

Dry Heat, Hot Takes: From Voir Dire to Verdict

A Trial Network Litigation Symposium



April 22 - 26, 2026

The Ritz-Carlton Dove Mountain



Dry Heat, Hot Takes: From Voir Dire to Verdict

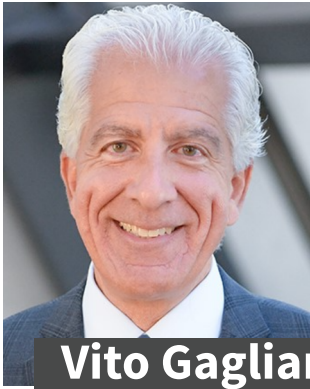
A Trial Network Litigation Symposium

April 23 - 26, 2026

Ritz-Carlton Dove Mountain; Marana, AZ

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Vito Gagliardi

Porzio Bromberg & Newman (Parsippany, NJ)

NLRB Takes a Different Track: Defending Cases Before the Restructured Agency

NLRB Takes a Different Track: Defending Cases Before the Restructured Agency

Vito Gagliardi

For over 90 years, the National Labor Relations Board has been responsible for enforcing the National Labor Relations Act. As the party in control of the Executive Branch tends to control the NLRB, and without any applicable principle akin to *stare decisis*, the NLRB's interpretation of the NLRA can and does change nearly as frequently as the interior décor of The White House. Since the 2024 election marked the first time in over a century that control of the Executive Branch changed parties in three consecutive elections, in-house counsel and employment and labor law practitioners should pay close attention to dramatic changes coming from the NLRB.

Management-side attorneys should resist the temptation to assume that the NLRB's jurisprudence applies only to unionized workforces. Although this is a common misconception, Section 7 of the NLRA applies widely to nearly all private sector employers¹ and protects the rights of nearly all private sector employees to engage not only in traditional union-related activities such as organizing and collective bargaining, but in "other concerted activities for the purpose of . . . mutual aid or protection."² Concerted activity can include discussions among non-union employees about terms and conditions of the work environment such as wages and safety issues,³ and can be protected in various forms, including social media posts and reactions or comments to social media posts.⁴

In recent years, the NLRB has revisited decisions on its interpretation of concerted activity as well as its standards governing whether an employer's policies or employment actions impermissibly restrict such protected activity, and to what extent an employer must permit its employees to

use company resources to engage in protected activity. In addition, the NLRB has reversed itself concerning more traditional labor issues such as access by non-employee union representatives to an employer's premises, and the level of protection enjoyed by employees discussing wages or working conditions or workplace investigations. After a year of being essentially nonfunctional, the revamped NLRB is coming into focus.

Agenda On A Collision Course

On January 20, 2025, Donald Trump took office for the second time. Guiding his campaign, even before his nomination, was a blueprint for a potential second Trump Administration: Project 2025. As to the NLRB, Project 2025 proposed that the next Trump Administration should fire NLRB General Counsel Jennifer Abruzzo; eliminate employer ability to recognize a union voluntarily after a card check; revive NLRB jurisdictional standards; allow decertification petitions while a collective bargaining agreement ("CBA") is in effect; ban project labor agreements; and increase the use of section 10(j) injunctions in discharge cases.

On January 27, 2025, President Trump fired the NLRB General Counsel as anticipated. However, on that same day, he took the unprecedented step of firing NLRB Chair Gwynne Wilcox before her term expired. Governing law prevented that action but it occurred nonetheless.⁵ This left the five-member NLRB without a quorum for the rest of 2025, rendering it without a quorum and therefore non-functional until two new members were appointed at the end of the year.

Ms. Wilcox did bring suit in an effort to have the opportunity to serve out her term, but that has not proven to be successful. The main reason is that the Supreme Court precedent which upheld the right of Congress to restrict the President from removing members of the independent agencies is currently under review in a separate case pending before the Supreme Court involving the removal

¹ 29 U.S.C. § 152(2).

² 29 U.S.C. § 157.

³ See, e.g., *MCPC, Inc. v. NLRB*, 813 F.3d 475, 483-84 (3d Cir. 2016).

⁴ *Butler Med. Transp., LLC*, 365 N.L.R.B. No. 112 (2017).

⁵ Section 3(a) of the NLRA provides that "[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office but no other cause." *Ms. Wilcox* was given no hearing and no effort was made to demonstrate a "for cause" removal. 29 U.S.C. § 153.

of a commissioner of the Federal Trade Commission (“FTC”). A ruling in favor of the Trump Administration would upend a Supreme Court case, nearly 100 years old, known as *Humphrey’s Executor*.⁶

In *Humphrey’s Executor*, the U.S. Supreme Court held that “[w]hen Congress provides for the appointment of officers whose functions . . . are of Legislative and judicial quality, rather than executive, and limits the grounds upon which they may be removed from office, the President has no constitutional power to remove them for reasons other than those so specified.” Rather, “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question.” Based on the oral argument before the Supreme Court in the above-referenced case involving the FTC, most observers expect that the Supreme Court will reverse *Humphrey’s Executor*, which has been eroded by other decisions in recent years, with a ruling declaring that Congress’ efforts to restrict the President’s typical unfettered right to remove executive branch officials when it comes to so-called independent agencies is unconstitutional.

This would leave President Trump with essentially free rein when it comes to removing members of agencies such as the NLRB. Oddly enough, other aspects of the recent Republican agenda mean that the decisions issued by the remade NLRB will not receive the type of deference when challenged in court, which they enjoyed previously. More specifically, the Supreme Court ruled recently that courts must exercise independent judgment in deciding whether an administrative agency -- such as the NLRB -- acted within its statutory authority.⁷ In overruling decades-old precedent known as the *Chevron* doctrine,⁸ the Supreme Court ruled that courts should defer to administrative agencies on questions of fact, but not questions of law. In short, although a statute may delegate discretionary authority to an agency, courts must ensure that the agency has engaged in “reasoned decision making” within those boundaries.

As a result, while the NLRB may soon begin overturning recent decisions, any rulings challenged in court will be receiving less deference than any decisions in the history of the NLRB.

Three Things That The NLRB Will Change

In any event, expect the revamped NLRB to make the following changes:

1. **Joint Employer Standard.** The NLRB has already formally reinstated a much narrower joint employer standard from President Trump’s first term, rescinding the Biden-era 2023 rule. Under the reinstated rule, entities may be considered joint employers only if they “possess and exercise substantial direct and immediate control over one or more essential terms or conditions of employment.” This reverses the broader 2023 standard, which would have allowed joint employer findings based on indirect control or merely reserved contractual authority.

2. **Independent Contractor Standard.** The Trump Board is expected to abandon the Biden Board’s Atlanta Opera framework and return to the D.C. Circuit’s FedEx standard.⁹ The D.C. Circuit has held that “entrepreneurial opportunity” is the “animating principle” for evaluating independent contractor status under the common-law test. The Biden Board in *The Atlanta Opera, Inc.*¹⁰ expressly rejected this standard, but the Trump Board is expected to reinstate the D.C. Circuit’s approach, making it easier to classify workers as independent contractors. *SuperShuttle DFW, Inc.*,¹¹ a Trump-Board decision that adopted the D.C. Circuit’s rationale, was overruled by Atlanta Opera and is expected to be reinstated.

3. **Contractor Employee Access to Property.** The Trump Board is expected to overturn *Bexar County Performing Arts Center Foundation*,¹² and reinstate the Trump-era standard in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*.¹³ Under the Trump-era rule, property owners may exclude off-duty contractor employees engaged in Section 7 activity unless those employees work both regularly and exclusively on the property and the owner fails to show reasonable non-trespassory alternatives exist. This change is strongly supported by the Supreme Court’s decision in *Cedar Point Nursery v. Hassid*, which held that “the right to exclude is a core aspect of property ownership” and that compelling third-party access to property constitutes an appropriation of that property.¹⁴

Three Things That The NLRB Cannot Change Readily

NLRB rulings can be appealed to the D.C. Circuit Court of Appeals. Once an appellate circuit ruling is issued, it becomes precedent binding on the NLRB. As a result, prior NLRB decisions which led to D.C. Circuit opinions are not readily changed. By way of example, the following

⁶ *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

⁷ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

⁸ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁹ *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017); *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

¹⁰ 372 N.L.R.B. No. 95 (2023).

¹¹ 367 N.L.R.B. No. 75 (2019).

¹² 372 N.L.R.B. No. 130 (2022).

¹³ 368 N.L.R.B. No. 46 (2019).

¹⁴ 594 U.S. 139 (2021).

D.C. Circuit decisions affirm NLRB rulings and constitute binding precedent that the Board cannot overturn through adjudication or rulemaking:

1. **Employer-Dominated Labor Organizations.** In *T-Mobile USA, Inc. v. NLRB*,¹⁵ the D.C. Circuit upheld the Board's finding that T-Mobile's "T-Voice" employee feedback program was an unlawful employer-dominated labor organization under Sections 2(5) and 8(a)(2) of the NLRA. This binding precedent limits employer-created employee engagement programs that address wages, hours, or working conditions.

2. **Protected Concerted Activity for Safety Complaints.** In *Xcel Protective Services, Inc. v. NLRB*,¹⁶ the D.C. Circuit affirmed the Board's ruling that an employee was protected when he complained to a third-party customer about the company's weapons certification process because the complaint related to workplace safety. This decision confirms broad Section 7 protections for employees who raise safety concerns -- even to parties outside the direct employer-employee relationship.

3. **Pretextual Discharge Analysis.** In *Acumen Capital Partners LLC v. NLRB*,¹⁷ the D.C. Circuit upheld the Board's finding that an employer unlawfully terminated a worker for his union support, rejecting the employer's claim that the termination was due to COVID-19 vaccination status. The court found "substantial evidence" of pretext, noting the timing of the discharge, the pretextual nature of the employer's explanation, and the disproportionality of the punishment. The decision establishes that employers cannot use facially neutral reasons (like policy violations) as a pretext to terminate employees who have engaged in protected group complaints about working conditions, wages, or safety.

What's Next

Now that the NLRB has a quorum and a functional majority of members appointed by President Trump, the NLRB will resume issuing decisions. One area where the NLRB has been interpreted recently in a consistent and bipartisan manner involves confidentiality and employment investigations. Various court decisions at the state level have addressed the same as well. For employers, they should revisit practices and policies that result in telling complainants/grievants and witnesses interviewed as part of an investigation to keep everything "confidential." Such instructions have been deemed to infringe on the Section 7 right to engage in concerted activity.¹⁸

To the extent that the NLRB does rescind Biden-era protections for employees and revert to employer-friendly approaches to organized activity, with reduced protections for dialogue about wages or safety or working conditions, employers should be mindful that various states are revising state laws to compensate for anticipated changes. Employers and attorneys who advise them should be more attentive than ever to state laws and recent or pending revisions.

Most of all, the legacy of staggering changes to the legal landscape in only two years leads to rampant uncertainty. That is, if presidents can replace members of the NLRB at will, and if courts no longer need to defer to NLRB rulings, whatever you think you know about federal labor law can change in an instant. Stay more vigilant than ever.

The author gratefully acknowledges the assistance of his colleague, Thomas J. Reilly, Esq. in the preparation of this article, and the assistance of Vito A. Gagliardi III in the preparation of the related presentation.

¹⁵ 90 F.4th 564 (D.C. Cir. 2024) (enforcing 372 N.L.R.B. No. 4 (2022)).

¹⁶ 2023 U.S. App. LEXIS 16066 (D.C. Cir. June 23, 2023) (enforcing 371 N.L.R.B. No. 134 (2022)).

¹⁷ 122 F.4th 988 (D.C. Cir. 2024).

¹⁸ See, e.g., *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 N.L.R.B. No. 144 (2019) (holding that post-investigation confidentiality requirements cannot infringe on Section 7 rights absent legitimate employer justification).

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NLRB Takes a Different Track: Defending Cases Before the Restructured Agency

Vito A. Gagliardi, Jr
PRINCIPAL



— Section 7 of the NLRA:

- Applies to nearly all private sector employees and protects the rights of their employees to:
 - Engage in traditional organizing and collective bargaining
 - Engage in “other concerted activities for the purpose of ... mutual aid or protection”

— Concerted Activity

- Can include discussions – including through social media – among employees about terms and conditions of the work environment (e.g., wages and safety issues)



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3

WHAT DONALD SAID HE WOULD DO (Project 2025)

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- Fire NLRB General Counsel Jennifer Abruzzo on “Day 1”
- Eliminate employee ability to recognize a union voluntarily after a “card check”
- Revise NLRB jurisdictional standards
- Allow decertification petitions while a CBA is in effect
- Increase use of Section 10(j) injunctions in discharge cases

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WHAT DONALD HAS DONE

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- Fired NLRB General Counsel on January 27, 2025
- Acting General Counsel later appointed
- Unprecedented firing of NLRB Chair Gwen Wilcox before expiration of her term

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- Wilcox one of a number of independent agency officials Donald dismissed
- Defiance of Humphrey's Executor, 295 U.S. 602 (1935) which affirmed Congress' power to protect certain agency officials from firing
- Upcoming decision in FTC member Rebecca Slaughter's challenge to her termination likely to overturn Humphrey's Executor

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WHAT HAS BEEN HAPPENING AT THE NLRB

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- January 2025-December 2025: Nothing
- December 2025: Senate confirmed two new Board members (there are now three) and a new General Counsel
- March 2026: One of the new members suggested significant change to NLRB tradition (e.g., reconsideration of Thryv holding regarding consequential damages in 2022)

THREE THINGS THE NLRB WILL CHANGE

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— The Joint Employer Standard

- 2026: Entities may be considered just employers only if they “possess and exercise substantial direct and immediate control over one or more essential terms or conditions of employment”
- 2023: Allowed joint employer findings based on indirect control

— The Independent Contractor Standard

- 2019: Donald-era NLRB eases standard for classifying workers as independent contractors (Super Shuttle DFW, Inc.)
- 2023: Cap'n Joe-era NLRB tightens standard (Atlanta Opera, Inc.)
- 2026: Prior standard will be reinstated

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— Standard for Contractor Employees Engaged in Concerted Activity

- 2019: Donald-era NLRB allows employers to exclude off-duty contractor employees engaged in Section 7 activity from premises (Bexar County Performing Arts Center)
- 2022: Cap'n Joe-era NLRB overturns standard (Bexar County Performing Arts Center)

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THREE THINGS THE NLRB CANNOT CHANGE

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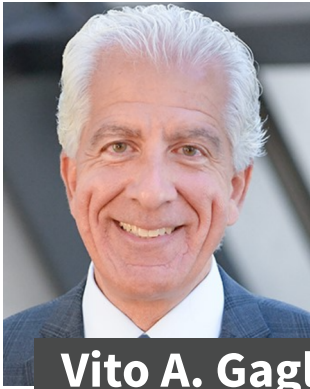
D.C. Circuit Rulings

1. Limits on employer-created employee engagement programs addressing wages and hours
2. Broad protections for employees who raise safety concerns
3. Consequences for terminating employees who have engaged in protected group complaints about working conditions, wages, or safety

WHAT TO DO

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& NEWMAN

- Review rules on investigations/confidentiality
- State's reactions
- Limits on future volatility due to Loper (not so) Brite (2024)



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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 & Labor
- Litigation

Areas of Focus

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

Recognitions

- NJBIZ - Leaders in Law, Employment: Labor, Litigation, ERISA (2025)
- NJBIZ - Law Power 50 (2022-2025)
- 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® (2005-2026)
- The Best Lawyers in America® – Education Law (2012-2026); Litigation - Labor & Employment (2013-2026)
- 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



Gabe Wohl

Bowles Rice (Charleston, WV)

Internal Investigations Without Regret: Finding Facts Without Creating New Liability

Internal Investigations Without Regret

Gabriele Wohl

Internal investigations are supposed to reduce risk. When allegations arise—whether from a whistleblower complaint, an audit finding, or a regulator’s inquiry—companies investigate to understand what happened and to demonstrate that they take compliance seriously. But the investigative process itself generates evidence. Emails coordinating the review, interview notes, draft memoranda, and internal discussions about potential exposure all create a written record. Years later, those materials often resurface in subpoenas, search warrants, or discovery requests. In many enforcement actions, prosecutors are able to reconstruct a company’s internal knowledge and timeline not from external evidence, but from the company’s own investigative files.

Regulators and litigants increasingly evaluate not just the underlying misconduct but how the company responded once concerns were raised. The Department of Justice frequently emphasizes that timely, well-structured internal investigations can earn cooperation credit and mitigate penalties. At the same time, poorly handled investigations can create new problems: inconsistent interview notes that suggest shifting narratives, premature conclusions in internal emails, failures to preserve documents, or privilege mistakes that lead to the compelled production of sensitive investigative materials. In extreme cases, internal investigative missteps have even contributed to obstruction allegations. In short, the investigation itself becomes evidence. Done well, it demonstrates a functioning compliance culture; done poorly, it can become Exhibit A in a civil or criminal case.

One of the first—and most consequential—decisions in any internal investigation is who should run it. Investigations led by in-house personnel can be efficient and less disruptive, but they may raise questions about independence, particularly if senior management is implicated or regulators later scrutinize the company’s response. In those situations, outside counsel often brings credibility and helps frame the work as legal advice rather

than routine business fact-finding. Clear role definition is equally important. An investigation conducted for the purpose of obtaining legal advice is far more likely to receive privilege protection than one that appears to be a general HR review or compliance audit. For that reason, companies should document the legal purpose of the investigation at the outset—through engagement letters, defined scope memoranda, and clear instructions that counsel is directing the fact-gathering process. Without that clarity, courts may conclude that the investigation was primarily business-driven, exposing interview notes, reports, and internal communications to discovery.

Preserving privilege is often the central objective of an internal investigation, but it requires more than simply labeling documents “privileged and confidential.” Courts look closely at whether the investigation was conducted for the purpose of obtaining legal advice and whether the participants understood the role of counsel. That begins with proper Upjohn warnings during employee interviews, making clear that counsel represents the company—not the individual employee—and that the company controls the privilege. It also requires documenting that the investigation is being conducted at the direction of counsel to provide legal advice regarding potential legal exposure. When those fundamentals are unclear, later disputes about who the lawyer represented or why the investigation occurred can undermine privilege claims.

Privilege challenges become even more common when investigations involve mixed roles. Compliance officers, HR professionals, and internal audit teams often participate in fact-gathering, but they frequently wear both business and legal hats. When investigations are conducted primarily by non-lawyers, or when their work appears indistinguishable from ordinary compliance reviews, courts may conclude that the materials were created for business purposes rather than legal advice. The format of the final work product also matters. A formal written investigative report can help structure legal analysis, but it also creates a document that regulators and litigants will seek to obtain. Slide decks, factual summaries, and investigative timelines—especially when

widely circulated—may be treated as ordinary business records rather than privileged legal work. For that reason, companies should think carefully about how investigative findings are memorialized, who receives them, and whether written documentation is truly necessary beyond counsel's legal analysis.

Internal investigations rarely occur in isolation. By the time a company begins reviewing potential misconduct, it may already face—or soon face—multiple forms of exposure. Criminal prosecutors, civil litigants, regulators, licensing authorities, and employees can all be interested in the same underlying facts. False Claims Act matters are a common example: an internal audit or compliance review may uncover billing concerns that later become the foundation of both a government investigation and a whistleblower lawsuit. The challenge for counsel is recognizing that an investigation conducted to address one risk can inadvertently create evidence for another. Decisions about timing are particularly sensitive. Interviewing employees before issuing a litigation hold, disciplining individuals before understanding the full factual record, or circulating early conclusions before criminal exposure is assessed can complicate parallel proceedings. The same is true for voluntary disclosures. Cooperation with regulators can yield significant benefits, but partial disclosures or evolving narratives may later appear inconsistent.

The way investigative findings are documented can amplify—or mitigate—those risks. Documentation is essential to a functioning compliance program, but it can also become powerful evidence in enforcement actions. Sloppy interview notes, editorialized summaries, or timelines that change as new facts emerge can suggest uncertainty or shifting explanations. At the same time, thoughtful documentation can be one of the strongest defenses a company has. Clear policies, training records, monitoring logs, and documented corrective actions show that compliance systems were designed to detect and address problems. When those records demonstrate that the company identified an issue, investigated it, and implemented a reasonable response, they can help establish good faith. The danger arises when documentation tells a different story—prior audit warnings that were ignored, repeated compliance failures that went unaddressed, or internal communications that minimize known risks. In those situations, the company's own records can become the most persuasive evidence against it.

Modern investigations also face a practical challenge that did not exist a decade ago: employee data scattered across personal devices and messaging platforms. Bring-your-own-device environments mean

that relevant communications may reside on phones, messaging applications, or collaboration tools that use auto-delete features. Enforcement agencies have made clear that they expect companies to preserve business communications regardless of where they occur. As a result, companies need clear policies addressing the use of personal devices for business purposes, including consent provisions that allow collection of work-related data when necessary. Investigation protocols should also account for the technical and privacy issues involved in collecting information from personal devices while preserving data integrity and separating personal from business communications.

Even when the underlying issue is relatively contained, the investigation itself can create new liability if it is handled poorly. Whistleblower retaliation claims often arise from the way investigations are conducted rather than from the underlying misconduct. Employees who report concerns may later argue that interviews were coercive, that disciplinary actions were retaliatory, or that they were marginalized after raising compliance issues. Investigations can also trigger obstruction concerns if document preservation is mishandled, witnesses are improperly coached, or communications suggest that the company attempted to coordinate testimony. Perhaps most damaging are situations in which internal investigative conclusions later conflict with evidence developed by regulators or prosecutors. When the company's own findings appear incomplete or overly favorable to management, investigators may view the original review as part of the problem rather than part of the solution.

For these reasons, the goal of an internal investigation should not simply be to close a matter quickly—it should be to create a record that demonstrates good-faith compliance. When structured thoughtfully, investigations can become powerful mitigation tools. They show that the company takes concerns seriously, investigates them under the direction of counsel, and responds with appropriate corrective action. In enforcement settings, that record can shape the narrative early, influence charging decisions, and support arguments for cooperation credit or reduced penalties.

An investigation conducted “without regret” is one that remains defensible even under the harshest scrutiny. It begins with a clearly defined legal purpose and a well-documented scope. Counsel directs the fact-gathering process, privilege is preserved through careful structure rather than overbroad claims, and documentation is created thoughtfully and circulated only when necessary. The investigative team remains aware of parallel risks—from civil litigation to regulatory enforcement—and

considers disclosure decisions strategically rather than reflexively.

Before launching any internal investigation, it is worth pausing to discuss a few simple questions with the client: What is the legal purpose of this investigation? Who is directing it, and under what authority? What additional

exposure could the investigation create across criminal, civil, or regulatory fronts? What information truly needs to be memorialized in writing, and who will receive it? And perhaps most importantly, if a prosecutor, regulator, or jury were to read this investigative record years from now, would it demonstrate a functioning compliance culture—or something else entirely?

Bowles Rice

Internal Investigations Without Regret

Finding Facts Without Creating New Liability *by Gabe Wohl, Esq.*

Investigations Can Cut Both Ways

Investigations can:

- *Reduce enforcement risk*
- *Demonstrate compliance culture*
- *Earn cooperation credit*

But they also create:

- *Discoverable documents*
- *Timeline evidence*
- *Statements attributed to the company*

Bowles Rice

Bowles Rice

The Six Decision Points

1. Who Runs the Investigation?
2. Preserving Privilege
3. Managing Parallel Risk
4. Documentation Discipline
5. Employee Devices & Data
6. When the Investigation Itself Creates Liability



3

Bowles Rice

Decision Point #1 Who Is Running the Investigation?

- In-house vs Outside Counsel
- Issues
 - *Independence*
 - *Credibility*
 - *Privilege Framing*
- Board-level vs Management-level



4

Bowles Rice

FirstEnergy (6th Circuit 2025)

“What matters under the attorney-client privilege is whether a company seeks legal advice, not what it later does with that advice.”



5

Bowles Rice

Guardrails for Structure

- Engagement letter
- Defined scope memo
- Legal purpose documented
- Counsel directing fact-gathering



6

Bowles Rice

Language Matters – Scope

- “Investigate possible misconduct ...”
- “Investigate response to allegations ...” **AND**
 - “Provide **legal services** in connection with the investigation”
 - “Collaborate on substantive and strategic decisions regarding **litigation**”
 - “Work cooperatively with Client’s **lawyers** in connection with the described project.”



7

Bowles Rice

Language Matters – Document

*“This memorandum is not a verbatim accounting of the interview, but instead contains our words, **mental impressions**, personal recollection, **creative thought process**, **opinions** and **discussion** of the events described below.”*



8

Decision Point #2 Preserving Privilege

- Upjohn warnings
- Mixed roles problem
- Written report vs Oral report



Upjohn Done Right

- Employee interviews
- Clear warnings:
 - *Counsel represents the company*
 - *Not the employee*
 - *Company controls privilege*



Bowles Rice

The Mixed Role Problem

- Compliance
- HR
- Internal audit
- Business vs Legal purpose



11

Bowles Rice

Written Reports: A Strategic Choice

Pros:

- *Clarity*
- *Legal analysis*

Risks:

- *Discoverability*
- *Factual summaries*



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Decision Point #3 **Parallel Risk**

- Criminal
- Civil
- Regulatory
- Employment

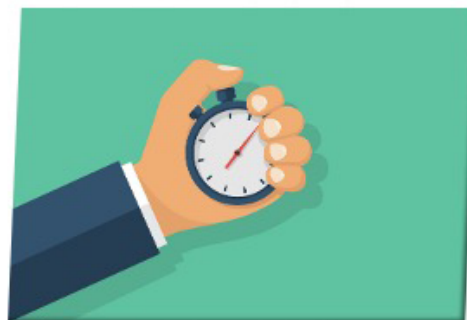


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Timing Risks

- Interviewing before litigation hold
- Premature discipline
- Premature disclosures



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Decision Point #4 Documentation

- Documentation can prove:

- *Compliance culture*

or

- *Deliberate indifference*



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Decision Point #5 Employee Devices

- BYOD environments
- Messaging apps
- Auto-delete risks



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Good Practices

- Clear BYOD policies
- Consent language
- Forensic collection protocols
- Data separation



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Decision Point #6 When the Investigation Creates Liability

- Retaliation
- Obstruction
- Inconsistent findings



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Turning Investigations into Mitigation Tools

- Investigations should show:

- *Good faith*
- *Proactive compliance*
- *Responsible remediation*



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What “Without Regret” Looks Like

- Clear legal purpose
- Defined scope
- Privilege preserved
- Documentation discipline
- Parallel risk awareness
- Thoughtful disclosure



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Final Checklist

Before launching an investigation ask:

1. *What is the legal purpose?*
2. *Who is directing it?*
3. *What exposure could it create?*
4. *What will we memorialize?*
5. *Who may read this someday?*





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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 businesses, institutions, and other organizations. In addition to her practicing in the Litigation Group, she leads the White Collar Defense and Investigations team. 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
- Labor and Employment
- Litigation
- White Collar Defense and Investigations

Professional Highlights

- CJA Panel Attorney District Representative for the Southern District of West Virginia
- Member of the Fourth Circuit CJA Appellate Panel Committee
- Member of the Judicial Conference of the Fourth Circuit Court of Appeals
- Visiting Professor, Appellate Advocacy, West Virginia University College of Law (Fall 2024)
- Served as Deputy General Counsel to former West Virginia Governor Earl Ray Tomblin (2013-2014)

Honors

- Named to The Best Lawyers in America (Commercial Litigation; Criminal Defense: White-Collar; Litigation – Labor and Employment; and Product Liability Litigation – Defendants), 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)

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)



Jake Lantry

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Forever Chemicals, Forever Litigation: PFAS Litigation and Evolving Regulatory Frameworks

Forever Chemicals and Forever Litigation: An Overview of PFAS Litigation and Review of Evolving Regulatory Frameworks

Jacob J. Lantry

Per- and polyfluoroalkyl substances ("PFAS") were first synthetically created nearly 100 years ago, and their use in commercial, industrial, and consumer products has proliferated over time. The ubiquity of these compounds, dubbed "forever chemicals," has exposed companies beyond the traditional manufacturers to protracted litigation related to products and processes that incorporate PFAS. Additionally, both public and private entities must navigate ever-evolving regulatory frameworks at local, state, and federal levels. This combination challenges companies of all sizes.

PFAS Background and Applications

"PFAS" is a blanket term for "any chemical with at least a perfluorinated methyl group ($-\text{CF}_3$) or a perfluorinated methylene group ($-\text{CF}_2-$)."¹ By at least one count, over 7 million recognized PFAS compounds exist.² PFAS are often called "forever chemicals" because of their stability and persistence, meaning they do not break down in the body or environment and they can accumulate over time. The most common PFAS are perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS").

PFAS were first recognized for their ability to resist heat, water, and oil. For that reason, their earliest applications were in firefighting foams commissioned by the United States Department of Defense and consumer products such as non-stick cookware. Eventually, use of PFAS in various consumer products became more widespread, including for use in food packaging (such as microwave popcorn bags, fast food containers, and pizza boxes); water- and stain-resistant clothing; paint; cosmetics; personal care products, including menstrual products; stain-resistant furniture; carpeting; photography; and pesticides.

Given the varying uses for PFAS, its proclivity to bioaccumulate, and certain disposal practices over the last half-century, there are widespread allegations of PFAS exposure directly from products as well as through groundwater, public drinking water systems, and private wells.

Multi-District and Class Action Litigation against PFAS Manufacturers

The first major litigation pertaining to alleged injuries from PFAS stemmed from a class action lawsuit brought in the West Virginia Wood County Circuit Court on behalf of approximately 80,000 individuals who alleged that they ingested water contaminated with C-8 (also known as PFOA) discharged from DuPont's Washington Works Plant near Parkersburg, West Virginia. See *Leach v. E.I. Du Pont de Nemours & Co.*, No. 01-C-608 (W. Va. Cir. Ct.).³

In 2005, as part of the parties' settlement of that litigation, a group of public health scientists, known as the "C8 Science Panel," was established to assess the potential link between C8 exposure and certain diseases. The Science Panel's work, conducted between 2005 and 2013, determined that there was a "probable link" between C8 exposure and six different disease categories: diagnosed high cholesterol, ulcerative colitis, thyroid disease, testicular cancer, kidney cancer, and pregnancy-induced hypertension (preeclampsia).

In 2013, approximately 3,500 personal injury or wrongful death actions were brought by individuals who alleged that they suffer or suffered from one of the six diseases identified by the Science Panel and who ingested water allegedly contaminated with PFOA from the DuPont Washington Works Plant. Those cases were consolidated into a multi-district litigation ("MDL") in the Southern District of Ohio in 2013. See *In re: E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation*, M.D.L. No. 2433 (S.D. Ohio). Three bellwether cases were tried between 2015 and 2017, each with multimillion

¹ Schymanski EL, et al. Per- and Polyfluoroalkyl Substances (PFAS) in PubChem: 7 Million and Growing. *Environ Sci Technol*. 2023 Nov 7; 57 (44).

² Id.

³ That investigation and litigation was depicted in the 2019 film "Dark Waters" starring Mark Ruffalo, Anne Hathaway, and Tim Robbins.

dollar plaintiff verdicts. In 2017, DuPont and Chemours agreed to pay \$670.7 million to settle most of the remaining suits.

In 2018, another MDL was established for cases alleging injuries and damages caused by PFAS-containing aqueous film-forming foam (“AFFF”) that allegedly contaminated groundwater near various military bases, airports, and other industrial sites where it was used to extinguish fires. See *Aqueous Film-Forming Foams (AFFF) Products Liability Litigation*, M.D.L. No. 2873 (D.S.C.). The plaintiffs in that wide-ranging litigation fall into four categories: water providers alleging damages stemming from remedial costs for treatment to ensure PFAS is below maximum contaminant levels; individual property owners alleging PFAS contamination decreased property values and damages to remediate the alleged contamination; personal injury claimants; and medical monitoring claimants. According to recent comments from the lead plaintiffs’ attorney, approximately 130,000 separate cases comprise this MDL.

Water provider plaintiffs made up the first group of bellwether plaintiffs in the AFFF MDL, and in 2023 DuPont, Chemours, and Corteva⁴ reached a \$1.185 billion settlement, and 3M reached a \$12.5 billion settlement, with these plaintiffs. These settlements did not end the litigation for the water provider plaintiffs, as defendants who did not reach a settlement remain. Currently, the personal injury plaintiffs’ claims pertaining to liver and thyroid cancer cases are being teed up for Daubert motions while the remaining cases are being litigated. No bellwether trials for any plaintiffs have occurred, though the parties expect the first trials either late this year or early 2027.

While not currently in an MDL, we have seen several lawsuits recently brought against 3M, DuPont, and other PFAS manufacturers and suppliers by firefighters alleging injuries associated with exposure to PFAS used in their turnout gear. See *Uniformed Professional Fire Fighters Association of Connecticut, et al. v. 3M Co., et al.*, 3:24-cv-01101 (D. Conn.). Additionally, attorneys general in at least 30 states have sued PFAS manufacturers (primarily 3M and DuPont) for damages associated with alleged PFAS contamination; while three states have settled those claims, the majority currently remain in litigation.

Increasing PFAS Litigation for Consumer Products

Beyond litigation directed at manufacturers of PFAS, two other types of PFAS litigation have recently surged: cases alleging injuries and damages relating to companies’ incorporation of PFAS into consumer products, and cases stemming from the allegedly improper disposal

of products ultimately resulting in soil or groundwater contamination.

The Michigan Department of Environmental Quality sued Wolverine World Wide, Inc. over groundwater contamination allegedly caused by the waterproofing materials in Wolverine work boots. See *Michigan Department of Environmental Quality v. Wolverine World Wide, Inc.*, 1:18-cv-00039 (W.D. Mich.). Landowners in Georgia have sued carpet manufacturers and various chemical makers, alleging that they contaminated their soil and water with PFAS. See *Lyles et al. v. Shaw Industries Inc. et al.*, 25-A-05396-8; *Cronon et al. v. Shaw Industries Inc. et al.*, 25-A-05401-8; and *Cordle et al. v. Shaw Industries Inc. et al.*, 25-A-05410-10 (Gwinnett Cty. Super. Ct.).

Manufacturers of consumer electronics have also been exposed to PFAS litigation. See *Anthony Ray Gonzalez v. Samsung Electronics America Inc.*, 2:24-cv-11234 (C.D. Cal.) (plaintiff alleges that Samsung knew it was using PFAS in its smartwatch wristbands but failed to warn consumers); *Dominique Cavalier et al. v. Apple Inc.*, 5:25-cv-00713 (N.D. Cal.) (putative class action alleging that Apple Watch Sport Bands contain a PFAS compound at levels more than 40 times the limit set by Apple).

Food- and food packaging-containing PFAS have also been subject to several recent lawsuits. See *In re Hershey Chocolate Litigation*, 1:24-cv-01868 (M.D. Penn.) (class action alleging that Hershey’s candies and chocolate bars contain dangerous levels of PFAS); *Lurenz v. Coca-Cola Co.*, 7:22-cv-10941 (S.D.N.Y.) (class action alleging that Simply Orange products contained dangerous levels of PFAS and were falsely marketed as “all-natural”). These claims have extended to pet food as well. See *Robin Humphrey et al. v. The J.M. Smucker Co.*, 3:22-cv-06913 (N.D. Cal.) (alleging that defendant failed to disclose the risks of PFAS in dog and cat food packaging).

“Greenwashing” claims relating to PFAS have also been on the rise, with plaintiffs alleging that products contain PFAS while being marketed as “all natural” are false and misleading. See *Micah Mason et al. v. W.L. Gore & Associates*, 2:25-cv-00049 (E.D. Wash.) (consumer class action claiming that Gore-Tex marketed “environmentally sustainable” waterproof fabric products that use PFAS); *Larisa Bullard v. Costco Wholesale Corp. et al.*, 3:24-cv-03714 (N.D. Cal.) (class action alleging that Costco falsely advertised its Kirkland brand baby wipes as being “natural” despite allegedly having toxic levels of PFAS); *Brittany Bounthon et al. v. The Procter & Gamble Co.*, 3:23-cv-00765 (N.D. Cal.) (alleging that P&G failed to disclose the presence of PFAS in their “pure cotton” tampon products).

⁴ Corteva is a spin-off of DuPont and maintained liabilities associated with legacy AFFF.

Given the ubiquity of PFAS, we can expect consumer-fraud and personal-injury litigation to continue in earnest for the foreseeable future. And although PFAS lacks a determinative exposure injury comparable to mesothelioma and asbestos, the Leach injuries identified by the C8 Science Panel will continue to serve as the basis for specific causation allegations for personal injury plaintiffs into the future.

Evolving Regulatory Framework for PFAS

Affecting, and in some cases driving, future litigation relating to PFAS exposure will be the continuously evolving state and federal regulatory frameworks for PFAS.

In 2016, the EPA first implemented a Lifetime Health Advisory Limit⁵ for PFOS and PFOA of 70 parts per trillion (“ppt”). In 2019, during President Trump’s first term, the EPA announced the PFAS Action Plan, which launched a communication and research plan to address various PFAS-related health and environmental challenges, including working to develop maximum contaminant levels for PFAS. In 2021, under the Biden Administration, the EPA announced a PFAS Strategic Roadmap, which culminated in the first-ever national drinking water standard for PFAS in 2024, setting a maximum contaminant level⁶ for five PFAS compounds.⁷

In May 2025, the Trump Administration EPA announced that it would keep the 4ppt MCLs for PFOS and PFOA set during the Biden Administration, but it also announced that it would rescind the regulations for the other three PFAS compounds. The Trump EPA also announced that it would extend the time for compliance with these MCLs from the originally proposed 2029 until 2031.

Of course, the EPA sets only the regulatory floor for PFAS, with various state and local governments passing laws and regulations relating to PFAS. Several states, including Minnesota, Nevada, and Illinois, have enacted enforceable PFAS drinking-water limits more stringent than the federal government.

Effective in 2026, laws in several states pertaining to PFAS reporting or prohibition went into effect,

including Colorado,⁸ Connecticut,⁹ Maine,¹⁰ Minnesota,¹¹ Vermont,¹² and Washington.¹³ Eight additional states will have similar restrictions go into effect in 2027, and in 2032, Maine, Minnesota, and New Mexico will each ban all products sold or distributed within the state that contain intentionally added PFAS.

TSCA Reporting Requirements

In October 2023, under the Biden Administration, the EPA finalized certain reporting and recordkeeping requirements for PFAS under the Toxic Substances Control Act (“TSCA”). Under that rule, any company that manufactured or imported PFAS or PFAS-containing products between January 1, 2011, and December 31, 2022, would have been required to report information regarding the use, production volume, disposal, potential exposures, and hazards of those products through the EPA’s Central Data Exchange (“CDX”) beginning in November 2024.

In 2025, under the second Trump Administration, the deadlines for reporting under TSCA were extended to October 13, 2026, for most manufacturers, and until April 13, 2027, for small businesses. The Trump EPA has also announced several exemptions to the TSCA reporting requirements, including for PFAS at concentrations at or below 0.1%; imported articles; and certain byproducts and research-and-development chemicals.

Conclusion

The “forever chemicals” moniker signals that litigation associated with the alleged health and environmental effects of PFAS will continue indefinitely, with the nature and scope of claims constantly expanding. Along with constantly evolving federal, state, and local regulations, companies large and small must be vigilant about how PFAS are incorporated into their products to avoid potential regulatory or litigatory consequences.

⁸ See C.R.S. §§ 25-15-601 to 25-15-605 (prohibiting the sale or distribution of the following with intentionally added PFAS: cleaning products, cookware, dental floss, menstrual products, and ski wax).

⁹ See C.G.S. § 22a-903c (prohibiting the sale or distribution of the following with intentionally added PFAS: apparel, carpets or rugs, cleaning products, cookware, cosmetic products, dental floss, fabric treatments, children’s products, menstrual products, textile furnishings, ski wax, and upholstered furniture).

¹⁰ See 38 Maine Stat. § 1614 (prohibiting the sale or distribution of the following with intentionally added PFAS: cleaning products, cookware, cosmetics, dental floss, juvenile products, menstrual products, textile articles, ski wax, and upholstered furniture).

¹¹ See MN Stat. § 116.943 (providing that manufacturers of any product sold or distributed in Minnesota containing intentionally added PFAS must submit a report to the Pollution Control Agency by July 1, 2026).

¹² See 9 Vt. Stat. Ann. §§ 2494e and 2494f (prohibiting the sale or distribution of the following with intentionally added PFAS: aftermarket stain and water-resistant treatments; artificial turf; incontinency protection products; juvenile products; residential rugs and carpets; and ski wax).

