEPA Limitation thus violates those environmental rights guaranteed by Article II, Section 3, and Article IX, Section 1, of the Montana Constitution. The District Court is affirmed: section 75-1-201(2)(a), MCA, is unconstitutional and the State is permanently enjoined

> from acting in accordance with it. We decide only that the Constitution does not permit the Legislature to prohibit environmental reviews from evaluating GHG emissions. Other issues will be discussed in the context of specific permitting cases.

Opinion at Para. 68. The dissent would have left this issue for the legislature and the court of public opinion rather than the judiciary.

> The overly simplistic focus of Plaintiffs and the Majority of this Court on the undisputed and indisputable fact that global warming "is harming Montana's environmental life support system now and with increasing severity for the foreseeable future" is no more than a political and public policy statement of the obvious. As such, it further serves as a smokescreen diverting attention away from those inconvenient facts of record and the other similarly indisputable fact: accelerated global warming caused by fossil fuel burning and other human sources of greenhouse gases is a highly complex global problem, any solution or meaningful mitigation to or of which lies exclusively in the domain of federal and international public policy choices and cooperation, rather than in a flashy headline-grabbing rights-based legal case in Montana.

Dissent at Para. 77. The case has drawn attention around the world, generated numerous headlines, and spawned several law review articles, but it has done nothing to solve the problem that caused the injuries of which the Plaintiffs originally complained.

Conclusion

Since the decision, the Montana Department of Environmental Quality has been trying to figure out what the case means. They now must consider GHG emissions as part of their MEPA review. How they will do so, and what factors they must consider, will be the subject of rulemaking, trial and error, and subsequent litigation. The Republican dominated 2025 legislature is currently in session and contemplating all types of "MEPA fixes." Various groups have called for a constitutional amendment to eliminate the "clean and healthful environment" inalienable right altogether. Unfortunately, for project developers in the State, it means more delay and more expense. And for environmental litigators, it inevitably means more work.

"A CLEAN AND HEALTHFUL ENVIRONMENT" – HOW MONTANA SOLVED GLOBAL WARMING….NOT.

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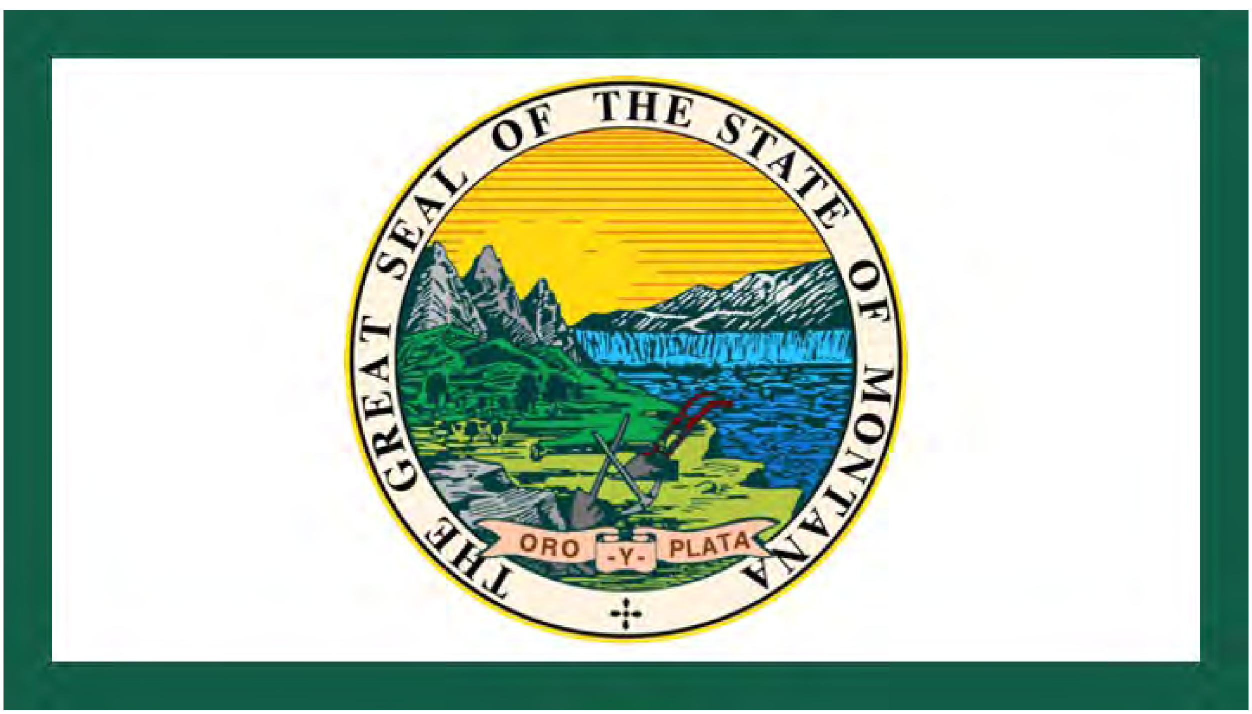


ORO y PLATA

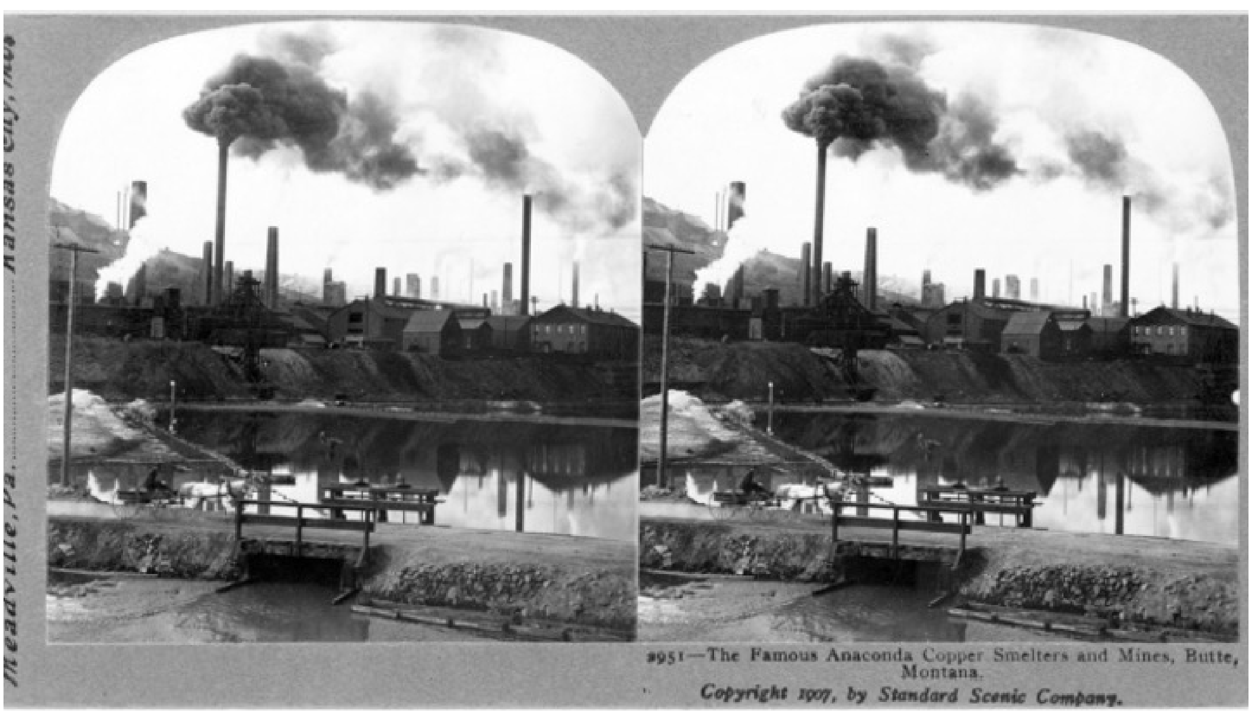
- State seal of the State of Montana.
- “Gold and Silver.”
- Pick and a shovel.
- Montana became a state in 1889.
- Built on natural resource extraction.

1889 Constitution

- Drafted by the Copper Kings who ran the State.
- 1889 Constitution was long and complicated.
- “Like the mansions of this time—massive, rambling, and adorned with gingerbread.”

Copper Industry runs the State

- Montana leads the nation in copper extraction.
- Butte becomes the “richest hill on earth.”
- The Anaconda Copper Company becomes the 4th largest corporation in the world.
- The “Company” builds its own smelter, its own class 1 railroad, and the tallest smokestack in the country, and dumps everything into the air and the rivers of the State.



Fast Forward 100 years to 1972

- Montana is a different place.
- The “Company” is losing power.
- The Environmental Movement is gaining momentum.
- There are more democrats in the State legislature than ever before or ever since.
- The United Nations Conference on the Environment is convened.


GET INVOLVED NOW. POLLUTION HURTS ALL OF US.
You can help by becoming a community volunteer. Write:
Keep America Beautiful, Inc.
99 Park Avenue, New York, New York 10016
Ad Council
People start pollution.
People can stop it.


Democratic National Convention

1972 Constitutional Convention

- High water mark for Democrats in Montana.
- 100 Delegates—58 Democrats, 36 Republicans, 6 Independents.
- 19 of the 100 were women.
- No Native Americans despite Montana having 9 Indian Reservations and tribal members making up 10% of the State's population.

1972 Constitution

- Completely new document.
- 35 “inalienable” rights.
- “All political power is vested in and derived from the people.”
- There is a right to be left alone.
- “The right of individual privacy is essential to the well-being of a free society.”

"A Clean and Healthful Environment"

- "The State and each person shall maintain and improve a **clean and healthful environment in Montana for present and future generations**."
- The "legislature shall provide for the administration and enforcement of this duty" including providing "for the protection of **the environmental life support system from degradation**" and securing "adequate remedies to **prevent unreasonable depletion and degradation of natural resources**."

Powerful Language

- "Strongest constitutional environmental section of any existing state constitution."
- "all encompassing, including but not limited to air, water, and land."
- "This right is, for the time in which we're living, and for the foreseeable future, of the inalienable rights that we hope to assure for our posterity."

Held v. State of Montana

- Tension between this Constitutional right, changing State politics, and global climate change lead to groundbreaking litigation.
- On March 13, 2020, 16 youths between 2 and 18 file suit against the State, the Governor, and multiple State agencies.
- State action has caused global climate change.
- Plaintiffs sought injunctive relief to protect their constitutional rights.

Constitution in Action

- Montana Environmental Policy Act (MEPA), like the National Environmental Policy Act (NEPA).
- Constitutional protections "do not require that dead fish float on the surface of our state's rivers and streams before the Constitution's farsighted environmental protections can be invoked."

2011 "MEPA Limitation."

- Legislature prohibited state agencies from "including a review of actual or potential impacts beyond Montana's borders."
- We don't want you even thinking about global warming when making Montana decisions.

Held litigation

- Lawsuit was funded by global environmental organizations.
- One of the first climate change lawsuits to survive a motion to dismiss.
- 36 depositions taken, 22 expert reports exchanged, 50,000 pages of documents produced, extensive written discovery.
- Went to trial in June of 2023.
- First climate change case to go to trial in the country.

Plaintiffs' injuries were all globally caused

- "Living through extreme weather events… being forced to seek refuge indoors to avoid smoke-filled skies, and losing cultural and familial traditions and practices, are traumatic for Rikki, Lander, Badge, Sariel, Georgi, Grace, Olivia, Clair, and Mica and causes them to experience feelings of despair, depression, and stress, making it hard to sleep at times."

State action causes harm

- State agencies “issue air quality permits for facilities that burn fossil fuels and emit GHG emissions, including coal and gas-fired power plants, and oil and gas refineries. Defendants permit coal, oil and gas mining and extraction on state, private and federal lands.”
- These actions all lead to emissions and hence to global warming and hence to causing the Plaintiffs’ injuries.

Global cause, local impact.

- Defendants did not deny that climate change was real.
- Focused on **justiciability, redressability, and standing**.
- “Not every problem posing a threat…can be solved by…judges.”
- Redressability requires that the plaintiffs’ injuries be “of a type that available legal relief can effectively alleviate, remedy, or prevent.”
- “[S]ome questions, even those existential in nature—are the province of the political branches.”

Montana's emissions are significant

- Montana is responsible for 166 million tons of GHG per year. 1 million people.
- Comparable to Argentina with 47 million people, Netherlands with 18 million people, or Pakistan with 248 million people.
- Responsible for 70 million tons per year that are extracted in Montana but burned elsewhere.
- More GHG emissions than Brazil, Japan, Mexico, Spain, or the United Kingdom.

Every ton matters

- District court concluded that "every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries."
- If every ton matters to a clean and healthful environment, forbidding consideration of the global impacts of state emissions must be unconstitutional.
- But climate change is a global problem.
- How can the injuries it causes be solved in Montana?

It's called "global" warming for a reason

- "It doesn't matter to the atmosphere where it's burned. It can be burned here or it can be burned at the other end of the planet. It all ends up in the atmosphere and is mixed together in a matter of weeks, so it really doesn't matter where." Plaintiffs' expert Dr. Running.
- **40 billion tons** of GHG are emitted annually. China alone emits **9 to 10 billion tons**.
- Montana's **166 million tons** is a drop in a very large bucket.

Not redressable

- Completely stopping all emissions in Montana would not be noticeable.
- Plaintiffs' injuries would not change.
- How does declaring one statute unconstitutional fix the problem?
- "When a significant social movement is needed, it often is started by one, two, or three people."

Montana Supreme Court Affirms

- On December 18, 2024, retiring Montana Supreme Court Justice Mike McGrath issued the majority decision.
- Prohibiting the consideration of the global impacts of Montana emissions violates the constitutional right to a clean and healthful environment.
- Global warming is impacting Montana.
- Skips over redressability. Skips over justiciability.

Ignoring the problem won't solve it.

- "This is akin to the old ad populum fallacy: 'If everyone else jumped off a bridge, would you do it too?' **Plaintiffs may enforce their constitutional right to a clean and healthful environment against the State, which owes them that affirmative duty, without requiring everyone to stop jumping off bridges, or adding fuel to the fire. Otherwise, the right to a clean and healthful environment is meaningless**."

Part of the injury is addressed

- "Plaintiffs allege that the MEPA Limitation causes a violation of their constitutional rights, which is their injury. Declaring *that* law unconstitutional and enjoining the State from acting in accordance with it will effectively alleviate *that* constitutional injury—that the State is acting in opposition to its affirmative constitutional duty through the MEPA Limitation."

Dissent got it right

- "[A]ccelerated global warming caused by fossil fuel burning and other human sources of greenhouse gases is a highly complex global problem, any solution or meaningful mitigation to or of which lies exclusively in the domain of federal and international public policy choices and cooperation, rather than in a flashy headline-grabbing rights-based legal case in Montana."

Global warming continues

- Earth keeps getting warmer.
- The impacts of global climate change continue.
- *The Held* decision got lots of press, lots of national and international attention, and caused lots of confusion.
- The real injury complained of remains.

"MEPA Fix"

- Republican dominated legislature is currently in session.
- Delete MEPA.
- Explain how GHG's will or won't be considered.
- Amend the Constitution to delete right to a clean and healthful environment.

Conclusion

- If "every ton" violates a constitutional right, the State will shut down, but the problem will still not be solved.
- The injuries caused by global warming will continue unabated.
- Litigating what can be considered, what can be ignored, and what difference it makes, will take years, and the process will keep lots lawyers very, very busy.

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

Neil has litigated cases for 30 years. In addition, he co-chaired the Rocky Mountain Law Foundation Special Institute on Natural Resources Development on Indian Land in 2006 and spoke on tribal jurisdiction at the RMMLF Special Institute in 2011. He again co-chaired the RMMLF Indian Law Special Institute in September of 2017 and was the Public Lands Section chair for the RMMLF 2017 Annual Institute. He is co-chairing the Foundations Natural Resources and Energy Litigation special institute in 2022. Over the years, he has spoken to various meetings of attorneys and industry professionals on environmental law, construction law, and Indian law, including the RMMLF, the State Bar of Montana, the American Institute of Architects, the CNA Annual Meeting of Invited Attorneys, the AEMA, and at the University of Vermont. He has appeared in numerous cases heard before the Montana Supreme Court, as well as federal courts in Montana, the 9th Circuit, the D.C. Circuit Court of Appeals, and the U. S. Supreme Court.

Practice Areas
- Commercial Litigation
- Construction Law
- Mining – Hard Rock, Coal and Industrial Mineralsn

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

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

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

The Heat Is On: Best Practices in Crisis Response

Vito Gagliardi
Porzio Bromberg & Newman (Morristown, NJ)

Crisis Management: Proactive and Reactive Strategies
Vito A. Gagliardi, Jr.

Most crises arise unexpectedly, posing significant risks to organizations and their stakeholders. Effective crisis management is crucial to mitigate risk and ensure business continuity. Crises, whether natural disasters, cyber-attacks, personnel issues, or litigation, can have profound impacts on an organization. This article outlines the scope of what an attorney can and should do in a crisis, and highlights essential proactive and reactive steps that organizations can implement to manage a crisis effectively.

The Role of an Attorney in a Crisis
Attorneys plays a crucial role in crisis management. During a crisis, legal issues often arise that require immediate attention and expertise. Attorneys can help navigate the legal complexities of a crisis, ensuring that an organization's actions are legally sound and that potential legal risks are mitigated. Attorneys not only provide essential guidance on regulatory compliance, liability issues, and contractual obligations, but can also serve as the spokesperson for an organization during a crisis. Unlike other organization representatives, however, attorneys are bound by certain ethical obligations.

When dealing with a crisis, attorneys should remember to maintain open and consistent communication with their client. *R.P.C.* 1.4. Communicating often with clients during a crisis will help the organization to effectively manage the crisis and avoid any potential ethical complications along the way.

When representing a client through a crisis, attorneys also should remember that

> [a] lawyer . . . shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a *substantial likelihood of materially prejudicing an adjudicating proceeding in the matter*.
>
> *R.P.C.* 3.6 (emphasis added).

The pitfalls of press conferences and extrajudicial statements were examined in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In *Gentile*, a defense attorney held a press conference to and said that his client, who was indicted for stealing drugs and traveler's checks from a safe deposit vault, was innocent and a "scapegoat" for police. Gentile, however, made these statements six months before trial. The jury ultimately acquitted Gentile's client. Gentile, however, was charged with violating ethics rules by making extrajudicial statements that prejudiced the jury.

An organization's attorney can often be the best spokesperson for the organization in times of crisis. The organization and its attorney, however, should be aware of the pitfalls of public disclosures, especially during litigation, and weigh the possibility of sanctions against the benefits of making a public statement. Maintaining consistent and clear communication pathways will help to avoid any additional crises between an organization and their attorney.

Proactive Measures: Preparing in Advance of a Crisis
Organizations can take four simple proactive measure to be better prepared for a crisis: (1) conduct a risk assessment and develop a risk management plan; (2) establish a crisis management team; (3) develop a crisis communication plan; and (4) prepare a business continuity plan.

Preparing for a crisis starts with conducting a basic risk assessment. By conducting a risk assessment, organizations can begin to prioritize their risk management efforts properly. A risk assessment informs the development of a simple risk management plan. Risk management plans document and categorize potential risks, and assesses the likelihood and impact of those risks. The risk management plan can then be used to establish basic protocols for risk mitigation. Risk management protocols identify and address potential issues like single points of failure, natural disaster hazards, compliance issues, and cybersecurity threats. Organizations should regularly review and update their risk management plans to adapt to changes in the business environment and address any emerging threats.

Forming a crisis management team, even if it is small, is the next critical step in preparing for a crisis. A crisis management team can include, for example, the business owner and key employees who are familiar with different aspects of the business. The main things to focus on when establishing a crisis management team are: picking individuals with suitable temperaments and skills, and selecting strong leaders. Each member of a crisis management team should have a clearly defined role and receive basic training through realistic exercises. Regular discussions and simple simulations can help ensure the team is prepared to act swiftly and effectively during a crisis.

Next, developing a formalized crisis communication plan is crucial. The purpose of a crisis communication plan, above all else, is to manage information, reduce confusion, and ensure that all necessary parties stay informed during a crisis. The plan should address who is a part of the crisis communication team, formalize key messaging and communication materials, and establish communication channels for internal and external stakeholders, including employees, customers, and suppliers. Crucial to a successful crisis communication plan is designating a spokesperson. The spokesperson must ensure that communication is consistent and authoritative. Templates of press releases, internal memos, and social media posts -- prepared in advance -- can help ensure consistent and transparent communication during a crisis.

Finally, business continuity planning is a key component of proactive crisis management. A basic business continuity plan ("BCP") should identify critical business functions and processes, and establish recovery strategies and backup systems. The BCP should also include simple procedures for maintaining operations during a crisis, such as relocating to an alternate site, using backup systems, and prioritizing essential functions.

Reactive Measures: Responding After a Crisis

In the immediate aftermath of a crisis, organizations should activate their crisis management team and follow any pre-established crisis management plan. The crisis management team's goal will be to assess the situation quickly, gather relevant information, and make decisions based on the information available. Transparent communication is essential during this phase. Organizations must provide timely and accurate information to stakeholders, using multiple communication channels, to reach all affected parties. Clear and consistent communication during a crisis builds and maintains trust, and helps to prevent the spread of misinformation.

One unfortunate possibility of a crisis is the involvement of fatalities and injuries. Organizations of every size should develop a plan to identify and communicate with next of kin, when appropriate. There is always the possibility that the list of injured and deceased may be leaked to the press. Well-developed, sensitive communication should be prepared in advance of a crisis to address this possibility with care.

Social media will play a significant role in crisis management. Organizations should consider whether they monitor social media or have a social media policy in place. While social media can create a crisis, it is also an effective tool to help manage a crisis. Social media monitoring and regular engagement can help manage public perception and provide timely updates, which will aid in any organization's management of a crisis.

Once a crisis is over, recovery efforts should begin with a thorough assessment of the impact of the crisis on operations. This assessment includes evaluating the extent of any physical and reputational damage, disruptions to business processes, and the financial implications of the crisis. Identifying areas requiring immediate attention and resources allows organizations to appropriately prioritize and focus their recovery efforts.

Finally, a post-crisis evaluation is necessary for continuous improvement. Conducting a post-crisis review, or "hot-wash," is necessary to analyze the effectiveness of any crisis response, and make improvements for the future. A post-crisis review generally includes gathering feedback from the crisis management team, employees, and other stakeholders, and identifying strengths and areas for improvement. The feedback gathered should be used to incorporate new strategies and best practices and inform updates to the organization's business continuity plans. The last step in the post-crisis review should be to identify any loose ends with the media, and flag any updates needed to the organization's digital accounts and social media feeds. These actions will help an organization to move forward, and ensure that a crisis does not "linger," and mistakes are not repeated.

Conclusion

Effective crisis management requires a proactive approach to prepare for potential threats and a reactive strategy to address crises when they occur. By implementing the measures outlined in this article, organizations can enhance their resilience, protect their reputation, and ensure a swift recovery from any crisis. Continuous improvement and regular updates to crisis management and business continuity plans -- especially after they have been pressure-tested by a real crisis -- are essential for maintaining preparedness.

PORZIO
Bromberg & Newman

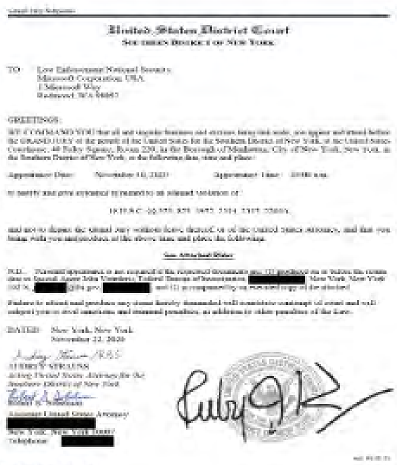
The Heat Is On: Best Practices in Crisis Response

Vito A. Gagliardi, Jr.
Principal

When is a Situation an Emergency?

- Qui Tam Complaint
  - Civil Investigation
  - Criminal Investigation
- Product Malfunction/Adulteration
  - Regulatory Agency Action
  - Class Action/Mass Tort
  - Congressional Hearings
- Social Media/Bad Press
  - Ex-Employee Complaints
  - Customer Complaints

Government Investigations


United States District Court
SOUTHERN DISTRICT OF NEW YORK

TO: Microsoft Corporation, USA

GREETINGS:

[redacted]

DATED: New York, New York
November 22, 2020

[redacted]

Telephone: [redacted]

PORZIO
Bromberg & Newman

Product Malfunction/Adulteration

1982 Tylenol
Adulteration
Chicago, IL

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Attorneys Provide:

- Legal guidance
- Strategic thinking
- Communication skills

PORZIO
Bromberg & Newman

Dr. Thomas Tramaglini

PORZIO
Bromberg & Newman

Proactive Preparation:

- Conduct a risk assessment and develop a risk management plan
- Establish a crisis management team
- Develop a crisis communication plan
- Prepare a business continuity plan

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Dr. Thomas Tramaglini

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The "hot wash" – post-crisis review to collect feedback and establish "lessons learned"
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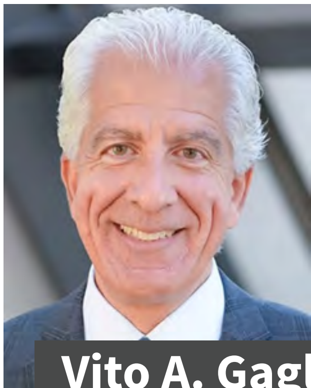

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Vito A. Gagliardi, Jr. is the Managing Principal of Porzio, Bromberg & Newman, P.C., and the President and CEO of Porzio Compliance Services (PorzioCS) and Porzio Governmental Affairs (PGA). Beyond his roles, Vito co-chairs the firm's Litigation Practice Group, and its Education and Employment Team. Certified as a Civil Trial Attorney by the Supreme Court of New Jersey Board on Trial Certification and a distinguished fellow in the American College of Trial Lawyers, Vito has left an indelible mark by arguing precedent-setting cases before the New Jersey Supreme Court. Vito's exceptional talent for simplifying complex facts and evidence to judges and juries sets him apart, with a remarkable track record of successful dispute resolutions through trial or negotiation. Widely renowned for his astute counsel, Vito's vast experience extends to boards of education, colleges, universities, APSSDs, charter schools, and businesses ranging in size from Fortune 100 companies to small, privately held entities. His influence expands to the Employment and Labor sector, where he is recognized for his strategic counsel in state and federal courts and key agencies. Vito's reputation as a trusted advisor and litigator reflects his unwavering dedication to achieving favorable outcomes for his clients.

Practice Areas
- Education Law
- Employment and Labor
- Litigation

Areas of Focus
- Disability Accommodations & Leaves of Absence
- Discrimination, Harassment and Retaliation
- Employment Counseling
- HR Training & Policy Development
- Professional Development Training Program
- Reductions in Force
- Restrictive Covenants
- Wage and Hour

Recognition
- NJBIZ - Leaders in Law, Employment: Labor, Litigation, ERISA (2025)
- NJBIZ - Law Power 50 (2022-2024)
- Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
- Chambers USA - America's Leading Lawyers – Labor & Employment (2017-2022)
- New Jersey Super Lawyers® (2005-2024)
- The Best Lawyers in America® – Education Law (2012-2025); Litigation - Labor & Employment (2013-2025)
- New Jersey State Association of Chiefs of Police - Chief George C. Tenney Award (2016)

Education
- Washington and Lee University School of Law - J.D., 1989; cum laude
- University of Notre Dame - B.A., 1986

Panel - Tales from the Crypt: Effectively Using Jury Research to Bolster Your Case

Jake Lantry
Campbell Conroy & O'Neil (Boston, MA)

Tales from the Crypt: Effectively Using Jury Research to Bolster Your Case
Jacob J. Lantry

Understanding how a jury is likely to perceive and react to your case, client, and witnesses, is critical to developing your trial strategy and giving your client the best chance for a favorable verdict. One of the most effective ways of understanding how the potential jury pool is likely to react to the themes or arguments you have advanced, or are considering advancing, is to conduct jury research.

"Jury research" is a phrase that broadly encompasses several different mechanisms for gauging juror attitudes on various issues. This information can be gathered through survey responses after participants read a description of the case; focus group discussions following in-person case presentations from both the plaintiff and defendant; mock trials, in which jurors observe actual witness examinations; or some combination of each of these. Which method is appropriate will depend on numerous case- or client-specific factors, including the nature of the information sought, case complexity, nature of exposure, and budget.

Exploring this topic was inspired in part by my own experience as a juror in a first-degree murder trial in December of 2024.[1] Participating in deliberations over the course of two days, after absorbing the evidence with my fellow jurors over eight full trial days, gave me a unique perspective on how jurors process and consider the evidence—including how and by whom it was offered—in their deliberations. I was genuinely surprised at the certainty with which jurors attempted to articulate why certain pieces of information were missing, and the equal amount of certainty with which they filled in those gaps for their fellow jurors. While I am confident that the rank speculation to which my fellow jurors resorted did not change what the verdict otherwise would have been, it also made me confident that there are cases in which a jury could perseverate and speculate on an ambiguous, unexplained, or missing piece of information in a way that could be the difference between one side winning or losing.

Given the amount of time, effort, and thought we all put into our cases, we run the risk of developing tunnel vision about the strength of our case, the valuation of the case, or the clarity of the facts. As one treatise puts it, "[m]any times we have heard a lawyer say that a fact, question or conjecture is 'not relevant.' The lawyer does not get to decide what is relevant in a jury trial. The jurors pick and choose based on their own life context."[2] Utilizing jury research in an effective way can help ensure we are evaluating our cases objectively and developing and preparing them in a way that best positions our clients and cases for favorable verdicts at trial.

Quantitative vs. Qualitative Jury Research

Jury research typically is categorized as either quantitative or qualitative. Quantitative jury research primarily concerns the results of surveys or other individualized assessments of juror attitudes that can be analyzed mathematically, while qualitative jury research largely relates to the analysis of focus group discussions or mock jury deliberations.

Surprisingly, there is substantially more peer-reviewed literature devoted to individual juror behavior than there is of the collective jury deliberation process.[3] While understanding what motivates and informs an individual juror, or how an individual juror interprets a set of facts or values a particular case is often helpful, it does not account for how the deliberative process impacts the collective decision a jury is asked to make.

My own recent experience underscored this phenomenon. For eight days, each juror had silently heard the evidence and made judgments about what it showed and what the

1 State of Minnesota v. Delaquay Levius Williams, Case No. 62-CR-22-1473.

2 Litigating Tort Cases, § 36:7, Uses and purposes of focus groups in litigation—Organizing discovery; see also id. ("An attorney's complete immersion into the case details can blind her as to the juror perspective.").

3 See, e.g., Brian H. Bornstein, Amy J. Kleynhans, The Evolution of Jury Research Methods: From Hugo Münsterberg to the Modern Age, 96 Denv. L. Rev. 813, 814 (2019) ("This neglect of actual jury behavior, in the majority of what passes as jury research, persists despite frequent calls from within the research community for greater attention to the deliberation component of the process.").

outcome should be; polling each of us individually before deliberations would have shown a different outcome than what we arrived at. Throughout the course of our two-day deliberation, jurors repeatedly changed positions; how and why this happened would require a qualitative analysis of our participation in the deliberation process. I present this anecdotal evidence to emphasize the potential limitations of quantitative jury research, when group dynamics play a key role in how juries arrive at their ultimate decisions.

Qualitative jury research will also reveal any gaps in evidence or other questions mock jurors identify as needing answers to, so you can be prepared to fill in those gaps at trial and prevent them from being filled by the jurors' own imaginations.

Timing of Jury Research Projects

Imagine having developed themes and narratives throughout the course of a case—preparing your witnesses to articulate those themes in depositions, taking third-party discovery to highlight those arguments, and retaining experts who help advance the narrative you intend to present at trial—only to learn at a pre-trial jury research project that those themes and narratives were not viewed positively by the mock jurors. At this point, you have no real way to reshape the case, and you have to deliver the news to your client that your likelihood of success at trial is far lower than you have been reporting for months or years.

Traditionally, focus groups or mock trials have been conducted later in the life of a case, either just before mediation or trial. While there remain good reasons for doing these projects later in the case, conducting focus groups and gathering information earlier—and possibly multiple times—in the life of the case allows an attorney to incorporate the information gleaned from the jury research into the fact and expert discovery stages of the case. For many foundational issues jury research can be conducted without any discovery actually having taken place, as certain themes or concepts that a jury will have to grapple with are known from the outset.[4]

Knowing how jurors likely will respond to certain issues can help you navigate fact and expert discovery in a way that bolsters your case if and when it gets to a jury, rather than learning when it is too late. Instead of defensively reacting to jurors' attitudes, early jury research can allow you to go on offense in shaping evidence that will resonate with your jury.

It's Not All About Winning and Losing

Whether motivated by a desire to impress the client, boost one's confidence before trial, or underestimating the strength of the opposing party's case, there can be a tendency or desire for attorneys to attempt to "win" the jury research project. This would be a mistake, and a disservice to both you and your client, because of course the results of a focus group or mock trial do not necessarily forecast a similar result at trial. The point of a jury research project is not to determine who will win or lose; the "primary impetus for using this research tool is to gain an understanding of how people make decisions about your case and not what decisions they come to."[5]

Thus, to make the exercise worthwhile, it is important to present a fair, balanced presentation of both sides' cases so that the mock jurors provide an honest, comprehensive analysis of each sides' strengths and weaknesses.

This also involves thoughtful selection about who will deliver the presentations to the mock jurors. Customarily, lead counsel for the client will present the client's case to the mock jurors; however, there may be situations where it is more beneficial for the lead counsel to deliver the opposing party's presentation. This could help ensure the opposing party's case is presented in a favorable light by an experienced trial lawyer, and potentially to assist the trial team in better understanding and appreciating the nature of the opposing party's case so that your counterarguments are sharpened in preparation for trial. There may even be situations—given an alignment of the right type of case, client, and opposing counsel—where the opposing party's presentation to mock jurors is delivered by lead counsel for the opposing party themselves.

Conclusion

Jury research projects have been a staple in our industry for decades, and most jury research projects require considerable time and resources from attorneys and clients. To ensure that the time and resources are used effectively and efficiently, it is important to think outside the box for ways to utilize jury research in ways that provide a competitive advantage to your client throughout the life of a case.

4 E.g., will a jury fault the plaintiff for misusing the product, or are they more likely to place that blame on the manufacturer for failing to adequately warn or protect the plaintiff from the harm that occurred? Was the plaintiff comparatively negligent under the circumstances?

5 Litigating Tort Cases, § 36:4, Uses and purposes of focus groups in litigation.

Tales from the Crypt: Effectively Using Jury Research to Bolster Your Case

Jacob J. Lantry
Campbell Conroy & O'Neil, P.C.

CAMPBELL TRIAL LAWYERS

Tales from the Crypt

Cryptkeeper

Juror #10

CAMPBELL TRIAL LAWYERS

Different Types of Jury Research

Survey

Focus Group

Mock Trial

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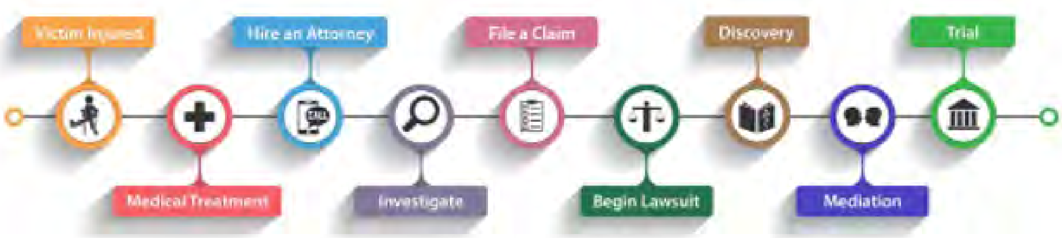
When to Conduct Jury Research?



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Identifying and Discarding Themes

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Testing Perception of Witnesses

How to test how a witness is perceived?

- Video
- Mock examination

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Who is the Information For?

Trial Counsel

Adjuster or TPA

In-House Counsel

Executives

Know your stakeholders!

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Identifying Jurors That Could Lead to Nuclear Verdict

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Use of AI in Jury Research

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Incorporating Jury Verdict Research into Voir Dire

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TRIAL LAWYERS

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Jacob J. Lantry

Member | Campbell Conroy & O'Neill (Boston, MA)

Jacob Lantry focuses his practice exclusively on civil litigation; primarily the defense of product liability, toxic tort, pharmaceutical, and catastrophic personal injury cases. He has tried cases to verdict in multiple states on behalf of corporate defendants and successfully assisted clients before various state appellate courts. Jacob also regularly drafts and argues dispositive motions on behalf of his clients, successfully obtaining dismissal and summary judgment in numerous cases.

Jacob is a 2017 graduate of the International Association of Defense Counsel's Trial Academy, an intensive trial practice seminar held each year at Stanford Law School. He is also a former chair of the Young Lawyers' Division of the Federal Bar Association's Massachusetts chapter. Additionally, Jacob is an Adjunct Professor of Trial Advocacy at the University of St. Thomas Law School in Minneapolis, Minnesota.

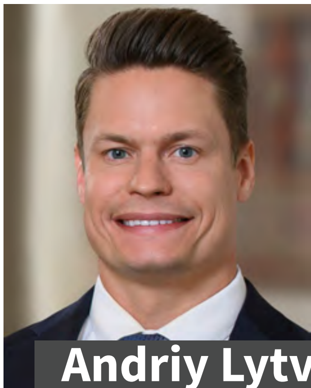
Practice Areas
- Personal Injury / Negligence
- Premises Liability
- Products Liability Defense
- Environmental Litigation
- Toxic Torts / Mass Torts Defense
- Pharmaceutical and Medical Devices

Industries
- Automotive
- Construction Industry Litigation
- Insurance Defense

Honors
- 2018-2020 Massachusetts Super Lawyers Rising Stars

Memberships
- Massachusetts Bar Association
- Massachusetts Defense Lawyers Association
- Massachusetts Chapter of the Federal Bar Association; Former Chair of the Young Lawyers Division

Education
- 2009, B.A., magna cum laude, The College of Saint Benedict and Saint John's University
- 2014, J.D., with highest honors, Drake University Law School



Your Patent Infringement Lawsuit Checklist

Andriy Lytvyn

Hill Ward Henderson (Tampa, FL)

Defensive Playbook for Frivolous Patent Infringement Claims

Andriy Lytvyn

Virtually any successful company, irrespective of the industry, can be blindsided by a patent infringement lawsuit. A common misconception is that patent litigation does not concern non-tech companies, but this is not true. For example, last year, Costco, Walmart, Starbucks, and Volkswagen were hit with patent infringement claims over using contactless payment terminals,[1] TGI Fridays and Wingstop were sued for patent infringement over their call routing systems,[2] Lululemon recently lost a patent infringement trial over its shoemaking methods,[3] and a federal district court ruled that Campbell's display racks for its canned soups infringe multiple utility patents.[4]

In addition to being unexpected, patent litigation is often highly complex and expensive. According to the 2024 data, a median verdict in a patent trial is approximately $3.7 million,[5] while the median litigation costs range from $600k (when the damages are bellow $1 million) to $3.6 million (when the damages exceed $25 million).[6] What's more is that trial outcome statistics in patent infringement lawsuits heavily favor the plaintiffs—of 82 verdicts entered in 2024, only 17 were in favor of accused infringers.[7] Bad actors, including certain non-practicing entities (NPEs), are eager to capitalize on these statistics, and so they send out volumes of fraudulent cease-and-desist letters and mass-file frivolous patent infringement complaints, often seeking a quick settlement, knowing that defending against a patent infringement lawsuit is cost prohibitive for many of their targets. Fortunately, there are several straightforward strategies explained in this article that can help identify and effectively counter such shakedown attempts.

