Litigation Symposium at Aviara

A Trial Network Litigation Symposium



November 5-8, 2026 **Park Hyatt Aviara Resort & Spa**

THE TRIAL Network

Litigation Symposium at Aviara

A Trial Network Litigation Symposium

November 5-8, 2026 **Park Hyatt Aviara; Carlsbad, CA**

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Fast Forward: A Closing Argument in the Year 2051

Jerry Glas
Deutsch Kerrigan (New Orleans, LA)

Closing Argument in the Year 2051
John Jerry Glas

Thank you for your jury service! It has been a long month. Our trial involved 42 witnesses over 21 days, totaling 56 hours of testimony. The parties introduced 135 exhibits, totaling more than 30,000 pages. It is a massive amount of evidence for anyone to process. Fortunately, the court isn't going to lock you in a windowless room with 12 legal pads and a box of pens.

We don't do that anymore.

Your jury deliberation room is state-of-the-art. It is equipped with 12 dedicated computer monitors and an interactive video wall with integrated smart board, embedded applications, and touch screen annotation tools. The court has uploaded every exhibit admitted into evidence and every videotaped deposition played during the trial. Thanks to our courtroom video cameras, you also have access to video of every "live" witness, which has already been synched to the real-time official court transcript. You can read or rewatch all 56 hours of sworn testimony. We hope you don't. But you can.

Your monitors are voice-activated and equipped with court-approved Artificial Intelligence ("AI"). It is fast. It is secure. It is reliable. Ask AI to search the trial exhibits and trial transcripts for any word or phrase. Ask AI to summarize or compare the testimony of witnesses. Ask AI to generate timelines, charts, and graphs. Use AI to answer your questions and to resolve your disputes. It will save you time. It will save you from making mistakes.

So, where should you start? During closing argument, Plaintiff's counsel insisted that our product had a manufacturing defect. Please note that counsel failed to cite a single page of trial testimony or suggest a single AI search to support that claim. It was the kind of conclusory statement we don't hear much anymore.

Twenty-five years ago, trial lawyers often made conclusory statements regarding trial testimony because jurors had no access to trial transcripts. Yes, seriously. Courts trusted deliberating jurors with the physical evidence, but not with the testimonial evidence. Don't ask me why. It was a long time ago. But I remember very clearly how the jury's inability to fact-check closing arguments tempted some lawyers to cherry-pick, spin, ignore, or exaggerate testimony. Fortunately, those days are gone. We are held accountable now for what we say.

Technology eliminated temptation.

But I digress. To prove a manufacturing defect under Revised Statute 9:2800.55, Plaintiff bears the burden of proving the product deviated in a material way from the manufacturer's specifications. So, I suggest you start by asking AI to search the trial testimony for those two magic words: "deviation" and "specification." That search will yield 33 hits. Click on the 33 hyperlinks and watch the 33 video clips. It won't take long. The clips total 10 minutes. You will see for yourself. No witness identified a deviation from specifications. Not one.

You can ask AI, "was the product built to the manufacturer's specifications?" The unbiased AI answer will be: "Yes, the product was built to the manufacturer's specifications." That answer is absolutely correct. And it is great for my client. But let's hit pause.

To be clear, you alone are the finders of fact. Not AI. We requested a trial by jury, not a trial by AI. And nobody in this courtroom wants AI to decide this case. In fact, the court will soon instruct you that jurors are permitted to use AI, but they must determine "for themselves" every question of fact. They must answer "for themselves" every jury interrogatory.

So, don't just read the unbiased AI answer. Click the 9 links on which that answer is based. Most of those links will be to the testimony of our expert, who inspected our product and repeatedly testified that our product "met specs." But the last link will be different. That last link will take you to my cross-examination of Plaintiff's expert, who candidly admitted that no "specific deviation" was

ever found. That admission appears on Day 6, page 439, line 15.

Once again… Day 6. Page 439. Line 15.

Turning to Plaintiff's design defect claim, you don't need to ask AI whether Plaintiff proved the existence of an alternative design. We agree that they did. But Revised Statute 9:2800.56 requires Plaintiff to prove more than the mere existence of an alternative design. Plaintiff also bears the burden of proving that the alternative design "was capable of preventing the claimant's damages."

On this point, you heard conflicting testimony. Whereas Plaintiff's expert testified the alternative German design would "more likely than not" have prevented the accident, our expert testified the German design was "incapable" of preventing the accident and would have caused the exact same injuries. Which means you, the jury, must decide which testimony should be given greater weight.

Ask AI to generate a chart comparing their qualifications. We intentionally asked both experts the same 12 questions about their education and experience. As a result, AI will generate a chart comparing their answers to those 12 questions. Apples to apples. Discuss that chart. Decide for yourself whose testimony is objectively entitled to greater weight. Is it their expert, who went straight from the classroom to the courtroom? Or is it our expert, who spent decades working in the industry, designing and testing similar products?

Ask AI to identify inconsistencies in their testimony. The unbiased AI report will identify 16 potential inconsistencies for Plaintiff's expert, including 3 "substantive" inconsistencies. Maybe you remember how their expert crawfished on whether: (a) prior accidents were similar; (b) prior studies established the German design was safer; and (c) Plaintiff was misusing or abusing the product. In contrast, AI will identify no substantive inconsistencies for our expert. None.

Rewatch the turning point in this trial. Search for the phrase "angle and amount." Find the question we asked Plaintiff's expert: "If the defense expert is correct about the angle and amount of force involved, isn't it true the German design would have resulted in the same accident?" Watch Plaintiff's expert sit in total silence before nervously glancing at Plaintiff's counsel and answering, "I don't know." Ask AI to time that silence. It was 9.3 seconds. Ask AI whether any other question during the entire trial took that long to answer.

AI is wonderful, but common sense will always be the most important tool in your toolbox. You alone are the judges of an expert's credibility. Yes, AI may someday be able to assist you by measuring facial responses, analyzing micro-expressions of emotion, and monitoring involuntary bodily responses like heart rate and blood pressure. But that day is not today. Fortunately, you don't need that data to recognize how lost and evasive Plaintiff's expert was on the stand. You saw it with your own eyes.

Finally, I want to briefly address the allegation that Plaintiff somehow sustained permanent brain damage. Ask AI to search the first 6 months of medical records for the word "concussion", the phrase "brain injury", and the acronym "TBI." Those searches will yield no hits because nobody diagnosed a concussion during the first 6 months. In fact, AI will report that the word variant "concussed" appears only once during the first 6 months, when the ER nurse noted that Plaintiff "did not appear concussed."

We provided you with a neurological timeline. If you doubt its accuracy, ask AI to generate a timeline of every healthcare record during the first six months. Click every link. Read every word of every Progress Note. Ask AI, "when was Plaintiff first diagnosed with a concussion?" Confirm for yourself that the neurologist handpicked by Plaintiff's counsel was the first to diagnose a concussion - more than 6 months after the accident.

Consider when Plaintiff's symptoms started. Ask AI to generate a chart showing Plaintiff's neurological complaints. That chart will confirm that Plaintiff only reported a cervicogenic headache during the first 6 months. Then, during the initial evaluation, counsel's handpicked neurologist suddenly noted 11 new complaints. Eleven. That's not how a concussion works. That's how litigation works.

Panning back to the big picture, I believe that asking the right AI questions and requesting the right AI searches will result in a defense verdict. Our product was not defectively designed or manufactured. But if any of you disagree, or have lingering questions, search for the answers together. And should one of those searches yield more than 50 hits, take a deep breath and realize how lucky you are to be deliberating in the year 2051.

Twenty-five years ago, if jurors wanted to search through 135 exhibits, a bailiff had to grab a hand truck and wheel heavy cardboard boxes into the deliberation room. Then, the jurors had to use their hands to physically search page-by-page through the 30,000 printed pieces of paper. The prospect was so daunting that most exhibit boxes remained stacked and unopened in the courtroom. Never searched. Never read. Never requested.

Back then, jury interrogatories were crude tests of the jury's collective memory. Today, thanks to advances in courtroom technology, jury interrogatories are open-book exams that you take with your fellow jurors. Today, the court wants you to base your verdict on the evidence, not on your memory of the evidence. Today, the court wants you to take your time and get it right. Which is why the court has given you everything you need.

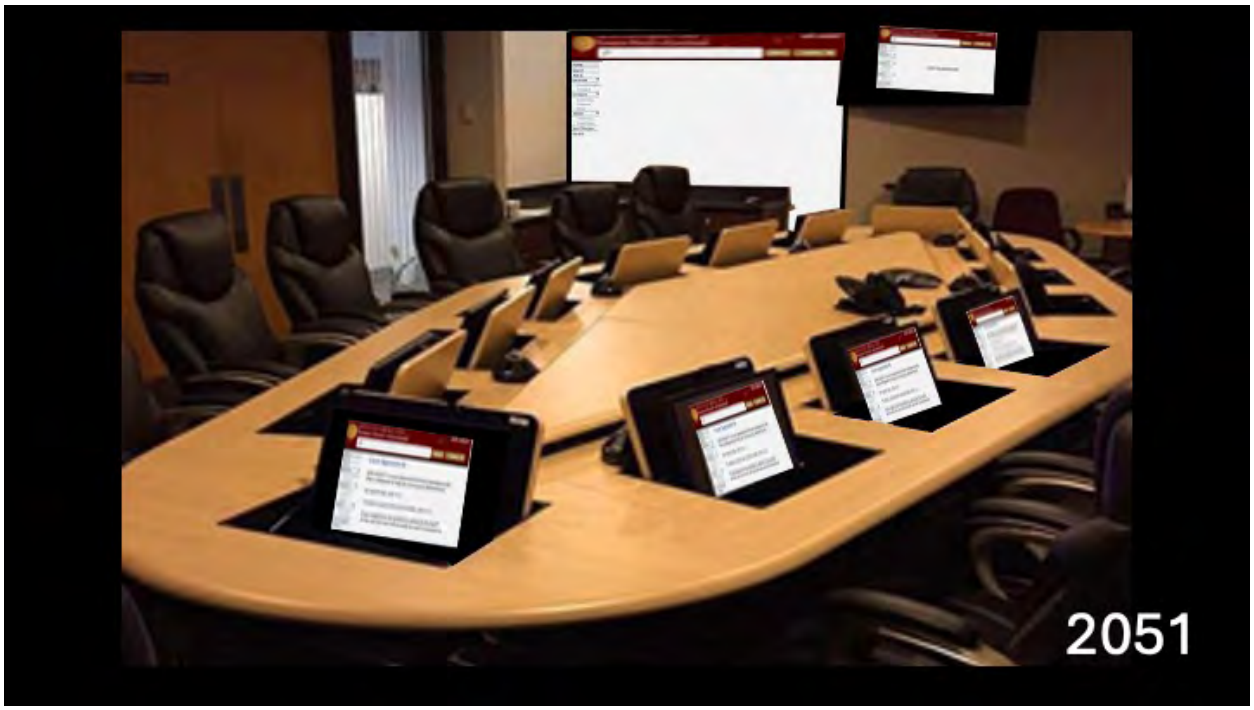
You have electronic access to the physical and testimonial evidence. You have the use of court-approved AI. And you have each other. You don't need me to tell you what your verdict should be. You know how and where to find the evidence.

The evidence speaks for itself.


in the
YEAR
2051
Closing Argument in the Year 2051
John Jerry Glas
Deutsch Kerrigan
New Orleans

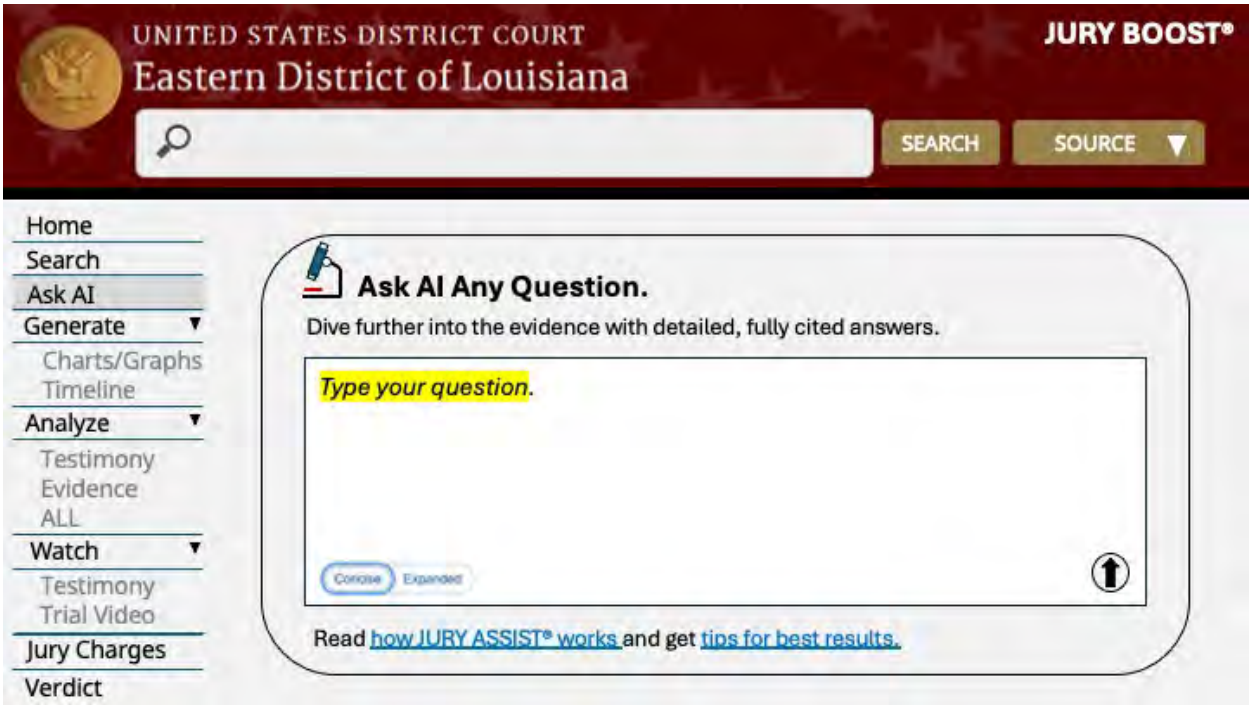

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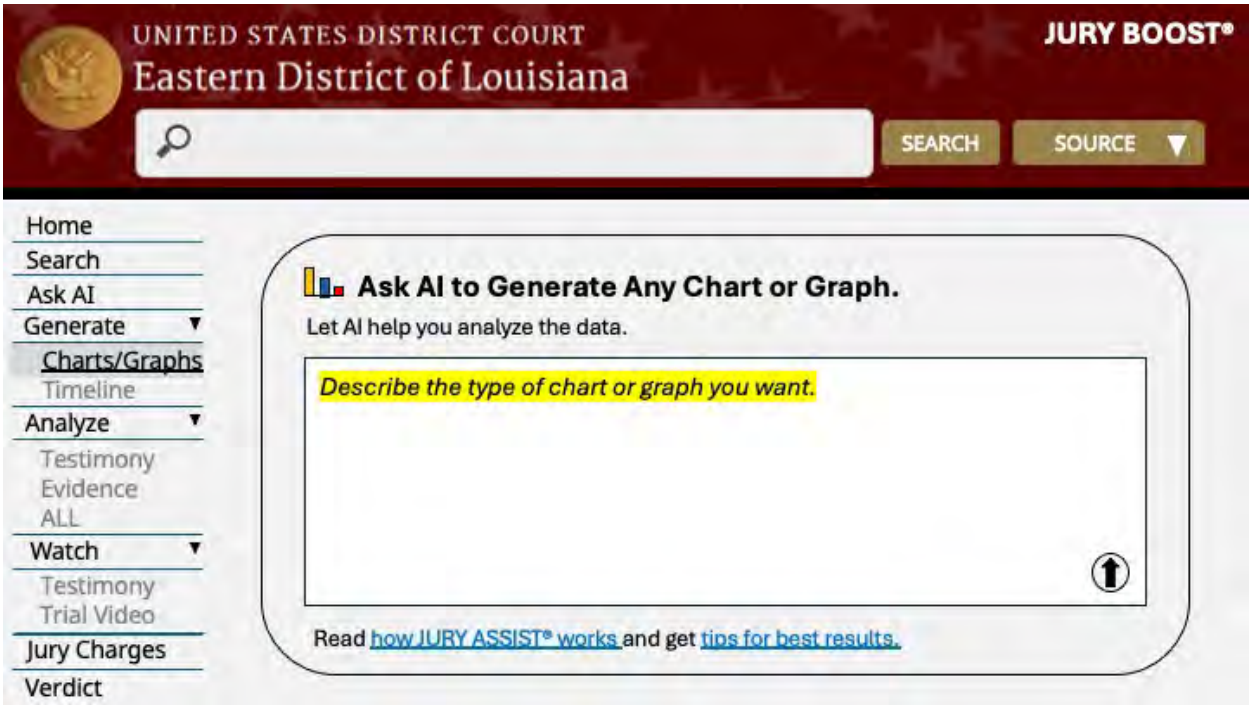