¹³ See Wash. Admin. Code §§ 173-337-025 and 173-337-110 (requiring notification to the Department of Ecology by any manufacturer, seller, or distributor of the following products: outdoor furniture, automotive waxes, apparel for extreme and extended use, footwear, recreation and travel gear, cookware, floor wax and polish, firefighting PPE, hard surface sealers, and ski wax).

⁵ HALs are not enforceable standards.

⁶ A “maximum contaminant level” (“MCL”) is an enforceable EPA standard setting the highest level of a contaminant allowed in drinking water.

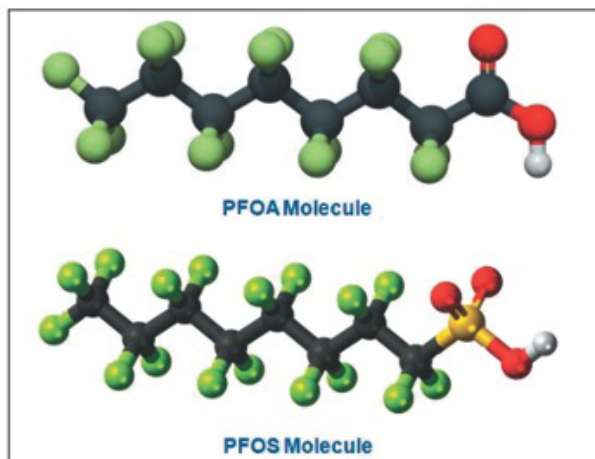
⁷ The MCL for PFOA and PFOS is 4 ppt and for PFNA, PFHxS, and GenX it is 10ppt.

Forever Chemicals and Forever Litigation: An Overview of PFAS Litigation and Review of Evolving Regulatory Frameworks

Jacob J. Lantry
April 23, 2026



Per- and Polyfluoroalkyl Substances



Early PFAS Applications



Leach v. DuPont and C-8 MDL No. 2433



Personal injury and wrongful death actions arising out of alleged ingestion of PFOA discharged from DuPont's Washington Works Plant near Parkersburg, West Virginia.



AFFF MDL No. 2873 U.S.D.C. South Carolina

- Alleged damages from groundwater contaminated with aqueous film-forming foams
- Four categories of plaintiffs:
 1. Property damage to water providers;
 2. Property damage to property owners;
 3. Bodily injury claims; and
 4. Medical monitoring



MDL – Water Provider Settlements

\$1B DuPont Deal Gets Final OK In Firefighting Foam MDL



3M PFAS settlement gains
final court approval





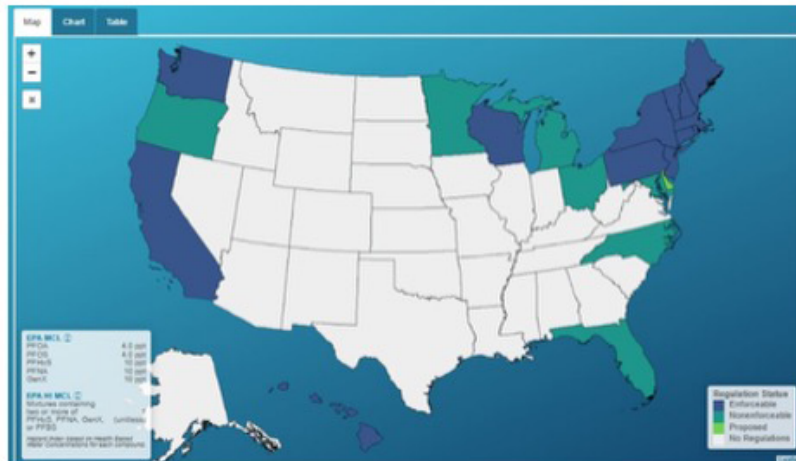
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Consumer Products in PFAS Litigation



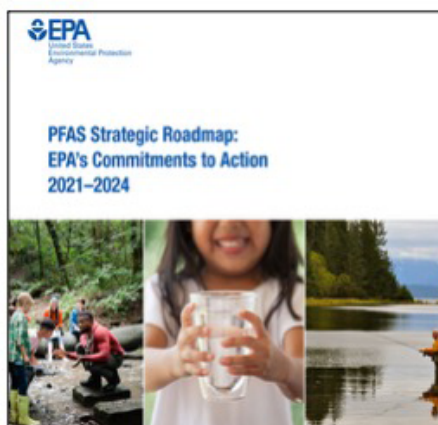
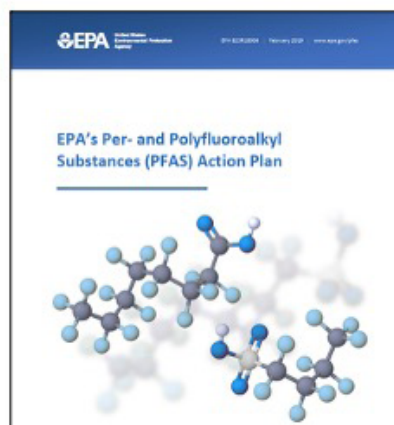
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State Regulation Impacting Litigation



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EPA Regulation of PFAS



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Drinking Water Regulations

EPA National Primary Drinking Water Standards			
PFAS		Maximum Contaminant Level Goal	Maximum Contaminant Level
PFOA		0	4.0 ppt
PFOS		0	4.0 ppt
PFNA		10 ppt	10 ppt
PFHxS		10 ppt	10 ppt
GenX		10 ppt	10 ppt
Mixture of 2 or more	PFNA	1 (unitless) Hazard Index	1 (unitless) Hazard Index
	PFHxS		
	GenX		
	PFBS		



PFAS Reporting under Toxic Substances Control Act

Instructions for Reporting PFAS Under TSCA Section 8(a)(7)

U.S. Environmental Protection Agency Office of Pollution Prevention and Toxics
May 2024
EPA-705-G-2023-3727



TSCA Reporting Exemptions

Current	Proposed	Implications for Reporters
No <i>de minimus</i> .	Exemption: PFAS manufactured or imported in a mixture or article < 0.1%.	Major – PFAS are often used in concentrations < 0.1%.
Imported articles are in scope.	Exemption: Imported articles.	Major – eliminated imported articles will eliminate most products in scope for most companies.
Byproducts, impurities, research and development chemicals, and non-isolated intermediates are all in scope.	Exemption: Certain byproducts, impurities, research and development chemicals, and non-isolated intermediates.	Major – these exemptions will decrease the burden on certain companies. Note: Byproducts subsequently used for a commercial purpose listed in 40 CFR 720.30(g) are not exempted.
PFAS in scope are those that qualify under US EPA's structural definition of PFAS.	No change , but US EPA is soliciting comments on whether US EPA should limit PFAS in scope to those with CAS No., TSCA Accession No., or Low-Volume Exemption No.	There is a difference between a PFAS that with no CAS No. vs. supplier did not provide CAS No. Often suppliers will only provide a PFAS trade name or abbreviation with no CAS No.; however, a CAS No. does exist. US EPA should clarify this distinction.
Deadline: April 13, 2026- October 13, 2026	Deadline: 60 days after the effective dates of the final rule; will last for three months instead of six months.	Major – companies will now have three months to report compared to six months. There is also a question of whether the reporting platform, CDIX, will be ready by that time.



Anticipated Trends in PFAS Litigation

- Increase in consumer fraud litigation
- Pollution claims seeking medical monitoring damages
- Non-AFFF personal injury cases
- State and federal regulation impacting litigation





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Jacob J. Lantry

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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.

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

Memberships

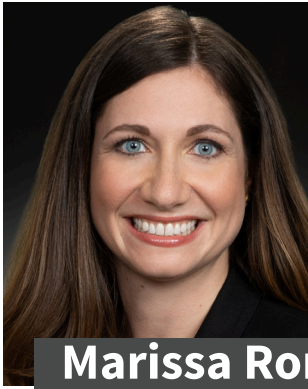
- Massachusetts Bar Association
- Massachusetts Defense Lawyers Association
- Massachusetts Chapter of the Federal Bar Association - Former Chair of the Young Lawyers Division

Honors

- 2018-2020 Massachusetts Super Lawyer Rising Stars

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



Marissa Ronk

Wheeler Trigg O'Donnell (Denver, CO)

Panel - Tariff Tales: Charting a Course Through Turbulent Waters

Tariff Tales: Charting a Course Through Troubled Waters

Joel Neckers, Marissa Ronk, and Herman Hoying

Since the beginning of his second term, President Trump has increased tariffs on U.S. imports from all of its foreign trading partners.¹ Under the purported authority of several different statutes, the administration has announced a flurry of different tariffs that would apply to various trading partners or product sectors. Although many of these tariffs have gone into effect, others were announced and never implemented or implemented at a rate (or with exceptions) different than what originally was announced. Many of those tariffs that were implemented have been modified numerous times over the course of the past year, in what Chief Justice John Roberts described as a “dizzying array of modifications.”² To make matters even more complex, on February 20, 2026, the Supreme Court, in a splintered opinion, found that President Trump lacked the authority to impose tariffs under the International Emergency Economic Powers Act (“IEEPA”)—the statute upon which the administration had relied for its largest and most sweeping tariffs.³ Although the Supreme Court did not decide whether or how refunds of the IEEPA tariffs would be provided, the Department of Justice had previously represented in the litigation that, if the President were found to lack authority to issue tariffs under the IEEPA, all of the tariffs imposed would be refunded with interest.

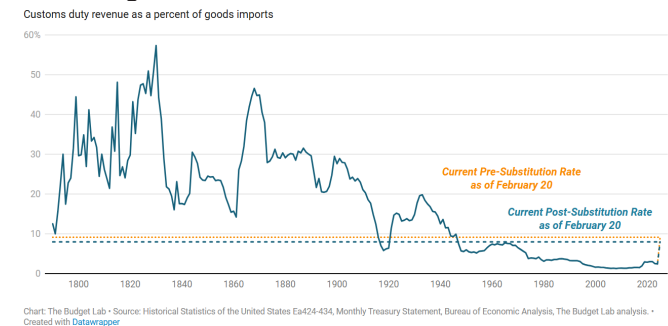
This flurry of unpredictable and constantly changing tariffs creates substantial challenges and uncertainty for the United States importers (e.g., manufacturers and distributors) responsible for paying the tariffs and their customers. The tariffs have been particularly difficult to navigate, because, not only are they unpredictable, but they were largely unexpected due to their breadth and scale—coming as they did after a period of several decades where most tariff rates were held relatively

constant and low. Many of the contracts governing the sale of the imported products or components thus do not expressly and specifically address how changes in tariff rates will be allocated or shared. Yet, given the size and breadth of the tariffs, it is often essential for the importer to pass on the cost of at least part of those tariffs to protect not only its bottom line, but its continued existence. This combination—a commercial need to pass on costs without a clear contractual right to do so—creates the perfect storm for litigation between importers and their customers.⁴ This paper addresses the practical considerations litigators and their clients should consider to best prepare for—and hopefully avoid—such litigation over tariffs.

The Troubled Waters: Unexpected and Constantly Changing Tariffs

Prior to President Trump's second term, the average effective U.S. tariff rate had been relatively low and stable for the past five decades.

US Average Effective Tariff Rate Since 1790⁵



In the first year of his second term (2025), President Trump imposed numerous tariffs on products imported from certain countries pursuant to the IEEPA⁶ and on

1 Presidential 2025 Tariff Actions: Timeline and Status, Congressional Research Service (Jan. 12, 2026), available at <https://www.congress.gov/crs-product/R48549>.

2 Learning Res., Inc. v. Trump, 146 S. Ct. 628, 640 (2026).

3 Id. at 646.

4 Although outside the scope of this paper, there also is the potential for litigation from downstream customers or ultimate consumers based upon allegations that tariff costs were improperly passed on to them, particularly if those tariffs ultimately are refunded pursuant to the Supreme Court's decision in Learning Resources. Also outside the scope of this paper is the abundant litigation filed challenging the legality of the tariffs and seeking a refund, which litigation the Supreme Court held must be filed in the United States Court of International Trade. See Learning Res., Inc., 146 S. Ct. at 637 n.1.

5 State of U.S. Tariffs: SCOTUS Ruling Update, The Budget Lab at Yale (Feb. 20, 2026), available at <https://budgetlab.yale.edu/research/state-us-tariffs-scotus-ruling-update>.

6 Pursuant to the IEEPA, upon identifying an “unusual and extraordinary threat” and declaring

certain types of products pursuant to Section 232 of the Trade Expansion Act of 1962 (“Section 232”),⁷ including the following:

Selected US Tariff Actions between January 20, 2025 and December 31, 2025⁸

- Canada (Fentanyl) - 35% on most goods; 10% on potash and Canadian energy; USMCA exemption.
- Mexico (Fentanyl & Migration) - 25% on most goods; 10% on potash; USMCA exemption.
- China (Fentanyl) - 10% on all goods; ended de minimis duty-free treatment
- Global (Trade Deficit) - 10%-41%, by country of origin, on most goods (with exceptions); 125% on China.
- Brazil (Government Policies) - 40% on select goods (with exceptions).
- India (Importation of Russian Oil) - 25% on most goods (with exceptions)

Section 232 Tariffs:

- Steel - 50% globally; 25% on imports from the United Kingdom
- Aluminum - 50% globally; 25% on imports from the United Kingdom
- Automobiles & Parts - 25% globally; 10% for UK;* 15% for Japan, South Korea, and EU; some USMCA exceptions
- Trucks & Buses - 10% on buses globally; 25% on trucks and truck parts globally; some USMCA exceptions
- Copper - 25% globally; 10% for United Kingdom; 15% for Japan, South Korea, and EU; some USMCA exceptions
- Timber/Lumber - 10%-25% globally; 10% for United Kingdom; 15% for Japan, South Korea, and EU

The Supreme Court’s description of the IEEPA tariffs imposed on China aptly demonstrates the fast-changing, dynamic nature of the tariffs:

One month after imposing the 10% drug trafficking tariffs on Chinese goods, he increased the rate to

20%. See Exec. Order No. 14228, 90 Fed. Reg. 11463 (2025). One month later, he removed a statutory exemption for Chinese goods under \$800. Exec. Order No. 14256, 90 Fed. Reg. 14899 (2025). Less than a week after imposing the reciprocal tariffs, the President increased the rate on Chinese goods from 34% to 84%. Exec. Order No. 14259, 90 Fed. Reg. 15509 (2025). The very next day, he increased the rate further still, to 125%. Exec. Order No. 14266, 90 Fed. Reg. 15625, 15626 (2025). This brought the total effective tariff rate on most Chinese goods to 145%. The President has also shifted sets of goods into and out of the reciprocal tariff framework. See, e.g., Exec. Order No. 14360, 90 Fed. Reg. 54091 (2025) (exempting from reciprocal tariffs beef, fruits, coffee, tea, spices, and some fertilizers); Exec. Order No. 14346, 90 Fed. Reg. 43737 (2025). And he has issued a variety of other adjustments. See, e.g., Exec. Order No. 14358, 90 Fed. Reg. 50729, 50730 (2025) (extending “the suspension of heightened reciprocal tariffs” on Chinese imports).⁹

On February 20, 2026, the tariff landscape became even more complicated and uncertain when the Supreme Court ruled that President Trump did not have authority to impose tariffs pursuant to IEEPA.¹⁰ The Supreme Court remanded the action to the lower courts without offering guidance on the impact of its decision—e.g., whether the government was required to refund the tariffs it had already collected pursuant to IEEPA and, if so, how and under what conditions. U.S. Customs and Border Control, the agency responsible for administering the collection of tariffs, stopped collecting the IEEPA tariffs on February 24, 2026. Over \$133 billion in IEEPA tariffs were collected by CBP.¹¹

Over 2,000 importers of record have filed claims seeking refunds of the IEEPA tariffs they have paid. On March 5, 2026, the Court of International Trade ordered: “with respect to any and all unliquidated entries that were entered subject to IEEPA duties, U.S. Customs and Border Protection is hereby directed to liquidate those entries without regard to the IEEPA duties” and “[a]ny liquidated entries for which liquidation is not final shall be reliquidated without regard to those duties.”¹² The Court suspended the Order from immediate effect.¹³ CBP responded to the Court’s Order by stating that it is in the process of “developing a new capability within its system

a national emergency, the President may “by means of instructions, licenses, or otherwise,” take the following actions to “deal with” the threat: “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.” Learning Res., Inc., 146 S. Ct. at 636 (quoting 50 U.S.C. § 1701).

⁷ Section 232 “authorizes the President to impose import restrictions—such as tariffs—if the Secretary of Commerce determines that a product ‘is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.’” See Presidential 2025 Tariff Actions, supra note 1 (quoting 19 U.S.C. § 1862).

⁸ Id.

⁹ Learning Res., Inc., 146 S. Ct. at 636.

¹⁰ Id. at 646.

¹¹ Deng, Chao, Tariffs Are a Wild Card for the Economy Again, Wall Street Journal (Feb. 22, 2026).

¹² Order, Atmos Filtration, Inc. v. United States, No. 26-cv-01259, ECF No. 29 (March 5, 2026), as amended by ECF No. 49 (March 20, 2026).

¹³ Id.

of record for imported merchandise—the Automated Commercial Environment (ACE)—to prepare to calculate and provide valid refunds of additional ad valorem duties imposed under IEEPA.”¹⁴ There has been no resolution, however, with regard to whether CBP will refund IEEPA tariffs paid on entries that have already been liquidated.¹⁵ Immediately following the Supreme Court’s ruling that the IEEPA tariffs were unlawfully imposed, President Trump announced that, with limited exceptions, a new 10% tariff would commence on February 24, 2026 that would be applied to all items imported into the United States pursuant to Section 122 of the Trade Act of 1974.¹⁶ Tariffs imposed pursuant to Section 122 cannot exceed 15 percent ad valorem and may not extend for a period exceeding 150 days.¹⁷ Challenges to the legality of the Section 122 tariffs President Trump imposed in response to the Supreme Court’s rejection of the IEEPA tariffs have already been filed in the Court of International Trade.¹⁸

The Tax Foundation estimates that the weighted average applied tariff rate—which was a low and relatively consistent 1.5% in 2022—rose to approximately 13.8% in 2026 while the IEEPA tariffs were still in place and will remain at approximately 10.3% during the 150-day period that the 10% Section 122 tariffs are in place.¹⁹ Such a large and volatile tariff rate has serious implications for the business relationship between importers and their customers and their respective bottom lines, yet—particularly because most of their contracts were entered into at a time when large increases in tariff rates were not contemplated—the agreements often do not expressly or specifically address to whom the increased costs associated with the tariffs should be allocated.

Charting a Course: Practical Considerations to Best Position Your Client to Succeed in Litigation (or Avoid it Altogether)

Involve Counsel Early On

Often, the initial development of a strategy for recouping

costs and the negotiation of price changes with a customer is handled by the sales and or operations teams on an individual customer-by-individual customer basis, without involvement from the legal department (let alone the involvement of outside litigation counsel). Given the novelty and financial significance of tariff recovery, however, it is essential that the legal team participate in the conversation from the beginning to develop a harmonious strategy across customers. In particular, where a company has materially identical or similar language across a variety of contracts, the company should use legal counsel to help ensure it is taking consistent positions on the meaning of key tariff-related terms, building consistent documentation in support of tariffs across customers (or requiring consistent documentation from its suppliers), and using similar methodology in calculating tariff-related price increases. To the extent there are valid business or other considerations justifying a deviation from the general practice, legal counsel can also help appropriately document that decision in a defensible manner.

Moreover, given the likelihood of potential disputes, legal counsel should also be involved early on to ensure general best litigation practices are followed, such as issuing evergreen reminders to key stakeholders about the discoverability of documents. Counsel should also make sure that if litigation is reasonably anticipated or imminent, appropriate document holds are issued.

Consider Whether Key Contractual Provisions Permit or Forbid Price Increases

Supplier contracts often provide fixed prices with the supplier taking on the risk that its costs will increase between the time the contract is entered and the product is delivered, cutting into its anticipated profits on the transaction. These contracts, however, often include certain provisions that provide some backstop or safeguard for the supplier, particularly where performance is to occur over a significant period of time. Even if such provisions do not expressly address changes in tariffs rates, there may be an argument that tariffs fall within the protections of the provision that may provide some leverage in negotiations with the customer, even if it may not ultimately win the day in court. It thus is essential to read the contract carefully and think outside the box to try to identify contract provisions that may be leveraged to provide relief to a supplier saddled with unexpected tariff costs (or, on the customer side, to develop defenses to any argument that the costs can be re-allocated to the customer).

Force Majeure or Other Excusable Event Provisions: Supplier contracts often include provisions that excuse a party’s non-performance of a contract obligation where

¹⁴ Declaration of Brandon Lord Responding to March 6, 2026 Court Order, *Atmus Filtration, Inc. v. United States*, No. 26-cv-01259, ECF No. 39 (March 12, 2026).

¹⁵ See *supra* note 11. “Liquidation” is the final computation or ascertainment of duties on entries for imported items. 19 C.F.R. § 159.1. “Liquidation—unless extended—must happen within one year,” and “typically occurs 314 days from entry.” See Complaint, *Atmus Filtration, Inc. v. United States*, No. 26-cv-01259, ECF No. 2 (Feb. 27, 2026) (citing 19 U.S.C. § 1504(a)).

¹⁶ Fact Sheet: President Donald J. Trump Imposes a Temporary Import Duty to Address Fundamental International Payment Problems, The White House (Feb. 20, 2026), available at <https://www.whitehouse.gov/fact-sheets/2026/02/fact-sheet-president-donald-j-trump-imposes-a-temporary-import-duty-to-address-fundamental-international-payment-problems/>. The next day, the President announced that the rate would increase to 15%, but that increased rate has not been implemented. See CSMS # 67844987 – Imposing Temporary Section 122 Duties, CBP (Feb 23, 2026), available at https://content.govdelivery.com/bulletins/gd/USDHSCBP-40b3b7b?wgt_ref=USDHSCBP_WIDGET_2.

¹⁷ 19 U.S.C. § 2132.

¹⁸ See, e.g., Complaint, *State of Oregon v. Trump*, No. 1:26-cv-01472-3JP, ECF No. 2 (March 5, 2026).

¹⁹ York, Erica and Durante, Alex, *Tariff Tracker: Impact of Trump Tariffs & Trade War by the Numbers*, Tax Foundation (March 13, 2026), available at <https://taxfoundation.org/research/all/federal/trump-tariffs-trade-war/>.

performance would be impossible or impractical due to some unanticipated event over which the party has no control—such as a natural disaster or war. In the context of unanticipated, high tariffs, the supplier may argue that it is commercially impractical (or even impossible) to perform its obligations under the contract because the unanticipated change in tariff rates would entirely erode the profit margin and result in an unsustainable loss to the seller. Although, in the context of unanticipated increases in material costs, courts generally have not found such economic hardship arguments persuasive (and some force majeure provisions expressly exclude them as a grounds for invoking the provision), the provision should be reviewed to determine whether there is a colorable argument to be made based upon significant, unforeseeable changes in the tariff rates. Many states recognize equitable principles under the common law—such as impossibility or frustration of purpose—that may allow the parties to make similar arguments.

Price Escalation Provisions: Supplier contracts may include a provision that allows the seller to charge the customer for certain types of unexpected increases in its costs, such as increased costs associated with increased prices for certain types of raw materials (e.g., steel) or disruptions caused by unanticipated events (e.g., trade embargoes or labor strikes). Depending on the specific language used in these provisions, there may be an argument that the price escalation should be interpreted to permit (or should not be interpreted to permit) the supplier to issue a change order for the increased costs associated with an increase in tariff rates between when the price was originally quoted and the date of performance.

Change in Law Provisions: Supplier contracts sometimes include a provision that allows for an adjustment in price when there is a change in law that causes a material increase in the supplier's cost of performance. Although these provisions sometimes expressly identify tariffs or duties or import taxes, they may also be more general and speak only in terms of laws or taxes generally. Such ambiguity provides both parties the opportunity to argue that the provision was or was not intended to cover a change in tariff rates. Similarly, the supplier agreement may include separate provisions addressing the parties' obligations with regard to transportation or importation that may provide a hook for seeking (or avoiding) the re-allocation of costs associated with an increase in tariffs.

Be Mindful of Reasonable Mitigation Requirements

Suppliers should be mindful that agreements may include an express obligation to mitigate any increases in costs before those costs can be passed on to the customer. And even in the absence of such provisions the common

law may impose a similar obligation to limit the damages available under the contract. There are numerous actions that an importer may use to mitigate the impacts of increased tariffs, including accelerating or delaying the date of importation, switching suppliers, or changing the location of manufacturing or assembly. The law generally only imposes an obligation to undertake reasonable mitigation efforts and the reasonableness will depend on the specific facts and circumstances—e.g., the costs associated with changing suppliers or locations, the feasibility of accelerating or delaying the project schedule. As such, the reasonableness of mitigation efforts is likely to be a ripe area for dispute in litigation, with competing experts offering different views on what mitigation efforts were required in particular circumstances. Companies should document in real time their mitigation analyses in order to help defend those mitigation efforts down the line.

Outside Experts Can Help Justify the Increased Costs Attributable to Tariffs

In some circumstances—e.g., where a specific finished product or component is imported for a specific customer's project—it is relatively easy and straightforward to calculate the increased cost associated with the increase in a tariff rate. In many other circumstances, however, it is much more difficult, because, among other reasons, (1) off-the-shelf components may be sourced in bulk without a specific customer or project in mind; (2) components may be sourced from multiple suppliers located in multiple countries to be used on multiple projects; (3) the manufacturer may have various shipping arrangements with suppliers pursuant to which the manufacturer is only sometimes responsible for payment of the tariffs; and (4) the time between importation and assembly may differ widely among components and even within specific part types. Given the difficulty often involved in tracing the specific part—and/or the specific tariff paid on a specific part—to a finished product, it may be necessary to develop a model to estimate the total cost of the tariffs associated with a given finished product.

Even if the supplier has in-house personnel capable of developing such a model, it may be preferable to work with an outside expert to develop the model to ensure it is defensible and that no bias is incorporated into the model. To the extent a dispute arises about the method used to calculate the tariffs, it will likely be more defensible and persuasive to have drawn upon and obtained the approval of an outside expert. To the extent the model is developed with the assistance of counsel, the expert can also be retained through counsel and thereby allow the conversations surrounding the development of the model to be protected from discovery and thereby allow for more frank and innovative problem-solving.

Contemporaneous Documentation Will Help a Company Defend Its Tariff Choices

Supplier agreements that permit price changes often require that the change order be supported with documentation of the increased costs that support the price change. Even in the absence of such a requirement, it is a good idea to provide documentation at the time the price change is requested to minimize the chance of litigation and maximize the potential for success in litigation. The documentation should provide the customer a straightforward explanation of the basis for the request for payment and clear understanding of how the specific charges were calculated—e.g., a plainspoken, high-level explanation of the methodology used to calculate the change in tariffs. Where an expert has been engaged to assist in developing the methodology, the expert should also provide feedback on the proposed documentation.

In addition to developing customer-facing documentation, it is also a good idea to develop internal documentation to substantiate the methodology being used and ensure that it is being applied consistently. Personnel should keep meticulous, detailed records for how the methodology

was applied to a specific customer, documenting the source material used and the specific calculations made for each step of the methodology.

Be Express About Tariffs in Future Contract Negotiation

In light of the tariff volatility over the past year, it is now apparent that substantial increases in tariff rates may be applied at any time with little to no warning and with dramatic impacts on a company's profitability and business relationships. In negotiating future contracts, companies should ensure that the parties discuss how changes in tariffs will be addressed and ideally include contractual provisions that expressly and specifically address the impact that increases (and decreases) in tariff rates during the performance of the contract will have on the contract price, how those adjustments will be made, and what documentation will be required to support it. Companies should make a concerted effort to obtain feedback from all of those involved in developing tariff recovery models and negotiating and litigating disputes with customers to incorporate the lessons learned into the new contractual provisions.

Tariff Tales: Charting a Course Through Troubled Waters



Marissa Ronk, Moderator
April 24, 2026



Our Captains



Joanna Brody
Vestas



Joel Neckers
Wheeler Trigg
O'Donnell



Mariah Jacobsen
Thermo King



April 2, 2025 – Liberation Day

- EO 14257 declared a national emergency over the trade deficit
- Invoked International Emergency Economic Powers Act (IEEPA)
- Raised tariffs on nearly all countries to 10% as a baseline + additional country-specific tariffs (~11-50%)



April 2025 – February 2026

Flurry of tariffs announced under both IEEPA and Section 232 of the Trade Expansion Act of 1962

- Some tariffs announced and never implemented
- Some tariffs announced but implemented at a different rate



February 2026 - *Learning Resources, Inc. v. Trump*

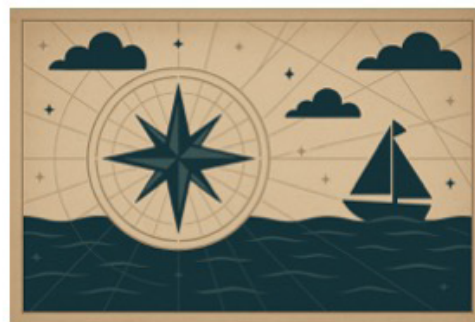
- Supreme Court affirmed decision finding that President Trump lacked the authority to use IEEPA to enact the tariffs
 - No guidance on whether U.S. Customs and Border Patrol was to refund any of the \$133B in tariffs it had already collected
- President Trump responded by announcing a new 10% tariff pursuant to Section 122 of the Trade Act of 1974, and has since announced investigations of additional tariffs pursuant to Section 301
 - New challenges already underway



Refund Landscape Remains Unsettled

Importers should expect:

- Continued uncertainty on refunds
- Delays in any refunds awarded
- New tariffs propounded under different authority



Supply Chain Landscape Remains Unsettled

- Disputes over who bears ultimate financial responsibility for the increased tariffs
- Disputes over how to calculate costs attributable to increased tariffs when components sourced from multiple countries, were imported at different times, or both
- Disputes over what constitutes “reasonable” mitigation efforts



Involve Legal Counsel – Early and Often

- Ensure consistent positions across contracts with similar language
- Build key documentation
- Ensure consistent and defensible methodology
- General litigation hygiene



Examine Key Contract Terms

- Force majeure or other excusable event provisions
- Price escalation provisions
- Change in law provisions



Consider “Reasonable” Mitigation Efforts

- May be defined by the contract or by common law
- Consider: accelerating or delaying date of import; switching suppliers; changing location of manufacturing or assembly
- Document analyses in real time



Potential Role for Outside Experts

- Can help develop a model to estimate the total cost of tariffs associated with a given finished product
- Will help ensure defensible process if litigation arises
- Could be converted to a testifying expert down the road



Consider Documentation

- External documentation: may be a tension between needing to request a price increase and keeping confidential commercially sensitive pricing information
- Internal documentation: substantiate methodologies, ensure uniform application



Future Contract Negotiations

- Expect to see express provisions in future contracts on who bears tariff responsibility and greater clarity in related provisions
- Incorporate lessons learned from key business and legal stakeholders on contract terms that could benefit from additional clarity
- Consider choice of forum





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

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

Marissa also is a mentor in the Leadership Council on Legal Diversity program. Prior to joining WTO in 2015, she worked in the litigation department of Winston & Strawn in Chicago.

Practice Areas

- Commercial Litigation
- Class Actions
- Product Liability
- Appellate

Industries

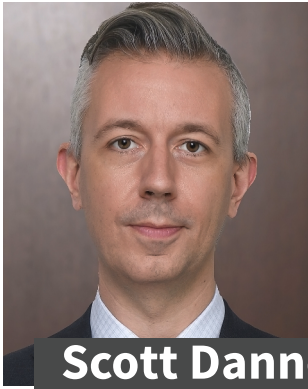
- Consumer Products & Services
- Oil & Gas
- Automotive
- Cannabis
- Healthcare

Legal Memberships, Activities, and Honors

- Colorado Super Lawyers - Super Lawyers, Business Litigation, 2023-2026; Rising Stars, Business Litigation - 2021; Rising Stars, Personal Injury - Products Defense, 2018-2020
- The Best Lawyers in America - Ones to Watch - Commercial Litigation, 2021, 2022, 2024, 2025; Ones to Watch - Mass Tort Litigation / Class Actions - Defendants, 2021-2023; Ones to Watch - Product Liability Litigation - Defendants, 2021, 2022, 2024, 2025; Ones to Watch - Litigation - Labor and Employment, 2024, 2025
- Benchmark Litigation - Future Star, 2021-2026; 40 & Under Hot List, 2023-2026
- Leadership Council on Legal Diversity - Mentor, 2022 - present; Fellow, 2022
- Colorado General Counsel Mentoring Program, 2018-2020
- International Association of Defense Counsel - Member

Education

- Harvard Law School - J.D., 2011, Journal of Law and Technology, Articles Editor
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Mass Arbitration: What It Is and How to Avoid It

Mass Arbitration: What It Is and How to Avoid It *Scott M. Danner*

Chances are, many of you work for companies with consumer- or employee-facing arbitration agreements. Following a series of Supreme Court opinions in the early 2010s, businesses increasingly adopted mandatory arbitration clauses with class action waivers to avoid suits that created settlement pressure—not because the claims had merit, but from the huge damages class actions can threaten. According to a 2025 study, over 80% of consumer-facing Fortune 500 companies require mandatory arbitration to some extent.¹

But every action provokes a reaction. Following the widespread adoption of these clauses, the plaintiffs' bar struck back, turning mandatory arbitration clauses against the businesses that adopted them. This is the strategy of "mass arbitration," which takes advantage of consumer-friendly terms in mandatory arbitration agreements, especially the requirement that businesses cover the claimants' arbitration costs. When these individual costs are aggregated, they can exert even greater non-merits settlement pressure than a class action.

This Article briefly outlines the mass arbitration phenomenon. It then identifies steps businesses can take to avoid mass arbitration before becoming a target, or to respond once a mass arbitration campaign has been launched.

What Is Mass Arbitration?

"Mass arbitration" can be loosely defined as a circumstance when a single lawyer or group of lawyers files arbitration demands against the same defendant on behalf of many individuals with similar claims.² Because the strategy depends on aggregating a large number of claims, claimants are typically consumers or employees/independent contractors affected by a common practice

or event (e.g., data privacy, consumer protection, or wage and hour claims).

Since many consumer-facing arbitration agreements now prohibit collective suits, the aggregating plaintiff's lawyer nominally brings claims on behalf of each individual separately, filing hundreds or thousands of copy-and-paste arbitration demands. Plaintiff's lawyers amass claimants through online marketing campaigns targeting customers or employees of businesses known to have mandatory arbitration clauses. Client intake and claims preparation are largely automated with sophisticated software programs designed to support mass arbitration campaigns.

Aggregating lawyers often launch a mass arbitration with no intention of actually litigating many (or any) of the claims on an individual basis. After all, the aggregating lawyer knows that conducting thousands of separate arbitrations would make little economic sense, given the low dollar values typically at stake in any individual's case. Companies know this too. In fact, according to the AAA, only 1% of individual demands brought as part of a mass arbitration campaign reached a final merits award in 2024.³ Which might lead you to ask, if the claims aren't going to be litigated to a final award, how do these aggregated claims create any settlement leverage at all? The answer is arbitration fees and costs. Even as the Supreme Court blessed mandatory arbitration clauses with class action waivers, it left open the possibility that state unconscionability doctrines could invalidate an arbitration clause that is overly one-sided in favor of a company. To avoid the risk that their clauses might be challenged under these doctrines, many companies agreed in their arbitration clauses to cover the consumer's or employee's arbitration costs, regardless of which party prevailed.

When thousands of individual claims are aggregated, the company's liability for arbitration fees can become

¹ David Horton, *Forced Arbitration in the Fortune 500*, 109 Minn. L. Rev. 2165, 2174 (2025); see also id. at 2206–07 ("Parties agree to arbitrate when they visit websites, send packages, purchase cars, sign leases, book trips, enter sweepstakes, [etc.]").

² See, e.g., J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1289 (2022).

³ Adam Shoneck, *Mass Arbitration in 2024: Insights from AAA's New Infographic*, American Arbitration Association (May 7, 2025), <https://www.adr.org/news-and-insights/understanding-the-mass-arbitration-landscape-in-2024-insights-from-the-aaa-s-new-infographic/>.

enormous. For example, the per-case arbitration fee in a mass arbitration against Uber was \$1,500. Under those rules, 1,000 individual demands filed would have meant \$1.5 million in non-refundable arbitration fees, due within 30 days. 10,000 demands, \$15 million in fees. 50,000 demands—a number that is not atypical in a sophisticated mass arbitration campaign—\$75 million in fees. Because claimants are recruited online and may be signed up as clients with little due diligence or direct communication, there is a considerable risk that many claims are made in the name of someone with no relationship to the company or viable claim to bring. But the upfront arbitration fees are due for those individuals' demands all the same. And these "initiation" fees were just the price of admission, a massive toll owed by companies for the opportunity to defend themselves on the merits.

Ironically, the emergence of mass arbitration can be traced to the defense bar's success in the last 20 years of upholding the enforceability of mandatory arbitration clauses with class action waivers.⁴ These provisions were challenged on various grounds over the decades, culminating with a trilogy of Supreme Court cases in the early 2010s that vindicated mandatory arbitration.⁵ Following these Supreme Court decisions, the number of businesses employing mandatory arbitration clauses in consumer-facing contracts tripled between 2011 and 2019.⁶

Plaintiff's firms first began launching mass arbitration campaigns in the late 2010s. Early cases aggregated tens of thousands of employment-related claims against DoorDash, Uber, and Chipotle.⁷ The practice soon spread to the consumer context: Intuit, Samsung, Family Dollar, and Amazon were early targets of consumer mass arbitration.⁸ Intuit alone faced about 200,000 consumer claims.⁹

Mass arbitration is still growing. In 2024, over 247,000 "individual" claims were filed with the AAA across 82 consumer mass arbitrations.¹⁰ The AAA received a further 33,000 filings in employment matters.¹¹ In a survey of corporate counsel, 45% of respondents representing

retail and technology businesses and 55% of those in logistics and transportation expected mass arbitrations to increase in 2026.¹²

How to Avoid It?

As the saying goes, an ounce of prevention is worth a pound of cure. How can a company avoid becoming the target of a mass arbitration campaign? And if your company finds itself a target, how can you avoid being leveraged into a large settlement of claims that lack merit?

Check your arbitration clause. The first step is to review your arbitration agreements before becoming a target. Just as the widespread adoption of mandatory arbitration clauses triggered a reaction from the plaintiffs' bar, companies responded by amending their consumer and employee-facing agreements. This Article identifies a subset of these approaches that have received recent attention in litigated cases.

One option is to remove mandatory arbitration altogether. For example, after being hit with tens of thousands of individual arbitration demands, Amazon removed its mandatory arbitration and class action waiver clauses, and instead designated state or federal courts in its home county as the exclusive jurisdictions for consumer disputes.

More often, companies have responded by preserving arbitration, while trying to avoid or mitigate the settlement leverage created by upfront arbitration cost-shifting. For example, some companies have included in their arbitration clauses agreements that provide a mechanism to limit, or at least sequence, the company's responsibility to pay the claimants' arbitration costs. One example is "batching," where the parties agree that one or more "batches" of mass-filed claims will be heard together first, limiting the company's initial exposure to arbitration costs to just the batched cases. In 2024, large arbitrator providers like the AAA and JAMS embraced various consolidation mechanisms with similar effects, so companies can now pursue some of these approaches simply by specifying the relevant AAA or JAMS rules in their agreements.

Along similar lines, some companies have revised their clauses to direct arbitration to newer arbitration providers that are more likely to mitigate the settlement leverage created by mass arbitrations campaigns. But courts may hold unenforceable arbitration agreements that tilt the arbitration procedures too far in the defendant's direction. For example, in its 2024 decision in *Heckman v. Live*

4 See generally Glover, *Mass Arbitration* at 1283, 1295–1303, 1315–19.

5 See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–87 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336–38, 344, 352 (2011); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 231–35 (2013).

6 Glover, *Mass Arbitration* at 1304 & n.103.

7 Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 *Vand. L. Rev.* 133, 148–49 (2025).

8 *Id.*

9 Keller Postman Represents ~200,000 Intuit Customers in Mass Arbitration, Keller Postman LLC (Mar. 4, 2022), <https://www.kellerpostman.com/keller-postman-represents-200000-intuit-customers-in-mass-arbitration/>.

10 Shoneck, *Mass Arbitration in 2024*.

11 *Id.*

12 2026 Annual Litigation Trends Survey, Norton Rose Fulbright (Jan. 2026), [norton-rose-fulbright-2026-annual-litigation-trends-survey.pdf](https://www.norton-rose-fulbright.com/2026-annual-litigation-trends-survey.pdf).