Three Pathways for Prevailing Against a Patent Infringement Claim

Generally, to prevail in a patent infringement lawsuit, the defendant must demonstrate one or more of the following: (1) procedural defects in the complaint or the patent, (2) non-infringement, and (3) patent invalidity. When the infringement claims are legitimate, these issues require a highly complex and comprehensive legal and technical analysis. Fortunately, when patent infringement claims are frivolous, there are practical solutions that can immediately reveal fatal flaws under each of these three pathways, potentially helping to eliminate the frivolous threat at the early stages of the case.

Procedural Defects

Only an owner (or, in certain circumstances, an exclusive licensee) of a patent has standing to bring forth an infringement claim. Accordingly, upon receipt of a cease-and-desist letter or service of a patent infringement complaint, it is critical to verify that the party sending the letter or filing the lawsuit actually owns the patent. The United States Trademark and Patent Office (USPTO) maintains a database of patent assignments and licenses (available at the following URL: https://assignment.uspto.gov/patent/index.html#/patent/search). The user interface for searching this database is straightforward, and search results provide access to electronic copies of every recorded assignment, license, and security interest document for any given patent. If the search results reveal that the party alleging infringement is not the owner or the exclusive licensee of the patent, then the infringement threat is likely a fraud.

Another critical consideration that can render a patent

1 Law.com, Costco, Walmart, Shell, Starbucks, Kroger and VW Hit With Patent Infringement Claims Over Payment Tech, https://www.law.com/therecorder/2024/07/23/costco-walmart-shell-starbucks-and-kroger-hit-with-patent-infringement-claims-over-payment-tech/ (last visited Mar. 10, 2025).

2 Law.com, A Dozen Suits: Patent Company Files Slew of Litigation in Texas, https://www.law.com/texaslawyer/2024/03/11/a-dozen-suits-patent-company-files-slew-of-litigation-in-texas/ (last visited Mar. 10, 2025).

3 Law360, Nike Wins $355K From Lululemon In Shoe Patent Trial, https://www.law360.com/ip/articles/2307154/nike-wins-355k-from-lululemon-in-shoe-patent-trial (last visited Mar. 11, 2025).

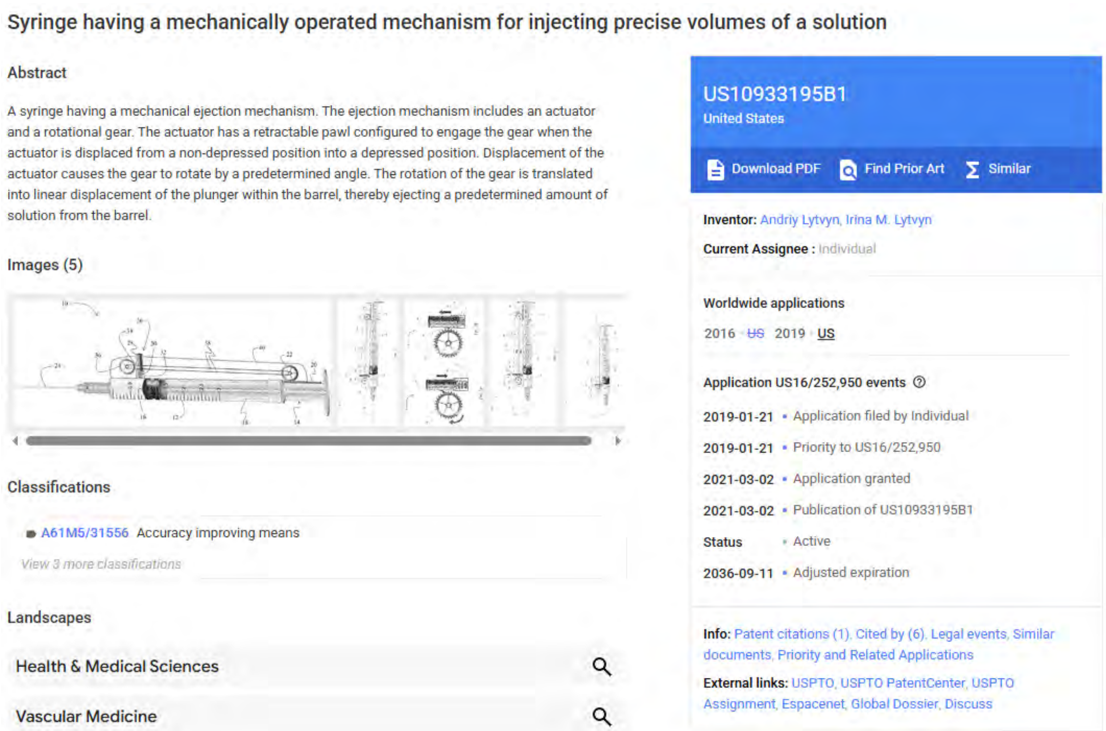
4 Gamon Plus, Inc. v. Campbell's Co., No. 15 CV 8940, 2025 WL 263552, at *13 (N.D. Ill. Jan. 22, 2025)

5 Marcum LLP, Patent Litigation Study, p. 2 (2024) (available at https://ipwatchdog.com/wp-content/uploads/2024/12/2024-Marcum-Patent-Litigation-Study.pdf).

6 American Intellectual Property Law Association (AIPLA), Report of the Economics Survey 2023, p. I-142 – I-148 (2023).

7 Law360, The Top Patent Damages Awards Of 2024, https://www.law360.com/articles/2262518/the-top-patent-damages-awards-of-2024 (last visited, Mar. 10, 2025).

unenforceable if it has expired. Generally, patents expire twenty years after their earliest priority date. An excellent resource for verifying whether a patent has expired is Google® Patents, which is available at the following URL: https://patents.google.com/. This resource provides an intuitive way to locate an electronic copy of any U.S. patent and delivers some key empirical information about that patent, including its expected expiration date.


Syringe having a mechanically operated mechanism for injecting precise volumes of a solution

Abstract

A syringe having a mechanical ejection mechanism. The ejection mechanism includes an actuator and a rotational gear. The actuator has a retractable pawl configured to engage the gear when the actuator is displaced from a non-depressed position into a depressed position. Displacement of the actuator causes the gear to rotate by a predetermined angle. The rotation of the gear is translated into linear displacement of the plunger within the barrel, thereby ejecting a predetermined amount of solution from the barrel.

Images (5)

Classifications

A61M5/31556 Accuracy improving means

View 3 more classifications

Landscapes

Health & Medical Sciences

Vascular Medicine

US10933195B1

United States

Download PDF Find Prior Art Similar

Inventor: Andriy Lytvyn, Irina M. Lytvyn

Current Assignee : Individual

Worldwide applications

2016 US 2019 US

Application US16/252,950 events

2019-01-21 • Application filed by Individual

2019-01-21 • Priority to US16/252,950

2021-03-02 • Application granted

2021-03-02 • Publication of US10933195B1

Status • Active

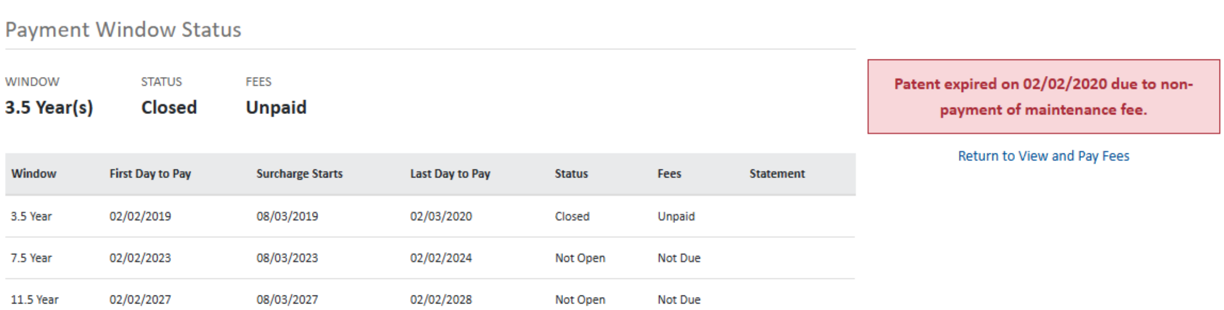
2036-09-11 • Adjusted expiration

Info: Patent citations (1), Cited by (6), Legal events, Similar documents, Priority and Related Applications

External links: USPTO, USPTO PatentCenter, USPTO Assignment, Espacenet, Global Dossier, Discuss

Screenshot Google® Patents search result for U.S. Patent No. 10,933,195; https://patents.google.com/patent/US10933195B1/

Further, a patent may expire prematurely if the patent owner fails to pay the requisite USPTO maintenance fees, which must be paid at three specific intervals after the issuance of a patent. The USPTO provides a database (available at the following URL: https://fees.uspto.gov/MaintenanceFees/) that shows whether each such fee has been paid and indicates when a patent has expired due to non-payment, as shown in the screenshot below.


Payment Window Status

WINDOW 3.5 Year(s) — STATUS Closed — FEES Unpaid

Window	First Day to Pay	Surcharge Starts	Last Day to Pay	Status	Fees	Statement
3.5 Year	02/02/2019	08/03/2019	02/03/2020	Closed	Unpaid	
7.5 Year	02/02/2023	08/03/2023	02/02/2024	Not Open	Not Due	
11.5 Year	02/02/2027	08/03/2027	02/02/2028	Not Open	Not Due	

Patent expired on 02/02/2020 due to non-payment of maintenance fee.

Return to View and Pay Fees

Another potential procedural deficiency that may be present in a patent infringement complaint is improper venue. The governing statute limits patent litigation venue to the defendant's state of incorporation or any district where the defendant has a "regular and established place of business."[8] Accordingly, if a patent infringement complaint is filed in a jurisdiction where the accused infringer is not incorporated nor has an established place of business, a motion to dismiss for improper venue could

8 TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 581 U.S. 258 (2017) (interpreting 28 U.S.C. § 1400(b)).

be the first line of defense.

Non-infringement

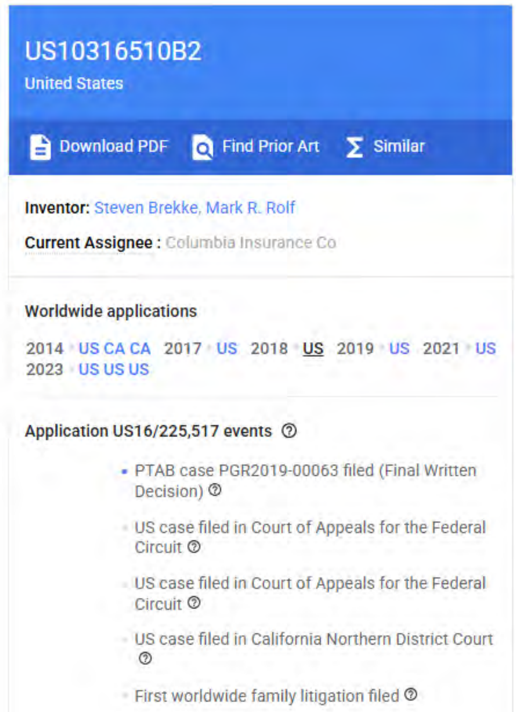
Proving that the accused product or method does not infringe the asserted patent is a dispositive defense to a patent infringement claim. Determining non-infringement is usually a highly complex and multi-faceted undertaking that requires in-depth legal and technical knowledge, which is one of the reasons why patent litigation costs are so high. However, while this is true when infringement claims are legitimate, frivolous infringement allegations are usually based on incomplete information, assumptions, and falsehoods about the accused product or method. In those circumstances, non-infringement may be immediately apparent even to someone who is not well versed in patent law.

Patent infringement is judged based on the patent claims, which are the enumerated paragraphs at the end of the patent. These paragraphs delineate the boundary of the patent owner's exclusive rights in the recited invention. To evaluate infringement, each independent claim should be written in a checklist form, listing all elements of the claim in a first column and the corresponding features of the accused product or method in a second column. If every element recited in the patent claim is present in the accused product or method, then the patent is infringed. Conversely, if even a single element of an independent claim is not present in the accused product or method, then there is no infringement. For example, if the independent claims recite a pencil with an attached eraser, but the accused pencil does not have an eraser, then infringement is precluded.

Patent Invalidity

Another key defense against patent infringement is that the asserted patent is invalid. However, because all issued patents have been examined and approved by the USPTO, they enjoy a presumption of validity in federal district courts, which an accused infringer must overcome with "clear and convincing" evidence. Alternatively, a patent can be challenged through an administrative proceeding before the USPTO, under the lower "preponderance of the evidence" standard. These administrative patent reviews—known as Inter Partes Review (IPR) and Post Grant Review (PGR)—went into effect in 2012 under the America Invents Act (AIA) and since then have resulted in a sharp decline in the number of patent infringement lawsuits.[9] Additionally, a series of the Supreme Court decisions—most notably, *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014)—significantly altered patent eligibility standards for inventions directed to business methods, software, and computer-related technology, making such patents vulnerable to invalidation on a motion to dismiss in a district court.[10]

Google® Patents is an excellent resource for quickly checking whether validity of a patent has been challenged in an IPR, a PGR, or whether the patent has been a subject of a district court litigation.



Screenshot Google® Patents search result for U.S. Patent No. 10,316,510; https://patents.google.com/patent/US10316510B2/en?oq=10316510

All PGR and IPR filings are public record and can be freely accessed through the Patent Trial and Appeal Case Tracking System (P-TACTS) at the following URL: https://ptacts.uspto.gov/ptacts/ui/home. If the USPTO has already issued its final written decision, then simply scrolling to the end of the opinion will immediately reveal whether the challenged patent claims have been invalidated. Further, even if a case settled prior to the final written decision, the invalidity arguments and evidence set forth in an IPR or PGR petition may provide

9 See Marcum LLP, Patent Litigation Study, p. 5 (2024) (available at https://ipwatchdog.com/wp-content/uploads/2024/12/2024-Marcum-Patent-Litigation-Study.pdf).

10 IP Watchdog, Checking in With Alice: Section 101 Developments at the Federal Circuit, District Courts, USPTO and Congress, https://ipwatchdog.com/2024/09/26/checking-alice-section-101-developments-federal-circuit-district-courts-uspto-congress/id=181593/ (last visited, Mar. 11, 2025).

a roadmap for effectively invalidating the challenged patent. Moreover, the best part of this public resource is that all the legal work has already been done (and paid for) by a prior accused infringer. Such preexisting invalidity arguments can be leveraged to quickly thwart a threat of patent infringement lawsuit and even force a voluntary dismissal of a filed complaint.

Likewise, if a patent has been litigated in a federal district court—especially where the patent pertains to software or a business method—it is important to check the case docket. A motion to dismiss for patent-ineligible subject matter followed by a voluntary dismissal is a clear signal that the patent is weak, and the patent owner wishes to avoid its invalidation. This information can be effectively leveraged against the patent owner, without incurring the expense of hiring a patent attorney.

Conclusion

While legitimate patent infringement concerns should be handled by qualified patent counsel, the practical strategies explained in this article provide a quick-response toolkit for identifying fraudulent and frivolous patent infringement threats and leveraging the legal work performed by prior accused infringers to effectively counter such shakedown attempts.

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Andriy Lytvyn is a registered patent attorney with over a decade of experience in patent and trademark law. He is Board Certified in Intellectual Property (IP) Law by the Florida Bar. Andriy graduated with honors from the University of Florida with dual degrees in Aerospace and Mechanical Engineering. Andriy earned his law degree from Boston University School of Law, whose IP program consistently ranks among the top 10 in the nation. While in law school, Andriy served on the editorial board of the Boston University Journal of Science and Technology Law.

After graduating from law school, Andriy returned to Tampa to establish a family and pursue a career in IP law. Andriy has extensive patent preparation and prosecution experience, which includes over 180 issued U.S. patents granted for a wide array of technologies, encompassing software, telecommunications, medical devices, consumer products, and retail security solutions. Andriy also has substantial experience in trademark prosecution, which includes over 100 U.S. trademark applications.

On the litigation front, Andriy has successfully represented clients, both petitioners and patent owners, in thirty Inter Partes Reviews (IPRs) and achieved one of the first successful patent defenses in a Covered Business Method (CBM) review. One of Andriy's most prominent professional accomplishments is winning a Federal Circuit IPR appeal against Apple Inc. (DSS Tech. Mgmt., Inc. v. Apple Inc., 885 F.3d 1367 (Fed. Cir. 2018)). As a result of that appeal, the U.S. Court of Appeals for the Federal Circuit issued a precedential opinion upholding the validity of the challenged patent and curtailing the Patent Trial and Appeal Board's ability to invalidate patents based on expert testimony rather than concrete evidence. Subsequently, the DSS opinion became extensively cited at all levels of patent litigation.

Practice Focus
- Copyrights
- Intellectual Property & Technology
- Intellectual Property Litigation
- Licensing Agreements
- Patent Litigation
- Patent Post-Grant Proceedings
- Patents
- Software and Technology
- Technology Transactions
- Trademark Law

Honors
- Florida Super Lawyers Rising Star (2022-2024)
- Tampa Club's 40 under 40 (2022)
- The Best Lawyers in America® : Ones to Watch (2024)
- TAMPA Magazine's Top Lawyers (2025) - Patent Law; Trademark Law

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Defending Biometric Information Privacy Act Class Actions

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Defending Biometric Information Privacy Act Class Actions
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"Any sufficiently advanced technology is indistinguishable from magic."
– Arthur C. Clarke (1973)

As we move forward into the 21st century, we continue to see vast technological advancements, and unfortunately, a legal system striving to catch up. We as litigators need to remain resilient in this ever changing landscape to protect our clients from the unintended consequences of patchwork state privacy laws. Biometrics information is at the forefront. Illinois passed the Biometric Information Privacy Act in 2008, and since then, many states have followed suit, leaving individuals, small businesses, and corporations uncertain in how to embrace biometric technology without becoming vulnerable to predatory lawsuits. This paper assesses Illinois's Biometric Information Privacy Act ("BIPA"), the current litigation trends related to BIPA, similar biometric privacy laws in other states, common defenses against BIPA claims. It also provides risk mitigation strategies for businesses and best practices for litigation.

I. Hold on, that's my face! What are Biometrics?

Let's start with biometric identifiers: the building blocks to identification. Biometric identifiers are the biological measurements or physical characteristics that are generally unique to each individual. Examples may include fingerprints, palm prints, face, DNA, iris, retina, odor or scent, and voice.[1] Biometrics is a form of using the biometric identifiers for an identification.[2] We commonly use biometrics to authenticate a person's identity. If you own a smart phone, you likely have used a biometric identifier today to access your phone. Smart phones use fingerprint or facial recognition to ensure security and provide access to owners. Another use of biometrics is identifying unknown individuals. For example, a police officer running fingerprints through a database or an advertiser in Minority Report identifying Tom Cruise through iris recognition. But what happens after the smart phone, police, or advertisers use these biometric identifiers? The biometric identifiers would have no use if deleted. The smart phone could not identify its owner if it does not have biometric identifiers to compare it with. The police could not locate their suspect if no fingerprint database existed. How is Lexus supposed to advertise to Tom Cruise without having information on his irises? This collected, stored, and used data of biometric identifiers is often considered biometric information, but the actual definition of biometric information varies depending on the applicable law.

II. Illinois's Biometric Information Privacy Act

Illinois was the first state to address biometric information when it enacted BIPA in 2008. Illinois passed BIPA in response to the Pay By Touch bankruptcy, an organization operating the largest fingerprint scan system in Illinois.[3] The bankruptcy left thousands concerned about what would become of their biometric information.[4] As the Illinois Legislature recognized biometric identifiers are unique to each person and once compromised, the person has little recourse.[5] So the Legislature drafted a stringent law on the collection of biometric information.

Although arguably the most rigorous biometric statute in the country today, BIPA defines biometric identifiers only as "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry."[6] It also explicitly excludes signatures, photographs, biological materials, height, weight, hair color, eye color, imaging like X-ray, or health information.[7] Yet this limited definition does not halt BIPA's overarching

1 Donald L. Buresh, Should Personal Information and Biometric Data Be Protected Under A Comprehensive Federal Privacy Statute That Uses the California Consumer Privacy Act and the Illinois Biometric Information Privacy Act As Model Laws?, 38 Santa Clara High Tech. L.J. 39, 48 (2022).

2 Id.

3 Charles N. Insler, How to Ride the Litigation Rollercoaster Driven by the Biometric Information Privacy Act, 43 S. Ill. U. L.J. 819 (2019).

4 Id.

5 740 Ill. Comp. Stat. Ann. 14/5.

6 740 Ill. Comp. Stat. Ann. 14/10.

7 Id.

impact. BIPA applies to all private entities in possession of biometric identifier or biometric information, and BIPA defines biometric information as "*any* information, regardless of how its captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual."[8] Interestingly, BIPA does not apply to governmental agencies.

BIPA sets out numerous requirements for those in possession or collection of biometric information,[9] and each section creates an individual claim:

- Section 15(a) requires a private entity to provide a publicly available written policy establishing its retention schedule and guidelines for permanently destroying biometric information.
- Section 15(b) provides that the private entity must inform the person in writing that biometric information is being collected or stored and the purpose and length of time for which it is collected, stored, and used. The private entity must then receive written consent from the person prior to collecting, capturing, or obtaining biometric information.
- Section 15(c) prohibits the private entity from selling or profiting from the information.
- Section 15(d) prohibits disclosure of the information unless the private entity receives consent, or the disclosure is necessary for a financial transaction, a state or federal law, or valid warrant or subpoena.
- Section 15(e) requires a private entity to use reasonable standard of care to protect the biometric information from disclosure.

Enforcement of BIPA occurs through a private right action, which provides that any person aggrieved by a violation may file an action against the offending party.[10] The person is entitled to monetary damages: $1,000 per negligent violation and $5,000 for intentional or reckless violation.[11] The person may also seek attorney fees. Businesses wishing to use biometric technologies as we advance into the future are trapped in a web of regulations, and the risk of not complying leaves such businesses vulnerable to litigation.

III. Litigation Trends: the Class Action Flood

Even so, for several years, BIPA litigation remained relatively dormant on the basis of Article III standing. Take McCollough who opened and closed her Smarte Carte locker with her fingerprint.[12] The court found that although Smarte Carte violated BIPA by not obtaining prior consent, McCollough could not demonstrate an actual injury. The Illinois Appellate Courts followed the same reasoning until the Illinois Supreme Court issued its ruling in *Rosenbach v. Six Flags Entertainment Corp.,* and the flood-gate of class actions burst open.[13]

Rosenbach's mother had purchased an online Six Flag season pass ticket for him. Upon entry, Six Flags required Rosenbach to scan his thumbprint to verify his identity and activate his season pass. Six Flags did not provide Rosenbach or his mother with a policy on how it stored the information, nor did Rosenbach or his mother provide consent for the thumbprint scan. The Illinois Supreme Court reversed the Illinois Appellate Court's decision that Rosenbach did not establish an injury in fact. Instead, injury in fact occurred by an invasion and infringement of the statutory rights under BIPA. No actual harm was required. The court's decision was unanimous, and plaintiffs could establish standing.

The Seventh Circuit partially agreed with the Illinois Supreme Court in *Bryant v. Compass Group, USA, Inc.*[14] Compass Group collected Bryant's fingerprint scan when she signed up to use a smart vending machine. The Seventh Circuit held that Compass Group's failure to obtain informed consent as BIPA required under section 15(b) was a concrete injury to satisfy the requirements of standing. But a violation of section 15(a) for failure to publicly disclose a data-retention policy did not create cognizable injury. Nonetheless, the Seventh Circuit in *Fox v. Dakkota Integrated Systems, LLC* held that failure to comply with a data-retention policy in violation of section 15(a) equally inflicted a privacy injury to satisfy Article III standing.[15]

With the standing door open, BIPA litigation exploded to new heights when the Illinois Supreme Court interpreted BIPA as providing for a "per-scan" theory of violation in *Cothron v. White Castle System, Inc.*, holding that plaintiffs could seek damage for each individual time a company unlawfully collected or disclosed data.[16] Given that the majority of BIPA cases involve some form of time-tracking or accessing of worksites via finger prints or facial scans, *Cothron* cleared the path for damages potentially surpassing millions of dollars *per individual* employee digitally punching in and out for years. Recognizing the potential windfall and policy ramifications of its ruling, the Illinois Supreme Court invited the legislature to "make

8 Id.

9 740 Ill. Comp. Stat. Ann. 14/15.

10 740 Ill. Comp. Stat. Ann. 14/20.

11 Id.

12 McCollough v. Smarte Carte, Inc., No. 16-cv3777, 2016 WL 4077108, at *3 (N.D. Ill. Aug. 1, 2016).

13 2019 IL 123186, ¶ 1, 129 N.E.3d 1197, 1199.

14 958 F.3d 617, 619 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (June 30, 2020).

15 980 F.3d 1146, 1148 (7th Cir. 2020).

16 2023 IL 128004, ¶ 1, 216 N.E.3d 918, 920, as modified on denial of reh'g (July 18, 2023).

clear its intent regarding the assessment of damages under the Act."[17] This potential for a windfall was only compounded when the Court held in *Tims v. Black Horse Carriers, Inc.*, that a five-year, as opposed to a one-year, statute of limitation applied to BIPA claims.[18] Such rulings have led to massive class action settlements and jury verdicts. For example, Six Flags Great America agreed to a $36 million settlement agreement over its finger-scan gate entry,[19] and a jury awarded a $228 million in a class action against BNSF Railway Co.[20]

Noticing how quickly Illinois had become the battleground for biometric information privacy litigations, the Illinois legislature and governor seemingly took up the Cothron Court's invitation by amending BIPA on August 2, 2024. The amended statutory language vacated *Cothron v. White Castle*, and presumably clarified that a business may only be held liable for one violation per person regardless of the number of times the information is unlawfully collected or disclosed.[21] The amended language also allows for written consent to be obtained through electronic signature.[22] Although the amended language limits damages, it does not limit entities' liability. And before you score one (or two) for the defense bar, it remains unclear if the amendments are retroactive. As of this writing, the courts are split. For example, in *Gregg v. Central Transport LLC*,[23] the Northern District of Illinois held that that the amendment to BIPA applied *retroactively* since the court simply *clarified* the original statute on *Cothron's* invitation. But another judge in the Northern District saw it differently.

In *Schwartz v. Supply Network, Inc.*, 2024 WL 4871408 (N.D. Ill. November 22, 2024), Judge Georgia Alexakis held the amendment applies *prospectively* because it substantively, rather than procedurally, changed the original statute. According to Judge Alexis, "[n]othing in the text of the amendment indicates that it is merely clarifying the Act, even though the legislature can expressly indicate its intent to clarify the statutory text."[24] Notably, another court has agreed with the *Schwartz* holding, finding that the amount-in-controversy requirement was easily met because each plaintiff alleged more than 150 unlawful biometric scans occurred before the case was filed.[25]

IV. Follow the Leader: Biometric Privacy Laws in Other States

Since BIPA's enactment, Texas, Washington, and New York City have followed suit, creating a patchwork of laws. In 2009, Texas enacted the Capture or Use of Biometric Identifiers Act ("CUBI") to regulate the collection of biometric identifiers for a "commercial purpose."[26] CUBI similarly requires consent before collecting biometric information and requires businesses to destroy any biometric information within a reasonable time. Washington enacted Biometric Privacy Protection in 2017, and it prohibits enrolling biometric identifiers in a database for a commercial purpose unless providing notice and obtaining consent or offering a mechanism to prevent the subsequent use of biometric identifiers.[27] Though Texas and Washington have their own biometric privacy laws in place, neither provides for a private right of action. Instead, each is enforced by the state's attorney general.

In 2021, New York City became the first city to implement a broad biometric privacy law. The law prohibits the sale, lease, trade, or profit from the transaction of biometric identifiers.[28] The law governs commercial establishments, and it requires the commercial establishments to post notices if they collect biometric information. Although it does have a private right of action, it does not require written consent to collect the biometric information.

Other states, such as California, Colorado, Utah, and Virginia, have included biometric information in their comprehensive privacy laws as sensitive information.[29] State legislatures continue to consider biometric information, and the current trend points to additional states enacting laws to address privacy concerns around biometric information. Since BIPA created the most rigorous compliance systems, it likewise provides an opportunity for businesses to prepare themselves against not only BIPA class actions but future state biometric class actions should the time come.

V. Potential Defenses Against BIPA Claims

Do not fret. Although the BIPA litigation landscape seems ripe for plaintiffs, businesses wanting to advance into the 21st century of technological growth still have avenues to

17 Id. at 929.

18 2023 IL 127801, ¶ 1, 216 N.E.3d 845, 846.

19 Sarah Mansur, Six Flags agrees to $36 million settlement over alleged BIPA violations, Cap. News Ill., Jun. 14, 2021, https://capitolnewsillinois.com/news/six-flags-agrees-to-36-million-settlement-over-alleged-bipa-violations/#:~:text=The%20law%2C%20passed%20in%202008,without%20first%20giving%20his%20consent.

20 Rogers v. BNSF Railway Co., U.S.D.C. N.D. Ill. Case No. 19 C 3083.

21 740 Ill. Comp. Stat. Ann. 14/20.

22 740 Ill. Comp. Stat. Ann. 14/10.

23 2024 WL 4766297 (N.D. Ill., November 13, 2024).

24 Id. at *2 (citations omitted).

25 See Giles v. Sabert Corp., 2025 WL 274326, at *4 (N.D. Ill. Jan. 21, 2025).

26 Tex. Bus. & Com. Code § 503.001.

27 RCW § 19.375.010.

28 NYC Adm. Code §§ 22-1201–1205.

29 Ca. Civ. Code § 1798.140; Colo. Rev. Stat. §§ 6-1-1303(6); Utah Code Ann. § 13-61-101; Va, Code Ann. § 59.1-575.

fight back.

It's Not Biometric Information. The text of the statute remains one of the best defenses. BIPA offers a limited definition on what qualifies as a biometric identifier. With that in mind, defendants have the advantage of presenting that the data collected is not in fact biometric information. Defendants benefit from articulating the specific components of their technology to describe the process in obtaining and analyzing the information collected. For example, X. Corp successfully argued that its PhotoDNA did not collect biometric identifier information.[30] X Corp. argued that BIPA requires a scan of facial geometry, but PhotoDNA scans photographs, not an individuals' facial geometry. Since plaintiffs did not allege that PhotoDNA identifies and scans the facial geometry of individuals in the photos, the court dismissed the claim. Additionally, BIPA only covers technologies that are capable of identifying an individual. The court dismissed a class action against Estee Lauder which claimed the company's virtual try-on tool violated BIPA.[31] Although plaintiffs had successfully alleged the company collected scans of facial geometry, it failed to demonstrate that Estee Lauder had the capability of identifying them from the collected data.

Lack of Possession or Collection. Because BIPA requires "possession" of biometric information, defendants have successfully dismissed numerous class actions arguing about what possession means in this context. For example, the court dismissed a class action because although plaintiffs alleged that Bectcon Dickinson used a fingerprint scan, plaintiffs failed to allege Bectcon Dickinson had any form of control over the data to have possession.[32] Unlike sections 15(a), (c), (d), and (e) which require possession of biometric data, Section 15(b) requires something beyond possession. Thus, Section 15(b) claims require plaintiffs to show the entity took an active step to collect or obtain the biometric information. Microsoft successfully argued in *Jones v. Microsoft Corp.* that plaintiffs failed to establish how the Microsoft cloud actively collected and stored biometric data.[33] So the statutory language provides numerous avenues of defense depending on the technology at issue.

Preemption and Arbitration Agreements. Akin to other state laws, BIPA is not immune to federal preemption. The Seventh Circuit has consistently held that federal labor laws preempt employees' BIPA claims when an employer has a broad management rights clause in a collective bargaining agreement ("CBA").[34] In *Walton v. Roosevelt University*, the Illinois Supreme Court agreed with the Seventh Circuit and held that the Labor Management Relations Act preempted claims brought by bargaining unit employees covered by a CBA.[35] The first defense-friendly ruling from the Court regarding BIPA claims. The decision created a glimmer of hope that the Illinois Supreme Court will not automatically adopt plaintiffs' interpretation of BIPA. What is more, federal courts have signaled a willingness to dismiss BIPA claims when an arbitration agreement governs. For example, in *Crooms v. Southwest Airlines*, the court held that any claims under BIPA must go to the arbitrator because the plaintiffs signed an arbitration agreement.[36] Consequently, employers have seen success in defeating BIPA claims.

Article III Standing. Defendants can still raise standing before the federal courts because of the claim splitting in BIPA. Although the Seventh Circuit held certain claims under BIPA have Article III standing, it still held a violation under Section 15(a) for failure to provide a publicly disclosed policy does not establish standing.[37] Section 15(a) does not involve a duty to an individual but rather a duty to the public. So the federal courts often dismiss or remand Section 15(a) claims to state court.[38]

Extraterritoriality Doctrine and Dormant Commerce Clause. Unfortunately, some courts have held that dismissing on extraterritoriality grounds is premature because it requires a fact-intensive inquiry into where the violation primarily and substantially took place.[39] Yet it remains an avenue to pursue since the defendant's violation must occur in Illinois. In *McGoveran v. Amazon Web Services* and *Vance v. Google*, the courts dismissed on extraterritoriality grounds because at no point did the plaintiffs allege the biometric data was created, possessed, or stored in Illinois.[40] Also often seen as a hail Mary, the dormant commerce clause becomes a viable defense, especially as new states enact privacy laws. In our current technological landscape, data transfers instantly across state borders, creating conflict between state laws and forcing businesses into complex schemes

30 Martell v. X Corp., No. 23 C 5449, 2024 WL 3011353 (N.D. Ill. June 13, 2024).

31 Castelaz v. Estee Lauder Companies, Inc., No. 22 CV 5713, 2024 WL 136872 (N.D. Ill. Jan. 10, 2024).

32 Heard v. Becton, Dickinson & Co., 440 F. Supp. 3d 960, 968 (N.D. Ill. 2020).

33 No. 22-CV-3437, 2023 BL 6184 (N.D. Ill. Jan. 9, 2023).

34 Fernandez v. Kerry, Inc., 14 F.4th 644 (7th Cir. 2021) (holding that an arbitrator must decide whether the employer properly obtained the union's consent to use the biometric timekeeping device); Miller v. Southwest Airlines Co., 926 F.3d 898, 903 (7th Cir. 2019) (holding that an adjustment board had to determine if the employer's broad management rights clause included the right for management to have employees' use the fingerprint scanning timekeeping device).

35 Walton v. Roosevelt Univ., 2023 IL 128338, ¶ 1, 217 N.E.3d 968, 970.

36 459 F. Supp. 3d 1041 (N.D. Ill. 2020).

37 Bryant, 958 F.3d at 626.

38 See, e.g., Thornley v. Clearview AI, Inc., 984 F.3d 1241, 1247-49 (7th Cir. 2021) (affirming the district court's grant of the plaintiffs' motion to remand); Roberson v. Maestro Consulting Servs., LLC, No. 20-CV-00895-NJR, 2021 WL 1017127, at *2 (S.D. Ill. Mar. 17, 2021) (staying an action in which the defendant initially removed the case to federal court, followed by the plaintiffs' failed attempt to remand the action to state court).

39 Rivera v. Google Inc., 238 F. Supp. 3d 1088, 1090 (N.D. Ill. 2017).

40 McGoveran v. Amazon Web Servs., Inc., No. 20 CV 1399, 2021 WL 4502089 (D. Del. Sept. 30, 2022; Vance v. Google LLC, No. 20 CV 4696, 2024 WL 1141007 (N.D. Cal. Mar. 15, 2024).

to abide by each. A strong argument exists that such compliance creates a substantial burden on interstate commerce. Even so, the district courts have declined to consider the dormant commerce clause argument at the motion to dismiss stage.[41] Allowing claims to survive the motion to dismiss stage places defendants in a difficult spot and often leads to settlement. Clearview A.I. settled for 23 percent of its company, after the district court declined to consider its dormant commerce clause argument and denied its motion to dismiss.[42] Clearview A.I. had to settle as it faced bankruptcy if litigation continued. Nonetheless, as the intricate web of privacy laws continues to grow, the U.S. Supreme Court will likely have to address this question in the near future. It's up to defendants to continue to raise these important constitutional questions.

VI. Risk Mitigation Strategies

Minimize Or Eliminate Collection of Biometric Information, Publicize Privacy Policy, and Follow Retention Schedule. Businesses can take preemptive actions to protect themselves against aggressive plaintiff attorneys. Importantly, businesses should implement clear and compliant biometric policies, ensure the policies comply with BIPA, and that the policies are publicly available. In doing so, businesses should minimize data collection to only what is necessary and delete the data once the purpose is fulfilled or one year after the last interaction as required under statute. Of course, businesses are built from teams of dedicated people. So, businesses should also educate their workforces through training on the biometric data handling policies. It also may be worth inquiring into the practice of collecting biometric information altogether as the attendant risks of doing so may outweigh the benefits.

Obtain and Retain Written Consent Form. Businesses must ensure they receive written consent from both consumers and employees before collecting or using their biometric information, and the recent amendments to BIPA allow businesses to obtain consent through electronic signatures. To that end, businesses can obtain consent from consumers and employees more efficiently through technological means. That said, it is equally important to retain proof of consent. Recently, our firm was tasked with defending a trucking company client that did *just about* everything right and with the purest of intentions; they disclosed the existence of cameras in the cabs of their tractors, sought written consent from employee drivers, but failed to preserve evidence of consent.

41 Rivera, 238 F.Supp.3d at 1104; Vance, 2020 WL 5530134, at *3.

42 Kathleen Foody, Facial recognition startup Clearview AI settles privacy suit, AP, https://apnews.com/article/clearview-ai-facial-recognition-lawsuit-settlement-5a99ded04630a4e94af01f9f3adf1e29.