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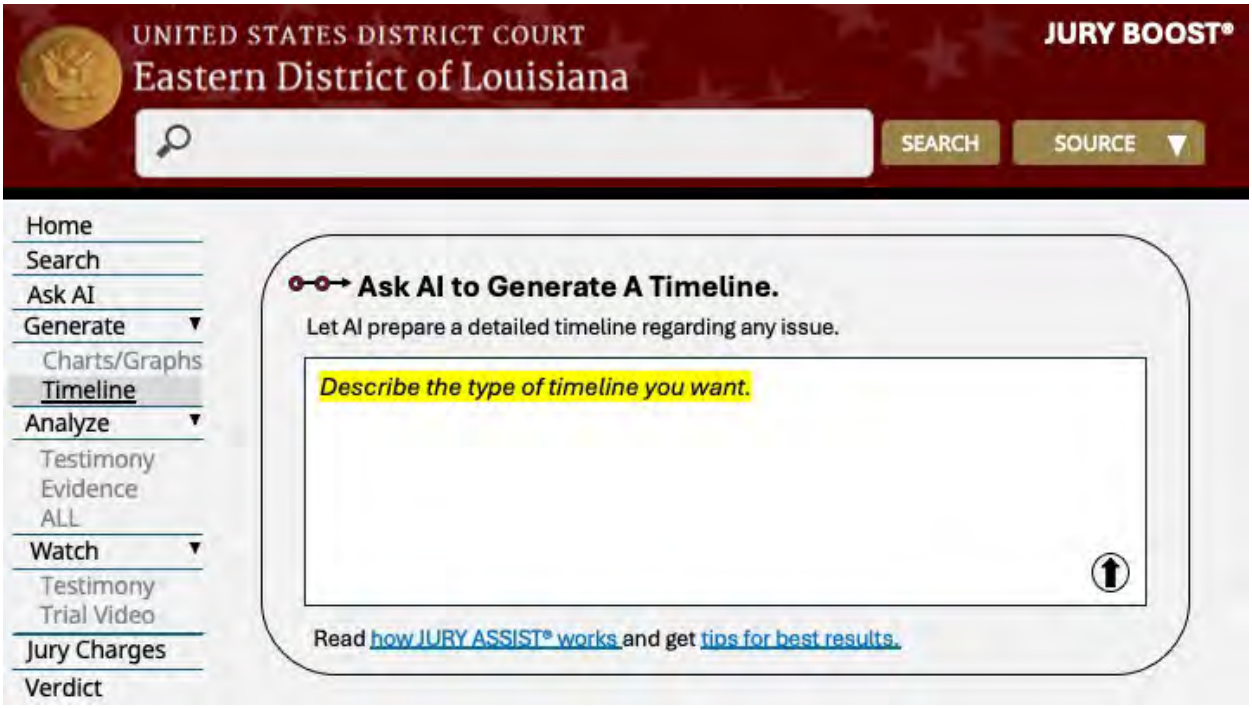

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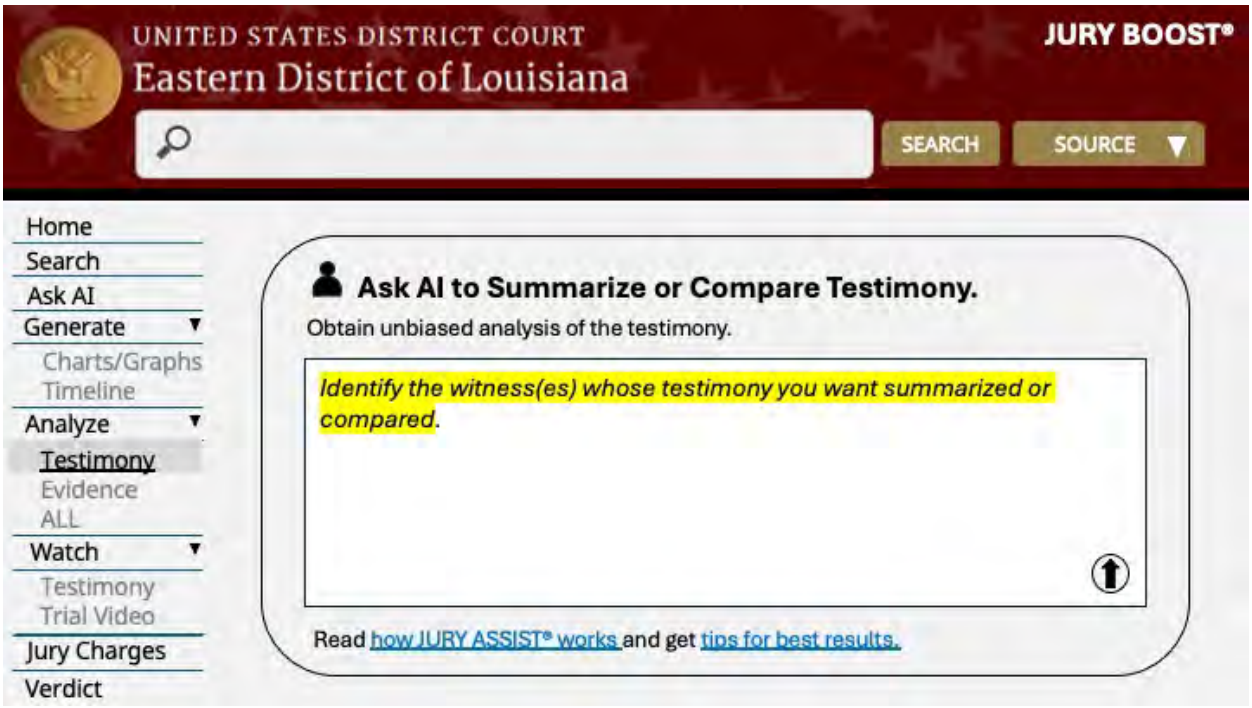

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Court Approved AI
JURY BOOST® is court-approved Artificial Intelligence (AI), that is designed to help you during jury deliberations.
For search tips, click here.
To watch a quick instructional video, click here.
If you experience any problems, please let the bailiff know, and the court will provide you with AI assistance.

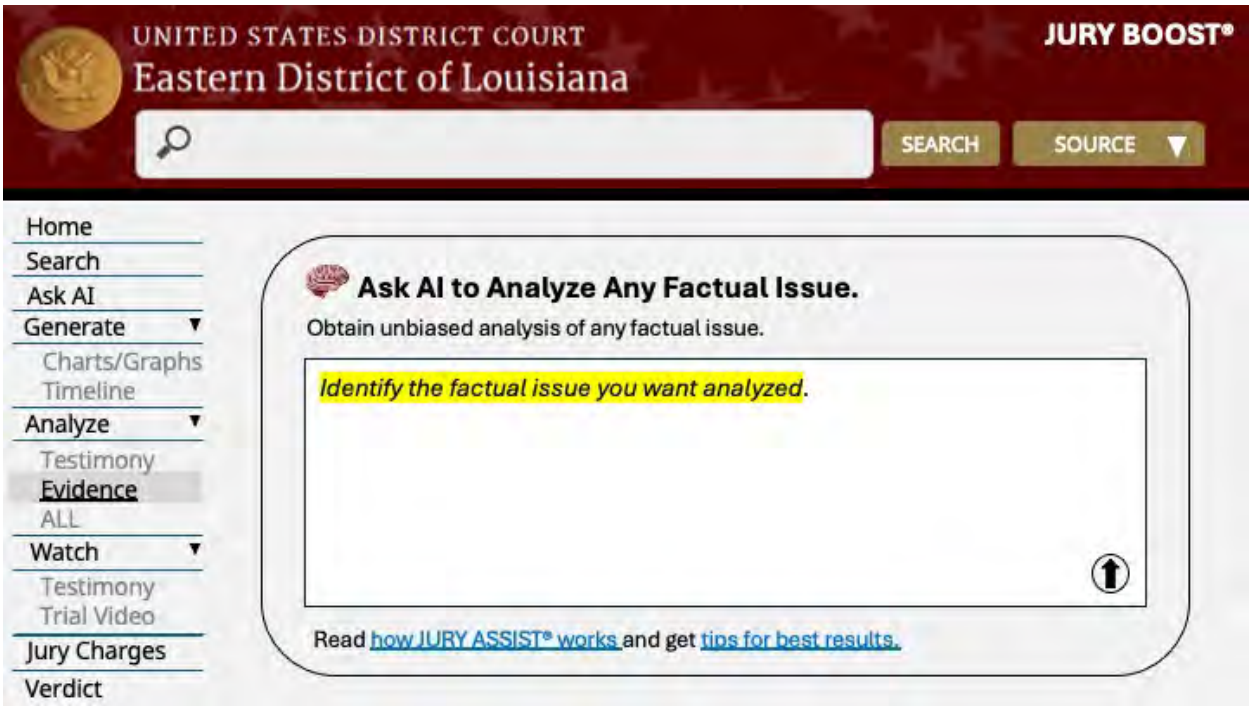

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Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Type your question.
Concise
Expanded
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Ask AI to Generate Any Chart or Graph.
Let AI help you analyze the data.
Describe the type of chart or graph you want.
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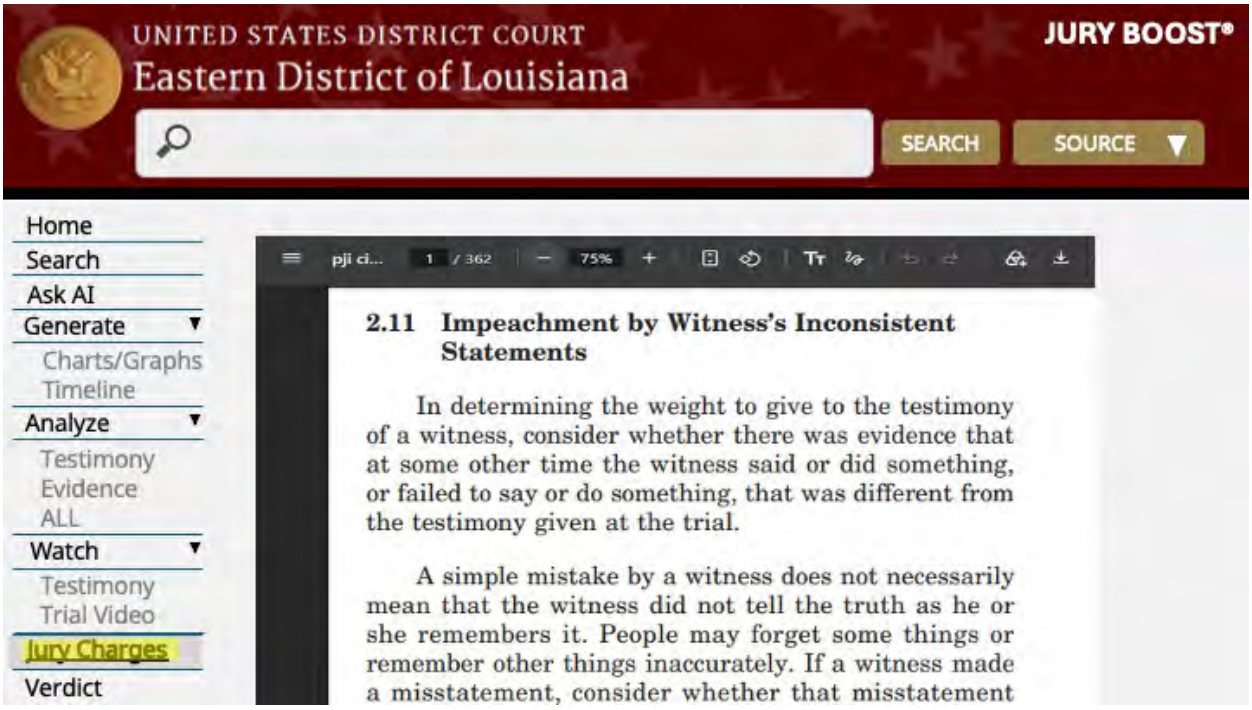

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Ask AI to Generate A Timeline.
Let AI prepare a detailed timeline regarding any issue.
Describe the type of timeline you want.
Read how JURY ASSIST® works and get tips for best results.

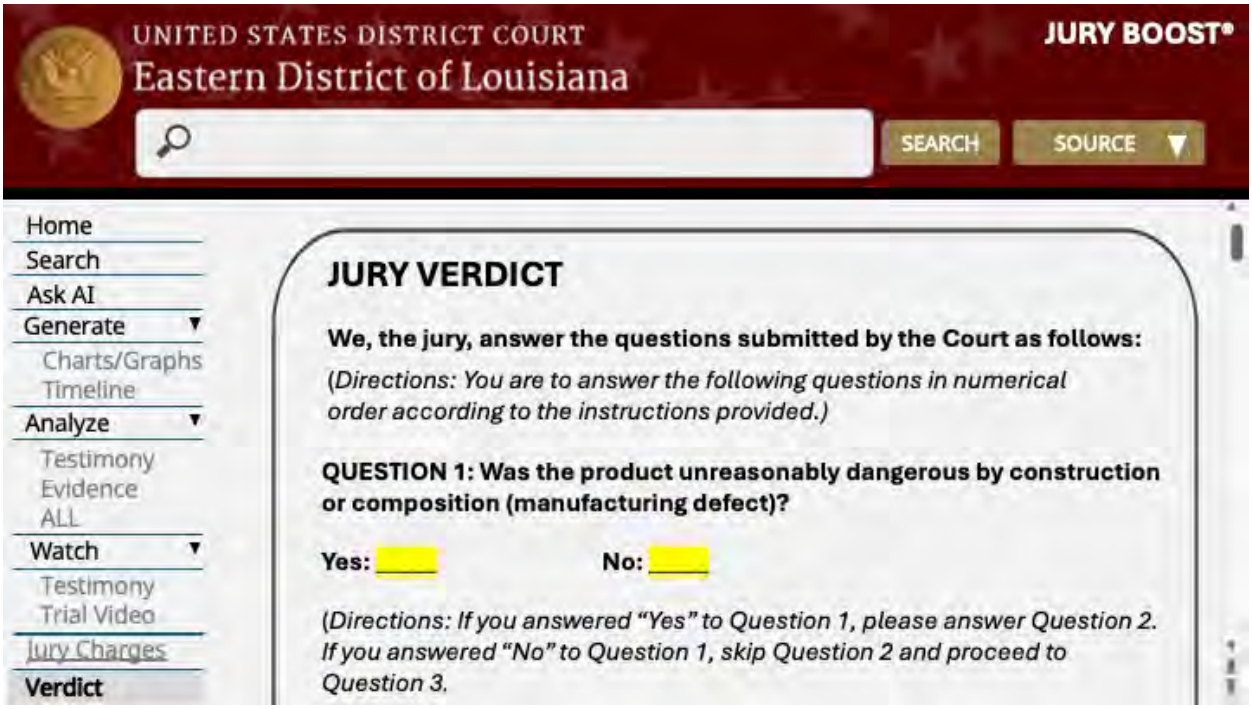

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Ask AI to Summarize or Compare Testimony.
Obtain unbiased analysis of the testimony.
Identify the witness(es) whose testimony you want summarized or compared.
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Ask AI to Analyze Any Factual Issue.
Obtain unbiased analysis of any factual issue.
Identify the factual issue you want analyzed.
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Watch Any Trial Testimony.
Rewatch or re-read the trial testimony of any witness.
Identify the witness or describe the testimony that you want to review.
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Watch Any Video Played During the Trial.
Rewatch any video admitted into evidence.
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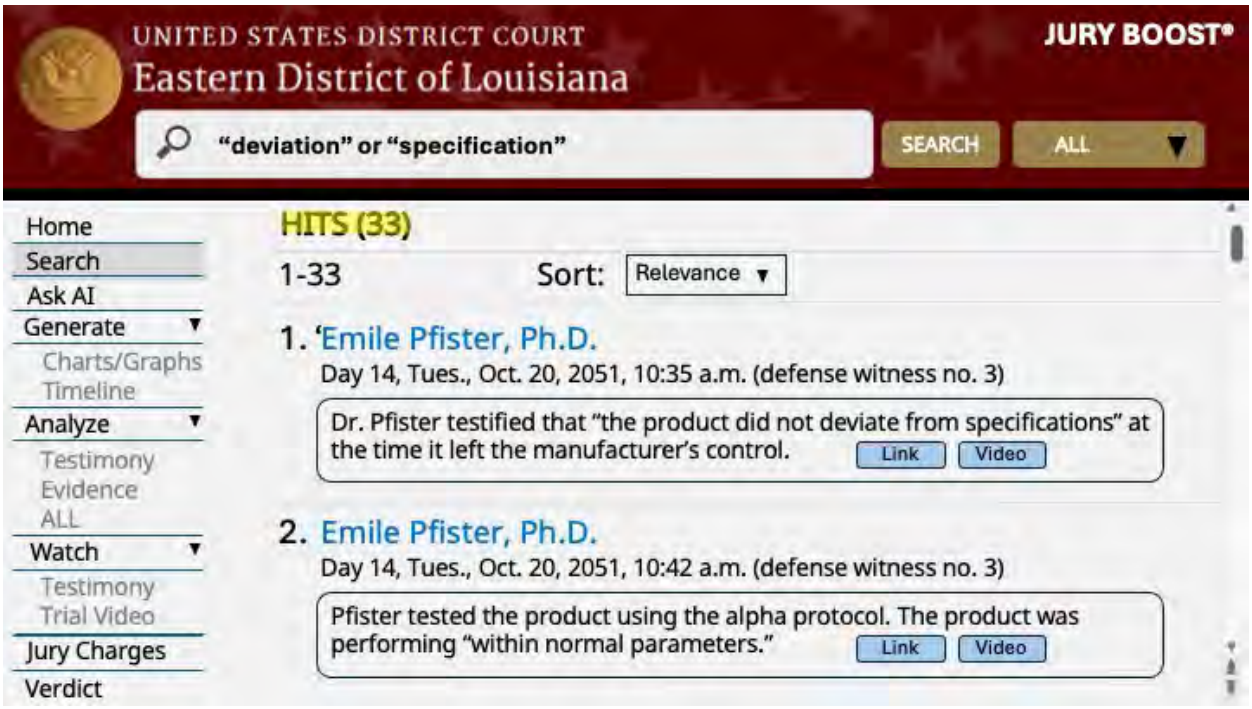