Nation Entertainment, the Ninth Circuit struck down as unconscionable Ticketmaster's efforts to designate New Era ADR as the arbitration provider, citing four features of New Era's protocols that the Circuit held failed to provide for fair and neutral arbitration: (1) treating "bellwether" cases as binding precedent on non-bellwether claimants; (2) inadequate discovery (limited to 25 MB or 25 pages of documents) and briefing (limited to five pages on the merits); (3) asymmetric arbitrator appointment; and (4) one-sided appeal rights from orders concerning injunctive relief.¹³ On the other hand, the same court in 2025 rejected an unconscionability challenge to the application of a JAMS consolidation rule that allowed Starz Entertainment to pay just a single case initiation fee for a tranche of 7,300 mass-filed claims.¹⁴ These decisions, and others applying them, provide a rough roadmap to crafting an arbitration protocol that will survive an unconscionability challenge, at least in the Ninth Circuit.

Ultimately, courts will decide over the coming years which company-drafted revisions to combat mass arbitration are enforceable. Plaintiffs will likely challenge these revised agreements as unconscionable under state law. When state law invalidates part of an arbitration clause, defendants will likely ask federal courts to find state law preempted for interfering with federal policy favoring arbitration. In addition, plaintiffs will likely continue to argue that arbitration clauses that render pursuit of certain claims economically irrational should not be enforced under the "effective vindication" doctrine; defendants may counter that doctrine lost its teeth in the Supreme Court's 2013 decision in *Italian Colors v. American Express*. State high courts and federal circuit courts are just beginning to weigh in on these complicated issues, and it may be years before we get anything like clarity from the U.S. Supreme Court.

Just because the legal landscape is evolving does not mean that it's a good idea to sit on the sidelines and wait for the perfect defense strategy to materialize. Even if you updated your clause in 2021 or 2022 to address mass arbitration risks, important cases continue to be decided. At a minimum, you should think carefully now about whether the cost of an update to your arbitration agreements is justified by the risks an update could help avoid.

Think twice before moving to compel. Another critical time to protect your company is immediately after being hit with a consumer class complaint in state or federal court. For a long time, the standard opening move for companies with a mandatory arbitration clause has

been to promptly seek to compel arbitration. Today, you should think twice before making that motion. Aggregator law firms monitor court dockets for successful motions to compel arbitration, which can serve as the "starting gun" for a mass arbitration campaign. According to a comprehensive study of mass arbitration in 2022, a large majority of mass arbitration campaigns occurred after or alongside a defense motion to compel arbitration of a putative class or collective action.¹⁵

If your company's arbitration clause exposes it to a mass arbitration campaign, the filing of a class action complaint might be your last best chance to remove it. After a business has successfully moved to compel arbitration, the aggregator firm may try to use that success to oppose later efforts to end a mass arbitration campaign.

Fighting over fees. What if the aggregator firm has already launched its campaign by filing demands with the arbitration provider specified in your agreement? Some companies have responded by refusing to pay the arbitration fees or otherwise participate in the arbitrations. For example, after plaintiffs' lawyers aggregated several thousand data-privacy claims and initiated mass arbitration, Samsung refused to pay the AAA's fees.¹⁶ Applying its own rules, the AAA terminated the case for Samsung's refusal to pay, which opened the door for claimants to bring their claims in federal court. Claimants chose not to proceed with their claims in court, however, and sued in federal court to compel Samsung to pay the AAA arbitration fees. The district court ordered payment, but the Seventh Circuit reversed, holding that the Federal Arbitration Act (FAA) did not permit the court to interfere, as "all the law requires is that the parties arbitrate according to the terms of their agreement."¹⁷ Because the parties delegated to the AAA the decision what to do if fees are not paid, and the AAA closed the case in accordance with its rules, the required arbitration "had been had," and there were no grounds for the federal court to interfere with its outcome.¹⁸ Similarly, the Second Circuit held last September that "once parties are before their chosen arbitral body, refusal to pay ongoing fees alone is not" a "refusal" to arbitrate that could trigger a federal court's power to compel arbitration under the FAA.¹⁹ Given these rulings, we expect to see more companies follow this approach, and more courts to weigh in.

Another important development in the coming years will be the fate of state laws that specify the consequences

¹³ *Heckman v. Live Nation Ent., Inc.*, 120 F.4th 670 (9th Cir. 2024).

¹⁴ *Jones v. Starz Ent., LLC*, 129 F.4th 1176 (9th Cir. 2025).

¹⁵ Glover, *Mass Arbitration at 1332–33 & n.259* (citing cases).

¹⁶ *Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609, 613 (7th Cir. 2024).

¹⁷ *Id.* at 621.

¹⁸ *Id.* at 622.

¹⁹ *Frazier v. X Corp.*, 155 F.4th 87 (2d Cir. 2025).

of a company's failure to pay. The California Arbitration Act, for example, provides that if the party that drafted a mandatory arbitration clause in an adhesive contract (i.e., the company) fails to pay arbitration fees when due, that failure is a material breach of the arbitration agreement, allowing the arbitration claimant to bring its claims in court and to seek other remedies (including sanctions). After several federal courts found that provision preempted by the FAA, the California Supreme Court disagreed in a decision handed down last August.²⁰ Meanwhile, Rhode Island in 2024 enacted its own arbitration statute to deal with non-paying defendants, closely tracking California's.²¹ A similar bill has been introduced in New York.²² We expect the fight over these statutes, and others like them, to continue.

What if you can't avoid it? This article has focused on how to avoid mass arbitration, because defending a mass arbitration campaign is not ideal. Of course, you can always settle, even if it costs more than you think the claims are worth. Or can you?

Unlike settlement of a certified class, paying off one aggregator lawyer won't necessarily buy global peace. What's to stop the same firm, or a different one, from showing up with another 10,000 demands next month, or next year? Moreover, if demands have not been filed, or lack reliable identifying information, how can you be sure that the money you spend on settlement is ever going to reach a bona fide customer, employee, or independent contractor? Companies have sought to avoid mass arbitration claims by settling a parallel pending class lawsuit, but some courts have expressed hostility to such settlements if they do not provide mass arbitration claimants an easy and effective way to opt out. Ultimately, settling mass arbitration campaigns can present challenges just as thorny as resisting them.

If you can't avoid or settle a mass arbitration campaign, then you may have to fight it out. Once the upfront arbitration costs and fees are paid, an important part of the aggregator firm's settlement leverage disappears. But not all of it: arbitrators continue to incur expenses throughout the proceedings, which are likely to be borne disproportionately (or entirely) by the company. Other costs may also be allocated asymmetrically; for example, discovery burdens are likely to fall more heavily on the

company than on any individual claimant, and aggregator plaintiff's firms may litigate more to maximize the defense expenses, than to actually win any particular one of their thousands of claims. Further, aggregator firms favor claims with trebling or other exemplary damages provisions, or fee-shifting in favor of a successful claimant, while companies may lack the ability to win back their fees even after defeating individual claims on the merits.

Companies can overcome these asymmetries, and many have fought back against mass arbitration claims by litigating the claims on the merits. But the decision to stand and fight should be a decision your company makes with eyes wide open and while it still has a choice—not one forced on you by an outdated arbitration clause.

Conclusion

Mass arbitration has been part of the litigation landscape for almost a decade, and the defense playbook is still being written. But a few themes have emerged: First, if your company's consumer- or employee-facing agreements contain a mandatory arbitration clause, then it is at risk. As mass arbitration campaigns continue to force large settlements, the list of targets will only grow. While mass arbitration began with a few specialized firms targeting some of the country's largest and highest-profile companies, their early success has spurred new firms to join the fray. And as more companies adapt, the range of targets will likely continue to expand.

Second, your company does not want to be on the receiving end of a mass arbitration campaign, which can be more costly and disruptive to your business than the class action the arbitration clause was designed to avoid. When prevention strategies fail, the choices are to pay potentially millions in arbitration fees for the privilege of litigating thousands of individual claims on their merits, or to pay a settlement that may have nothing to do with the merits of the claims, and everything to do with the amount of arbitration fees.

Third, the best time to protect yourself is before any claims arise. If you wait until the aggregator firms come knocking, you may find yourself pursuing unproven and expensive strategies to defend yourself in an evolving legal landscape.

²⁰ *Hohenshelt v. Super. Ct. of L.A. Cty.*, 573 P.3d 944 (Cal. 2025).

²¹ 10 R.I. Gen. Laws § 10-3-24 (2024).

²² N.Y. Assemb. A3461A, Leg. Sess. 2025–2026 (2025).

Mass Arbitration:

What It Is and How To Avoid It

April 24, 2026

Scott M. Danner

HOLWELL SHUSTER & GOLDBERG LLP

Agenda

1. What is it?

2. How to avoid it?

Agenda

1. What is it?

2. How to avoid it?

3

Mass Arbitration: Origins

- In 2011, the Supreme Court held that contracts requiring mandatory arbitration and prohibiting class relief were permissible, provided they are not unconscionable. This ruling was reaffirmed in a 2013 decision.
- Many companies incorporated such clauses into their agreements believing it minimized exposure given the damages generally at stake for individual claimants.
- In an effort to avoid being deemed unconscionable, arbitration clauses adopted by companies seeking to avoid class actions routinely require the Company to pay all arbitration fees, limit circumstances where the Company can recover attorneys' fees, and allow the consumer to choose the manner of arbitration.
- Most arbitration providers — including the American Arbitration Association (“AAA”) — charge a minimum of approximately \$3,000 a case.

4

Mass Arbitration: "Prohibitively Expensive"

- Over the past few years, a handful of firms — led by Keller Lenkner (now Keller Postman) — have weaponized consumer and employer arbitration clauses with favorable terms by aggregating thousands of claims through targeted advertising campaigns.
- Aggregating claims makes entrance fee to just defend prohibitively expensive and the vast majority of such fees are non-refundable under recent precedent.
- For example, if 75,000 demands for arbitration are filed with the AAA, the Company has 30-days to pay a largely non-refundable fee of \$225 million as the cost of admission.
- Claimants' counsel will offer a settlement slightly less than the AAA charge — \$2,900 per claim or so — attempting to induce a quick resolution.

5

Ripped From The Docket



6

Ripped From The Docket



7

Mass Arbitration: By The Numbers



8 out of 10 Fortune 500 companies require mandatory arbitration



280,000 new "individual" arbitration demands filed with AAA in 2024



Only 1% of claims proceeding to merit arbitration resulted in final awards

Sources: AAA; David Horton, *Forced Arbitration in the Fortune 500*, 109 MINN. L. REV. 2165 (2025).

8

Agenda

1. What is it?

2. How to avoid it?

9

Agenda

2. How to avoid it?

➤ Pre-Launch

➤ Post-Launch

10

Pre-Launch: Check Your Clauses



🔍 To Arbitrate or Not to Arbitrate?

🔍 Alternative Providers?

🔍 Sequencing?

🔍 Fee Allocation?

11

Pre-Launch: To Move Or Not To Move?

9		
10	JOHN DOE & all other similarly situated	Case No. 04-24-2026-0000
11	<i>Plaintiffs,</i>	Hon. Jane Smith
12		
13	v.	
14		DEMAND FOR JURY TRIAL
15	YOUR COMPANY, Inc.	
16	<i>Defendant.</i>	
17		
18		CLASS ACTION COMPLAINT
19		



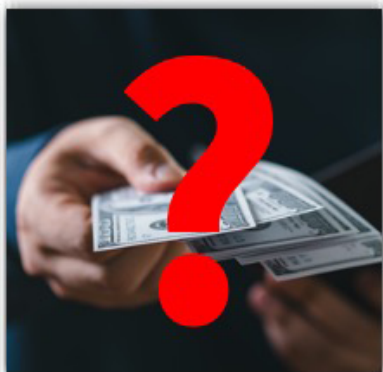
12

Pre-Launch: To Move Or Not To Move?

- **Automated/Passive Supplemental Approach:** Monitor court dockets for motions to compel class actions to arbitration, and copycat existing legal theories with potentially better advertising approach.

13

Pre-Launch: To Move Or Not To Move?



- Providers may terminate for nonpayment of fees
- Courts may lack authority to compel payment
- The law continues to develop

14

Mass Arbitration: Key Takeaways

1. If you have employees or customers, you're at risk.
2. Avoid mass arbitration if you can.
3. An ounce of prevention...



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Scott Danner

Partner | Holwell Shuster & Goldberg (New York, NY)

Scott Danner's practice focuses on trials and arbitration hearings, representing plaintiffs and defendants in high-stakes, complex commercial cases. Since becoming a partner in 2020, Scott has first-chaired trials in federal and state court, securing multiple eight-figure verdicts for his clients, and defended dozens of mass arbitration claims at full merits hearings. Scott has been recognized as a Litigation Trailblazer by The National Law Journal, a leading Antitrust Lawyer and leading Litigator by Lawdragon, and an "amazing trial lawyer" by his clients, as reported by Legal 500. He was also recommended in Legal 500's 2021 guide for his litigation work and recognized by The American Lawyer and Law360 for his recent trial wins.

Scott represents clients in a wide range of industries, including aerospace, digital platforms, and private equity; and his previous engagements involve antitrust, trade secrets, and contract disputes. Scott also has extensive experience representing clients in New York appellate courts, including successful appeals to the New York Court of Appeals and the Appellate Division, First Department. Scott is actively involved in HSG's pro bono practice and regularly represents indigent criminal defendants on appeal.

Notable Cases

- Lead trial counsel for aerospace start-up Zunum Aero Inc., winning a jury verdict finding Boeing liable for \$81.3 million for misappropriating substantial trade secrets related to the development of hybrid-electric aircrafts. The Ninth Circuit reinstated the verdict in full after the district court set it aside, and reassigned the case to a different district judge to handle further post-trial proceedings. The case was reported upon in Forbes, Reuters, MSN, the Seattle Times, and various legal publications, and the appeal win in Reuters, Business Insider, Law360 (including Law360's Legal Lions column), World IP Review, Seattle Times, and Aviation Week, among many others.
- Lead trial counsel for Valve Corporation in defending against mass arbitrations brought under the antitrust laws.
- Lead trial counsel for Melody Business Finance, a hedge fund, in litigation against former hedge fund billionaire Philip Falcone, securing an award of \$69.8 million—approximately 99% of the amount sought following a trial on damages.
- H.I.G. Capital LLC, a private equity firm, in Delaware state court litigation asserting claims against the Audax Group, another private equity firm, for fraud in connection with the \$900 million+ sale of a portfolio company in 2022.
- Valassis Communications, Inc., a MacAndrews & Forbes company, as plaintiff in litigation against News Corp. and its subsidiaries alleging federal and state antitrust violations, unfair competitions, and tortious interference seeking more than \$600 million in damages. Valassis defeated summary judgment and then reached a confidential settlement during jury deliberations following a nearly three-week trial in the Southern District of New York.
- Melody Capital Partners, an investment fund, as plaintiff in various litigations and out-of-court foreclosures under the Uniform Commercial Code resulting from defaults under loan agreements secured by equity interests, real estate, and fine art, among other collateral.
- IAC/InterActiveCorp and Match Group, Inc. in litigation brought by the founders of Tinder seeking several billion in damages over the corporate consolidation of Tinder and Match.

Education

- Benjamin N. Cardozo School of Law (J.D., summa cum laude, 2009; Felix Frankfurter Prize; Cardozo Law Review)
- Cornell University (B.A., 2005; Phi Beta Kappa)



Amy Sorenson

Snell & Wilmer (Salt Lake City, UT)

Fallout: Inside the New Age of Nuclear Mega Verdicts

Fallout: Inside the New Age of Nuclear Mega Verdicts *Amy F. Sorenson*

Over the past decade, civil litigators have confronted a marked increase in so-called “nuclear verdicts”—generally defined as jury awards exceeding \$10 million, with “thermonuclear verdicts” referring to awards exceeding \$100 million. These verdicts, once relatively rare and concentrated in a handful of jurisdictions and matters, have become more frequent, larger in size, more geographically widespread—and less tied to evident large-scale catastrophic injury. The trend has significant implications for case valuation, litigation and trial strategy, the cost and availability of insurance, and, in some cases, continued corporate viability.

Although jurisdictions like California, Florida, New York and Texas have historically dominated this space, recent data suggests that nuclear verdicts are increasingly appearing in more moderate venues, including traditionally conservative-jury states like Utah. This paper summarizes national trends, identifies principal drivers behind escalating verdicts, and offers new strategies to combat these sometimes devastating judicial outcomes.

National Trends in Nuclear Verdicts—Increasing Size and Frequency

The number and size of nuclear verdicts have risen significantly in the past 15 years. In a 2022 publication, the Institute for Legal Reform for the U.S. Chamber of Commerce identified 1,376 verdicts exceeding \$10 million between 2010 and 2019, reflecting a steady upward trajectory over that period. Moreover, the study found that the median nuclear verdict increased over 27% during that period, outpacing inflation, and that the 1,300 or so verdicts in that period included 101 “thermonuclear” verdicts in excess of \$100 million.¹

In updated research for the period 2013 through 2022, the U.S. Chamber found that while nuclear verdicts dropped significantly during the COVID-19 pandemic lockdown,

they rebounded to near prior levels before the end of 2021. The median nuclear verdict during the updated period studied was \$21 million, and the median nuclear verdict in product liability cases specifically hit \$36 million in 2022, a 50% increase over the course of ten years.²

In addition, the proportion of extremely large awards increased: approximately 19% of nuclear verdicts during the years 2013 to 2022 exceeded \$50 million, and 115 of those verdicts exceeded \$100 million.³ In 2024, 135 lawsuits against a corporation resulted in a verdict exceeding \$10 million, a 52% increase over 2023. No one seems immune: 55 industries were the subject of a nuclear verdict in 2024, ranging from beverages to movies to fertilizers, from construction and engineering to and oil and gas.⁴

Case Type and Venues Trends

Historically, nuclear verdicts are concentrated in a relatively small number of case types—typically, products liability, auto and trucking, and medical malpractice cases. Together, those types of cases have accounted for nearly 2/3 of all such cases nationwide, which make up has remained steady since 2010.⁵

The plaintiffs’ bar has traditionally preferred to file and try cases in the state courts. Nuclear verdict data supports this preference. Most nuclear verdicts occur in state courts (approximately 90%), with a disproportionate share historically arising in a handful of large states, while federal courts were host to only 140 out of the nearly 1300 nuclear cases identified from 2013 to 2022.⁶

While New York, California, Florida, and Texas are responsible for more than half of all nuclear awards (disproportionate even for their size, as these states

¹ U.S. Chamber of Commerce Institute for Legal Reform, Nuclear Verdicts: Trends, Causes, and Solutions (September 2022), at 2.

² U.S. Chamber of Commerce Institute for Legal Reform, Nuclear Verdicts: An Update on Trends, Causes, and Solutions (May 2024), at 3.

³ Id.

⁴ Marathon Strategies, Corporate Verdicts Go Thermonuclear, available at <https://marathonstrategies.com/wp-content/uploads/2025/05/Nuclear-Verdicts-Report-2025.pdf> at 2.

⁵ U.S. Chamber of Commerce Institute for Legal Reform, Nuclear Verdicts: An Update on Trends, Causes, and Solutions (May 2024), at 8.

⁶ Id. at 14.

represent only about 1/3 of the U.S. population), there is reason for caution regardless of venue.

A recent medical malpractice judgment out of Utah provides one such cautionary tale. Utah has historically been viewed as a moderate or defense-friendly jurisdiction, with relatively conservative jury awards compared to national averages both in terms of likelihood of plaintiff's verdict and in absolute size.⁷ However, a recent Utah case illustrates the state's exposure to thermonuclear verdicts. In 2025, a Utah state court entered a \$951 million judgment against Steward Health Care arising from a birth injury at a Utah hospital—the largest personal injury award in Utah history. The default judgment included past and future medicals, lost earning capacity, pain and suffering in the hundreds of millions of dollars (before application of the state's \$450,000 medical malpractice pain and suffering statutory cap), punitive damages of nearly \$500,000,000, and attorneys' fees.⁸

Industry observers confirm the widespread nature of the trend: nuclear verdicts occurred in more states (34) and more courts (77) than ever before.⁹

Drivers of Nuclear Verdicts

Practitioners and industry analysts attribute the rise in nuclear verdicts to a combination of factors.

Increased numbers of nuclear and thermonuclear verdicts, and an increased proportion of larger verdicts within those verdict types, are attributed to plaintiffs' trial strategies, including the increased use of damages anchoring, reptile theory arguments,¹⁰ and trial themes that appeal to jurors' growing hostility at a perceived lack of corporate accountability, and capitalizing on a desensitization to extremely large damages figures, including via plaintiffs' attorney advertising.¹¹

Structurally, studies suggest the largest component of recent nuclear verdicts is comprised of pain and suffering awards, which commentators suggest may be an unintended consequence of the U.S. Supreme Court's deliberate adoption of due process limits on "runaway" punitive damages awards in a line of cases beginning with the *State Farm v. Campbell* decision in 2002. Since then, punitive damages awards that exceed a single digit

multiple of compensatory damages are highly unlikely to comport with due process. The result has been remand and remittitur as to excessive punitive damages awards, and renewed emphasis by the plaintiffs' bar on subjective damages components, such as pain and suffering.¹²

Another contributing factor suggested by industry analysts is the rise of third party litigation funding ("TPLF") in the form of investment and underwriting of plaintiffs' cases in return for a portion of the "profit" of any damages award. TPLF allows deferred or no settlement, more and more elaborate expert retentions, and longer and more complex trials, such as combining multiple plaintiffs into a single matter in mass actions, multiparty actions and class actions.¹³

Strategies

The rise of nuclear and thermonuclear verdicts has clear implications for trial and settlement. Lawyers, clients and insurers must adequately take into account the possibility of not just liability, a substantial damages award, and possibly punitive damages, but the likelihood of a damages award far in excess of actual damages – in the tens or hundreds of millions of dollars, even for a single plaintiff or incident. Best practices include early, rigorous and objective case evaluation, and valuation; a laser focus on issues concerning not just liability and damages, but whether themes of corporate accountability, greed, or excess exist and can be addressed; the early and even repeat use of focus groups and mock trials; and venue considerations (state versus federal court and particular state's or local court history with outsize verdicts, lawyer verdict advertising and similar desensitizing factors). Ultimately, even if outsized, unexpected verdicts are avoided with proper case evaluations and objective efforts toward settlement.

Motion practice and discovery and trial objections should include a plan from the outset of the case to address reptile, "make safe" arguments; the application of Daubert not only to liability but damages experts; the sufficiency of plaintiff's damages disclosures under state law; the exclusion or limitation of anchoring, per diem, and golden rule damages arguments (and a back up plan should such evidence and argument come in regardless); and affirmative, tested defense themes that take into account corporate responsibility and accountability as well as duty, breach, and causation, and which avoid disrespectful trial, discovery or settlement themes.

⁷ Utah Jury Awards Trail U.S. Average, *Deseret News* (Oct. 24, 1991) (noting that Utah ranks 43rd in nation for jury awards in excess of \$1 million and had a median jury award in wrongful death cases of \$150,000).

⁸ *Cowboy State Daily*, Judge Awards Nearly \$1 Billion... (2025); *ChildbirthInjuries.com*, \$951 Million Utah Birth Injury Verdict (2025).

⁹ *Marathon Strategies*, Corporate Verdicts Go Thermonuclear, available at <https://marathonstrategies.com/wp-content/uploads/2025/05/Nuclear-Verdicts-Report-2025.pdf> at 2.

¹⁰ See generally *Nuclear Verdicts: Trends, Causes, and Solutions* (September 2022).

¹¹ *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* (May 2024), at 39-40.

¹² *Nuclear Verdicts: Trends, Causes, and Solutions* (September 2022), at 25-26.

¹³ *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* (May 2024), at 40-43.



Inside the New Age of Nuclear Mega Verdicts

Amy F. Sorenson
Snell & Wilmer L.L.P.
April 24, 2026

SNELL
& WILMER

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What is a Nuclear Verdict?

- "Nuclear" Verdict = > \$10 Million Jury Award
- Mega or "Thermonuclear" Verdict = > \$100 Million Jury Award
- Increasingly Common in Catastrophic/Death
 - Personal Injury
 - Medical Malpractice
 - Product Liability
 - Civil Rights Cases
- And Now ... in Ordinary Injury Cases

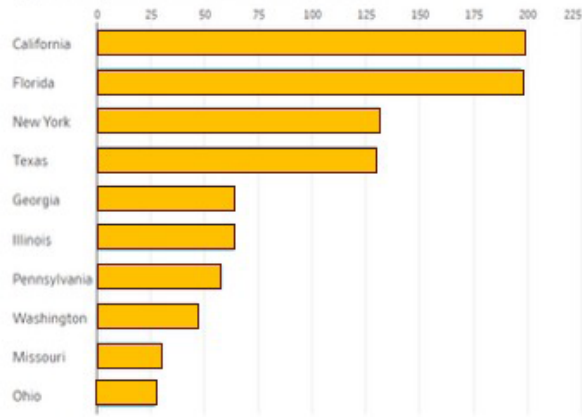


*bottle caps are currency in Fallout

Can It Really Happen In My Case?



Top 10 states by total number of nuclear verdicts, 2013-2022



Source: U.S. Chamber of Commerce Institute for Legal Reform

Single State Case Study – Utah Then Utah – Historically Conservative Verdict Environment



Published Oct 24, 1990, 12:00 a.m. EDT

By Devenet Rimes, Marianne Funk, Staff Writer

Injury and death apparently aren't worth as much in Utah as they are in other states.

Jury awards for death and injury in the Beehive State are running 6.5 percent below the national average - the sharpest disparity since researchers began tracking awards seven years ago. Jury awards in most of Utah's rural counties are 13.4 percent below the national average, according to the 1990 Utah Verdict Survey conducted by Jury Verdict Research Inc., an Ohio company.

The company's October publication reviewed Utah jury awards for the latter half of 1989, all of 1990 and the first half of 1991, said Dwight E. Edmond, author of the publication.

The survey noted that Utah ranks 48th in the nation for jury awards in excess of \$1 million. However, it also reported that 34 percent of Utah jury awards were for more than \$100,000. That figure is up from 30 percent in the 1990 report.

Utah juries are not only more conservative in the size of their awards, they are also more reluctant to give out awards at all. Utahans seeking cash for an injury or death have a 10 percent chance of winning in court compared to a 63 percent chance nationally, the report said.

In Utah, the median jury award for a death is \$20,000. The median award for disk damage is \$100,000, but other back and neck injuries pull down an average of only \$1,857. From mid-1989 to mid-1991, Utah juries awarded a high of \$4 million in one case and a low of \$1 in several others.

The report also contained sketches of several Utah cases. A Utah artist who earned about \$1000 a year committed suicide in Castleview Hospital's psychiatric ward during a 30-minute span in which doctors and nurses at the hospital left him unattended.

The dead man's family sued the hospital for not watching him more closely. A jury awarded the family \$40,000 - more than the man would earn in two lifetimes based on his annual income when he died.

In addition, the family won an undisclosed amount from one of the man's doctors.

The case histories underscore the capricious nature of trial law. One woman received \$16,500 for a shoulder injury she suffered when she slipped and fell on some water and leaves accumulated in the doorway of a Smith's food King.

But another woman who suffered a shoulder and elbow injury when she slipped and fell in a Maverik Country Store was awarded \$100,000 for her pain.

A Salt Lake business owner demanded that Salt Lake City pay him \$2,000 for alleged police brutality. The man sustained a severed nerve and a crushed artery in his shoulder after a Salt Lake police officer used excessive force to subdue him, the report said.

The city thought the man's injury was worth only \$6,000 and that was all it offered to pay him. A jury saw things differently. It awarded the man \$200,000 for his injuries. After the verdict came in, the city settled with the man for an undisclosed amount, the report said.

A Maunus woman won a \$2.2 million jury award after her 27-year-old husband was crushed to death under a 30-ton stack of steel at Nucor.

Single State Case Study – Utah Now?

Judge Awards Nearly \$1 Billion to Rock Springs
Family Over Botched Baby Delivery



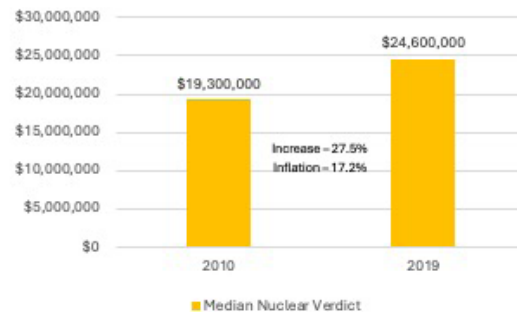
Single State Case Study – Utah Now?

Past Medical Damages	\$685,020.51
Future Medical Damages	\$57,724,462.00
Future Loss of Earning Capacity	\$7,515,199.00
AZ's Noneconomic Damages:	\$200,000,000.00
Anyssa's Noneconomic Damages:	\$110,000,000.00
Danny's Noneconomic Damages:	\$100,000,000.00
Punitive Damages	\$475,924,681.51
TOTAL	\$951,849,363.02

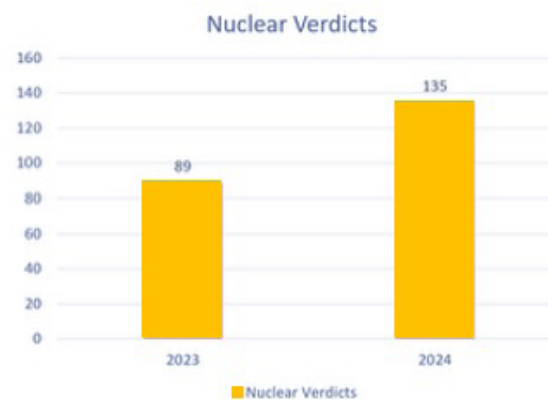
Past Medical Damages	\$685,020.51
Future Medical Damages	\$57,724,462.00
Future Loss of Earning Capacity	\$7,515,199.00
AZ's Noneconomic Damages:	\$450,000.00
Anyssa's Noneconomic Damages:	\$450,000.00
Danny's Noneconomic Damages:	\$450,000.00
Punitive Damages	\$475,924,681.51
TOTAL:	\$543,199,363.02

Nationwide: Increasing Size, Increasing Frequency ⚡

U.S. Chamber of Commerce Study of Over 1,300 Nuclear Verdicts Nationwide (2010-2019)



Nationwide: Increasing Size, Increasing Frequency ⚡





How Did We Get Here? Trial Tactics



- **Anchoring**

- Extremely large damages sought
- It works – participants who watched a mock medical malpractice trial and were presented with a \$5 million anchor returned award four times that of mock jurors given no anchor
- “Once an anchor number has been provided, the number exerts undue influence on the final figure” and “can sway decisions even when the anchor provided is completely arbitrary”. *Plaintiff Magazine*, (Mar. 2013), at 1
- Discounts off entirely arbitrary anchors of hundreds of millions of dollars – still arbitrary, and still hundreds of millions of dollars

How Did We Get Here? Trial Tactics

- **Reptile theory**

- What It Is: Focus on “making safe”/community safety/absence of injury or harm
“Improper appeals to a jury’s emotions by arguing a defendant’s conduct threatens the community’s safety.”
Russell v. Dep’t of Corr. & Rehab. (2021) 72 Cal.App.5th 916
- What It Isn’t: the standard of care, the reasonable person
- Motions to exclude – mixed results
 - *B.V. v. Walmart, Inc.*, 2024 U.S. Dist. LEXIS 130057 (C.D. Cal. 2024) (precluding each party from misstating the law or misleading the jury);
 - *Tiierina v. Alaska Airlines, Inc.*, 2024 U.S. Dist. LEXIS 12952 (S.D. Cal. 2024 (deferring to trial);
 - *Griffin v. Pet Sense, LLC*, 2024 U.S. Dist. LEXIS 67284 (E.D. Ark. 2024) (counsel “may not make any improper ‘reptile’ argument that jurors must protect themselves and the community by punishing Defendants”)



How Did We Get Here? Trial Tactics

In court: Mom “would have been better off delivering this baby at the bathroom of a gas station, or in a hut somewhere in Africa, than in this hospital,” he said. “**Literally, this was the most dangerous place on the planet** for her to have given birth.”

In findings of fact/conclusions of law: “Although this Court took the emotional weight of the testimony into account in rendering its decision, **it did not base its decision on passion or prejudice**. Instead, the testimony’s power made this Court acutely aware of what Plaintiffs lost and the depth of their pain in a manner that a cold record could never reflect.”



How Did We Get Here? Juror Attitudes

- Plaintiffs' lawyers cite
 - Generations of "corporate greed" and scandal
 - 2008 Global Financial Crisis - only one executive sentenced
 - Trust in the federal government falling since 1958 (Pew)
 - Jury service as sole source for corporate accountability and "direct democracy"
- Emotion (fear, hostility and anger) drives punitive, non-economic, and even economic damages up
- Desensitization to large verdicts – growing concerns about lawyer advertising



'Nuclear' Jury Verdicts Rise Alongside American Anger

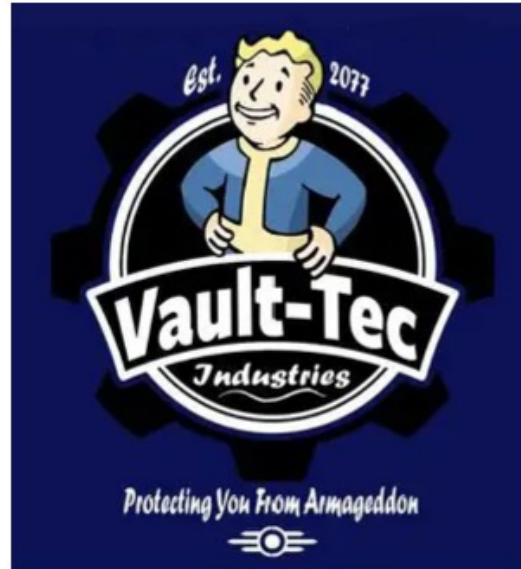
How Did We Get Here? Damages Types and Limits

- U.S. Supreme Court adopts significant, constitutional limits on punitive damages awards. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2002)
- To include evaluation of a ratio between punitive and compensatory damages:
 - "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425.
- Punitives subject to reversal and remittitur
- Plaintiffs' lawyers respond -- sky high pain and suffering demands (sometimes coupled with punitive damages rhetoric)
- Only about half of states have pain and suffering caps, and only a handful cap in all cases, not just medical malpractice



How Did We Get Here? Third Party Litigation Funding

- Increasing concerns about the growth of third-party litigation funding
- Enables
 - Deferred or no settlement
 - More (and better) expert work
 - Longer and more complex trials
- *Very* big business
 - Projected at \$31 billion annual investment by 2028
 - More than half is directed at U.S. litigation



Getting to Shelter: At Trial



- Early, objective, and rigorous case evaluation – and valuation
- Informed not only by legal liability, but accountability
- Focus groups and mock trials
- Venue
- Motions and objections
 - Reptile theory
 - Daubert and junk science applies to damages too
 - Sufficiency of damages disclosures
 - Per diem, golden rule and anchoring arguments
 - Instruct the jury on the actual standard of care
 - Not safety or make safe or corporate safety policy

Getting to Shelter: On Appeal

- Prejudice
- Quantify the Gaps Between
 - Past medicals and future damages
 - Economic and non-economic
 - Compensatory and punitives
- Argue the Standards
 - Safety rules are not the standard of care
- Constitutional Limits
 - Even compensatory damages can violate due process if they are grossly excessive
 - Punitive damages – even those less than the “outer limit” of 9 times compensatory damages – where compensatory damages are “substantial”





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Partner | Snell & Wilmer (Salt Lake City, UT)

Amy Sorenson is a nationally recognized civil litigator with nearly three decades of experience in the federal and state courts of Utah, Nevada, and California. With a collaborative approach and an energizing presence, Amy has led high profile matters ranging from complex business litigation to federal Constitutional and statutory “bet-the-company” challenges and beyond. A trusted advisor to business both in and out of the courtroom, Amy also has led and resolved difficult internal investigations matters. Her industry-specific knowledge includes financial services, higher education, sports, and technology. Driven by a strong sense of duty and service, Amy has never shied away from a challenge she believes in. Amy’s leadership includes acting as co-chair of the firm’s Financial Services Litigation and Litigation, Investigations, and Trials Practice Groups, formerly serving on the firm’s Expanded Executive Committee, and founding the Snell & Wilmer Women’s Initiative, which aims to support the career development of Snell & Wilmer’s women attorneys. For her community, Amy is proud to have served as co-chair of the Utah State Bar Access to Justice Commission since 2018 and to have led the most recent Magistrate Judge Merit Selection Panel for the U.S. District Court for the District of Utah.

Services

- Litigation, Investigations, and Trials
- Financial Services Litigation
- Intellectual Property Litigation
- Trust and Estate Litigation
- Investigations, Government Enforcement, and White Collar Defense
- Appeals and Critical Motions
- Education
- Data Centers

Awards & Recognition

- Legal 500, Salt Lake City Elite, Commercial Disputes (2026)
- Lawdragon, Top 500 Global Leaders in Crisis Management (2025-2026)
- The Best Lawyers in America® - Commercial Litigation (2014-2016, 2018-2026); Bet-the-Company Litigation (2024-2026); Banking and Finance Litigation (2024-2026)
- The Best Lawyers in America®, Salt Lake City Lawyer of the Year, Bet-the-Company Litigation (2026)
- Chambers USA, America’s Leading Lawyers for Business®, Litigation: General Commercial (2017-2025)
- Mountain States Super Lawyers® - Civil Litigation: Defense (2013-2025); Top 50 Women Lawyers (2014-2015, 2018-2024); Top 100 (2018, 2021-2024); Rising Stars Edition (2012)
- Utah Business Magazine, Utah’s Legal Elite - Civil Litigation (2007-2009, 2012-2015, 2017-2019, 2021-2022); Commercial Litigation (2020); Litigation, General Commercial (2025)
- Federal Bar Association, Utah State Bar, Distinguished Service Award (2021)
- The American Lawyer & Corporate Counsel, Top Rated Lawyer in Technology (2013)

Education

- University of California, Berkeley, School of Law (J.D.) - California Public Employee Relations Journal, Berkeley, California; American Jurisprudence Award, White Collar Crime, Recipient; Dragonette Memorial Award for Outstanding Achievement in Civil Litigation Trial Practice, Recipient; Prosser Prize, Civil Trial Practice, Recipient
- Yale University (B.A., English, cum laude, with distinction)
- Harvard University, John F. Kennedy School of Government, Executive Education, Women and Power Program



Ashby Pate

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Early & Often: Why Appellate Counsel Belongs at the Table on Day One

Early & Often—The Top Ten Reasons to Get Appellate Counsel on Board Before Things Go Sideways

R. Ashby Pate and Terry McCarthy

Sophisticated companies are beginning to recognize a fundamental truth about complex litigation: the best time to think about an appeal is long before one becomes necessary.

The traditional model of engaging appellate counsel only after an adverse verdict is now giving way to the practice of embedding appellate specialists within trial teams from the outset of high-stakes cases. This shift reflects a growing understanding by most sophisticated companies that appellate lawyers are not merely post-trial damage control specialists, but rather strategic partners who can strengthen trial court outcomes, drive down settlement values, bolster written product, and preserve appellate issues for the future.

For cases with high exposure, precedential value, or—for cases that are already in a ditch as a result of a series of adverse rulings—collaboration with appellate counsel boosts the likelihood of favorable outcomes and often saves clients millions in post-trial wrangling and adverse judgments.

Nowadays, the question is not whether a case might benefit from appellate involvement—it is whether you can really afford to proceed without it when substantial money is at stake.

Whether you are a trial counsel advocating for early appellate support to your client, or whether you are a client advocating for early appellate support to a skeptical board, here are the top ten reasons why getting appellate counsel on board early and often will pay huge dividends in the long run.

Reason One: Preserving Error for Appeal

File this one under Captain Obvious, but it really does bear repeating—no aspect of appellate practice is more frequently neglected than proper error preservation.

In a recent closed-door session with members of the Alabama Supreme Court, justices indicated that the reason the Court issues so many affirmances without an opinion—in Alabama, they are called “Affirmed, No Opinions,”—is not because the Court was too lazy to write a lengthy opinion, but because, far too often, counsel had failed to preserve a rather obvious error during trial. And the justices just didn’t want to throw the offending lawyers under the bus.

Record preservation missteps are common, even among experienced litigators. An appellate lawyer embedded within the trial team keeps a constant eye on preserving arguments for potential appellate review while trial counsel focuses on witness preparation, courtroom advocacy, and jury persuasion. Appellate counsel can ensure that objections are made clearly, specifically, and timely—because a party who fails to preserve an issue by objecting in a timely manner waives review of that issue in the appellate courts. This division of labor allows trial lawyers to take calculated risks and pursue aggressive strategies with confidence, knowing their options are being preserved.