Arbitration Agreements with Class Waivers. Equally essential is properly drafting an arbitration agreement without falling into the unconscionability pitfalls. It's important for businesses to define and explain the scope of disputes covered under the arbitration agreement. While agreements should use language to ensure encompassing claims under BIPA, businesses should also define the claims excluded from mandatory arbitration. An all-encompassing arbitration agreement may lead to a finding of unconscionability and thus, make it unenforceable. Similarly, businesses should consider including a class action waiver, precluding class action litigation and class arbitration (in effect, allowing disputes to be resolved on an individual basis).

Vet Your Vendors And Seek Indemnity. Plaintiffs will continue to present novel arguments before the courts, including attempts to expand businesses' liability to actions of third parties. Accordingly, businesses must ensure through their contracts with third-party vendors that the vendors comply with BIPA and assume liability. Businesses also may have liability in instances of data breaches. To ensure protection, business should implement industry-standard cyber security practices to establish a reasonable standard of care and ensure their cyber security insurance and vendors cover BIPA claims.

VII. Best Practices for Litigating BIPA Cases

Plaintiffs will continue to bring BIPA class actions, and early case assessments are essential. As litigators, we must identify the key defenses and the potential success of a motion to dismiss. BIPA class actions can be defeated at the motion to dismiss stage. So, we must familiarize ourselves with our client's technology, including the ins and outs of their procedures at the beginning to determine if it even falls under the scope of BIPA. We must also examine the enforceability of employment and consumer agreements, and if an arbitration agreement or class action waiver exists, promptly move to dismiss.

Even if a complaint survives the motion-to-dismiss stage, class actions, including BIPA class actions, require certification. Once again, we must familiarize ourselves with the technology. Does the technology work differently depending on the use or information? Does the technology store certain biometric information different than other biometric information? Does the technology work differently on a phone versus a computer? It is important to individualize the claims, and one way to accomplish that is through the technology itself and how the consumer interacts with it. The best resource is always your client who can help educate you about the nuances of their technological systems. Another way to individualize the claim is through the alleged injury.

It is feasible that the employer offered plaintiffs various methods of consent, and thus, we must separate the class to determine which consent method is valid.

Finally, only if necessary, defendants should consider settlement. After all, large settlement awards only create bad precedent and serve as an incentive for avaricious plaintiffs' attorneys to file lawsuits in hopes of having a bite at the apple. But we must also weigh the risk of statutory damages versus the cost to litigate. Although BIPA class actions in the past created massive settlements, defendants now have a stronger hand to play thanks to the 2024 amendment.

VIII. Conclusion

The flood gates are open, and BIPA class actions will continue to pose a litigation risk for businesses seeking to streamline processes through technological advancements, including through the collection of biometric information. But that risk can and should be mitigated. It behooves companies to review, update, and publicize their privacy policies in strict conformance with BIPA, and follow up to make sure that employees responsible implementing such policies are informed and properly trained.

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Juan's experience leading the litigation functions of two international, Fortune 150 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.

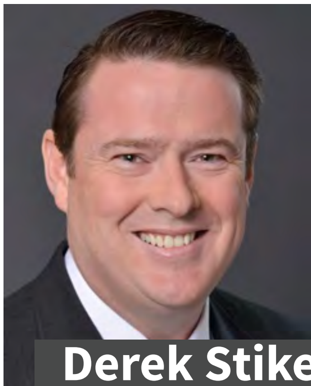
As both inside and outside counsel, Juan has managed large litigation teams, including coalitions comprised of experts from different firms, to oversee and execute legal strategy to help his clients meet their business objectives. From consumer class actions to government investigations to mass torts, 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
- Catastrophic Injury Defense
- Commercial Litigation

Industries
- Consumer Products & Services
- Medical Devices & Pharmaceuticals
- Asbestos
- Real Estate

Legal Membership, Activities, and Honors
- The Best Lawyers in America - Commercial Litigation, 2025
- 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"
- American Bar Association
- State Bar of Wisconsin

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



The Hidden Psychology of Numbers

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How the Psychology of Numbers Threatens a Fair Trial
Derek Stikeleather

The practice of suggesting a specific (often exaggerated) award to a jury is well-known as "anchoring," a tactic which, by design, skews a jury's impression of a case by exploiting a vulnerability in human cognition. Generally, anchoring refers to "a behavioral bias whereby information a person is exposed to disproportionately affects a future decision." M. Conklin, *Precise Punishment: Why Precise Punitive Damage Requests Result in Higher Awards*, 10 Mich. Bus. & Entrepreneurial L. Rev. 179, 180 (2021). "Anchoring reaches this result by changing the reference point that people use to make judgments. When an anchor is set, future judgements are made in relation to the anchor instead of being based on a neutral examination of the available evidence." *Id*.

In recent years, anchoring's profound impact on jurors has become undeniable. *Id.* "The empirical research on jury damages awards is replete with findings on the effectiveness of anchors." *Id.* at 181; M. Behrens, 44 Am. J. Trial Advoc.at 323 ("Empirical research proves the effectiveness of anchoring."). By asking "for numbers well beyond what they believe the jury will award," plaintiffs' attorneys *reasonably* expect "that the net effect will be an amount larger than what the jury would have otherwise awarded absent the anchor." T. O'Toole, *Jury Economics: Requests for Damages are Anchoring Strategies for Plaintiffs and Defendants*, 48 Mont. Lawyer 26, 26 (2023).

Strategic anchoring can undermine a defendant's right to a fair civil trial by exerting undue influence on the jury's ability to impartially weigh evidence. "Defense counsel have their hands tied in responding to anchoring tactics," as they "are often reluctant to offer a counter-anchor because [it] could be viewed as a concession of liability,' and even "if a defendant counters an absurdly high request, the *plaintiff's counsel hopes that jurors will split the difference between the numbers*, which still allows a nuclear verdict to occur." M. Behrens, 44 Am. J. Trial Advoc. at 325 (emphasis added; quotation omitted).

The psychological influence of anchoring is almost impossible to offset. "It is well recognized that a numerical anchor influences jurors' judgment about damages even if they do not recognize that the anchor affected their decision." M. Behrens, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 Am. J. Trial Advoc. 321, 323 (2021). Remarkably, even "when participants are aware that the anchor point is completely arbitrary, it still biases their judgment." M. Conklin, 10 Mich. Bus. & Entr'l L. Rev. at 182. As one staggering example, experiments with German judges found that simply *rolling dice* immediately before they decided a hypothetical criminal sentence affected the sentencing length, with higher rolls yielding longer sentences. B. Englich, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, Personal Soc. Psychol. Bull. 32(2):188-200 (2006); *see also* J. Rachlinski, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, Ann. Rev. Law Soc. Sci., 13:203-29 (2017).

Even instructions to disregard an improper and irrelevant anchor normally do not work for jurors—nor even for judges. Cornell Law Professor Jeffrey Rachlinski's research on bankruptcy judges showed that when choosing an interest rate for a bankruptcy plan, their decision was affected by exposure to the original contract rate—despite the fact that bankruptcy-law "doctrine explicitly requires them to ignore" it. J. Rachlinski, Ann. Rev. Law Soc. Sci., 13:203-29 at 215. That is why instructions to ignore anchoring are inadequate.

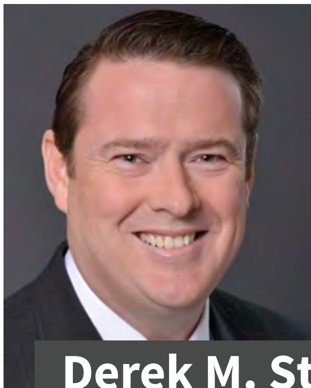
Professor Rachlinski has collected various studies that repeatedly show that anchoring can "generate ridiculous outcomes." For example, two groups of judges were asked to decide the proper award after hearing a brief description of a case of an employee's claim of unlawful racial discrimination. Both groups heard the same hypothetical case description—except that one group also heard that the plaintiff saw a case similar to hers on the television show Judge Judy, and that Judge Judy awarded $415,300. Although the judges chuckled to themselves that the Judge Judy comment was plainly irrelevant to their case, those who heard the Judge Judy snippet still awarded *eight times* what the group of non-anchored judges awarded. In another shocking example, municipal court judges, asked to assess a fine against a hypothetical roadhouse bar for a noise-ordinance violation, tripled the awards when the bar's name was changed from "Club 58" to "Club 11,866." J. Rachlinski, Ann. Rev. Law Soc. Sci., 13:203-29.

The fascinating—and frightening—takeaway from this research is that plaintiffs can manipulate a jury, judge, or mediator not only by asking for $50 million in a case worth much less than that but also by simply mentioning that 50 million people watched the Super Bowl or that a town uses 50 million gallons of water each day. *Any* large number can be used to anchor the listener.

As laypersons who generally lack litigation experience, the average juror is especially vulnerable to improper anchoring. Conklin explains that jurors' "lack of legal experience places them at a heightened risk of succumbing to the anchoring effect." M. Conklin, 10 Mich. Bus. & Entr'l L. Rev. at 181.

Fortunately, courts are increasingly aware of improper anchoring. In 2023, the Supreme Court of Texas ordered a new trial after plaintiffs, in closing arguments, compared the value of their claim to the prices paid for a $71 million fighter jet and a $186 million painting. *Gregory v. Chohan*, 670 S.W.3d 546, 557 (Tex. 2023). The court criticized "unsubstantiated anchoring" as "a tactic whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case." *Id*. It recognized that, after "learning that a particular aircraft or painting sells for many millions of dollars, jurors are no closer to gaining a sense of how to compensate the family for their injuries." *Id*. at 588. Indeed, the "self-evident purpose of these anchors . . . is to get jurors to think about the appropriate damages award on a magnitude similar to the numbers offered, despite the lack of any rational connection between reasonable compensation and the anchors suggested." *Id*. It emphasized that unsubstantiated anchors "have nothing to do with the emotional injuries suffered by the plaintiff and cannot rationally connect the extent of the injuries to the amount awarded." *Id*.

As encouraging as it may be to see appellate courts calling out anchoring and providing relief on appeals, one should presume that most courts are not adequately sensitized to the issue. The onus remains on defendants to recognize the danger of anchoring and object when they see it. Defendants should consider motions in limine to prevent anchoring and be prepared to move for a mistrial when plaintiffs drop an improper anchor, especially before the jury has heard the evidence.



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Derek is currently leading the multi-firm appellate team challenging a $261 million verdict against a Florida children's hospital. The high-profile case was featured in the Netflix movie 'Take Care of Maya.' It is the second time that Derek has challenged a final judgment that exceeds $200 million. In 2021, Derek's briefing and oral argument persuaded the Appellate Court of Maryland to overturn a $205 million final judgment — the largest birth-injury award in U.S. history — and order JNOV for the defendant hospital. Derek was also instrumental in helping the same court to vacate the 2012 judgment that followed a $55 million verdict against a Maryland hospital. These remain the two largest birth-injury verdicts in Maryland history.

As national appellate counsel, Derek works closely with trial counsel across many disciplines not only on appeals but also before and during trials to brief and argue expert challenges, summary judgment, and other dispositive issues. A dedicated writer, Derek fundamentally believes that excellent briefing wins cases. In recent years, Derek has assisted with reducing a $110 million Minnesota verdict to $10 million, post-trial briefing on a $68 million New Mexico verdict, appeals of eight-figure judgments in Connecticut and Florida, and pre-trial expert challenges in Ohio and South Carolina. He has briefed and argued appeals on behalf of physicians and several prominent hospitals before the appellate courts of Maryland and the District of Columbia and in the United States Court of Appeals for the Fourth Circuit. Derek has also successfully argued class action and commercial appeals in the California Court of Appeal, New York's Appellate Division (First Department), and the United States Court of Appeals for the Fifth Circuit.

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Expert Witness or Open Book? Combatting Overreach in Independent Medical Examiner Financial Discovery

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Expert Witness or Open Book? Combatting Overreach in Independent Medical Examiner Financial Discovery
Roman Lifson

In typical personal injury cases, the plaintiff asserts that the subject incident caused long-lasting or permanent injuries, and the defendant tries to disprove some of all of those assertions. The rules provide the defendant an opportunity to have a medical expert examine the plaintiff to evaluate his or her alleged injuries and opine on their effect and causation. Because the universe of experts – especially physicians – who are willing to perform such independent medical exams ("IME") are limited, the same physicians often are retained for this purpose repeatedly. Over time, Plaintiffs' counsel have become more aggressive in seeking through subpoena these physicians' private financial information, including their total annual earnings and earnings from their expert witness work alone. The stated purpose for this discovery is to explore the physician's potential bias as a result of being hired frequently by defendants' law firms or insurers. However, the motivation often is more sinister – to deter physicians from agreeing to perform an IME for a defendant. Physicians familiar with this practice will sometimes draw a hard line and make clear that they will abandon the case and refuse to testify if their personal financial information is required to be disclosed. This article discusses the applicable rules, court decisions, and a recent case in which this matter was fully litigated.

The Rules[1]

A. Rule 35
Federal Rule of Civil Procedure 35(a)(1) provides: "The court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Rule 35(a)(2)(A) provides that the Order for the examination "may be made only on motion for good cause and on notice to all parties and the person to be examined." "The good cause requirement of Rule 35 requires 'an affirmative showing by the movant that ... good cause exists for ordering each particular examination.'" *Gallegos v. BNSF Railway Company*, 2023 WL 8187870 (D. MT. Nov. 27, 2023) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964)).

The threshold question is whether the plaintiff has placed his mental or physical condition in controversy. This requirement is met easily, as long as the plaintiff seeks damages for injuries he claims were caused by the subject accident. The Rule then requires the party requesting the exam to show good cause and provide notice to all parties and the examinee. "[A] plaintiff in a negligence action who asserts mental or physical injury ... provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." *Schlagenhauf*, 379 U.S. at 119. "'Good cause' requires a showing that the examination could adduce specific facts relevant to the cause of action and necessary to the defendant's case." *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 609 (C.D. Cal.1995). "[A] plaintiff may not avoid a Rule 35 examination simply on the grounds that other sources of information, such as medical reports and depositions of plaintiff's treating physicians, are available." *Ornelas v. Southern Tire Mart, LLC*, 292 F.R.D. 388, 392 (S.D. Tex. 2013). "[C]ourts have continually looked to whether the plaintiff has retained his own experts, and whether he intends to prove his claims through their testimony at trial, as relevant to a finding of 'good cause.'" *Id*. "Even where a plaintiff chooses to forgo the use of an expert, courts have found that a defendant should not be compelled to limit its case to mere cross examination, as expert testimony can be essential to afford a defendant adequate opportunity to challenge the plaintiff's claim." *Id*.

"While Rule 35 does not indicate the extent which conditions may be placed on an IME, courts have generally entered protective orders after a showing of good cause pursuant to Fed. R. Civ. P. 26. However, the party seeking the restrictions bears the burden of demonstrating that required good cause." *Trainor v.*

1 This article concerns the federal rule, but the discussion should be applicable to the corollary state rules. However, please note that state rules can vary somewhat and state courts may reach different conclusions, so research into the approaches taken by the courts of the specific state is warranted.

Florida Dirt Source, LLC, 2019 WL 5849087 at *1 (S.D. Ga. Nov. 7, 2019). *See, e.g.*, *Calderon v. Reederei Claus-Peter Offen GmbH & Co.*, 258 F.R.D. 523, 529 (S.D. Fla. 2009).[2]

B. Rule 26

While Rule 35 permits an IME, Rule 26 is relevant also because it details what items a party may obtain from an opposing expert. Rule 26(a)(2)(B) already specifically lists the information that a testifying expert must provide with that expert's report: "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and a statement of the compensation to be paid for the study and testimony in the case." Fed. R. Civ. P. 26(a)(2)(B)(v and vi). Therefore, the Rule already has established the balance between what a litigant may and may not discover from an expert. *See Drake v. Allergan, Inc.*, 2014 WL 12718977 at *1 (D. Vt. Oct. 29, 2014) ("Under the plain meaning of the Rule, this required disclosure ['of the compensation to be paid for the study and testimony in the case' per Fed. R. Civ. P. 26(a)(2)(B)(vi)] is limited to the present case."). So, opposition to a party's demand for more extensive financial information from a testifying expert should note that Rule 26 already addresses the topic.

The Chilling Effect

Courts have noted that intrusive demands that IME physicians disclose personal financial data will inappropriately dissuade physicians from offering that service and, consequently, deprive the legal system of the analysis Rule 35 permits. *See Profitt v. Highlands Hospital Corporation*, 2021 WL 5435171 *5 (E.D. Ky. Nov. 19, 2021) ("the Court is motivated by the reality that demanding non-party witnesses – especially expert witnesses – disclose sensitive information about their income will have a chilling effect on litigation.... Litigants here, and in other matters, would be harmed if routine discovery of financial information 'deter[red] individuals with valuable knowledge and expertise from assisting future juries.'") (quoting *Drake*, 2014 WL 12718977 at *2); *Campos v. MTD Products, Inc.*, 2009 WL 920337 at *5 (M.D. Tenn. April 1, 2009) ("the Court notes that requiring production of the requested financial information could also have a chilling effect on other experts whose substantial income is, unlike Dr. Smith, not derived from producing expert opinions.").

Striking The Balance

Courts understandably become sympathetic to a plaintiff's desire to expose an IME physician's bias if that physician often is hired by the defendant's insurer or law firm, and especially when that physician earns significant sums from those sources each year. The inquiries are necessarily fact-specific, but the parameters below should be helpful in opposing overly intrusive demands for experts' financial data, and even in deciding whether an expert is suitable for engagement.

For example, in *Behler v. Hanlon*, 199 F.R.D. 553, 561 (D. Md. 2001), the court recognized the plaintiff's legitimate need to explore the physician's bias, but distinguished discovery into the physician's expert witness activities on defendants' behalf from discovery into his specific finances:

> [N]o intellectually honest argument can be made that the information sought by plaintiff regarding Dr. Keehn's activities as a defense expert witness is not relevant to bias/prejudice impeachment, and, therefore, within the scope of discovery permitted by Rule 26(b)(1). However, legitimate issues are raised regarding the extent of the bias discovery sought, the methods of discovery employed, and possible abuses that could occur if the discovery is permitted without a protective order. For example, plaintiff seeks discovery of the total income earned by Dr. Keehn for the last five years, the amount thereof earned providing defense Rule 35 examinations, records relating to the hours spent by Dr. Keehn in this capacity, copies of his tax returns, and a listing of all insurance companies with whom he is affiliated, as well as a listing of all cases in which he has provided expert services. This is overkill. While there may be cases in which an expert's gross income, and the specific amounts thereof earned by providing services as an expert witness, may be discoverable, this should not be ordered routinely, without a showing, absent here, why less intrusive financial information would not suffice. Most people are sensitive about their income, and who knows the details about it. By their very nature, expert witnesses are knowledgeable of information that is scientific, technical, or specialized, generally acquired by long, hard study and experience. When asked to provide expert testimony, they are in a position to request compensation that matches their qualifications, which can seem shockingly high to those not familiar with the costs of modern litigation. Moreover, in the post-Daubert/Kumho Tire era, and in light of the Rule 26(a)(2) disclosure requirements and the recent changes to Rules 702 and 703, counsel increasingly are more selective in who they ask to be expert witnesses,

2 In addition to restrictions on the disclosure of the IME physician's personal finances, parties may wish assert limitations on other aspects of the IME, including (1) the video recording of the exam, (2) presence a court reporter, (3) presence of plaintiff's counsel or representative, (4) limitations on what type of examination the physician may conduct, (5) limitations on what questions the physician may ask during the examination, (6) restriction on forms that the plaintiff may be required to complete as part of the examination, etc.

> knowing that they will be subject to the utmost scrutiny. Those who pass muster likely will be able to command fees commensurate with their skill and experience, which may, to a lay member of the jury, appear exorbitant, when in fact what was charged is the going rate. <u>Rule 26(a)(2)(B) requires disclosure of the compensation received by a retained expert in the particular case at issue, and counsel routinely bring this out during cross-examination when questioning an opposing expert witness. However, permitting routine disclosure of the expert's gross compensation, from all sources—including those unrelated to litigation activities—would provide the jury with little information relevant to a fair assessment of the expert's credibility, while concomitantly introducing the real possibility of creating confusion, distraction and even prejudice</u>. Nor is the trial of a case facilitated if a party sponsoring an expert attempts to draw the possible sting of expert compensation by attempting to prove that what his or her expert charges is within the norm, as this opens the door for collateral issues that could further distract the jury.

199 F.R.D. at 561-62 (emphasis added). *See also Bilenky v. Ryobi Ltd.*, 2014 WL 12591078 *3 (E.D. Va. Oct. 22, 2014) ("Plaintiff may seek to introduce evidence of Mr. Nielsen's compensation, within a recent timeframe, for testimony on behalf of one company – Husqvarna. Unlike the impeaching party in *Behler*, Plaintiff does not seek to offer evidence about Mr. Nielsen's entire history of defense-side testimony.").

In *Profitt*, *supra*, 2021 WL 5435171 *5, the court rejected plaintiff's argument that the physician must produce 1099 forms and other financial records to validate the percentages of legal work the physician performs for various entities. The *Profitt* court explained why it rejected this demand:

> First, federal tax returns and form 1099s from the last seven years are not within the scope of discovery. Plaintiffs' motion to compel modified the subpoena as to request the first page of the returns along with expert's gross income in order to deduce the percentage of income Whaley makes from medical legal work. Even as modified, the request of seven years' worth of IRS tax information along with the expert's gross income from all work is superfluous. The Plaintiffs state that they seek this information solely to deduce a percentage of income derived from medical legal work. In the case of the United States' expert, Dr. D'Alton, the Plaintiffs appeared to have no issue asking this very question during a deposition wherein D'Alton unequivocally stated less than 10% of her gross income could be attributed to expert witness work. In the case of HRMC experts, Plaintiffs posed almost identical questions in the depositions of Sagin, Wright, and Rouse. Plaintiffs maintain that the experts only provided "vague and carefully scripted approximations" but do not accuse the experts of being dishonest or refusing to answer the questions outright. <u>Absent a showing that a witness refuses to answer the questions, or that the witness is dishonest, it is unclear why the Plaintiffs resort to an invasive tool of discovery when an inquiry at deposition could have yielded evidence sufficient to confirm or refute the biases held by any given expert</u>.

2021 WL 5435171 *5 (emphasis added). *See also Sullivan v. Metro North R. Co.*, 2007 WL 8327696 at *2 (D. Conn. Dec. 3, 2007) ("the court finds that so long as [expert] fully answers questions about the percentage of income he derived on an annual basis [during prior five years] from providing expert witness services, he need not produce his tax returns or other financial information"); *Young v. Pleasant Valley School Dist.*, 2011 WL 3678691 at *2 (M.D. Pa. Aug. 20, 2011) ("The Court is persuaded by Defendants' argument that such questions [about expert's annual earnings from expert witness testimony] are needlessly intrusive especially in light of the information's marginal relevance.").

The balance the court in *Brzezinski v. Allstate Insurance Company*, 2012 WL 12869522 (S.D. Cal. Aug. 28, 2012), established is consistent with *Profitt*, *Sullivan*, and other cases:

> In *Rogers*, the expert was willing to: provide estimates of the percentage of his medical practice that involves forensic work versus clinical work, the percentage of his income that is derived from forensic work, the percentage of his forensic practice that is on behalf of plaintiffs versus defendants, the number of forensic evaluations he performs per week, and his hourly billing rate for performing forensic services. Plaintiff will also learn the actual dollar amount that [the expert] has been and will be paid by the [defendant] for his services in this case. This should be more than sufficient information to allow Plaintiff to effectively cross-examine [the expert] at the time of trial regarding his opinions and the financial motive or bias that may have influenced those opinions.

Id. at *8 (citing *Rogers v. United States Navy*, 223 F.R.D. 533, 536 (S.D. Cal. 2004)). *See also Tate v. United States*, 2016 WL 7108427 at *1 (D. Ak. Dec. 5, 2016) ("Numerous federal courts ... have held that the expert's bias can be adequately revealed by requiring the expert to disclose the proportion of his income that is derived from litigation activities. These courts recognize that the amount of an expert's litigation income is relevant to the jury's bias analysis, but the value of that evidence is slight when the expert has already disclosed the proportion of his income that comes from litigation, and is typically outweighed by the potential harms from allowing the discovery—namely, confusing and distracting the jury and burdening the expert."); *Young*, *supra*, 2011 WL 3678691 at *1-2 (denying motion to compel expert to disclose information beyond "the amount of Dr. Dragan's compensation for testifying in this matter," the cases in which he had testified, and the percentage of his expert testimony on behalf of plaintiffs and defendants); *Capers v. One Beacon Insurance Company*, 2008 WL 11347702 at *2 (D. Mont. June 13, 2008) ("to enable a party to assess an expert's potential biases caused by financial incentives it is sufficient for an expert to provide estimates of the percentage of his medical practice that involves forensic work versus clinical work, the percentage of his income that is derived from forensic work, the percentage of his forensic practice that is on behalf of plaintiffs versus defendants, the number of forensic evaluations he performs per week, and his hourly billing rate for performing forensic services.") (citation omitted).

Moreover, "[c]onclusory allegations of bias do not suffice for this Court to authorize such comprehensive discovery not provided for under the Federal Rules of Civil Procedure." *Profitt*, 2021 WL 5435171 at *6.

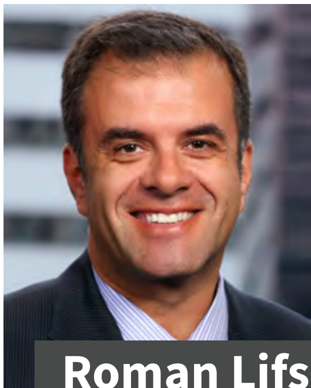
Case Study

In a case currently pending in the U.S. District Court for the Western District of Virginia, the defendant designated an orthopedic surgeon to perform an IME on a plaintiff who claims grievous spinal injuries stemming from a low-speed rear-end collision between the defendant truck and the car plaintiff was driving. In opposing the motion for a Rule 35 exam, the plaintiff demanded that the physician disclose his personal financial information, including "canceled checks, 1099s, W2s, or other tax information reflecting payments from expert services in personal injury cases," and documents reflecting the percentage of income earned through expert witness work when hired by defendants or insurers (which, by simple math, would disclose his total annual earnings). The Magistrate Judge granted the defense's motion for the Rule 35 exam and denied the plaintiff's demand for the physician's financial data. In its order, the Court limited the information that the physician would be required to disclose if the plaintiff chose to depose him to "the approximate percentage of his professional time he devotes to medical-legal work, the approximate percentage of his income he derives from medical-legal work, the amount he has billed in this matter, and his previous work on behalf of either defendant or defendants' counsel in this matter." In doing so, the Court applied the same balance reached in *Brzezinski* and other cases referenced above. During the hearing, the Court held that the above inquiry is the proper scope of discovery and the information the plaintiff sought was "well beyond the scope of what is allowed by Rule 26."

Undeterred, plaintiff's counsel issued a subpoena to the physician for his personal financial data even before taking his deposition and asking him the questions the Court permitted. The defense responded with a motion to quash, which the Magistrate Judge granted based on his prior rulings. Plaintiff then appealed the Magistrate Judge's ruling to the District Judge. In his appeal, plaintiff relied on cases in which courts allowed broader discovery into an expert's personal finances because the expert had had an extensive relationship with the defendant or its insurer and had earned significant sums from them in prior engagements. However, the defense had not worked with this physician in the past, he had never been hired by the defendant or the defendant's insurer, so it was easy to distinguish these cases.[3] However, the potential for broader discovery into an expert's personal finances should be considered if counsel, the client or the insurer already has an extensive relationship with the expert.

In this case, the plaintiff's counsel had encountered the expert physician in prior cases, and it appeared that plaintiff's counsel's aggressive pursuit of the physician's personal financial data was intended at least in significant measure to dissuade him from undertaking this assignment and others in the future. As discussed above, courts have recognized precisely this chilling effect in circumscribing the extent to which a litigant may delve into an opposing expert's personal finances.

3 The District Judge has delayed ruling on plaintiff's appeal pending an upciming settlement conference.



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Roman Lifson

Partner | Christian & Barton (Richmond, VA)

Roman Lifson is a partner, Litigation department chair, and serves as the firm's general counsel. Mr. Lifson enjoys an active motorsports law practice in which he addresses the needs of race track operators, track event organizers, race teams and individuals in a wide array of areas including litigation, contract negotiation, and liability and risk management. He also represents clients in litigation involving product liability, business disputes, medical negligence and First Amendment rights. Mr. Lifson is a former chair of the Virginia Bar Association's Civil Litigation Section and the Defense Research Institute's Automotive Specialized Litigation Group. He is also an avid and accomplished race car driver, and participates in road racing events throughout the eastern half of the United States. He is the 2012 BMW Club Racing South Atlantic Champion in the I-Prepared class.

Mr. Lifson serves as a mediator, energetically guiding parties to settlement.

Practice Areas

- Trials / Appeals / Alternative Dispute Resolution
- Products Liability and Torts
- Intellectual Property Litigation
- Communications and Media
- Insurance Law
- Medical Malpractice

Experience

- Handled various automotive product liability matters, including at trial.
- Defended electrical equipment manufacturer in the U.S. District Court for the Eastern District of Virginia in case stemming from an electrical fire causing severe burns.
- Defended manufacturer in Roanoke Circuit Court in wrongful death case arising from an explosion of an industrial heater.
- Defended service company in the U.S. District Court for the Eastern District of Virginia in case arising from a malfunctioning ocean-going refrigerated container.
- Prosecuted product liability subrogation action involving a defective resin in Harris County, Texas, Circuit Court.
- Serve as local defense counsel in the Eastern and Western districts of Virginia in cases involving medical devices.
- In addition to automobile product liability actions and those listed above, Mr. Lifson has represented clients in product liability actions involving aircraft, ice resurfacers, all-terrain vehicles, snowmobiles, personal watercraft, bridges, tractors, and other industrial equipment.
- DRI Law Institute Liaison for annual Product Liability Conference.

Recognitions

- Martindale-Hubbell - AV Preeminent® Peer Review Rated
- The Best Lawyers in America® - Commercial Litigation, Litigation-Insurance, Product Liability Litigation-Defendants, 2024-2025
- Virginia Super Lawyers - Civil Litigation Defense, 2013-2020, 2022-2024

Education

- University of Virginia School of Law, J.D., 1992 - Editorial Board, Virginia Law Review; Editorial Board, Virginia Journal of International Law
- Amherst College, B.A., 1989 - Magna Cum Laude

From Bitcoin to BitCons: An Update on All Things Crypto

Joshua Metcalf
Forman Watkins & Krutz (Jackson, MS)

The Current State of Cryptocurrency, DAOs, and NFTs

Joshua Metcalf

Three years ago, a Trial Network panel of experts held a discussion entitled Blockchain, Smart Contracts, and Cryptocurrency, where panel members discussed the latest developments in the crypto space. At that time, Bitcoin was selling for less than $40,000, Non-Fungible Tokens ("NFTs") were hot commodities, and J.P. Morgan had just established an official presence in "The Metaverse." Discussions surrounding cryptocurrencies, NFTs, the metaverse, smart contracts, and new ways of organizing businesses were filled with excitement and speculation. These technologies were seen as the future of finance, digital ownership, and decentralized governance. Over the intervening years, the landscape has evolved significantly, and the space continues to change rapidly. This article provides an overview and an update on the state of cryptocurrency, its regulatory environment, and associated developments.

Bitcoin and Cryptocurrency

What Are We Talking About?

Cryptocurrency is a digital or virtual currency secured by cryptography, making it nearly impossible to counterfeit or double-spend. Bitcoin, the first and most well-known cryptocurrency, remains the flagship of the crypto market, while thousands of alternative coins (altcoins) have emerged, offering various functionalities and use cases. Among these, Ethereum (ETH) has established itself as the dominant platform for smart contracts and decentralized applications, while other top cryptocurrencies such as Binance Coin (BNB), Solana (SOL), and Ripple (XRP) provide unique features tailored to different use cases, including transaction speed, scalability, and cross-border payments.

One of the key benefits of cryptocurrency is its decentralized nature, which removes the need for intermediaries like banks and allows for peer-to-peer transactions. Additionally, blockchain technology provides transparency and security, ensuring that transactions are immutable and publicly verifiable. Many advocates believe that cryptocurrencies can enhance financial inclusion, reduce transaction costs, and improve access to global financial markets. Furthermore, the borderless and censorship-resistant nature of cryptocurrencies allows individuals to transact even in regions with restrictive financial systems.

U.S. Regulation

The regulatory landscape for cryptocurrency remains fragmented and dynamic. Governments worldwide are grappling with how to classify, tax, and oversee digital assets. Some nations, like El Salvador, have embraced Bitcoin as legal tender, while others have implemented strict crackdowns.

In the United States, legislative action on cryptocurrency has been slow, with Congress failing to pass comprehensive regulations that would provide clarity to the industry. As a result, much of the regulatory framework has been shaped by executive orders from the White House and enforcement actions from agencies such as the Securities and Exchange Commission (SEC). This approach has led to uncertainty, as companies must navigate an evolving landscape without clear statutory guidance. While some proposed legislation has aimed to address cryptocurrency oversight, including bills focused on stablecoins and digital asset taxation, none have gained significant traction. The reliance on executive orders and agency enforcement actions underscores the ad-hoc nature of U.S. crypto regulation, leaving the industry in a state of flux.

Executive Orders

Because of the lack of U.S. crypto legislation, much of the regulation of cryptocurrency in the U.S. has taken the form of executive orders issued by both the Trump and Biden administrations, each reflecting different priorities and regulatory philosophies. During his first presidency, President Trump did not issue any significant executive orders affecting cryptocurrency.

President Biden's Executive Orders on Crypto

President Biden's administration was seen as largely anti-cryptocurrency and sought to limit the development and use of cryptocurrencies. President Biden issued Executive Order 14067 on Ensuring Responsible Development of Digital Assets in March 2022, marking a significant shift in federal oversight of cryptocurrencies. This order outlined a government-wide strategy to regulate and harness the benefits of digital assets while mitigating risks. Key provisions included:

- Consumer and investor protection – Directing federal agencies to evaluate risks and provide recommendations to safeguard consumers.
- Financial stability – Tasking agencies like the Treasury Department with analyzing crypto's impact on the broader economy.
- Illicit finance and national security risks – Strengthening enforcement against illicit uses of digital assets.
- U.S. leadership in digital asset innovation – Encouraging the development of a U.S. central bank digital currency (CBDC).

Although phrased in terms of harnessing the potential benefits of cryptocurrencies, Executive Order 14067 was primarily carried out by federal agencies through regulatory and enforcement actions that were seen as very hostile to everything related to crypto.

President Trump's Executive Orders on Crypto

As mentioned above, during his first term, President Trump did not issue a comprehensive executive order specifically dedicated to cryptocurrencies, but his administration did take several actions impacting the industry. In 2018, Trump signed Executive Order 13827, which prohibited U.S. citizens from dealing with Venezuela's Petro cryptocurrency, signaling concerns about the use of digital assets to evade sanctions.

In his second term, President Trump has pledged to position the United States as a global leader in the cryptocurrency space:

- Executive Order 14178: "Strengthening American Leadership in Digital Financial Technology" (January 23, 2025): This order revoked President Biden's previous executive order on digital assets and prohibited the establishment or promotion of a central bank digital currency (CBDC). It also established a working group tasked with proposing a federal regulatory framework for digital assets within 180 days.
- Executive Order 14233: "Establishment of the Strategic Bitcoin Reserve and United States Digital Asset Stockpile" (March 6, 2025): This order announced the stated policy of the U.S. to establish a "Strategic Bitcoin Reserve" and to create a Digital Asset Stockpile. The order addresses all cryptocurrency currently held by the U.S., but in Section 1 singles out Bitcoin as "the original cryptocurrency[,]" and in Section 3(c) instructs the Secretary of the Treasury and the Secretary of Commerce "to develop strategies for acquiring additional Government BTC provided that such strategies are budget neutral and do not impose incremental costs on United States taxpayers." The order prohibits the acquisition of additional Stockpile Assets other than in connection with forfeiture proceedings and civil penalties.

Federal Enforcement Actions and the SEC's Role in Cryptocurrency Regulation

Executive orders set the direction, but individual agencies carry out the President's directives. Under the Biden Administration, the Securities and Exchange Commission (SEC) played an active role in shaping the crypto landscape, filing numerous enforcement actions and "regulating by enforcement" in the absence of an established legal framework. Seen as a major opponent of the crypto industry during the Biden Administration, recent developments demonstrate a significant shift in regulatory posture under the Trump administration.

The SEC's Changing Role

Under the current administration, crypto-friendly officials have been appointed to key regulatory positions. Additionally, the SEC has dropped several high-profile investigations against crypto firms, signaling potential regulatory relief. As the U.S. Justice Department's priorities shift toward immigration and traditional financial fraud cases, cryptocurrency enforcement actions are expected to decline.

During the Biden administration (January 2021 to January 2025), the SEC initiated several enforcement actions and investigations targeting the cryptocurrency industry. Cases against Ripple Labs, Coinbase, Kraken, Robinhood, and others dominated the headlines. When President Trump took office in January 2025, SEC Chairman Gary Gensler resigned, and Mark Uyeda was named as acting chairman of the SEC. Uyeda is widely seen as much more friendly to the crypto industry, and he named SEC Commissioner Hester Peirce to lead a "Crypto Task Force" to establish a workable regulatory framework. According to the SEC's January 21, 2025, press release, the focus of the task force "will be to help the Commission draw clear regulatory lines, provide realistic paths to registration, craft sensible disclosure frameworks, and deploy enforcement resources judiciously." Since January, the SEC has announced dismissals of numerous lawsuits against crypto firms, including Coinbase, Kraken, and Robinhood.

Notable cases include:

- Ripple Labs (December 2020): In probably the most important crypto enforcement action, the SEC filed against Ripple Labs and its executives in the Southern District of New York, alleging the sale of unregistered securities through the XRP token.The SEC argued that the offer and sale of XRP tokens constituted an offer and sale of investment contracts under SEC v. W.J. Howey, which provides that an "investment contract" is a contract, transaction, or scheme whereby a person: (1) "invests his money" (2) "in a common enterprise" and (3) "is led to expect profits solely from the efforts of the promoter or a third party." Ripple Labs disagreed and, in July 2023, secured a ruling that, although institutional sales of XRP by Ripple Labs were securities transactions, XRP sales on exchanges were not. Both Ripple and the SEC appealed to the Second Circuit in October of 2024. The case was heavily litigated, and Ripple Labs reportedly spent more than $100MM defending the case.
- BitConnect (May 2021): The SEC charged five individuals for promoting BitConnect's unregistered securities offerings, alleging a Ponzi scheme that defrauded investors of over $2 billion.
- Coinbase (June 2023): The SEC sued Coinbase, one of the largest cryptocurrency exchanges in the world, in the Southern District of New York, alleging the company had violated securities laws by operating as an unregistered broker, exchange, and clearing agency since 2019. Coinbase is publicly traded in the U.S. and strongly contested the claims of the SEC. In 2023, Coinbase lost a motion for summary judgment after the court determined that Coinbase failed to show as a matter of law that the tokens at issue were not securities, however, the court granted a motion for interlocutory appeal in January of 2025. Despite its early win in the district court, the SEC announced on February 21, 2025, that it was dismissing its action against Coinbase.
- Kraken (February 2023): The SEC charged Kraken for failing to register the offer and sale of its crypto asset staking-as-a-service program, which the SEC deemed as securities. The Kraken case was dismissed.
- Genesis and Gemini (January 2023): The SEC charged both firms for offering and selling unregistered securities to retail investors through a crypto lending program.
- Robinhood: In February 2025, the SEC concluded its investigation into Robinhood's crypto trading arm without taking any action.