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pji ci... 1 / 362 75%
2.11 Impeachment by Witness's Inconsistent Statements
In determining the weight to give to the testimony of a witness, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at the trial.
A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement

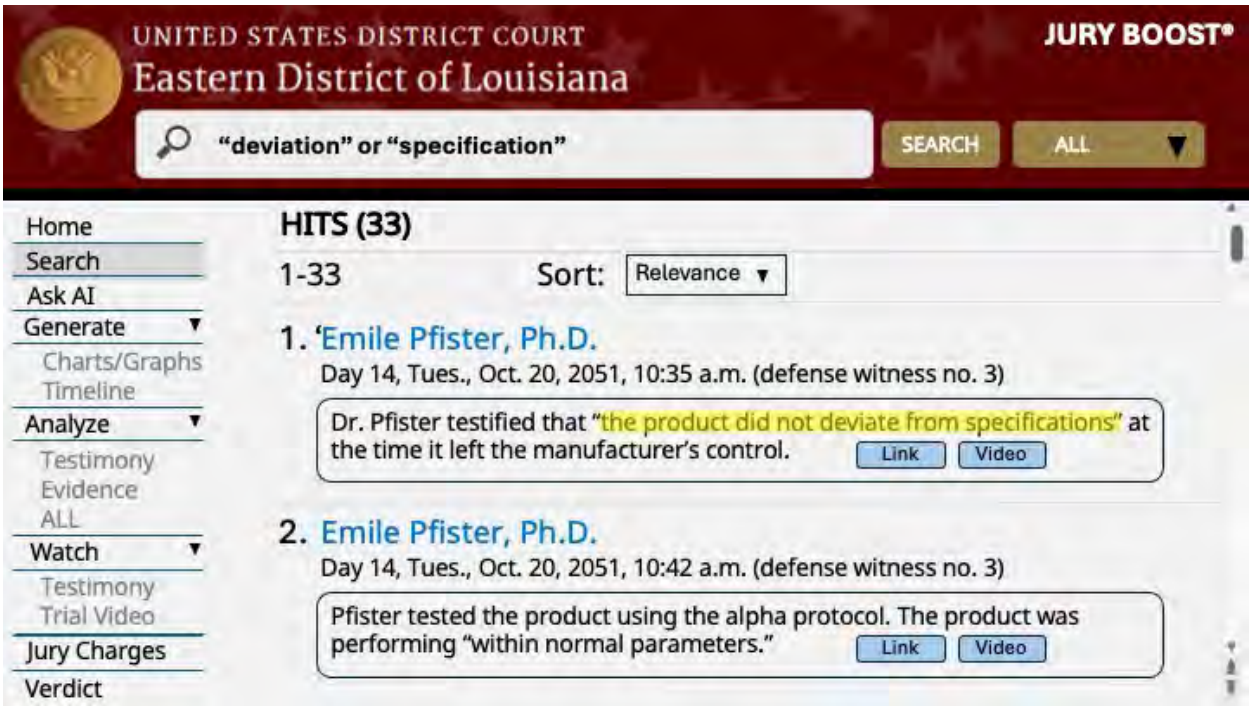

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JURY VERDICT
We, the jury, answer the questions submitted by the Court as follows:
(Directions: You are to answer the following questions in numerical order according to the instructions provided.)
QUESTION 1: Was the product unreasonably dangerous by construction or composition (manufacturing defect)?
Yes: ____ No: ____
(Directions: If you answered "Yes" to Question 1, please answer Question 2. If you answered "No" to Question 1, skip Question 2 and proceed to Question 3.

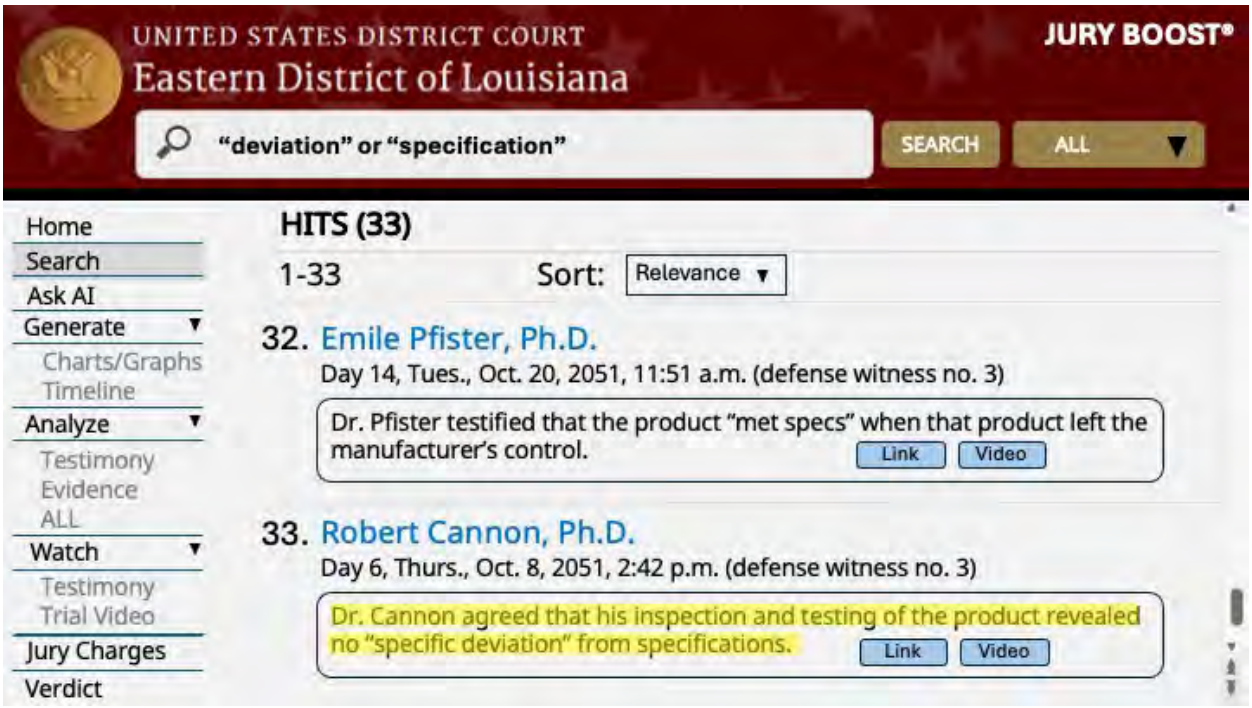

Manufacturing Defect
Theory

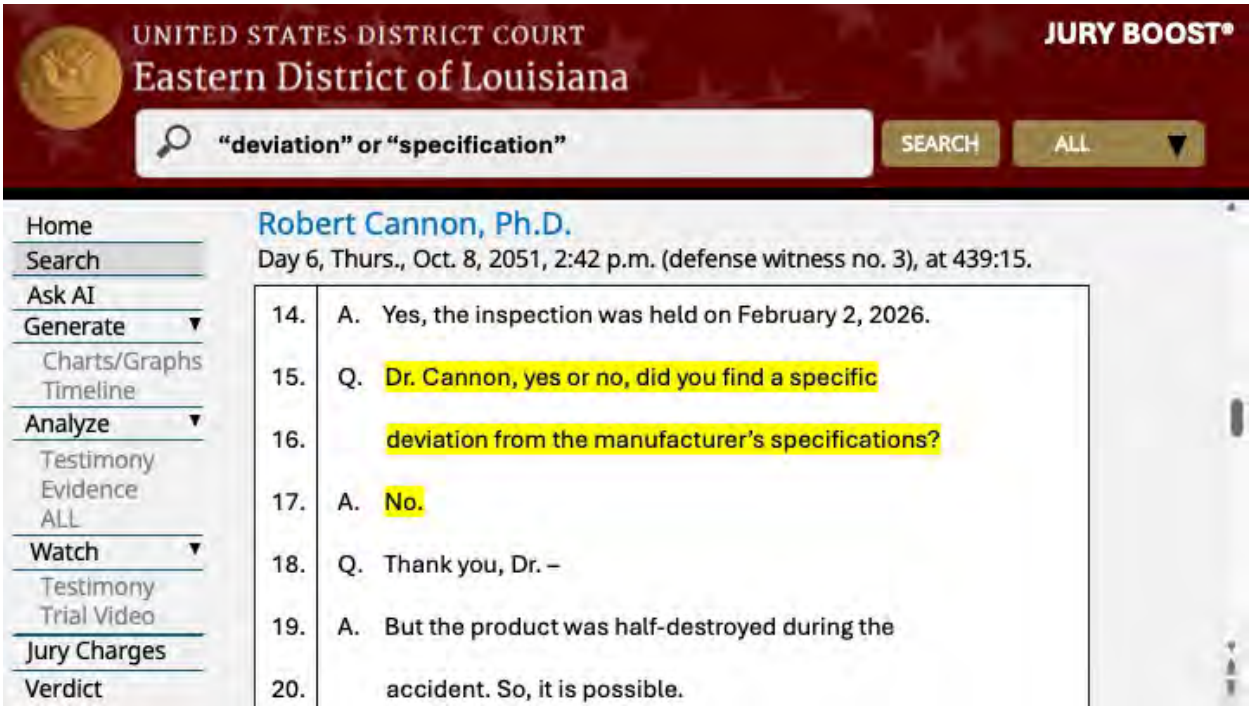

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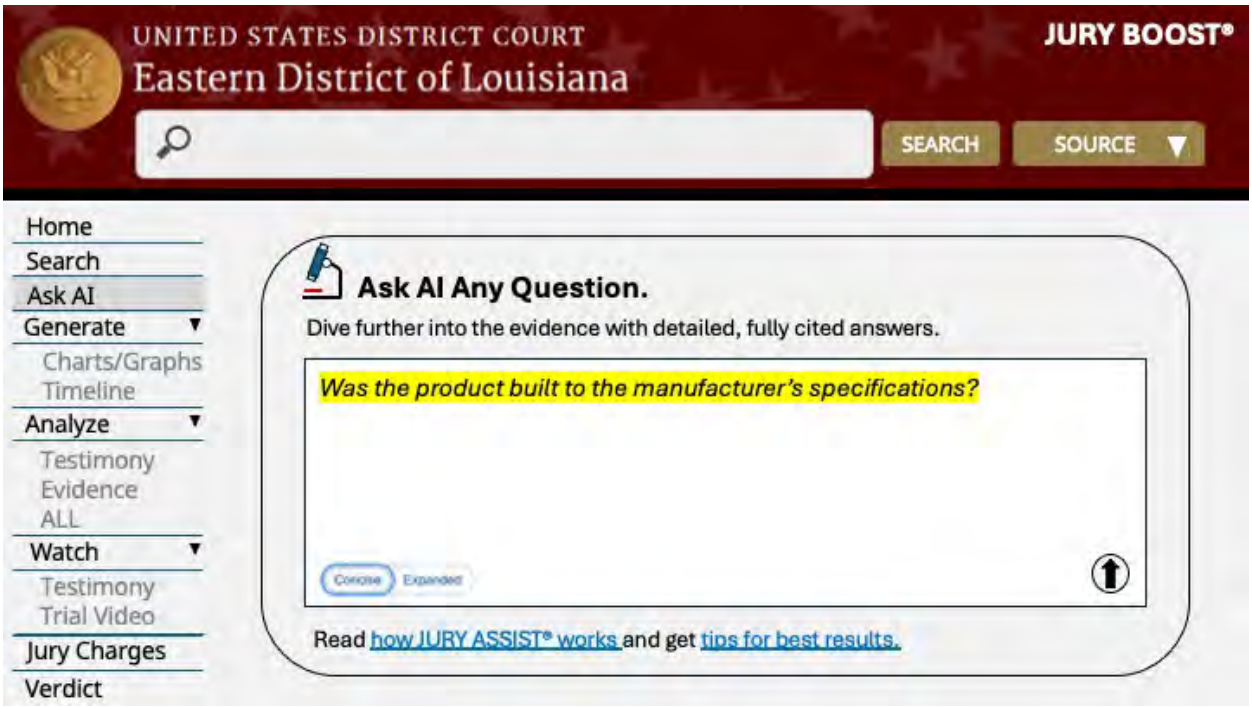

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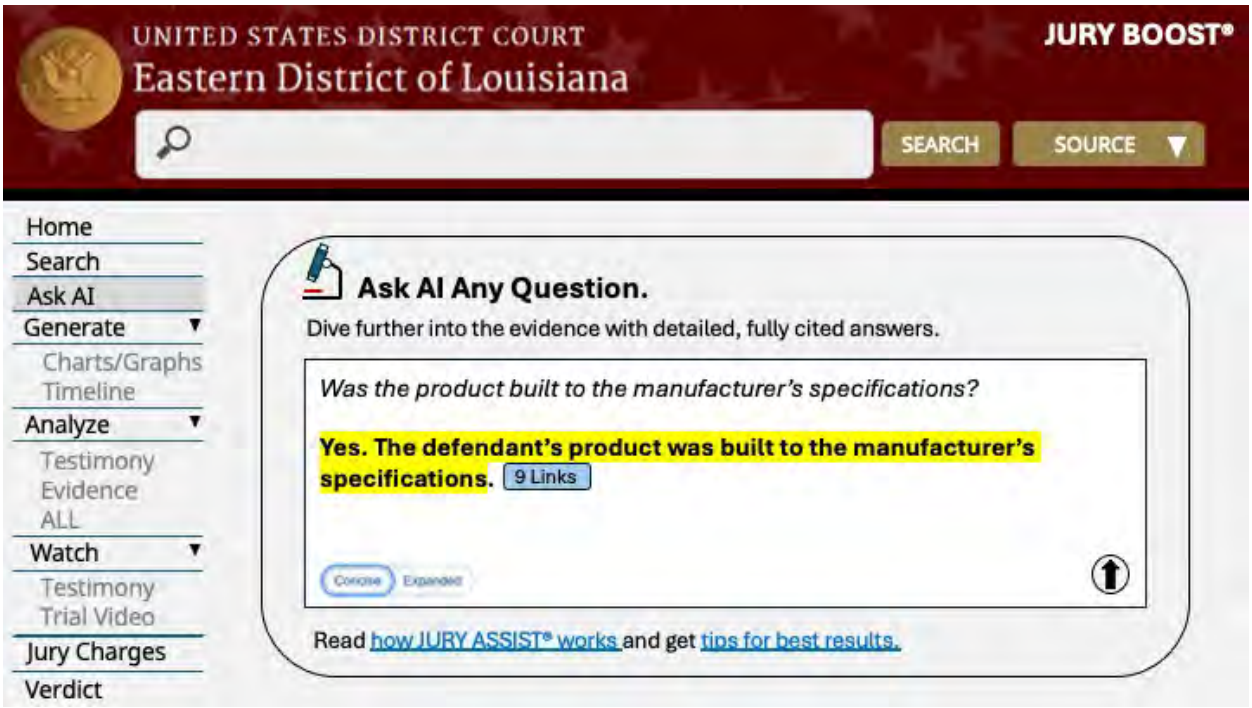