Reason Two: Strengthening Dispositive Motions Practice

Ten years ago, I participated in drafting an ABA Law Journal article with the Editor of Black’s Law Dictionary, Bryan A. Garner, entitled *The Clear Opener: How to Avoid Mucking Up the Most Crucial Part of Discourse*. In it, we described the deep issue approach to brief writing that our firm now employs when hired as appellate counsel to draft—or beef up—dispositive motion practice at the request of trial counsel. The dividends this approach has paid over the years would be hard to measure, even in state court where these kinds of motions are routinely waste basketed.

The truth is, dedicated appellate lawyers excel at distilling complex legal arguments into clear written work for busy judges. Their strong legal research and writing skills—the bare minimum for appellate work—translate into more persuasive briefs at the trial court level—from preliminary

objections to jurisdictional motions and class certification oppositions, to motions to dismiss and motions for summary judgment. An early investment in identifying and briefing dispositive legal issues can speed up the resolution of a case by motion or settlement.

Bringing in a skilled appellate lawyer to brief a dispositive motion can increase the likelihood of a win in the trial court. Given the high rate of affirmance on appeal, securing a victory at the trial level substantially increases the likelihood of ultimate success.

Reason Three: Providing a Fresh Perspective

Trial lawyers can become deeply invested in their cases, which can make it difficult to evaluate arguments and strategy with objectivity. Appellate counsel bring fresh eyes and an ability to see the big picture.

As generalists with broad experience across different substantive areas of law, appellate lawyers may identify issues that are not within the knowledge or experience of the trial lawyer. They can provide an unbiased assessment of the merits of claims and defenses, evaluate the strength of legal arguments, and offer candid feedback about case strengths and weaknesses.

Appellate counsel can also act as the client's eyes and ears in the courtroom, providing an experienced and objective view of the progress of the trial. This detached perspective helps trial counsel and clients make informed decisions about strategy and settlement throughout the litigation. The appellate lawyer's training to see the case through the same lens as appellate judges provides insight that is invaluable when determining which arguments to emphasize and which battles to fight.

Reason Four: Drafting Motions in Limine

Before and during trial, appellate counsel can assist trial counsel with developing critical evidentiary motions, including motions in limine to exclude damaging evidence and damaging experts.

These motions represent a crucial opportunity to shape the evidence the jury will hear and to frame legal issues for potential appellate review. Appellate lawyers can draft or respond to motions in limine, offers of proof, limiting instructions, and motions on issues of privilege or confidentiality. When a court excludes important evidence—whether through a motion in limine or during trial—appellate counsel can also ensure that a proper offer of proof is made so that the substance and significance of the excluded evidence are clearly reflected in the record for potential appellate review.

Importantly, trial lawyers should understand that a trial

court's rulings on motions in limine are usually preliminary in nature. The inherent purpose of a motion in limine is to prevent the proponent of potentially prejudicial matter from displaying it to the jury until the trial court has ruled on its admissibility in the context of the trial itself. Because such rulings typically are not final and definitive, counsel should raise timely and appropriate evidentiary objections throughout the trial to preserve issues for appeal. Appellate counsel embedded in the trial team can ensure that favorable in limine rulings are properly protected and that objections are renewed as necessary when evidence comes in at trial.

Reason Five: Ensuring Proper Jury Instructions and Verdict Forms

Jury instructions represent one of the most technical yet crucial aspects of trial practice—and one that is often the most ripe for appealable error. The instructions to the jury provide the framework for the verdict form, and the verdict form formalizes the jury's decisions on the case. Both can influence the jury's ultimate answers and control what issues may be raised on appeal.

Appellate counsel can help draft jury instructions, verdict forms, or proposed findings of fact and conclusions of law. If a jury instruction proposed by an opponent or given by the court contains an incorrect statement of law, appellate counsel can ensure that proper objections are made. Counsel must submit preferred instructions in writing, object to proposed instructions with specific legal grounds, and reassert objections during the charge conference. All objections must be made before the jury is instructed and begins deliberations to be preserved for appeal.

Verdict forms require similar attention, and appellate counsel can help trial counsel navigate the difficult tactical decisions about how detailed the verdict form should be.

Reason Six: Identifying Interlocutory Appeal Opportunities

Time is money—and interlocutory appeals can buy a lot of time.

An appellate team can advise trial counsel about whether a ruling constitutes an appealable interlocutory order, and whether it should be appealed during or after trial—and they can take the laboring oar when it comes to drafting the appeal while discovery is still hot and heavy for trial counsel. Knowing when to seek early intervention by the appellate courts can be a litigation game-changer and, if successful, can save the client substantial time and money.

This strategic awareness requires both familiarity with

the procedural rules governing interlocutory appeals and judgment about when such appeals are likely to succeed. Appellate specialists, with their regular practice before reviewing courts, are uniquely positioned to guide trial counsel on whether to pursue immediate review of adverse rulings.

Reason Seven: Creating Settlement Leverage

Let's be honest—this is the most important reason of all. The visible presence of appellate specialists on a trial team reinforces the significance of the case and can influence how opposing counsel, opposing parties, and even the court approach key decisions throughout the litigation. Again, time is money. And sophisticated opponents must factor in not just the risk of an adverse trial verdict, but also the likelihood that any judgment will survive post-trial challenges and appeals and, at a minimum, drag on for years. When opponents recognize that the trial team is prepared for a long appellate battle, this often leads to more realistic settlement discussions earlier in the litigation.

The investment in specialized appellate counsel signals that significant interests are at stake—whether financial exposure, precedential value, or strategic business implications—thereby elevating the perceived importance of the case. Parties who would otherwise roll the dice at trial become more amenable to reasonable resolutions when they realize the opposing party is prepared to fight through the appellate process. By the time counsel waits until after an adverse verdict to engage appellate specialists, settlement leverage has often evaporated.

Reason Eight: Influencing Judicial Decision-Making

Trial judges understand that cases involving appellate counsel are being litigated with an eye toward appellate review, leading to more careful consideration of rulings and increased attention to procedural requirements.

Hiring appellate counsel early in a case tends to place trial judges on notice that each of the myriad decisions they make will be closely scrutinized and potentially brought to a higher court for review and reversal. Experience has shown that trial judges almost always take early note of an appellate lawyer participating as part of the team at the counsel table or from the gallery.

Most trial judges dislike being reversed. The presence of appellate counsel in the courtroom tends to cause them to think more carefully about legal and evidentiary rulings that could have a dramatic or even dispositive impact on the case. Bringing in appellate counsel at the trial level sends a message to both the opponent and the court that the legal issues in the case will be taken seriously and pursued to higher courts if necessary.

Reason Nine: Managing Post-Trial Motions

Post-trial motions represent the crucial bridge between trial court proceedings and potential appellate review, requiring both immediate tactical decisions and long-term strategic thinking. Appellate counsel excel at crafting post-trial motions that serve dual purposes: seeking immediate relief in the trial court while also preserving issues for appeal.

The technical requirements and tight deadlines of post-trial practice demand specialized expertise. From ensuring compliance with complex procedural rules to managing the intricate timing requirements for various post-trial motions, appellate counsel can prevent the procedural missteps that foreclose appellate options entirely. But the effectiveness of a post-trial motion often depends on groundwork laid during trial. For example, a Rule 50 post-trial motion for judgment as a matter of law is only as strong as the Rule 50 motion made before the case was submitted to the jury. If the trial motion fails to raise the correct grounds, those arguments generally cannot be added after the verdict.

Early involvement by appellate counsel helps ensure that these issues are properly framed and argued at the right time. By identifying dispositive legal gaps in the opposing party's case and making targeted Rule 50 motions during trial, appellate lawyers preserve the precise issues that can later support a renewed Rule 50 motion after judgment. Similarly, arguments that damages were excessive or inadequate must first be raised in a timely new trial motion; otherwise, the right to challenge the damages amount will be forfeited on appeal. When appellate lawyers have been embedded throughout the trial, they are already familiar with the key rulings, evidentiary disputes, and jury instruction issues that form the foundation of effective post-trial motions, allowing them to act quickly and strategically in the critical post-verdict window.

Reason Ten: Avoiding the High Cost of Waiting

Perhaps the most compelling reason to engage appellate counsel early is understanding what is lost by waiting until after an adverse verdict.

Once the trial is over, many critical opportunities are lost forever. Objections that were not made, jury instructions that were not requested, and procedural steps that were not preserved cannot be remedied on appeal. Even the most skilled appellate attorney cannot resurrect arguments that were waived at trial or create a record that was never properly developed in the first place.

Post-trial appellate counsel must work backwards through transcripts and pleadings to identify potential

issues, often discovering that the strongest arguments were foreclosed by trial strategy decisions made without appellate considerations in mind. The result is weaker appeals, lower success rates, and higher overall costs when the entire case must be reconstructed for appellate purposes.

What seems like cost savings by avoiding early appellate involvement often becomes a false economy when a substantial verdict cannot be overturned due to unpreserved issues.

Conclusion

The traditional approach of viewing appellate practice as separate from trial practice no longer serves clients

in high-stakes litigation. The collaboration between trial counsel and appellate counsel is what brings the greatest value.

Is involving appellate counsel early an added expense? Of course. But cases with high exposure clearly warrant the investment. Having appellate counsel engaged early can save costs by streamlining the legal process and increasing the likelihood of a favorable outcome from trial through any potential appeals.

The question for trial counsel and their clients is not whether they can afford to involve appellate counsel early, but whether they can afford not to.



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Ashby may have one of the most interesting resumes of any Alabama lawyer.

A former justice on the Supreme Court of the island nation of Palau, Ashby presided over hundreds of cases as a trial and appellate judge there — and he helped create that country's first-ever jury trial system. He also served as a judicial clerk for U.S. District Court Judge U.W. Clemon, one of Alabama's civil rights pioneers. He was the editor-in-chief of the Law Review for Samford University's Cumberland School of Law, and he later earned an LL.M. from the University of East Anglia in Norwich, England, where he graduated first in his class and was awarded the Sir Roy Goode Prize in international law. He is also one of only 50 distinguished lawyers and judges in Alabama currently serving on the American Law Institute, and was inducted as a Fellow into the Alabama Law Foundation in 2020, an honor limited to only 1% of all members of the Alabama Bar. Ashby draws on all of this unique experience in his general commercial defense practice, which focuses on appellate work, catastrophic injury, commercial plaintiffs' litigation and complex government litigation and investigations.

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

Practice Areas

- Arbitration & Mediation Services
- Appellate
- Class Actions
- International Disputes
- Pharma & Medical Device
- Complex Government Litigation & Investigations
- Corporate Plaintiff's Litigation

Awards

- Alabama State Bar Leadership Forum (2018)
- Benchmark Litigation, "Future Star" (2021)
- Benchmark Litigation, "Litigation Star" (2022-24)
- The Best Lawyers in America® by BL Rankings — Appellate, Commercial Litigation, Personal Injury Litigation (2021-26)
- Birmingham Business Journal, "Top 40 Under 40" (2017)
- Birmingham Magazine, "Top Birmingham Attorneys" (2018)
- Chambers USA, "Up and Comer" for Litigation (Alabama)
- Mid-South Super Lawyers by Thomson Reuters — Civil Litigation (2023-24)

Education

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



Mary Clift Abdalla

Forman Watkins & Krutz (Jackson, MS)

Reptile Theory: Changing Colors Like a Chameleon

Reptile Theory: Changing Colors Like a Chameleon *Mary Clift Abdalla*

While courts universally prohibit “Golden Rule” arguments—which ask jurors to step into a plaintiff’s shoes during deliberations¹—creative trial attorneys have spent years developing a method to circumvent this rule by finding another avenue to manipulate jurors’ minds and, ultimately, their decisions. In lieu of placing the juror into the shoes of the plaintiff, “Reptile Theory” tactics are used to exploit jurors’ primary instincts to promote “safety” and “protect their communities” through large verdicts. The Reptile Theory has emerged as a sinister and serpentine tactic utilized by counsel for the plaintiff to evade prohibitions of the Golden Rule argument. Therefore, it is critical for defense counsel to understand its origin and role in modern advocacy to shield juries and protect clients from the venomous fangs of these unscrupulous and calculated efforts by trial attorneys.

The Golden Rule and The Reptile Theory

Golden Rule arguments inherently prey on juror empathy “by encouraging [them] to depart from neutrality and to decide the cases on the basis of personal interest and bias rather than on evidence.” *Burnett v. Ocean Props., Ltd.*, 987 F.3d 57, 75 (1st Cir. 2021). In *Lovett ex rel. Lovett v. Union Pacific R. Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000), the Eighth Circuit noted that “such an argument is universally condemned because it encourages the jury to ‘depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.’” *Id.*; *Dole v. USA Waste Servs. Inc.*, 100 F.3d 1384, 1388 (8th Cir. 1996). Ironically, while defense counsel must now consistently battle “reptilian” tactics that target juror fear rather than sympathy, the underlying legal prohibition remains the same. Courts have long recognized that it is improper for jurors to award an injured party “damages as you feel it is entitled to...”²

¹ Golden Rule arguments are improper. See 33 Federal Procedure, L. Ed. § 77:269 (2019); see also *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1580 (10th Cir. 1984).

² *Fries v. Am. Lead Pencil Co.*, 141 Cal. 610, 613-14 (1904) (“To say that the jury may award such damages as they feel the plaintiff is entitled to is the equivalent to telling them that they may give play to their emotions of sympathy for the injured child, emotions which, eminently proper in themselves, can have no just place for fixing an award for actual damage. Thus, the jury would be justified in departing from the express rule that the damages must be proximate,

based on juror emotions.

Many argue that “reptilian” tactics and similar “conscience of the community” arguments are fundamentally improper “Golden Rule” arguments in disguise. The underlying reasoning that courts uniformly ban Golden Rule arguments runs parallel to the strategy pursued by reptilian tactics – rather than requiring jurors to make decisions based on the evidence and the law, these strategies invite jurors to make decisions based on emotional reactions and personal interest.

Origins of the Reptile Theory

The scientific underpinnings of the “Reptile Theory” trace back to the 1960s and the work of neuroscientist Dr. Paul MacLean. MacLean coined the lizard brain theory and laid the foundation for the scientific underpinnings of the Reptile Theory, which posited that humans have a part of their brains called the R-complex. The Reptile Theory is part of the broader Triune Brain Theory, where the R-Complex is the brainstem. During his research, Dr. MacLean perceived that both reptiles and mammals had common “primitive” behaviors associated with basic survival, such as enacting routines and protecting territory. Thus, MacLean determined that the human brain had evolved from the reptilian one and still contained “the old lizard brain” within it (the R-complex). Although subsequent research has cast doubt on the biological validity of his model, the Reptile Theory remains a dominate force in modern courtrooms due to its sheer effectiveness.

For litigation purposes, the Reptile Theory is commonly attributed to former theatrical director David Ball and plaintiff’s attorney Don Keenan in their book, *Reptile: The 2009 Manual of the Plaintiff’s Revolution*. While the authors marketed this tactic as a revolutionary breakthrough, the core concept is far from new. Rather, these reptilian tactics are a modern rebranding of age-old psychological principles and litigation strategies that have been used to influence jurors since the beginning of

and would be permitted, under the influence of their feelings to make an award which, based upon sympathy, would contain elements of damage, both speculative and remote.”).

American jurisprudence.

Treatment of Reptilian Strategies in Court

While no universal ban or widespread consistency exists regarding the use of reptilian tactics in courts, there has been a growing judicial trend towards courts excluding or banning reptilian tactics or questions during litigation. Exclusions of the reptile theory have taken place through protective orders and motions in limine that exclude certain statements during closing arguments or by overturning jury verdicts. However, it is imperative that defense counsel educate the court early and often as to the risks associated with allowing plaintiff's attorneys to manipulate the juries' emotions, as courts may acknowledge that such statements or strategies are improper, yet still decline to provide relief if the statements are deemed non-prejudicial.³ The following case summaries highlight where defense counsel have successfully convinced courts to exclude Reptile Theory questions or argument.

In *Brooks v. Caterpillar Global Mining Am. LLC.*, 2017 WL 3401476, *8 (W.D. Ky. Aug. 8, 2017), a district court granted defendant's motion in limine to preclude plaintiffs' counsel from attempting to present "Reptile Theory" evidence or arguments at trial. The court noted that the "Reptile Theory arguments appear to mirror the 'send the message' or conscience of the community arguments" which are "disfavored in the Sixth Circuit." *Id.* at *9. (citing *Strickland v. Owens Corning*, 142 F.3d 353, 358 (6th Cir. 1998)). The Court further stated that "any argument by Plaintiffs' counsel that attempts to urge the jury to render a verdict against Defendant on the basis of fear for the safety of the community or fear for the safety of the jury and their families is inappropriate." *Id.*

Similarly, in *Biglow v. Eidenberg*, 424 P.3d 515 (Kan. 2018), the Supreme Court of Kansas upheld the prohibition of Plaintiff's reptile arguments because they could mislead the jury regarding the actual legal duty of care. There, the trial court granted Defendant's motion in limine banning the plaintiff and his experts from using the word "safe" because the court was concerned that the jury would conflate the word "safe" with a required "standard of care which means to be the best, perfect, the most cutting edge" and was therefore inconsistent with Kansas law. *Id.* at 526-28.⁴

In *Estate of McNamara v. Navar*, 2020 WL 1934175, at

*3 (N.D. Ind. Apr. 22, 2020), the district court granted a protective order prohibiting "Reptile Theory" questions during depositions, specifically those regarding the existence and purpose of alleged "safety rules". In support of their motion for protective order, defendant relied on testimony plaintiff's counsel elicited from a prior deposition asking about "universal safety rules" pertaining to the broader public and not exclusively the plaintiff. The district court thus issued a protective order barring plaintiff's counsel from using reptilian tactics.

In *Fitzpatrick v. Wendy's Old-Fashioned Hamburgers of N.Y., Inc.*, 168, N.E.3d 361 (Mass. 2021), the appellate court affirmed the trial court's order granting a mistrial for the defendant, after a jury returned a verdict in favor of plaintiff, when plaintiff's counsel made certain statement in closing that improperly appealed to the jurors' emotions, passions, prejudices and sympathies.

In *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985), the Fifth Circuit Court of Appeals took direct issue with "the conscience of the community" argument made by plaintiff's counsel during its closing in a trucking accident caused by a defective tire. There, plaintiff's counsel told the jury, "[y]ou're going to be the conscience of the community with this verdict", while repeatedly "referencing to a community standard or expectation which would be disappointed unless the jury returned a large verdict in Westbrook's favor." *Id.* While ultimately upholding the liability portion of the verdict, the court reversed and remanded the damages portion of the verdict, finding that plaintiff's closing argument crossed a line that resulted in a verdict formed by "passion or prejudice." *Id.* at 1241. In so doing, the Court held that "[o]ur condemnation of a 'community conscience' argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation" and that "[s]uch appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders." *Id.* at 1238-39.

These cases represent a broad section of cases that have addressed the Reptile Theory at differing stages of litigation. As exemplified in these cases and as discussed more fully below, issues and disputes regarding the Reptile Theory emerge repeatedly during litigation and require thoughtful consideration throughout the entirety of a case

The Reptile Theory and Defense Strategy

In practice, the Reptile Theory is a two-prong strategy designed to bypass a juror's logic and trigger primitive survival instincts. First, plaintiff's counsel establishes that the defendant is a "community danger" by framing the

³ See *Regalado v. Callaghan*, 207 Cal. Rptr. 3d 712, 725 (Ct. App. 2016) (holding that playing to jurors' emotions and self-interest through the "Reptile Theory" is improper misconduct when Plaintiff's counsel appealed to the "conscience of the community" and urged jurors to consider "public policy" in their decision. However, while the Court viewed these comments as improper, the comments were brief and not prejudicial and did not require reversal).

⁴ See also *Griffin v. Pet Sense, LLC*, 2024 WL 1604605, at *4 (E.D. Ark. Apr. 12, 2024) (granting Defendants' motion in limine on "reptile theory." Plaintiff was prohibited from making any improper "reptile" argument that jurors must protect themselves and the community by punishing Defendants).

case around certain safety rules. Second, they attempt to convince jurors that they must use their power to mitigate future harm to society and individuals by awarding large damages to the plaintiff by focusing on safety and danger and thus tapping into human primitive desires. Counsel will often use hypotheticals to prevent future theoretical harm, since the harm has already occurred to the plaintiff, and use adjectives like “unnecessarily” and “needlessly” to activate jurors’ reptilian area of the brain and through other scenarios to blur objectivity and activate fear and emotion.

Although not uniformly banned like Golden Rule arguments, defense counsel must creatively and relentlessly defend against reptilian strategies at every stage of litigation.⁵ Defending against reptilian tactics requires counsel to identify and neutralize potential reptilian arguments at the earliest possible stage. While these tactics often favor theoretical scenarios instead of relevant facts and evidence, there are often discovery requests and deposition questions that are designed to eventually be used to inflame jurors. From the moment a complaint is served, it is important for defense counsel to securitize and audit all legal exposure, including breach of contract, failure to adhere to industry standards, citations by governing authorities or non-compliance with applicable regulations.

Plaintiff’s discovery methods are often designed to broaden the scope of litigation, placing the defendant at a heightened risk by seeking “pattern and practice” evidence. Defense counsel must remain vigilant against requests for information regarding adverse events, practices, procedures or policies that are irrelevant to the specific allegations and make necessary efforts to resist such overbreadth. Along these lines, to maintain a focused defense, counsel must strictly enforce relevant timeframe and geographical scope during production and only produce documents that fall within those parameters. Simultaneously, it is vital to collaborate with the client early to identify documents that demonstrate compliance with safety regulations and exemplify a robust “safety story” to counter a plaintiff’s narrative of negligence.

Depositions require heightened caution and must be approached with specialized preparation when a defendant is targeted by reptilian tactics. Witnesses are often subjected to leading questions designed to extract admission of oversimplified “safety rules” and “duties” designed to better position opposing counsel’s

theories of the case for trial. Perhaps the most important task is preventing a witness from inadvertently providing testimony that fosters fear and distrust among jurors. This preparation must be taken even further when a witness is testifying as a corporation representative. There, the corporate representative must be prepared to affirm the company’s commitment to safety and regulatory compliance while simultaneously defending inherent risks and professional judgments required in their industry or with their products.

Beyond witness preparation, a comprehensive defense requires a deep understanding of opposing counsel’s prior litigation strategies. In fact, if it can be demonstrated that that plaintiff’s counsel habitually employs Reptile Theory questions outside of a witnesses’ area of expertise, courts may grant a protective order to prevent witnesses from “undue emotional tactics.” For instance, in *Estate of McNamara v. Navar*, 2020 WL 1934175 (N.D. Ind. Apr. 22, 2020), the court granted the defendants request to “enter a protective order prohibiting the plaintiff’s counsel from posing ‘Reptile Theory’” questions ... during the deposition examination of the defendants.” *Id.* at *1. Even in the absence of a prior track record, defense counsel should evaluate the grounds for a protective order prior to any corporate representative depositions, arguing that abstract “safety rule” questions serve no purpose other than to inflame the jury and prejudice the defendant.

Prior to trial, defense counsel must exhaust every procedural avenue to prevent the introduction of evidence or testimony designed to incite fear or unfairly prejudice the jury. Motions in limine are an essential tool for excluding such inflammatory content and to shield defendants from the “emotional manipulation” inherent in reptilian tactics. While certain jurisdictions may be less receptive to these arguments, a well-crafted motion in limine should always include specific examples of plaintiffs’ attempt to elicit irrelevant testimony during depositions that support reptile tactics and only serve to illicit a fear-based verdict.

Ultimately, a defendant’s trial theme must center on the objective evidence and the actual damages presented, rather than theoretical risks. This theme should be utilized at the outset during voir dire to identify and select jurors who demonstrate a capacity for rational analysis over emotional reactivity. These jurors must repeatedly hear and understand that their focus should only be on the facts as demonstrated by the evidence – not on emotions or fears. Often times defense counsel faces the difficult task of refuting the emotional entreaties of plaintiff’s counsel with rational arguments, while not appearing cold, uncaring, or dismissive. During trial, defense counsel must remain vigilant, objecting to any

⁵ See generally, David R. Kott, Natalie H. Mantell, Meghan McSkimming, Keep Reptile Theory Out of the Courtroom, 62 NO. 9 DRI For Def. 20 (Sept. 2020); Kevin Deenihan, Matt Jensen, Fighting Reptile Theory in Court: Making Plaintiffs’ Attorneys Feel Survival Danger, DRI’s Trials and Tribulation (Feb. 2016); David R. Kott, Natalie H. Mantell, Meghan McSkimming, Exposing and Preventing the Use of Reptile Theory During Jury Trials, ABA newsletter (Feb. 2021), <https://www.americanbar.org/groups/litigation/resources/newsletters/trial-evidence/exposing-and-preventing-reptile-theory-during-jury-trials>.

testimony that veers into “reptilian” territory to remind the jury that their verdict must be grounded in the law and to preserve the record for appeal.

Conclusion

One of the most pressing concerns facing defense counsel and their clients is the recent proliferation of “nuclear verdicts”⁶ awarded by juries. Research into what

is driving these large verdicts shows that jurors are falling prey to the emotional appeals and safety concerns that form the very backbone of the Reptile Theory. As such, this current litigation climate requires diligent oversight and opposition of any references to the Reptile Theory before the jury and to stay informed of how courts in various jurisdictions are approaching it.

⁶ According to the Chamber of Commerce’s Institute for Legal Reform, the term “nuclear verdict” refers to any award or settlement that exceeds \$10 million.



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Going straight into law school from undergrad, Mary Clift was determined to immediately exercise her love for reading and writing, as well as her intense work ethic. Now, as an attorney and a mother, each day is an opportunity for her to do both. Creative and hard-working, Mary Clift is driven by the daily challenges that come with practicing law. To her, work is an opportunity to learn, each day offering her a chance to work harder and be better.

As an avid football fan, Mary Clift understands the importance of strategy and approaches her cases with innovative concepts and solutions. When working with Mary Clift, a client can expect to receive exceptional effort from a lawyer who counts every day as a blessing and takes great delight in working hard for her family and her clients.

Practice Areas

- Asbestos
- Benzene
- Product Liability
- Workers' Compensation

Important Litigation Involvement

- Represented a large premises defendant before the South Carolina Workers' Compensation Commission against claims that hundreds of former plant workers developed neurological, cardiovascular, and/or pulmonary injuries as a result of alleged workplace chemical exposure. After a two week trial, our team received extremely favorable rulings. The Commissioner completely zeroed out the claimants in nine of the thirteen cases and found another defendant completely responsible for a tenth case. As cases were pending on appeal, the parties reached a global settlement for the entire inventory of hundreds of pending claims.
- Represented a commercial real estate company in federal court in a case involving the flooding of a shopping center and involving a FEMA Letter of Map Revision. Plaintiff sought compensation related to the flood damage and for the store's closure for 10 months in the amount of approximately \$2.5 million. Our team filed a motion for summary judgment, which was granted by the Court; all claims against the client were dismissed, and subsequently the client obtained an award of a portion of costs and fees.

Professional Recognition

- A/V Preeminent Rated by Martindale-Hubbell (2023)
- Selected to Mid-South Super Lawyers (2023-2025)
- Selected to The Best Lawyers in America® (2019-2026): Product Liability Litigation – Defendants and Mass Tort Litigation/Class Actions – Defendants
- Selected to Mid-South Rising Stars (2015-2022)
- Top 10 Honoree, Top 50 Under 40 Business Leader, Mississippi Business Journal (2020)
- Top 50 Leading Lawyers selected by the Mississippi Business Journal
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Education

- University of Mississippi School of Law, J.D., cum laude
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Taming the Beast: Defending Against Abusive 30(b)(6) Notices

Taming the Beast: A Guide for Defending Against Abusive 30(b)(6) Notices

Brian Kern and Paul Hassell

Despite the rule's aim to streamline discovery, overbroad and excessive 30(b)(6) notices are increasingly common and burdensome. This roundtable dives into best practices for responding strategically, from initial objections and negotiations to witness preparation and motion practice. Participants will discuss preparing corporate witnesses to handle disputed topics, when "I don't know" is an appropriate answer, and when to hire witness consultants.

PHASE ONE: The War Starts Before the Notice Is Received

It is imperative that savvy defense counsel working closely with the client begin preparing for the 30(b)(6) notice before it ever arrives. This includes identifying potential designees, mapping out institutional knowledge on direct and tangential case issues, locating anticipated documents or relevant document repositories, and identifying any gaps in the client story. Early action prevents forced, lastminute designations and reduces the risk that plaintiff's counsel will exploit internal confusion, which can quickly torpedo case defense posture.

Remember, this is when counsel begins shaping the future testimony—long before the topics are written. Damage control is exponentially more difficult than prevention. Counsel must consider early on whether to proactively engage experienced deposition or trial consultants. This decision is ideally made long before or at worst immediately after the notice arrives. The goal for adequate preparation and client involvement is streamlined communication and decision making ultimately resulting in an easier process for all. This can be especially critical for new clients or clients with less experience with 30(b)(6) deposition practice.

PHASE TWO: The Notice Arrives

When the notice is served, the stakes immediately escalate. 30(b)(6) depositions now sit at the center of

modern discovery disputes. What was originally designed as an efficient mechanism for capturing an organization's knowledge has, in many cases, become a tool for forcing costly internal investigations, crafting plaintifffriendly narratives, and manufacturing admissions. Defense counsel cannot treat these notices as routine; each abusive 30(b)(6) notice is an attempt to define the company's story for the immediate case and beyond. The only effective response is to narrow the scope, control the designations, and prepare witnesses with the same rigor as you would bring to trial preparation and trial.

At this juncture counsel is well-advised to treat the notice as a discovery request that requires responses and client input. Perform a once over, noting what might be reasonably available from the client and what seems absurd or broad on its face. Remember, the ultimate goal is to prevent fishing expeditions and to develop future arguments to a Court on why any specific request should be quashed.

PHASE THREE: Objections, Negotiation, and MeetandConfer Strategy

This is where the real battle occurs. Sprawling, burdensome depositions are a defendant and defense counsel's worst nightmare. Each vague, narrative, or overbroad topic must be challenged immediately.

The first step is refusing to accept the premise of an abusive notice. Object specifically, meet and confer aggressively, and force the requesting party to define the actual information they seek, rather than allowing a deposition on "everything the company knows." From there, control the battlefield: divide topics among carefully chosen witnesses, prepare them for the limits of their designation, and make clear that speculation, legal conclusions, and expert opinions are not a part of the company's testimony.

Defense counsel should seek a protective order to cabin abusive topics. Otherwise, an overbroad notice might transform a discovery tool into an unbounded narrative deposition that binds the corporation. Properly

handled, a 30(b)(6) deposition should not be a liability for the defense—it should be an opportunity to define the company's knowledge with precision and prevent the other side from manufacturing admissions through ambiguity or overreach—but getting there requires a lot of work and buyin from the company. The testimony lives forever, so you (and the client) better get it right.

Rule 30(b)(6) imposes a defined and limited duty. An organization must testify about information that is “reasonably known or reasonably available,” not create new analyses, undertake boundless investigations, or adopt plaintiff's characterizations of disputed events. Courts routinely reject topics that are vague or sweeping or demand knowledge the corporation does not possess. Framing objections, meet-and-confer efforts, and preparation around this standard not only protects the company, but it also builds a clean record for judicial intervention when a plaintiff insists on treating the rule as a license for narrative discovery during the deposition itself.

PHASE FOUR: Witness Selection and Preparation

Once scope is controlled, the defense must select, train, and prepare the designees. This is the longest and most critical phase. Remember, a corporate witness is obligated to testify about reasonably available information, not to investigate endlessly or fill gaps in the plaintiff's case.

Selecting the designee(s) is both an art and a science. Sometimes it is strategically wiser to put forward a witness who genuinely does not know than one who knows too much. In litigation, as in life, “a little knowledge is a dangerous thing” and sometimes a witness who truly knows little is safer than one burdened with too much to tell. In many instances, the most honest and defensible answer is simply “the company does not have that information” or “I do not know after reasonable inquiry.”

Legacy masstort litigation offers a stark lesson. Companies repeatedly rotated corporate representatives because no single current employee possessed the necessary historical knowledge. This led to serial depositions, judicial frustration, and the appearance of evasion. The opposite danger is equally real: designating a witness who knows “where all the bodies are buried” invites damaging concessions that cannot be walked back. Balancing these risks can feel nearly impossible, particularly when counsel must represent the company's position. In that setting, what looks like training a “puppy” from the ground up is not about fostering independent judgment at all; it is the intentional construction of a witness who does not—and, in the face of an overbroad notice, should not—supply personal testimony beyond the corporation's disclosed knowledge.

Jurors, however, evaluate these witnesses through an entirely different lens than defense counsel. They begin with deep mistrust of corporate representatives. And they frequently complain that defendants “put someone up who does not know anything.” This is especially noted with current employees who are perceived as having “a dog in the fight” and lacking objectivity.

Socialscience research on credibility defines three core pillars: trustworthiness, competence, and likeability. Even factually relevant testimony fails if the witness appears arrogant, hostile, selfserving, or evasive. Excessive “I don't know” answers reinforce the suspicion that the company is hiding something. Former employees or retirees often project greater credibility because they are no longer tied to the organization. Newer employees, meanwhile, must still demonstrate knowledge to avoid looking uninformed. The goal is balance: produce what the rule requires while protecting the company and presenting a witness jurors can respect.

Jurors do not expect a corporate representative to know everything. They understand that some information is second-hand, unavailable, or simply not documented. What they penalize is an overly guarded demeanor or excessive “I don't know” answers. The totality of the witness's responsiveness determines credibility. A witness who spends an entire deposition saying “I don't know” cannot credibly transform into an expert at trial. Preparation must train the designee to answer as “the company” rather than as an individual.

Preparation Mechanics

Thorough preparation addresses both substance and delivery. It must begin when the notice is narrowed. Divide discrete topics among multiple witnesses, when appropriate. Prepare each designee on the strict limits of their designation so they never speculate, offer legal conclusions, or give expert opinions. Early selection planning is essential; if a consultant is brought in late, the strategy is already baked in.

Witnesses should master every relevant document including information produced in discovery, internal policies, contracts, emails, public websites, and industry publications. Plaintiff's counsel will arrive with a fully informed narrative; your witness(es) must be the undisputed expert(s) on the company's own materials. Counsel should be prepared with their own research and perspective having placed themselves in the Plaintiff's shoes and approaching from that viewpoint.

Creating protected attorney work-product tools exclusively for preparation is helpful: flowcharts illustrating document connectedness, corporate structure, and regulatory

compliance. Tie internal safety standards to federal, state, local, and/or industry standard requirements and show where the company exceeds them. Use slide decks only in prep. These visuals help witnesses explain “how things work” crisply and consistently, preventing the confusion that plaintiff’s counsel will attempt to exploit.

The goal of preparation, therefore, is to train the designee to inhabit the corporation’s position by answering as the company rather than as an individual so that their testimony not only responds to plaintiff’s questions but can also leave even skilled examiners momentarily disoriented about where the narrative can be safely pushed next.

Practice the art of honest concessions. Credible witnesses concede what must be conceded such as an unsigned document or a gap in records because certainty without accuracy destroys trust. The witness who admits minor points gains credibility to hold firm on core positions. Additionally, mock depositions, including videotaped sessions, reveal non-verbal habits that undermine likeability and allow counsel to refine delivery. Prepare designees to concede obvious facts while holding ground on matters that truly matter. Emphasize everyday language over corporate jargon. A poor 30(b)(6) performance reinforces negative stereotypes and can drive outlier damage just as credible, likeable professional witness earns the benefit of the doubt. The witness must project humanity and competence under oath.

Consultants can also assess witnesses’ strengths and weaknesses against juror psychology, refine delivery, and help strike the precise balance between protection and forthrightness. Early collaboration, combined with pre-discovery research and witness prep, prevents reactive scrambling and turns the deposition into a settlement strengthening opportunity rather than a liability.

PHASE FIVE: The Deposition

By this point, the deposition should be the easiest part of the process for the witness. However, even the best-prepared witness needs active protection in the room. Defense counsel must enforce the scope, guard against examiner overreach, and preserve the record without hesitation.

Defense counsel should lodge concise but consistent objections to vague, compound, or misleading questions, and should make clear when an examiner strays beyond the witness’s designated topics. When a question plainly calls for personal knowledge only, counsel should say so on the record to prevent the answer from being treated as a corporate admission (while being cognizant of local practice regarding deposition conduct).

These boundaries not only help the witness stay within their lane; they also create a paper trail for limiting the use of problematic testimony later and can also reinforce witness confidence during the examination.

PHASE SIX: After the Deposition: Containment, Use, and Strategic Leverage

The 30(b)(6) deposition does not end with the last question. What happens next determines how the testimony affects the case. Defense counsel has four objectives:

1. Evaluate transcript for necessary clarifications.
2. Consider corrective declarations if appropriate.
3. Assess whether plaintiff exceeded scope and if a motion is needed.
4. Align testimony with trial themes and summary judgment strategy.

Conclusion: Turning the Beast Into an Opportunity

Properly handled, a 30(b)(6) deposition should be considered the moment to define the company’s knowledge with precision and prevent manufactured admissions rather than a risk. It requires significant work and company buy-in, but the testimony lives forever. Approach it with the same discipline you bring to trial, and you will not merely tame the beast; you will make its testimony work for the defense at every stage of the case.

Defense counsel who refuse the abusive premise, select and prepare witnesses with juror psychology in mind, and leverage consultants early will transform one of litigation’s most dangerous tools into a precise, credible definition of the company’s position. The testimony that “lives forever” then becomes an asset, not a liability.

Therefore, a 30(b)(6) deposition becomes the company’s best opportunity to define its story on its own terms and to head off narrative risks that cannot be undone later. Because the testimony will follow the case wherever it goes, defense counsel must shape it from the outset with the same intentionality they bring to the courtroom.

Practicable Defense Checklist for the Abusive 30(b)(6) Notice:

- Challenge vague, narrative, or undefined topics immediately.
- Demand clarity and definitions before agreeing to designate.
- Assign discrete topics to multiple carefully selected designees.
- Prepare each witness only within their scope—no spillover.
- Use visual aids to teach complex internal processes.
- Protect the record with targeted, concise objections.

Taming the Beast: Defending Against Abusive 30(b)(6) Notices

- Encourage honest concessions to build credibility.
- Seek court relief when the notice demands what Rule 30(b)(6) does not.



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Practice Areas

- Medical malpractice defense
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- Insurance law
- Products Liability
- Admiralty
- General negligence

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- South Carolina Bar Association
- American Bar Association
- South Carolina Defense Trial Attorneys' Association

Education

- J.D., Charleston School of Law, 2009 - Federal Courts Law Review, Member; Student Bar Association, Member
- B.S., Clemson University, 2002
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JEOPARD-izing Your Career: Regulating Employee Speech

JEOPARD-izing Your Career: Regulating Employee Speech

Malissa Wilson

Can employers discipline or terminate employees for their actions, statements, or posts outside of work hours? In this age of viral social media, widely shared public opinions, and highly visible public behavior, employers face growing challenges in determining when an employee's conduct crosses the line from protected expression to behavior that justifies workplace discipline. To navigate the legal minefield of regulating employee speech and other conduct, it is essential that employers understand the parameters and limits of their authority. Against this backdrop, employees who believe they have been disciplined or terminated unfairly often turn to established legal protections to challenge those decisions.¹ Though it is not the only cause of action available to employees who believe they have been wrongfully terminated, many choose to pursue claims under Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees on the basis of a protected characteristic.² Protected characteristics include race, color, religion, sex, and national origin. Title VII's protection extends to treatment that results in adverse employment actions, such as termination or discipline, as well as to hostile work environments and retaliation caused by an employer's bias toward a protected trait.³ Although Title VII requires employees to first exhaust administrative remedies, such as filing a charge with the Equal Employment Opportunity Commission ("EEOC"), employment discrimination claims may ultimately proceed to court. These issues most often arise in three recurring contexts – what employees wear, what employees post, and what employees do away

from work – that test the boundaries between protected expression and actionable conduct.