These developments indicate a significant shift in the SEC's enforcement strategy, moving toward a more lenient regulatory environment for the cryptocurrency industry.

Other Federal Agencies and Adverse Actions

In addition to the enforcement actions and investigations by the SEC, the Biden Administration directed other federal agencies to take actions against crypto interests. One example is "Operation Choke Point 2.0," a term coined by cryptocurrency advocates to describe the U.S. government's alleged efforts to restrict crypto businesses' access to banking services. This initiative, reminiscent of the original Operation Choke Point, in which the Obama administration sought to limit financial access to industries deemed "high-risk" by pressuring banks to sever ties with certain types of businesses like firearms dealers. Operation Choke Point 2.0 reportedly involved federal regulators pressuring banks to sever ties with cryptocurrency companies, making it difficult for them to operate within the traditional financial system. These agencies included the Federal Reserve, which allegedly set guidelines discouraging banks from servicing crypto firms; the Office of the Comptroller of the Currency (OCC), which oversaw national banks and their engagement with crypto-related businesses; the Federal Deposit Insurance Corporation (FDIC), which reportedly warned banks about the risks of working with crypto firms; the SEC, which as described above, took aggressive enforcement actions against major crypto companies; and the Department of Justice (DOJ), which investigated financial institutions linked to crypto firms; all echoing tactics used in the original Operation Choke Point. As a result, three major banks, including Silvergate Bank, Signature Bank, and Silicon Valley Bank (SVB)—all of which had significant crypto ties—collapsed or faced overwhelming regulatory scrutiny in 2023.

Fraud, Hacks and Scams in the Cryptocurrency Space

Fraud remains a persistent issue in the cryptocurrency industry, affecting investors and undermining trust in digital assets. Each year, billions of dollars are lost to fraud, hacks, and scams. Some of the malicious conduct is perpetrated by seemingly legitimate businesses (i.e. FTX), some by criminal enterprises, and some even by sophisticated foreign actors (i.e. the recent theft of $1.5B in Ethereum from the ByBit Exchange by the state-sponsored Lazarus Group in North Korea).

FTX Fraud and Bankruptcy

FTX was founded in 2019 by Sam Bankman-Fried, and quickly ascended to prominence, becoming the world's third-largest cryptocurrency exchange by volume, and serving over one million users worldwide. The platform was lauded for its innovative products and rapid growth, positioning Bankman-Fried as a prominent figure in the crypto space. Unbeknownst to his customers, Bankman-Fried was secretly misappropriating customer funds from the FTX exchange to prop up his investment firm, Alameda Research. Alameda, which was supposed to operate independently, had a secret "backdoor" allowing it to borrow billions from FTX without users' consent or collateral. These funds were used for high-risk trading, venture investments, political donations, and lavish personal expenses. In November 2022, FTX faced a sudden surge in customer withdrawals, revealing a staggering $8 billion shortfall in its accounts. This liquidity crisis exposed the company's insolvency, leading to its swift collapse and subsequent bankruptcy filing. Bankman-Fried was arrested in December 2022 and charged with multiple offenses, including wire fraud, securities fraud, and money laundering. Bankman-Fried was convicted on all seven counts and sentenced to 24 years in prison. The process of reimbursing FTX customers is ongoing, but because of the increase in the value of the broader crypto market throughout 2024, the vast majority of customers have received near-complete recoveries. Michael Lewis chronicled the scandal in his 2023 book Going Infinite: The Rise and Fall of a New Tycoon.

The Bybit Hack and North Korean, State-Sponsored Crypto Theft

According to a December 19, 2024, report from Chainalysis, North Korean state-sponsored hackers have become some of the most successful hackers in the world. Chainalysis estimates that in 2023, North Korean state-sponsored hackers stole approximately $660 million in cryptocurrency across 20 incidents, and in 2024, they stole approximately $1.34 billion in 47 incidents.

In February 2025, Bybit, a prominent cryptocurrency exchange, experienced a significant security breach resulting in the theft of approximately 400,000 Ethereum tokens, valued at $1.5 billion. The attack exploited a vulnerability in Bybit's security infrastructure, specifically targeting the firm's security provider. The Federal Bureau of Investigation (FBI) attributed this heist to the Lazarus Group, a North Korean state-sponsored hacking collective.

"Rug Pulls"

Another malicious risk in the crypto market is the prevalence of "rug pulls," where project developers abandon their ventures after collecting investor funds, leaving token holders with worthless assets. Rug pulls typically occur in decentralized finance (DeFi) projects and NFT schemes, where developers create hype around a token or project, attract significant investment, and then disappear with the funds. Tracking down the perpetrators can be nearly impossible.

One notorious recent example is the $HAWK token, associated with internet personality Haliey Welch (known as the "Hawk Tuah Girl"). Launched on December 4, 2024, the token's market capitalization soared to approximately $500 million shortly after its release but then plummeted by over 90% within hours, leading to significant investor losses. Investors have filed a complaint with the SEC, as well as a civil suit against the creators of $HAWK.

Rug pulls remain a significant issue in the crypto industry, emphasizing the need for investor vigilance, regulatory oversight, and transparency in project development.

Memecoins

Meme coins are a type of cryptocurrency that often originates from internet jokes, cultural references, or social media trends rather than having a strong underlying technological or financial use case. These tokens are typically speculative in nature, driven by hype, community engagement, and celebrity endorsements rather than fundamental value or utility. Despite regulatory challenges, "rug pulls," and fraud concerns, memecoins continue to attract retail investors. Dogecoin, Shiba Inu, and other speculative assets remain popular, often driven by social media trends rather than fundamental value. Another good example of a memecoin is the $Trump coin, which was announced by the president-elect on January 17, 2025, and which, according to the $Trump website, is "intended to function as an expression of support for, and engagement with, the ideals and beliefs embodied by the symbol '$TRUMP' and the associated artwork, and are not intended to be, or to be the subject of, an investment opportunity, investment contract, or investment of any type." The $Trump coin jumped to a value of nearly $70USD, but as of early March was only worth about $10.

Where did they go? NFTs, DAOs, and the Metaverse

Non-Fungible Tokens (NFTs)

NFTs) are unique digital assets stored on a blockchain that certify ownership and authenticity of digital or physical items such as art, music, and collectibles. Unlike cryptocurrencies such as Bitcoin, which are interchangeable (fungible), NFTs are distinct and unique. Their value is often driven by scarcity, and market demand, making them popular in the art world, gaming, and digital ownership ecosystems. NFTs experienced a meteoric rise in popularity in 2021, with NFT trading volumes surging from $82 million in 2020 to $17 billion in 2021, however, sales had declined significantly by 2022, and a September 2023 report by blockchain analytics firm dappGambl indicated that over 95% of NFT collections had zero monetary value. NFT activity increased in 2024, but nothing like 2022. The long-term prospects for NFTs remain to be seen.

DAOs – Decentralized Autonomous Organizations

DAOs were once seen as a revolutionary governance model for decentralized decision-making and corporate governance linked to blockchain technology. That said, many uncertainties existed regarding many aspects of DAO existence, including liability on the part of tokenholders. In April 2021, Wyoming pioneered legislation by allowing DAOs to register as distinct business entities, providing them with a recognized legal status – albeit within the existing context of LLCs. Tennessee followed suit, enacted a law permitting the registration of DAOs in April of 2022. In 2023, Utah enacted legislation creating the Limited Liability DAO (LLD), insulating tokenholders of DAOs from personal liability for the acts of the business. Although somewhat slow to develop – especially with official state recognition – the number of DAOs continues to increase.

The Metaverse: What Happened?

The metaverse was once heralded as the future of digital interaction. Interactions in the online world were skyrocketing, and numerous prognosticators predicted the expenditure of billions of dollars in online virtual worlds. In February 2022, J.P. Morgan became the first major bank to establish a virtual lounge, named “Onyx,” in Decentraland – a blockchain-based virtual world. However, interest has waned, and projects like Meta’s VR initiatives have struggled to gain traction. According to recent reports, the metaverse has failed to attract and engage users meaningfully, raising questions about its long-term viability.

Bitcoin to Bitcons: the Current State of Crypto

Joshua J. Metcalf

FormanWatkins

Overview

- Constantly evolving
- Rapidly changing regulation, technology, and adoption
- No predicting the future

Bitcoin and Cryptocurrency: What is it?

- Cryptocurrencies use blockchain technology, a distributed ledger that records all transactions across a network of computers, ensuring transparency, security, and immutability, preventing fraud or manipulation.
- They enable decentralized, borderless transactions that are transparent, secure, and censorship-resistant.
- Bitcoin remains the flagship cryptocurrency.
- Alternative coins (altcoins) like Ethereum, Binance Coin, Solana, and XRP provide different functionalities.

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U.S. Regulation

- Fragmented, unpredictable, and ever-evolving
- Little to no legislative action
- Legislative vacuum filled
    by: Executive orders
    Agency enforcement ections

U.S. Regulation

- Regulation by Executive Order

    Biden

    Executive Order 14067: "Ensuring Responsible Development of Digital Assets"

    Trump

    Executive Order 14178: "Strengthening American Leadership in Digital Financial Technology"

    Executive Order 14233: "Establishment of the Strategic Bitcoin Reserve and United States Digital Asset Stockpile"

U.S. Regulation

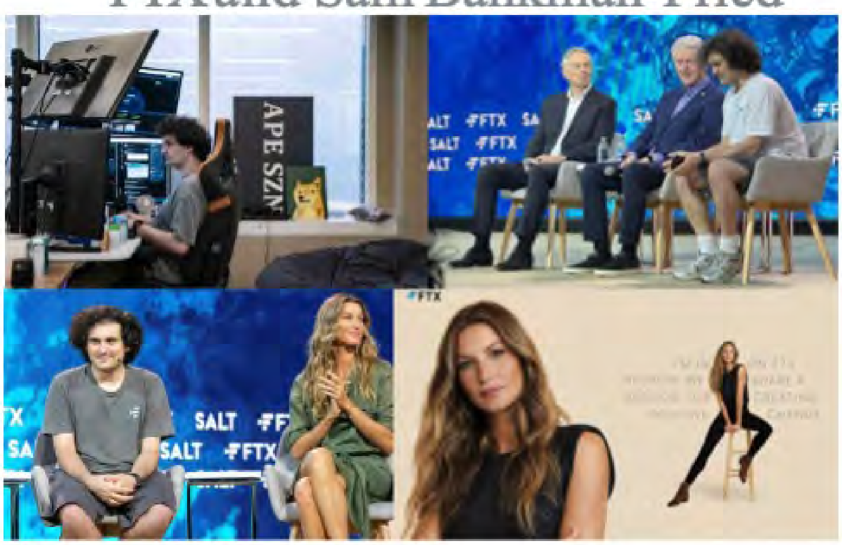
- •Regulation by Enforcement
  - -Aggressive Action by the Biden SEC
    - Ripple Labs (December 2020)
    - Coinbase (June 2023)
- •Operation Chokepoint 2.0
- •Almost all cases dismissed in 2025

U.S. Regulation

- •Where is US regulation headed?

FRAUD, HACKS, AND SCAMS IN CRYPTO

FTX and Sam Bankman-Fried



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State-Sponsored Hacking: North Korea and the Bybit Hack

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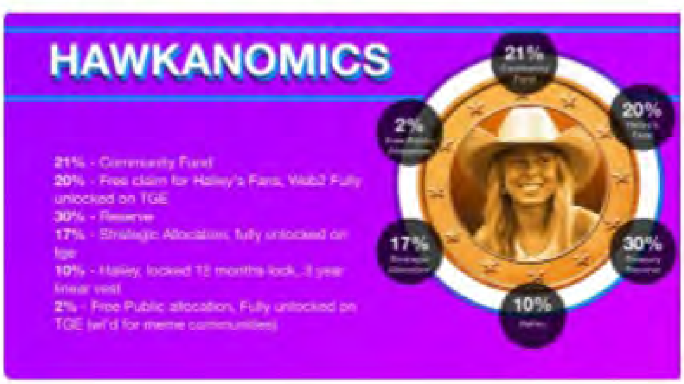
Memecoins… and "rug pulls"

- Memecoins cryptocurrencies inspired by internet jokes, cultural trends, or social media hype rather than underlying technology or utility. Examples include Dogecoin and Shiba Inu.
- Some, like $HAWK, turn into "rug pulls."



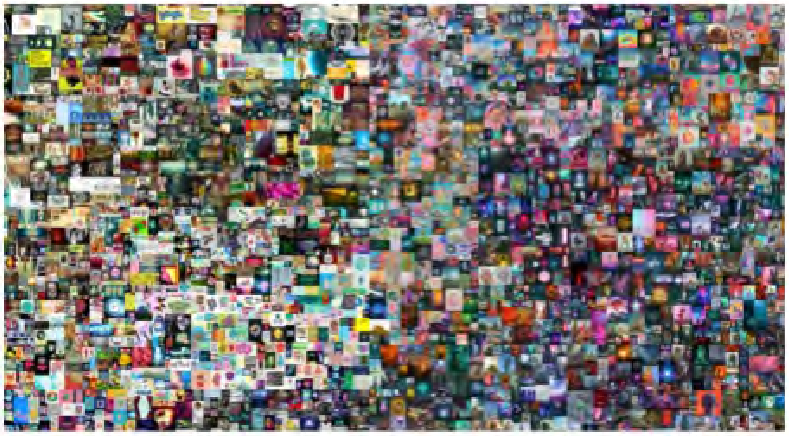
What happened to….?

- Non-fungible Tokens (NFTs)
- Decentralized Autonomous Organizations (DAOs)
- The Metaverse

NFTs

- Non-fungible tokens
- Represent ownership of unique digital assets, such as art, collectibles, or in-game items
- Examples include CryptoPunks, Bored Ape Yacht Club
- Estimated 95% of NFTs now have no value

NFTs



DAOs

- •Decentralized Autonomous Organizations
- •New entity (think LLCs in the 70s and 80s)
- •Recognized by Wyoming, Tennessee, and Utah
- •Slow to take off

The Metaverse

What's Next?

- Keep an eye on federal action and legislation.
- Civil suits will likely increase.
- Hang on for the ride!

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Devoted and driven, Joshua Metcalf never slows down. Always giving 100% of his effort to his work, Joshua has been organizing the defense of complex cases nationwide for more than 20 years, building a respected reputation in that time. Having learned the need for attention to detail during his tenure at the Virginia Military Institute, Joshua uses his strong desire to serve and his relentless work ethic to offer his clients a detail-focused but efficient representation, which emphasizes creative strategies and a thorough deconstruction of his opponent's case. Vowing never to be outworked or out-prepared, Joshua offers clients a strong legal voice and an organized defense to help them identify the issues that really matter to them and to their cases, and to implement appropriate plans to ensure success from both a legal and business perspective. With an insatiable intellectual curiosity, Joshua loves digging into complex medical and scientific issues, and enjoys collaborating with the talented members of his team to produce a consistently excellent product for his clients. For Joshua, business is personal and, as his clients can attest, a close working relationship and regular communication is at the heart of any engagement with Joshua and his team. Joshua carries this same focused intensity with him away from work, which is reflected in his commitment to his community and his dedication to his wife and four children.

If he is not in his office or on the road for a client, chances are you will find him with his wife and kids - at a gymnastics meet or baseball game, on a campout, or doing tractor therapy at the family's tree farm.

Practice Areas
- Asbestos
- Chemical & Mold Exposure
- Commercial Litigation
- Construction
- Environmental Litigation
- Hearing Loss
- Personal Injury
- Product Liability
- Cryptocurrency
- Pesticide

Professional Recognition
- Martindale-Hubbell® AV Preeminent® Peer Review Rating
- The Best Lawyers in America® (2019-2024): Litigation – Environmental
- Selected to Mid-South Super Lawyers (2019-2023)
- Selected to Mid-South Rising Stars (2010-2016)
- Selected as one of Mississippi Business Journal's Leaders in Law (2013)

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

ETHICS: Social Media Is Your Frenemy: Trial Risks and Ethical Pitfalls

Michelle Byers

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ETHICS: Social Media Is Your Frenemy: Trial Risks and Ethical Pitfalls

Michelle M. Byers

Social media is both friend and foe. It is a powerful tool if it can be harnessed successfully and utilized appropriately to bolster a case or exclude biased jurors. It is also a source of significant pitfalls if used unethically or boundaries are ignored. This article will address how to properly authenticate social media for use at trial, the risks and rewards of social media research of potential and seated jurors, and the ways in which the social media presence of a client's employees, experts, lawyers, and the judge can impact your client's case. Lastly, some recommendations will be offered to help protect against social media ultimately harming your client's case.

Social Media Authentication for Trial

We have all had that case where you are preparing for trial, examining or re-examining the witness's publicly available social media profile, and find the smoking gun—that is, evidence that the alleged damages are fabricated or proof that the story is not what it seems. Jackpot! You print a copy of the photograph or the online post and mark it as Exhibit 1. You walk into the courtroom confident that you will dismantle the other party's case to the great satisfaction of your client.

Assuming you hit the jackpot, have you taken the necessary steps to collect your winnings? Simply printing out what is on the computer screen and moving for its entry as an exhibit will undoubtedly result in a missed opportunity to present relevant, admissible evidence in support of the case. Instead, you must authenticate the social media post in a way that complies with the rules of evidence in your jurisdiction before it can be admitted. Authenticating evidence requires the proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is."[1] This is particularly important with the rise of fake social media accounts and the ability of hackers to infiltrate social media platforms. A social media post can be authenticated through testimony of a witness with knowledge of the post or circumstantial evidence paired with distinct characteristics of the post.[2] Both methods will assist you with demonstrating that the post is what you claim it is.

A witness with personal knowledge can authenticate a social media post.[3] The owner of the post, if a party to the case, can identify it as her own through testimony or written admissions. If the witness is not the owner, she can testify that she observed the owner publishing the post. This is the easiest way to authenticate a user's social media content.

You can authenticate a social media post without relying on its owner or eyewitness testimony by showing that "circumstantial evidence of the case combined with the 'appearance, contents, substance, internal patterns, or other distinctive characteristics' of the social media post are sufficient to prove that the proffered evidence is what it is purported to be," in accordance with Federal Rule of Evidence 902(b)(4).[4] This form of authentication typically requires two steps.

First, you must establish that the post you seek to introduce accurately reflects what was found online. This can be accomplished by the witness that printed the post testifying that the post reflects what was on his screen at the time it was printed. This testimony may be corroborated by the introduction of metadata related to the post. Metadata is "data about data," or "information describing the history, tracking, or management of an electronic document."[5] It contains "information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted."[6] Examples of metadata for electronic

1 Fed. R. Evid. 901(a).

2 Fed. R. Evid. 901(b)(1), 901(b)(4).

3 Fed. R. Evid. 901(a), 901(b)(1).

4 5 Christopher B. Mueller & Laird C. Kirkpatrick, Email, Social Media, Web Pages, Text Messages, Instant Messages Electronic Signatures, Federal Evidence § 9:9 (4th ed.) (quoting Fed. R. Evid. 902(4)).

5 Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005) (quoting proposed advisory committee note to Fed. R. Civ. P. 26(f)).

6 Id. (quoting The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, App. F (The Sedona Conference Working Group Series, Sept. 2005 Version)).

documents include file name, creation date, modification date, last accessed date, and file permissions.[7] Often, metadata is information that is not apparent to the viewer of a hard copy or screen image.[8] Metadata can corroborate testimony as to the circumstances of locating and downloading the post.

Once you demonstrate the accuracy of the post you intend to introduce into evidence, you must present evidence of its authorship. This is because of the rise of social media security concerns and the risk of fraudulent posts. The evidence can be in the form of testimony that the post could have only come from the owner because it (1) contains information only the owner would know; (2) is consistent with statements the owner previously made; or (3) contains code words that only the owner would use. This type of testimony has provided sufficient foundation for the admission of social media evidence in several jurisdictions.[9]

After introducing sufficient evidence to authenticate the social media post, you must be prepared to argue for admission based on relevance, prejudice, or hearsay. Establishing authenticity is only the first step in securing the admissibility of social media posts at trial.

Social Media and Jury Selection

The social media content of jurors can be a goldmine of information to evaluate whether a juror has a bias you want to avoid at the outset, or monitor whether a juror is engaging in misconduct during trial. A juror's social media profile can tell you about her political leanings and interests, inform whether she has an undisclosed connection to the litigation, and help you discover her likely biases. Failing to review juror social media content is a missed opportunity at best, and a potential violation of your ethical obligations to your client at worst.[10]

However, you must be sure the efforts made to investigate jurors—either during empanelment or after they are selected—are ethical and comply with the rules of professional conduct in your jurisdiction. American Bar Association (ABA) Model Rule 3.5(b) prohibits a lawyer from communicating with jurors throughout the litigation unless authorized by law or court order. The Model Rules also prohibit an attorney from engaging a third party to do what the lawyer could not otherwise do. ABA Model Rule 8.4(a) prohibits a lawyer from knowingly assisting or inducing another to violate the rules or to "do so through the acts of another."

"There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[11] Investigating a potential juror's social media during empanelment advances this public interest and will not violate ethical obligations if conducted appropriately. At least Missouri, New Hampshire, and New York have affirmed the appropriateness of investigating a potential juror's social media presence before the juror is empaneled.[12]

Those jurisdictions that permit continued monitoring of a seated juror's social media have noted the importance of such monitoring to identify juror misconduct.[13] The ABA notes that juror misconduct via social media, if discovered, triggers a lawyer's obligations under ABA Model Rule 3.3 to report the misconduct to the court to protect the tribunal from criminal or fraudulent conduct.[14] Under no circumstances, however, should you, or anyone acting on your behalf, take affirmative steps to "friend" or mislead a potential juror when conducting the research.[15]

Be wary of investigating potential jurors on social media sites that alert users to profile views, such as LinkedIn. Simply clicking on the profile link sends an alert to the juror, letting her know that someone viewed her profile. In some jurisdictions, this may be deemed improper communication with jurors in violation of Model Rule 3.5. In New Hampshire and in the view of the New York City Bar Association Ethics Committee, any notification of an attorney's access to a juror's social media is a violation of the rules.[16] However, the ABA has taken the position that the "fact that a juror or a potential 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

7 Id. (quoting The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, App. E n.1).

8 Advisory committee note to Fed. R. Civ. P. 26(f).

9 See, e.g., United States v. Browne, 834 F.3d 403, 413 (3d Cir. 2016) (witnesses involved in chat with author offered detailed testimony about the exchange consistent with chat logs; author's personal information interspersed in conversations with witnesses); United States v. Barnes, 803 F.3d 209, 217 (5th Cir. 2015) (messages in question matched author's manner of communication); Commonwealth v. Oppenheim, 16 N.E.3d 502, 510 (Mass. App. Ct. 2014) (evidence sufficient to authenticate that defendant wrote instant message, where tone was familiar to recipient, and message referred to earlier discussions with recipient and personal details about defendant); State v. Bell, 882 N.E.2d 502, 512 (Ohio Com. Pl. 2008) (messages contained coded words only author and victims would have known).

10 N.H. Bar Assoc. Ethics Comm. Op. #2019-20/03 ("a review of a juror's social media presence may be ethically required in providing competent representation under Rule 1.1"); United States v. Stone, 613 F. Supp. 3d 1, 44 (D.D.C. 2020) (rejecting defendants' motion for new trial on grounds of newly discovered juror bias and misconduct in part because "the decision not to conduct internet research did not deprive the defendant of his only means to discover the information").

11 ABA Formal Ethics Op. 466 (2014).

12 Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010); N.H. Bar Assoc. Ethics Comm. Op. #2019-20/03; N.Y.C. Bar Assoc. Formal Op. 2012-2 (2012)

13 N.H. Bar Assoc. Ethics Comm. Op. #2019-20/03. See United States v. Tsarnaev, 96 F.4th 441, 458 (1st Cir 2024), where defendant's attorney raised the issue of potential juror misconduct when it was discovered after provisional qualification that the juror communicated with friends on Facebook about the case. The First Circuit ruled the district court was obligated to investigate further upon learning of the potential misconduct because the right to an impartial jury is a "constitutional bedrock." Id.

14 ABA Formal Ethics Op. 466 (2014).

15 N.H. Bar Assoc. Ethics Comm. Op. #2019-20/03; N.Y. Cnty. Lawyers Assoc. Formal Op. 743 (2011).

16 N.H. Bar Assoc. Ethics Comm. Op. #2019-20/03; N.Y.C. Bar Assoc. Formal Op. 2012-2 (2012).

Rule 3.5(b)."[17] Colorado and the District of Columbia have taken similar positions.[18] Therefore, be sure to consult the applicable rules to ensure that the investigation you are conducting complies with the ethical obligations of your jurisdiction.

In some instances, judges have limited the litigants' ability to investigate jurors before and during trial.[19] The ABA encourages judges to address their expectations by way of local rule, standing order, or case management order.[20] Be sure to consider all the guidance available, not just the rules of professional conduct, when conducting potential juror research.

Social Media Activity of Defense Witnesses, Experts, Lawyers, and Judges

Almost everyone related to the litigation process has a social media presence: parties, a client's employees, lawyers, experts, and even the judge. Their presence may range from profiles on traditional friendship-based platforms like Facebook, to business-oriented platforms such as LinkedIn. Your online presence should be protected to prevent influencing the litigation process, even if unintentionally. This includes employing privacy protections built into the platforms, as well as good Internet hygiene practices.

Good Internet hygiene starts with understanding who can view posted content. Make sure you have a good understanding of the privacy settings of all social media platforms you use. Also consider whose online content may impact your client, whether it is a client employee, an expert, the lawyer, or the judge.

Take a client employee's social medial presence as an example. If the employee is sharing his personal ideas online, which may not align with the client's mission or values, consider whether that employee should serve as the corporate representative at deposition. It is possible the views of the employee could undermine his authenticity or credibility while testifying. For example, if the employee serves as the client representative at deposition for an engineering company that performs bridge inspections, be sure the employee has not publicly commented about his preference to shortcut training, safety, or compliance. Likewise, if the employee is a representative of an auto manufacturer, make sure he is not publicly disparaging online the safety and reliability of the vehicle about which he will testify.

Consider your non-litigation connections to an expert. Lawyers and clients work closely with experts, often on cases extending over many years, which leads to the development of a friendship outside of the litigation. Perhaps you have shared interests in recreational activities or volunteerism. While most experts have professional websites to advertise their services, be sure to investigate whether your expert publicly shares her non-litigation activities on social media as well. Do you and your expert volunteer for the same charity? Do you appear together in photographs on the charity's website? Your opponent might use those photographs to suggest the expert has bias or has been influenced by your personal relationship. This is not to say volunteerism is taboo; just be thoughtful about disclosing online how and with whom you spend your personal time.

The same goes for connecting with judicial officials on social media. In Massachusetts, the Committee of Judicial Ethics prohibits a judge who uses LinkedIn from connecting with "any attorney who is reasonably likely to appear before that judge."[21] The Committee directs judges to reject connection requests, disconnect from lawyers who appear before them, and consider disclosing prior connections to determine whether disqualification is required.[22] While the opinion is directed to judges, you should take heed and strongly consider refraining from connecting with judges on social media. Some judges will publicly post comments on social media about current events or speaking opportunities. Lawyers will "like" these posts, presumably to show support. While the intent is probably harmless, opposing counsel or parties might see the interaction as an attempt to curry favor with the court. Enough interactions like these, and an opposing party might move to exclude your participation in a case due to a perceived conflict of interest. It is not worth the trouble of having to explain to your client that an important motion hearing had to be rescheduled, or an excellent judge was disqualified from trying the case, because of your social media connection.

The continued growth of LinkedIn poses risks as well. When LinkedIn was first developed, it was a social media platform for sharing work-related updates. Now, users post references to family or social pastimes. The Massachusetts Committee of Judicial Ethics noted its rationale for the optional connection disclosure requirement when it was proposed in 2016 that "LinkedIn is primarily used for sharing professional, rather than

17 ABA Formal Ethics Op. 466 (2014).

18 See D.C. Bar Legal Ethics Comm. Formal Op. 371 (2016); Colo. Bar Ass'n Ethics Comm. Formal Op. 127 (2015).

19 See, e.g., Order on Use of Juror Information, Singular Computing LLC v. Google LLC, No. 19-12551-FDS (D. Mass. Jan. 8, 2024), ECF No. 703 (ordering Google to refrain from accessing its users' personal data for purposes of investigating any member of the venire or empaneled jury but allowing parties to investigate seated jurors' publicly available information after empanelment); Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1103-04 (N.D. Cal. Mar. 25, 2016) (requiring parties to voluntarily consent to ban against Internet research on the venire or jury, or comply with procedure informing venire of scope of parties' intent to search their publicly available social media).

20 ABA Formal Ethics Op. 466 (2014).

21 Mass. Comm. Judicial Ethics Op. 2016-08.

22 Id.

personal, information, so a former LinkedIn connection is typically less likely to have acquired personal information about a judge that could be used to convey the impression of special knowledge and access."[23] However, because the nature of LinkedIn has changed, your usage should adapt as well. With the increase of personal information shared on LinkedIn, the personal-professional line has been blurred and can impact your client's case.

Staying Frenemies with Social Media

How do you ensure your social media presence does not threaten your client's case? Several ways come to mind:

- Routinely review and update privacy settings on the platforms on which you have a presence. This is just good practice in both your personal and professional lives.
- Evaluate the content shared on the platforms on which you have a presence. If you have profiles on several platforms, consider dividing shared content along personal and professional lines. Use Facebook to share family updates or photographs, or news about volunteer activities you engaged in with an expert-turned-friend; employ LinkedIn to share professional development updates and thought leadership pieces within your subject matter expertise. A clear line between personal and professional content will go a long way to alleviate any perceived bias or conflict.
- Examine the scope of your connections on the platforms on which you have a presence. Do you really need to connect with a colleague on several platforms? Is it imperative the colleague sees your child's school play photographs and your professional commentary? In a world of oversharing, consider putting limits on who has access to personal information. Do not be afraid to disconnect with colleagues or acquaintances on platforms where you share personal information while maintaining a professional online connection with them. Most people will respect your choices and your efforts to tackle ethical issues that may impact your clients and your practice.
- Decide whether maintaining social media connections with judges adds any value to you or your clients. While in the short term it may seem like a good idea, the online relationship may be more trouble than it is worth.

Taking steps to avoid the ethical pitfalls and risks of using social media will benefit you, your clients, your practice, and your client's case.

23 Mass. Comm. Judicial Ethics Op. 2018-03.

Social Media Is Your Frenemy

Trial Risks and Ethical Pitfalls

Michelle M. Byers

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Social Media

- Authentication
- Risks
- Rewards
- Strategies

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Authentication

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Authentication

- Fed. R. Evid. 901(a)

- Evidence Sufficient to Support a Finding That the Item Is What the Proponent Claims It Is

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Authentication

- Personal Knowledge
- Fed. R. Evid. 901(b)(1)

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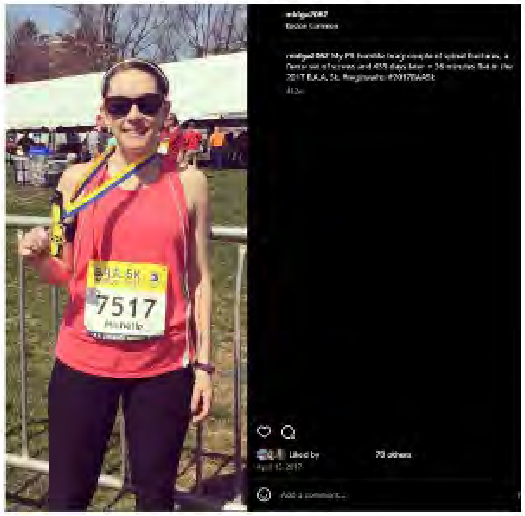
Authentication



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Authentication

- Circumstantial Evidence
- Distinctive Characteristics
- Fed. R. Evid. 901(b)(4)

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Authentication

- Does the Post Accurately Reflect What Was Found Online?
  - Metadata
- Evidence of Authorship

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Authentication

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Authentication

- Case Study
  - *State v. Bell*, 882 N.E.2d 502 (Ohio Com. Pl. 2008)
  - Coded Words

Authentication

- Case Study
  - *State v. Green*, 830 S.E.2d 711 (S.C. App. 2019)
  - Distinct Message Content

Authentication

- Case Study
  - *Commonwealth v. Oppenheim*, 16 N.E.3d 502 (Mass. App. Ct. 2014)
  - Distinct Tone

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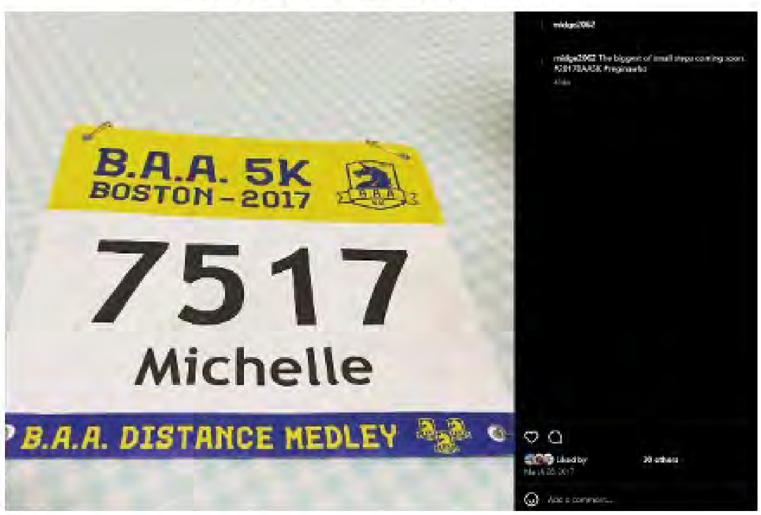
Authentication



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Authentication

- Authentication Is Only the First Step
- Be Prepared to Argue For or Against Relevancy, Prejudice, Hearsay

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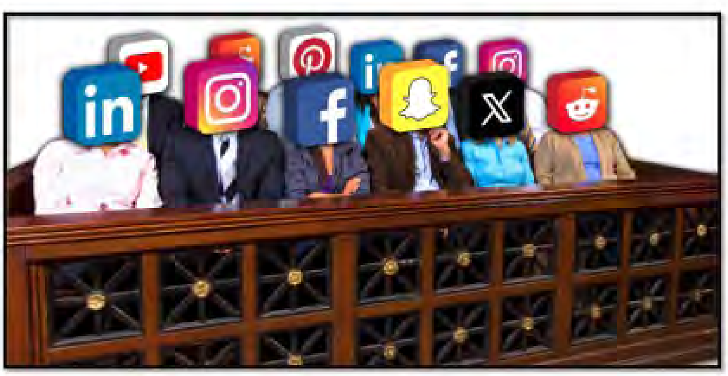
Social Media Risks & Rewards

- Juror Investigation



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Social Media Risks & Rewards

- Model Rule 3.5(b) and Juror Communications

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Social Media Risks & Rewards

CLIENT EMPLOYEES

EXPERTS

LAWYERS

JUDGES

- Privacy
- Credibility
- Bias

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Social Media Risks & Rewards

- Best Practices
  - Review Privacy Settings
  - Divide Content Between Platforms
  - Evaluate Scope of Connections

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Michelle M. Byers

Member | Campbell Conroy & O'Neil (Boston, MA)

Michelle focuses her practice on a wide range of civil litigation matters, defending the firm's clients in product liability, premises liability, and personal injury/negligence matters, and has particular experience in the automotive industry. She has experience in both state and federal courts around New England representing a wide range of national corporations and insurance companies in complex matters involving multiple parties, as well as small businesses and individuals in general liability disputes.

Michelle has tried numerous cases, obtaining defense verdicts in contract and complex product liability jury and bench trials.

Practice Areas
- Legal Malpractice
- Personal Injury / Negligence
- Premises Liability
- Products Liability Defense

Industries
- Automotive
- Insurance Defense
- Construction Industry Litigation

Publications
- Moderator, "I Passed the Bar During a Pandemic! Now What Do I Do?" MBA Young Lawyers Division Symposium
- Moderator, "I Passed the Bar! Now What Do I Do?" MBA Young Lawyers Division Symposium
- Panelist, "What I Wish I Had Known as a Young Litigator," Young Lawyers Division Symposium
- Massachusetts Attorney-Conducted Voir Dire and Monetary Amount Claimed, TORTSOURCE, Spring 2015, at 3
- What Are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts, 46 NEW ENG. L. REV. 551
- As Luck Would Have It: Pollard v. Geo Group, Inc.'s Extension of the Bivens Remedy Against Private Prison Employees, 46 NEW ENG. L. REV. 185

Honors
- Massachusetts Bar Association's Leadership Academy Fellow, 2019-2022
- Massachusetts Bar Association's Trial Academy Participant (Apr. 3-4, 2019)
- Massachusetts Super Lawyers Rising Star – 2016, 2017, 2018, 2019, 2020, 2021
- Best Lawyers: Ones to Watch – 2020, 2021

Education
- 2006, B.S., magna cum laude, Northeastern University
- 2012, J.D., cum laude, New England Law | Boston

ETHICS: Navigating Attorney-Client Privilege in the Age of AI

Gabe Wohl
Bowes Rice (Charleston, WV)

Navigating Attorney-Client Privilege in the Age of AI
Gabe Wohl

Balancing AI Innovation and Legal Duties
Generative AI (GenAI) tools are rapidly integrating into law practice, raising complex questions about how traditional confidentiality doctrines apply. The attorney-client privilege and work product protection are defined by rules and precedent that predate AI, but these frameworks must be interpreted flexibly to accommodate and provide structure to AI-assisted legal work.

The attorney-client privilege is one of the most foundational tenets in legal practice, ensuring clients are free to seek sound legal advice. Common over-dependence and misuse of the privilege as a shield in litigation not only weakens its protection but also runs the risk of unpredictable and adverse rulings, especially as these protections merge with new technology. Advanced AI, like ChatGPT and Microsoft Copilot, has changed the way lawyers communicate with clients and prepare for litigation. A review of what these protections cover and do not cover is critical to prevent technology from sabotaging efforts to guard confidential and otherwise non-discoverable information.