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Verdict
HITS (33)
1-33
Sort:
Relevance
1. 'Emile Pfister, Ph.D.
Day 14, Tues., Oct. 20, 2051, 10:35 a.m. (defense witness no. 3)
Dr. Pfister testified that "the product did not deviate from specifications" at the time it left the manufacturer's control.
Link
Video
2. Emile Pfister, Ph.D.
Day 14, Tues., Oct. 20, 2051, 10:42 a.m. (defense witness no. 3)
Pfister tested the product using the alpha protocol. The product was performing "within normal parameters."
Link
Video

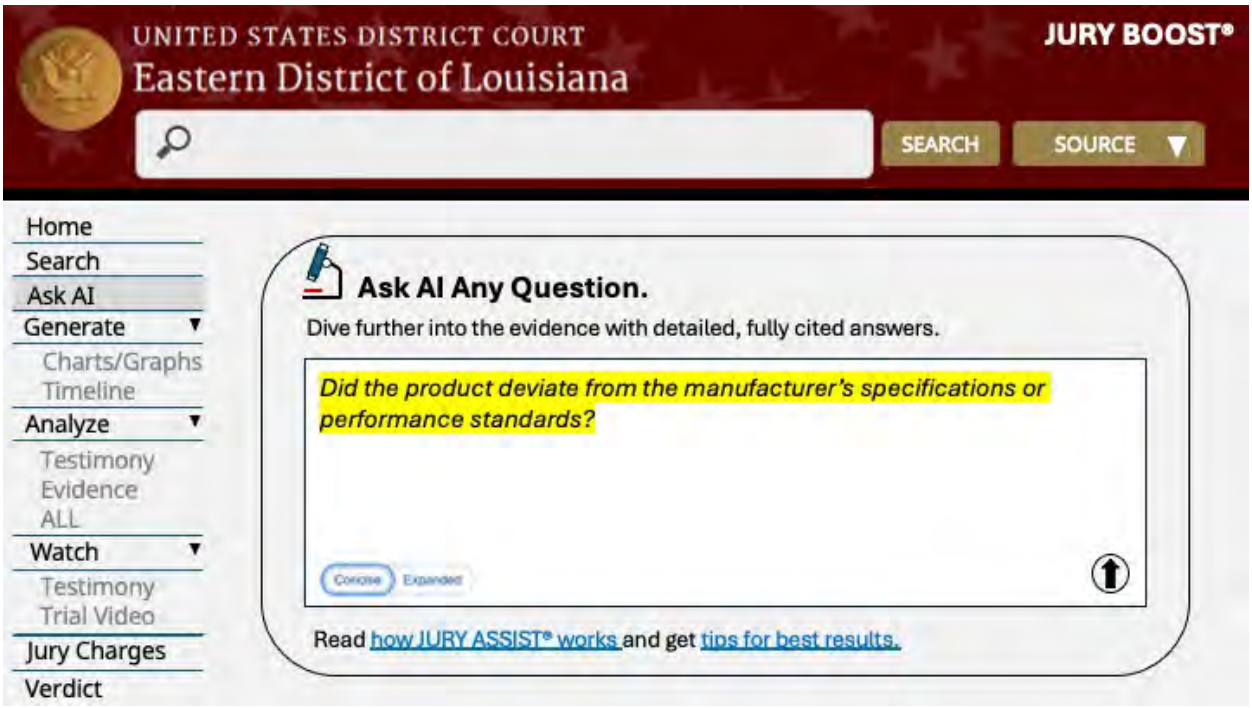

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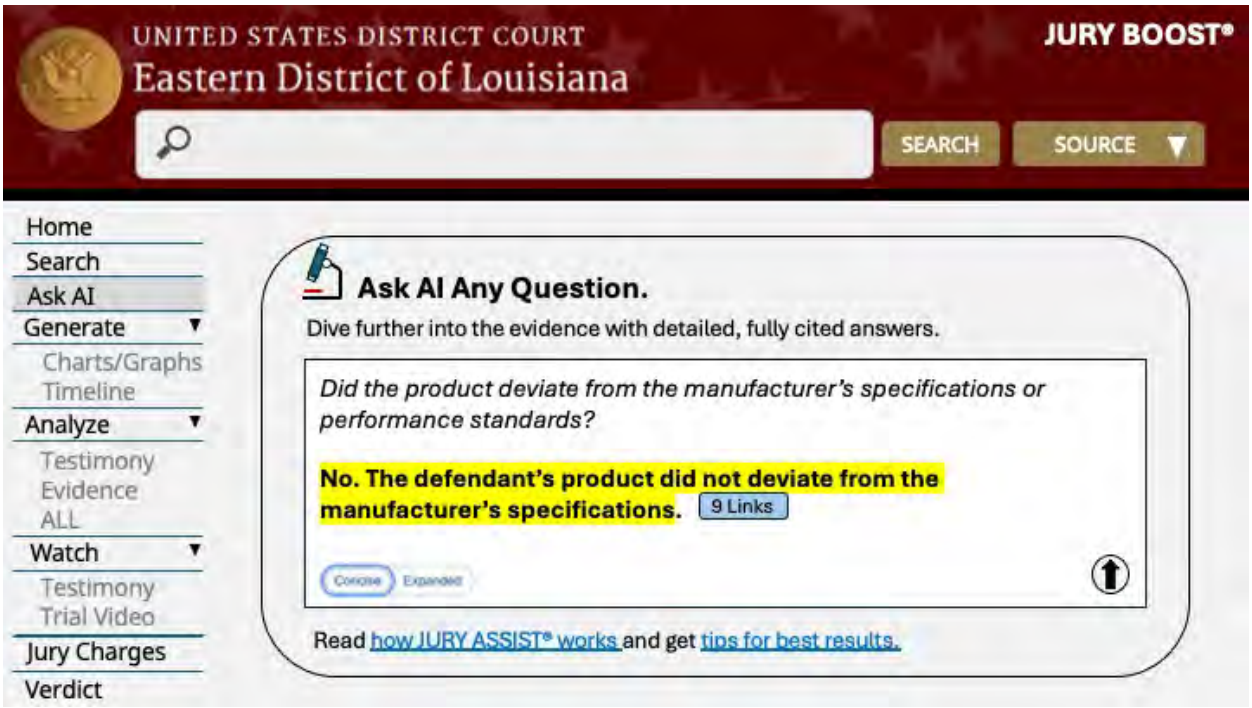

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HITS (33)
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Sort: Relevance
32. Emile Pfister, Ph.D.
Day 14, Tues., Oct. 20, 2051, 11:51 a.m. (defense witness no. 3)
Dr. Pfister testified that the product "met specs" when that product left the manufacturer's control.
Link
Video
33. Robert Cannon, Ph.D.
Day 6, Thurs., Oct. 8, 2051, 2:42 p.m. (defense witness no. 3)
Dr. Cannon agreed that his inspection and testing of the product revealed no "specific deviation" from specifications.
Link
Video


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Robert Cannon, Ph.D.
Day 6, Thurs., Oct. 8, 2051, 2:42 p.m. (defense witness no. 3), at 439:15.
14. A. Yes, the inspection was held on February 2, 2026.
15. Q. Dr. Cannon, yes or no, did you find a specific
16. deviation from the manufacturer's specifications?
17. A. No.
18. Q. Thank you, Dr. –
19. A. But the product was half-destroyed during the
20. accident. So, it is possible.

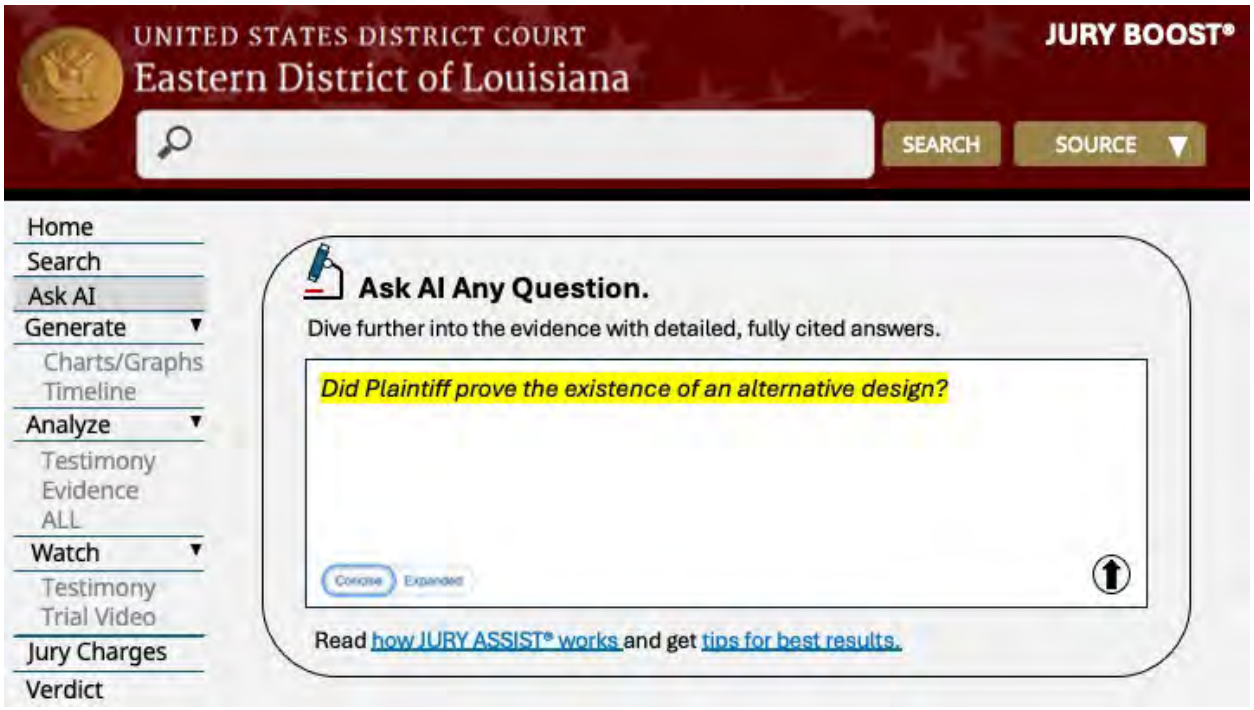

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Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Was the product built to the manufacturer's specifications?
Concise
Expanded
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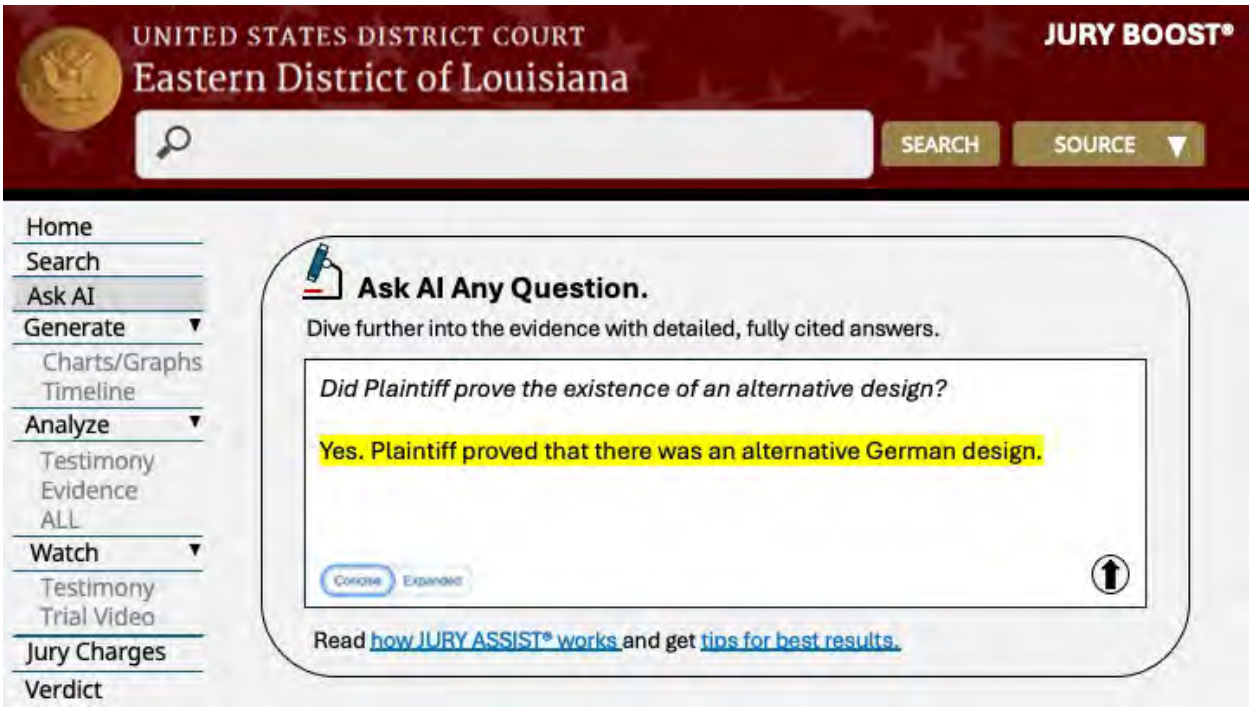

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Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Was the product built to the manufacturer's specifications?
Yes. The defendant's product was built to the manufacturer's specifications.
9 Links
Concise
Expanded
Read how JURY ASSIST® works and get tips for best results.