What Employees Wear

Many employers require employees to adhere to a uniform or dress code, but issues can arise when employees choose attire that departs from conventional workplace norms. For example, when James Halbauer wore a "Make America Great Again" hat to work at the post office, one of his coworkers, Mashalina Spicer, objected.⁴ His supervisor allegedly told him that he would "escort him from the premises" if he wore the hat again to work.⁵ Halbauer claimed that his employer treated him differently from Spicer, a Black woman. A week after he wore the "Make America Great Again" hat, he said that Spicer wore a "Black Lives Matter" shirt and called him a racist, but was not similarly reprimanded.⁶ He noted several other instances of disparate treatment.⁷ Halbauer also complained to his supervisor that Spicer was "uttering blasphemy" that "offended him."⁸ Eventually, he claimed that "because of his supervisors' discrimination and Spicer's religious harassment and abusive language, he was unable to continue working at the post office and had to enter counseling."⁹ Although he was not fired, he brought Title VII claims for reverse discrimination as a white male and hostile work environment based on religion.¹⁰

The Western District of Kentucky did not dismiss his claims outright. The court granted summary judgment on the hostile work environment claim because the conduct Halbauer complained of was not sufficiently severe.¹¹ Borrowing the phrase from the Sixth Circuit, the court wrote that "[o]ffensive though these incidents may

¹ While the first Amendment is not generally applicable in workplace discrimination cases involving private employers, Title VII causes of action are available to any employee, public or private. See *Johnson v. Comm'n on Pres. Debates*, 202 F. Supp. 3d 159, 173 (D.D.C. 2016) ("It is fundamental that the First Amendment binds only the actions of the Government and does not apply to actions of private persons or entities."); see also *Ponce v. Billington*, 679 F.3d 840, 844 (D.C. Cir. 2012) ("[T]he general provisions of Title VII apply with equal force in both private and federal-sector cases.").

² Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17.

³ See Robert J. Nobile, *Human Resources Guide* ch. 1, § 1:2 (Westlaw, Feb. 2025 update) (discussing causes of action under Title VII); see also *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 259 (1981).

⁴ *Halbauer v. DeJoy*, 538 F. Supp. 3d 736, 740 (W.D. Ky. 2021) [hereinafter Halbauer I].

⁵ *Id.*

⁶ *Halbauer v. DeJoy*, No. 320CV00533GNSRSE, 2023 WL 4372710, at *3 (W.D. Ky. July 6, 2023) [hereinafter Halbauer II].

⁷ *Halbauer I*, 538 F. Supp. At 740.

⁸ *Id.*

⁹ *Id.* at 741.

¹⁰ *Id.*

¹¹ *Id.* at 744.

have seemed to him, they [did] not paint a picture of an environment creeping with anti-Christian sentiment.”¹² Halbauer’s reverse discrimination claim initially survived dismissal, but the court later dismissed the claim with prejudice.¹³

Although Halbauer complained about Spicer’s “Black Lives Matter” t-shirt, the court in Halbauer did not address whether such a shirt could be prohibited in the workplace. However, the First Circuit Court of Appeals took up the issue in *Kinzer v. Whole Foods Market, Inc.*¹⁴ That case involved three Whole Foods employees who violated the store’s dress code by wearing “Black Lives Matter” masks.¹⁵ The three employees – Hayley Evans, Christopher Michno, and Savannah Kinzer – brought Title VII retaliation claims after Whole Foods terminated them.¹⁶

Whole Foods’ dress code prohibited “apparel displaying messages or brands not affiliated with the company” and specified that masks must be without “any visible slogan, message, logo or advertising.”¹⁷ All three plaintiffs noted that, prior to 2020, management had been lax in enforcing the dress code.¹⁸ However, under the store’s policy, “if an employee showed up to work wearing a BLM mask and refused to replace it, they would be subject to progressive disciplinary actions, which, eventually, would lead to termination.”¹⁹ That policy was ultimately applied to Haley Evans and Christopher Michno, both of whom were terminated after refusing to stop wearing “Black Lives Matter” masks to work.²⁰ The First Circuit found that Evans and Michno could not show that Whole Foods’ disciplinary policy was a pretext for retaliatory animus.²¹ Citing a previous case on a similar issue, the court explained that the fact that Whole Foods only began enforcing the dress code policy after employees started wearing “Black Lives Matter” masks to work was not enough to establish discriminatory animus because of the new challenges in “the era of employee mask-wearing.”²² The court granted summary judgment on these claims.²³

While both Evans and Michno engaged in some activism, Kinzer’s protected activities were much more extensive.²⁴ Kinzer wore “Black Lives Matter” masks to work “both to express support for the Black community and to protest Whole Foods’ discipline of employees who had worn such masks at other stores.”²⁵ Beyond her own actions, however, she organized her coworkers to do the same by distributing dozens of masks to other Whole Foods employees.²⁶ Kinzer was identified as a leader, organizing protests outside the store that attracted community members and public officials and received media attention.²⁷ Her other efforts included organizing a town hall with Whole Foods workers across several states, using social media to criticize the store’s policy, and launching a campaign to raise funds “to offset the lost wages of protesting workers.”²⁸ Whole Foods executives referred to her as an agitator and activist.²⁹

Unlike Evans and Michno, Kinzer met her burden of showing that Whole Foods’ stated reasons for her termination could have been pretextual. She presented evidence that her termination was based on a final disciplinary point that would ordinarily have been excused and that high-level executives were involved in the decision to terminate her, and that the action followed “a succession of multiple protected acts in the weeks leading up to the adverse employment action.”³⁰ Finding a genuine dispute of material fact as to her retaliation claim, the court denied summary judgment.³¹

Make America Great Again hats and “Black Lives Matter” masks both convey clear, intentional political messaging. However, sometimes employers can interpret political statements where none are intended. For example, in the case of Erin Conner, a Black woman employed by the City of Naples Airport Authority, her human resources manager read a “subversive” political message into a t-shirt featuring a fictional comic-book character.³² Conner’s t-shirt depicted Marvel’s Black Panther.³³ Conner’s HR manager thought the shirt referenced the Black Panther political party, deemed it “offensive,” and required a meeting to address it.³⁴ Three months after Conner raised multiple complaints to her supervisor

¹² Id. at 745 (quoting *Henry v. Fed. Rsrv. Bank of Atlanta*, 609 F. App’x 842, 845 (6th Cir. 2015)).

¹³ Id.; Halbauer II, 2023 WL 4372710, at 7.

¹⁴ 99 F.4th 105 (1st Cir. 2024).

¹⁵ Id. at 107.

¹⁶ Id. at 108.

¹⁷ Id. at 109.

¹⁸ Id. at 110-13.

¹⁹ Id. at 109.

²⁰ Id. at 113-15.

²¹ Id. at 120.

²² Id. at 122 (quoting *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263, 274 (1st Cir. 2022)).

²³ Id.

²⁴ Id.

²⁵ Id. at 110.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id. at 110-11.

³⁰ Id. at 118-20.

³¹ Id. at 120.

³² *Conner v. City of Naples Airport Auth.*, No. 2:21-CV-332-SPC-NPM, 2021 WL 4593791, at 1 (M.D. Fla. Oct. 5, 2021).

³³ Id.

³⁴ Id.

in response to HR's meeting, she was terminated.³⁵ She alleged that she was terminated "because NAA believed that [she] must have been trying to make a racially-based statement because she was an African-American woman wearing a t-shirt of the 'black panther' comic book character, and because she objected to race discrimination" and brought Title VII racial discrimination and retaliation claims.³⁶

Because she did not adequately plead her discrimination claim, the court granted summary judgment in favor of her employer.³⁷ However, Conner's retaliation claim survived. Her complaints objecting to racial discrimination constituted protected activity sufficient to establish a prima facie case of retaliation.³⁸ Although three months elapsed between her complaints and her termination, she alleged sufficient facts to state a plausible claim.³⁹

What Employees Post

Employee activity on social media can quickly create challenges for employers. Posts that reflect discriminatory views, spread misinformation, or provoke political controversy may expose employers to reputational risk and public backlash. Although a clear and comprehensive social media policy can help mitigate these concerns, courts continue to see Title VII claims brought by employees alleging unlawful termination for their online expression.

For example, Southwest Airlines Company terminated flight attendant Charlene Carter "for publicly posting and privately sending to the president of the flight attendants' union graphic images and videos of aborted fetuses."⁴⁰ Carter claimed that her termination was religious discrimination in violation of Title VII.⁴¹ The case went to trial, and a jury ultimately returned a verdict in Carter's favor. The case was subsequently appealed to the Fifth Circuit.⁴²

Carter was "a pro-life Christian, who believe[d] abortion is a taking of human life contrary to the teachings of the Bible, and a staunch opponent of organized labor."⁴³ While not a member of Southwest's workers' union, Carter "vocally opposed the Union's leadership," posting her views on

social media and messaging the union's president, Audrey Stone, directly.⁴⁴ When the union posted about its involvement in the January 2018 Women's March on Washington, Carter was "outraged by what she viewed as Union-sponsored support for abortion."⁴⁵ She sent Stone a series of private Facebook messages, which included several videos of aborted fetuses and "a photo of women wearing costumes depicting female genitalia."⁴⁶ She made similar posts publicly.⁴⁷

Southwest terminated Carter. It asserted that she had "represented the [C]ompany in a manner that [was] disparaging" to its employees in violation of its social media, workplace bullying and hazing policies and "that each of those policy violations was 'an independent sufficient basis for termination.'"⁴⁸

The Fifth Circuit noted that because the "critical question" in a Title VII discrimination claim is "what motivated the employer's employment decision," an employer can violate Title VII "if it takes an adverse employment action 'with the motive of avoiding the need for accommodating a religious practice.'"⁴⁹ Considering evidence that showed that "many Southwest employees likewise held pro-life, Christian beliefs," the court found that Carter failed to show direct evidence that her religious beliefs were a motivating factor in her termination.⁵⁰ She also could not show that any true comparators were treated differently from her regarding the company's social media policy – she could not point to anyone who "sent any direct messages to a coworker" or whose communications were "hostile in nature."⁵¹ The Fifth Circuit directed the lower court to enter judgment as a matter of law for Southwest as to Carter's belief-based Title VII claim.⁵²

Carter was terminated for a series of posts, but sometimes a single comment can be enough grounds for an employee's termination. Companies have likewise relied on social media policies to justify terminating employees for Facebook posts suggesting harm towards protesters.⁵³ For example, a bank terminated Lisa Ellis after she publicly commented on a news story involving a councilman who had been arrested for driving through a crowd of protestors, stating that he should have "taken a

³⁵ Id.

³⁶ Id. (capitalization in original).

³⁷ Id. at 3.

³⁸ Id. at 4.

³⁹ Id.

⁴⁰ Carter v. Loc. 556, Transport Workers Union of Am., 138 F.4th 164, 177 (5th Cir. 2025).

⁴¹ Id.

⁴² Id.; see also Carter v. Transport Workers Union of Am. Loc. 556, 353 F. Supp. 3d 556, 562 (N.D. Tex. 2019).

⁴³ 138 F.4th at 177.

⁴⁴ Id. at 178.

⁴⁵ Id.

⁴⁶ Id. at 178-79.

⁴⁷ Id. at 179.

⁴⁸ Id. at 179-80.

⁴⁹ Id. at 185 (quoting Abercrombie, 575 U.S. at 772).

⁵⁰ Id. at 187.

⁵¹ Id. at 188.

⁵² Id. at 210.

⁵³ See Boscarino v. Auto Club Grp., No. 21-10899, 2023 WL 3170021 (E.D. Mich. Apr. 28, 2023); Ellis v. Bank of New York Mellon Corp., No. CV 18-1549, 2020 WL 2557902 (W.D. Pa. May 20, 2020).

bus” and “plow[ed] thru” the demonstrators.”⁵⁴ Individuals offended by Ellis’s comment “inundated her employer with complaints,” demanding to know “whether Ellis’s post reflected the values of the Company” and condemning the post “for encouraging violence.”⁵⁵ After conducting a thorough investigation into whether Ellis had violated the company’s code of conduct and social media policy, “everyone agreed that Ellis’s post created a reputational risk and was offensive because it advocated violence.”⁵⁶ Although Ellis was regarded as a good employee, the bank ultimately decided to terminate her, finding that her post violated the code of conduct and social media policy “because [it] was offensive, demonstrated poor judgment, showed a lack of respect for others, harmed [the bank’s] reputation, and encouraged violent behavior.”⁵⁷

The code of conduct in question required employees to “exercise good judgment and conduct[] [themselves] in a manner that is above reproach.”⁵⁸ It also included a mandate to “respect their clients, communities, and one another.”⁵⁹ The social media policy said that employees must “be professional and responsible when posting on external social media.”⁶⁰ It warned employees that they are responsible for what they post and that their social media posts needed to comply with the code of conduct.⁶¹ Specifically, it wrote that an employee’s “use of external social media that harms or impairs [the bank’s] financial or professional reputation or is damaging to [the bank] in any other respect may result in consequences affecting [the employee’s] employment status...up to and including termination.”⁶²

Ellis, a white woman, brought a Title VII race discrimination claim in protest of her termination. She failed to present the court with a proper comparator to support an inference of unlawful discrimination.⁶³ She also could not show that the bank’s reasons for dismissing her were pretextual.⁶⁴ The court pointed out that Ellis herself admitted that she made her post in poor judgment and that it could be interpreted to encourage violence.⁶⁵ As the code of conduct and social media policy were abundantly clear in their expectations and Ellis had never felt discriminated against because of her race, “no reasonable jury could

find [the bank’s] reasons for terminating Ellis were pretextual.”⁶⁶ The court granted summary judgment in favor of the bank.⁶⁷

What Employees Do Away From Work

Some plaintiffs elect to forgo Title VII claims altogether in favor of pursuing more applicable state law causes of action. Leah Snyder, a computer programmer who was terminated after posting photographs of herself at the Capitol building on January 6, found success with this approach.⁶⁸ Because Snyder claimed that she had been wrongfully terminated in violation of public policy, the court accepted her assertion that she had exercised her “constitutional right to speak freely, peaceably assemble or petition her grievances to the Government” and concluded that she had pleaded sufficient facts for her claim to proceed under California civil rights law.⁶⁹ The court denied summary judgment because determining “whether Plaintiff was fired for a political motive largely comes down to a credibility determination,” which is a matter for a jury to decide.⁷⁰

Amy Cooper’s suit against her employer ended much less favorably for her than Snyder’s.⁷¹ Cooper, now colloquially known as the “Central Park Karen,” rose to fame after she was featured in a viral video.⁷² The video showed an encounter Cooper, a white woman, had with Christian Cooper (no relation), a Black man and avid birdwatcher.⁷³ Cooper was walking her dog unleashed, and Christian Cooper asked her to comply with park rules and leash her dog.⁷⁴ Christian Cooper recorded the interaction as it devolved, capturing her threat to call the police and report that “an African American man [was] threatening [her] life.”⁷⁵ She made the call, and the video, posted on the same day as George Floyd’s murder, went viral.⁷⁶

Cooper, who had worked as a portfolio manager and head of insurance investment at an investment firm, lost her job the day after the encounter.⁷⁷ Believing her

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id. at 2.

⁵⁷ Id.

⁵⁸ Id. at 4.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id. at 10-11.

⁶⁴ Id. at 12.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Snyder v. Alight Sols., LLC, No. SACV2100187CJCKESX, 2022 WL 17184979, at 1 (C.D. Cal. Sept. 14, 2022).

⁶⁹ Id. at 3.

⁷⁰ Id. at *4.

⁷¹ See Cooper v. Templeton, 629 F. Supp. 3d 223 (S.D.N.Y. 2022).

⁷² See Matt Stieb, Amy Cooper Didn’t Learn Much From Being ‘Central Park Karen’, New York Magazine Intelligencer (May 26, 2021), <https://www.nymag.com/intelligencer/2021/05/amy-cooper-didnt-learn-much-from-being-central-park-karen.html>.

⁷³ See Sarah Maslin Nir, How 2 Lives Collided in Central Park, Rattling the Nation, N.Y. Times (June 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html>.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

termination was unlawful, she filed suit against her former employer, alleging race and sex discrimination under 42 U.S.C. § 1981 and the New York State Human Rights Law.⁷⁸ Cooper could not produce any evidence that could give rise to “a minimal inference of discriminatory motivation.”⁷⁹ Even though her employer repeatedly condemned racism in its public notice of her termination, “a statement that someone is a ‘racist,’ while potentially indicating unfair dislike, does not indicate that the object of the statement is being rejected because of [their] race.”⁸⁰ Cooper could not show that her employer “made any remarks, whether publicly or privately, that could be viewed as directly reflecting discriminatory animus.”⁸¹ Additionally, she failed to show the court any similarly situated comparators.⁸² The court dismissed both claims.⁸³

While employers have become attuned to the workplace implications of their employees’ political activity, there is also growing awareness about non-political social media posts made by employees’ family members. That issue arose when a car dealership terminated Russ Kirby’s employment based on his wife’s explicit social media activity.⁸⁴ Kirby, a white man, was married to a Black woman.⁸⁵ She operated various pornographic social media accounts, including some “written from the perspective” of a woman’s husband.⁸⁶ Despite the accounts operating under pseudonyms, one of Kirby’s coworkers recognized his wife in a picture on his desk, took screenshots of the accounts, and circulated the information throughout the dealership.⁸⁷ Kirby was terminated, and he brought claims for Title VII discrimination, alleging that his superiors had made discriminatory comments “about his wife’s appearance as a [B]lack woman.”⁸⁸ He also claimed that the company “used his wife’s pornography as a pretext to fire him” in retaliation for speaking up against discrimination during his employment.⁸⁹

Because he was not a member of a protected class, Kirby’s claim hinged on associational discrimination

because of his marriage to a Black woman.⁹⁰ Although he asserted that his coworkers had made comments that evoked longstanding racial stereotypes of Black women, the court did not agree that those comments carried such connotations.⁹¹ He also could not show any appropriate comparators.⁹² The court found that the examples of comparators’ posts and pictures Kirby produced were merely “suggestive or revealing” and were not comparable to his wife’s “explicit commercial pornography.”⁹³ Because he could not show that he was discriminated against because of his wife’s race, he could not make his *prima facie* case of discrimination.⁹⁴

Kirby was, however, able to make a *prima facie* case of retaliation “because he engaged in protected activity that was temporally proximate to his termination.”⁹⁵ Kirby pointed to several instances in which he had publicly raised questions about diversity and the treatment of his minority coworkers.⁹⁶ He was also able to raise evidence that could show that the car dealership’s stated reason for terminating him was pretextual.⁹⁷

Conclusion & Takeaways

As these cases illustrate, the line between protected expression and actionable workplace conduct remains highly fact-specific, requiring employers to carefully navigate evolving legal and cultural expectations. Against this backdrop, employers must remain mindful not only of how they respond to employee conduct, but also of how those responses are applied across different groups.

Since the enactment of Title VII, employers have been required to treat employees equally. The recent United States Supreme Court decision in *Ames v. Ohio Dept. of Youth Services*, however, signals that even greater vigilance may now be necessary.⁹⁸ In *Ames*, a white heterosexual woman claimed that she was passed over for promotion and demoted because of her sexual orientation.⁹⁹ In a unanimous decision, the Court clarified that non-minority plaintiffs are not subject to a heightened evidentiary burden when bringing Title VII claims, confirming that members of majority groups are entitled to the same standard as minority plaintiffs in alleging discrimination.¹⁰⁰

⁷⁸ Cooper, 629 F. Supp. 3d at 228-29.

⁷⁹ Id.

⁸⁰ Id. (quoting *Maraschiello v. City of Buffalo Police Dep’t.*, 709 F.3d 87, 97 (2d Cir. 2013)) (emphasis in original).

⁸¹ Id.

⁸² Id. at 231.

⁸³ Id.

⁸⁴ Kirby v. Sewell Corp., No. 3:24-CV-2116-N, 2024 WL 4983141, at 1 (N.D. Tex. Dec. 4, 2024).

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id. at 2.

⁸⁹ Id.

⁹⁰ Id. at 3.

⁹¹ Id. at 3-4.

⁹² Id. at 5.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id. at 6.

⁹⁸ See *Ames v. Ohio Dept. of Youth Services*, 145 S. Ct. 1540 (2025).

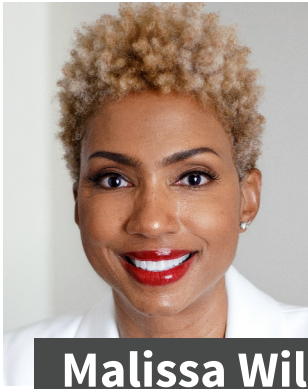
⁹⁹ Id. at 1542.

¹⁰⁰ Id.

In light of this development, employers should take proactive steps to minimize risk. To position themselves to avoid workplace discrimination claims – or to prevail at summary judgment – employers should implement clear, comprehensive social media, dress code, and code of conduct policies that set forth well-defined expectations. Equally important is the consistent and even-handed enforcement of those policies across all employees.

Maintaining detailed records of employee interactions and complaints is likewise critical. The ability to identify and document specific instances of conduct with

precision can prove invaluable in the event of litigation. Notably, plaintiffs are more successful in pursuing Title VII retaliation claims than discrimination claims, with retaliation claims more frequently surviving summary judgment. The data shows that retaliation remains the most commonly asserted basis for discrimination claims filed with the EEOC, accounting for nearly 48% of all charges. In addition to Title VII considerations, employers should also remain mindful of applicable state and local laws, which may provide plaintiffs with alternative causes of action subject to less stringent requirements.



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

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

Practice Areas

- Labor & Employment Law
- Insurance Coverage & Bad Faith Defense
- First Amendment Law
- Personal Injury
- Political Law
- Premises Liability
- Workers' Compensation

Professional Recognition

- Selected to Mid-South Super Lawyers (2024-2025)
- The Best Lawyers in America® (2021-2026): Litigation – Labor and Employment and Product Liability Litigation – Defendants
- The Best Lawyers in America®, 2023 “Lawyer of the Year” for Jackson, Miss., in Labor and Employment Litigation
- Selected as one of Mississippi's 50 Leading Businesswomen by the Mississippi Business Journal (2019)
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War and Peace: Finding Calm in an Adversarial Profession

War and Peace: Finding Calm in an Adversarial Profession

Roman Lifson

More than one-quarter of lawyers report that they suffer from depression, and one-fifth report anxiety and alcohol dependence, which are strongly linked to suicide risk.¹ The American Psychological Association reports that lawyers are 3.6 times more likely to suffer from depression than the general population, and according to a recent Johns Hopkins study, lawyers have the highest rate of depression of any profession. It also has been estimated that 40% of law students suffer from depression by the time they graduate. Lawyers experience suicidal ideation (thoughts, ideas, or ruminations about ending one's own life) at a rate three times higher than the general population.² Lawyers also experience elevated levels of stress (perceiving events in one's life or work as unpredictable, uncontrollable, and/or overloaded) and loneliness (perceiving one's social needs as not being met), which also are well-established predictors of suicide risk.³ According to the CDC, suicide is the third leading cause of death among lawyers.⁴ In fact, while the rate of suicidal ideation among lawyers is three times the general population, the rate of completed suicides among lawyers is six times higher.⁵ Even more alarmingly, the prevalence of suicidal ideation among lawyers is highest in the youngest group – those 30 years-old and younger – more than double the rate of those aged 51-60.⁶ A significantly greater proportion of lawyers in the suicidality group reported that their time in the legal profession was detrimental to their mental health, caused an increase in their substance/alcohol use, and considered leaving the

profession due to mental health problems or burnout.⁷

Not surprisingly, excessive work load is correlated with suicidal ideation. Notably, loneliness is correlated with suicidality even more strongly, with those endorsing loneliness nearly three times more likely to experience suicidal ideation.⁸ The highest indicator was perceived stress, with those reporting high stress being 22 times more likely to experience suicidal ideation.⁹ The study recommended:

the highly conspicuous extent to which it relates to lawyer suicide risk specifically would suggest that stress should be a primary target of suicide prevention and mitigation strategies for that population. A twofold strategy whereby stressors in lawyers' lives are reduced, and their stress tolerance is enhanced, would seem to be the most efficacious approach for mitigating the stress-suicidality risk.

Considering the profound impact of stress on lawyer suicidality, we believe that all options should remain viable for mitigating stress, including the examination and recalibration of organizational or profession-wide attitudes, norms, and cultures relating to work.¹⁰

The role of loneliness – found to correlate with suicidality as noted above – also did not escape the researchers' focus:

In the present study, lawyers experiencing high levels of loneliness were nearly three times as likely to experience suicidal ideation as those experiencing low levels of loneliness. This finding aligns with previous work demonstrating a relationship between loneliness and suicide risk. Importantly, research has also shown that a sense of relatedness, i.e., how you connect, or relate to others, and whether you feel a sense of belonging at work, among lawyers strongly correlates with improved

¹ Stressed, Lonely, and Overcommitted: Predictors of Lawyer Suicide Risk, *Healthcare* (Basel). 2023 Feb 11;11(4):536 ("Stressed"). <https://pmc.ncbi.nlm.nih.gov/articles/PMC9956925/>.

² *Id.*

³ *Id.*

⁴ North Carolina Lawyer Assistance Program. <https://www.nclap.org/what-we-help-with/depression-suicide/>.

⁵ <https://www.moorecountync.gov/DocumentCenter/View/437/How-I-Almost-Became-Another-Lawyer-Who-Killed-Himself-PDF?bidId=>.

⁶ Stressed .

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

wellbeing. By making collaboration and regular social interactions in the work environment more of a priority, employers may be able to help mitigate some of the loneliness their lawyers experience. Any such efforts will undoubtedly be complicated by remote and hybrid working models that now predominate the legal field, especially as recent reports from the field suggest that many lawyers are reluctant to return to the office.¹¹

The sources of depression and stress are many – client demands, long work hours, deadlines, lack of control over outcomes, pressures to develop business, multitasking demands, etc. The adversarial nature of the profession, especially litigation, must be added to this mix. As one lawyer who writes about her path through major depressive disorder notes, “[t]he adversarial nature of legal proceedings, combined with the emotional intensity of certain cases, further compounds the challenges we face.”¹²

The stories of the toll that law practice can have are many. One example:

In July 2015, Peter, a partner at the Silicon Valley office of Wilson Sonsini Goodrich & Rosati, died a drug addict, felled by a systemic bacterial infection common to intravenous users. He lived in a state of heavy stress, as he obsessed about the competition, about his compensation, about the clients, their demands, and his fear of losing them. He loved the intellectual challenge of his work but hated the combative nature of the profession, because it was at odds with his own nature. His last phone call was for work: Vomiting, unable to sit up, slipping in and out of consciousness, he had managed, somehow, to dial into a conference call. As he was being eulogized during his memorial service, quite a few of his colleagues were bent over their phones, reading and tapping out emails. Their friend and colleague was dead, and yet they couldn’t stop working long enough to listen to what was being said about him.¹³

The 2017 report of the National Task Force on Lawyer Well-Being¹⁴ identified the concerns and issued many recommendations. The thrust of the report is to identify the problems and encourage the various stakeholders to eliminate the stigma and establish support programs. The report “recommend[s] that bar associations and courts adopt rules of professionalism and civility, such

as those that exist in many jurisdictions.”¹⁵ Absent is a recognition of the role of adversariness and specific recommendations for how to alleviate its effects. However, some are focusing on this aspect:

The practice of law is inherently adversarial, which itself is inherently stressful by nature. To thrive in the adversarial system, lawyers are trained to be competitive and aggressive because the goal is to “win.” Such training is “fueled by negative emotions,” and as a consequence “can be a source of lawyer demoralization, even if it fulfills a social function.” Consequently, when the practice of law is reduced to many zero-sum disputes, it can produce “predictable emotional consequences for the practitioner, who will be anxious, angry, and sad much of [their] professional life.” Moreover, dealing with difficult opponents, clients, and colleagues can often leave lawyers feeling “emotionally shattered.”¹⁶

The analysis focuses on the move from zero-sum situations to non-zero-sum situations. Zero-sum contests are likely to produce negative emotions, unlike non-zero-sum ones.¹⁷

The adversary process, which lies at the heart of the American system of law, has long been viewed as a classic zero-sum game: in litigation, one side’s gain often moves in lockstep with the other side’s loss. Lawyers are trained to be aggressive and competitive precisely because they must win the litigation game. This training, because it is fueled by negative emotions, can be a source of lawyer demoralization, even if it fulfills a social function. One problem with the adversarial paradigm, according to leading lawyers like Sol Linowitz, is that “the single-minded drive toward winning the competition ... will make these young lawyers not only less useful citizens ... but also less good as lawyers, less sympathetic to other people’s troubles, and less valuable to their clients.”¹⁸

“When the practice of law is tied up with a large number of zero-sum games, it will produce predictable emotional consequences for the practitioner, who will be anxious, angry and sad much of his professional life.”¹⁹ “The psychological question is whether adversaries can be competitive without being pessimistic. The way adversariness is perceived by lawyers helps shape their character and encourages pessimistic behavior. And sometimes competitiveness is unnecessarily combative. The Canons of Ethics emphasize ‘zealous’

¹¹ Id. (emphasis added)

¹² <https://milesmediation.com/blog/the-imperative-of-mental-health-for-attorneys-navigating-the-legal-landscape-with-resilience/>.

¹³ “Capitalizing on Healthy Lawyers.” Harvard Law School Center on the Legal Profession, March/April 2020. <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/approaching-lawyer-well-being/capitalizing-on-healthy-lawyers/>. (“Capitalizing”)

¹⁴ <https://perma.cc/MB95-V6HE>

¹⁵ Id. at 15.

¹⁶ Capitalizing.

¹⁷ Seligman, Verkuil and Kang, “Why Lawyers Are Unhappy,” <https://perma.cc/WV3B-QDAW>. (“Seligman”).

¹⁸ Sol M. Linowitz, *The Betrayed Profession: Lawyering At The End Of The Twentieth Century*, 107-08 (1994).

¹⁹ Seligman.

representation. But one can fairly ask, what does zealous representation add to competent representation?”²⁰

Justice Sandra Day O'Connor questioned why lawyers insist on viewing litigation as a war.²¹ “The question is, can lawyers serve the adversary system without generating conflict on a personal level? Civility need not weaken the lawyer’s commitment to the adversary system.”²²

The suggestions for ameliorating these effects have centered on changes within the profession’s structure. However, dealing with the deleterious effects of unnecessary adversariness within the mind and body of each lawyer has not been well developed. Mindfulness programs have shown promise. For example, “attorneys at an international law firm reported a 45 percent increase in focus, a 35 percent decrease in stress, and a 35 percent increase in effectiveness after completing a firm-sponsored mindfulness program.”²³ Lawyers also have been encouraged to work on their professionalism to avoid unnecessary disputes.²⁴ The Virginia State Bar doubled-down on the National Task Force Report:

The adversarial nature of law practice distinguishes it from other professions. “In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what.” The method by which this is accomplished, however, is necessarily conflict-ridden, and conflict breeds stress.

The “nature of civil litigation,” as one commentator has observed, “involves two lawyers (often Type A personalities) squaring off against one another under circumstances where there will be a winner and a loser, and part of each lawyer’s job will be to capitalize on any possible error in judgment that the other side makes.” Summarized another way: “[n]early every stage of litigation is a battle of persuasion, from convincing opposing counsel that the offer you made is favorable and reassuring your client that you have made a fair assessment of the case that justifies your billable hours, to persuading a judge or jury to view the facts of a case as you do.” In short, conflict is an unfortunate reality for many lawyers.

The emotions created by incessant conflict — anger, guilt, and fear — cause stress that can have physical ramifications. Stress, in and of itself, is not a bad thing. Chronic stress, however, can inhibit the body’s essential

functions, including disease prevention, and, as at least one study has shown, accelerate the body’s aging at a cellular level. Chronic stress can also lead to anxiety disorders (including panic attacks), lack of sleep, digestive issues, and heart disease.

The contentious nature of the legal profession and its associated stress can also negatively affect a lawyer’s mental health. Lawyers are prone to a “simmering variety of anger” that can express itself in a multitude of ways, including a cynical attitude, impatience, irritability, depression, disconnection from others, and fatigue. Elevated levels of hostility, in turn, have been shown to correspond with premature deaths related to cardiovascular disease.

Lawyers need to be taught and to understand that the practice of law does not involve only logic and analytical skills, but also an understanding of their own emotions and the emotions of those around them. Concepts like “Emotional Intelligence” and “Emotional Contagion” are important for lawyers to better comprehend their clients and their clients’ needs. But a better understanding of these concepts is also vital to lawyer well-being.²⁵

Justice O'Connor added: “Incivility disserves the client because it wastes time and energy: time that is billed at hundreds of dollars an hour, and energy that is better spent working on the client’s case than working over the opponent.... It is enough for the ideas and positions of the parties to clash; it is wasteful and self-defeating for the lawyers to do so as well.”²⁶

However, the recommendations of these well-meaning reports are rooted in the same-old constructs of our profession — programs administered by firms, CLE programs by bar organizations, etc. No one has articulated the benefit of true personal development programs to help lawyers understand themselves and connect meaningfully with other human beings. This internal exploration and meaningful connection is not achieved in a conference room or at a cocktail reception. It requires a shedding of the veneers we normally carry. Fulsome internal exploration requires us to delve into the deep recesses of our psyches, analyze our experiences going back to childhood, uncover and evaluate wounds that we incurred and of which we likely are not even aware, and get in touch with our bodies instead of living entirely in our brains. Meaningful connection with other people requires a willingness to share not only our wins, successes and misleadingly positive Instagram-

²⁰ Id.

²¹ Sandra Day O'Connor, Professionalism, 78 OR. L. REV. 385 (1999).

²² Seligman.

²³ Capitalizing.

²⁴ See, e.g., <https://cl.cobar.org/departments/the-paradox-of-professional-rivalry/>.

²⁵ The Occupational Risks of the Practice of Law, Report of the Virginia State Bar President’s Special Committee on Lawyer Wellbeing, May 2019 at 23-25. <https://vsb.org/common/Uploaded%20files/docs/vsb-wellness-report.pdf>.

²⁶ Sandra Day O'Connor, Professionalism, 78 OR. L. REV. 385 (1999).

worthy views of our lives, but also our failures, fears and shame. These transcendent experiences require skilled facilitation and the participants' commitment to explore their lives in profoundly new and deeper ways. They also require the participants to be willing to face scars they have kept hidden (including to themselves) for years and often decades, to see their role in their families, communities and professions in an entirely new light, and to recognize patterns which have stood in their way. This process can be confronting, difficult and even temporarily destabilizing. It also is essential to make progress beyond our typical existence in which our relationships are tempered by facades and fear of judgment.

For anyone interested in the above, here are some resources to consider:

<https://www.wimhofmethod.com/>
<https://www.enneagraminstitute.com/>
<https://9dbreathwork.com/>
<https://laylamartin.com/>
<https://www.journeytosapience.com/>
<https://www.lucasmack.com/retreats>
<https://www.linkedin.com/in/natefloyd/>
<https://johnwineland.com/>
<https://www.harvestseries.com/>
www.mythicadventuretravel.com



War and Peace

FINDING CALM IN AN ADVERSARY PROFESSION

*Roman Lifson
Christian & Barton, L.L.P.
Richmond, Virginia*

Lawyer Mental Health

Surveyed lawyers suffering from some level of
DEPRESSION: 28.3 percent



Surveyed lawyers suffering from some level of
ANXIETY: 19.3 percent



Surveyed lawyers suffering from some level of
STRESS: 22.7 percent



Surveyed lawyers reporting concerns with
DEPRESSION at some point in their careers: **45.7 percent**



Surveyed lawyers reporting concerns with
ANXIETY at some point in their careers: **61.1 percent**



Lawyer Mental Health

Highest Depression Rate

Suicide Ideation → 3x

Highest among 30-year-olds and younger

Completed Suicide → 6x

36% Alcohol Abuse → 5x

9% Prescription Drug Abuse

Causes

Stress

Billable Hour

Excessive Workload

Client Demands

Business Generation

Deadlines

Multi-tasking Demands



Causes: Our Focus

Adversariness

- Zero-sum → Negative emotions
- Client's war → Lawyer's war
- Lack of control
- Distrust
- Ego
- Fear

Adversariness

"It has been said that a nation's laws are an expression of its peoples' highest ideals. Regrettably, the conduct of our nation's lawyers has sometimes been an expression of the lowest. Increasingly, lawyers complain of a growing incivility in the profession, and a professional environment in which **hostility, selfishness, and a win-at-all-costs mentality** are prevalent."





"Shakespeare's *Taming of the Shrew*: Adversaries in law "strive mightily, but eat and drink as friends"

"In contemporary practice, however, **we speak of our dealings with other lawyers as war—and too often we act accordingly.**"

~Sandra Day O'Connor, 1999

Causes: Our Focus

Loneliness

- Suicidal Ideation → 3x
- Relatedness → Strong correlation to well-being

Initiatives So Far: Same Old

- National Task Force on Lawyer Well-Being
- State Bar programs
- Professionalism and Lawyer Well-being CLEs



A New Paradigm

- Lawyers as the Solution, Not the Problem
- Meaningful Connection
- “What would Ty do?”
- Head v. Heart

Internal Work

- Understand ourselves to understand and relate to others
- Address trauma
 - Childhood
 - Adult
 - Identify → Embody → Release



Embodiment: The Body Keeps the Score

- Out of the head, into the body
- Overcome fear of
 - Emotion
 - Expression
 - Embarrassment
 - Judgment
- Path to removing the blocks

Internal Work

Defining Purpose

- In Life
- In Work



Meaningful Connection

Authenticity

- Instagram Lives v. Reality
- Fear of Judgment

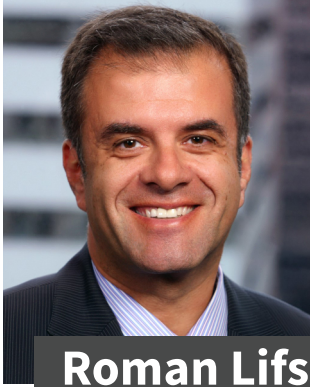
Community

- Discernment
- Truth – Beyond Programming



Next Steps

- Retreats
- Online Programs
- Enneagram
- Human Design
- Medicine Journeys



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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.

Roman is a husband to a renaissance woman, father of five remarkable adult children, accomplished race car driver, avid photographer, enthusiastic traveler, and long-suffering Minnesota Vikings fan.

Roman's fascination with cars and motorsports began at an early age. He started participating in track events in the early 2000s, eventually earning an instructor certification and progressing to wheel-to-wheel racing at renown tracks like Virginia International Raceway, Road Atlanta, Daytona, Sebring, Mid-Ohio, Barber Motorsports Park, and others

Practice Areas

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

Recognition

- Martindale-Hubbell - AV Preeminent® Peer Review Rated
- The Best Lawyers in America® - Commercial Litigation, Litigation-Insurance, Product Liability Litigation-Defendants, 2024-2026
- Virginia Super Lawyers - Civil Litigation Defense, 2013-2020, 2022-2025

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



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From Code to Courtroom: The Growing Risk from AI Products

From Code to Courtroom: The Growing Risk from AI Products

Stephanie M. Laws

Artificial intelligence is everywhere and rapidly becoming part of everyday life. A recent Gallup survey shows that AI is already widely embedded in everyday consumer products, with nearly all Americans using AI-enabled technology.¹ More than eight in ten Americans report using several AI-enabled products each week, including weather forecasting apps (87%), streaming services (83%), online shopping platforms (82%), social media (81%), and navigation apps (81%).² Yet nearly two-thirds of these users do not realize they are using AI.³

As AI spreads into both everyday tools and higher-stakes areas like medical devices, vehicles, and therapy apps, the number of people affected when these technologies fail inevitably grows. More use means more potential harm. And more harm raises questions about who should be held liable. This growing exposure presents a critical question: Can product liability law serve as a way for people to seek redress when AI technologies cause harm?

The answer is far from clear. There can be no product liability claim without a “product.”⁴ Product liability law is well settled when a tangible good causes a harm. A defective toaster, for example, clearly counts as a product and the law provides a path for injured consumers to seek redress. AI systems are different. Their intangible nature makes it difficult to determine whether they qualify as a “product” under traditional doctrine.

Legislatures and courts are beginning to respond, attempting to shape the law to address AI-related injuries. But the law is developing far more slowly than the

technology itself. This article addresses those doctrinal developments and explores what AI businesses can do to respond.

Traditional Product Liability Doctrine: Why AI Does Not Fit Easily

Traditional product liability doctrine generally has been limited to tangible goods placed into the stream of commerce.⁵ Consistent with this principle, courts have historically declined to treat software, apps, and other digital platforms as “products” because they are intangible. Instead, courts typically characterized them as services or information, placing them outside the reach of product liability law.

Several cases illustrate this traditional approach. A federal court in Kentucky held that video games and software were not subject to a product liability claim because “intangible thoughts, ideas, and expressive content are not ‘products.’” *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 811 (W.D. Ky. 2000). And another federal court in New York held that an e-retailer’s website “is better characterized as a provider of services.” *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 399 (S.D.N.Y. 2018). Similarly, in *Jackson v. Airbnb, Inc.*, a California court dismissed the Plaintiff’s product liability claim, holding that an online marketplace app was a platform connecting users, and therefore a service rather than a tangible product. 639 F. Supp. 3d 994, 1011 (C.D. Cal. 2022).