Attorney Client Privilege
For a record or recording to be protected by the attorney-client privilege, it must involve a communication or intended communication between a client or its agent and an attorney or its agent. If coming from a client, the communication is covered if it contains a request for legal advice and facts that the attorney needs to assess for the legal advice. If coming from an attorney, the communication must contain legal advice. The U.S. Supreme Court, in *Upjohn Co. v. United States,* famously explained that the privilege's "purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice."

A communication is only partially protected if it contains information that is outside of these boundaries, and, if relevant and responsive, it must be produced with only the privileged portion redacted.

This privilege is waived by the inclusion of a third party other than the client, attorney, and certain agents of the client or attorney. Professional services and technology tools that transcribe, summarize, analyze, and generate client communications may, depending on the vendor's terms, expose otherwise protected communications to third parties and waive the privilege.

Work Product Protection
The Federal Rules of Civil Procedure codify the work product doctrine in Rule 26(b)(3). This rule provides that "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative" absent a showing of substantial need and undue hardship.

Work product subject to protection can be generated by a client or attorney or their representatives, and the information does not have to be a communication or meet any substantive criteria.

Drafts, notes, or research generated by an attorney (or by an AI tool at an attorney's direction) for a case are generally shielded from discovery by opposing parties. Even if an opponent demonstrates substantial need for fact work product, the rule mandates that courts "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney" – opinion work product.

Unlike the attorney-client privilege, work product can be disclosed to non-adverse third parties and maintain the protection. Also unlike attorney-client privilege, the production of *fact* work product can be compelled if the needs of the case demand it.

Incorporating artificial intelligence into legal factfinding, advanced research, document review, and content generation can save clients money and achieve more comprehensive strategies and defenses, but it can also make fact and opinion work product accessible to outside parties, jeopardizing the protection.

The Privilege Log

The federal rules provide that a party claiming privilege must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." This rule often gets neglected in the commotion of pre-litigation and, as a result, critical discovery can become unnecessarily exposed. Responsive and relevant communications and material default to discoverable. The party asserting a privilege bears the burden of establishing its applicability, and it cannot meet this burden by simply relying on general allegations or blanket assertions that the privilege should apply. A privilege log must provide sufficient detail as to why the information in the document is privileged as required under the rules.

Privilege logs should be examined for potential vulnerabilities created by artificial intelligence tools. It is increasingly common for memoranda, interview summaries, and meeting records to be generated using technology. Understanding when the potential for this technology to constitute a waiver will enable attorneys to not only defensively protect their clients, but also ask the right questions to develop an argument for disclosure on the offensive side.

AI Generated Content

GenAI is an artificial intelligence tool that generates content following a prompt using large language models (LLMs). LLMs are learning models that process huge amounts of information and use it to generate, predict, and analyze content. There are new GenAI tools marketed to lawyers everyday—tools that conduct legal research; draft client communications, memoranda, briefs, and legal documents; and assist with discovery responses and litigation strategy. Users must input information into the system to generate the content. When the task is legal research, maintaining privileges and protections are typically not much of a concern. But, with more tailored content generation, there is a real risk of inadvertent waiver. When using GenAI, the result improves with more precise details and more context in the prompt. Adding details and context to the prompt dramatically enhances and tailors the end content, but it can get dangerously close to providing otherwise protected information to a third party.

When confidential information is input into a GenAI tool and that information is accessible by individuals that work for the vendor, third parties the vendor discloses to, or other users of the tool, this could expressly waive any privilege.

Open GenAI programs use publicly available data to train their LLMs. Once a user inputs a question or a prompt into one of these platforms, that information can be used to further train the LLM and improve the model. For example, data from questions on certain free platforms from OpenAI or Meta are shared back with their developers. Some models contain terms that permit use of user inputs such that they could, in part, be provided as content to other users.

Closed GenAI models are proprietary tools that rely on self-contained datasets. Instead of prompts being used to train the program, that information is not accessible by other users. While closed GenAI is more expensive, it is typically more reliable and secure. Even with closed GenAI, the terms of the program must be scrutinized to determine who has access to user information and how it is used. There may be privacy options imbedded in the program that need to be selected to ensure privacy.

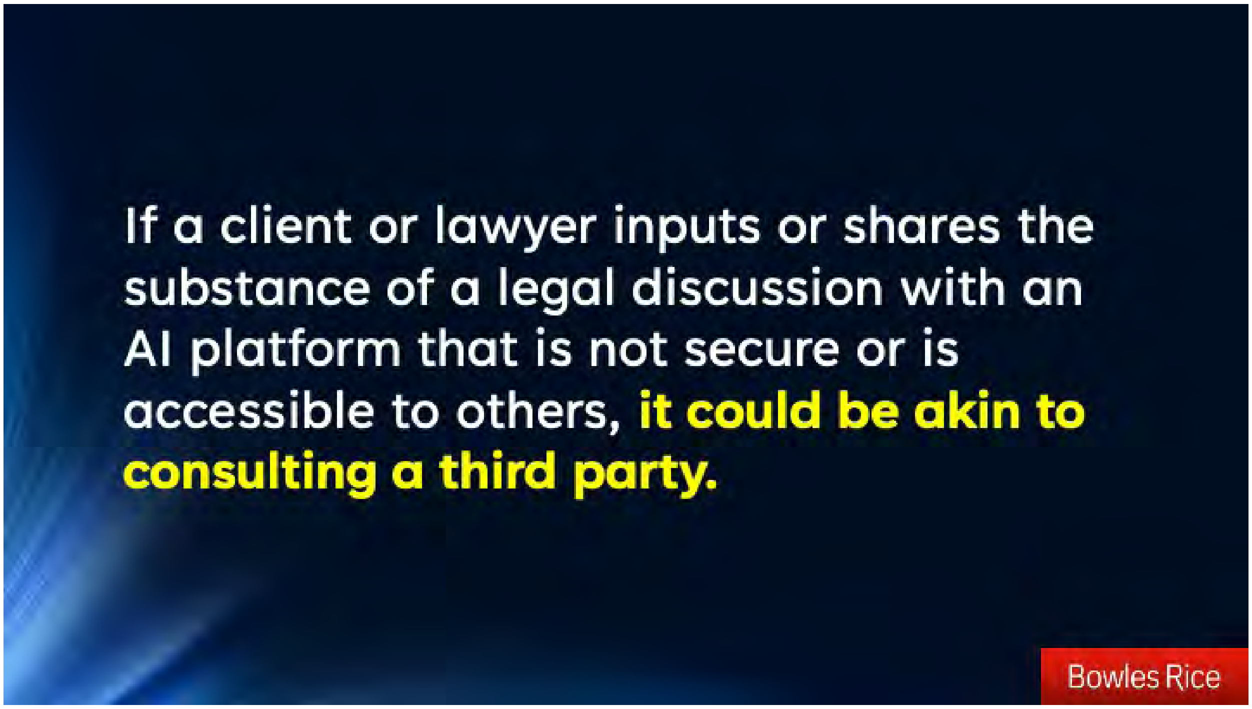
To take advantage of GenAI while minimizing the risk of waiving protections, consider closed systems when working on matters that are highly specific to a client. Before purchasing GenAI tools, ask the vendor: Where is the data stored? Who can access it? How is it encrypted? Is it mingled with other customers' data?

When using open AI systems, train employees on protecting confidential information by never inputting sensitive or specific prompts that could reveal a specific client or matter.

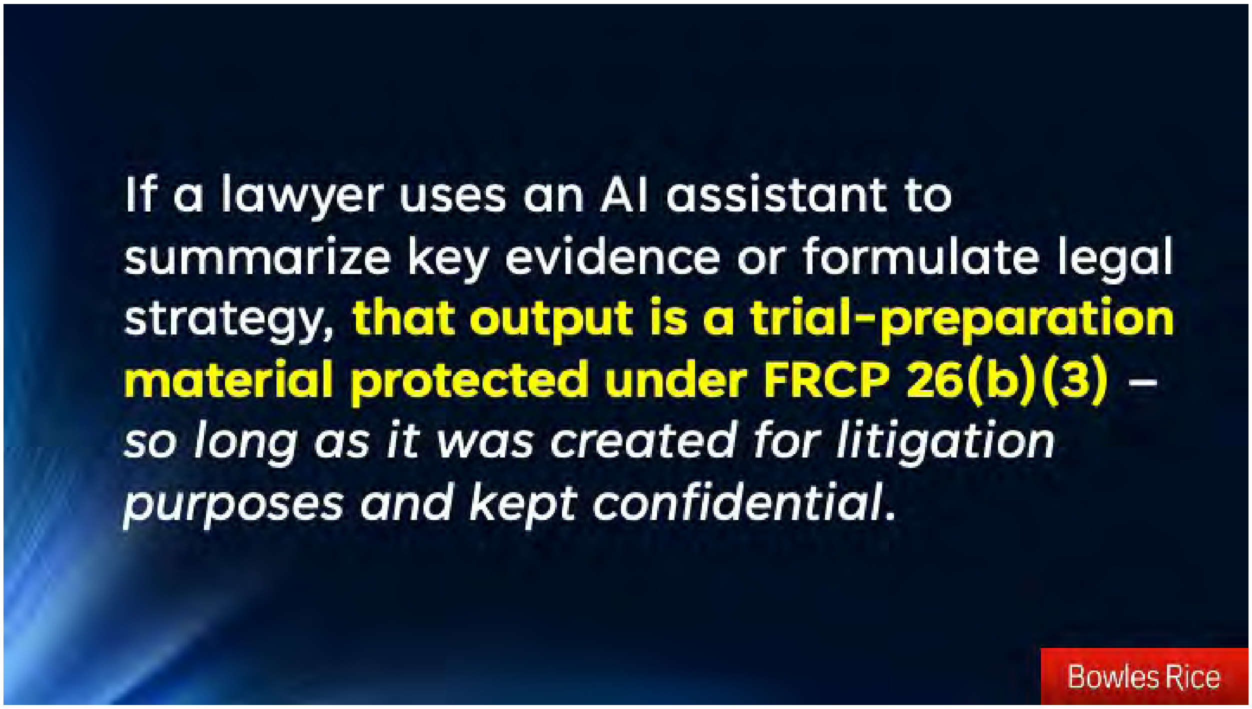
Given the thoroughness and accuracy of GenAI, as well as its tremendous time-saving capabilities, avoiding new technology is becoming less of an option for attorneys. The risk of waiving a privilege is always intimidating, but luckily lawyers are good at paying attention to the fine print. Review the privacy terms, talk to the vendor's representatives, and adjust all options to prevent disclosure to anyone outside the attorney-client relationship and limit accessibility to the public.


Balancing AI Innovation and Legal Duties
by
Gabe Wohl
Bowles Rice

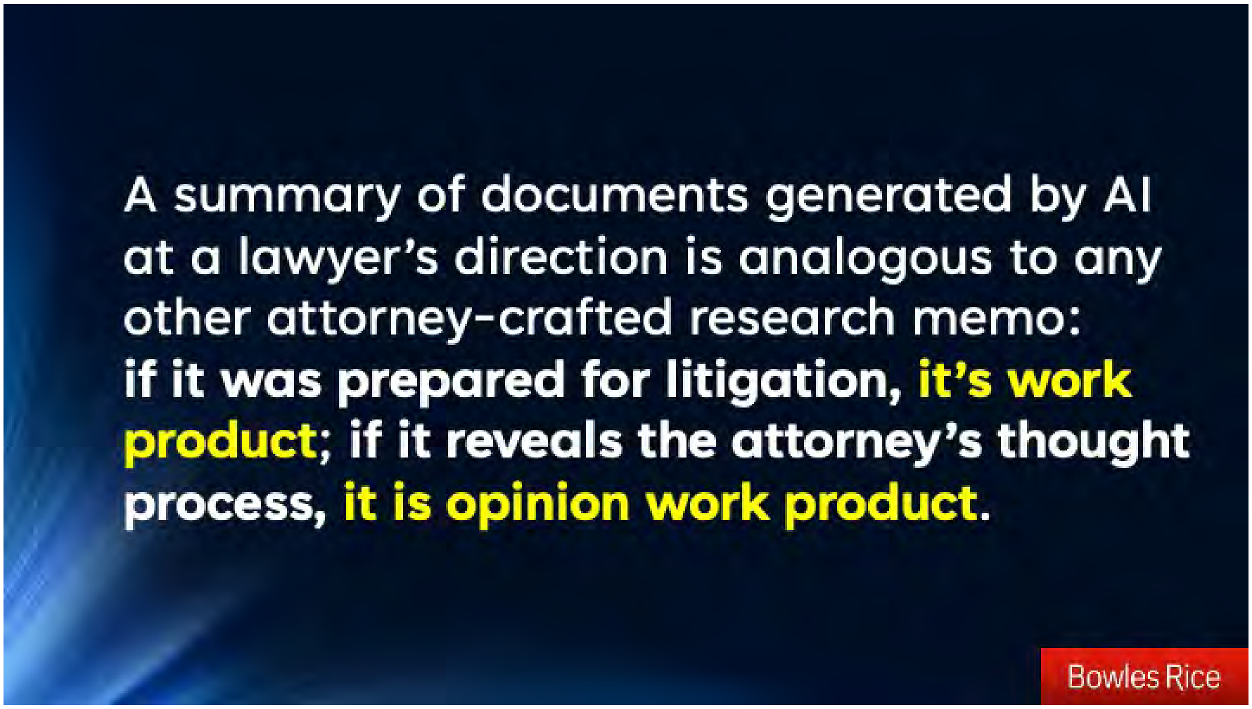

Attorney-Client Privilege


If a client or lawyer inputs or shares the substance of a legal discussion with an AI platform that is not secure or is accessible to others, it could be akin to consulting a third party.
Bowles Rice


Work Product Protection


If a lawyer uses an AI assistant to summarize key evidence or formulate legal strategy, **that output is a trial-preparation material protected under FRCP 26(b)(3)** – *so long as it was created for litigation purposes and kept confidential.*
Bowles Rice


AI Content as Fact & Opinion Work Product


A summary of documents generated by AI at a lawyer's direction is analogous to any other attorney-crafted research memo:
if it was prepared for litigation, it's work product; if it reveals the attorney's thought process, it is opinion work product.
Bowles Rice


Using a public AI service to analyze a client's confidential information could be viewed as **voluntarily exposing that information to an outside party**, jeopardizing protection.
Bowles Rice


Data Retention
and Preservation


Waiver and
Inadvertent
Disclosure Risks


Federal Rules of Evidence 502:
An inadvertent disclosure can avoid waiver if reasonable precautions are taken
Bowles Rice


Discovery Requests on an Opponent's Use of AI

Request for Production:

"Produce all documents and communications sufficient to identify or describe your use of any generative artificial intelligence tools (including but not limited to ChatGPT, OpenAI Codex, GitHub Copilot, Microsoft 365 Copilot, or other large language model-based tools) in connection with the claims or defenses in this action."

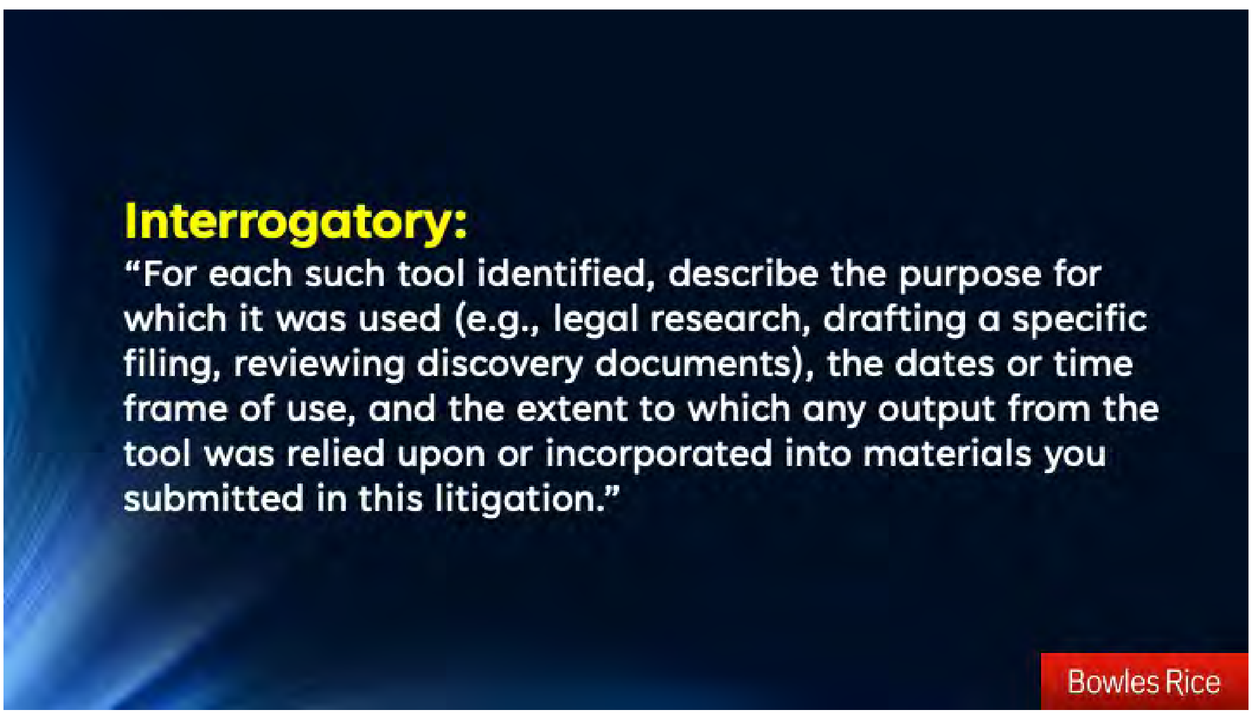
Bowles Rice

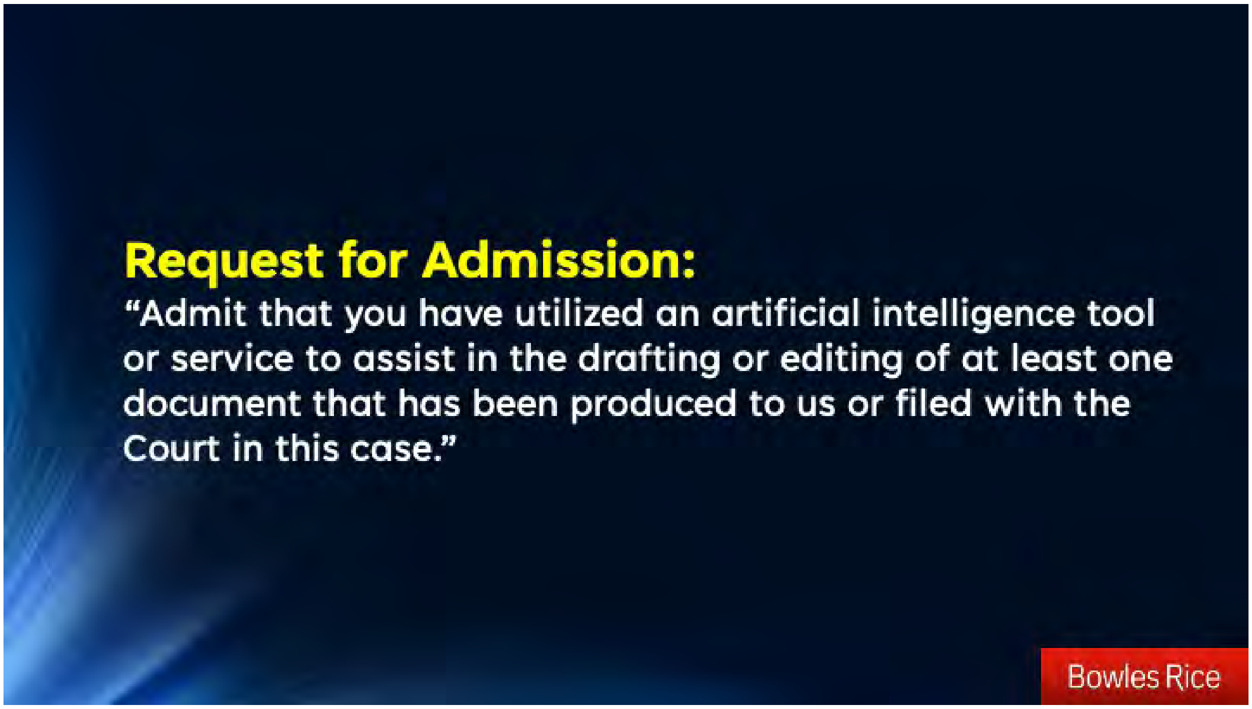
Request for Production:

"This includes, but is not limited to, any outputs generated by such AI tools that were used in preparing court filings, discovery responses, or other litigation materials, as well as any records of prompts or queries you input into those AI tools."

Bowles Rice

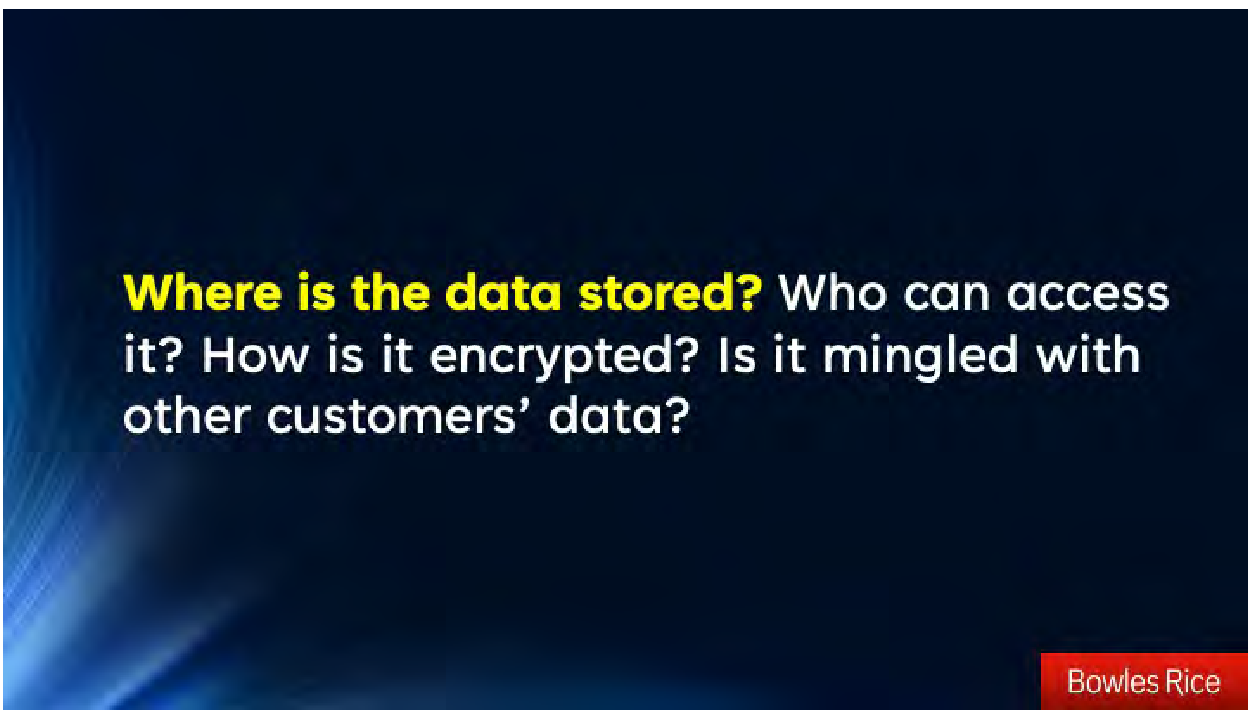

Interrogatory:
"Identify any artificial intelligence or machine-learning tools used by or for you (including by your attorneys or agents) to draft, analyze, or review any documents in this case, including pleadings, briefs, discovery responses, or document productions."
Bowles Rice

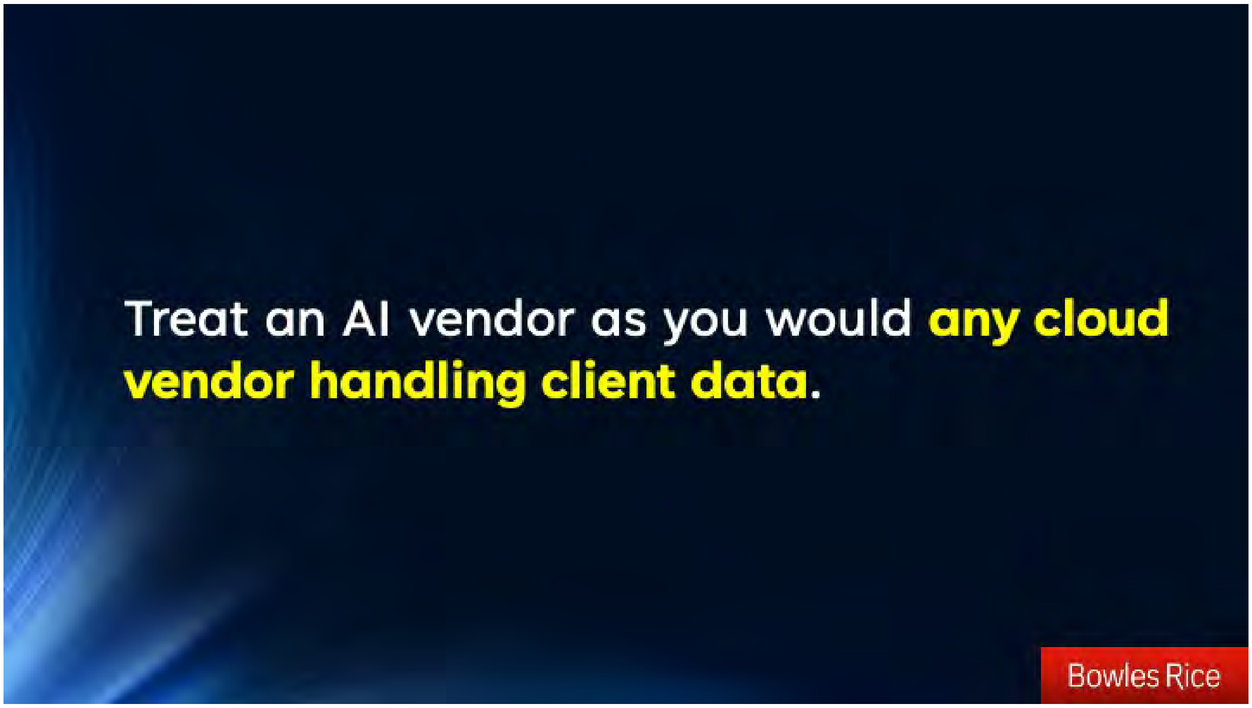

Interrogatory:
"For each such tool identified, describe the purpose for which it was used (e.g., legal research, drafting a specific filing, reviewing discovery documents), the dates or time frame of use, and the extent to which any output from the tool was relied upon or incorporated into materials you submitted in this litigation."
Bowles Rice


Request for Admission:
"Admit that you have utilized an artificial intelligence tool or service to assist in the drafting or editing of at least one document that has been produced to us or filed with the Court in this case."
Bowles Rice


Data
Privacy


Prompts and responses are encrypted in transit and at rest and are not used to train the underlying large language models.
Bowles Rice


Where is the data stored? Who can access it? How is it encrypted? Is it mingled with other customers' data?
Bowles Rice


Treat an AI vendor as you would any cloud vendor handling client data.
Bowles Rice


Best Practices

Vet and Use Secure AI Tools

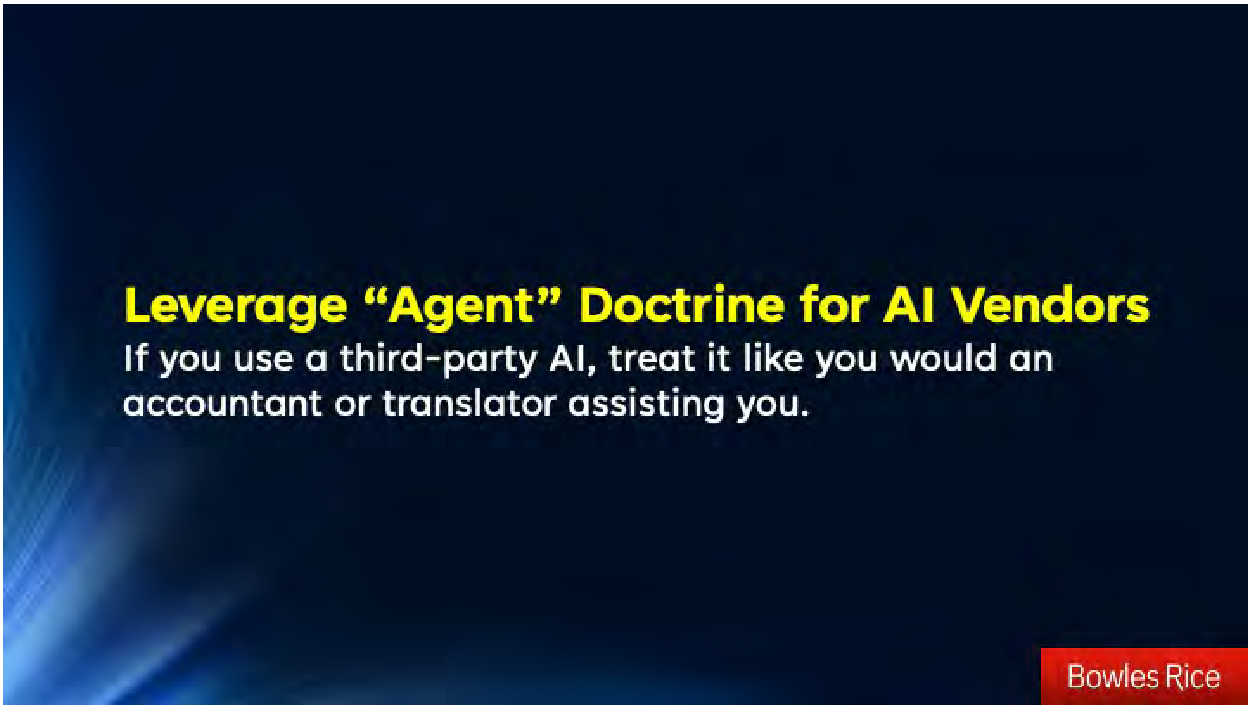
Choose enterprise-grade AI platforms that contractually guarantee data confidentiality. Avoid public or consumer AI apps for any sensitive or client-related work.

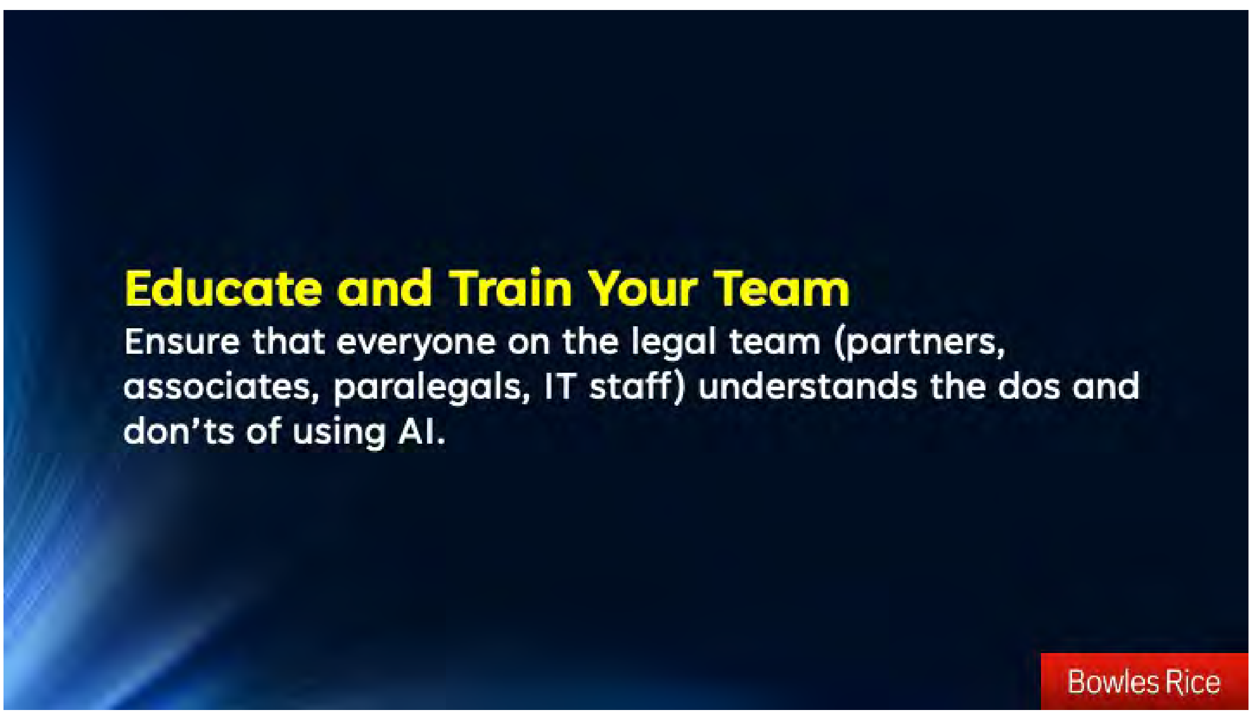
Bowles Rice

Preserve Privilege: Don’t Put Privileged Info in Public AI

Treat any AI prompt as if you’re speaking to a third party – unless you are certain of the tool’s privacy.

Bowles Rice


Leverage "Agent" Doctrine for AI Vendors
If you use a third-party AI, treat it like you would an accountant or translator assisting you.
Bowles Rice


Educate and Train Your Team
Ensure that everyone on the legal team (partners, associates, paralegals, IT staff) understands the dos and don'ts of using AI.
Bowles Rice

Maintain Strong Work Product Discipline

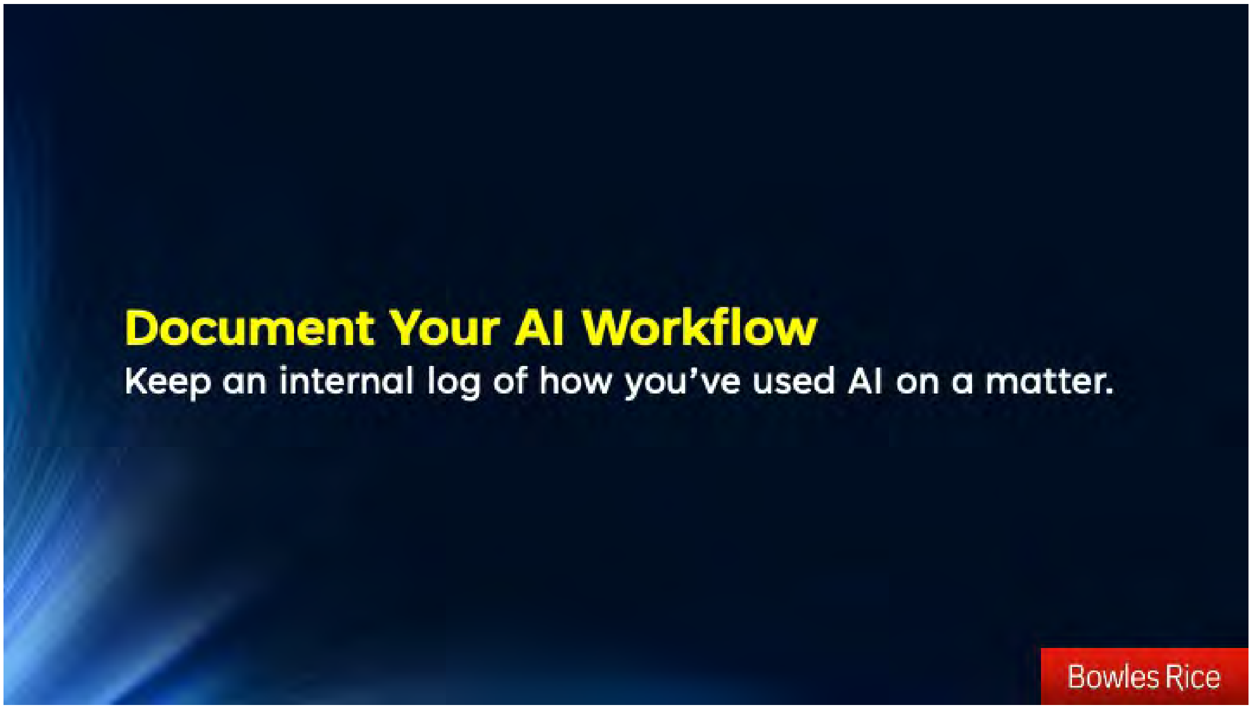
Treat AI outputs as you would any attorney work product.

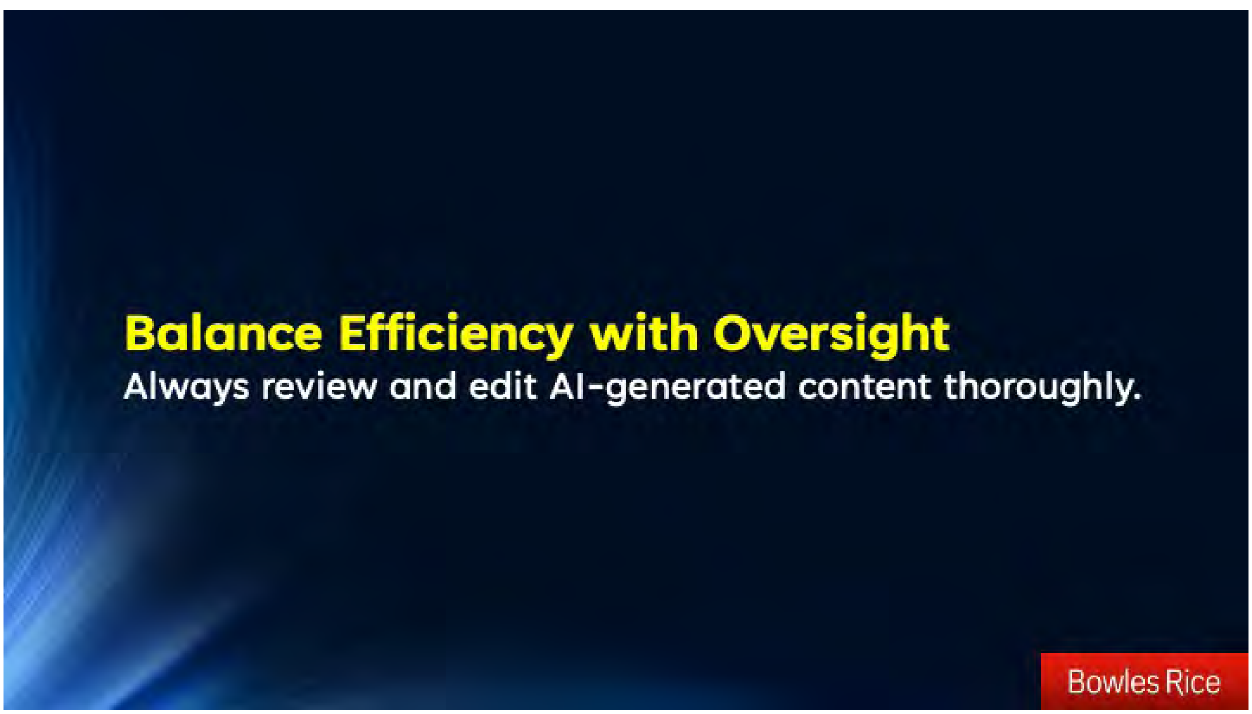
Bowles Rice

Use Clawback Agreements & 502(d) Orders

Despite precautions, mistakes happen. Every federal case with ESI should have an agreed **clawback provision (pursuant to FRE 502)** or, better yet, a court-entered 502(d) order.