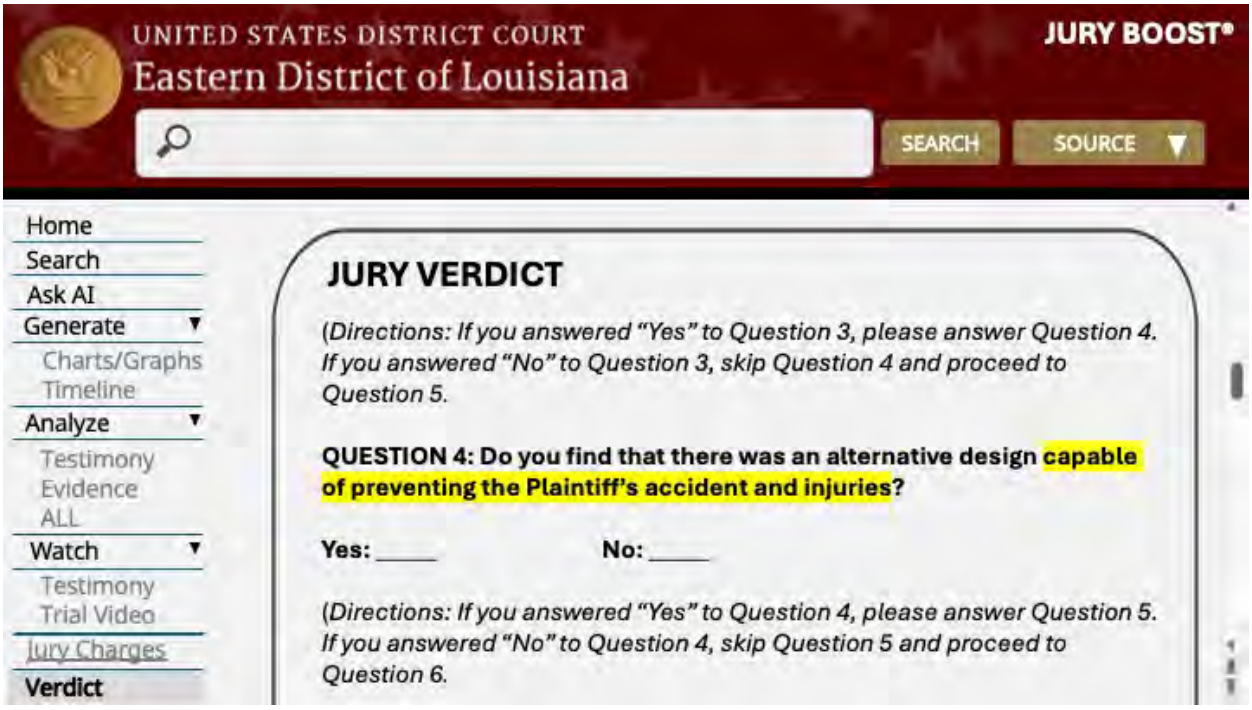

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Verdict
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Dive further into the evidence with detailed, fully cited answers.
Did the product deviate from the manufacturer's specifications or performance standards?
Concise
Expanded
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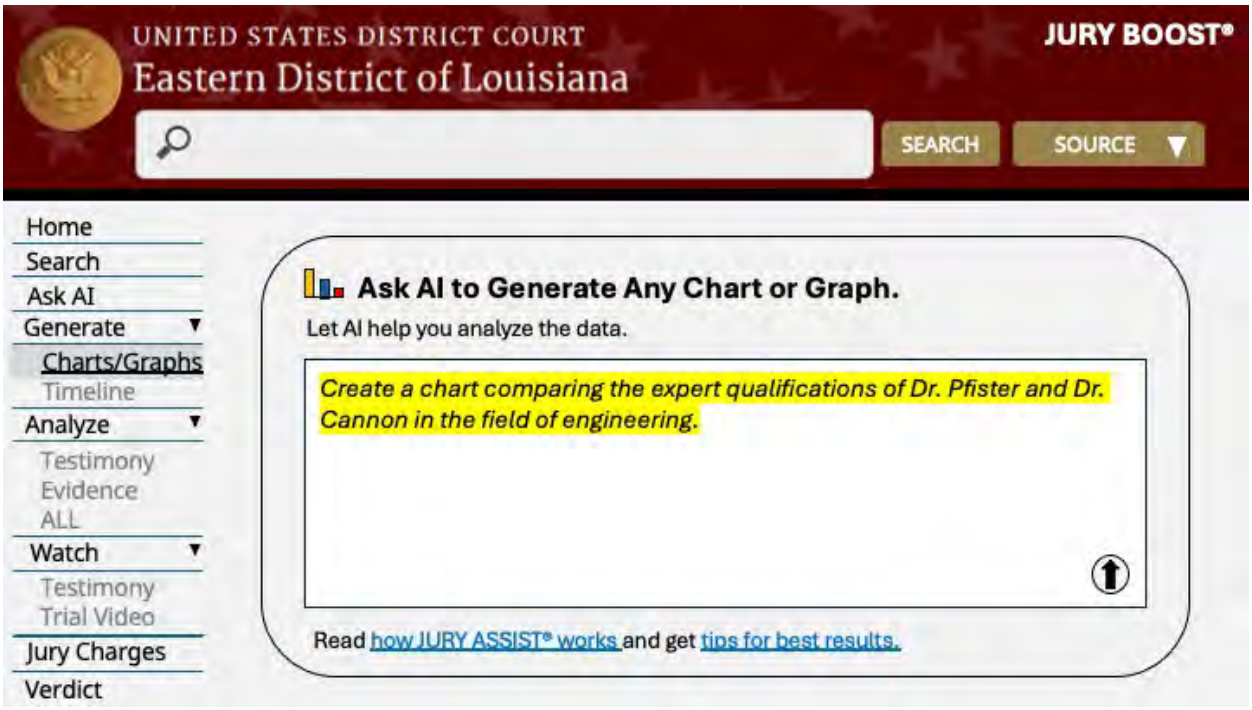

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Verdict
Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Did the product deviate from the manufacturer's specifications or performance standards?
No. The defendant's product did not deviate from the manufacturer's specifications.
9 Links
Concise
Expanded
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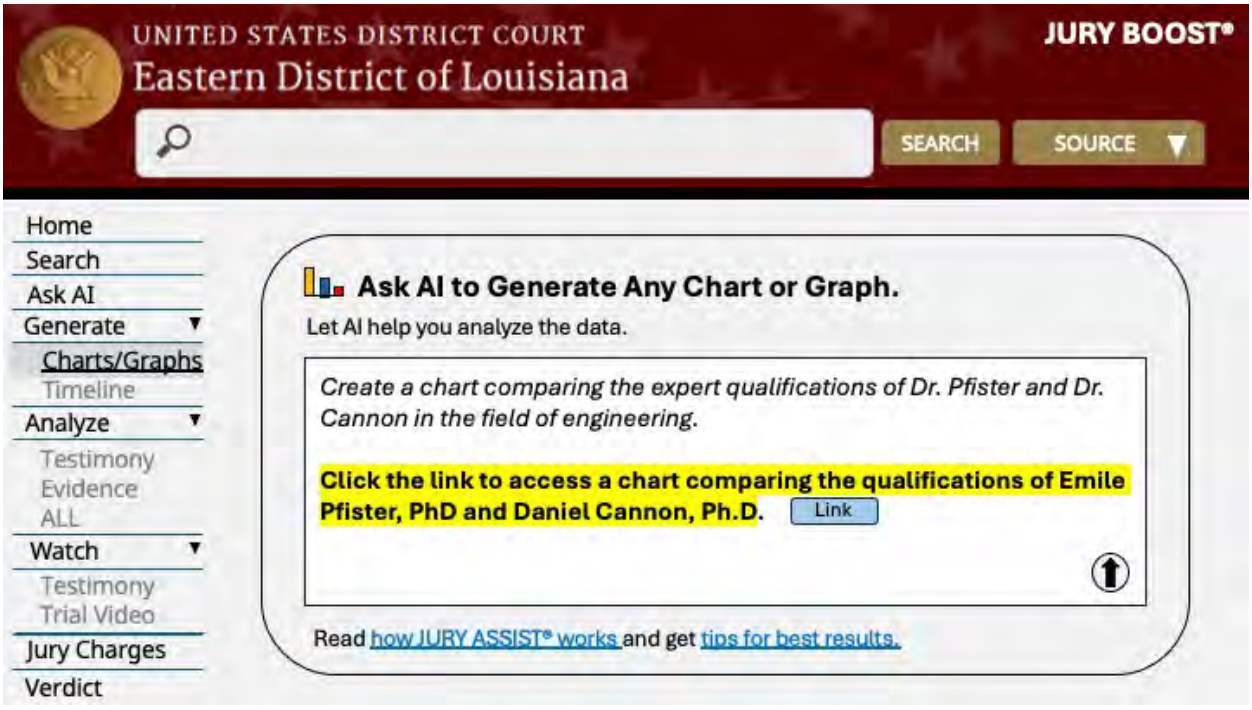

Design Defect
Theory


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Dive further into the evidence with detailed, fully cited answers.
Did Plaintiff prove the existence of an alternative design?
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Verdict
Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Did Plaintiff prove the existence of an alternative design?
Yes. Plaintiff proved that there was an alternative German design.
Concise
Expanded
Read how JURY ASSIST® works and get tips for best results.

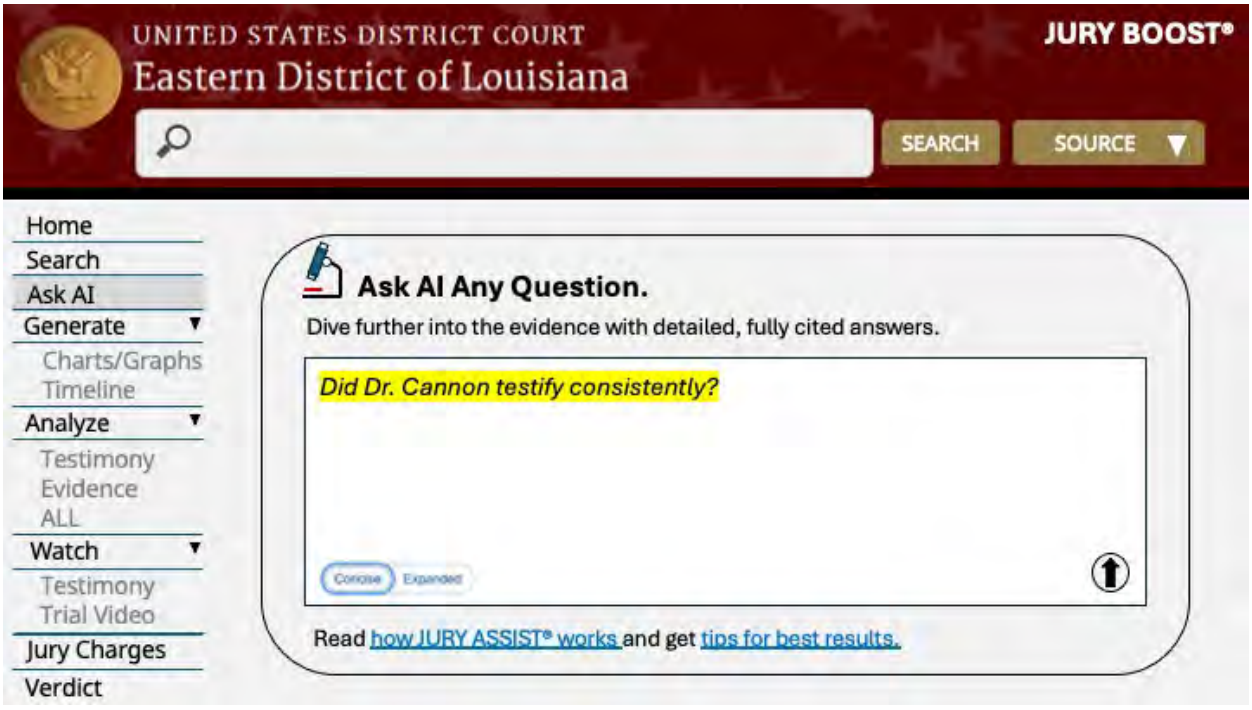

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Verdict
JURY VERDICT
(Directions: If you answered "Yes" to Question 3, please answer Question 4. If you answered "No" to Question 3, skip Question 4 and proceed to Question 5.
QUESTION 4: Do you find that there was an alternative design capable of preventing the Plaintiff's accident and injuries?
Yes: _____ No: _____
(Directions: If you answered "Yes" to Question 4, please answer Question 5. If you answered "No" to Question 4, skip Question 5 and proceed to Question 6.

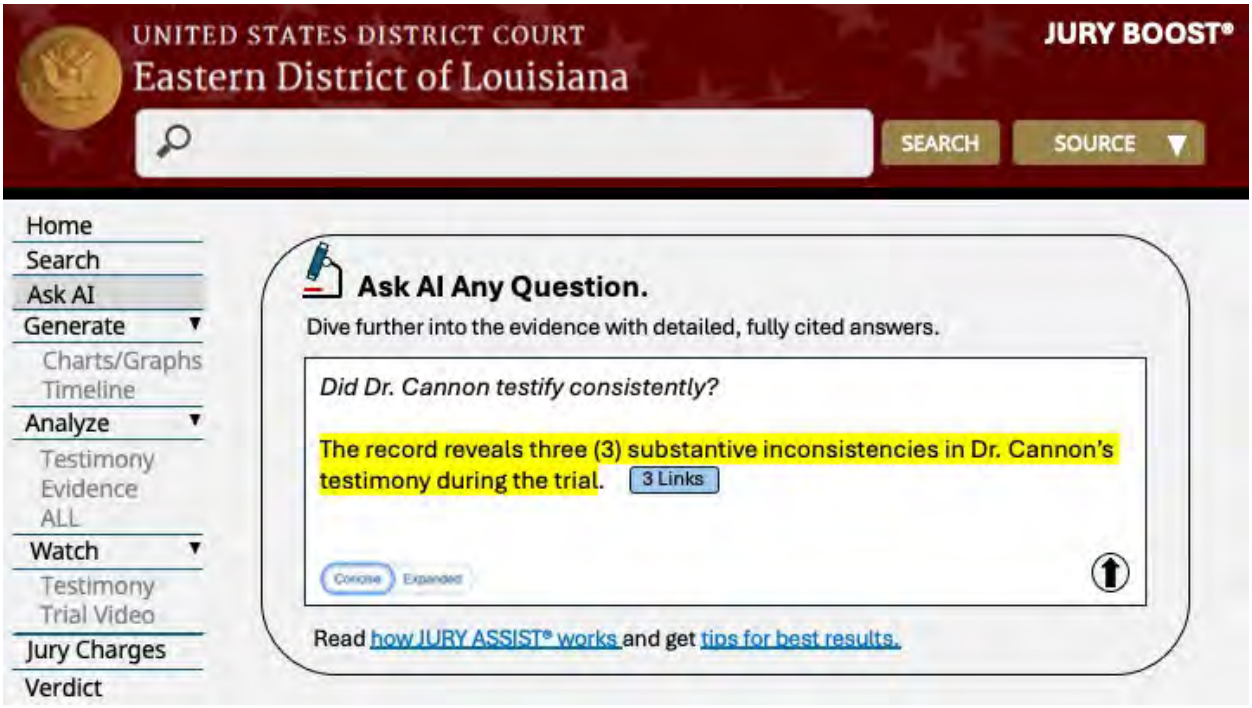

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Verdict
Ask AI to Generate Any Chart or Graph.
Let AI help you analyze the data.
Create a chart comparing the expert qualifications of Dr. Pfister and Dr. Cannon in the field of engineering.
Read how JURY ASSIST® works and get tips for best results.

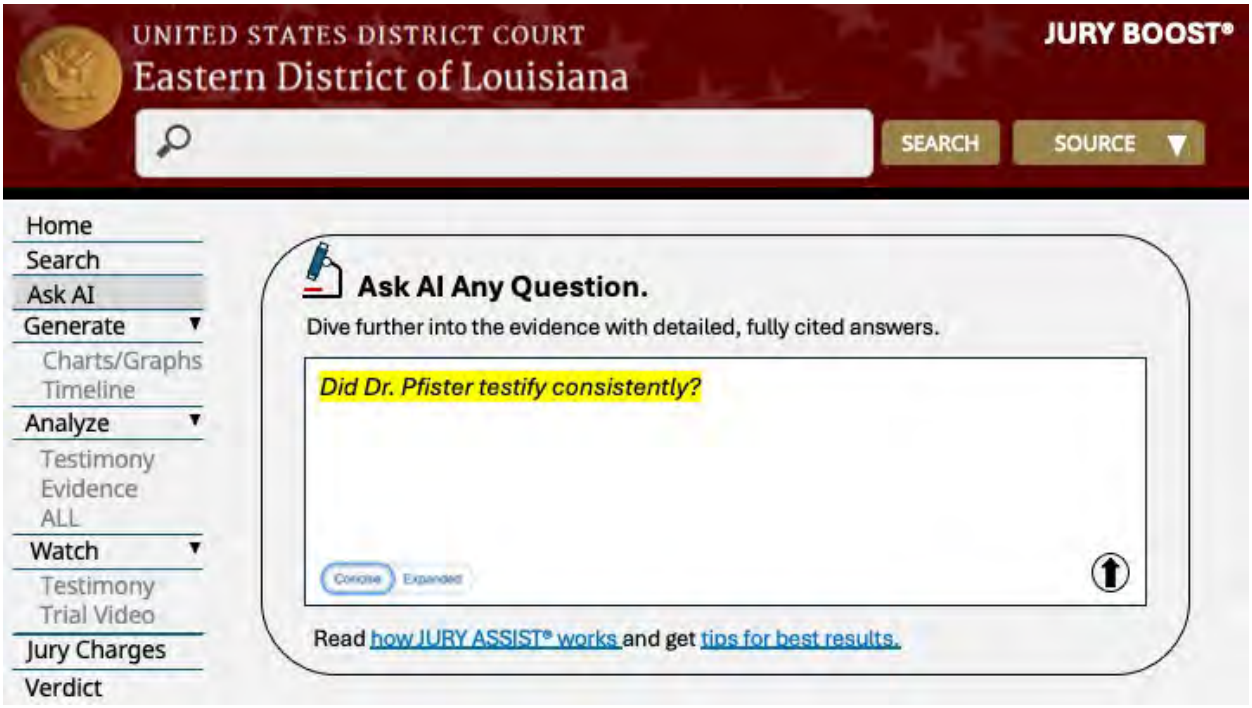

UNITED STATES DISTRICT COURT
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Testimony
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Jury Charges
Verdict
Ask AI to Generate Any Chart or Graph.
Let AI help you analyze the data.
Create a chart comparing the expert qualifications of Dr. Pfister and Dr. Cannon in the field of engineering.
Click the link to access a chart comparing the qualifications of Emile Pfister, PhD and Daniel Cannon, Ph.D.
Link
Read how JURY ASSIST® works and get tips for best results.