Several state statutes reflect the traditional assumption that product liability is directed at physical goods—machines, appliances, and cars that can be manufactured, sold, and placed in the stream of commerce. Tennessee’s product liability statute defines products as “any tangible object or goods produced.” Tenn. Code § 29-28-102. Ohio’s statute limits the definition of product to “any object, substance, mixture, or raw material that constitutes tangible personal property.” Ohio Rev. Code § 2307.71.

¹ Eilyn Maese, *Americans Use AI in Everyday Products Without Realizing It*, Gallup (January 15, 2025), <https://news.gallup.com/poll/654905/americans-everyday-products-without-realizing.aspx>.

² *Id.*

³ *Id.*

⁴ *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1211 (N.D. Tex. 1985).

⁵ Restatement (Third) of Torts: Prod. Liab. § 19 (1998) (“A product is tangible personal property distributed commercially for use or consumption.”).

The upshot of these cases and statutes was a clear doctrinal line: tangible goods were considered products, but software and digital systems usually were not. Because of that distinction, courts routinely dismissed product liability claims involving software or apps on the ground that there was no “product” about which to sue. For decades, that meant that technology-related harms fell outside of the reach of product liability law.

That line, however, is beginning to blur. Given the rapid growth of AI and its expanding role in everyday life, courts are reconsidering the traditional line between tangible products and intangible technology.

Courts Are Beginning to Adapt: Emerging AI Product Liability Theories

While courts historically treated software applications and websites as services rather than products, a recent wave of cases suggests that this line is beginning to shift. As one court put it, “as our physical and digital lives become further entwined,” the issue of whether software and AI are products “is an issue that must be treated thoughtfully.” *Beyer v. DraftKings, Inc.*, No. 25 C 1336, 2025 WL 3281680, at *12 (N.D. Ill. Nov. 25, 2025). Several recent cases demonstrate this shift.

Garcia v. Character Technologies, Inc.

One of the most closely watched cases addressing this issue is *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157 (M.D. Fla. 2025). That case involved the Character AI app, which allows users to chat with fictional AI “Characters.” *Id.* at 1167. After a 14-year-old boy became emotionally attached to one of these Characters, his mental health severely declined and he eventually took his own life after a Character encouraged him to “come home.” *Id.* at 1168-69.

In deciding whether the Character AI app was a product, the court drew a critical distinction. It held that the app could qualify as a product, but only for design defect-based claims—not for claims based on the content or the AI generated speech. According to the court, allegations related to the content, like remarks the Characters made, could not survive. *Id.* at 1179-80. But allegations that Character AI was defective because the app failed to confirm users’ ages and because users were unable to exclude indecent content could survive. *Id.* The decision thus carefully limited liability to defects tied to the functional design of the technology, rather than to the content produced by the system. *Id.* at 1180.

Doe v. Lyft, Inc.

Doe v. Lyft, Inc., took a similar approach to *Garcia*. 756 F. Supp. 3d 1110 (D. Kan. 2024). In that case, a rideshare company approved a fraudulent driver application—the

driver’s photo did not match the license photo submitted with the application. *Id.* at 1117. The plaintiff was sexually assaulted by the driver and an accomplice after a ride. *Id.* The plaintiff alleged the rideshare app was defective because it approved someone as a driver when the license did not match the picture provided. *Id.* at 1118-1119.

In deciding whether the rideshare app was a product, the court noted the “recent trend of expanding product liability theories towards these platforms,” rejected the all-or-nothing approach that software is either always a product or never one, and held that the plaintiff’s product liability claim was viable. *Id.* at 1119-1120. The harm, the court reasoned, resulted from the app’s biometric verification and driver validation systems, which were designs or functionalities of the app. *Id.*

In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation

Though also rejecting the all-or-nothing approach, the court in *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.* took a different approach. 702 F. Supp. 3d 809 (N.D. Cal. 2023). There, the plaintiffs alleged several defects with social media applications that led to addiction and mental health issues in children. *Id.* at 819. The defendants argued that their platforms were services and not subject to product liability claims. *Id.* at 838.

The court rejected that sweeping argument. *Id.* Drawing on the Restatement (Third) of Torts, the court explained that while product liability traditionally applied to tangible goods, intangible items (like social media applications) may qualify as products when they are sufficiently analogous to tangible goods in their distribution and use. *Id.* at 841-42. The court also considered “public policy factors in determining what constitutes a ‘product’ for the purposes of product liability claims.” *Id.* at 850 n.50. Applying that framework, the court examined the plaintiffs’ allegations feature by feature, considering defects such as age-verification systems, screen-time limits, account deletion barriers, and algorithmic design choices. *Id.* at 849-53. The court concluded that several of these features could be plausibly treated as products because they functioned in ways analogous to traditional consumer goods. *Id.*

The Emerging Consensus

Although the law remains unsettled and these decisions differ in their reasoning, one consistent theme emerges—courts are beginning to reject categorical arguments that AI systems, software, or mobile applications are always services and never products.

Still, the legal landscape remains in flux. Some decisions

focus on the source of the harm, others on the functional analogue to tangible goods, and others on the policy justifications underlying strict product liability. Taken together, however, these cases reflect an important shift in how courts approach digital technology. The traditional rule that products must be tangible is increasingly difficult to apply in a world where software, algorithms, and AI systems shape how products function and how consumers interact with them. Courts are therefore moving toward a more flexible, function-based analysis. But while the direction of change is becoming clearer, the doctrine is far from settled. As AI continues to expand across industries and consumer products, courts will likely continue to grapple with where the line between services and products ultimately should be drawn.

Efforts to Fill the Doctrinal Gap

The growing number of AI-related disputes has exposed a basic problem: the law has not yet developed a clear framework for addressing injuries caused by AI systems. This uncertainty is particularly significant given the rapid pace at which AI is evolving and becoming a part of everyday life. As AI systems become embedded in more consumer products and services, questions about liability will only become more frequent and more consequential. That is why legislatures and legal groups are beginning to respond.

The AI LEAD Act

Recognizing this uncertainty, lawmakers and legal institutions have begun exploring ways to clarify how liability should apply to AI. One of the most significant proposals in the United States is the AI LEAD Act (Aligning Incentives for Leadership, Excellence, and Advancement in Development Act), introduced by Senators Dick Durbin (D-IL) and Josh Hawley (R-MO). The Bill would establish a federal framework for AI product liability.

The AI LEAD Act begins by acknowledging that while AI systems hold “great promise,” they “have caused and will cause harm to businesses and individuals,” and “jeopardize public safety and the financial well-being of both individuals and entire industries.”⁶ The Bill explains that product liability law can assist in addressing harms caused by AI.⁷ To that end, it defines “Artificial Intelligence Systems” broadly to include software, tools, or applications that use algorithms or machine learning to make or assist in decisions—whether standalone or built into larger systems—and classifies AI systems as “products” within traditional liability frameworks.⁸

The Bill would create a federal cause of action, allowing plaintiffs to bring claims in federal court when AI systems cause harm, with a four-year statute of limitations.⁹ The Act would authorize lawsuits by individuals, class plaintiffs, state attorneys general, or the U.S. Attorney General.¹⁰

The American Law Institute AI Liability Project

In parallel with legislative efforts, legal institutions are working to develop principles that can guide courts, legislatures, and private actors. In October 2024, the American Law Institute (ALI) launched a project focused on civil liability for artificial intelligence.¹¹ The project aims to analyze how existing common-law doctrines apply to AI-related harms and to develop principles that can guide courts and private actors. The project’s principles will provide much-needed clarity on how AI-based products fit within established product liability frameworks, particularly as courts confront novel AI product liability claims.

Comparative Law: The European Union

While U.S. law is evolving primarily through litigation and proposed legislation, the European Union has taken a more proactive approach. The EU’s adoption of Directive (EU) 2024/2853 on October 23, 2024, marked a significant development in product liability law, as it recognized software and artificial intelligence as products subject to strict liability.

Under the updated Product Liability Directive, software and AI systems are recognized as products. Article 4(1) of the Directive defines a product as “all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software.”¹² The Directive explicitly clarifies that “software is a product for the purposes of applying no-fault liability, irrespective of the mode of its supply or usage, and therefore irrespective of whether the software is stored on a device, accessed through a communication network or cloud technologies, or supplied through a software-as-a-service model.”¹³

Practical Guidance for AI Companies and Product Designers

In light of this evolving legal landscape, companies developing or deploying AI systems should anticipate

⁶ S. 2937, 119th Cong. § 2(2), available at <https://www.congress.gov/bills/119th-congress/senate-bill/2937/text>.

⁷ Id. at § 2(4).

⁸ Id. at § 3.

⁹ Id. at § 301, 303.

¹⁰ Id. at § 301.

¹¹ Principles of the Law, Civil Liability for Artificial Intelligence, American Law Institute (October 2024), https://www.ali.org/project/principles-law-civil-liability-artificial-intelligence?active-tab=tab_2.

¹² Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on Liability for Defective Products and Repealing Council Directive 85/374/EEC, 2024 O.J. (L 2853).

¹³ Id.

increased litigation risk. Courts are beginning to scrutinize AI systems in ways analogous to traditional products, focusing on issues such as design choices, safety features, and foreseeable misuse. But many courts have yet to address the issue, and the ones that have are not applying a single, consistent framework.

Nonetheless, companies and developers should approach AI risk through a product safety lens. This includes conducting thorough product safety reviews, documenting risk assessments, and evaluating reasonably foreseeable uses and misuses of AI systems. Businesses may also implement appropriate safeguards and control mechanisms, such as age verification tools, parental controls, and limitations on prolonged or harmful use.

Given the unsettled state of the law, there is no one-size-fits-all compliance strategy. Businesses must be prepared to defend their AI design, development, and deployment decisions under multiple, evolving theories of liability. Early involvement of litigation counsel can help companies not only to respond to claims but proactively position themselves to defend against them.

Conclusion

AI liability law is changing—and quickly. Courts are moving away from rigid distinctions and becoming more willing to treat AI systems like products. Legislatures are not far behind. And though the law remains in flux, companies and developers should assume their systems will be scrutinized under expanding theories of liability and prepare accordingly.

From Code to Courtroom

The Growing Risk from AI Products

PRESENTED BY
Stephanie Laws

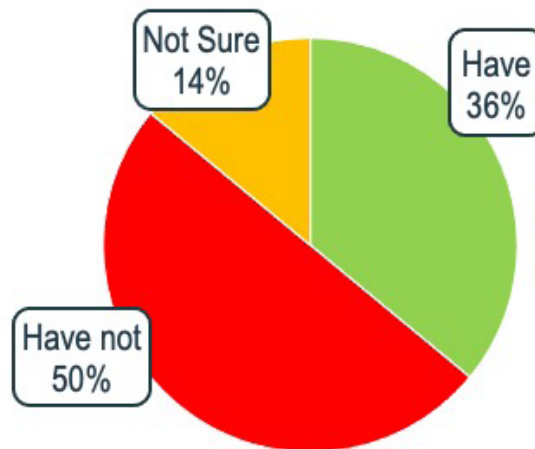
April 25, 2026

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Rising Use of AI

Have you used AI-enabled products in the past seven days?



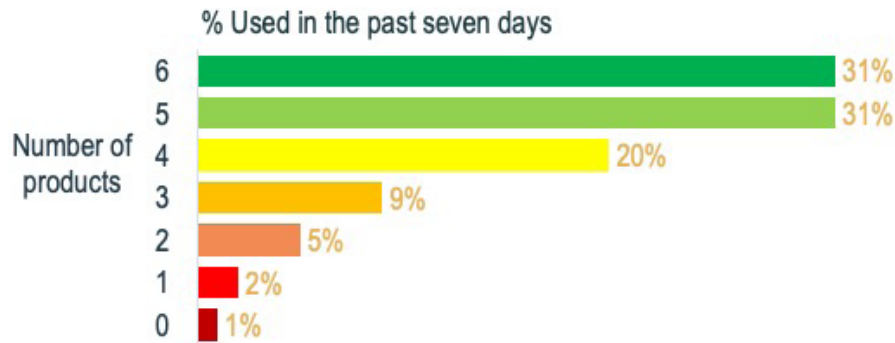
Ellyn Maese, *Americans Use AI in Everyday Products Without Realizing It*, Gallup (January 15, 2025).

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Rising Use of AI

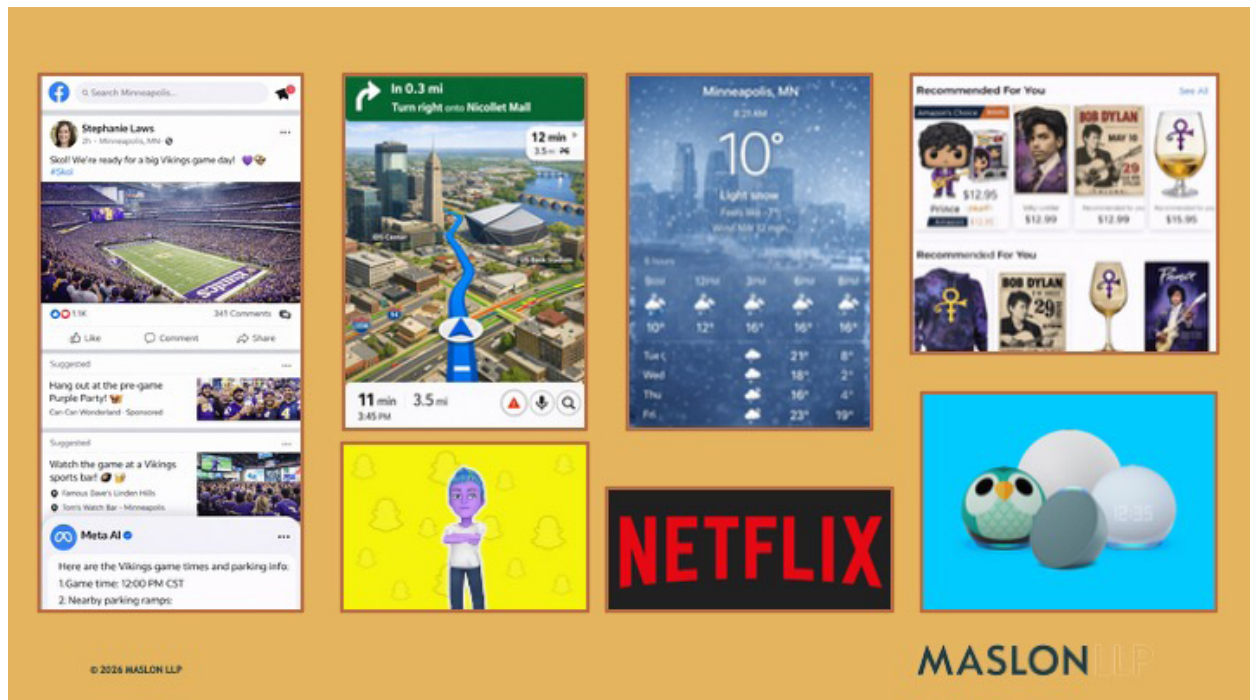
Number of common AI-enabled products used in the past seven days



Ellyn Maese, *Americans Use AI in Everyday Products Without Realizing It*, Gallup (January 15, 2025).

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Is AI a “Product”?



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(c) “Goods” means tangible personal property

...

(e) “Product defect tort claim” means a common law tort claim for damages caused by a defect in the goods.

Minn. Stat. § 604.101

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Restatement (Third) of Torts

Section 19: Definition of “Product”

- a) A product is tangible personal property distributed commercially for use or consumption. Other items . . . are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property
- b) Services, even when provided commercially, are not products.

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Use of AI

But even if certain information that Heppner input into Claude was privileged, he waived the privilege by sharing that information with Claude and Anthropic, just as if he had shared it with any other third party.

United States v. Heppner, No. 1:25-cr-00503-JSR, Dkt. No. 27 (S.D.N.Y. Feb. 17, 2026).

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Use of AI

Had counsel directed Heppner to use Claude, Claude might arguably be said to have functioned in a manner akin to a highly trained professional who may act as a lawyer's agent within the protection of the attorney-client privilege.

United States v. Heppner, No. 1:25-cr-00503-JSR, Dkt. No. 27 (S.D.N.Y. Feb. 17, 2026).

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Reliance on AI

Fargo crime suspect says AI face recognition software failed. Police say there was more to the arrest

'Cartoonish' sketch helps police identify thief in Pennsylvania



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Angela Lipps, seen here in a photo from her GoFundMe page, spent more than five months in jail for a crime she maintains she didn't commit after AI software linked her to a series of bank fraud incidents. She was released in December when charges against her were dropped. [Courtesy of Michael Weiss via GoFundMe](#)

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Coming Attractions



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Stephanie Laws

Partner | Maslon (Minneapolis, MN)

Stephanie Laws is a practical problem solver who represents businesses in product liability and complex civil litigation in federal and state courts nationwide. She also conducts internal investigations and helps companies respond to government enforcement actions. Stephanie's product liability bandwidth spans multiple industries, with particular focus on defense of FDA-regulated products. She is an experienced litigator who has handled cases from fact investigation through jury verdict. She has significant experience managing large-scale document collections and productions as well as e-discovery issues, both in one-off cases and across coordinated portfolios. Stephanie leverages insights from multiple client secondments to develop efficient legal strategies that are custom tailored to fit business needs.

Stephanie is also deeply engaged with pro bono work. She partnered with Maslon attorney Steve Schleicher in his role as special prosecutor for the state of Minnesota in the trial of former Minneapolis police officer Derek Chauvin for the murder of George Floyd, providing integral support to the state's use-of-force case. Stephanie also serves on Maslon's Pro Bono Committee and maintains an active practice, including representing victims of domestic violence seeking orders for protection against their abusers and representing asylum seekers, among other endeavors.

Practice Areas

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

Honors

- Selected for inclusion in Best Lawyers: Ones to Watch, 2021-2025 (These awards recognize attorneys, who are earlier in their careers, for outstanding professional excellence in private practice in the United States.)
- 40 Under 40 Honoree, Minneapolis/St. Paul Business Journal, 2025
- Invited to join the International Association of Defense Counsel, 2023
- Up & Coming Attorney, Minnesota Lawyer, 2022
- Recognized on Minnesota Super Lawyers® list, 2023-2025 (Minnesota Super Lawyers® is a designation given to only 5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2018-2022 (Minnesota Rising Stars is a designation given to only 2.5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Light of Justice Award, Texas Defender Service, 2018
- Top Women Attorneys in Minnesota® list, 2019-2023 (The annual edition of the Top Women Attorneys in Minnesota list features attorneys selected for the previous year's Minnesota Super Lawyers® and Rising Stars lists.)
- Recognized as a Top Lawyer, Minnesota Monthly, 2024 (The research for the Top Lawyers list, created by Professional Research Services, is based on an online peer-review survey sent to all attorneys in Minnesota.)

Education

- University of Pennsylvania Law School - J.D., cum laude, 2012
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Panel - One Claim, Many Interests: Navigating High-Severity, Multi-Beneficiary Claims

Derek Stikeleather

Goodell DeVries Leech & Dann (Baltimore, MD)

One Claim, Many Interests: Navigating High-Severity, Multi-Beneficiary Claims

Derek Stikeleather and Peggy Chu

The civil litigation landscape is seismically shifting. Although 2026 claim frequency remains at pre-pandemic levels, medical and indemnity cost severity continues to soar across all jurisdictions and practice areas. This means higher stakes, more complex negotiations, and persistent pressure on settlement values driven by factors far beyond simple economic inflation. For defense counsel, insurers, and claims professionals, the fallout of nuclear verdicts—eight-, nine-, or even ten-figure jury awards—is no longer theoretical. It directly impacts case valuation, litigation strategy, and ultimate exposure. To improve outcomes, one must understand what drives escalating severity and implement disciplined and proactive countermeasures.

Factors driving the escalating severity in claims

Current data highlights a “perfect storm” of socio-economic and legal trends pushing claims values to record heights. In 2024 alone, U.S. courts saw 135 nuclear verdicts (exceeding \$10 million), with an average payout of approximately \$51 million. These outcomes not only influence the immediate case but also drive up the cost of settlement for all similar cases while further influencing public perceptions of “reasonable” verdicts. The mounting severity of claims is driven by a combination of factors, including social inflation, aggressive tactics by savvy plaintiffs’ lawyers, and the increase in third-party litigation funding.

Social Inflation and Expanding Liability

Social inflation refers to legal and cultural trends that drive up insurance-claim costs faster than traditional inflation. It is distinct from traditional inflation, such as rising costs for medical care, long-term treatment, labor, and property repair, which already increase claim severity. Social inflation reflects a broad shift in how jurors perceive responsibility, damages, and corporate or institutional accountability. Social inflation is the least predictable force behind rising claim severity. When aggressive

advocates combine true inflation with social inflation, it can produce staggering exposure.

One driver of social inflation is evolving juror attitudes towards civil litigation. Jurors today are more inclined to view lawsuits not simply compensating individual wrongs but as a means for correcting social wrongs. This expands potential liability by lowering the threshold for finding fault and expanding the scope of corporate defendants’ responsibility. Actions that might previously have been accepted as non-negligent, recognized complications, or unavoidable outcomes are now reframed as preventable harms worthy of compensation.

Equally significant is the transformation in how damages—especially non-economic damages—are conceptualized. Constant exposure to high-dollar figures has desensitized most jurors to what may be reasonable compensation for an injury. Jurors are increasingly willing to return once-rare nuclear verdicts that surpass reasonable compensation for specific harms and create “generational wealth.” Untethered from traditional notions of reasonableness and proportionality, jurors often view outsized awards as a means of delivering justice, deterring future conduct, or addressing perceived inequities. This is true even in cases where there are no claims for punitive damages.

Declining public trust in corporations and institutions aggravates the problem and erodes many tort-reform measures. Defendants—particularly corporate or healthcare entities—often begin trials with a credibility shortage. Jurors are inclined to scrutinize their conduct and be less receptive to defense narratives. And voters are more inclined to remove structural constraints that previously moderated verdict size. Statutory caps on damages, procedural safeguards, and other reforms have weakened or been challenged (sometimes even by judges), further contributing to severity.

Anchoring and Aggressive Tactics

Many plaintiffs’ counsel are very good at what they do. They have not only adapted but, in many respects,

capitalized on these social trends with increasingly sophisticated litigation strategies.

Numerical anchoring is one of the most powerful tools in their arsenal. By introducing high—often unreasonable—damages figures early, plaintiffs establish a psychological baseline around which all subsequent damages discussions revolve. Even when jurors discount the initial number as too high, it continues to exert gravitational pull on their deliberations. Anchoring remains effective even when jurors and judges are knowledgeable about the subject matter, forewarned about the danger of anchoring, and motivated to resist it.

Closely related to the anchoring is the psychological manipulation of the “reptile theory.” It is designed to trigger fear and anger in jurors and a desire to protect community safety. By reframing an individual stranger’s case as a broader, personal threat—not an isolated incident—plaintiffs can shift the focus from individualized facts to systemic risk.

Narrative control is central to these tactics. Plaintiffs’ firms increasingly invest in emotional priming, storytelling, and visual advocacy to distill complex facts into simple compelling themes and “junk science.” This approach works even better in cases involving technical subject matter, such as medicine and products liability. Jurors will gravitate towards clarity and relatability over nuance and complexity. It is often no longer good enough for a defendant to factually prove that it is right; the jury also must feel that the defendant is right.

The rise of national plaintiffs’ firms and social media have further accelerated this trend. Mega-firms bring significant resources, standardized playbooks, and specialized expertise to most high-value cases. This facilitates the consistent deployment of high-impact strategies across jurisdictions. Social media has expanded the reach and influence of lawyer advertising. Public-facing campaigns not only publicize—and normalize—anomalously large awards and attract more clients but also shape broader perceptions of liability and damages. By the time a case reaches a jury, its underlying themes may already be culturally familiar.

Litigation Funding and Increased Leverage

Third-party litigation funding (TPLF) has emerged as a major driver of severity. It has grown from a niche financing mechanism into a multibillion-dollar industry, which fundamentally alters the economics of litigation. By providing plaintiffs with access to capital, TPLF incentivizes prolonged litigation as it reduces the financial pressure for plaintiffs to settle early. Plaintiffs can afford to pursue extended discovery, retain top-tier experts,

and proceed to trial even in the face of significant risk. This increases the plaintiffs’ leverage, particularly in cases where defendants face reputational damage or operational pressures. TPLF has been credited with contributing to a 57% increase in liability-claim severity over the past decade. Outside investors—whose returns depend on maximizing recovery—also increase the costs of settlements. So, when some plaintiffs are personally ready to settle, their obligations to their financiers often compel them to continue litigating.

Legislators have begun to respond. Federal legislative proposals, such as the Litigation Funding Transparency Act of 2026 and the Protecting TPLF From Abuse Act, seek to mandate disclosure of funding arrangements in certain cases. At the state level, jurisdictions including Kansas, Oklahoma, and Georgia have enacted measures to address disclosure and control, while others have focused on limiting foreign involvement. While these efforts signal growing concern, the practical reality remains: litigation funding is now a permanent feature of the landscape, and defense counsel must account for its influence.

Strategic Countermeasures for Defense Counsel and Carriers

In this environment, merely reactive approaches invite disaster. The foundation of effective defense is early action. Delays can have cascading effects on severity. Effective defense demands early engagement, disciplined strategy, and alignment across legal and claims functions.

Claims must be reported at the earliest indication of a potential compensable event, not merely upon the filing of a lawsuit. Early reporting helps best preserve evidence, including medical records, electronic data, and witness testimony. It also allows defense counsel to begin shaping the narrative before plaintiff does so. Front-end triage is critical to identify high-exposure matters that merit significant resources.

Insurers need a strong relationship with the insured, built on trust, transparency, and clear expectations about the litigation process. Defense teams should recognize the emotional toll of litigation. A collaborative approach ensures that the insured remains engaged and aligned with the defense strategy. Providing support—whether through counseling resources, robust witness preparation, or professional witness coaches—can improve witness performance and credibility and the overall case outcome.

Prompt and objective expert evaluation is one of the most effective tools for controlling severity. Early engagement of qualified experts allows the defense to assess standard

of care, causation, and damages before positions harden. This process should focus not only on defensibility but also on realistic exposure. Identifying weaknesses early enables informed decision-making about whether to defend, mitigate, or resolve the claim.

In high-stakes cases, reputational risk often parallels financial exposure. Early identification of claims with potential publicity—whether due to catastrophic outcomes, sensitive facts, or media interest—is critical. Defense strategy should be coordinated with communication planning to ensure consistency across legal, operational, and public-facing messaging. Failing to do so can erode credibility and amplify risk. Where appropriate, defense teams should include public-relations specialists to promote the client's reputational objectives.

Building the Right Defense Team

Team composition matters. Counsel should be selected based on alignment with the case-specific demands, including venue characteristics, complexity, and jury dynamics. Some cases may require a hybrid approach, combining local trial counsel with national or appellate specialists. Damage experts and consultants should be integrated early to ensure consistency in valuation and presentation.

Effective defense teams align medical, causation, and damages experts around a unified theory of the case to clarify and reinforce key themes. Experts must do more than provide siloed opinions. They must support a cohesive narrative, or they may undermine credibility and confuse jurors.

Defense counsel must develop a clear, defensible narrative that simplifies complex issues into terms that jurors can understand. Again, early case framing is critical. This includes forming the overall strategy early: whether to aggressively defend, mitigate exposure, or pursue resolution. A well-defined action plan provides consistency throughout the litigation.

Data-driven decision-making is increasingly important. Internal tools such as claims review committees and authority checkpoints help ensure consistency and discipline. Externally, focus groups, mock juries, and damage evaluations provide valuable insight into how cases are likely to be perceived. Venue-specific verdict data and historical settlement benchmarking allow for more accurate valuation. Such data can also be used to counter plaintiff anchors by providing objective, evidence-based reference points.

Mediation as a Process, Not an Event

Mediation should be viewed as an ongoing process rather than a single event. Early mediation may be appropriate in some cases, while others benefit from waiting until key leverage points are reached. Even unsuccessful mediations can provide valuable intelligence and help shape resolution strategy.

Effective mediation advocacy must balance persuasion and credibility. Clear, narrative-driven presentations that acknowledge both strengths and risks resonate better. In complex cases, mediators with subject-matter expertise can enhance credibility and facilitate productive dialogue. Involving experts in the process can further strengthen presentations.

Structured settlements are increasingly used to break through a deadlocked negotiation. They are particularly effective for minor plaintiffs with significant future care needs and individuals with limited financial sophistication. By addressing psychological barriers to settlement and providing long-term financial security, structured arrangements can help the plaintiffs achieve their goals and reduce total payout costs. They are also useful in multi-beneficiary claims, where allocation and timing considerations can complicate negotiations.

Trial Readiness as Leverage

Ultimately, trial readiness remains the best leverage. Investing in witness preparation, expert development, and trial demonstratives signals a willingness to proceed to verdict. Key litigation milestones—such as depositions, dispositive motions, and pretrial rulings—can be used strategically to create pressure and drive resolution. Demonstrating preparedness not only improves trial outcomes but also enhances negotiating position throughout the case. Prepared, credible witnesses can significantly influence both trial outcomes and settlement dynamics.

Conclusion

Escalating claim severity is the product of multiple converging forces: social inflation, evolving tactics by plaintiffs, litigation funding, and economic pressures. Together, these dynamics have reshaped the litigation landscape and raised the stakes for all participants. For defense counsel and insurers, success in this environment requires more than technical competence. It demands early engagement, strategic alignment, and a proactive, data-driven approach. By understanding the drivers of severity and implementing disciplined countermeasures—from early triage and expert involvement to strategic mediation and trial readiness—

defense teams can better manage risk, control outcomes, and navigate the challenges of modern litigation. The stakes have changed. The response must as well.

One Claim, Many Interests

Navigating High-Severity, Multi-Beneficiary Claims

What drives escalating severity?

What drives escalating severity?

- Social inflation
- Anchoring and aggressive plaintiff tactics
- Litigation funding

What tactics help counter this trend?

What tactics help counter this trend?

- **Carrier perspective:** Early reporting & front-end clam triage
 - Early reporting of PCE's – not just filed suits
 - Early engagement with the insured
 - Reputation preservation & crisis communication
 - Early expert review (std. of care/causation & damages)

What tactics help counter this trend?

- Building the right defense team
- Strategic use of experts
- Case framing & strategic plans
- Leveraging claim tools & data
- Use of strategic consultants

What tactics help counter this trend?

- Claim evaluation tools
 - Focus groups
 - Targeted mock trials
 - Damage evaluations
 - Data-driven decision making

What tactics help counter this trend?

- Mediation strategy as a process (not an event)
 - Timing strategy
 - Mediator involvement with experts
 - Effective mediation presentation
 - Structured settlements

What tactics help counter this trend?

- Trial readiness as leverage
 - Investing in witness preparation before key depositions and trial
 - Demonstrating willingness to try the case
 - Using milestones to create pressure



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Derek Stikeleather is Chair of the Appellate and Critical Motions Practice Group at Goodell DeVries. He practices primarily in appellate advocacy and complex litigation, often as national appellate counsel for clients responding to nuclear verdicts. Derek has vast experience in commercial disputes and defending medical malpractice, product liability, and class action claims.

Derek is currently leading the multi-firm appellate team that persuaded Florida's Second District Court of Appeal to vacate the \$208 million judgment that followed 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 prevailed on appeal to vacate 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.

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.

Practice Areas

- Appellate and Critical Motions
- Medical Malpractice
- Product Liability
- Pharmaceutical and Medical Device Litigation
- Class Action Litigation

Honors

- Litigation Counsel of America (LCA) – Fellow; Trial Law Institute; Diversity Law Institute
- Benchmark Litigation – Litigation Star (2026)
- Chambers USA - Litigation: Appellate (Maryland), Band 1 (2022-2025)
- Best Lawyers in America - Baltimore Lawyer of the Year, Appellate Practice (2024 and 2026); Appellate Practice (2023-2026); Medical Malpractice Law - Defendants (2026)
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Education

- University of Maryland, School of Law (J.D., 2004) - Order of the Coif; Writing Fellow; Journal of Health Care Law & Policy – Notes and Comments Editor
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- University of Pennsylvania (B.A., cum laude, 1993)



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Pulling Back the Curtain on the Plaintiffs' Bar

Pulling Back the Curtain on the Plaintiffs' Bar

Lana A. Olson

What's the Attorney Information Exchange Group ("AIEG")?

AIEG stands for Attorney Information Exchange Group. It is a nationwide litigation support group founded in Birmingham, Alabama for the sole purpose of allowing plaintiffs' attorneys to share information about similar cases among themselves. Widely known as the most significant group of its type, it was founded in the mid-1970's by Francis H. Hare, Jr., a noted national plaintiffs' attorney from Birmingham.

AIEG's bylaws recite that it was founded for the following purposes: (i) to assist its member attorneys handling similar cases to properly prepare and fairly resolve product defect cases; (ii) to reduce the time and expense required to properly prepare and fairly resolve product defect cases; (iii) to offset the inherent advantages favoring defendants in defective product litigation; and (iv) to overcome the obstacles that unjustly impede the victims of defective products in the exercise of their right to seek legal redress.

AIEG quickly became actively involved in mass litigation in federal and state courts across the country—either as counsel for mass tort plaintiffs, as an amicus advocating pro-plaintiff causes, or as a third-party repository of technical information germane to mass torts. AIEG has in excess of 600 members and has been involved in a number of watershed mass tort cases, including the Ford Pinto litigation, the GM side saddle fuel tank litigation, the Toyota sudden acceleration litigation, the Ford Firestone tire litigation, and varying species of the tobacco litigation.

How Does it Work?

AIEG touts its areas of expertise as: automotive products, consumer products, medical malpractice, roadway safety, and trucking safety. Within these topics, it administers a number of discrete databases; each deals with a different alleged product defect design in a particular product that is the subject matter of individual

product liability cases pending in state and federal courts around the country. AIEG allows its plaintiff attorney members to place materials obtained from defendants through discovery into the databases at AIEG. When an AIEG member submits a description of his case to AIEG, the AIEG prepares a list of documents in the database that may be on topic. The AIEG member then selects which documents he wants. AIEG members do not sell material; it is paid for in kind.

AIEG's membership is limited to active members of the American Association for Justice ("AAJ") who represent plaintiffs in product defect cases. AIEG Members are required to agree not to divulge AIEG documents to non-AIEG members. If a court orders an AIEG member to produce an AIEG document, that attorney's membership in AIEG is automatically terminated.

Where Does It Fit Among the Plaintiffs' Bar?

AIEG represents itself as a necessary resource to plaintiffs' counsel in mass tort litigation involving allegations of product defect. It points to cooperation among the defense bar and contends to the plaintiffs' bar that the failure to take advantage of its corroborative sharing mechanism constitutes legal malpractice. AIEG considers the type of sharing it does as its "civil responsibility to the judicial system" and its member attorneys have noted that it is their "custom and practice." AIEG member attorneys often, as a matter of custom and routine, will not agree to a stipulated protective order prohibiting sharing.

What Types of Materials Can AIEG Members Access?

Among the materials commonly shared among AIEG members: expert reports, trial testimony, deposition testimony, corporate representative deposition testimony, "hot docs," technical product design information, and internal corporate documents produced during discovery. AIEG members also have access to legal memoranda and attorney work product prepared by fellow AIEG members containing legal analyses, opinions, mental impressions, and conclusions. "Providing Member Attorneys" are to aid AIEG members in their case preparation activities

and facilitate the desire of AIEG members handling similar cases to participate in “a cooperative effort to achieve the common interest of properly preparing and fairly resolving individual cases.”

Why Should You Worry About AIEG?

AIEG poses a multi-layered threat to a corporate defendant sued in any jurisdiction in the nation. First, the mere proliferation of sensitive corporate documents among plaintiffs' attorneys not only increases the likelihood of suit in the first place, but also increases the likelihood that a corporate representative or defense expert will be ambushed at deposition with “hot docs” or other incendiary materials obtained from the AIEG exchange.

In addition, AIEG frequently appears as an amicus to oppose a corporate defendant's efforts to prevent or inhibit dissemination of documents and information obtained by plaintiffs during pretrial discovery. And AIEG has appeared as an amicus to support other plaintiff-friendly causes, such as the survival of common law tort claims amidst a highly regulatory federal framework and an overly lax application of Rule 702 of the Federal Rules of Evidence.

Although AIEG's by-laws state that it will not share material in violation of a protective order, it has been known to do so on a number of occasions. See *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 487 (5th Cir. 2012), *McDonald v. Cooper Tire & Rubber Co.*, 2005 WL 3372855, at *1 (M.D. Fla. Dec. 12, 2005).

More recently, and in a high-profile MDL context, a court imposed significant sanctions for the misuse of a centralized discovery repository. In *In re Uber Technologies, Inc., Passenger Sexual Assault Litigation*, No. 3:23-md-03084 (N.D. Cal. Feb. 2026), Magistrate Judge Lisa Cisneros sanctioned plaintiffs' counsel Bret Stanley \$30,000 plus attorney's fees for disclosing Uber's confidential discovery materials—specifically the names of internal Uber policies—in other lawsuits against Uber in Texas and New Jersey. Stanley had searched the MDL discovery repository for documents to use in an unrelated matter. The court found his conduct “impermissible and unreasonable” and emphasized the “vital” role that protective orders play in limiting the disclosure of confidential information. Notably, the court also ordered the parties to confer on whether the protective order should be modified to allow limited use of certain materials in other litigation with appropriate safeguards. The Uber decision is a modern illustration of the very risk that AIEG's model poses: that a centralized discovery repository becomes a “litigation war chest” for attorneys pursuing claims beyond the litigation in which

the materials were produced.

What Can I Do to Protect My Client From AIEG?

First: Do Your Part to Prevent AIEG From Obtaining Sensitive Information in the First Place by Negotiating for a Strongly Worded Protective Order and Acting Vigorously at All Times to Ensure That It Is Adhered To

Hallmarks of a Strong Protective Order

What are the characteristics of a strong protective order? A strong protective order allows certain materials to be designated as confidential, sensitive, or proprietary. It limits the universe of people who can access those documents and the uses to which they may be put. As broad a definition of protected information as possible should be urged; this definition should span beyond trade secrets and proprietary information and reach any type of information that a court could conclude lies within a zone of privacy. For example:

Protected Material: all information, regardless of the manner in which it is generated or maintained (including without limitation any deposition or other testimony, transcripts, or tangible things), that is protected under state or federal law as confidential business information, trade secrets, or as being within the zone of privacy of an individual or entity.

And because courts will be more inclined to enforce protective orders that are specifically bargained for, include a recital that makes plain the intended purpose of the protective order. In other words, make an express statement that the protective order is being stipulated to for the specific purpose of protecting confidential information from disclosure to unauthorized individuals or groups. For example:

Basic Principles. All protected material shall be used solely for this case or any related appellate proceeding, and not for any other purpose whatsoever, including without limitation any other litigation, contemplated litigation, any business or competitive purpose or function, or any communication or dissemination to the public, the media, or any information exchange groups in any form. Protected Material shall not be distributed, disclosed or made available to anyone except as expressly provided in this Order.

After defining what type of content should be subject to a protective order, the universe of people who can access that type of content should be sharply circumscribed. For example: disclosure should be limited to “authorized persons, solely in the performance of their duties in connection with the trial preparation of this case.” Such “authorized persons” should further be defined as

counsel of record for the parties to the case at hand who have consented to and signed the protective order, their support staff, and outside experts they have retained. A provision allowing for access outside the definition of authorized person upon agreement of counsel should be included and each authorized person should agree to subject himself or herself to the jurisdiction of the court entering the protective order.

Authorized persons should be expressly defined to exclude AIEG and like groups. For example:

Authorized persons shall not include any organization or entity that regularly maintains or disseminates documents or information regarding documents, including abstracts or summaries, or any other records as a service to its members, subscribers, or others, or the representative of such an organization or entity.

It is critically important to ensure very specific compliance with all the terms of the protective order to avoid an argument that its protections were somehow waived. In addition, a safeguard for inadvertent disclosure should be included and whatever steps are outlined there followed in such an event.

Courts Are More Likely to Enforce a Negotiated Protective Order and To Impose Sanctions for Its Violation

There is general unanimity that a negotiated protective order can only be changed upon the moving party's showing of "good cause." See, e.g., *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499 (S.D. Ia. 1992) (citing cases). The rationale is that a party which in good faith negotiates a stipulated protective order and then proceeds to produce documents pursuant to that protective order is entitled to "the benefit of its bargain; namely, to rely upon the terms of the stipulated protective order." See, e.g., *Birden v. City of Waterloo*, 2016 U.S. Dist. LEXIS 73868 (N.D. Ia. Jun. 7, 2016).