Bowles Rice


Document Your AI Workflow
Keep an internal log of how you've used AI on a matter.
Bowles Rice


Balance Efficiency with Oversight
Always review and edit AI-generated content thoroughly.
Bowles Rice


Embrace Transparency
with Clients and In-House Counsel
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Gabriele Wohl

Partner | Bowles Rice (Charleston, WV)

Gabriele Wohl is an experienced litigator in the firm's Charleston, West Virginia office, regularly handling complex civil litigation for national corporations. In addition to her practicing in the Litigation Group, she leads the White Collar Defense and Investigations team and chairs the Bowles Rice Diversity Committee. Gabe keeps in close contact with her clients and enjoys helping them navigate stressful and intricate legal issues.

In her litigation practice, Gabe has years of experience advocating for businesses ranging from Fortune 500 companies to local entrepreneurs. She has traveled nationwide to represent witnesses and corporations in complicated multi-district litigation matters and government investigations. Gabe has litigated several False Claims Act cases to favorable resolutions, and routinely defends medical professionals and practices against Medicaid fraud allegations. She also conducts thorough internal investigations for her business clients, focusing on employee misconduct, financial fraud, and compliance.

Gabe appears often in federal court and has argued before the Court of Appeals for the Fourth Circuit.

Before joining Bowles Rice, Gabe served as an Assistant United States Attorney for the Southern District of West Virginia. There, she gained first-chair experience in drug trafficking and public corruption trials and served as the office's District Elections Officer and Computer Hacking and Internet Prosecution Coordinator. At the U.S. Attorneys Office, she participated in complex white collar investigations and prosecutions involving a variety of federal offenses, including fraud, identity theft, worker safety violations and civil rights violations. She also provided civil rights training for the West Virginia State Police Academy.

Practice Areas
- Appellate Advocacy
- Business Litigation
- Education Law: Higher Education
- Labor and Employment
- Litigation
- WE Mean Business: Women Executives and Entrepreneurs
- White Collar Defense and Investigationse

Honors
- Named to The Best Lawyers in America (Commercial Litigation, Criminal Defense: White-Collar and Litigation - Labor and Employment), since 2024
- Extra Mile Award, West Virginia Center for Children's Justice (2017)
- Award for Excellence, Council of Inspectors General on Integrity and Efficiency (2016)
- Best Lawyers: Ones to Watch – 2020, 2021

Education
- J.D., West Virginia University College of Law (2009) - Editor-in-Chief, West Virginia Law Review; Order of the Coif
- B.A., Political Science, Wellesley College (2004)

ETHICS:
AI in the Courtroom:
Risks, Rules, and Guidance

Tom Feher
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Ethical Issues and Dangers in the Use of Artificial Intelligence in Litigation and Trial
Tom Feher

The term “artificial intelligence” is used frequently and in many contexts. As the authors of the most recent ABA ethics opinion on the topic notes, “at its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition.” - ABA Formal Ethics Opinion 512 at 1. (citing, BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

For many years, there have been computer programs used in litigation practice designed to perform tasks that humans had performed for generations, including databases that kept track of documents and programs that allowed Boolean searches of case decisions. Today these tools have evolved into programs called large language models that use datasets ranging from specialized “legal” content to massive databases of more or less everything that can be found on the internet to create novel content by mimicking, using prediction of how content might be written to “predict” what would be written by a human, otherwise known as “Generative AI.” The number of ways that legal tech companies (both traditional and otherwise) have developed for this technology to create and produce things that humans have traditionally created expands every day.
Foregoing old tools like typewriters for Chat GPT to create legal work product doesn’t change the essential obligations of the lawyer to clients and the system, including our ethical obligations. The proliferation of Generative AI, however, causes us to look at and for other scenarios in which those duties are implicated and might be breached by us or our opponents.

Response of the Authorities
Ethical authorities around the country have been addressing issues raised by new technologies and their use in the profession for decades. Generative AI tools already exist to assist lawyers in tasks such as legal research, document review, and drafting discovery, examinations, briefs and other legal documents. And with the advent of Generative AI, the task of staying current on the technology has become very difficult, in no small part because the tools and ways Generative AI can be used have expanded exponentially and will likely continue to do so. As the ABA has noted:

> At the same time, as with many new technologies, Generative AI tools are a moving target—indeed, a rapidly moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate.

Nonetheless, it is incumbent on the profession to keep up. In July of 2024 the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512, which was a broad-based attempt to collect existing opinions and set forth a framework for reviewing these developments as they occur.

In Opinion 512, the ABA focused on a few primary areas where the use of Generative AI is directly implicated: Competency, Confidentiality and Communication.

Rule 1.1 Competence
The first rule in most state’s Code of Professional Responsibility says that a lawyer has an ethical responsibility to be competent at what they do: ABA Model Rule 1.1 requires that “a lawyer shall provide competent representation to a client” and that this duty “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” as well as to understand “the benefits and risks associated” with the technologies used to deliver legal services to clients.

The vast majority of states have adopted a form of the ABA’s Comment 8 (or its equivalent) to Rule 1.1, which says that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." This mandate establishes that lawyers have an ethical duty to be professionally competent with the use of technology in the practice of law.

According to the ABA, to comply with their Rule 1.1 competence requirement, lawyers have two choices: 1) acquire a reasonable understanding of the benefits and risks of the Generative AI tools' capabilities and limitations in practice or 2) draw on the expertise of someone who does. What constitutes a "reasonable understanding" of those benefits and risks? That of course is not defined, other than by the circular definition of "reasonable" from the Rules' definitions: "the conduct of a reasonably prudent and competent lawyer." Based on this and many other sources, it is safe to say that a lawyer handling litigation in 2025 needs to at gain an initial understanding of how Generative AI works and how it doesn't work (discussed in more detail below).

Opinion 512 also highlights what is especially difficult here, which is not just meeting this standard, but maintaining compliance. Generative AI's continuously increasing pace of developing new capabilities and applications makes compliance a moving target: "This is not a static undertaking. Given the fast-paced evolution of Generative AI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks." But the Committee does suggest that lawyers should:

- "consider" reading about Generative AI tools targeted at the legal profession
- attend relevant continuing legal education programs, and
- consult with others who are proficient in Generative AI technology

The ABA Committee does identify the fact that some uses of Generative AI present less risk and are likely more suited to most lawyers' practice. It says that "using Generative AI tools that are designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the Generative AI tool provides a reasonable basis for relying on its results."

Using AI to generate "ideas" would not seem to implicate competence, at least other than to the extent it becomes part of the standard of care and the failure to do so is deemed "incompetent" as discussed briefly below. But such a use does not seem to raise the question of whether a lawyer may "rely on its results." The question of whether the results may be reasonably relied upon arises not when it is used to generate ideas but, rather, when it is used to create work product, like briefs or even summaries of evidence. As shown repeatedly, Generative AI may not be relied upon to generate reliable results, at least in its current form, suggesting a number of ethical risks.

Ethical issues with AI's output.

Despite its name, Generative AI is not intelligent. Its capability to generate intelligible content is sometimes hard to imagine, but that content is still limited by the quality and sources it is trained on. As a result, Generative AI can produce outdated, inaccurate or otherwise incomplete results. In addition, because Generative AI lacks the ability to critically identify or think about conflicting evidence and policy issues, its conclusions may often miss important issues and arguments.

In litigation, there are multiple tasks for which Generative AI might be used, including discovery requests and responses, and drafting of various documents. Attorneys are using Generative AI products to conduct legal research and even draft court filings. Generative AI may be, as the ABA notes, a good tool for generating ideas, but Generative AI lacks the capability to identify issues or nuances the way a competent attorney will. Any attorney using Generative AI to conduct research or draft documents must be competent to use the tool, meaning an understanding of how the inputs used and directions given will influence what the product will and will not generate. Ethical competence requires that attorneys not only put in the time and thought to learn how to use the tools, but also to ensure that all issues are identified and addressed to ensure clients are properly represented.

But worse than simply missing issues, there are numerous examples where some Generative AI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality. Google's Bard chatbot incorrectly claimed that the James Webb Space Telescope had captured the world's first images of a planet outside our solar system.[1] ChatGpt produced the name and time for the person holding the record for crossing the English Channel *on foot* and the year when the Golden Gate Bridge was moved to Egypt (2016).[2]

The ways in which reliance on Generative AI have resulted in documented hallucinations undetected by lawyers are surprisingly frequent. Despite the highly publicized case against Avianca where two attorneys were sanctioned for filing a brief with citations to nonexistent cases in 2023,

1 https://www.ibm.com/think/topics/ai-hallucinations (last visited 3.10.2025)

2 https://www.sify.com/ai-analytics/the-hilarious-and-horrifying-hallucinations-of-ai/ (last visited 3.10.2025).

and another highly publicized matter where Michael Cohen was caught doing the same thing,[3] courts continue to catch and sanction lawyers for using Generative AI to write their briefs and failing to detect that it created citations to cases that didn't exist (and even fake quotes from those cases).[4]

Notwithstanding such public warnings, lawyers continue to make the same mistake. As recently as February 25, 2025, a federal magistrate in Indiana issued sanctions against an attorney from Texas that filed a brief including citations to nonexistent cases.[5] In that case, the brief in question had been filed in November 2024, long after the highly publicized Avianca and Cohen cases. Yet, as in each of the prior examples, the attorney claimed he "did not know that AI was capable of generating fictitious cases and citations."[6] The Court noted that the lawyer had filed previous briefs in the matter that included other false citations.

In awarding sanctions, the Magistrate noted that the lawyer's duty is to check all filed citations and ensure they are "good law," which includes assuring the case actually exists. He noted that there are specific tools available to lawyers to ensure that citations are still good, and the failure to do so resulted in three specific ethical violations:

- Lack of Competence pursuant to Rule 1.1
- Duty to Assert Meritorious Claims and Contentions pursuant to Rule 3.1
- Duty of Candor Toward a Tribunal pursuant to Rule 3.3

The Magistrate noted that he is a strong proponent of using technology in the practice, but that such use must be appropriate:

> Nevertheless, much like a chainsaw or other useful, but potentially dangerous tools, one must understand the tools they are using and use those tools with caution. It should go without saying that any use of artificial intelligence must be consistent with counsel's ethical and professional obligations. In other words, the use of artificial intelligence must be accompanied by the application of ***actual intelligence*** in its execution.[7]

The ABA's opinion likewise points out that lawyers have an ethical duty to understand Generative AI's flaws and limitations and emphasizes that reliance on the tools alone is a breach of the attorney's ethical duties:

> Because Generative AI tools are subject to mistakes, lawyers' uncritical reliance on content created by a Generative AI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a Generative AI tool's output—without an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1. While Generative AI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

Competence regarding AI generated evidence and deep fakes

There is a burgeoning area of law regarding the reliability, admissibility or other effects of evidence generated by or through AI, especially in the area of criminal law.[8] Some of these cases will follow traditional precedent developed around animated simulations, but Generative AI's ability to create other forms of evidence will cause more inquiries about reliability and prejudice. Competence will almost certainly require tomorrow's litigators to develop their understanding of these issues.

A separate, but increasingly important issue for litigation is the proliferation of what are known as "deepfakes." A deepfake originally referred to media where a person in an image or video was swapped with another person's likeness. But today, deepfakes' use and character have developed significantly. Today, a deepfake is an elaborate form of "synthetic media" that uses AI to manipulate or entirely fabricate audio, video, or images that appear convincingly real. These AI-generated counterfeits can range from swapping faces in videos to creating entirely fabricated audio recordings or images of individuals who

3 https://www.courthousenews.com/judge-wont-sanction-michael-cohen-over-ai-generated-fake-legal-cases/

4 Monetary sanctions ranging from $2,000 to $5,000 have been awarded for submitting false AI citations in Gauthier v. Goodyear Tire & Rubber Co., No. 1:23-CV-281, 2024 WL 4882651 (E.D. Tex. Nov. 25, 2024) ($2,000 penalty to attorney failing to verify AI generated cases); Mortazavi v. Booz Allen Hamilton, Inc., No. 2:24-CV-07189-SB-RAO, 2024 WL 4308032 (C.D. Cal. Sept. 26, 2024) ($2,500 penalty for failing to disclose use of AI and including citation to nonexistent case); Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023) ($5,000 for using AI to generate opinion excerpt which did not exist).

5 Hallucinated AI Citations Garner $15K Sanction for Texas Attorney

6 gov.uscourts.insd.215482.99.0.pdf, at 2.

7 Id., at 6 (emphasis added).

8 See, e.g., State of Washington v. Puloka, No. 21-1-04851-2 KNT, 2024 Wash. Super. LEXIS 1467 (Super. Ct. Kings Co. Wash. 2024 (AI-enhanced video inadmissible in jury trial); Matter of Weber, 2024 NY Slip Op 24258 (N.Y. Surrogacy Ct. Oct. 10, 2024)(expert's testimony unreliable where he used AI-tool to assist with calculations); Kohls v. Ellison, 2025 U.S. Dist. LEXIS 4928 (D. Minn. Jan. 10, 2025)(excluding expert's declaration because it included unverified, AI-hallucinated citations generated by GPT-4); People v. Wakefield, 175 A.D.3d 158 (N.Y. App. Div. 2019)(due process implicated when decisions are made by AI rather); People v. Wakefield, 38 N.Y.3d (2022)(DNA report produced by a probabilistic genotypical model that used "some measure" of artificial intelligence was "testimonial"); State v. Stilwell, 232 A.3d 363, 372 (N.H. 2019)(machine-generated raw DNA profile data generated by software was not testimonial).

don't exist.[9]

As noted by one commentator regarding deepfakes and litigation, "if a deepfake is admitted as authentic evidence, it can undermine the court's truth-seeking mission. Deepfakes can easily become outcome determinative, given that video evidence in the courtroom is impactful and can profoundly influence individual perception of events. Deepfakes also undermine the public's ability to trust authentic videos. Judges and juries may be skeptical of believing what they see in a real, undoctored video because they know images are now easily manipulated. In other words, the knowledge that deepfakes are out there and hard to spot may make fact-finder's question whether they can even believe real footage. *See*, Agnieszka McPeak, The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood, 23 VAND. J. ENT. & TECH. L. 433, 440 (2021).

Today, we accept readily the notion that any lawyer agreeing to handle complex litigation implicitly means that that the lawyer (and/or firm) can deal with detailed ESI issues, which wasn't widely accepted 10 years ago. As AI and deepfakes continue to develop and become pervasive in the culture, the ethical obligation of technical competence is likely to soon expect litigators to be competent to address potential deepfake evidence in litigation, especially if and when the Courts move forward with changes about admissibility and authentication of AI based evidence. The Federal Courts' Advisory Committee on Evidence Rules voted in November to work further on proposals that would address issues about "deepfakes" and the reliability of materials generated by AI tools. See, https://news.bloomberglaw.com/us-law-week/ai-evidence-rule-proposals-move-ahead-at-federal-courts-panel (last visited 3.9.2024).

Such competency likely includes a lawyer's need to be wary of potential deepfakes regarding evidence in litigation. To be competent going forward, a lawyer should be thinking about and addressing whether evidence – including the evidence produced by a client – is real and how authenticity will be established on either side. This will almost certainly include understanding the outside resources available to do so.

Competency with experts

To be competent to handle much litigation, lawyers must also be facile in dealing with experts for both sides. Today, this includes understanding how the federal Daubert rules and state corollaries apply to their cases and experts. Soon, competence will require litigators to understand that, like lawyers and many other professionals, experts will be using AI to prepare their opinions and to be prepared to support or challenge admissibility based on that use. At least one Court has excluded an expert in part because of his reliance on AI to perform calculations. *See, Matter of Weber*, 2024 Slip Op. 24258 (N.Y. Surrogate's Court Oct. 10, 2024).

Confidentiality

Model Rule 1.6 requires lawyers to maintain the confidentiality of all information relating to the representation of a client, regardless of its source, absent actual or implied client consent, and that duty is extended to former and prospective clients' information by Rules 1.9(c) and 1.18(b). The ABA has noted that "protection of client confidentiality is perhaps the most fundamental duty in the legal profession," and that this duty is implicated when using Generative AI.

As discussed, Generative AI tools "learn" and perform tasks by drawing on the vast array of information available on the internet and other sources. Confidentiality of client information is implicated in using Generative AI because many of the existing Generative AI tools add to its "library" whatever is submitted to it as part of requests. Thus, if a lawyer is very specific in a request made to a Generative AI tool (which is part of what is required for high quality output), the request will often identify facts and names related to a client and subject of representation. And when information relating to one client's representation is input into the tool, it can theoretically be revealed in response to subsequent prompts by others using the same tool, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning Generative AI tool may disclose information relating to the representation to persons outside the firm who are using the same Generative AI tool.

Accordingly, lawyers must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." This means understanding how the tool used works, where it draws from, and how – if at all – it protects or shares information submitted (which may include segregation or encryption). The ABA suggests that "as a baseline," lawyers should read and understand the tools' Terms of Use and privacy policy and understand who has access to information input into the tool - or consult with a colleague or external experts (such as IT professionals or cyber security experts) who have read and understand those terms and policies.

Of course, the Rules on confidentiality permit disclosure with client consent. A client might well consent to the disclosure of confidential information to a Generative AI

9 The term "deepfake" derives from blending "deep learning" and "fake" to reflect using deep learning algorithms in the creation process. https://www.proofpoint.com/us/threat-reference/deepfake

tool, especially based on the potential for cost savings and efficiency. But the consent must be "informed," which means that the lawyer "has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." See, Model Rule 1.0 (e).

In Opinion 512, the ABA notes that "the client must have the lawyer's best judgment about why the Generative AI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the Generative AI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the Generative AI tool will have access to information relating to the representation."

Communication

The third area of ethics the ABA identified as being implicated by the use of Generative AI is communication with clients. Specifically, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of Generative AI tools to clients pursuant to Rule 1.4.

The use of Generative AI to produce work product may not be surprising to many sophisticated clients. Indeed, many clients today send Outside Counsel Guidelines that specifically address Generative AI, but not consistently. Some insist that Generative AI may not be used (at least without their consent) while others not only say such use is appropriate, they say they expect their lawyers to use Generative AI and tell them how it will be used to save them money.

But other clients not only fail to express a preference in advance, but they will also lack an understanding of what Generative AI is or the risks and benefits of its use on their matters.

The ABA (and a number of states so far) indicate that a lawyer "must ***consider***" whether they have a duty to disclose GAI use to their clients, and concludes that lawyers "***may*** tell clients how they employ [Generative AI] tools." The opinion acknowledges that "[t]he facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their [Generative AI] practices to clients or obtain their informed consent to use a particular [Generative AI] tool."

Obviously, lawyers must disclose their Generative AI practices if asked, including by the terms of outside counsel guidelines. If not asked, the ABA's view is that clients must be informed and give informed consent if the lawyer proposes to put confidential information into a Generative AI tool. While the ABA says it is "not possible to catalogue every situation in which lawyers must inform clients about their use of Generative AI," Opinion 512 suggests that lawyers must inform/consult with clients:

- When the use of a Generative AI tool is relevant to the basis or reasonableness of a lawyer's fee, or
- When Generative AI's output will influence a significant decision in the representation, such as when a lawyer relies on Generative AI technology to evaluate potential litigation outcomes or jury selection, or
- When a client that retained a lawyer based on the lawyer's particular skill and judgment opts to use Generative AI (which was not part of the understanding of how the representation was to be accomplished).

It is important to note that, while the ABA and most state authorities allow lawyers considerable leeway in deciding whether and what to tell a client about using Generative AI, lawyers must first understand the tools in order to make that assessment. At this point, it does not appear there is an obligation to tell every client that you are not using Generative AI. But before actually using it for any client matter the lawyer must learn the basics and assess whether the use being considered requires communicating the proposal to the client.

Supervisory Responsibilities

As discussed, the tasks that Generative AI might be used to accomplish include legal research, summarizing evidence and drafting documents like correspondence, discovery and briefs. These are tasks that in many firms are most often performed by associates or other timekeepers under a more experienced lawyer's supervision. Indeed, in many firms the more experienced lawyers have shown great resistance to using the tools and likely have little understanding of how to use them.

Whenever work is being performed by others, Model Rules 5.1 and 5.3 address the ethical duties of the more senior lawyers to oversee that work and ensure their subordinates' compliance with ethical obligations. That obligation applies to use of Generative AI tools - even when the senior lawyer may not understand the tools. As noted by the ABA, the senior lawyers "must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct." Because the use of Generative AI implicates many rules of professional conduct, it is the ethical responsibility of senior lawyers to affirmatively ensure compliance with those rules by others on their team. Among other specifics, Opinion 512 asserts that "[m]anagerial lawyers must establish clear policies regarding the law firm's permissible use of Generative AI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using Generative AI tools."

In other words, any lawyer or firm considering the use of Generative AI should first establish written policies addressing the duties and prohibitions imposed by the Rules. Many firms also follow the best practice of requiring training before firm personnel may use Generative AI tools for client work. The ABA suggests that the training should include: the basics of Generative AI technology, the capabilities and limitations of the tools, ethical issues in use of Generative AI and best practices for secure data handling, privacy, and confidentiality.

Lawyers also have oversight obligations when they rely on contractors outside their firm that use Generative AI in connection with client work. When outsourcing legal and nonlegal services to third-party providers, lawyers must ensure that the third party will do the work capably and protect the confidentiality of information relating to the representation. Prior opinions on the topic emphasized: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to Generative AI providers and tools, and are particularly relevant when employing experts to who much client confidential information is entrusted. The lawyer using such services cannot assume the expert utilized has the same knowledge and level of sophistication as the lawyer, particularly when utilizing experts from smaller organizations or who are not regularly employed as experts.

Reasonable Fees and Related issues

Rule 1.5 requires a lawyer's fees and expenses to be reasonable. Subsection (a) sets forth a non-exclusive list of criteria for evaluating whether it is. Though that list does not identify the use of Generative AI as a factor (the rule significantly predates Generative AI), it does clearly include "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." If a task was (or could be) completed far faster using Generative AI, that factor might well be relevant to evaluating whether a fee is reasonable as required by Rule 1.5.

This could be especially relevant in evaluating flat fees (i.e., an attorney who needs to devote very little actual time to an engagement by using Generative AI to perform the work might well be found to have charged an unreasonably large fee).

An attorney billing a client based on an hourly rate may well save time by using Generative AI, but charging more time than actually spent would violate many Rules, including especially Rule 8.4 (c)'s prohibition against conduct involving dishonesty, *fraud*, deceit, or misrepresentation. Of course, a client may agree to vary the fee charged based on the use of Generative AI - so long as the client is properly informed about all relevant concerns (as discussed above).

The better (and as yet unanswered) question is whether an hourly fee based on time actually spent might be found unreasonable because the time spent could have been much less by using Generative AI. Will clients accuse firms of gouging and waste for failing to use Generative AI? Time will tell, but such an argument does not seem far fetched given the number of clients already asking firms how they will use Generative AI to save on fees.

These considerations further support the notion that firms should be talking to their clients about using or not using Generative AI from the outset of representation.

Do Ethical Rules Require Use (or at least the consideration of the use) of AI?

The time will almost certainly come when the failure to use (or to at least offer to use) Generative AI will be considered below the standard of care. That may seem far-fetched today, but consider the fact that many of today's more experienced lawyers there was no such thing as email, computer-assisted research or computerized document redaction when they started practice. How long will it be before using Generative AI is considered just one more of the items in the competent litigator's tool belt? Ethical obligations to be technically proficient and charge a reasonable fee will certainly be argued to impose a duty to understand and use Generative AI for our clients' benefit.

Conclusion

Though Generative AI will continue to develop and improve, attorneys obligations to clients will remain. Adoption of these tool will certainly change how litigation services are delivered, but for the foreseeable future, human intelligence and oversight will remain critical and it will remain our obligation to help our clients understand how these developments affect them.

ETHICAL ISSUES AND DANGERS IN THE USE OF ARTIFICAL INTELLIGENCE IN LITIGATION AND TRIAL

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Always Innovating

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Artificial Intelligence

- Computer technology, software, and systems that perform tasks traditionally requiring human intelligence.
- Large language models that use massive databases to "predict" what would be written or done by a human, otherwise known as "Generative AI"

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Response of the Authorities

- ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 512
- **Rule 1.1 Competence**
  - "a lawyer shall provide competent representation to a client"
  - "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" and
  - understanding "the benefits and risks associated" with the technologies used to deliver legal services to clients

Response of the Authorities

- ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 512
- **Comment 8**
  - "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."
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ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 512

- **Ethical issues with Generative AI's output**
  - Good tool for generating ideas
  - Attorneys using Generative AI must be competent to use the tool
    - understanding of how the inputs used and directions given will influence what the product will and will not generate
    - Understanding Generative AI can't identify issues or nuances

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Competence

Ethical issues with Generative AI's output

- Generative AI tools are also prone to "hallucinations"
- Can make statements of fact about a case or record that are inaccurate
- Can generate citations to cases that don't exist (including quotes from nonexistent cases)

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Competence

False citations violate multiple Rules

- Lawyer's duty is to ensure cases represent "good law." Failure to do so violated:
  - Lack of Competence (Rule 1.1)
  - Duty to Assert Only Meritorious Claims and Contentions (Rule 3.1)
  - Duty of Candor Toward a Tribunal (Rule 3.3)

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Competence

Competence regarding AI generated evidence and deep fakes

- "Synthetic media" that uses AI to manipulate or entirely fabricate audio, video, or images that appear convincingly real
- Competence to address potential deepfake evidence
- Understanding of new rules on admissibility and authentication of AI based evidence.

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Confidentiality - Model Rule 1.6

- Lawyers must maintain the confidentiality of all information relating to the representation of a client absent actual or implied client consent
- Generative AI tool may disclose confidential information to persons outside the firm who are using the same Generative AI tool
- Lawyers must make "reasonable efforts" to avoid disclosure or unauthorized access to confidential information

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Confidentiality - Model Rule 1.6

- "Baseline" is to read and understand Terms of Use and privacy policy and understand who has access to information input into the tool
- Consult with a colleague or external IT or cyber security experts who understand those terms and policies.
- Client may provide informed consent
- Must understand the risks and benefits

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Communication

Rule 1.4 (a)(2) and (b)

- A lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished."
- Lawyer must explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation."
- Lawyer "must ***consider***" whether they have a duty to disclose GAI use to their client
- Lawyer "***may*** tell clients how they employ GAI tools."
- Lawyers must disclose Generative AI practices if asked

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Supervisory Responsibilities

- Senior lawyers "must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct."
- Managerial lawyers must establish clear policies regarding the law firm's permissible use of Generative AI
- Supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using Generative AI tools.
- Best practice is to create written policies first, and provide training

SmartPath

Supervisory Responsibilities

- Additional oversight obligations for contractors outside their firm that may use Generative AI in connection with client work.
- When outsourcing to third-party providers, lawyers must ensure that the third party will do the work capably and protect the confidentiality of client's information.

Fees and Related issues

Rule 1.5 - a lawyer's fees and expenses must be reasonable

- "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly
- Flat fees
- Hourly charges
- Overcharging by failing to use GAI?
- Will failure to use GAI be considered below the standard of care?

Thank you!

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Tom Feher

Partner | Thompson Hine (Cleveland, OH)

Tom is known as the firm's problem solver. He enjoys unravelling complex issues using creativity and intellect. In addition to work for clients, Tom has also served as Thompson Hine's Loss Prevention Partner, where he counsels lawyers and management, as well as defending claims. He has held that role for over a decade, demonstrating the level of regard his colleagues have for him. Tom also represents lawyers outside the firm on issues related to legal ethics, compliance, disciplinary investigations and related professional responsibility matters. Tom advises businesses who deal with lawyers about all aspects of professional responsibility and compliance in the legal profession and has represented both sides in fee disputes and related issues.

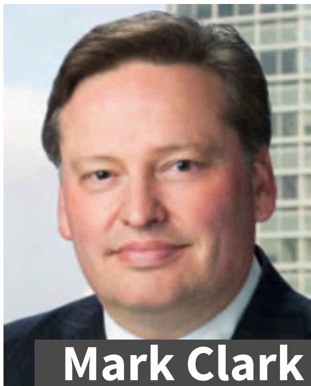
Recent roles have included defense of law firms in disciplinary investigations and proceedings, counseling attorney clients with disciplinary complaints or who could be facing sanctions and defending and prosecuting motions to disqualify lawyers. Tom has spoken and written frequently on the ethical and professional issues lawyers face.

Focus Areas
- Legal Ethics, Professional Responsibility and the Business of Law
- Business Litigation
- Product Liability Litigation

Experience
- Representation of parties in numerous litigations involving breach of fiduciary duty claims regarding investments, administration of significant trust assets and corporate governance.
- Representation of chemical industry in matters involving employee injuries and related fraud and conspiracy allegations in numerous cases across the United States.
- Representation of developer in disputes with city over zoning and construction disputes regarding residential developments, including constitutional claims for improper shutdown of construction.
- Representation of trustees in actions involving claimed breaches of duty and resulting investment losses.
- Representation of will and trust beneficiaries in disputes regarding interpretation of multiple instruments controlling disposition of multimillion dollar trust corpus.
- Representation of investors defrauded of multimillion dollar investments by financial advisor.
- Numerous representations of shareholders in closely held corporations against co-shareholders regarding usurpation of corporate opportunities, wasting or theft of corporate assets and other disputes.

Distinctions
- Listed as a Litigation Star by Benchmark Litigation, 2015, 2017 to 2025
- Selected for inclusion in The Best Lawyers in America® 2016 to 2025 for Commercial Litigation, Litigation-Insurance and Product Liability Litigation-Defendants; named the Best Lawyers® 2019 Litigation-Insurance "Lawyer of the Year" in Cleveland
- AV® Preeminent Rated by Martindale-Hubbell
- Selected for inclusion in Super Lawyers by Ohio Super Lawyers magazine, 2007 to present

Education
- Cleveland-Marshall College of Law, J.D., 1987, magna cum laude
- Kent State University, B.S., 1983



Insurance Litigation Risks in a New World Order

Mark Clark

Parsons McEntire McCleary (Houston, TX)

Insurance Litigation Risks In a New World Order
Mark Clark

Rising public hostility toward health insurers combined with skyrocketing premiums has made the insurance industry more villainous than ever. And when it comes to bad faith, insurers are discovering that nuclear verdicts are not only stalking bodily injury claims, but they are finding their way into what was once technical insurance coverage and bad faith disputes.

On December 4, 2024, Brian Thompson, the CEO of United Healthcare, was murdered in Midtown Manhattan, New York City. The shooting occurred early in the morning just outside of the Midtown Hilton. The shooter got away, and a manhunt ensued. But while the manhunt progressed, social media erupted with people hailing the shooter as a hero. United Healthcare posted an online bereavement message that was then mocked by 77,000 comments. The killer had written on the bullet casings "deny, defend, depose" as a cynical mantra of the way the killer felt that health insurers responded to claims.

After the killer was apprehended, he wore a red sweater purchased from Nordstrom when he appeared in court. The sweater immediately sold out on Nordstrom's website due to the shooter's many admirers.

This horrific vitriol towards the insurance industry comes at a time when commercial insurers are facing not only declining public sentiment, but legislatures are passing laws making it easier for insureds to sue for bad faith, and courts are lowing the evidentiary bar and upholding higher verdicts. As a result bad faith verdicts have been on the rise and damages have been skyrocketing.

Settlement Agreements as Excess Judgments
One of the significant problems faced by insurers is that agreed judgments are being recognized as valid excess judgments in some jurisdictions. In *McNamara v. Government Employees Ins. Co*., 30 F.4th 1055 (11th Cir. 2022), the United States Court of Appeals for the Eleventh Circuit, interpreting Florida law, found that where an insured entered into an agreed judgment, the judgment was sufficient to support an excess judgment against an insurer found liable in bad faith for failure to accept an earlier settlement within policy limits.

Florida has an "offer of judgment" law, Fla. Stat. Ann. § 768.79, which permits either party to make a settlement offer, and if accepted, the court retains jurisdiction to issue a judgment in the amount of the settlement and enforce the settlement.

In *McNamara,* the insured had been in an auto collision in which a woman was thrown from her motorcycle and suffered debilitating paralysis. GEICO was the insurer of the liable party, and within two weeks of the accident, GEICO began to try to settle with the Plaintiff. However, the Plaintiff was not conscious, and GEICO was unable to track down anyone who represented the Plaintiff or was a guardian of the Plaintiff. Eventually a person claiming to be the husband and legal guardian of the Plaintiff wrote a handwritten letter to GEICO advising who he was and offering to settle for the $100,000 limits. The husband placed a time limit on the demand. GEICO responded that it would like to settle but indicated that it needed a marriage certificate to confirm the marriage and proceed to settlement. The husband failed to produce a marriage certificate, the time limit demand expired, and the settlement was never made.

Soon thereafter, the lawyers representing the claimant offered to settle with the insured parties for $4.7 million. The offer of settlement was accepted by the insureds and the court entered a judgment pursuant to Fla. Stat. Ann. § 768.79. The claimant then took an assignment of the insured's bad faith claim and brought bad faith claims against GEICO. The district court dismissed the suit on summary judgment ,holding that an agreed settlement was insufficient to justify an excess judgment.

The Eleventh Circuit reversed the summary judgment. As the court noted, in Florida the "insured is not obligated to obtain the determination of liability and the full extent of his or her damages through a trial and may utilize other means of doing so, such as an agreed settlement, arbitration, or stipulation before initiating a bad faith cause of action." Citing to *Fridman v. Safeco Ins. Co. of Illinois,* 185 So.3d 1214 (Fla. 2016).

The court therefore remanded the case to the District Court for trial on the remaining bad faith issues. The trial has not yet taken place, and whether asking for a marriage certificate was a justifiable excuse for not timely paying the settlement is very much in dispute.

UIM Claims: Liability Need Not be Established

On Jan. 18, 2022, in New Jersey, the Insurance Fair Conduct Act (IFCA) became law. N.J.S.A. 17:29BB-1 to -3. The IFCA provides that "an individual injured in a motor vehicle accident and entitled to the uninsured or underinsured motorist coverage of an insurance policy" may file a lawsuit against an insurer that has "unreasonably denied" the insured's claim for benefits.

The IFCA allows for the recovery of "(1) actual damages caused by the violation of [the IFCA], which shall include, but need not be limited to, actual trial verdicts that shall not exceed three times the applicable coverage amount; and (2) pre-and post-judgment interest, reasonable attorney's fees, and reasonable litigation expenses."

As of March 2025, there were no reported cases in which an award of damages had been made under the IFCA. But it is only a matter of time before an insurer and an insured disagree over the liability of the uninsured motorist, or the reasonable damages that could be awarded. By untethering the UIM award from the need for an actual trial or finding of damages, New Jersey has opened the doors to significant gamesmanship for bad faith in New Jersey UIM claims.

An insured may simply claim that their damages are as high as the limits of UIM available. If an insurer chooses to disagree with the valuation of damages and seeks a trial on the issue, it now risks a finding of bad faith under the IFCA, which may produce damages up to three times the available UIM limits plus attorney's fees and prejudgment interest.

In Georgia an Insurer May be Liable for an Excess Judgment Even Where the Suit Wasn't Tendered to the Insurer.

A Georgia court has found that where an insurer was aware of a pre-suit claim but was never advised that suit had actually been filed, the insurer was nevertheless responsible for an excess default judgement. *GEICO Indemnity Co. v. Whiteside*, 311 Ga. 346 (Ga. 2021).

In *Whiteside*, GEICO received notice of an auto accident. The insured was a permissive user of the named insured's vehicle, and was not a direct insured, and did not possess a copy of the policy. Before the suit was filed, the claimant made a time-limited demand to GEICO for the policy limits of $30,000.00 The claimant had significant injuries and medical damages were already $15,000.00. GEICO rejected the demand and countered with an offer of $12,500.00. At that point, the claimant's counsel stopped communicating with GEICO and sued the insured driver.

The insured was thereafter served the lawsuit. However, the insured, thinking GEICO also had notice of the lawsuit, threw out the summons and complaint and took no action to contact GEICO or hire a lawyer. A default judgment of $2,916,204 was subsequently entered against the insured, which was far in excess of the policy's $30,000 limit.

GEICO learned of the suit only after the default judgment was entered. GEICO attempted unsuccessfully to have the default judgment vacated. The court denied the motion to set aside the default judgment, and it remained intact.

The case made it to the Georgia Supreme Court on certified questions from the U.S. Eleventh Circuit Court of Appeals. The case presented some unique facts. The insured being sued was not the "named insured" on the policy. The insurer was well aware of that fact. Also, the insured had no drivers license, lived in an "unrentable apartment" which had no electricity, and no furniture other than a mattress on the floor. The insured had no sophistication, and it was apparent that she would not understand what to do with a lawsuit if one were served.

When the claim was first made, GEICO issued a letter to the insured acknowledging coverage and stating "[b]ased on the evidence we have gathered, we are responsible for the accident. Mr. Guthrie was injured in this accident and we will be handling this injury directly with" his attorney.

The insured claimed that she did not send the lawsuit to GEICO because she thought GEICO was aware of the suit as GEICO had stated in its correspondence that it would be handling the claim with claimant's attorney.

The case turned on the difference between tort law (bad faith is a tort) rather than contract law. While the policy required the insured to provide a copy of all suit documents to GEICO as a precondition to coverage, the court found that coverage was a contract question. At the time that GEICO committed bad faith by wrongfully rejecting the settlement agreement, coverage was not in dispute, so coverage issues were moot for purposes of the bad faith trial.

The court held that GEICO should have foreseen that by advising an unsophisticated insured that GEICO would handle the claim directly with the claimant's attorney, the insured would not know to tender the lawsuit to GEICO, especially given that the insured did not have a copy of the policy.

The jury found that GEICO was 70% responsible for the default judgment and the insured was 30% responsible. After prejudgment interest was added, GEICO was required to pay a judgment of $2.7 million.

Quota Share Policies and Bad Faith

As insurers face higher verdicts for casualty claims, many are starting to participate in quota share policies, wherein multiple insurers agree to a percentage of the limits instead of all the limits. Such a quota sharing arrangement was at issue in a recent Bad Faith case.