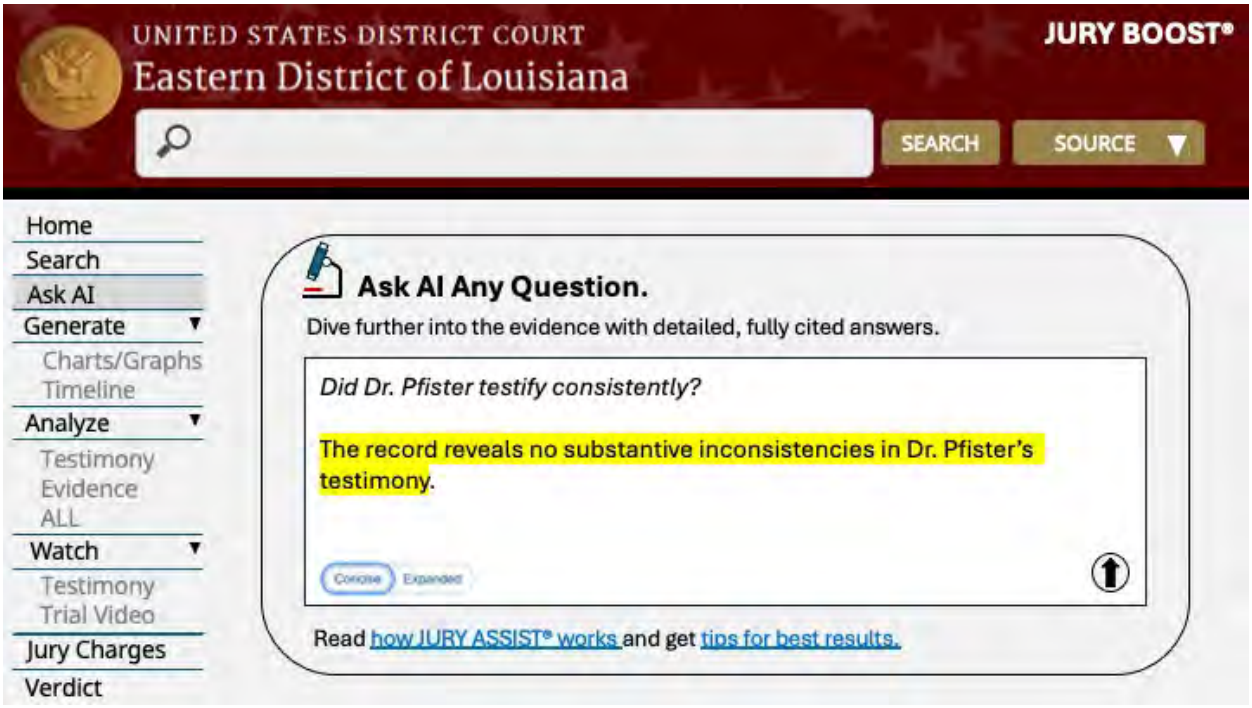


Expert Qualifications	Daniel Cannon (Plaintiff)	Emile Pfister (Defense)
Member of ASTM Committee for this product ?	NO	YES
Published peer-reviewed articles on the subject?	NO	YES
Holds patents for similar products?	NO	YES
Inspected and tested similar products?	NO	YES
Designed similar products?	NO	YES
Worked in the industry for one year?	NO	YES
Employed by manufacturer of similar product?	NO	YES
Employed by any manufacturer of any product?	NO	YES

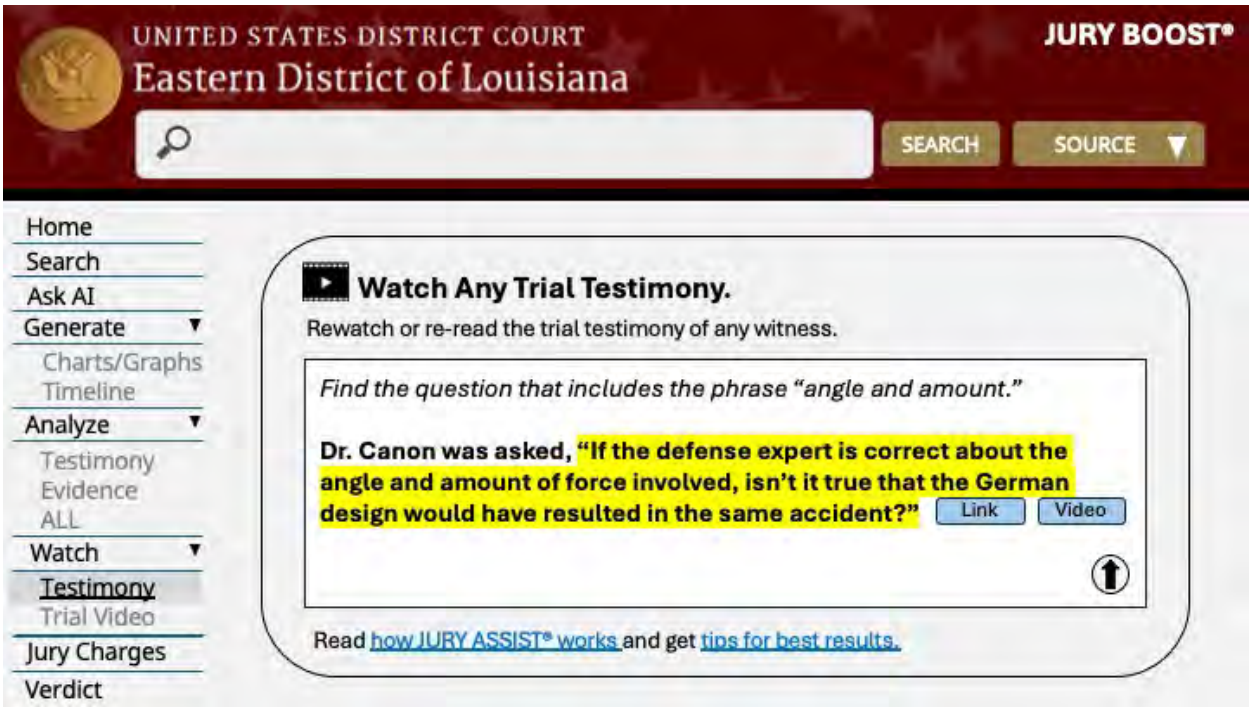



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Verdict
Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Did Dr. Cannon testify consistently?
The record reveals three (3) substantive inconsistencies in Dr. Cannon's testimony during the trial.
3 Links
Concise
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Verdict
Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Did Dr. Pfister testify consistently?
Concise
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Testimony
Trial Video
Jury Charges
Verdict
Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
Did Dr. Pfister testify consistently?
The record reveals no substantive inconsistencies in Dr. Pfister's testimony.
Concise
Expanded
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Jury Charges
Verdict
Watch Any Trial Testimony.
Rewatch or re-read the trial testimony of any witness.
Find the question that includes the phrase "angle and amount."
Read how JURY ASSIST® works and get tips for best results.

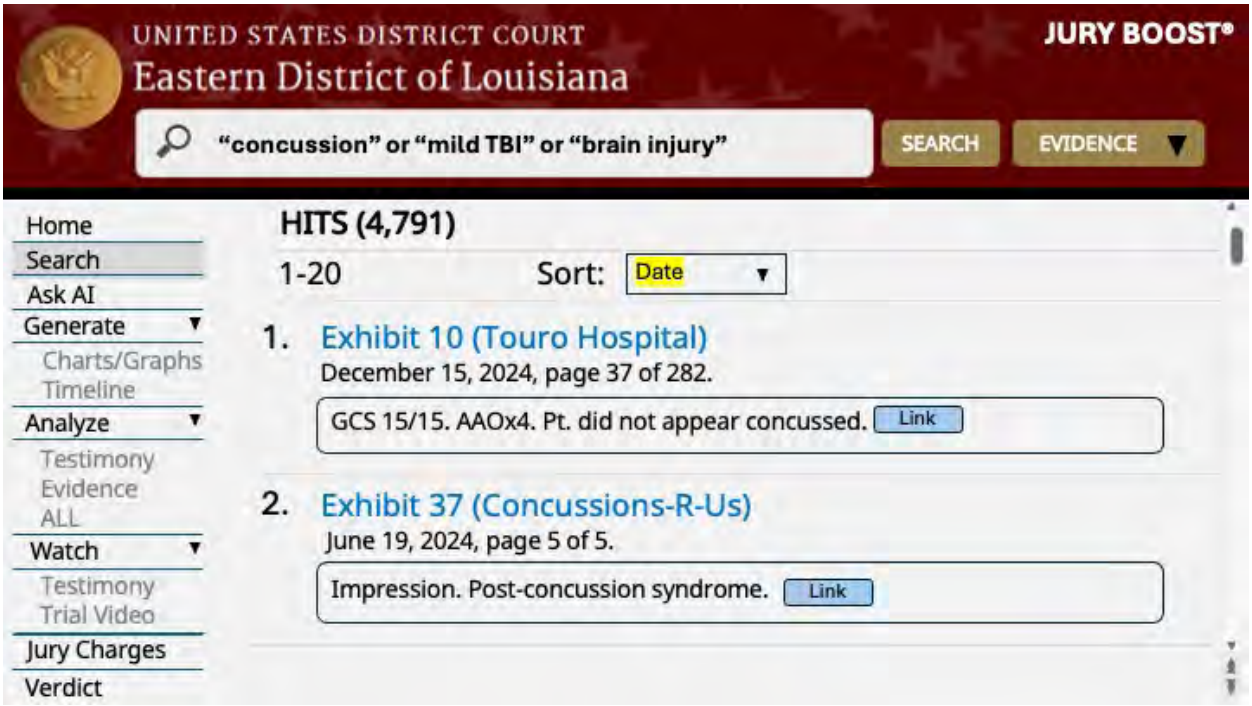

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Verdict
Watch Any Trial Testimony.
Rewatch or re-read the trial testimony of any witness.
Find the question that includes the phrase "angle and amount."
Dr. Canon was asked, "If the defense expert is correct about the angle and amount of force involved, isn't it true that the German design would have resulted in the same accident?"
Link
Video
Read how JURY ASSIST® works and get tips for best results.

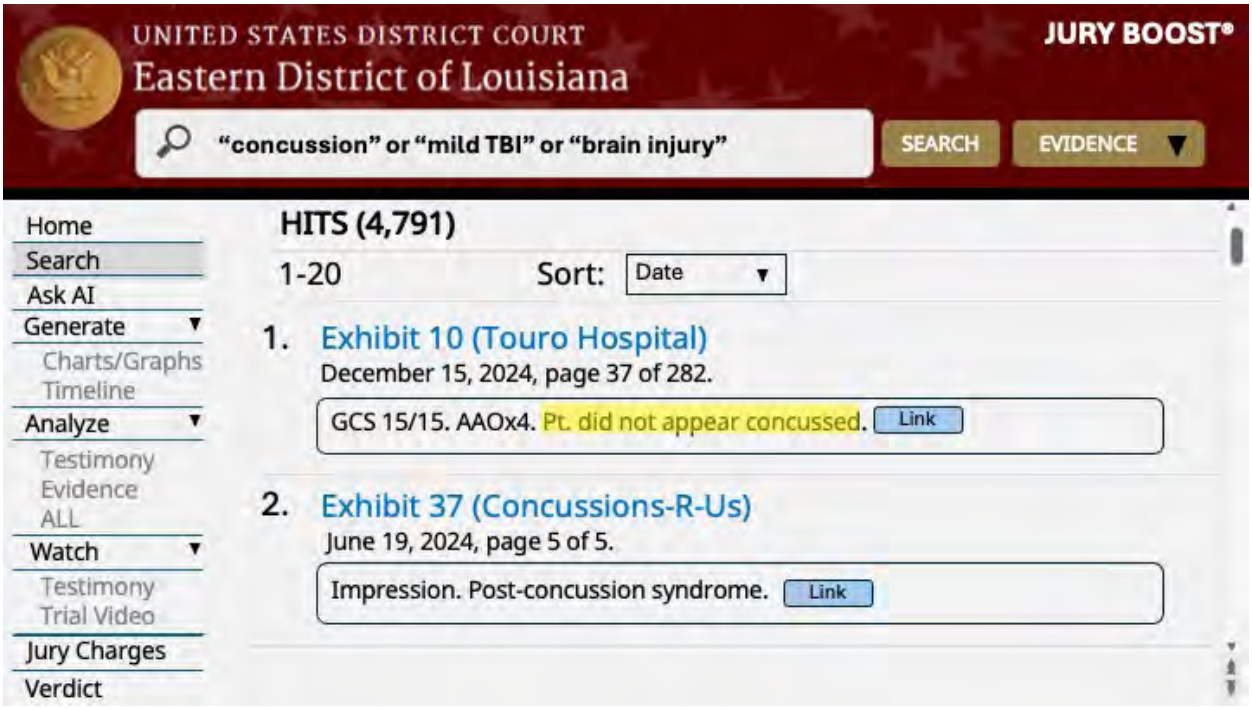

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Verdict
Substitute similar photo of plaintiff's expert
1:25:05 / 33:10

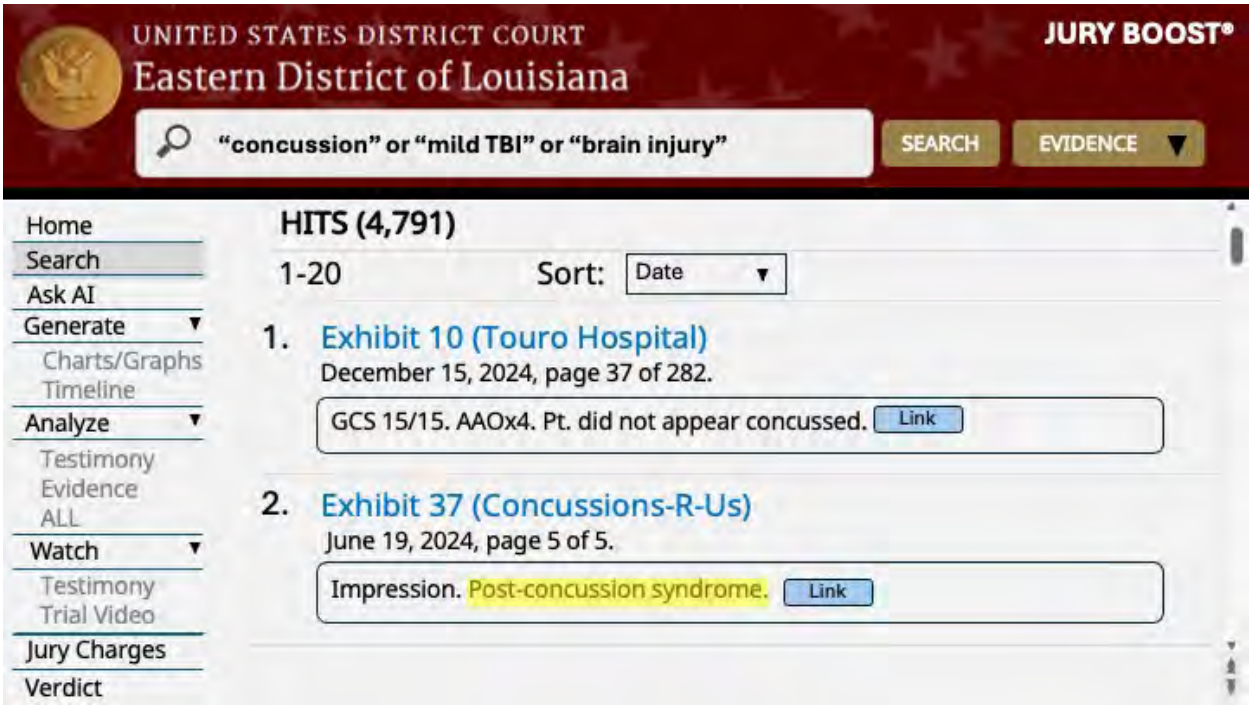

Traumatic Brain Injury (TBI)
Allegation

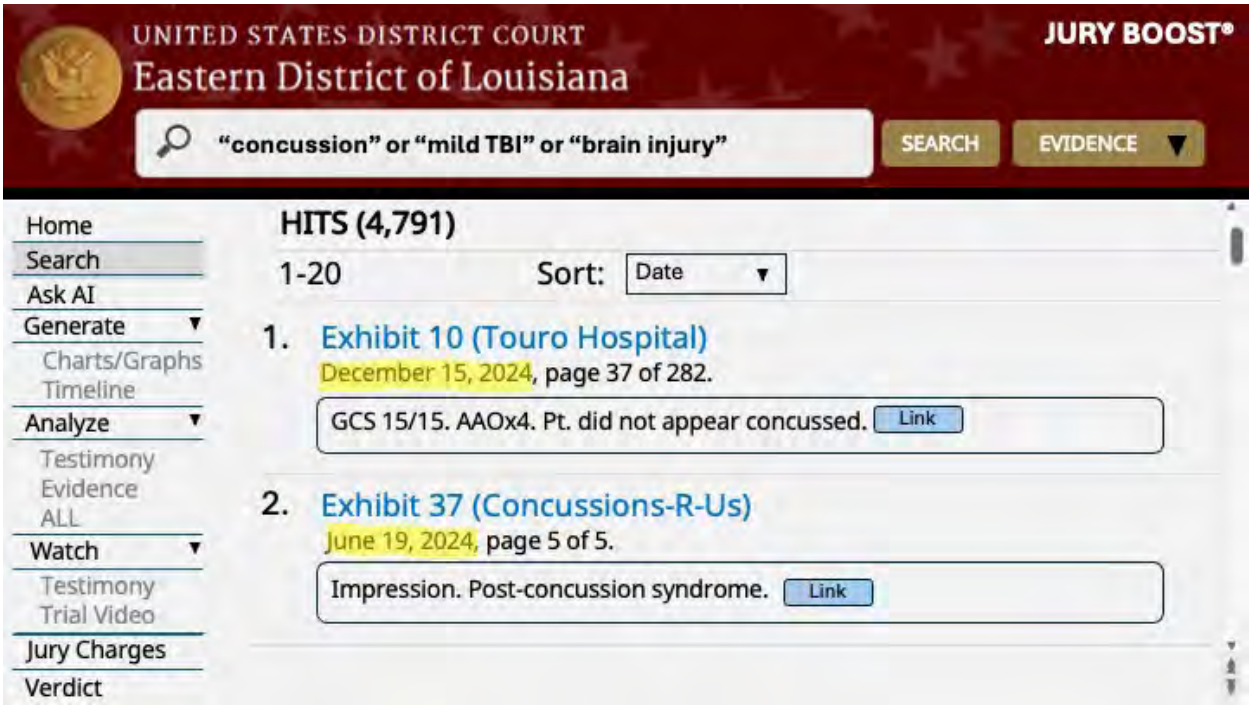

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Searching Evidence
Jurors can search the trial testimony and the exhibits that were admitted into evidence during the trial by typing the search word or terms next to the magnifying glass and clicking "search."
To more narrowly tailor your search, click on the pull down "source" button, and narrow your search to a specific category of evidence.
For search tips, click here.