In addition, efforts toward securing a strongly-worded protective order and to vigilantly police its enforcement weigh toward imposing sanctions for its violation. See, e.g., *Rodriguez Trenado v. Cooper Tire & Rubber Co.*, 2011 WL 79525 (Jan. 6, 2011) (sanctioning attorney who provided documents to AIEG in contravention of protective order).

As noted above, the *In re Uber Technologies* decision underscores this principle: the court imposed a \$30,000 sanction plus attorney's fees where counsel misused documents from a centralized MDL discovery repository, reinforcing that courts will hold attorneys accountable when they treat protective orders as negotiable.

If You Cannot Negotiate a Strong Protective Order that Prohibits Sharing and Protects Confidentiality, Advocate for the Entry of a Protective Order Having That Same Effect

If plaintiff's counsel refuses to negotiate a protective order that protects confidentiality and prevents sharing, it can be an uphill battle to persuade a court to include a non-sharing provision in a protective order. In fact, the sharing mechanism that AIEG promotes and that AIEG members facilitate has been lauded by some courts as an aid to efficient mass tort litigation. Federal courts in particular have been very open to the sharing practice that AIEG promotes. See, e.g., *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980). Soon after AIEG came on the scene in the *Ford Pinto* litigation, one court adjudicating those claims observed:

If, as asserted, a single design defect is the cause of hundreds of injuries, then the evidentiary facts to prove it must be identical, or nearly so, in all the cases. Each plaintiff should not have to undertake to discover anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel. Efficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved.

See *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982). Not only courts, but commentators, have praised AIEG's sharing model. AIEG attorneys often cite these materials in negotiating for sharing provisions. Members of the firm founded by the founder of AIEG have been known to tout that they have been litigating product liability cases for nearly 40 years, and cannot recall ever losing a court ruling on the issue of plaintiffs' information sharing. They reference trial journals, see George E. McLaughlin and William J. Hansen, *Mining Discovery In Other Cases*, 43 Trial 32, 34 (Nov. 2007) ("Many defendants in product liability cases use obstructive tactics—such as seeking wide-ranging protective orders—to restrict information-sharing among plaintiff counsel in related cases. Their aim is to make each plaintiff lawyer reinvent the wheel in every case. But with few exceptions, courts have embraced information-sharing among counsel in related cases, to avoid duplication of discovery; ensure full, fair, and consistent disclosure by defendants; improve efficiency and consistency; and keep costs down."), as well as litigation texts and treatises, see Roxanne Barton Conlin & Gregory S. Cuisimano, *Litigating Tort Cases* §14.44. ("Sharing information among plaintiffs' counsel furthers the objectives of the Rules of Civil Procedure—namely, just resolution of cases by 'eliminating delay, unnecessary expense and all other impediments to the

expeditious administration of justice. In sharp contrast, the effect of restrictive confidentiality orders conflicts with each of these objectives. The authorities are virtually unanimous in recognizing the value in information sharing.”).

Likewise, AIEG and groups like it have been praised for having a “sunlight as a disinfectant” effect. See *Wilk v. American Medical Ass’n*, 635 F.2d 1295 (7th Cir. 1980). (In fact, AIEG invokes state sunshine in litigation laws to argue against confidentiality protections.). In a related vein, there is a presumption that, absent a good reason, pre-trial discovery is to be conducted in public. See Federal Rule of Civil Procedure 26(c) (“good cause” required for the issuance of a protective order). See also *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988).

There is authority supporting the contrary view, i.e., that there is no right to access the discovery materials in a related case. See, e.g., *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 679 (1982) (holding protective order was not subject to a First Amendment challenge and stating that “the effective administration of justice does not require dissemination beyond that which is needed for litigation of the case. It was the needs of litigation and only those needs for which the courts adopted [Rule 26]...”), *aff’d*, 467 U.S. 20, 33 (1984). See also *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (“[A]ppellants’ common law right of access does not extend to information collected through discovery which is not a matter of public record.”).

There are, however, several good bases on which to oppose the entry of a protective order that contains a sharing provision. As an initial matter, consider whether the case or claims even give rise to some basis for sharing. Unless there are other lawsuits regarding the same product and making the same allegations, there really should be no reason to share the information with anyone. A plaintiff’s attorney who urges for a sharing provision in a unique litigation setting is more than likely trying to build the arsenal of information that AIEG and groups like it have against corporate defendants. And the caselaw recognizes that the efficiency and cost savings benefits of shared discovery are entirely speculative when there is no specific plaintiff involved in a lawsuit that would benefit. See, e.g., *Menendez v. Wal-Mart Stores*, 2012 WL 90140 (N.D. Ind. Jan. 11, 2012) (plaintiff could not identify collateral lawsuits for purported sharing benefit), *Gil v. Ford Motor Co.*, 2007 WL 2580792 (N.D. W. Va. Sep. 4, 2007) (court rejecting hypothetical benefit and issuing protective order against disclosure of confidential information).

Recent case law reinforces this view. In *SRH Holdings, LLC v. Gov’t Emps. Ins. Co.*, No. 23-cv-10325 (D. Mass. Jan. 4, 2024), the court noted that sharing clauses in protective orders “are disfavored in the federal courts” and are permitted “only where the protected discovery is highly relevant to other litigation such that duplicative discovery may be avoided and the sharing of information would promote efficiency.” Similarly, in *Associated Terminals LLC v. Entergy Corp.*, 2023 U.S. Dist. LEXIS 150966, *13 (E.D. La. Aug. 28, 2023), the court observed that “the trend appears to be away from inclusion of sharing in protective orders,” and that “particularly in the federal system, [courts] have been hostile to upfront sharing provisions.”

In addition, there is support for the argument that a sharing provision should not be used to do an end run around discovery rules in collateral litigation. For example, permitting sharing when the information would not be discoverable in collateral litigation has been frowned upon. See *Gil*, *supra*, at *5. See also *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560 (2d Cir. 2005) (denying modification of protective order because it was sought to circumvent the close of discovery in collateral litigation), 8A *WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE*, §2044.1 (3d ed. 2013) (sharing of discovery should be denied where it would subvert the discovery limitations in the collateral litigation).

Also argue the relative prejudice to the parties if sharing is allowed. In *Massachusetts v. Mylan Labs, Inc.*, 246 F.R.D. 87 (D. Mass. 2007) a sharing provision was disallowed because the plaintiff in that case would get the documents at issue, just be prevented from sharing them with parties not before the court. A corporate defendant, by contrast, can see its commercial interests substantially harmed if confidential or sensitive information is made widely available. Moreover, it has taken steps and expended sums to shield that information from public view for years. See *Williams v. Taser Int’l, Inc.*, 2006 WL 1835437 at *1 (N.D. Ga. 2006) (noting the risk to defendant by release of confidential information and difficulty enforcing protective order when documents were shared outweighed the plaintiff’s interests in sharing that information).

Another strategy is to argue to the court that a sharing provision will create a “side show” whereby the parties will just come running back to court to hash out what can and cannot be shared. Explain to the court that a sharing provision will unduly burden it with controversies that are completely collateral to the case at hand. Moreover, those controversies could continue to arise long after the case before the court is concluded. In particular, warn the court of the everlasting risk that parties in collateral litigation will come before it to intervene to have the

protective order modified. See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.”).

How Does New Rule 16.1 Play Into This?

The stakes of the discovery sharing debate have never been higher. According to the Institute for Legal Reform, MDLs accounted for nearly two-thirds of private civil cases in federal court in 2024, underscoring the central role that mass tort proceedings play in modern product liability litigation—and the outsized significance of how protective orders and discovery sharing are handled in those cases.

A landmark procedural development took effect on December 1, 2025: Federal Rule of Civil Procedure 16.1, the first MDL-specific procedural rule ever adopted. Rule 16.1 provides a framework for initial case management of MDL proceedings and encourages early exchange of information, early resolution of discovery disputes, and consolidated discovery management. Defense counsel should be keenly aware of this new rule, as it may shape how protective orders and discovery sharing are addressed at the very outset of mass tort proceedings. In particular, the rule’s emphasis on early case management creates an opportunity—and an imperative—for defense counsel to raise protective order concerns and anti-sharing provisions at the earliest stages of an MDL, before a sharing framework becomes entrenched.

Can I Prevent My Witnesses From Being Ambushed by the Type of Material AIEG Supplies to the Plaintiffs’ Bar?

You can take steps to avoid having a witness ambushed by materials gathered from AIEG or a similar database. The first step is attempting to determine what materials the plaintiff may have gotten from AIEG or a similar entity. Targeted interrogatories aimed at identifying materials drawn from the AIEG database can be effective. For example:

Please identify the following information for each and every document obtained by Plaintiff or Plaintiff’s counsel from the Attorney’s Information Exchange Group (“AIEG”) that is relevant to this case:

- a. A description of the document;
- b. The source of the original document;
- c. The date upon which the document was originally obtained;
- d. The date upon which the document was added

to the AIEG database;

e. When the document was retrieved by Plaintiff from the AIEG database; and

f. Any identifying bates labels on the document.

And in order to cast as broad a net as possible, it is helpful to inquire beyond the AIEG database:

Please identify each and every database or website to which Plaintiff or Plaintiff’s counsel has access to which contains documents responsive to these requests, any of Defendants’ previous requests, or any of Plaintiff’s requests directed to Defendant.

Note, however, that AIEG is generally treated just like any other agent assisting counsel in preparing a case. For this reason, materials selected from AIEG by a plaintiff’s attorney have been held subject to the work product doctrine, as they could give away his strategy in preparing the case for trial. See *McDaniel v. Freightliner Corp.*, 2000 WL 303293 (S.D. N.Y. 2000).

What Can I Do if My Corporate Representative Is Confronted with an AIEG-Provided Document In Deposition?

Assume you are putting your corporate representative up for deposition and she is confronted with a facially-inflammatory corporate document. What should you do? First: stay as calm as possible. Deposition is not trial, which is where the admissibility of the document will be determined.

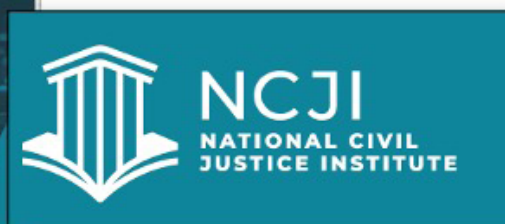
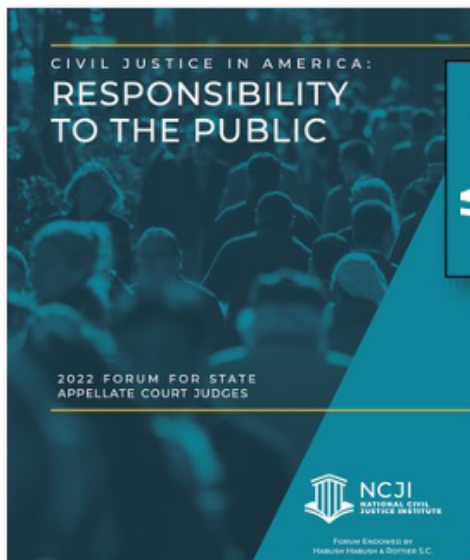
At deposition, it is important to build your arsenal for arguing that the document should be excluded from evidence. Depending on your facts and your rep’s personal knowledge, establish whether the document can even be authenticated. Has your witness seen it before? Have personal knowledge of its contents? Did it pre-date or post-date his or her time at the corporation? Can your witness provide testimony to make it difficult for the document to circumvent the hearsay rule? For example, if the author of the document (if even known) was not authorized to speak on behalf of the corporation, then establish as much. And if the author is unknown, establish that much as well.

Do the matters or incidents in the document even have any bearing on the issues in your case? If different products, product models/designs, or manufacturing timeframes are at issue, then testimony to that effect will go a long way toward a motion in limine to exclude the document as irrelevant and to opposing your opponent’s argument that “other similar incidents” exception for Rule 404(b) is satisfied.

Pulling Back the Curtain on the Plaintiffs' Bar

The most important thing you can do is to build a record to support your arguments for excluding the document. Depending on your relationship with opposing counsel, you may request that the deposition be adjourned until your witness can familiarize himself with the document.

But, if the witness truly has no personal knowledge regarding the document or the matters it deals with, you are probably better off building a record demonstrating he or she was ambushed and that the document should be excluded.

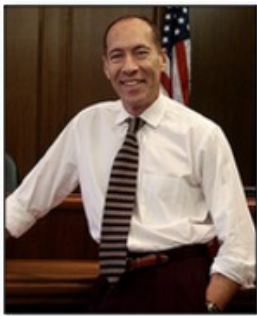


*Formerly known as the
"Roscoe Pound Institute"*



Lightfoot

Morning Paper, Oral Remarks, and Comments



Civil Justice and Accountability: The Challenge of Grave Corporate Misconduct

Stephan Landsman
DePaul University College of Law

- Professor Andrew Bradt of UC Berkeley School of Law
- Hon. Martha Walters, Chief Justice, Oregon Supreme Court
- Lana A. Olson, President-Elect of DRI
- N. John Bey, AAJ Representative

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Morning Paper, Oral Remarks, and Comments



“Recent history provides a great many more examples of **profit-maximizing corporations** that have disregarded regulation, manipulated litigation, and managed to carry out what has amounted to **deadly activity**.”

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Morning Paper, Oral Remarks, and Comments



“Empirical data actually indicate that there is little plaintiff-side discovery abuse. The story of rampaging plaintiffs is simply a **myth**.”

“Conventional regulatory supervision is simply **insufficient** to control potentially lethal corporate misconduct.”

 Lightfoot

Morning Paper, Oral Remarks, and Comments



"If private enforcement is to provide effective policing of corporate harm, **discovery and public dissemination of litigation-generated information is essential.**"

■ Lightfoot

Morning Paper, Oral Remarks, and Comments



"What is left? I believe that it is civil litigation, which offers the last potentially effective barrier to **large-scale corporate life-taking.**"

"Corporations have... been afforded a range of evidentiary privileges that **withhold important evidence** from decision makers."

■ Lightfoot

Morning Paper, Oral Remarks, and Comments



“These cases are but the **tip of the iceberg of deadly activity** by corporations in America.”

Lightfoot

The Judges' Comments

Prof. Landsman's examples of deadly corporate misconduct (Massey Coal, Purdue Pharma and General Motors) as “outliers”

- “I think it's a kind of pattern of practice with big corporations. **They think they are invincible.**”
- “I disagree that they are outliers. I think they are, unfortunately, **part of the norm of corporate practice.**”
- “I think punitive damages have a role to play.”



Lightfoot

The Judges' Comments

Prof. Landsman's examples of deadly corporate misconduct (Massey Coal, Purdue Pharma and General Motors) as "outliers"



- "Such cases, and the conduct they exemplify, are not uncommon, not merely outliers – and **they might even have been bigger than they were.**"
- "The practices Prof. Landsman discussed **exist down to a small level.**"

Lightfoot

Afternoon Paper, Oral Remarks, and Comments



The Rule of Law is Fragile:
The Importance of Legitimacy and Access

Stephen Daniels
American Bar Foundation

Lightfoot

Afternoon Paper, Oral Remarks, and Comments



“Reformer-sponsored advertisements depict a system that has gone terribly and dangerously wrong. The basic or unifying theme is the idea of a system run amok for which **‘we all pay the price,’** and it is one full of evocative metaphors and threatening images.”

■ Lightfoot

Afternoon Paper, Oral Remarks, and Comments



“[The narrative portrays] Americans as pathologically litigious and juries as willing to inappropriately award millions of dollars at the drop of a hat, especially in medical malpractice and products liability cases.”

■ Lightfoot

The Judges' Comments

"Villains" in the civil justice system

- "The Chamber of Commerce. I come from one of those "judicial hell holes." We have a newspaper that is run by the Chamber that reports on everybody – every verdict, everything. It is all slanted toward that message, 'you are paying for this'... They do a wonderful job of messaging... It never stops, because it is the Chamber."



Lightfoot

The Judges' Comments

"Villains" in the civil justice system

- "The tort reform advocates."
- "I think there are some villains. When there's abuse in discovery, that is villainous conduct."
 - "That is not systemic necessarily, it's more individual companies and I think that is where the plaintiff bar does a really good service in trying to ferret it out. Fraud on the court, really, is what it boils down to."

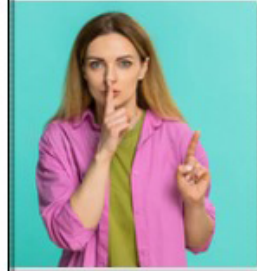


Lightfoot

The Judges' Comments

Discovery

- “As judges, I think we have a tendency to say, ‘Let the parties work it out.’ But I actually think we sometimes do a **disservice** by doing that. Oftentimes, what you’ve got is [a plaintiff or a group of plaintiffs] agreeing to a confidentiality agreement about what [the defendant] can produce... I think **we as judges have to pay more attention to what is transpiring** with regards to that.”



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Responding to the Plaintiffs' Bar: NFJE (National Foundation for Judicial Excellence)

- Counterweight to the National Civil Justice Institute
- Started by DRI in 2004 / Annual Symposium
- Support and education to the judiciary & publication of scholarly works
- Funded 100% by donations and volunteer support
- Reached over 3,600 judges & all 50 states
- Costs for judges fully covered to attend Symposium



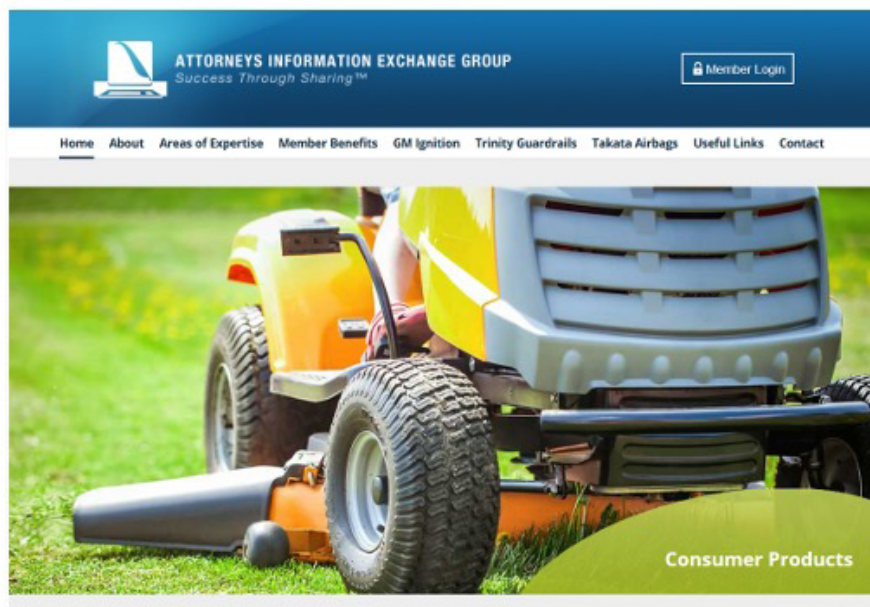
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2025 NFJE Symposium – 145 Judges Attended



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Lana Olson

Partner | Lightfoot Franklin & White (Birmingham, AL)

Lana Olson is a trial lawyer who understands the pressures in-house counsel face. When it comes to defending her clients, Lana has never been afraid of a challenge. Whether she is trying a complex, high-stakes case, providing day-to-day risk management advice or leading an internal investigation, Lana has the experience and judgment needed to guide clients through even the most daunting situations. She is a gifted leader who believes in prioritizing clear communication with clients and tailoring her approach to their unique needs.

Maintaining a varied litigation and arbitration practice, Lana serves as lead trial counsel in matters involving toxic tort, product liability, catastrophic injury, class action, commercial/consumer fraud and breach of contract claims. Her clients are located all over the country and range from Fortune 100 multinational companies to small family businesses. They include a Fortune 100 global science, chemical and innovation company, a residential warranty company; and a Fortune 50 online technology company, along with international commercial vehicle safety manufacturers, chemical manufacturers and transportation companies.

Lana understands the complicated realities facing today's in-house lawyers because she was once in their shoes: she served for seven years as the assistant general counsel for a leading heavy truck component distributor. In this role, she managed all facets of the company's legal and compliance matters, from day-to-day consultation to the most complex and significant pieces of litigation.

Practice Areas

- Catastrophic Injury
- Commercial Litigation
- Commercial Transportation
- Class Actions
- Employment Law
- Environmental & Toxic Torts
- Product Liability
- Consumer Claims Defense

Awards

- Benchmark Litigation, "Local Litigation Star" — Environmental, General Commercial, Labor and Employment, Product Liability (2018-21)
- Benchmark Litigation, "Litigation Star" (2022-24)
- Benchmark Litigation, "Top 250 Women in Litigation" (2017-24)
- The Best Lawyers in America® by BL Rankings — Environmental Litigation (2011-26)
- Birmingham Business Journal, "Best of the Bar" (2020)
- B-Metro magazine, "Top Women Attorneys" (2018, 2020)
- B-Metro magazine, "Top Flight Attorneys" (2019)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Environmental Litigation (2011-13)
- Mid-South Super Lawyers by Thomson Reuters — Environmental Litigation (2014-23)
- Who's Who Legal: Product Liability Defense (2017-19)

Education

- Samford University, Cumberland School of Law (J.D., cum laude)
- Florida State University (B.S.)



Steve Pearson

Smith Gambrell Russell (Chicago, IL)

“Hot Tubbing” Experts: Too Hot, Too Cold, or Just Right?

HotTubbing Experts in Federal and State Courts: A Growing but Cautious Experiment

Steven D. Pearson

“Hottubbing,” formally known as concurrent expert evidence (CEE) or concurrent expert testimony, is a procedural method that allows each party’s retained experts to testify simultaneously before the judge, interact directly with one another, and respond in real time to questions, as if they were casually chatting in a hot tub. Originating in Australia in the 1970s, the method has gained traction in several commonlaw jurisdictions and has more recently begun to make inroads into U.S. federal and state courts.¹

Traditionally, the American adversarial system requires each expert to testify separately, followed by crossexamination by the party opposing the proponent of the expert witness. Hottubbing is designed to allow real-time bantering between experts to make the technical points of each experts’ opinions (and bases thereof) more easily understandable to the “non-expert” judge and jury. Hot-tubbing reduces adversarial posturing and promotes efficiency—but its compatibility with traditional adversarial procedures remains a subject of understandable debate.²

Origins and Global Adoption

Hottubbing was first developed by the Australian Competition Tribunal and later widely adopted in Australian courts before spreading to the U.K., Canada, Singapore, New Zealand, and international arbitrations.³ By the early 2000s, the method reached the United States, initially appearing in federal claims matters, Daubert hearings, and highly technical patent disputes.⁴

How HotTubbing Works - Key Procedural Components

Across jurisdictions, the hottubbing process typically includes:

1. Pretrial expert conferencing held between the court and each parties’ expert (conclaves) - Experts meet collectively to identify agreements and disputes and prepare a joint report similar to process routinely engaged by parties under Federal Rule 16 establishing pretrial scheduling agreements.⁵
2. Concurrent testimony at hearing or trial - Experts are sworn in together, then they jointly respond to judgeled questioning. Attorneys retain far limited crossexamination rights.^{6,7}
3. Interactive expert dialogue - The process helps experts correct, challenge, or explain each other’s opinions in real time, to clarify both the contested technical issues and the related expert opinions.⁸
4. Judicial control of the process - The judge leads the hot-tubbing discussion to improve factfinding efficiency and reduce unnecessary adversarial acrimony.

Use of HotTubbing in U.S. Federal Courts - Judicial Discretion Under Federal Rules

No federal rule expressly authorizes or prohibits hottubbing. However, Federal Rule of Evidence 611 grants judges broad discretion over the “mode and order” of presenting evidence at trial to promote truthfinding, avoid wasted time, and protect witnesses:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so

¹ <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/>

² <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/>

³ <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/>

⁴ <https://www.roundtablegroup.com/the-experienced-expert/bubbles-or-troubles-hot-tubbing-for-experts/>

⁵ <https://civiljuryproject.law.nyu.edu/concurrent-expert-evidence-in-the-united-states-is-there-a-role-for-hot-tubbing/>

⁶ <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/>

⁷ <https://civiljuryproject.law.nyu.edu/concurrent-expert-evidence-in-the-united-states-is-there-a-role-for-hot-tubbing/>

⁸ <https://www.roundtablegroup.com/the-experienced-expert/bubbles-or-troubles-hot-tubbing-for-experts/>

as to:

1. make those procedures effective for determining the truth;
2. avoid wasting time; and
3. protect witnesses from harassment or undue embarrassment.

Hottubbing fits well within this discretionary framework so long as meaningful crossexamination rights are preserved.⁹

Notable Federal Use Cases

- Judge Jack Zouhary (N.D. Ohio) employed hottubbing in a complex antitrust multidistrict litigation involving class certification. He described the process as “rewarding” and expressed willingness to use it again.¹⁰
- Judge William Young and Judge Woodlock (D. Mass.) also experimented with the method after learning of its success in Australia.¹¹

Practical Benefits Reported in Federal Courts

Federal judges using the technique cite the overall improved understanding of competing expert positions, and an improved rate of understanding and resolution of technical disputes among experts. Reduced time and cost in complex litigation (especially antitrust and patent matters) has been cited.¹²

Limitations in Federal Practice

Although more common in arbitrations, hottubbing remains infrequent and discretionary in federal and state courts. Lack of formal codification, concerns about diminished counsel control, and potential dueprocess objections have limited its adoption.¹³

Use of HotTubbing in State Courts

U.S. state courts have not adopted hottubbing uniformly. Its usage is sporadic and generally occurs in specialized or complex civil matters, judgeled case management situations, or when parties consent or a court uses inherent authority to structure expert testimony more efficiently.

States have shown greater caution than federal courts due to procedural variations, jury trial prevalence, and concern that concurrent testimony could influence juror

perceptions differently than sequential testimony.

Legal commentary indicates that judges who have experimented with the method find it very effective in bench trials but more problematic in jury trials, where simultaneous expert exchanges could overwhelm jurors.¹⁴

Empirical and Psychological Considerations

Research suggests that hottubbing does not eliminate the adversarial allegiance of a party’s retained expert—experts still tend to align with the side that retained them, despite interacting with the other side’s expert concurrently. For example, a 2021 empirical study showed no significant reduction in partisan expert bias between adversarial and concurrent testimony formats.¹⁵

This raises questions about whether hottubbing can truly neutralize expert bias or merely just reorganizes how that bias is expressed.

Arguments in favor of HotTubbing in U.S. Courts

1. Efficiency and Time Savings - Concurrent testimony may shorten proceedings by consolidating expert presentations and clarifying technical disputes efficiently.¹⁶
2. Enhanced Judicial Understanding - Direct expert interaction between the parties’ experts and the judge gives judges a clearer view of where the real points of disagreement between the experts exists and in effect, allows the judge to be a better gatekeeper between the experts and the jury.¹⁷
3. Cost Reduction - Hot-tubbing has proven to be particularly beneficial in highstakes federal litigation involving complex science and/or economics.¹⁸

Challenges and Criticisms

1. Reduced Attorney Control - Lawyers lose strategic control of the order in which expert testimony is received by the fact-finder. Instead, judges and the experts drive that discussion.¹⁹
2. Judicial Competency Requirements - Judges must actively and skillfully manage these discussions—it is not intended to be an expert “food-fight” in which the experts jointly throw as much against the wall as possible to see what may stick.²⁰

9 <https://natlawreview.com/article/concurrent-expert-evidence-hot-tubbing-america-experts-jump>

10 <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/>

11 <https://civiljuryproject.law.nyu.edu/concurrent-expert-evidence-in-the-united-states-is-there-a-role-for-hot-tubbing/>

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13 <https://www.roundtablegroup.com/the-experienced-expert/bubbles-or-troubles-hot-tubbing-for-experts/>

14 <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/>

15 https://academicworks.cuny.edu/jj_pubs/460/

16 <https://www.roundtablegroup.com/the-experienced-expert/bubbles-or-troubles-hot-tubbing-for-experts/>

17 <https://www.hka.com/article/hot-tubbing-the-experts-friend/>

18 <https://natlawreview.com/article/concurrent-expert-evidence-hot-tubbing-america-experts-jump>

19 <https://www.hka.com/article/hot-tubbing-the-experts-friend/>

20 <https://www.roundtablegroup.com/the-experienced-expert/bubbles-or-troubles-hot-tubbing-for-experts/>

3. Compatibility with Jury Trials - Concurrent testimony can confuse jurors if the process allowing for expert debate is not fully explained. This problem could be ameliorated by allowing the jury to submit questions as part of the overall hot-tubbing process.

Future of HotTubbing in American Courts

Hottubbing is likely to expand in the United States, particularly in bench trials. Multidistrict litigation and other complex commercial, antitrust, and patent cases are well-suited for this process. As state and federal courts are increasingly experimenting with innovative case management techniques designed to make the truth-finding process more efficient and more understandable, wider use of this process may be expected.

But widespread adoption will likely require formal

procedural guidance, judicial training, and more empirical evidence supporting the benefits of hot-tubbing over traditional methods.

Conclusion

Hottubbing of experts represents a promising, though cautiously adopted, procedural innovation. So far, Federal judges have shown greater willingness than state courts to experiment with this practice, particularly in complex technical cases where judicial comprehension and efficiency are paramount. Concerns about adversarial fairness, counsel control, and jury suitability continue to limit broader adoption. As United States courts continue to explore alternative means of improving expert testimony, hottubbing remains a compelling—but still evolving—tool in the procedural toolbox.

“Hot Tubbing In Court”



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WHAT IS IT?

**Expert witnesses from both sides
testify together at the same time.**

- Method championed in Australia and now used in other common law jurisdictions and arbitrations
- Primary goal to enhance the efficiency and accuracy of the evidence taking process at trial
- Enhances the “gatekeeping” function of the Judge regarding the opinions of experts allowed to be heard by the jury.

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LEGAL SUPPORT

Federal Rule of Evidence 611

Mode and Order of Examining Witnesses and Presenting Evidence

- a. Control by the Court; Purposes: The Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
- (1) Make those procedures effective for determining the truth;
 - (2) Avoid wasting time; and
 - (3) Protect witnesses from harassment or undue embarrassment.

Advisory Committee Notes: [Rule 611(a) (1)] restates in "Broad terms the power and obligation of the judge" with ultimate responsibility for the effective working of the adversary system. The Rule controls the many questions arising during the course of trial which "can be solved only by the judge's common sense, and fairness in view of the particular circumstances".

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OUTCOME

Does Hot Tubbing Help Clarify Areas of Agreement or Disagreement of Experts at Trial?

- ② Use in MDL’s has included “science days”
- ② Use in Daubert hearings and claims construction hearings and patent litigation
- ② Use favored where expert testimony itself is difficult to understand and complicated



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IS HOT TUBBING FAIR?

- Changes the adversarial order of the parties’ proofs at trial
- Changes the traditional cross-examination method of our adversarial system
- Interjects a trial lawyer’s loss of control over what evidence is before the court/jury if the discussion between the experts veers off counsel’s planned narrative



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Does Hot Tubbing Ease or Enhance Jury Confusion?



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Few reported cases due to absence of appeals

Deborah Frame-Wilson v. Amazon.Com, Inc., United States District Court, Western District of Washington, Case No 2:20-cv-00424-JHC (Feb 26, 2026)

- Amazon sought hearing with multiple experts in proposed class action accusing the retail giant of artificially inflating consumer prices in violation of Antitrust laws
- Amazon argued hot-tubbing was necessary to allow the Court to efficiently question and assess, in real time, representations made to the court that were fundamental to alleged antitrust violations
- Consumers’ expert (an MIT economics professor) had allegedly changed an opinion previously given in related litigation
- Amazon contended that hot-tubbing would “provide the court invaluable information – an unfiltered format – to assess whether [the expert’s opinion on an economic model he utilized] would provide the jury a sound basis to make reasonable judgment about antitrust impact
- Court rules the “hot-tub” hearings was “not necessary at this time”

Rovakat, LLC v. CIR, 102 T.C.M. (CCH) 264 (T.C. 2011), *aff’d* 529 F.App’x 124 (3rd Cir 2013)

Court commenting favorably on the hot-tubbing process noting the process was “highly focused, highly structured, and directed by the Court.”

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Steven D. Pearson is a Partner, Head of the Litigation Department and member of the Executive Committee of Smith, Gambrell & Russell, LLP. Mr. Pearson previously served as the Co-Managing Partner of Freeborn & Peters, which combined with SGR in 2023.

Mr. Pearson is an experienced trial lawyer who has tried numerous cases to verdict in both state and federal courts in Illinois and across the country. His trial and litigation practice involves a number of areas with an emphasis upon restrictive covenant and trade secrets in the insurance brokerage arena. His vast depth of experience in trials and litigation also involves complex insurance coverage, bad faith, reinsurance, and non-medical professional liability matters. Mr. Pearson also regularly litigates large scale attorney fee disputes and has testified as an expert witness in such matters. His practice representing parties in restrictive covenant and trade secret litigation involves all aspects of the process, from counseling to litigation through trial and appeal in both state and federal courts across the country. He has an intimate knowledge of insurance, having previously served as both national and regional counsel for several insurance companies in a broad array of industry sectors and taught insurance law for nearly a decade as an adjunct professor of law with a special emphasis on the litigation of insurance claims and related extra-contractual obligations of insurers.

Prior to joining Freeborn, Mr. Pearson was a founding partner in Meckler Bulger Tilson Marick & Pearson LLP where during his nearly 25 years tenure he was instrumental in the growth of that firm from 12 lawyers in Chicago at its founding to over 100 lawyers in offices located in multiple states while serving on the firm's Management and Executive Committees.

Areas of Practice

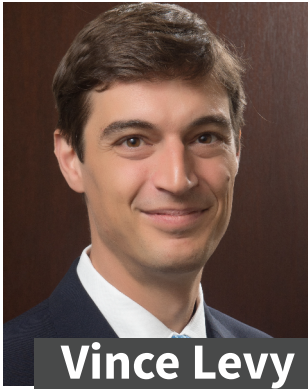
- Litigation / Trial Practice
- Trade Secrets
- Insurance and Reinsurance

Recognitions

- Martindale-Hubbell AV Preeminent Peer Review Rated.
- The Best Lawyers in America - Commercial Litigation, Insurance Law, and Insurance Litigation (2013-2026).
- Illinois Super Lawyers - 2005-2016, 2021, Insurance Coverage.
- Leading Lawyer, Law Bulletin Publishing Company.
- Illinois Leading Lawyers - Insurance Coverage, Business Litigation, Construction Litigation - 2020 (cited in multiple years).

Education

- Undergraduate - University of Minnesota
- Law School - DePaul University College of Law



Vince Levy

Holwell Shuster & Goldberg (New York, NY)

Can You Keep a Secret? Mitigating Trade Secret Litigation Risks

Can You Keep A Secret? Mitigating Trade Secret Litigation Risks

Vincent Levy

Trade-secret litigation is on the rise. As with all lawsuits, trade-secret litigation can be costly and uncertain, with recent examples of juries awarding sizeable judgments subject to trebling by the court. Moreover, because corporate parties rely on trade-secret statutes to protect their confidences, they may find themselves to be plaintiffs or defendants in these lawsuits. This paper offers some thoughts on mitigating litigation risks, both for those wishing to protect confidential information they deem “secret” and “valuable,” and for those concerned with mitigating the risk of finding themselves the target of a lawsuit.

Trade-Secret Statutes

Today, state and federal law protects “trade secrets.” In contrast to patent law, which gives inventors monopolies over novel inventions disclosed to the public, trade-secret statutes protect novel information that is kept secret (the classic example is Coca Cola’s formula). Many companies protect their intellectual property through combinations of claiming public patents and taking various steps to keep key information secret, such as by using nondisclosure agreements or limiting who has access to certain information.

Nearly all states have adopted the Uniform Trade Secrets Act. The Act protects “information, including a formula, pattern, compilation, program, device, method, technique, or process” that “[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use,” and “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” This can include sensitive business information (like customer lists) and more technical secrets (e.g., formulae, specifications for highly technical products, etc.).

The Act defines misappropriation to include improper use or disclosure without authorization. Courts have not required that the defendant put a product to market using trade secrets, and have found it a misappropriation to, for example, “rely[] on the trade secret to assist or accelerate research or development.”¹ Moreover, for a number of reasons, including because “direct evidence of industrial espionage is rarely available,” courts allow juries to draw inferences of misappropriation from circumstantial evidence.²

A successful plaintiff suing for misappropriation may recover ordinary damages corresponding to its actual losses and the defendant’s unjust enrichment (which could be a royalty-type payment). If the misappropriation is willful and malicious (which is a question that can go to the jury or the court), the court may award exemplary damages of up to twice the amount of ordinary damages inclusive of unjust enrichment (i.e., trebling) plus reasonable attorneys’ fees.

Congress also adopted trade-secret protections in 2016 when it enacted the Defend Trade Secrets Act (DTSA). The DTSA offers parallel protections, giving trade-secret plaintiffs the choice of bringing claims in state or federal court.

Common Fact Patterns in Litigation

Trade-secret litigation is on the rise. Practitioners and commentators have offered different explanations, including the publicity of high-damages awards and the perceived receptivity of various state and federal forums for protecting intellectual property. Regardless of the reasons, companies find themselves as both plaintiffs and defendants in trade-secret cases,³ because they both rely on trade-secret law to protect their intellectual property and often receive information in confidence.

¹ E.g., *AtriCure, Inc. v. Jian Meng*, 842 F. App’x 974, 982 (6th Cir. 2021) (quoting *Welloxig, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 877 (5th Cir. 2013)).

² E.g., *Pioneer Hi-Bred Int’l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1239 (8th Cir. 1994); *Modumetal, Inc. v. Xtallic Corp.*, 425 P.3d 871, 879 (Wash. Ct. App. 2018).

³ Compare *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665 (Wash. 1987) (Boeing was trade-secret claimant) with *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 2022 WL 433457 (11th Cir. Feb. 14, 2022) (Boeing defendant).

Thus, trade-secret cases are often brought between competitors or former business partners, and they typically fall into one of several recurring fact-patterns. Many cases involve claims that a departing employee took confidences with him or her to a competitor, and used the confidences to work on a competing product. Other cases involve disputes over the sharing of information under an NDA, typically between companies exploring a potential investment or venture, after the potential deal does not materialize or goes south.

Protecting Your Trade Secrets

Demand robust NDAs and keep track of your confidences. If you are going to share secrets with a potential partner, do not cut corners. Negotiate a robust NDA that will commit your potential partner to maintaining the information in confidence and not using it for purposes you deem inappropriate. Moreover, consider recording what you share and who you share it with, and including appropriate designations on shared information if the agreement contemplates it (and/or for particularly sensitive information).

Maintain adequate procedures with current employees and partners. As trade-secret statutes require “reasonable” efforts “to maintain [the] secrecy” of trade secrets, having robust procedures governing who can access information deemed a trade secret, and how the information can be used, is important. This could include written policies limiting access to those with a “need to know,” and requiring employees, partners, and others with access to “secrets” to sign appropriate confidentiality commitments. And if you identify a technical breach of a procedure, such as information being shared with someone who should not have access, consider raising the issue with your counterparty.

Beware departing employees. One of the most common fact patterns in trade-secret suits involves claims that departing employees took confidences with them. It is important to ensure that they will remain subject to confidentiality obligations after they leave—a step more easily taken during the employment relationship—and for employees with access to particularly sensitive information, consider pairing those restrictions with appropriate non-competes. Moreover, if you have robust procedures in place to protect your most sensitive information (including restricting access), that may further mitigate departing employees being able to take confidential information with them.

Think about the interplay with patent law. Companies that rely on both patent and trade-secret law to protect their intellectual property should give thought about the interplay of these two areas of law, because “publication

of information in a patent application eliminates any trade secrecy.”⁴ If you ever have to protect trade secrets through litigation, you will have to define secrets with enough specificity to distinguish them and their importance from any patents.⁵ So, if you are going to seek patent protections for some inventions, be careful not to disclose information that you wish to protect through trade-secret statutes, such as specifications on implementing methods disclosed in the patent. If you disclose too much in the patent, you will lose trade-secret protection.