In *GRQ, LLC v. Am. Guar. & Liab. Ins. Co.*, No. 3:21-CV-227 DRL, 2024 U.S. Dist. LEXIS 51281, (N.D. Ind. Mar. 22, 2024), the U.S. District Court for the Northern District of Indiana upheld a $112 million jury verdict, including $12.5 million in punitive damages against each of the seven quota share insurers involved.

In *GRQ*, the insureds property was damaged in a flood. GRQ sought $26.8 million in damages from the quota share insurers on its property coverage policy. The issue was coverage for pollution, specifically remediation of PCBs, as part of the flood remediation. The insured hired an engineer (Jeff Pope) to oversee the remediation. The insurers hired McLarens, a third party claims service as independent adjuster. Trouble arose when representatives of McLarens, the insurers' representative, hired Pope, GRQ's representative to work for the insurers' team. This set up a classic conflict of interest for Pope, but the parties proceeded, seemingly oblivious to the conflict. Thereafter, Pope began opining, perhaps at the suggestion of McLarens, that the PCB levels on the property were historically high, and the current high level of PCB's were not caused by the flood. The insurers used Pope's opinions to deny coverage.

The court found that GRQ had presented sufficient evidence that Pope acted improperly in a "turncoat" manner and his conduct was performed in collusion with McLarens. The conduct of McLarens was imputed to the quota share insurers who had also received Pope's reports.

The jury found each of the seven quota share insurers liable for bad faith and awarded $12.5 million in punitive damages against each insurer on top of a $13 million compensatory damage award.

Countering Public Sentiment in Voir Dire

Below are a few suggestions for jury voir dire in a bad faith case:

- Explore juror's history of insurance, have any been insured by any Defendant.
- Juror's knowledge of details of their own insurance policy.
- Juror's experience with claims. Payment and denial of claims.
- Jurors experience with filling out insurance applications and other forms.
- Has an insurer ever treated them wrongfully in the handling of a claim?
- Question their attitudes and explore predispositions to insurance companies.
- Do the jurors understand contracts including offer and exchange?
- Do the jurors understand the premium as payment … payment for what?
- Do the jurors understand that a policy provides specifically defined coverage and contains specific exclusions?
- Should insurance contracts be honored?
- Has an insurer ever dishonored a contractual obligation to the juror?
- Discuss proof of claim and ask the juror if they believe that it is fair that a proof of claim is provided.
- Do jurors expect an insurer to be judicious in its decision making?
- Do jurors understand that overpaying claims, or covering claims that are not covered, impacts premiums for everyone?

Motions In Limine

1. Personal opinions concerning insurance companies.
2. Commentary on advertising campaigns.
3. Increased Premiums.
4. Profit margins and profit motive testimony.
6. Pain and suffering of injured plaintiff not relevant to bad faith as to insured.
7. Personal attacks against the character of insurance employees.

United Health Care CEO

Brian Thompson
Dec. 4. 2024

Public Reaction

Delay, Deny, Defend

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NEWS COVERAGE

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BAD FAITH

CONTRACT VS. TORT

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Reasonable Ordinary Prudent Insurer

Settle or Risk Excess Judgment

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Uninsured Motorist Claims Insurance Fair Conduct Act

1. Liability Against Other Driver Need Not Be Established.

2. What's Reasonable?

3. Bad Faith Claims are Preserved and Available in Addition to Statutory IFCA Claim.

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Settlement Agreements as Excess Judgments

- *McNamara v. Government Employees Ins. Co.*, 30 F.4th 1055 (11th Cir. 2022)

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LAW
Parsons McEntire McCleary PLLC

GEORGIA BAD FAITH

- Insurer Should Anticipate Insured's Ignorance of the Policy Terms
- *GEICO Indemnity Co. v. Whiteside*, 311 Ga. 346 (Ga. 2021)

PMM
LAW
Parsons McEntire McCleary PLLC

QUOTA SHARE BENEFITS AND RISKS

- $112 MILLION DOLLAR BAD FAITH VERDICT AGAINST SEVEN INSURERS IN QUOTA SHARE
- THIRD PARTY ADMINISTRATOR INSURANCE ADJUSTER RESPONSIBLE FOR CONDUCT, INSURERS REQUIRED TO PAY
  - *GRQ, LLC v. Am. Guar. & Liab. Ins. Co.*, No. 3:21-CV-227 DRL, 2024 U.S. Dist. LEXIS 51281, (N.D. Ind. Mar. 22, 2024)

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TRYING THE BAD FAITH CLAIM

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MOTIONS IN LIMINE

KEEPING PUBLIC AND PERSONAL OPINIONS OUT OF THE COURT ROOM

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Mark L. Clark

Shareholder | Parsons McEntire McCleary (Houston, TX)

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

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

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

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

Education
- South Texas College of Law; Houston, Texas - J.D., 1993
- Abilene Christian University; Abilene, Texas - B.A., 1990

Panel - Arbitration Under Siege: Navigating the Latest Legal and Strategic Challenges in Class Action Litigation

Roger Meyers
Bush Seyferth (Troy, MI)

Arbitration Under Siege: Navigating the Latest Legal and Strategic Challenges in Class Action Litigation
Roger P. Meyers

For years, it has been almost a mantra to say the goal of arbitration is to ensure the efficient, economical, and speedy resolution of disputes. *See, e.g.*, *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 280 (5th Cir. 2007) (en banc); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 989 (9th Cir. 2007); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004).[1] Yet, in practice, getting a dispute into arbitration can take a great deal of litigation. Even in the seemingly straightforward circumstance of a dispute between two signatories to an agreement containing a pre-dispute arbitration clause, the parties often feel that arbitration favors one side and litigation favors the other side. The typical result is a procedural skirmish of motions to compel arbitration or stay litigation; arguments about the scope of the arbitration provision and who should decide arbitrability; and disputes about waiver, preliminary relief, and other issues.

The situation gets notably more complex when litigation is filed between a signatory to an arbitration provision and a non-signatory. Usually—though not exclusively—these situations arise when a plaintiff who signed an arbitration agreement with a non-party to the action asserts claims against a non-signatory defendant, who then wishes to compel the dispute to arbitration. Many states have contract-law doctrines that may allow enforcement of an arbitration agreement even by or against a non-signatory. But the law is far from universal, and the tests can be demanding to meet. Moreover, such fights quickly expand to involve issues about whether judge or arbitrator decides the question, and whether the non-signatory has waived any right it may have had to compel arbitration.

The stakes and complexity reach their pinnacle when the underlying court case is a putative class action. There, each named plaintiff who signed an arbitration agreement is purporting to represent hundreds or thousands of absent class members (typically broken out by state). Thus, developments—and obstacles—to one named plaintiff's claim can have an outsized effect on the magnitude of the dispute. And, because of that, plaintiff-side class counsel routinely strive to make it difficult for defendants even to know whether arbitration agreements exist, which in turn spawns still more fighting.

Against that backdrop of complexity and consequence, this article reviews some recent developments and battles being fought at the intersection of arbitration and class-action litigation.

Why Arbitrate?

As a starting premise, it makes sense to briefly look at why these battles are worth fighting at all. As shown below, the current legal landscape is far from favorable for proponents of arbitration, particularly non-signatories. In just three years' time, it has become vastly easier to successfully oppose arbitration via an assertion of waiver. That forces arbitration proponents to act aggressively from the outset to determine and secure their rights—often while simultaneously engaging in initial fact-finding and preparing a motion to dismiss—and to do all this while navigating a veritable minefield in which every step taken (or not taken) will be criticized as "incompatible" with an intention to arbitrate.

Even so, some classic benefits to arbitration may still apply. These include (perhaps) lower cost and faster resolution, likely with less extensive discovery, as well as the ability to resolve a dispute confidentially.

There are also class-action specific benefits that explain why these fights continue to be worthwhile—particularly for non-signatory defendants. A typical product-defect class action may have anywhere from 5-50 (or more) named plaintiffs, whose combined grievances can span 20-100 counts across hundreds of pages of a single complaint. Often, those plaintiffs can only seek to represent absentee class members who purchased in the named plaintiffs' own states. Thus, plaintiff-side

1 All citations have been cleaned up for readability.

class counsel prioritize recruiting named plaintiffs from as many different states as possible; and typically just one or a few named plaintiffs will be from any given state.

A legal defect that eliminates the named plaintiff(s) representing a given state therefore has the potential of knocking out ***all*** claims in the case brought under that state's law and, by extension, all putative class members for that state. So, forcing a named plaintiff into arbitration can dramatically reduce damages exposure. Indeed, once a determination in favor of arbitrability has been made, plaintiffs often abandon their claims entirely because it is not lucrative for plaintiff class counsel to pursue individual claims. This, in turn, may deter those counsel from bringing certain claims at all because of the challenge of finding willing and otherwise qualified named plaintiffs who did not sign arbitration agreements.

Changing Law on Waiver

The modern era of arbitration in the federal courts dates back 100 years, to the United States Arbitration Act enacted in 1925 "for the express purpose of making valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681–82 (2010). That statute was reenacted and codified in 1947 as the more familiar Federal Arbitration Act ("FAA"). *See id.* at 682; 9 U.S.C. § 1 *et seq.*

Over time, the FAA became widely understood as reflecting a strong federal policy in favor of arbitration agreements. *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2004). The Supreme Court itself contributed to that understanding. In one of the seminal cases on enforcement of arbitration provisions, the Court described a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In another paramount case, the Court emphasized that "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v . Byrd*, 470 U.S. 213, 221 (1985). The FAA itself reinforced this understanding in various ways, including by authorizing interlocutory appeals of orders contrary to arbitration (e.g., refusing a stay or denying a motion to compel) but precluding interlocutory appeal of orders enforcing arbitration agreements.

Against such a backdrop, federal courts of appeals unsurprisingly came to view with skepticism attempts to avoid arbitration agreements. In particular, as pertinent here, the appellate courts overwhelmingly imposed a two-part test to address assertions that the proponent of arbitration had waived the right to enforce an arbitration agreement. Just three years ago, the Sixth Circuit Court of Appeals reemphasized that "we apply a strong presumption in favor of arbitration and do not lightly infer that a party has waived its right to arbitration." *U.S. ex rel. Dorsa v. Miraca Life Sciences, Inc.*, 33 F.4th 352, 357 (6th Cir. 2022). The court then repeated a test for waiver that, with slightly varying wording, had been endorsed by nine federal circuits: "A party may waive an agreement to arbitrate by engaging in two courses of conduct: (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice." *Id.*

Just three months later, however, the Supreme Court dramatically altered the landscape by rejecting the prejudice prong of the majority test. In *Morgan v. Sundance*, 596 U.S. 411 (2022), the Court explained that waiver "is the intentional relinquishment or abandonment of a known right." *Id.* at 417. "Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice." *Id.* Thus, the Court held, neither should courts do so within the arbitration context: "The FAA's policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* at 418.

Morgan sent shockwaves through corporate defendants. While assertions of waiver had long been part of litigating arbitrability disputes, the prejudice prong provided a great deal of cushion even where arbitrability was asserted months (or years) into litigation. Overnight, however, the focus shifted to actions taken just days or weeks after service of a complaint. Compounding the challenge, while *Morgan* "stripped" away the prejudice prong, *see id.* at 419, it did not rewrite existing circuit authority on intentional relinquishment.

For example, the Sixth Circuit had already held that "a motion to dismiss that seeks a decision on the merits and an immediate and total victory in the parties' disputes is entirely inconsistent with later requesting that those same merits questions be resolved in arbitration." *Solo v. United Parcel Service Co.*, 947 F.3d 968, 975 (6th Cir. 2020). And the Seventh Circuit, which had followed the prior minority approach, had previously emphasized the need for a party to have done "all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." *Smith v. GC Servs. Ltd. P'Ship,* 907 F.3d 495, 499 (7th Cir. 2018).

Unsurprisingly, plaintiffs' counsel immediately began asserting waiver with new enthusiasm and considerable success. The high-water mark on such arguments (so far) is the ruling plaintiffs obtained in *In re Chrysler Pacifica Fire Recall Products Liability Litigation*, 715 F. Supp. 3d 1003 (E.D. Mich. 2024), which is currently on appeal. There, 69 plaintiffs had filed a consolidated master complaint as part of multi-district litigation. *Id.* at 1004–05. Defendant FCA initially moved to dismiss the complaint challenging all 81 causes of action on the merits. *Id.* Five months later, FCA moved to compel arbitration of 18 plaintiffs whom it learned had signed agreements containing arbitration clauses when they purchased their vehicles. *Id.* at 1007. The court was skeptical of this explanation, asserting that "it taxes credulity to posit that FCA was not aware of the standard sales documents its dealers were using." *Id.* Ultimately, though, that doubt was immaterial to the court because, "even if that were accurate" regarding the recency of FCA's knowledge, "it does not change the reality that FCA sought an immediate and total victory from this Court by pursuing its motion to dismiss all claims in the CMC." *Id.* In other words, *Chrysler Pacifica*—unless and until it is reversed—stands for the astonishing proposition that waiver can be found through actions taken even absent actual knowledge of a right to compel arbitration. Meanwhile, plaintiffs have also tried to delay revelation of their arbitration agreements (thus forcing defendants to litigate longer before trying to compel arbitration) while simultaneously expanding the scope of conduct that constitutes a request for a decision on the merits that is thus "inconsistent" with the right to arbitrate. For example, in a recent skirmish in *Pacheco v. Ford Motor Co.*, the plaintiffs argued—while opposing early discovery of any arbitration agreements—that Ford had already waived arbitration through a prior motion to dismiss granted on jurisdictional grounds and by moving to stay tag-along litigation. The court rejected those efforts, declining to "sanction a heads-I-win, tails-you-lose approach." No. 22-11927, slip op. at 6 (E.D. Mich. Mar. 5, 2025).

Non-Signatory Enforcement

Arbitration fights between parties who are both signatories tend to rise and fall quickly either on waiver or on challenges to the scope of the arbitration provision; and, because modern arbitration provisions are typically very broad, those arguments tend to be weak. But arbitration fights between a party who is a signatory (typically a named plaintiff, in class litigation) and a party who is a non-signatory (typically the defendant) deal with complex and highly state-specific enforcement issues.

As a general rule, a person or entity who is not a party to a contract has no standing to compel arbitration. *Britton v. Co-op. Banking Grp.*, 4 F.3d 742, 744 (9th Cir. 1993). But a majority of courts agree that, if a plaintiff "can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as defendants in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990); *see also Hilti, Inc. v. Oldach*, 392 F.2d 368, 369 n.2 (1st Cir. 1968). Thus, the Supreme Court has held that a litigant who was not a party to the arbitration agreement may compel arbitration if state contract law allows him to enforce the agreement. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009).

The starting point for these battles, as with signatory vs. signatory disputes, is scope. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs. Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 650 (1986). But in the signatory vs. non-signatory context, the party resisting enforcement has an argument not available against another signatory: arbitration provisions are often written in language such as "a dispute between you and us" or provide that "either you or we may initiate arbitration." Because a non-signatory is neither the "you" nor the "us" in such circumstances, the argument goes, a dispute with a non-signatory cannot be within the scope of the agreement. Some courts have, indeed, accepted such arguments despite that they cut so broadly as to leave little to remain of states' various doctrines permitting non-signatory enforcement. *See, e.g.*, *Harrison v. General Motors LLC*, 651 F. Supp. 3d 878, 892 (E.D. Mich. 2023). Even after a non-signatory gets past the scope hurdle, it must find a state-law basis to stand in the shoes of the absent signatory. The best-known arguments deployed for that purpose are agency, third-party beneficiary status, and equitable estoppel.

Courts widely agree that agency is an effective basis upon which non-parties can enforce arbitration agreements. When "a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3rd Cir. 1993); *see also Letizia v. Prudential Bache Sec.*, 802 F.2d 1185, 1187–88 (9th Cir. 1986). Yet, for many defendants, agency is a disfavored argument for numerous reasons, including that non-signatory manufacturers often prefer for both liability and discoverability reasons to not argue that their dealers are agents.

A second basis on which courts may allow a non-signatory to compel arbitration is intended third-party beneficiary status. To qualify as an intended third-party beneficiary, the original agreement must have been executed "for the primary and direct benefit of" the non-party. *Peters v. Keyes Co.*, 402 Fed. App'x. 448, 451 (11th Cir. 2010); *see also Fundamental Admin. Servs., LLC v. Patton*, 504 Fed. App'x. 694, 701 (10th Cir. 2012); *Superior Energy Servs., LLC v. Cabinda Gulf Oil Co. Ltd.*, 635 Fed. Appx. 375, 376 (9th Cir. 2016) (permitting the non-party defendant to compel arbitration "where the contracting parties intended for the payments to go to the third party"). But this doctrine, too, is rarely available in practice because dealer arbitration agreements typically do not name manufacturers as intended third-party beneficiaries and often disclaim the existence of any such beneficiaries at all.

That leaves equitable estoppel, which has become the most commonly employed argument in these cases. One of the leading cases explaining that doctrine is *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999). Under *MS Dealer*, arbitration may be compelled through equitable estoppel "when the signatory . . . 'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory." *Id*. at 947 (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)). Equitable estoppel also applies when the allegations are of "'substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" *Id.* Numerous jurisdictions have followed the *MS Dealer* formulation. *See, e.g.*, *Grigson v. Creative Agency L.L.C.*, 210 F.3d 524 (5th Cir. 2000); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798–99 (8th Cir. 2005).

Though the doctrine of equitable estoppel is relatively widely accepted in concept, some states do not recognize it and states that do recognize it often have slightly different nuances in their approaches. Moreover, while it might seem fairly straightforward to say a plaintiff necessarily relies on the terms of an agreement when alleging, for example, that she would not have purchased or would have paid less in the absence of alleged fraud, in practice arbitrability decisions often depend on the presence or absence of specific contractual obligations being asserted rather than just the price term or the contract as a whole. Similarly, plaintiffs routinely base fraud (and fraudulent concealment) claims on failure of dealers—with whom they actually interacted at the point of purchase—to disclosure the omitted "truth," only to then at the arbitrability stage disclaim those allegations and insist the dealers were hoodwinked too, rather than active participants in concerted misconduct.

Delegation

Another major front in the arbitrability wars is the question who decides whether a given dispute must be arbitrated. "Generally, when asked to compel arbitration under a contract, a court determines whether the parties agreed to arbitrate their dispute." *Swiger v. Rosette*, 989 F.3d 501, 505 (6th Cir. 2021). But, under the FAA, parties can agree that "an arbitrator, rather than a court, will determine gateway questions of arbitrability such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* Such a provision is often referred to as a delegation clause. *Id.*

Parties resisting arbitration often seek to evade delegation provisions by attacking the agreement as a whole. For, "the issue of the agreement's validity is different from the issue whether any agreement between the parties was ever concluded." *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879 (6th Cir. 2021). Thus, it remains for a court to determine whether any agreement was formed in the first instance. *Id.* But, if a delegation provision then "calls for an arbitrator to decide the validity and enforceability of both the arbitration provision and the contract in which it appears, courts may only decide a challenge to the arbitration provision specifically." *Id.* "Merely challenging the entire agreement will not suffice." *Swiger*, 989 F.3d at 506.

Courts have recognized that delegation principles present a "logical conundrum" in non-signatory enforcement circumstances because "if the nonsignatories are not parties to the contract, then the plaintiff has no agreement with them." *Id.* at 507. But, where a valid agreement otherwise exists, courts have held, delegation of questions of arbitrability includes the question whether a non-signatory can enforce the arbitration provision. *Id.*

Conclusion

As the foregoing discussion has shown, successfully compelling a given plaintiff to submit her claims in arbitration, and then convincing the arbitrator to agree the dispute is arbitrable under a state-law non-signatory enforcement doctrine, is a difficult proposition. But it is not impossible.

Meanwhile, litigation in this space follows a consistent move-countermove pattern, as both proponents and opponents of arbitration seek to blunt adverse developments and capitalize on favorable ones. Thus, success in evading obstacles and forcing claims into arbitration will predictably lead to still more battlegrounds. Some of these lurking just over the horizon include the prospects of: 1) signatory plaintiffs potentially using equitable estoppel arguments against non-signatory manufacturers to compel arbitration of claims where the manufacturer might prefer to be in court; 2) mass arbitration and class arbitration, where legal and procedural vehicles may be less favorable for full-throated defense; and 3) the possibility that plaintiffs' counsel will start arbitrating the merits of some of these disputes and seeking to use offensive issue preclusion to enforce arbitral findings against the defendant in other court cases or arbitrations.

For now, however, the current state of affairs is finding effective ways to extract potential arbitration agreements as quickly as possible from plaintiffs who are trying to avoid providing them, and get those arbitration issues before the courts without either foregoing the ability to defend vigorously (e.g., via motion to dismiss) or stepping on a waiver landmine in the process.


Arbitration Under Siege
Navigating the latest legal and strategic challenges in class action litigation


Today's Panelists
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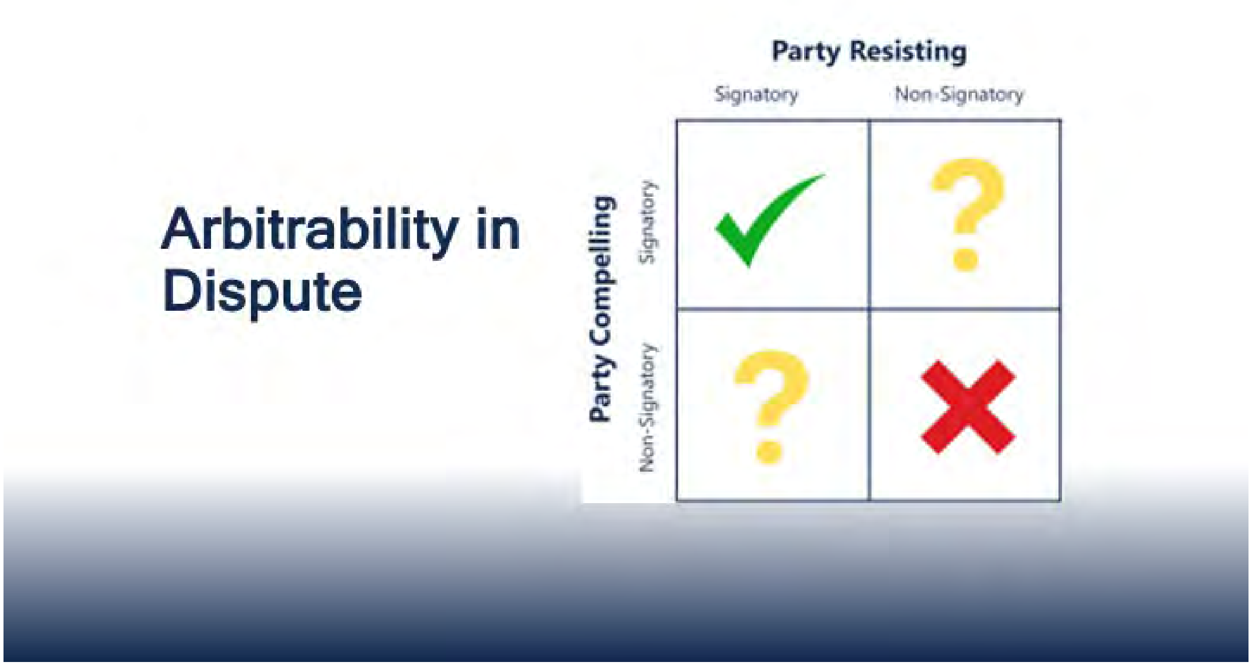
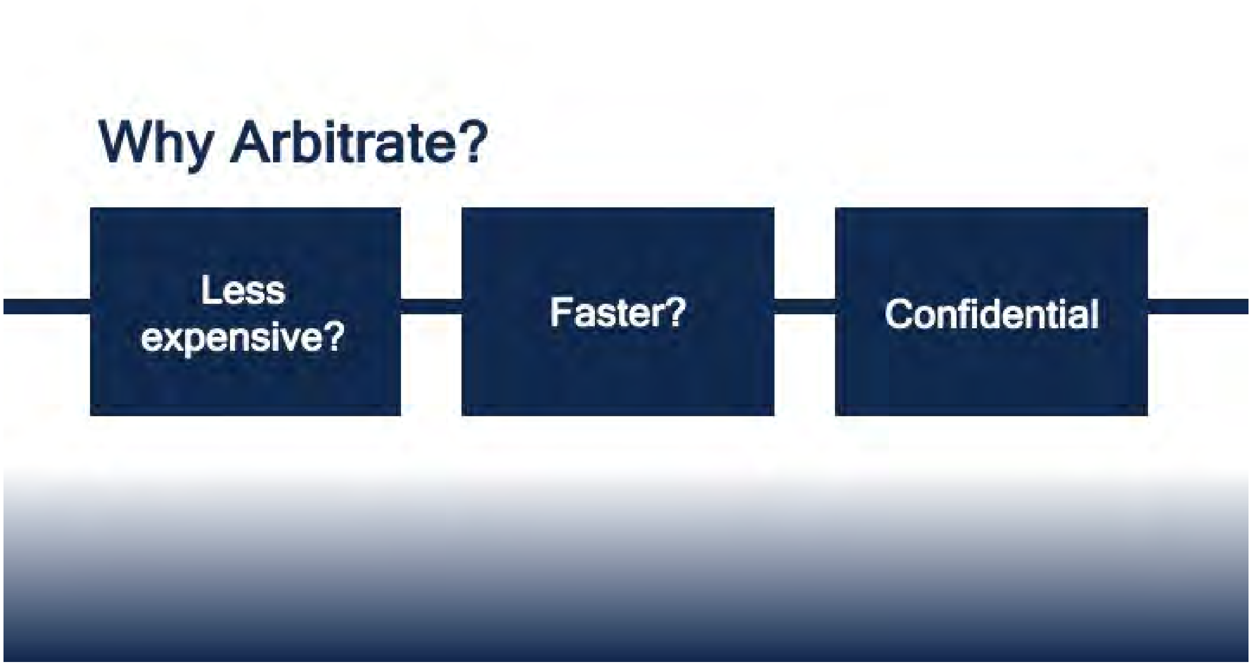
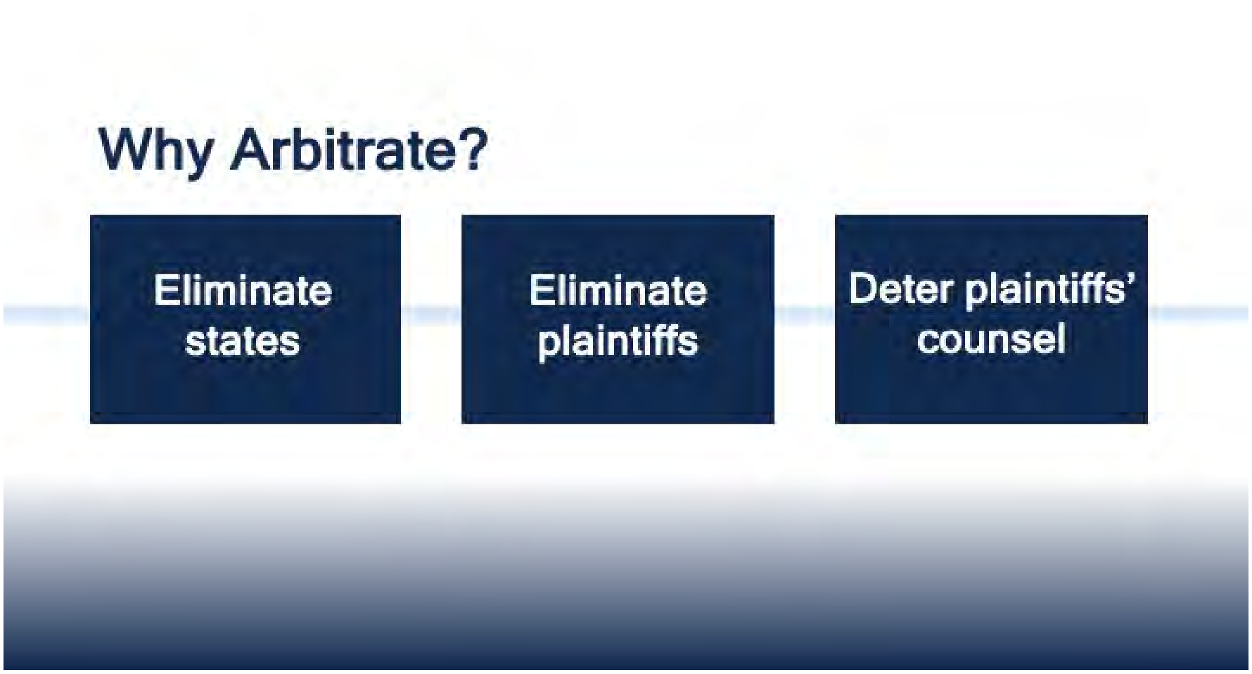
Ford Motor Company
Roger Meyers
Bush Seyferth PLLC
Moheeb Murray
Bush Seyferth PLLC
Briana Montminy
Nissan North America


Arbitrability in Dispute
Party Resisting
Signatory
Non-Signatory
Party Compelling
Signatory
Non-Signatory


Why Do We Want To Arbitrate?


Why Arbitrate?
Less expensive?
Faster?
Confidential


Why Arbitrate?
Eliminate states
Eliminate plaintiffs
Deter plaintiffs' counsel

Waiver

The FAA's policy favoring arbitration **does not** authorize federal courts to invent special, arbitration-preferring procedural rules.

Morgan v. Sundance, 596 U.S. 411 (2022)

Waiver

A motion to dismiss that seeks a decision on the merits and an immediate and total victory . . . is entirely inconsistent with later requesting that those same merits questions be resolved in arbitration.

In re Chrysler Pacifica, 715 F. Supp. 3d 1003 (E.D. Mich. 2024)

Waiver

It taxes credulity . . . that FCA was not aware of the standard sales documents its dealers were using.

Even if that were accurate, it does not change the reality that FCA sought an immediate and total victory . . .

In re Chrysler Pacifica, 715 F. Supp. 3d 1003 (E.D. Mich. 2024)

Waiver

Waiver

Plaintiffs' positions seem to suggest that a defendant's choices should usually be limited to acquiescing to the start of discovery by answering the complaint or else waiving its right to arbitration by filing a pre-answer motion to dismiss.

Pacheco v. Ford Motor Co., NO. 22-11927 (E.D. Mich. Mar. 5, 2025)

Non-Signatory Enforcement

Non-Signatory Enforcement

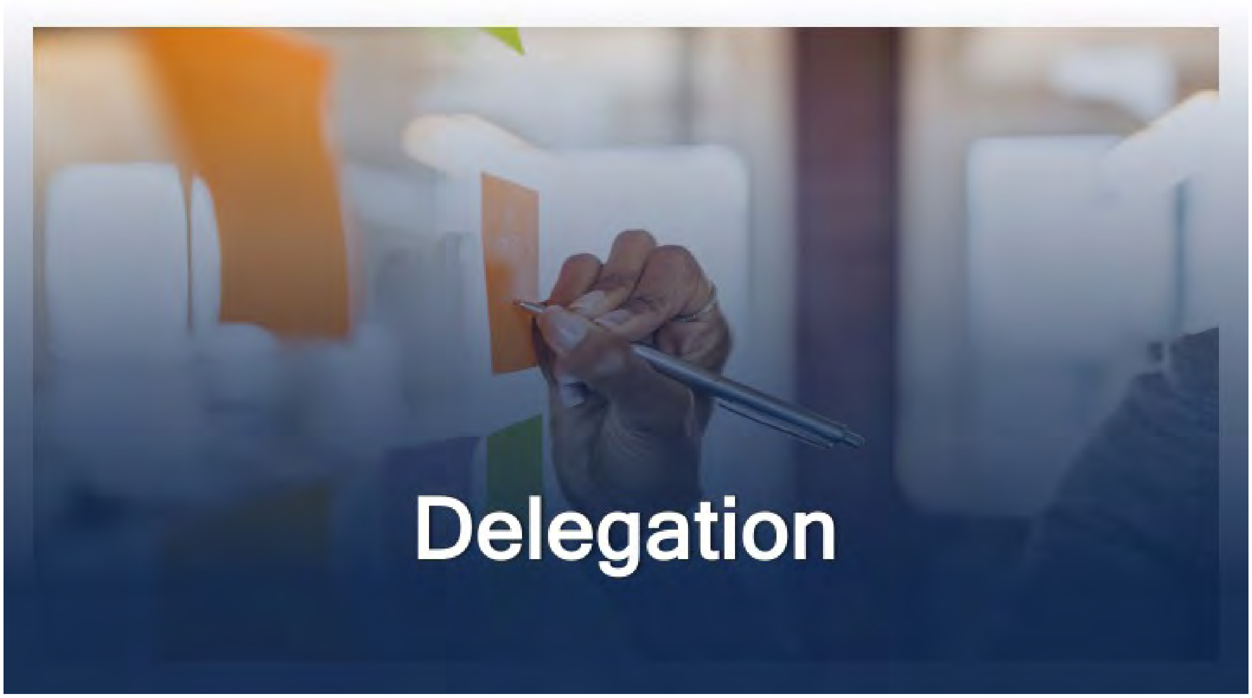
> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

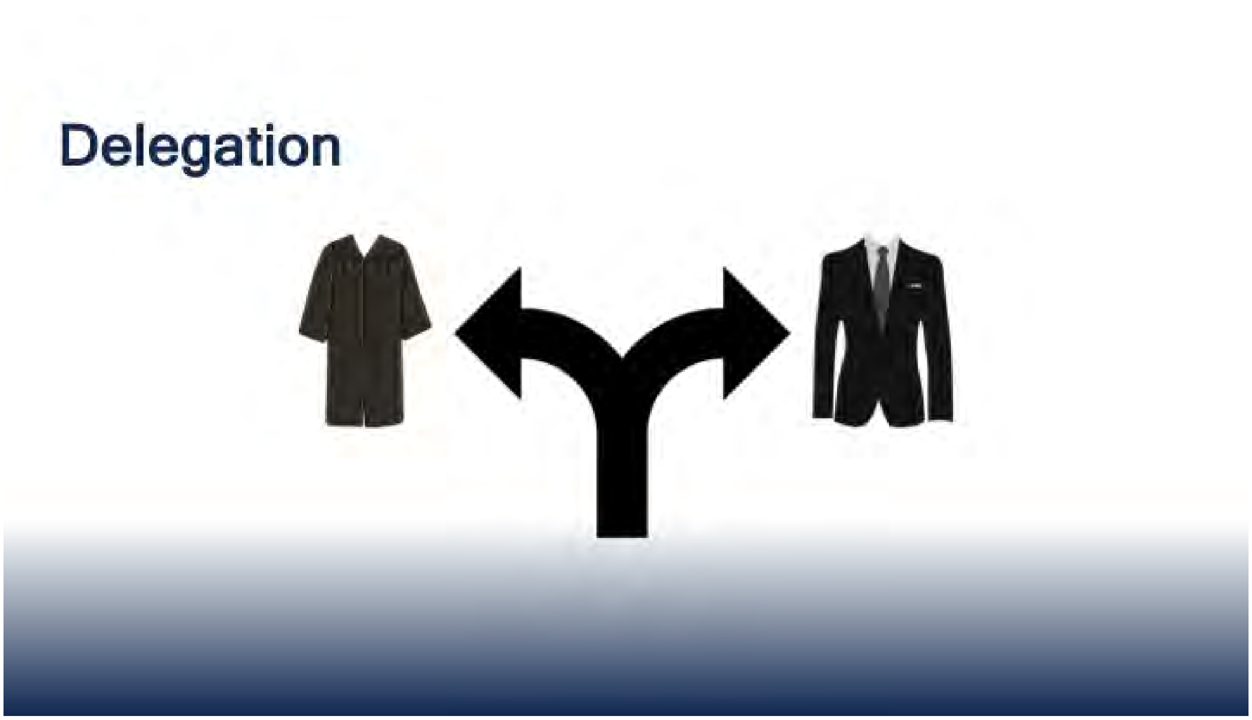
AT&T Techs., Inc. v. Comm'ns Workers of Am., 475 U.S. 643 (1986)

Non-Signatory Enforcement

- Equitable estoppel
- Agency
- Third-party beneficiary

Non-Signatory Enforcement


Delegation


Delegation

Delegation

Risk of Success

Risk of Success


Risk of Success

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Roger P. Meyers

Member | Bush Seyferth (Troy, MI)

Roger P. Meyers leads the firm's complex business and commercial litigation practice and serves as the firm's general counsel. He routinely handles disputes involving business ownership and governance, mergers and acquisitions, commercial contracts, fraud and fiduciary duties, securities, health care, employee mobility and unfair competition, and trade secrets. He also has significant experience in appeals, arbitrations, class actions, and internal investigations, and has tried or arbitrated several disputes to final judgment. In addition to handling major business and governance disputes across industries, Roger has a particularly deep background in the health care, private equity and financial services, and technology / telecommunications industries.

Related Services
- Business and Commercial
- Class Actions
- Securities / Finance
- Fact Investigations

Representative Class Action Matters
- Trial counsel for auto manufacturer in putative class action alleging fraud and deceptive trade practices relating to brake master cylinders.
- Defended software company in class action for alleged constitutional violations in connection with payment processing.
- Trial counsel for auto manufacturer in putative class action alleging fraud and deceptive trade practices relating to water pumps.
- Defended marketing firm in significant Telephone Consumer Protection Act class action.
- Represented auto manufacturer in putative class action alleging breach of warranty and fraud relating to alleged transmission defect.
- Secured victories in two substantive arbitrability disputes stemming from an oil consumption class action.

Honors and Awards
- Michigan Super Lawyers (2020 – present)
- Michigan Super Lawyers, Top 100, (MI: '24)
- Chambers USA Guide, Litigation: General Commercial (Michigan) Band 3 (2023 – 2024)
- Benchmark Litigation, Future Star (2024 – present)
- Inclusion in The Best Lawyers in America© Ones to Watch: Commercial Litigation (2024 – present)
- DBusiness Top Lawyers (2023 – Present)
- Thomson Reuters, Stand-Out Lawyer
- Michigan Lawyers Weekly, Leaders in the Law (2023)
- Michigan Lawyers Weekly, Go-To Lawyers for Business Law (2022)
- Detroit Bar Association Foundation Fellows Class (2020)
- Michigan Super Lawyers, Rising Star (2012-2019)
- America's Top 100 High Stakes Litigators® for Michigan (2018)
- Legal Aid Defender Association, Recognized for Pro Bono Service (2012)

Education
- University of Michigan Law School, J.D., magna cum laude, 2009
- Suffolk University, B.S. Business Administration – Computer Information Systems, summa cum laude, 2003

“Worthless” Claims for Big Money: Defending Against the Surge of Non-Injury Class Actions

Sean Gugerty
Goodell DeVries Leech & Dann (Baltimore, MD)

More Money for Nothing (Class Actions), an Uptick That’s Not Free
Sean Gugerty

In recent years, product-liability defendants have faced another unwelcome development in class actions: a huge uptick in the number of no-injury cases where the only harm alleged is economic loss from purchasing the product. In these cases, plaintiffs allege that widely used over-the-counter or consumer goods were misleadingly labeled or defective and are therefore “worthless” or “worth less.” Often the alleged defect is theoretical or has not manifested for a significant portion of the class. But the plaintiffs’ bar sees value in these cases, even if the actual benefit to class members is nil.