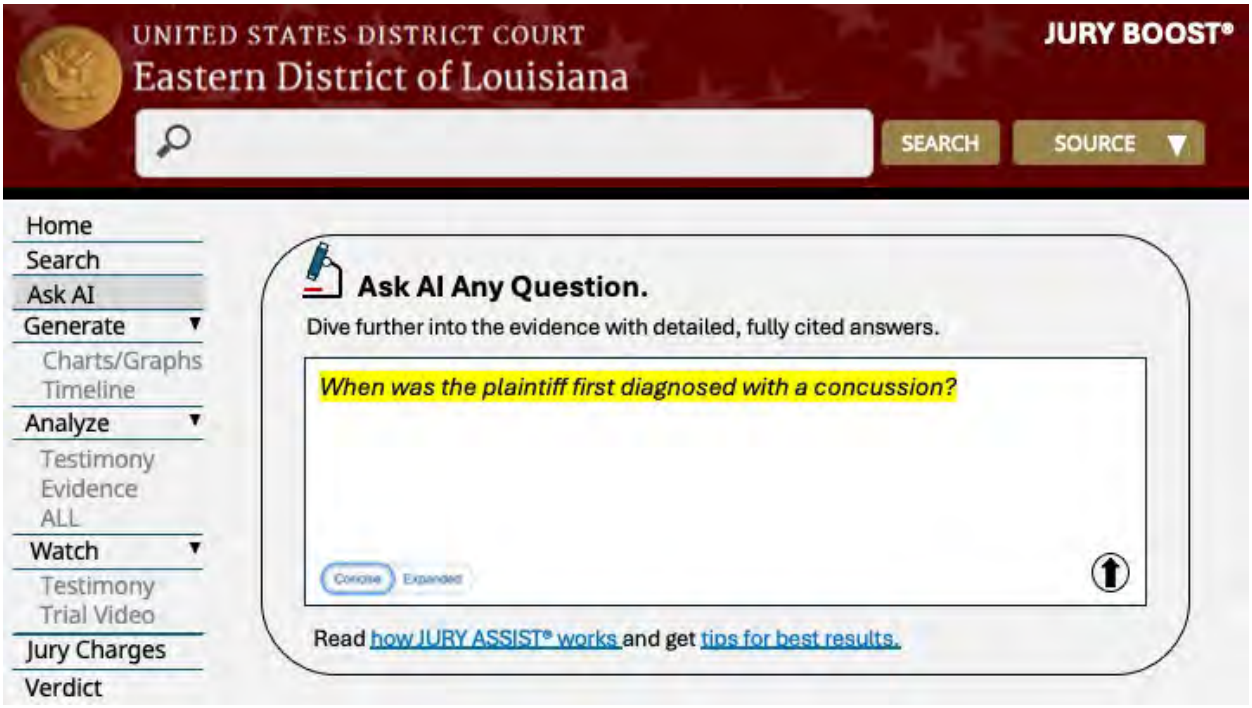

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Verdict
Searching Evidence
Jurors can search the trial testimony and the exhibits that were admitted into evidence during the trial by typing the search word or terms next to the magnifying glass and clicking "search."
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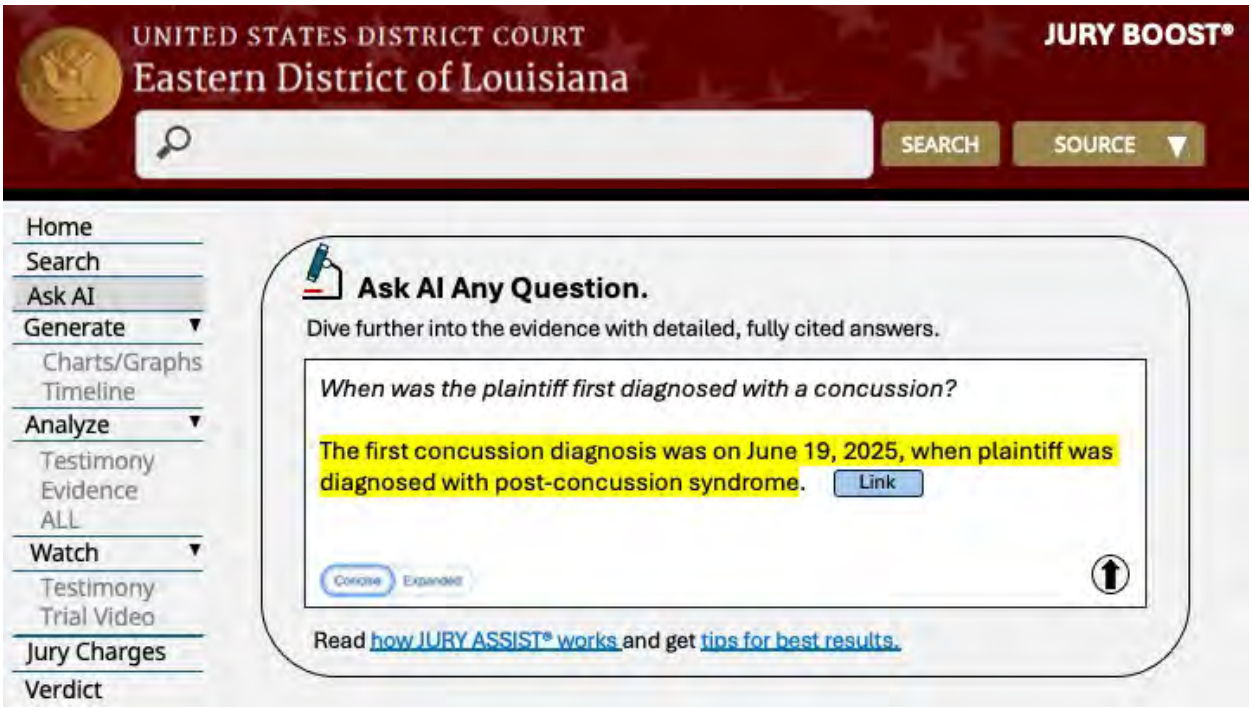

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HITS (4,791)
1-20
Sort: Date
1. Exhibit 10 (Touro Hospital)
December 15, 2024, page 37 of 282.
GCS 15/15. AAOx4. Pt. did not appear concussed. Link
2. Exhibit 37 (Concussions-R-Us)
June 19, 2024, page 5 of 5.
Impression. Post-concussion syndrome. Link

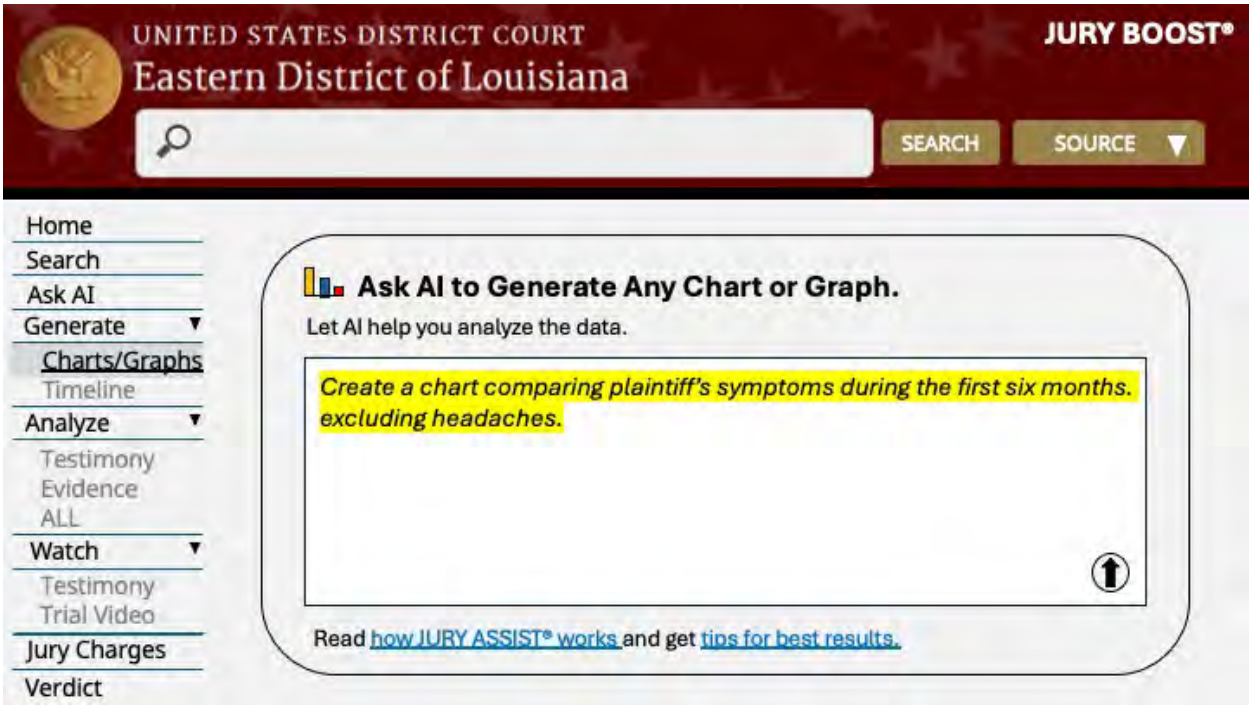

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June 19, 2024, page 5 of 5.
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December 15, 2024, page 37 of 282.
GCS 15/15. AAOx4. Pt. did not appear concussed. Link
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June 19, 2024, page 5 of 5.
Impression. Post-concussion syndrome. Link


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Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
When was the plaintiff first diagnosed with a concussion?
Concise
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Ask AI Any Question.
Dive further into the evidence with detailed, fully cited answers.
When was the plaintiff first diagnosed with a concussion?
The first concussion diagnosis was on June 19, 2025, when plaintiff was diagnosed with post-concussion syndrome.
Link
Concise
Expanded
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Ask AI to Generate Any Chart or Graph.
Let AI help you analyze the data.
Create a chart comparing plaintiff's symptoms during the first six months. excluding headaches.
Read how JURY ASSIST® works and get tips for best results.

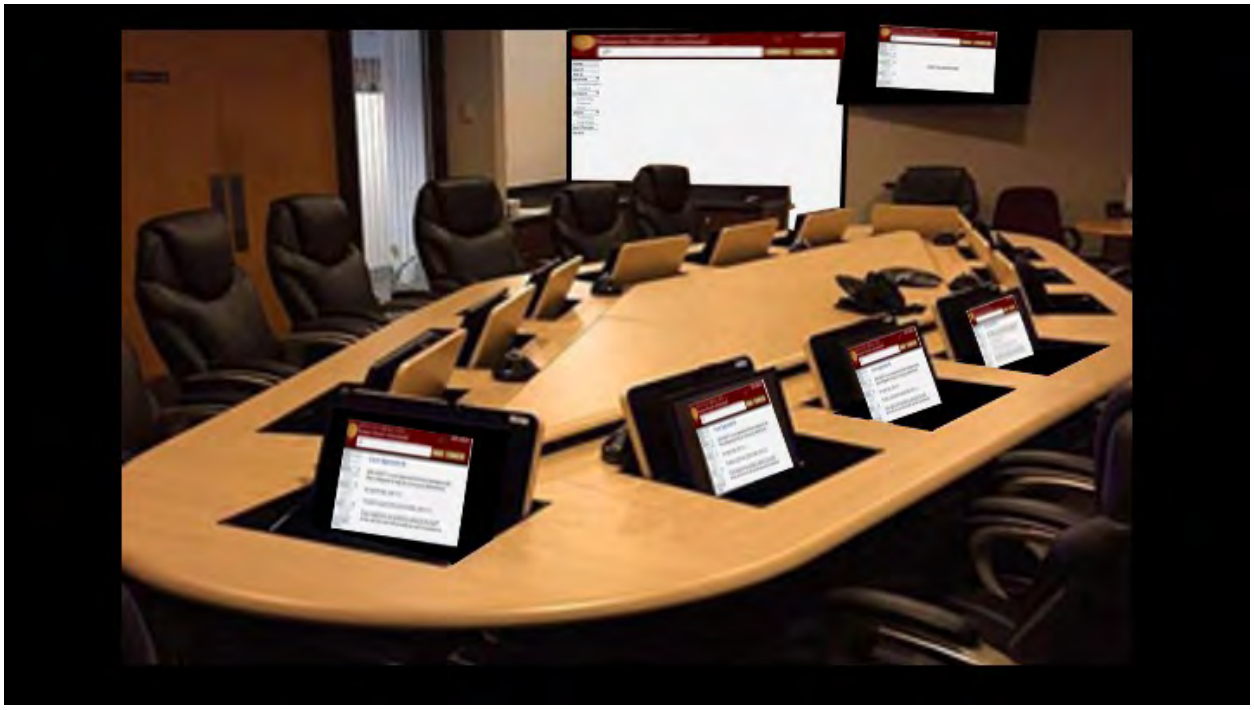
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	12-16-2024	01-16-2025	03-14-2025	05-15-2025	06-19-2025
Headaches	YES	YES	YES	YES	YES
Depression	NO	NO	YES	YES	YES
Sleep Apnea	NO	NO	NO	YES	YES
Slurred Speech	NO	NO	NO	NO	YES
Blurred Vision	NO	NO	NO	NO	YES
Photophobia	NO	NO	NO	NO	YES
Tinnitus	NO	NO	NO	NO	YES
Phonophobia	NO	NO	NO	NO	YES
Memory Loss	NO	NO	NO	NO	YES
Confusion	NO	NO	NO	NO	YES
Dizziness	NO	NO	NO	NO	YES







504.593.0627
jerry@deutschkerrigan.com

John Jerry Glas

Partner | Deutsch Kerrigan (New Orleans, LA)

John Jerry Glas is the Chair of the Civil Litigation Department at Deutsch Kerrigan. Jerry is a Fellow of the American College of Trial Lawyers. He has tried 117 civil or criminal trials, including 79 jury trials. Jerry has been admitted pro hac vice in 10 states and had success on both sides of the aisle. In 2021, as lead trial counsel for the plaintiff (Lindale Pipeline, LLC), Jerry obtained a $26 million verdict in Houston. In 2012, as lead trial counsel for the defendant (TASER International, Inc.), Jerry obtained a zero verdict in St. Louis, which was listed by Missouri Lawyers Weekly as one of that year's "Largest Defense Verdicts."

Jerry is the author of The New Science of Trial Advocacy: The Waiter Pivot, which was published by the American Bar Association (ABA Publishing) in 2023. The "Waiter Pivot" is an alternative approach to trial advocacy that embraces the recent paradigm shift in jury psychology and teaches attorneys how to surprise, disarm, and persuade modern jurors. Forget direct advocacy, conventional cross-examination, and bobblehead experts. Jerry encourages trial lawyers to rewrite the old trial playbook, reinvent themselves, and redefine their role in the courtroom.