Mitigating The Risk of Being Sued

Beware confidentiality agreements, and their scope. Confidentiality agreements and NDAs are so standard that they often are negotiated or agreed without lawyer involvement, and they often include very broad protections. From the perspective of the recipient, this can be a real trap for the unwary, as plaintiffs may claim that the breach of a broad confidentiality agreement is not just a violation of the contract, but also a trade-secret violation. Lawyers should remind the business that NDAs are real contracts with real consequences, including significant potential trade-secret liability and other risks.⁶ Businesses should review those NDAs to make sure that they do not provide protections that are broader than necessary, including ensuring confidentiality agreements (a) have appropriate termination provisions, (b) have mechanisms to address information that is “not really secret,” and (c) specifically define the universe of what information is covered by the agreement. For example, if an NDA covers only written information and expressly disclaims protection over information shared orally, this can potentially cabin exposure and mitigate disputes over trade-secret claims based on testimony that the plaintiff shared important information only orally.

Businesses worried about trade-secret liability risks can also try to include provisions in NDAs making clear what will and will not be deemed an improper use. This can include provisions stating, for example, that if someone received confidential information, it would not be improper to use the information on certain types of projects, even if they compete with the business of the sending party. Keep track of information received under NDAs (process matters). Litigators are used to paying attention to information covered by confidentiality agreements, with protective orders being a mainstay of litigation, but

4 Attia v. Google LLC, 983 F.3d 420, 426 (9th Cir. 2020)

5 Imax Corp. v. Cinema Techs., Inc., 152 F.3d 1161 (9th Cir. 1998) (requiring patent holder claiming trade-secret protection for “dimensions and tolerances” of patented projector system to specify the “dimensions and tolerances” with particularity to survive summary judgment); Advanced Modular Sputtering v. Superior Ct., 132 Cal. App. 4th 826, 836 (2005) (“Where, as here, the alleged trade secrets consist of incremental variations on, or advances in the state of the art in a highly specialized technical field, a more exacting level of particularity may be required[.]”)

6 Martin Marietta Materials, Inc. v. Vulcan Materials Co., 68 A.3d 1208, 1210 (Del. 2012), as corrected (July 12, 2012) (affirming injunction against merger for breach of NDA).

businesses often are not. Material designated confidential can easily make its way to persons not entitled to see the information, or into corporate documents with no relationship to the potential transactions that led to the sharing of information in the first place. This is another liability trap. And it can be mitigated by adopting and adhering to processes designed to prevent information leakage, such as by using clean teams (if appropriate) and storing designated information in separate locations. That sort of documented procedure can counter arguments made in litigation that fact-finders should draw adverse inferences.

Similarly, if information is exchanged to evaluate a potential transaction, and the discussions are abandoned, consider expressly terminating the agreement and documenting the destruction of all documents subject to it. This will be easier to accomplish if you kept track of the information as it came in, and kept it segregated.

Avoid ambiguity. Another recurring fact pattern that can lead to litigation and liability involves ambiguity in the parties' interactions. For example, sometimes parties will continue to work together and share information after the purposes of the confidentiality agreement have closed, but without there being an express agreement that the NDA expired. Or the receiving party may believe that certain information designated by the other party as confidential is publicly available, and may for that reason fail to accord it confidential treatment. Or there is ambiguity as to the purposes for which the receiving party intends to use information received under the NDA. Documenting and resolving ambiguities as they arise can avoid later disputes. Thus, for instance, if an agreement terminates on a certain date but the parties continue to share information, it is best to set forth in a clear writing whether the exchange will be subject to restrictions on use. Similarly, if you are not sure whether information is confidential, ask in writing before engaging in self-help.



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Vincent Levy acts as lead counsel to sophisticated clients in trial and appellate courts, as well as arbitration proceedings, primarily in complex commercial disputes. He has presented oral argument in the Supreme Court of the United States and various courts of appeals and has led and co-led trial teams in jury and bench trials, as well as arbitration hearings, including through verdict and award.

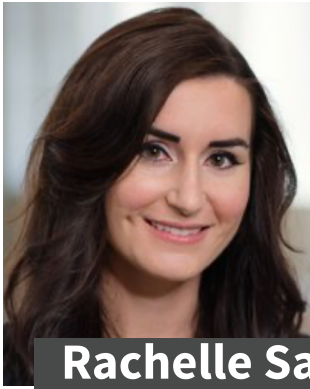
Clients and peers observe he “can tackle the toughest legal issues and explain them in clear compelling briefs,” and “is ‘just a brilliant attorney.’” Adam Feldman, author of the Empirical SCOTUS, identified Vince’s Supreme Court principal merits brief in *Waetzig v. Halliburton Energy Services* as the top brief among the principal merits briefs filed in the first ten decisions of October Term 2024, calling it a “tour de force in advocacy” and a “masterclass” that “balanced doctrinal precision with rhythmic narrative.” Lawdragon named him a Leading Global Litigator and a Leading Global Bankruptcy & Restructuring Lawyer in 2025; The National Law Journal included him on its Elite Boutique Trailblazer list in 2018; while the New York Law Journal included him on its inaugural Trailblazer list in 2019 and named him a Rising Star in 2017. He has been recognized by Benchmark Litigation (every year since 2017) and Super Lawyers (every year since 2015). His successes have been recognized several times in Law360’s Legal Lions column and The American Lawyer’s Litigator of the Week column.

Vincent has experience advising clients pursuing or facing claims under or related to, among others, antitrust law, state and federal administrative law, state corporate law, state contract and tort law, trade-secret statute, federal arbitration law, public and private international law, the Foreign Sovereign Immunities Act, federal securities laws and regulations, the Bankruptcy Code, the Securities Investor Protection Act of 1970, and Section 1782. He has substantial experience as lead counsel in complex transnational disputes, including in U.S. court proceedings related to foreign litigation or arbitration matters, and in arbitrations under various arbitral rules, including the AAA, ICC, and LCIA, as well as ad hoc rules. His clients have included public and private businesses (such as MacAndrews & Forbes, H.I.G., Goldman Sachs, Visa, HP, and TiVo), hedge funds, prominent law firms, public-interest organizations, foreign sovereigns, and individuals (including current and former directors of companies, such as Sears and Codere SA).

Among other administrative-law and constitutional matters, Vincent currently represents a financial institution awarded \$5 billion in grants by EPA challenging the Trump Administration’s dismantling of the grant program, a U.S. manufacturer challenging the Biden Administration’s implementation of Buy America mandates in a multi-billion-dollar project, and two members of the Board of the National Credit Union challenging their termination without cause. He secured the first injunction against the second iteration of President Trump’s travel ban on behalf of an asylee in Wisconsin seeking derivative-asylum status for his wife and young child, ultimately obtaining their reunification. Vincent represented a bipartisan group of 65 legislators in submitting an amicus brief that Justice Kagan quoted in her dissenting opinion in *Rucho v. Common Cause* as well as her separate opinion in *Whitford v. Gill*, while SCOTUSblog singled out his brief on behalf of the Brennan Center in *Benisek v. Lamone* as a notable “‘impact’ brief.”

Education

- Columbia Law School (J.D., 2007; John Ordronaux Prize; David M. Berger Memorial Prize; James Kent Scholar 2004-07; Editor-in-chief, Columbia Journal of Transnational Law; Philip C. Jessup International Law Moot Court Competition, best oralist in 2006 championship round and member of 2006 world championship team)
- London School of Economics and Political Science (M.Sc. with distinction in Econometrics and Mathematical Economics, 2004)
- Harvard College (A.B., Social Studies, magna cum laude, 2000)



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Garbage In, Garbage Out: Effective AI Prompting in Litigation

Garbage In, Garbage Out: Practical Tips for Effective AI Prompting in Litigation

Rachelle Sanchez

Prompting lies at the heart of reliable and effective use of generative artificial intelligence. The rule of “garbage in, garbage out” governs AI prompting, even for those models purpose-built for legal work. Well-designed prompts raise the quality of drafting, research, and case preparation, and they lower the odds of hallucinations becoming headlines. Clear intent, necessary context and iterative refinement consistently produce more accurate outputs while vague instructions yield generic or wrong answers that demand rework and invite ethical risk. Publicized incidents of fabricated citations underscore why litigators must ask for source-backed answers and build verification into their AI workflow. This article lays out a practical playbook for effectively prompting AI - what to ask, how to ask it, and why it works.

Know Your Tool, Know Its Limits

Each AI platform has its own knowledge base, guardrails, and limits. It is critical for litigators to understand their AI’s technical limits, which shape how information is processed, when crafting effective prompts.

Generally, AI breaks language down into “tokens,” which are the basic units of text a model reads and processes, and different models have different token limits. When you exceed the token limit, the model can silently drop parts of the record—losing valuable context. The result? Polished responses that look complete at first glance but actually omit critical information. Practically, that means you should provide concise inputs, chunk long materials, and carry forward concise summaries so the model “sees” what matters.

Further, general large language models (LLMs) can be powerful but may lack confidentiality controls, legal-grade constraints, and safer ingestion of sensitive data than legal-specific LLMs. For that reason, litigators should avoid inputting personally identifiable information, personal health information, or privileged materials into public tools, and confirm data-retention settings, access

controls, and auditability.

Biases in how models use context also matter. Performance is often highest when key instructions or facts appear at the beginning or end of the prompt. As prompts get longer, information buried in the middle is more likely to be overlooked (a phenomenon known as “lost-in-the-middle” bias), so carefully consider the sequencing of your prompts. Word repetition also signals emphasis, known as “majority-label bias,” so use words deliberately. For instance, if you ask the model to analyze a Rule 12(b) motion and repeatedly say “dismiss” or “dismissal” in your prompt, the model may over-focus on dismissals and skew the analysis toward throwing out claims. To avoid this issue, instruct the model to evaluate the motion claim-by-claim under the applicable standard without repeating outcome words.

If you match the task to the right platform and intentionally manage context and confidentiality, you’ll get reliable help instead of risky surprises.

Prompting Principles that Deliver in Practice

With the tool selected, effective prompting comes down to a repeatable set of habits that reduce risk and efficiently raise the quality of work product.

Start with a simple mental model: intent, clarity, context, and refinement. LLMs follow instructions literally. If you do not define the task, the audience, and the constraints, the model fills in gaps with assumptions that may be wrong for your case. Define the action you want, remove ambiguity, ground the task in the facts and (if needed) the relevant jurisdiction, and then iterate until the output matches your desired result. Be explicit about role, audience, and format. For instance, telling the LLM to “act as a senior litigator” frames the level of analysis. Naming the audience (e.g., federal judge, jury, client) guides tone and depth. Specifying headings, length, or tables gives the model a blueprint and prevents walls of text that require heavy editing.

Provide only the necessary context, which will depend

on the specific request. Critical background may include the procedural posture, dates, key facts from recent deposition testimony, or the jurisdiction. Lengthy narratives consume tokens and increase the risk that the model pays attention to colorful details rather than the context that matters.

Break complex tasks into steps. Rather than asking the LLM to “draft a summary judgment based on the attached deposition testimony and plaintiff’s complaint,” you should work with the AI to plan first, outline next, then draft and finally refine. A stepwise approach helps expose the model’s reasoning so you can catch mistakes early and verify more quickly.

Use constraints that the model must follow. “Do” and “Do not” restrictions fence the task and help reduce the risk of the LLM drifting into unwanted results. For instance, you can direct the model to: “do limit analyses to the specified time frame” or “do not introduce facts beyond the record supplied.” These constraints can lower the chance of confident, but wrong, answers and make your review faster.

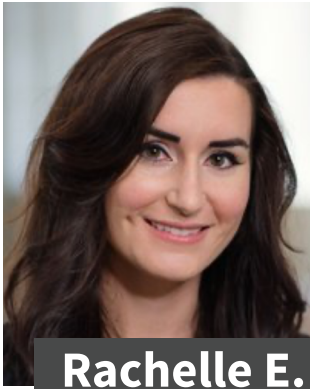
Offer a few examples, known as few-shot prompting, when you want a specific voice or format. Two to four exemplars teach the model what “good” looks like in your practice. However, you should avoid offering the model “negative” examples of, for example, formats you do not want because it learns by imitating patterns rather than by inferring constraints, so “negative” examples can become templates the model echoes in the output.

Consider your own limitations. When you lack deep subject-matter knowledge, start with easy-to-verify

questions, then deepen as you confirm sources. Depending on the desired output, keep in mind when to use AI as a stepping stone to the end product. For instance, if you are prepping for a highly specialized expert deposition and know little about the subject area, asking AI to simply “draft an expert deposition outline” may (will) result in an ineffective examination. If you can’t check its work, you can’t use its work. Instead, consider prompting AI to help educate you with citations and sources on the area of expertise.

Build verification into the prompt. You should ask the model to provide citations to every assertion or summarization and require citations to accepted sources, which you can define. You can also ask for a confidence statement, where the AI assesses its own analysis, or for the AI to identify open questions or flag contrary authority. Human oversight is always necessary when using AI, and citations and confidence statements help you more efficiently review its work.

AI is undeniably in our future. Luckily for us, litigators are masters of language and effective communication, which makes us especially well-suited to effective AI prompting. As models improve, your clarity, constraints, and verification discipline will still determine the reliability of the output. Start with low-risk workflows, work token-smart, lead with structure and context, iterate deliberately, and treat accuracy controls as non-negotiable. Critically, view prompting as a team sport at your firm to garner better results. Use AI regularly across the board and learn from the firm’s collective experience by sharing what worked and what did not in your prompts and outputs. Collaboration is key to raising the quality of outcomes.



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Rachelle Sanchez leverages her experience as a former criminal prosecutor to defend her clients.

Rachelle defends leading consumer products companies, automakers, original equipment manufacturers, retailers and others against product liability claims and other high-stakes litigation. As part of her practice, she often serves as local counsel for multinational conglomerates in matters before Alabama courts and the Eleventh Circuit. Rachelle also defends doctors, nurses, surgeons and other health care professionals against medical malpractice claims.

Whether she is consulting with engineers to better understand how a product works or investigating patient charts to develop arguments supporting a physician's treatment recommendations, Rachelle dives into the facts of each case and fully accounts for the positions of her clients. She then leverages her deep trial, appellate, and alternative dispute resolution experience to develop solutions and strategies that help achieve a client's unique objectives.

Before joining Lightfoot, Rachelle served in the U.S. Army, first in a combat support role as an MP and later in the JAG office where she worked alongside JAG officers in trying administrative and punitive legal matters. Rachelle also served as a criminal prosecutor with the Maricopa County Attorney's Office in Arizona. She first-chaired numerous jury trials, oversaw more than 200 bench trials and handled hundreds of sentencing and substantive motion hearings. Rachelle brings all of this experience to bear in defending her clients.

In addition to her work with clients, Rachelle serves on Lightfoot's Inclusion Committee. She is also the technology chair for the 2025 DRI Women in the Law Seminar. Rachelle is active with the firm's pro bono efforts and has represented immigration asylum seekers and military sexual harassment survivors.

Practice Areas

- Automotive
- Healthcare
- Medical Malpractice
- Product Liability

Awards

- The Best Lawyers in America® "Ones to Watch" by BL Rankings — Commercial Litigation, Health Care Law, Medical Malpractice Law, Personal Injury Litigation, Product Liability Litigation (2022-26)
- Birmingham Business Journal, "Veteran of Influence" (2020) Pedrick Scholar (2013)
- Sandra Day O'Connor College of Law, Dean's Award (2015)
- Truman Young Prosecutorial Fellow (2014-15)

Education

- Arizona State University, Sandra Day O'Connor College of Law (J.D., cum laude)
- Barrett Honors College at Arizona State University (B.A., summa cum laude)



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Raids, Rights, and Repercussions: Lessons from Operation Metro Surge

Raids, Rights, and Repercussions: Lessons from Operation Metro Surge

Jason Lien, Kerri Wright, and Ashley Patyk

In December 2025, the Department of Homeland Security launched what the federal government described as the “largest immigration enforcement operation ever,” deploying thousands of Immigration and Customs Enforcement (ICE) officers and Customs and Border Protection (CBP) agents to the Minneapolis–St. Paul metropolitan area.¹ Dubbed “Operation Metro Surge,” the enforcement action drew immediate national attention not only for its unprecedented scale but also for the legal controversies it generated over the constitutional limits of federal enforcement authority, including questions about the federal government’s ability to enter and inspect workplaces.²

As of February 2026, the federal government claims that the operation has resulted in more than 4,000 arrests.³ It also triggered nationwide protests, multiple federal lawsuits, and an intense public debate about the boundaries of immigration enforcement in American workplaces and communities.⁴ For employers and their counsel, Operation Metro Surge offers critical lessons about the intersection of federal immigration authority, constitutional protections, and workforce management.

Legal Landscape

Employers concerned about immigration enforcement should understand the relevant legal landscape,

including federal immigration enforcement authority, constitutional protections that apply to the workplace, and the potential tension between federal enforcement and local authorities.

First, immigration enforcement in the United States is primarily conducted by two sub-agencies within the Department of Homeland Security (DHS), specifically, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). ICE is responsible for interior enforcement, including the apprehension of individuals with removal orders, whereas CBP traditionally focuses on border security but has authority to support some interior enforcement actions.⁵ In addition, thousands of law enforcement officers from other agencies have been detailed to ICE to assist in immigration enforcement.⁶ Generally, federal immigration officers possess broad statutory authority to question individuals about their immigration status, arrest individuals believed to be removable, and conduct investigations into potential immigration violations.⁷

However, this authority is not unlimited. The second point employers should understand is that the Fourth Amendment to the United States Constitution provides certain protections. Employers should know that the Fourth Amendment: (1) protects all persons within the United States—citizens and noncitizens alike—from unreasonable searches and seizures; (2) provides different protections depending on the nature of the space at issue—public areas that are freely accessible to members of the public (such as a reception area or retail floor) receive less protection because individuals have a diminished expectation of privacy in such spaces, whereas private areas (such as offices, employee-only zones, locked warehouses, and areas marked “private” or “employees only”) are entitled to constitutional

¹ Katie Angell et al., 2025–26 Minnesota ICE Deployment, *Britannica* (Feb. 15, 2026), <https://www.britannica.com/event/2025-26-Minnesota-ICE-Deployment>; see also, e.g., Dana Thiede, Activists Want Answers After ICE Raid on St. Paul Business, *Kare11* (Nov. 19, 2025), <https://www.kare11.com/article/news/local/activists-want-answers-after-ice-raid-on-st-paul-business/89-27bd081e-9a29-4b5e-ba0d-ec139086a934>.

² Danya Galnor & Priscilla Alvarez, Minnesota, Twin Cities Sue Trump Administration over Unprecedented Immigration Operations, *CNN* (Jan. 12, 2026), <https://www.cnn.com/2026/01/12/us/minneapolis-immigration-officers-mobilizing-protests>.

³ New Milestone in Operation Metro Surge: 4,000+ Criminal Illegals Removed from Minnesota Street, *The White House* (Feb. 4, 2026), <https://www.whitehouse.gov/articles/2026/02/new-milestone-in-operation-metro-surge-4000-criminal-illegals-removed-from-minnesota-streets/>.

⁴ Jennifer Ludden & Liz Baker, Amid Lawsuit and Protests, Trump Sends Border Czar to Minnesota, *NPR* (Jan. 26, 2026), <https://www.npr.org/2026/01/26/nx-s1-5688835/leadership-shakeup-amid-protests-lawsuits-immigration>; see also New Case Collection: Operation Metro Surge, *C.R. Litig. Clearinghouse* (Feb. 5, 2026), <https://clearinghouse.net/post/1179/> (compiling lawsuits about Operation Metro Surge).

⁵ Holly Straut-Eppsteiner, Immigration 101: Executive Branch Agencies Involved with Immigration, *Congress.Gov* (June 7, 2023), <https://www.congress.gov/crs-product/IF12424>; Legal Authority for the Border Patrol, U.S. Customs & Border Prot. (Feb. 12, 2026), https://www.help.cbp.gov/s/article/Article-1253?language=en_US.

⁶ David J. Bier, ICE Has Diverted Over 25,000 Officers from Their Jobs, *Cato Inst.*: *Cato at Liberty* (Sept. 3, 2025), <https://www.cato.org/blog/ice-has-diverted-over-25000-officers-their-jobs>.

⁷ 8 U.S.C. § 1357.

protection; and (3) requires the government to obtain consent before entering a private area from someone inside the premises or a judicial warrant authorized by a “neutral and detached magistrate,” which is different than an administrative warrant authorized by an ICE agent or DHS.⁸

Finally, Operation Metro Surge highlighted growing tensions between federal immigration enforcement and state and local authorities. Minnesota’s Attorney General, alongside the cities of Minneapolis and St. Paul, filed a federal lawsuit challenging the operation on multiple constitutional grounds, alleging that the operation unconstitutionally targeted Minnesota based on the state’s political leanings and enactment of “sanctuary” laws prohibiting participation in federal immigration enforcement, constituted federal commandeering of state resources in violation of the Tenth Amendment, and violated the Administrative Procedure Act through arbitrary and capricious agency action.⁹ While the district court ultimately denied a preliminary injunction halting the operation,¹⁰ the litigation underscored the legal complexities that arise when aggressive federal enforcement intersects with state sovereignty concerns. These tensions create additional uncertainty for employers given that some states have recently sought to enact laws related to how employers should respond to immigration enforcement activities.¹¹

Employers’ Response When ICE Comes to the Workplace - Prepare for How to Immediately Respond

The arrival of immigration agents at a business creates an immediate and high-stakes situation that requires careful navigation. Employers must balance their obligation to avoid obstructing legitimate law enforcement activities with their right to protect their business interests, their employees, and their constitutional rights. Accordingly, when immigration agents appear at a workplace, critical first steps that employers should take are as follows:

1. **Verify Agent Identification.** Request that the agents identify themselves and their agency. ICE officers should present credentials and be able to provide their names

and badge numbers.¹² Even if they refuse to do so, employers should document the identity of agents to the extent possible, as this information may be relevant in any subsequent legal proceedings.

2. **Request and Review Warrants.** Ask to see any warrant the agents present. This is the most important step in determining the employer’s legal obligations. If agents present a document, carefully examine it to determine whether it is a judicial warrant or an administrative warrant. Key indicators include who signed the document and which entity issued it. A judicial warrant will bear the signature of a state or federal judge or magistrate and will reference a state or federal court.¹³ An administrative warrant—typically ICE Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal/Deportation)—is a document issued internally by DHS, and is signed by an immigration officer, not by a state or federal judge or magistrate.¹⁴ Generally if a document is issued by ICE, DHS, or the Department of Justice (DOJ), it is an administrative warrant. If it is issued by a federal or state court, it is a judicial warrant.

If agents present only an administrative warrant, employers may politely but clearly state that they do not consent to entry into non-public areas without a judicial warrant.¹⁵

If agents present a judicial warrant, employers should carefully review its scope. A judicial warrant must specify the premises to be searched and the persons or items to be seized,¹⁶ and employers should limit entry to the areas and purposes specified in the warrant. Employers should designate a representative to accompany the agents to ensure that the execution of the warrant remains within its authorized scope.

There are narrow exceptions to the warrant requirement that may permit entry without either type of warrant. Exigent circumstances—such as an imminent threat to safety, active pursuit of a fleeing suspect, or the potential destruction of evidence—may justify warrantless entry.¹⁷ However, these exceptions are narrowly construed, and their application can be challenged in subsequent legal proceedings.

⁸ U.S. Const. amend. IV; See *v. City of Seattle*, 387 U.S. 541, 545 (1967) (concluding that entry to search “portions of commercial premises which are not open to the public may only be compelled” through Fourth Amendment warrant procedures); *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (determining public employees retain Fourth Amendment rights in private work areas); *Riley v. California*, 573 U.S. 373, 382 (2014) (stating that warrants under the Fourth Amendment provide protection by requiring review by “a neutral and detached magistrate instead of . . . the officer engaged in . . . ferreting out crime” (quoting *Johnson v. U.S.*, 333 U.S. 10, 14 (1948))); see also Hannah James, DHS Warrantless Home Entry Memo’s Fourth Amendment Problem, Brennan Ctr. (last updated Feb. 4, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/dhs-warrantless-home-entry-memos-fourth-amendment-problem>.

⁹ See generally Complaint for Declaratory and Injunctive Relief, *Minnesota v. Noem*, No. 0:26-cv-00190 (D. Minn. Jan. 12, 2026).

¹⁰ *Minnesota v. Noem*, ___ F. Supp. 3d ___, 2026 WL 253619, at *12 (D. Minn. Jan. 31, 2026).

¹¹ E.g., Paris Barraza, *New California Laws Take on ICE, How Immigration Enforcement Occurs*, USA Today (Dec. 30, 2025), <https://www.usatoday.com/story/news/california/2025/12/30/new-california-laws-on-ice-arrests-immigration-enforcement/87919168007/>.

¹² See 8 C.F.R. § 287.8(c)(2)(iii).

¹³ See Warrants and Subpoenas, What to Look Out for and How to Respond, Nat’l Immigr. L. Ctr., 3, 14–15 (Jan. 2025), https://media.nilc.org/wp-content/uploads/2025/01/2025-Subpoenas-Warrants_.pdf.

¹⁴ See *id.* at 6, 16.

¹⁵ See, e.g., *Osny Sorto-Vasquez Kidd v. Mayorkas*, No. 2:20-CV-03512, 2021 WL 1612087, at *6 (C.D. Cal. Apr. 26, 2021); *Garrison G. v. Bondi*, No. 26-CV-172, 2026 WL 157677, at *4 (D. Minn. Jan. 17, 2026).

¹⁶ U.S. Const. amend. IV; see also *Groh v. Ramirez*, 540 U.S. 551, 551 (2004) (determining warrant that did not describe items to be seized was “plainly invalid”).

¹⁷ See, e.g., *Kentucky v. King*, 563 U.S. 452, 460 (2011).

3. **Identify Authorized Company Representatives.** Only designated company representatives should interact with immigration agents. These individuals should be trained in advance on the company's policies and procedures. Front-line employees, including receptionists and security personnel, should be instructed not to consent to searches or answer substantive questions, but rather to contact the designated representative immediately.

4. **Avoid Obstruction While Protecting Rights.** It is a federal crime to obstruct or interfere with immigration enforcement activities.¹⁸ At the same time, declining to consent to a warrantless search of non-public areas is not obstruction—it is the exercise of a constitutional right. Employers should be courteous but firm in asserting their rights.

Develop Internal Response Protocols

Effective response to immigration enforcement requires advance preparation. Employers should establish and maintain the following protocols:

1. **Determine and Label Your Private and Non-Private Spaces.** Determine which spaces in your business are private and which are open to the public and place signs to clearly mark them as such. Do not assume it is obvious from the structure of your business space.

2. **Designate a Legal Point of Contact.** Identify in-house or outside counsel who can be reached immediately in the event of an enforcement action. This attorney should be familiar with the company's operations, workforce composition, and any prior interactions with immigration authorities.

3. **Train HR or Management Representatives.** Train designated managers or human resources personnel on the company's response procedures. These individuals should understand the distinction between administrative and judicial warrants, know how to contact legal counsel, and be prepared to serve as the company's representatives during an enforcement encounter.

4. **Document and Preserve Evidence.** Designate a person to document the encounter in real time, including photographing or copying any warrants presented; noting the time, location, and identities of agents; and recording what areas agents sought to access and whether consent was granted. This documentation may be critical in any subsequent litigation.

5. **Establish Internal Communication Procedures.** Establish protocols for communicating with employees during and after an enforcement action. Employees will

be anxious and may have questions. Prepared internal communications can help maintain workforce stability and ensure that employees understand their rights.

What Employers Need to Know with Respect to Employees Targeted by Immigration Enforcement

When employees are detained, questioned, or arrested during immigration enforcement actions, employers face a complex set of legal and practical challenges. The manner in which employers respond can affect employee morale, expose the company to legal liability, and shape the organization's reputation.

Handling Employee Detentions or Arrests

Employers generally have no obligation to provide information about specific employees unless presented with a valid judicial warrant or subpoena. However, employers should not take affirmative steps to conceal employees or help them evade enforcement, as this could constitute obstruction.¹⁹

If an employee is detained or arrested at the workplace, employers should take care not to interfere with law enforcement while also documenting what occurs. If possible, the employer should note which employees were affected and attempt to learn where they will be taken. This information can be critical for employees' family members and legal counsel.

Leave, Payroll, and Benefits Considerations

When employees are detained, employers must address immediate practical questions. If an employee is taken into custody during a shift, the employer must still compensate the employee for hours already worked.²⁰ Employers should review their policies regarding absences and determine how detained employees will be treated for payroll purposes.

Benefits administration also requires attention. Employers should review health insurance and other benefit plans to determine how employee absences due to immigration detention affect coverage. Employers may choose to continue benefits for a specified period or follow standard termination procedures.

Avoiding Discrimination and Retaliation Claims

Immigration enforcement creates significant discrimination risk. Employers must be vigilant not to take adverse employment actions based on an employee's actual or perceived national origin, citizenship status, or ethnicity, which is prohibited under the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 and

¹⁹ See *id.*

²⁰ 29 U.S.C. § 206 (requiring employers to pay minimum wage); 29 C.F.R. § 785.11 (defining "work time" as all time during which an employee is "suffered or permitted to work").

¹⁸ 18 U.S.C. § 111.

the Immigration and Nationality Act.²¹

Employers should not assume that employees of particular backgrounds are more likely to lack work authorization, nor should they treat employees differently based on appearance, accent, or name. Selective enforcement of documentation requirements or different treatment of employees following an enforcement action can give rise to discrimination claims.²²

There may also be a risk of retaliation claims. Employees who raise concerns about immigration enforcement practices, question the legality of employer conduct, or participate in protests may be engaging in protected activity under various federal and state laws.²³

Immigration Verification Obligations

Employers are required by law to verify the identity and employment authorization of all employees through the Form I-9 process regardless of each employee's national origin or perceived immigration status.²⁴ Employers should conduct periodic internal I-9 audits to ensure ongoing compliance and confirm that employees' work authorization remains valid and up to date. If ICE requests to review I-9 records, employers should understand their rights. ICE may conduct I-9 inspections, but these typically require at least three business days' advance notice.²⁵ Employers should have counsel review any inspection notice and ensure that I-9 records are organized and complete before the inspection occurs.

Resulting Employee Protests and Workplace Tensions

Large-scale immigration enforcement operations frequently generate protests and workplace tensions. Operation Metro Surge was no exception—the operation prompted sustained protests in Minneapolis and nationwide, with demonstrators following ICE vehicles, gathering outside detention facilities, and organizing community resistance.²⁶

For employers, these dynamics create distinct challenges. Employees may wish to participate in protests, express political views at work, or take other actions that create tension within the workforce. Employees have varying degrees of legal protection for participating in protests,

depending on the nature of the protest, the employee's role, and whether the employer is public or private.

Employers' Ability to Regulate Employee Conduct

Private employers have broad authority to maintain order in the workplace, and may prohibit employees from engaging in political discussions or displaying political paraphernalia during work hours, provided such policies are applied neutrally and do not target particular viewpoints.²⁷ For example, an employer that prohibits all political buttons treats employees consistently; an employer that prohibits only certain political messages risks claims of viewpoint discrimination.

In contrast, public employees retain First Amendment protections, but these protections are not absolute. Under the framework established by the Supreme Court in *Pickering v. Board of Education* and refined in subsequent cases, public employees have a qualified right to speak on matters of public concern unless it causes a substantial disruption to the workplace.²⁸

Additionally, courts have generally recognized that employers may discipline employees for off-duty speech when the speech causes substantial disruption to workplace operations, undermines the employer's legitimate business interests, or makes the employee unable to perform job duties effectively.²⁹ The more public-facing the employee's role, the greater the employer's interest in regulating speech that affects business relationships.³⁰

Employers should establish clear policies that inform employees of expectations while avoiding overly broad restrictions that may be unenforceable or create legal exposure.

National Labor Relations Act Considerations

The National Labor Relations Act provides important protections that may apply when employees engage in collective activity related to immigration enforcement. Section 7 of the NLRA protects employees' rights to engage in "concerted activities for the purpose of

21 42 U.S.C. § 2000e-2(a); 8 U.S.C. § 1324b(a).

22 See, e.g., 42 U.S.C. § 2000e-2(a); 8 U.S.C. § 1324b(a).

23 See, e.g., 8 U.S.C. § 1324b(a)(5); 42 U.S.C. § 2000e-3(a).

24 8 U.S.C. § 1324a(b).

25 8 C.F.R. § 274a.2(b)(2)(ii).

26 E.g., Danielle A. Scruggs, Photos: Thousands Once Again Protest ICE in Minneapolis and Across the U.S., NPR (Jan. 30, 2026), <https://www.npr.org/sections/the-picture-show/2026/01/30/g-s-1-108087/photos-thousands-once-again-protest-ice-in-minneapolis-and-across-the-u-s>; David Ostendorf, Minnesota Shows Us that Resisting ICE Works, TIME (Jan. 29, 2025), <https://time.com/7358686/minnesota-resisting-ice-works/>; Grace Eliza Goodwin, Protesters and Lawmakers Gather Outside Texas Facility Where Minneapolis Child Is Held, BBC (Jan. 28, 2026), <https://www.bbc.com/news/articles/cn8jk5335vdo>.

27 *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (confirming First Amendment does not restrict private employers' authority over employee speech); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978) ("[W]here . . . suppression of speech suggests an attempt to give one side of a debatable public question an advantage . . . , the First Amendment is plainly offended.")

28 *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (establishing framework balancing employee speech rights against employer's interest in maintaining efficient workplace operations); see also *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527–28 (2022) (describing test for evaluating public employee's First Amendment rights).

29 *Connick v. Myers*, 461 U.S. 138, 151–52 (1983) (permitting employers to take action when they "reasonably believe[]" employee speech "would disrupt the office, undermine [the employer's] authority, and destroy close working relationships").

30 *Rankin v. McPherson*, 483 U.S. 378, 390 (1987) ("The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.")

collective bargaining or other mutual aid or protection.”³¹ Employees who collectively protest working conditions or take group action to address workplace safety — activities that may arise from concerns about employer cooperation with immigration authorities — have potentially protected status under Section 7.³² Accordingly, employers should be cautious before disciplining employees for group activities related to immigration enforcement.

Litigation Risks for Employers

Immigration enforcement actions can expose employers to a range of litigation risks. In-house counsel and employment litigators should understand these potential exposure areas and develop strategies to mitigate risk.

Discrimination Claims

Employees may allege that employers engaged in national origin discrimination during or after an immigration enforcement action.³³ Common theories include disparate treatment (treating employees of particular national origins less favorably), disparate impact (applying facially neutral policies that disproportionately affect particular groups), and hostile work environment (permitting harassment based on national origin or immigration status).³⁴

Employers should document the legitimate, nondiscriminatory reasons for all employment decisions. Supervisors should be trained on anti-discrimination requirements, and any complaints of discrimination should be promptly investigated.

Retaliation Claims

Employees who oppose what they perceive as unlawful employer conduct, participate in investigations, or exercise statutory rights may be protected from retaliation.³⁵

Employers should be particularly cautious when taking adverse action against employees who have raised concerns about immigration practices or the employers’ related policies. Even if the underlying complaint lacks merit, discipline of a complaining employee may support an inference of retaliation if it follows closely in time.

Wrongful Termination Disputes

When employees are detained or fail to report to work due to immigration-related circumstances, employers must navigate termination decisions carefully. Hasty

terminations may expose employers to claims of breach of contract, violation of established personnel policies, or discrimination.

Employers should review all applicable policies and contractual obligations before terminating employees. Consistent application of policies is also essential to avoiding claims that similarly situated employees were treated differently.

Civil Rights Claims Arising from Cooperation with Immigration Enforcement

Employers who cooperate with immigration enforcement—for example, by permitting access to non-public areas, providing employee information, or otherwise facilitating enforcement activities—may face claims from affected employees. Theories may include invasion of privacy, intentional infliction of emotional distress, or negligence. Employers should understand their legal obligations and exercise care not to exceed them. Voluntary cooperation with enforcement activities should be undertaken only after consultation with counsel and careful consideration of potential legal exposure.

Subpoenas and Government Investigations

Immigration enforcement may be accompanied by government investigations and document requests.³⁶ As with arrest and search warrants, employers should comply with judicial subpoenas, but are not required to comply with administrative subpoenas unless a state or federal court orders the employer to do so.³⁷

Document preservation obligations arise when litigation is reasonably anticipated. Employers should implement litigation holds to prevent destruction of potentially relevant materials and ensure that employees understand their preservation obligations.

Coordination of Legal and Public Relations Responses

Large-scale enforcement actions often attract media attention. Employers should coordinate legal strategy with public relations efforts to ensure that public statements do not create legal exposure. Statements to the media should be reviewed by counsel before release.

Best Practices for Employers and Their Counsel

Proactive preparation is the most effective way to mitigate the risks associated with immigration enforcement. The following recommendations can serve as a practical playbook for employers:

1. Develop an ICE Response Protocol. Create a

31 29 U.S.C. § 157.

32 See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978) (holding Section 7 protects employees who “seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship”).

33 See, e.g., 42 U.S.C. § 2000e-2(a); 8 U.S.C. § 1324b(a).

34 E.g., *National Origin Discrimination*, U.S. EEOC, <https://www.eeoc.gov/national-origin-discrimination>.

35 E.g., 8 U.S.C. § 1324b(a)(5); 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 158(a).

36 See *Warrants and Subpoenas*, *supra* note 13, at 4–5, 7, 17–22.

37 *Id.* at 7–8.

written policy that outlines the company's procedures for responding to immigration enforcement actions. The policy should identify designated representatives, establish communication procedures, and provide guidance on interacting with agents.

2. Train Managers and HR Personnel. Conduct regular training for managers, human resources staff, and front-line supervisors on the company's response protocols. Training should cover the distinction between administrative and judicial warrants, employees' rights, and the company's legal obligations.

3. Designate Legal Response Contacts. Identify in-house counsel or outside attorneys who can be reached immediately in the event of an enforcement action. Ensure that designated company representatives know how to contact these attorneys.

4. Prepare Internal Communication Plans. Draft templated communications for employees that can be issued during or after an enforcement action. These communications should provide factual information while avoiding statements that could create legal exposure.

5. Audit I-9 Compliance. Conduct regular audits of Form I-9 records to ensure compliance with verification requirements. Correct any errors before an inspection occurs.

6. Review Workplace Policies. Ensure that workplace policies regarding political activity, social media use, and employee conduct are clearly written, consistently enforced, and compliant with applicable law.

7. Coordinate with Outside Counsel During Enforcement Actions. If an enforcement action occurs, contact legal counsel immediately. Real-time legal guidance can help the company navigate the encounter while protecting its rights.

Looking Ahead

Operation Metro Surge may have wound down in Minnesota, but similar enforcement actions in other jurisdictions remain likely, and employers must be prepared to navigate a complex legal landscape that includes constitutional protections, federal immigration statutes, employment discrimination laws, labor relations requirements, and state and local regulations. The stakes are high. An inadequate response can result in legal liability, reputational damage, and workforce disruption.

The key takeaway is clear: companies that understand their legal rights and obligations, develop response protocols, and train their personnel will be far better positioned to navigate enforcement actions than those that wait until agents arrive at the door. The lessons of Operation Metro Surge underscore that advance preparation is no longer merely advisable, but essential.



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

Prior to joining Maslon in 2002, Jason served as a Naval Officer with the United States Navy Judge Advocate General's Corps, where he litigated court-martial proceedings, administrative hearings, and military appeals.

Jason has been ranked every year since 2016 by Chambers USA for his work in construction law. In addition, Jason has been selected for the 2015-2025 Minnesota Super Lawyers® lists and prior to that was recognized as a Minnesota Rising Star. Jason was also named as a Thomson Reuters® Stand-Out Lawyer from 2024-2026 based on a survey of senior in-house counsel for client satisfaction, client advocacy, and legal skills.

In addition to his litigation practice, Jason has served as a member of Maslon's Governance Committee. Outside of the office, Jason is a three-time Ironman finisher.

Practice Areas

- Litigation
- Appeals
- Business Litigation
- Construction & Real Estate Litigation
- Insurance Recovery
- Tort & Product Liability
- Real Estate: Condemnation & Eminent Domain

Honors

- Recognized in Chambers USA: America's Leading Lawyers for Business, Construction, Minnesota, 2016-2025
- Recognized as Thomson Reuters® Stand-Out Lawyer, 2024-2026 (Based on Thomson Reuters® survey of more than 2,000 senior in-house counsel for client satisfaction, client advocacy, and legal skills.)
- Recognized on Minnesota Super Lawyers® list, 2015-2025 (Minnesota Super Lawyers® is a designation given to only 5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Selected for inclusion in The Best Lawyers in America®, 2021-2026
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2006-2009, 2011-2012 (Minnesota Rising Stars is a designation given to only 2.5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Recognized as a Top Lawyer, Minnesota Monthly, 2022-2023 (The research for the Top Lawyers list, created by Professional Research Services, is based on an online peer-review survey sent to all attorneys in Minnesota.)

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