Thankfully, defendants have tools available. Among these are challenging the plaintiffs’ claims on federal preemption grounds, challenging the plaintiffs’ standing under Article III, and pursuing strategies to defeat class certification. These are battle-tested ways to combat these suits from start to finish.

Federal Preemption Under the Food, Drug, and Cosmetics Act

Although not specific to class actions, federal preemption under the Food, Drug, and Cosmetics Act (FDCA) is a defense that’s often available in the product-liability context. This defense is especially strong for no-injury cases, as the FDCA has particularly strong express-preemption provision for claims involving OTC drugs (21 § U.S.C. 379r) and cosmetics (21 § U.S.C. 379s). For those categories, no state may have a requirement that “is different from or in addition to, or that is otherwise not identical with, a requirement under [the FDCA].”[1] Thus, for example, a claim that a defendant mislabeled its product, or failed to include a warning, may be preempted because it is seeking to impose a requirement that is “in addition to” the labeling requirements imposed by federal law. While unfortunately, both statutes contain carve-out provisions for traditional product liability claims,[2] they are squarely applicable to no-injury claims based on state consumer fraud statutes or other similar provisions.

Claims can also be impliedly preempted, including when state-law claims are used to allege that the defendant violated federal law, trampling on the primary authority of the FDA to enforce the FDCA and federal drug regulations.[3]

Article III Standing in the No-Injury Context

Given the vague nature of the economic-loss theories advanced in no-injury cases, the issue of standing can provide fertile ground for defendants. Standing includes the well-known requirement of a concrete and particularized injury in fact, which contrasts with the situation where plaintiffs sue over a product they have used without issue. The Third Circuit put it well: “buyer’s remorse, without more, is not a cognizable injury” sufficient for Article III standing.[4] But not surprisingly, this is often a contested issue. It includes the question of whether and when absent class members must demonstrate standing.

On that question, the Supreme Court has taken up relevant cases recently, including a very recent grant of certiorari that is potentially significant. In the 2021 case *TransUnion LLC v. Ramirez*, the Court held that “[e]very class member must have Article III standing in order to recover individual damages.”[5] But that case addressed a final judgment awarding damages, not the earlier class-certification stage: the Court specifically left open “the distinct question whether every class member must demonstrate standing *before* a court certifies a class.”[6] What followed was a circuit split, and some circuits have held that Rule 23 “permit[s] certification of a class that potentially includes more than a *de minimis* number of uninjured class members.”[7]

1 21 U.S.C. § 379r(a)(2); 21 U.S.C. § 379s.

2 21 U.S.C. § 379r(f); 21 U.S.C. § 379s(d).

3 Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 349 n.4 (2001) (citing 21 U.S.C. § 337(a)).

4 In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig., 903 F.3d 278, 281 (3d Cir. 2018).

5 594 U.S. 413, 430 (2021).

6 Id. at 430 n.4.

7 Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 669 (9th Cir. 2022) (en banc).

On January 24, 2025, though, the Supreme Court granted certiorari in *Lab’y Corp. of Am. v. Davis* to decide the question “[w]hether a federal court may certify a class action . . . when some members of the proposed class lack any Article III injury.”[8] This case will give the Court the opportunity to resolve the circuit split around the question left open in *TransUnion*.

A separate question that will not be resolved by *Lab’y Corp. of Am.* is whether the economic-loss theories of no-injury cases are injuries in fact for purposes of Article III standing. The Eighth Circuit, for example, has held that they are not.[9] Some other courts, like the First Circuit, have gone the other way.[10]

Against this backdrop, defendants can argue that a plaintiff’s economic-loss theory is not a concrete and particularized injury in fact. This could take the form of arguing that the named plaintiff’s product was not contaminated or defective (and thus no economic loss has occurred) or that the plaintiff has not shown that all similar products are contaminated or defective.

Class Certification in the No-Injury Context

No-injury class actions are attractive to the plaintiffs’ bar in part because personal-injury cases are often defeated at class certification, as the injuries involve tend to be highly variable. Nonetheless, there are strategies to challenge class certification in no-injury cases as well.

Whether class members have proof of use can be an individualized issue, especially where less than all similar products are shown to be contaminated or defective. Proof of use problems with named plaintiffs (especially in the context of non-prescription products) can call their typicality and adequacy into question. Also, related to the standing issue, the question of whether each class member’s product is actually contaminated or defective can be a significant individualized issue. Finally, the plaintiffs’ damages model, which often will seek to measure a price premium the plaintiffs paid because of the alleged latent defect, can be challenged based on the variety of factors that go into a product’s price.

Conclusion

Despite the lack of benefit to class members, no-injury class actions are likely here to stay. Manufacturers, retailers, and other potential product-liability defendants should be prepared when the plaintiffs’ bar shows up—and there are strong defenses available to take on such suits, and win.

8 No. 24-304, __ S.Ct. __, 2025 U.S. LEXIS 427 (U.S. 2025).

9 Johannessohn v. Polaris Indus., 9 F.4th 981, 987 (8th Cir. 2021) (“[P]laintiffs must allege that their product actually exhibited the alleged defect.”).

10 Xavier v. Evenflo Co. (In re Evenflo Co.), 54 F.4th 28, 36 (1st Cir. 2022).

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Sean Gugerty

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

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

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

Practice Areas

- Medical Malpractice
- Product Liability
- Appellate

Representative Matters

- Sean was lead briefing counsel in demurrers (motions to dismiss) that resulted in an Alameda County court's decision dismissing — as federally preempted — a consumer group's Proposition 65 claims against generic ranitidine manufacturers and retailers. After plaintiff appealed, Sean took a leading role in appellate briefing and argument for the defendants and secured a reported decision affirming the trial court's dismissal ruling.
- Sean, with Rick Barnes and others, is part of the team that represents Perrigo in the personal injury product liability and medical monitoring and consumer class action MDL No. 2924 related to over-the-counter medicine ranitidine (Zantac) and alleged exposure to N-Nitrosodimethylamine (NDMA). This MDL involves over 100,000 claimants and cases and is considered one of the most complex MDL proceedings in U.S. history. Sean was co-drafting counsel for motions to dismiss filed collectively on behalf of dozens of the generic manufacturer defendants, which ultimately resulted in the MDL court dismissing all causes of action against the generic manufacturers in July 2021 based on federal preemption.
- Sean took the lead in the motion to dismiss briefing that resulted in dismissal of all claims against the manufacturer and sellers of an over-the-counter ibuprofen product based on federal preemption.

Honors and Awards

- Best Lawyers - Ones to Watch - Medical Malpractice Law - Defendants (2021-2022); Health Care Law (2021-2022)
- Maryland Super Lawyers - Rising Star -Personal Injury - Medical Malpractice Defense (2021-2025)

Education

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

The Future of ESG: Managing Reputational and Legal Risk

Dave Poston
Poston Communications

Issues Mangement and Crisis Decision Tree to Manage Reputational Risk Amidst Political Polarization
Dave Poston

Corporations and law firms today find themselves in the midst of unique challenges in dealing with the new Trump Administration related to their past and current client representations, court filings and management policies.

Leaders are required to ask: (1) "what should we be saying on which issues and when?" and (2) "how can we analyze and strategize an overall approach as well as be prepared to respond to individual situations?"

While the fervor has died down somewhat, it may be helpful to remember that the Israel-Hamas war was and remains a catalyst for many tense situations impacting law firms, their clients and client relationships, their employees, law schools, legal organizations, and many others in the legal ecosystem. Those speaking out for either side simultaneously served as lightning-rods for the actions of the leaders of both sides of the conflict.

The situation is a useful one to reflect upon as many strategies are applicable, especially when combined with crisis and risk management principles.

Leadership is a Call to Courage and Action
We are constantly getting asked: "What should we be saying or doing on the issue at hand and when?"

Law firms tend to not want to stick their neck out, because they want their clients' interests to come first. But client's welcome clarity around law firm's beliefs, especially to determine if they are aligned.

Similarly, companies tend to not want to stick their neck out, for fear of shareholder suits or alienating customers. But extensive data proves that consumers of all types want to know that companies are operating from a belief system.

These parallel dilemmas leave leaders unsure of their position and footing. Our recommendation? Leadership is a call to courage and action. No company or law firm exists in a vacuum, no law firm can represent everyone, and no position can truly be neutral.

The very act of accepting a representation is a choice. That choice is one of profit and operational costs versus all its priorities. Law firm leaders might as well understand who they are, accept and embrace that identity, seek clients that align with their mission and values – and speak out proudly about their brand and position – not to mention the rule of law.

Decision Tree - Client Representations
Acceptance of certain client representations can obviously be fraught with danger, or it may bring emphasis to other clients with extreme viewpoints. Law firms struggle to balance that governmental and other relationships can assist clients in other ways with potential negative impacts.

- Does taking this client, not taking a client conflict with your ESG statement, policy, or other commitments?
- If we ask the same question of one from the affected group, whether a team member, client, friend, etc., would we get the same answer?
- Does this client need Client Committee review?
- Does or would another client have a point-of-view regarding this client/issue?
- Would this client/issue not affect one geographical area of the office negatively, but be received negatively by another geographical area or client?

Decision Tree - Stand or Speak Out on Issues
Once a law firm has mapped the fifty or so scenarios that it is most likely to face, they are much better prepared to proactively stand up, react or stay silent about an issue. We often recommend to leaders that in a crisis, it is best to rely on that pre-planning and only alter the decision under extreme circumstances. The following questions are some of the ones we suggest using as a decision tree to determine if alterations to the plan should occur.

- Does this situation directly or indirectly involve or impact us or our team, clients, or others we care about?
- Is it the right thing to do?
- Is this part of what makes our firm different?
- Should we be demonstrating leadership on this issue, including if it is an extension of a related issue to which we are committed?
- What would our team, clients and families expect of us in this situation?
- Are we willing to take a stand that might cause us to lose clients?

Ranking of Scenarios by Public Opinion

When working through any analysis of issues, it is important to brainstorm anything possible to be included and then rank them. We recommend that clients put issues into four buckets.

- Expected – Those issues on which organizations are expected to speak out in favor of.
- Accepted – Those issues on which it is deemed acceptable for organizations to speak out in favor of.
- To Be Determined – Those issues which are in movement, like DEI and ESG, on which organizations may or may not desire to speak out in favor of.
- Not Acceptable – Those issues on which it is deemed unacceptable for organizations to speak out in favor of or not speak out in favor of.

Holding Statements

War, death, and injury are always at the top of crisis scenarios lists for demanding a statement or action on behalf of an organization. In making determinations on strategies and tactics for organizations to take during polarized times, reflecting on a number of key points that became clear in the public discourse about the Israel-Hamas war can be helpful: (1) an organization's mission might limit the scope of any statement or action, such that it could address concerns for those impacted but not address the actual issue at hand; (2) an organization might not be ready to respond fully in the moment but rather could express concerns now and commit to more complete statement or action in the near future; (3) situations often change rapidly; (4) the actions of or facts revealed by others mean that opinions might need to be clarified, changed or updated; and, (5) client representations, issues management and crisis communications response are never really "done" but is rather an ongoing effort.

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Dave Poston

Chief Executive Officer and General Counsel | Poston Communications

Dave Poston is a licensed attorney who has held numerous international in-house and agency positions for law and other professional services firms handling international responsibilities from offices in Atlanta, London, New York and San Francisco.

Throughout his career, Dave has developed media opportunities for his clients and employers in hundreds of important international media and trade publications. He managed firm-wide public relations and marketing in various roles as marketing and/or public relations director or manager at King & Spalding LLP, Dorsey & Whitney LLP and Jones & Askew LLP. He worked with more than 20 West Coast law, architecture, construction, financial services, management consulting, real estate, technology and travel clients at Blattel Communications.

Dave has earned recognition from a variety of prestigious organizations over the course of his career, most notably being named the Public Relations Professional of the Year by the Public Relations Society of America (PRSA) in 2020. Dave also leads Poston Communications' Crisis Communications and Litigation PR division, which has been recognized by Chambers and Partners as one of the top 20 crisis firms in the U.S., achieving rankings in its Litigation Support and Crisis & Risk Management Guides. Additionally, Dave is a Ranked Individual in Band 4 of the Litigation Support Guide and Band 2 of the Crisis & Risk Management Guide. Dave "is intelligent, a creative problem solver, pushes the envelope, and always looks at situations from an objective perspective," one Poston client told Chambers researchers.

Dave graduated with a double major — Bachelor of Arts in political science and English & history — from Emory University in Atlanta and received his law degree from Tulane Law School in New Orleans. He also received training in graphic design at the School of Visual Arts in New York City and sales with Miller Heiman and Motorola's Six Sigma University. He has served as the co-chair of the Legal Marketing Association's (LMA) "Strategies" magazine, president of the LMA Southeastern Chapter and a member of the 2003 Committee of the Year for the LMA New York Metropolitan Chapter. He is also a member of the State Bar of Georgia. When he isn't in the office, Dave enjoys exploring Atlanta on his bike and being outdoors.

Honors and Awards

- Selected for inclusion in the Chambers & Partners Litigation Support Guide for Litigation PR & Communications and in the Crisis & Risk Management Guide for Crisis PR & Communications
- CSR & Diversity Award – LGBTQIA2+ Centered Campaign, PRNEWS (2021)
- Public Relations Professional of the Year, Public Relations Society of America (PRSA) (2020)
- Best Media Relations Campaign, Bulldog Awards (2020)
- Diversity & Inclusion Awards: Outstanding Voice, Atlanta Business Chronicle (2020)
- Image Award, Florida Public Relations Society Orlando Area Chapter (2020)
- Radiance Award – Public Service, Public Relations Society of America (PRSA) – Sunshine District (2020)

Education

- Tulane University Law School - J.D., Law; 1995
- Emory University - Bachelor of Arts, English, History and Political Science; 1992

Exposing Litigation Funding Schemes: Strategies for Discovery and Trial

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$1,400 Massages on a Kentucky Horse Farm: What's Included?
Sandy Hooper

In personal injury cases, plaintiff lawyers will sometimes refer an injured client, who is often at Maximum Medical Improvement ("MMI"), to a third-party lender known as a litigation funding company. Seeking to profit off the underlying litigation, the outside lender agrees to advance money for plaintiff's medical treatment, which is often medically unnecessary and excessively priced. The lender, in turn, refers the plaintiff to a group of hand-picked medical providers. The providers operate under a previously signed contract with the lender to provide "rack rate" medical treatment in exchange for repayment of the medical services rendered when the case settles or results in a verdict, after which the treatment is often discounted to around 30% of billed amounts.

This scheme: allows the plaintiff to receive unnecessary and exorbitantly expensive medical treatment; allows the plaintiff's counsel to drastically increase his client's claim for compensatory damages at trial; and allows the lender to recoup the moneys advanced for medical treatment and personal expenses at a profit for the benefit of the lender's investors. In the end, everybody wins…. except the defendant—who usually gets stuck with the bill. This article provides defense lawyers with tips for discovering the existence of litigation funding in your cases and offers strategies for exposing the scheme, turning the information into admissible evidence, and using the scheme to undermine plaintiff's credibility at trial.

How To Discover Third Party Litigation Funding in Your Case
To sniff out third party litigation funding, begin with a search through the plaintiff's medical records. Common signs are expensive and questionable "treatment" including: massages; lengthy inpatient treatment stays; non-traditional therapies like speech, physical, art, animal, or music therapies; community or work integration training; and personal expenses like apartment rent or utility payments.

In a Mississippi personal injury case we recently handled, Plaintiff was sent by his lawyers and the litigation funding company to an in-patient rehabilitation facility on a Kentucky horse farm where Plaintiff received massages billed at $1,400/hour, lengthy inpatient treatment billed at $1,500/night (totaling $400,000), "community/work integration training" totaling $200,000, and 9x upcharges for durable medical equipment and counseling. Telltale billing practices put us on notice that Plaintiff's lawsuit was being subsidized and invested in by a third party: medical bills with vague descriptions, use of Health Insurance Claim Forms (HFCAs) as a substitute for a typical medical record or bill, unusual coding on a medical bill, marked-up treatment costs, charges for non-medical expenses, and unnecessary treatment. The defense should be wary of unexpected and expensive treatment after MMI, new doctors post-MMI, and out-of-state treatment. Oftentimes, the additional treatment is not recommended by Plaintiff's workman's compensation doctors, a fact that should be elicited during doctor depositions.

Perhaps the most fail-safe tool for uncovering third party litigation funding is offensive written discovery. Simply serve a few interrogatories and requests for production about litigation funding to Plaintiff's counsel early on. Targeted questions like, "are the damages you seek to recover in this lawsuit subject to a lien and/or subrogation interest of any litigation funding or financing companies?" and requests like, "please produce any and all documents or agreements entered into by any of your medical providers and any third-party individual or entity in which the third party agreed to pay for medical treatment provided to you for the injuries you allege in this lawsuit" can be used to identify agreements with litigation funding companies and lenders. In our Mississippi case, at least one medical provider who was under contract with the litigation funding company produced its contract with the lender in response to a subpoena for the Plaintiff's medical records.

Finally, there is no substitute for conducting some basic research into the litigation funding company identified in your case. The litigation funding shakedown can be exposed with research on sites like PACER, Westlaw, LexisNexis, or your state's online judicial filing system. After you have discovered the name of the litigation funding company, search through previously filed motions and orders for good arguments and favorable law allowing you to talk about litigation funding at trial. Through our research we discovered many helpful judicial opinions on litigation funding, including its admissibility. Don't forget to search on Google and YouTube for the identified lender. In our case, a search for the provider and lender on YouTube uncovered a priceless marketing video in which a plaintiff's counsel from New Orleans explained how to effectively use litigation funding to pump up medical damages in a TBI case. Fortunately, the same Kentucky doctor who treated our Mississippi plaintiff provided some very helpful comments on the video that we used against her in her deposition.

How To Use Third Party Litigation Funding To Your Advantage

Discovery of third party litigation funding is one thing; getting evidence in admissible form is another. Begin with non-party subpoenas to lenders and providers for contracts, correspondence, application documents, case assessment materials, and master charge sheets related to the plaintiff. Depose provider physicians and other healthcare professionals, both contract and non-contract, along with representatives from the funding company. Across those depositions, expose and attack the billing records and reasonableness and necessity of the plaintiff's treatment. Ask the witness why treatment is being charged at X rate when everybody else pays Y rate. Ask the witness why care was ordered above and beyond what plaintiff's workman's compensation doctors recommend.

Once you uncover litigation funding, you need to make a decision about how you're going to use it. Do you want the litigation funding evidence excluded (and thus, not a part of plaintiff's damages model) or do you want it admitted so that you can use it to cudgel plaintiff's doctor and litigation funding witness on the stand?

From there, if you want the litigation funding evidence excluded, consider motions *in limine* for exclusion of medical treatment and billing without adequate foundation. If you want evidence of litigation funding admitted, a persuasive argument may be made that evidence related to the funder and its relationship with the provider shows the bias of the provider and is necessary to show whether the treatment was reasonable, necessary, and caused by the accident in question. In support, a defense attorney who has turned over every stone might be able to identify contracts—as we did—between the third parties and the funding company where the provider agrees to provide a medical causation link for treatment prior to ever meeting the plaintiff; point to promotional materials from the lender and/or provider about the true purpose of treatment; and reference the markup of charges from other providers by the funded provider.

The defense may also attack the medical bills directly in an effort to exclude them. In doing so, ask: do the bills provide detailed itemization of services rendered? Can the best evidence rule crack the door? And do the "bills" violate applicable legal or ethical standards (e.g., AMA Ethics Op. 11.3.1(d), which provides, "Physicians must not charge a markup or commission, or profit on services rendered by other health care professionals")?

Finally, be ready to rebut the plaintiff lawyer's most likely counterattack in effort to exclude evidence of litigation funding: the collateral source rule. The collateral source rule provides that the defendant cannot admit evidence showing the plaintiff received compensation from a source independent of the defendant ***for the sole purpose*** of reducing defendant's liability. To overcome this roadblock, argue that evidence of litigation funding is relevant to challenge the reasonableness of medical charges; admissibility of evidence of litigation funding depends on the purpose for which it is offered; and evidence of litigation funding is admissible to show bias. With the right approach, a prepared defense lawyer can come out on top when faced with evidence of litigation funding. In our case, a Mississippi state court granted a motion *in limine* to allow evidence pertaining to litigation funding based on the arguments that (1) the lender's investment into the plaintiff's medical care was relevant to show the bias of the treating physicians and (2) the lender was not a collateral source. The same court granted another motion *in limine* to exclude evidence of medical treatment and billing without adequate foundation because (1) the HFCA claim forms were not itemized medical bills and therefore did not satisfy the law's requirements and (2) the HFCA claim forms contain multiple layers of hearsay and violate the best evidence rule.

In sum, litigation funding in personal injury lawsuits is a real and present reality and represents a danger to defendants. There are strategies for turning the information uncovered into admissible evidence at trial, exposing the scheme and shedding light on the plaintiff's true damages versus his inflated damages. Happy hunting—and to our Canadian friends, we wish you Bonne Chasse!

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Sandy's law practice focuses on products liability, premises liability, transportation litigation, and medical device litigation. He has deep experience defending automobile and heavy truck manufacturers as well as motor carriers in lawsuits arising from catastrophic accidents.

Sandy started at Lightfoot in 2004 and during the last two decades he has successfully tried bench trials and jury trials to verdict. He has argued before the U.S. Court of Appeals for the 11th Circuit in Atlanta. He is licensed in Alabama, Mississippi, Tennessee, Texas, and Oklahoma. In August 2024, he was part of a Lightfoot trial team in a case in which Plaintiff suffered a catastrophic injury to his upper extremity while working near a conveyor belt. Plaintiff blamed the designer of the conveyor for his injury, but after a 5-day trial in federal court in Mobile, the jury delivered a defense verdict for Sandy's client.

Before joining the firm, Sandy served as a law clerk to Judge Thomas A. Wiseman, Jr. of the U.S. District Court for the Middle District of Tennessee. Judge Wiseman was proud of his small-town roots and was a "lawyer's judge" who imparted many valuable lessons to his law clerks. Before clerking, Sandy worked on Capitol Hill as a driver for U.S. Senator Chuck Hagel from Nebraska.

Sandy grew up the "caboose" in a train of five children in a small west Tennessee town. His parents still live there. Jealous of an older sister who was studying French in college, Sandy set out to learn a second language in high school and now speaks fluent French. During election years, he appears as a talking head on French-Canadian TV trying to explain, as best he can, American politics to our neighbors to the North. Sandy's 93 year-old father still practices law in the same town where Sandy grew up, but complains he doesn't have enough work to do. One lasting influence on Sandy's life is his maternal grandmother, Mary Sanford Myatt of Memphis, who passed away in 2014 at the age of 102.

Practice Areas

- Automotive
- Catastrophic Injury
- Commercial Litigation
- International Disputes
- Pharma & Medical Device
- Product Liability

Awards

- The Best Lawyers in America© by BL Rankings — Product Liability Litigation (2019-24)
- Martindale-Hubbell, AV-Preeminent Rated
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Product Liability (2014)
- Mid-South Super Lawyers by Thomson Reuters — Product Liability (2015-21)

Education

- Washington & Lee University School of Law (J.D.) - Washington & Lee Law Review
- Washington & Lee University (B.A., magna cum laude)

Reverse the Curse: Using "Reverse FOIA" Litigation to Protect Trade Secrets

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Reverse the Curse: Using "Reverse FOIA" Litigation to Protect Trade Secrets
Kelly Sheridan

The Freedom of Information Act, 5 U.S.C. § 552 (FOIA) and similar state laws are vital tools for government transparency and accountability – these laws play a crucial role in promoting transparency, preventing corruption, and allowing public oversight of government actions. However, public disclosure laws are increasingly being exploited by companies seeking to gain an unfair business advantage in the competitive bidding process by accessing their rivals' trade secrets. Savvy practitioners can leverage "reverse FOIA" lawsuits to safeguard their company's or clients' trade secrets.

Public Disclosure Laws and "Reverse FOIA" Litigation

FOIA is a federal law enacted in 1966, and most recently amended in 2016, that grants the public the right to request access to records from any federal agency. The law is designed to promote transparency and accountability in government by ensuring that citizens can obtain information about government activities. Under FOIA, agencies must disclose requested public records upon request, including documents, reports, emails, and other records. All such records must be promptly produced unless the relevant agency determines that a requested records falls under one of nine enumerated exemptions – such as national security, personal privacy, or law-enforcement investigations – or under other common-law exemptions recognized by federal courts.[1]

Any entity or individual may file a FOIA request, including private citizens, journalists, and business entities. FOIA requests may be filed anonymously, though in so doing, the requestor waives their ability to challenge the relevant agency's response to the request. FOIA requestors who believe that a federal agency wrongfully withheld public records in response to a duly-issued request, or that the relevant agency improperly asserted that requested records were exempt from disclosure, have a statutory right to file suit in federal court against the relevant agency seeking injunctive relief, attorney's fees, and costs.[2]

In addition to FOIA, all 50 states and the District of Columbia have some form of public-disclosure laws, variously termed "public records laws," "open records acts," or "sunshine laws." Like FOIA, these state laws generally require all relevant public records to be produced upon request unless they fall within a statutory exemption. There is significant variation among individual state public-disclosure laws in terms of their scope and application, including how long the relevant agency may take to acknowledge and fulfill each request; which records are exempt; and the remedies available to requestors who take issue with the relevant agency's response to their request. Most state public disclosure laws generally track FOIA in granting requestors either a statutory cause of action or a right of appeal to contest the relevant agency's response to a request; in addition to attorney's fees, many state laws also permit aggrieved requestors to recover statutory fines or penalties against state and local agencies that wrongfully withhold records.

"Reverse FOIA" litigation is so named because it takes the inverse posture of the typical or "affirmative" public-records litigation described above. In reverse FOIA litigation, an entity with an interest in *preventing* the public disclosure of records held by an agency files suit to enjoin the agency from producing records in response to a public-disclosure request. If "affirmative" FOIA litigation seeks to claw open an agency's files for public viewing, reverse FOIA litigation seeks to slam them shut:

> "Reverse-FOIA" actions are now a common species of FOIA litigation . . . Typically, a submitter of information – usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products – seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request.[3]

1 See 5 U.S.C. § 552(b).

2 5 U.S.C. § 552(a)(4)(B).

3 CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1134 (D.C. Cir. 1987).

When Does Reverse FOIA Litigation Arise and Why is it Necessary?

While federal and state public-disclosure requests can implicate a host of confidentiality and privacy concerns, reverse FOIA litigation primarily arises in the context of trade-secrets claims.[4] As explained by one early commentator,

Despite the laudable objectives of Congress in enacting the FOIA, it has often been used by business entities as a device to obtain valuable and otherwise unavailable information submitted to the government by their competitors . . . In the possession of business competitors, this information could be an invaluable tool for analysis of the submitter's business and for a comparative evaluation of each party's operations.[5]

This statement – made more than 45 years ago – could not resonate more today. In the typical fact pattern, a public agency issues a request for proposals or otherwise initiates a public bidding process; one of the unsuccessful bidders submits a public-disclosure request for the winning bidder's materials; the winning bidder receives third-party notice of the request from the agency;[6] and, unable to persuade the relevant agency to withhold the bid materials, the winning bidder files suit seeking an injunction barring the agency from producing part or all of its bid. Frequently, the requestor is not a lawyer and does not recognize that the winning bidder will even receive notice of their request, let alone initiate litigation in response – they simply fill out an online form or send an email to the relevant agency without considering the implications.

Relevant to trade secrets, FOIA exemption 4 expressly exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure – but it is not self-executing. The Supreme Court has held that because FOIA is a public-disclosure statute, its exemptions are not "mandatory bars" to the production of records and FOIA itself does not provide jurisdiction in reverse FOIA actions; instead, review must be based on the Administrative Procedure Act (APA).[7]

As a result, if a party cannot persuade the agency to withhold its trade secrets from production in response to a FOIA request, the party must seek an injunction. In such litigation, the party seeking to enjoin the production of records bears the burden of showing that the records at issue are protected by the Trade Secrets Act and that the contemplated release would be arbitrary and capricious, an abuse of discretion, or otherwise "not be in accordance with the law."[8] Challenges to agency decisions are reviewed in light of the "basic policy" of FOIA to "open agency action to the light of public scrutiny" and exemptions are given a "narrow construction."[9] Review is based on the administrative record, and agency decisions receive deference so long as they reflect a reasoned decision based on substantial evidence.[10]

There is significant variation in state public-disclosure laws regarding trade secrets, but most protect them in some capacity: Some state public disclosure laws expressly exempt trade secrets; some state laws incorporate the Uniform Trade Secrets Act or another state-law analogue; and some state courts have created a common-law exemption for trade secrets.

Like state public-disclosure laws, state procedural laws impacting reverse FOIA considerations vary widely. In some states, public agencies are not required to even provide third-party notice to entities that may have a confidentiality concern in requested records; in others, agencies "may" provide third-party notice of requests; and in yet others, entities with a confidentiality concern in requested records are entitled to notice in all instances and effectively hold a veto over the agency's proposed production.

Reverse FOIA litigation is necessary because most government agencies are generally reluctant to stick their neck out and assert an exemption at the request of a party claiming a confidentiality interest – public-disclosure laws were enacted in furtherance of a public policy of disclosure and open government, and the incentive structure created by the attorney's fees and fines available in affirmative FOIA litigation creates a strong bias in favor of disclosure. At the same time, because a court order enjoining an agency from releasing records insulates the agency from fines and penalties, agencies often decline to take a position in reverse FOIA litigation and the real battle is with the requestor.

4 Other contexts in which reverse FOIA litigation arises include disclosure requests made to law-enforcement agencies and correctional facilities; public healthcare facilities and private entities that partner with them; state colleges and local school districts; public-employee disciplinary bodies; and requests that implicate First Amendment concerns.

5 Stephen F. Hehl, Reverse FOIA Suits After Chrysler: A New Direction, 49 Fordham L. Rev. 185, 187 (1979).

6 FOIA does not expressly require that agencies provide third-party notice of FOIA requests to parties that may claim a confidentiality interest in requested records, but an Executive Order issued by President Reagan directed all federal agencies to adopt regulations providing for third-party notice of FOIA requests. See Executive Order 12,600, Predisclosure Notification Procedures for Confidential Commercial Information, 52 FR 23781, 3 CFR (1987).

7 Chrysler Corp. v. Brown, 441 U.S. 281, 293-94, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979)

8 See, e.g., Canadian Comm. Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008).

9 Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 (D.D.C. 1997).

10 See, e.g., McDonnell Douglas v. EEOC, 922 F. Supp. 235, 241-42 (E.D. Mo. 1996) (finding agency action to be arbitrary and capricious where agency's finding was "not supported by substantial evidence in the agency record" and where "to the extent [the agency] did consider the facts of [the] case, it viewed only the facts favorable to its predetermined position").

An Ounce of Prevention: Tips for Companies that Deal with Public Agencies

When companies receive notice for the first time that a public agency they deal with is contemplating producing confidential materials to one of their competitors, they are often, and understandably, shocked – the news that an agency intends to turn over your confidential materials to a competitor is galling. Worse yet, because public-disclosure laws generally impose stringent timelines, by the time notice of a request lands on an in-house lawyer's desk, the matter is already a three-alarm fire. In-house counsel can mitigate the stress of dealing with these last-minute emergencies with proactive preparation:

- Educate Business Counterparts: Make sure that your counterparts on the business side of the company are aware of public-disclosure laws and recognize that materials they submit to federal, state, or local agencies may be subject to disclosure. Incorporate into existing company procedures a to-do or action item to review information that is submitted to any public agency for confidentiality concerns.
- Wave the Flag: Make public agencies that your company or client interacts with aware of any confidentiality concerns by labeling trade secrets as such – doing so is critical to ensure you receive third-party notice of public-disclosure requests, and creates a helpful record if you are forced to litigate a reverse FOIA matter. Clearly labeling specific sections or appendices as confidential is better than adding a boilerplate disclaimer or footer to an entire document.
- Call in the Calvary: Ask your company's litigation counsel if they have attorneys with experience in reverse FOIA matters, and establish a relationship ahead of time so you don't waste precious time trying to locate and retain competent counsel. Most reasonable agency counsel will grant an extension of a records-disclosure deadline to afford you time to try to negotiate a resolution or seek injunctive relief, but serial extensions put the agency at risk and, as a result, are rarely granted – reverse FOIA disputes are "sudden-death overtime," so don't waste your time-outs! Outside counsel who are well-versed in the relevant public-disclosure law are also more likely to have success negotiating a favorable resolution with the agency and the requestor.
- Set Expectations: Reverse FOIA plaintiffs are forced to steer toward the vanishing point between public-disclosure laws and trade-secret concerns. Make sure your business counterparts have reasonable expectations about what they can prevent from disclosure and what they cannot. If your company bids on public contracts, it needs to be comfortable with basic business descriptions and financial numbers being in the public domain even though the requestor's motivations may seem underhanded. For example, you might succeed in preventing the disclosure of bid-specific, line-item pricing that a competitor could use to reverse-engineer a more competitive bid on future contracts, but a court is going to be very reluctant to find that the bottom-line price paid on a public contract is exempt from disclosure. Help your lawyers help you – be willing to concede points you are going lose so they can go to the mat on disclosures that would create true risk for your business.

A Pound of Cure: Tips for Practitioners

Reverse FOIA matters are a growing and interesting niche of the law where knowledgeable and experienced lawyers can produce real and tangible results for their clients – being able to "put out the fire" for a client is invaluable! But like actual firefighters, it is critical to be prepared and vigilant so you can spring into action when the call comes. The following lessons (many of which were learned the hard way) help navigate these short-turnaround engagements and promote your ability to get them resolved successfully:

- Know the Legal Landscape: If you represent a company or clients that deal with public agencies, it is critical to keep up to speed on FOIA and your state's public-disclosure laws. Evaluating public-disclosure exemptions can be a confusing choose-your-own-adventure-style exercise in parsing statutory language, incorporation by reference, and judicial decisions, not to mention procedural and logistical concerns. You won't have time to educate yourself when you get the frantic call from a client whose confidential materials will be released if you don't get a TRO in 48 or 72 hours, and you will reap dividends from doing your homework ahead of time.
- Get Your Ducks in A Row: Because trade secrets claims are fact-intensive, it's imperative to be ready to jump into the details. This is not the time to be drafting your basic statement of the relevant legal standard and a proposed TRO! Go one step further than maintaining a briefing bank and draft a template "wish list" declaration that includes every fact you would like your client to attest to in order to have the strongest trade secret claim under applicable law – it's far more efficient to have the client tell you which facts they can't swear to under penalty of perjury than to begin your engagement with an open-ended interview about their business practices.
- Assemble a Team: The middle of a reverse FOIA fire drill is not the time to have a sit-down conversation with your associate about the interesting intersection of policy interests reverse FOIA cases implicate.

Select a dedicated associate to work on these matters, and look for opportunities to help them develop a depth of knowledge by drafting proactive summaries for clients or preparing internal templates and checklists. Similarly, this is not the time for that new legal assistant to figure out the local rules governing TROs and the logistics of getting a hearing slot from the ex parte clerk – reverse FOIA matters require a more nimble courthouse familiarity than the typical litigation practice, so make sure your staff are in the best possible position to help you get in front of a judge and get your order signed.

- Be Pragmatic: Because the strongest opposition in reverse FOIA cases frequently comes from the requestor, these cases implicate judgment calls outside of the legal nuts and bolts of obtaining an injunction. Is the requestor likely to engage in negotiations and accept a redacted copy of the requested records, or are they just going to lawyer up when they learn your client has done so? Are they well-resourced, and is there some ideological or journalistic motivation behind their request? If the requestor is a necessary party under your public disclosure law, is it wiser to adopt a shock-and-awe approach, or will the requestor respond emotionally to “getting sued?” If the requestor is not a necessary party, are they likely to intervene or will you be able to coast to an unopposed injunction against an agnostic agency? A majority of reverse FOIA disputes resolve before the permanent-injunction stage – and given the strong presumption in favor of disclosure, responsible and cost-effective client service in these cases requires considering pragmatic and creative solutions and not simply defaulting to a scorched-earth approach.

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Kelly Sheridan is a partner at Corr Cronin. He believes lawyers obtain the best possible outcome for their clients—whether through settlement, court order, or trial—by showing the opposing party they are willing and able to take cases to trial, and preparing each and every case accordingly from day one.

This guiding principle has earned Kelly recognition and respect in the Seattle legal community and from clients locally, regionally, and nationally—including companies and individuals that have been denied coverage by their insurance company, businesses that are in bet-the-company disputes with a competitor, and entities that are wrongfully accused of causing catastrophic personal injuries.

In addition to insurance coverage litigation, Kelly has significant experience defending product liability, professional negligence, and general commercial matters. He has also developed expertise in Washington's open government laws, and regularly represents businesses in litigation against public agencies under the Washington Public Records Act, RCW 42.56 et seq.

Kelly joined Corr Cronin in 2012 and was elected partner in 2019. He has been recognized in Best Lawyers in America as "One to Watch" every year since 2021. Super Lawyers named Kelly a "Rising Star" in Washington from 2016 through 2022, and a "Super Lawyer" since 2023. In 2018, Kelly was admitted as an Associate Fellow by the Litigation Counsel of America, a trial lawyer honorary society devoted to promoting superior advocacy and ethical standards in the practice of law.

Prior to Joining Corr Cronin, Kelly served as a federal law clerk to United States District Judge Edward F. Shea in the Eastern District of Washington. He is an alum of Dartmouth College and the University of Washington School of Law, where he graduated with highest honors, served as an Executive Editor on the Washington Law Review, and was admitted to the Order of the Coif.

Kelly serves on the Board of Directors of the New Discovery School, and previously served for five years as Legal Chair of the Board of Directors of the Blue Ridge Neighborhood Club, and for 10 years on the Board of Directors of the Washington Climbers' Coalition, a nonprofit dedicated to protecting and promoting rock climbing access across the state. Kelly is the author of two guidebooks to nationally-recognized rock climbing areas in Washington and remains active in Washington's outdoor recreation community.

Practice Areas

- Insurance Coverage
- Personal Injury
- Product Liability
- Professional Liability
- Real Estate and Environmental Litigation

Education / Background

- J.D., High Honors, University of Washington School of Law
- B.A., Psychology and English, Dartmouth College
- Extern, Judge Robert S. Lasnik, U.S. District Court for the Western District of Washington
- Extern, Judge Richard D. Eadie, King County Superior Court
- Law Clerk, Judge Edward F. Shea, U.S. District Court for the Eastern District of Washington)

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