Practices

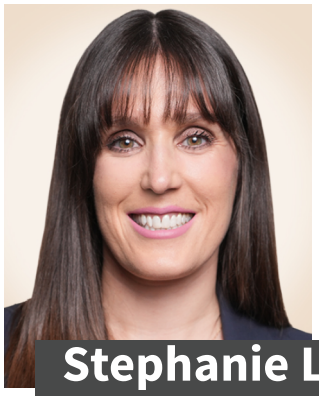
- Appellate Litigation
- Insurance Defense, Coverage, Disputes and Bad Faith
- Products Liability
- Retail and Hospitality
- Transportation
- Trucking and Commercial Transportation

Accolades

- Benchmark Litigation "Litigation Star"; 2025-2026
- Louisiana Super Lawyers®; 2015-present
- Louisiana Super Lawyers® - Cover & Featured Article; "How Jerry Glas develops his rapport with juries," January 2022
- CityBusiness Leadership in Law Award; 2012, 2017, 2024 (Hall of Fame)
- The Best Lawyers in America® "Lawyer of the Year"; Transportation Law, 2027; Mass Tort Litigation / Class Actions - Defendants, 2023 & 2026
- The Best Lawyers in America®; 2012-present
- Inside New Orleans Readers' Favorite Elite Lawyer; 2021
- New Orleans Magazine's "Top Lawyers"; 2016, 2018-2019, 2021-2025
- CityBusiness "Ones to Watch: Law"; 2016
- Missouri Lawyers Weekly - Largest Defense Verdicts; 2013
- AV Preeminent Martindale-Hubbell® Peer Review Rating™; 2010-Present.
- Louisiana State Bar Association Pro Bono Publico Award; 2009
- Federal Bar Association Camille Gravel Public Service Award; 2009)

Education

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



The Duty to Innovate? Evolving Risks in Post-Sale Manufacturing Obligations

Stephanie Laws
Maslon (Minneapolis, MN)

Post-Sale Duties After Gilead: What the California Supreme Court Decided and What Risks Remain

Stephanie Laws

In August 2026, the California Supreme Court decided a landmark products liability case that had drawn amicus briefs from the U.S. Chamber of Commerce, PhRMA, and the Product Liability Advisory Counsel, Inc., among other industry organizations.[1] In the Gilead Tenofovir Cases, the California Supreme Court rejected a duty to innovate, holding that "drug manufacturers do not owe a duty of care to users of a nondefective drug when making decisions about whether and when to commercialize an allegedly safer alternative drug."[2]

Yet Gilead is at once broader and narrower than it first appears. The decision rejected liability for the delayed commercialization of an allegedly safer alternative product, but traditional post-sale duties—warning of newly discovered dangers, recalling upon government mandate, and performing voluntary recalls with reasonable care—remain fully intact. The Court also left open several important questions: whether proof of defect is always required in product-based negligence actions, how the analysis might change at later stages of drug development, and whether its reasoning extends beyond the pharmaceutical context.

This article examines what the California Supreme Court decided in Gilead and what risks of liability remain. Part II provides the factual background of Gilead. Part III traces the procedural history of the case through the courts. Part IV identifies the questions the Court expressly or implicitly reserved. Part V concludes with observations about the road ahead.

Factual Background: Development of Tenofovir-Based Medications

The Gilead litigation arises from the development history of two antiviral drugs used to treat HIV. In 1991, Gilead Sciences, Inc. acquired the rights to tenofovir, an antiviral compound for the treatment of HIV/AIDS.[3] Gilead developed tenofovir disoproxil fumarate ("TDF"), which received FDA approval in 2001 and became a cornerstone of HIV treatment regimens worldwide.[4] TDF was commercially successful and clinically effective, but there was a purported association between the drug and significant side effects, including renal toxicity, bone density loss, and dental injuries.[5]

Meanwhile, Gilead also developed a second tenofovir-based medication known as tenofovir alafenamide ("TAF").[6] Despite touting its many anticipated benefits, in 2004, Gilead stopped TAF development claiming that TAF's "safety, tolerability, and efficacy profile did not appear sufficiently different from TDF."[7] Ultimately, Gilead resumed TAF development in 2010, initiated Phase III clinical trials in 2013, and obtained FDA approval for TAF in November 2015.[8] But early research into TAF allegedly showed that TAF delivered the active drug more efficiently to target cells, achieving comparable antiviral efficacy at substantially lower doses and with a reduced impact on the kidneys and bones.[9] This raised a question whether the delayed development of TAF was an intentional strategy to maximize profits from the TDF patent before commercializing TAF as a safer alternative, which would have allowed Gilead to avoid cannibalizing TDF's sales

1 See, e.g., Amici Curiae Br. U.S. Chamber Com., Cal. Chamber Com., Wash. Legal Found., & Nat'l Retail Fed'n, Gilead Tenofovir Cases, No. S283862 (Cal. Nov. 4, 2024); Amicus Curiae Br. PhRMA, BIO & Cal. Life Scis., Gilead Tenofovir Cases, No. S283862 (Cal. Nov. 4, 2024); Br. Amicus Curiae Prod. Liab. Advisory Council, Inc., Gilead Tenofovir Cases, No. S283862 (Cal. Nov. 4, 2024).

2 Gilead Tenofovir Cases, 20 Cal. 5th 390, 435, 594 P.3d 61, 91 (2026).

3 Id. at 405, 594 P.3d at 70.

4 Id.; Master Long Form Complaint, Gilead Tenofovir Cases, JCCP No. 5043, Case No. CJC-19-005043, ¶¶ 1, 70–72 (S.F. Super. Ct. Jan. 30, 2020).

5 Master Long Form Complaint, Gilead Tenofovir Cases, JCCP No. 5043, Case No. CJC-19-005043, ¶¶ 73–74 (S.F. Super. Ct. Jan. 30, 2020).

6 Gilead Tenofovir Cases, 20 Cal. 5th at 405, 594 P.3d at 70.

7 Id., 594 P.3d at 71.

8 Id. at 406, 594 P.3d at 71.

9 Master Long Form Complaint, Gilead Tenofovir Cases, JCCP No. 5043, Case No. CJC-19-005043, ¶¶ 51–52 (S.F. Super. Ct. Jan. 30, 2020); Gilead Tenofovir Cases, 20 Cal. 5th at 405, 594 P.3d at 70–71.

and more "effectively monetize both drugs."[10]

The Procedural History of the Gilead Tenofovir Cases

A. The Trial Court

On January 30, 2020, thousands of plaintiffs filed claims in a coordinated proceeding, Judicial Council Coordination Proceeding (JCCP) No. 5043, in the San Francisco Superior Court, alleging harm resulting from the use of TDF.[11] Critically, the plaintiffs did not allege that TDF was defective. Instead, they alleged that "Gilead unreasonably delayed bringing TAF to market . . . and that this delay deprived them, for many years, of the option to take what they allege is a safer alternative drug."[12] Without an alleged defective product, plaintiffs dropped their strict liability and warranty claims, but continued to pursue two causes of action: negligence and fraudulent concealment.[13] Their negligence theory rested on the contention that Gilead breached a duty of reasonable care by delaying the commercialization of TAF—a drug Gilead itself had developed and allegedly knew to be safer.[14] Their fraudulent concealment claim alleged that Gilead had a duty to disclose information about TAF to patients and physicians and had suppressed that information to protect TDF revenues.[15]

Gilead moved for summary judgment on both the negligence and fraudulent concealment claims.[16] As to negligence, Gilead maintained that any claim against a manufacturer for injuries caused by its product requires proof that the product was defective—and because plaintiffs conceded TDF was not defective, their negligence theory could not succeed.[17] As to fraudulent concealment, Gilead argued it owed no duty to disclose facts about TAF, an investigational drug that had not yet received FDA approval as an HIV treatment.[18]

The trial court denied the motion, holding that plaintiffs' claims could proceed.[19] Gilead petitioned the appellate court for writ relief.[20]

B. The Court of Appeal

On January 9, 2024, Division Four of the California Court of Appeal's First Appellate District issued its decision.[21]

As to negligence, the Court of Appeal affirmed the trial court, holding that "the legal duty of a manufacturer to exercise reasonable care can, in appropriate circumstances, extend beyond the duty not to market a defective product."[22] The court took care to distinguish the duty question presented here from a broader "duty to innovate" label, noting that plaintiffs did not claim a manufacturer has a legal duty to invent a safer alternative drug, but rather that their claim was premised on Gilead's possession of TAF and its knowing and intentional withholding of that treatment following its invention.[23] The Court of Appeal also noted that the applicable Rowland v. Christian[24] factors could justify an exception to the general duty of care—the factors being foreseeability of harm, degree of certainty that the plaintiff suffered injury, closeness of the connection between the defendant's conduct and the injury, moral blame, the policy interest in preventing future harm, the extent of the burden to the defendant, and the availability, cost, and prevalence of insurance for the risk involved—but concluded that Gilead had not established that an exception was warranted.[25]

As to fraudulent concealment, the court reversed.[26] It held that Gilead had no duty to disclose information about TAF—an unapproved drug still in development—to patients or physicians.[27] The court reasoned that for the fourteen years between the commencement of Gilead's sales of TDF in 2001 and the FDA's approval of TAF in 2015, TAF was not available to patients as a treatment, and therefore information about it was, as a matter of law, not material to the choice between TDF and other available medications.[28] The court separately rejected plaintiffs' argument that disclosure might have biased physicians against prescribing TDF, finding that reasoning impermissibly speculative.[29]

Gilead filed a petition for review with the California

10 Master Long Form Complaint, Gilead Tenofovir Cases, JCCP No. 5043, Case No. CJC-19-005043, ¶ 1 (S.F. Super. Ct. Jan. 30, 2020); Gilead Tenofovir Cases, 20 Cal. 5th at 405, 594 P.3d at 71.

11 Master Long Form Complaint, Gilead Tenofovir Cases, JCCP No. 5043, Case No. CJC-19-005043 (S.F. Super. Ct. Jan. 30, 2020); Gilead Tenofovir Cases, 98 Cal. App. 5th at 916, 317 Cal. Rptr. 3d at 140 (stating that "24,000 plaintiffs in this coordinated proceeding allege that they suffered . . . adverse effects from their use of TDF").

12 Gilead Tenofovir Cases, 20 Cal. 5th at 406–07, 594 P.3d at 71.

13 Id. at 407, 594 P.3d at 71; Master Long Form Complaint, Gilead Tenofovir Cases, JCCP No. 5043, Case No. CJC-19-005043, at 24–34 (S.F. Super. Ct. Jan. 30, 2020) (setting forth claims of negligence, strict product liability, breach of express warranty, breach of implied warranty, and fraud and concealment).

14 Master Long Form Complaint, Gilead Tenofovir Cases, JCCP No. 5043, Case No. CJC-19-005043, ¶¶ 135–51 (S.F. Super. Ct. Jan. 30, 2020).

15 Id. ¶¶ 184–204.

16 Gilead Tenofovir Cases, 20 Cal. 5th at 406–07, 594 P.3d at 71.

17 See Gilead Tenofovir Cases, 98 Cal. App. 5th 911, 917, 317 Cal. Rptr. 3d 133, 140 (2024), as modified on denial of reh'g (Feb. 1, 2024), rev'd and remanded, 20 Cal. 5th 390, 594 P.3d 61 (2026).

18 Id.

19 Id.

20 Id., 317 Cal. Rptr. 3d at 141.

21 See generally id.

22 Id. at 917, 317 Cal. Rptr. 3d at 141.

23 Id. at 921, 317 Cal. Rptr. 3d at 144.

24 Rowland v. Christian, 69 Cal.2d 108, 70 Cal. Rptr. 97 (1968).

25 Gilead Tenofovir Cases, 98 Cal. App. 5th at 917, 936–37, 317 Cal. Rptr. 3d at 141, 157.

26 Id. at 949–50, 317 Cal. Rptr. 3d at 167–68.

27 Id.

28 Id. at 949, 317 Cal. Rptr. 3d at 168.

29 Id.

Supreme Court as to the negligence claim, which the California Supreme Court granted.

C. The California Supreme Court

On August 3, 2026, the California Supreme Court reversed the Court of Appeal decision on the negligence claim.[30] The Court held that "drug manufacturers do not owe a duty of care to users of a nondefective drug when making decisions about whether and when to commercialize an allegedly safer alternative drug."[31] It directed the trial court to enter summary judgment in Gilead's favor on all causes of action.[32]

Although the Court's decision appears to be an unequivocal rejection of a duty to innovate, the Court's analysis is notable. Rather than deciding at the threshold whether a duty existed, the majority assumed for the sake of argument that a general duty of care applied and then asked whether the Rowland factors justified an exception to that duty.[33] The Court concluded that they did.[34]

Of note, on foreseeability, the Court emphasized that a manufacturer cannot reliably predict a drug's safety profile during the early stages of clinical testing.[35] The causal chain between a manufacturer's decision to pause development and a patient's eventual injury was, the Court found, "highly attenuated," running through uncertain science, FDA regulatory review, physician prescribing decisions, and individual patient choice.[36]

On moral blame, the Court acknowledged the plaintiffs' allegations that Gilead paused TAF development to protect TDF revenues but held that a profit motive, standing alone, was insufficient to establish the kind of moral culpability that would justify imposing a novel duty.[37] As the Court explained, equating profit motive with moral culpability would apply to "virtually every negligence action brought against a business," rendering the standard unworkable.[38]

And with respect to policy concerns, the Court cautioned that a duty to innovate risked skewing how manufacturers allocate research resources, potentially discouraging exploration of entirely new therapies in favor of marginal refinements to drugs already on the market.[39] The Court emphasized the substantial burden of drug development, observing that Gilead estimated that bringing TAF to market required approximately $100 million in costs and more than five years of clinical trials and regulatory review.[40]

Notably, this decision was far from unanimous. Rather, the decision produced three separate writings beyond the majority opinion. Chief Justice Guerrero filed a concurrence arguing that proof of product defect is always required to sustain a negligence claim against a product manufacturer.[41] Justice Kruger filed a concurrence, joined by Justices Corrigan and Desautels, expressing skepticism that the defect requirement could be overridden.[42] Justice Evans dissented, characterizing the majority's holding as conferring "sweeping immunity from negligence liability" on pharmaceutical manufacturers and arguing that the decision would insulate companies from accountability even in egregious cases of profit-driven delay.[43]

What Risks of Liability Remain After Gilead

Although Gilead may appear to be a sweeping decision, it is a carefully bounded one. The Court resolved the specific question before it—whether a duty exists on the facts presented—while leaving several significant questions for another day.

First, the Court did not categorically hold that proof of product defect is always required to sustain a negligence claim against a manufacturer. The majority expressed "significant doubts" about whether a negligence theory can proceed absent proof of defect, and four justices—Chief Justice Guerrero in her concurrence and the three justices joining Justice Kruger's concurrence—appeared sympathetic to a defect requirement.[44] But the majority ultimately resolved the case on the Rowland exception analysis without reaching that broader question.[45] The result is that, at least formally, the door remains open for a future plaintiff to argue that a manufacturer's negligent conduct caused injury even absent a traditional defect.

Second, the Court's analysis was heavily influenced by the early stage of TAF's development at the time of the alleged pause. TAF had not completed Phase III clinical trials and had not received FDA approval when Gilead stopped development in 2004. The Court repeatedly

30 Gilead Tenofovir Cases, 20 Cal. 5th at 435, 594 P.3d at 91.

31 Id.

32 Id.

33 Id. at 403, 594 P.3d at 69.

34 Id.

35 Id. at 415, 594 P.3d at 77.

36 Id. at 420, 594 P.3d at 81.

37 Id. at 422, 594 P.3d at 82.

38 Id.

39 Id. at 422–23, 594 P.3d at 83.

40 Id. at 430, 594 P.3d at 88.

41 Id. at 435, 594 P.3d at 91 (Guerrero, C.J., concurring).

42 Id. at 449, 594 P.3d at 101 (Kruger, J., concurring).

43 Id. at 450, 594 P.3d at 101 (Evans, J., dissenting).

44 Id. at 409, 594 P.3d at 73 (majority opinion); id. at 435, 594 P.3d at 91 (Guerrero, C.J., concurring); id. at 449, 594 P.3d at 101 (Kruger, J., concurring).

45 Id. at 409, 594 P.3d at 73 (majority opinion).

emphasized the scientific uncertainty inherent in early-stage drug development and the attenuated causal chain between a research decision and a patient's injury.[46] What remains open is how the analysis might differ if a manufacturer possessed a safer alternative that had already completed Phase III trials, received FDA approval, or even been approved and marketed in another jurisdiction. The Court did not foreclose the possibility that a duty might be recognized at a later stage of development, though it offered no roadmap for where that line might fall.

Third, traditional product liability theories remain fully intact after Gilead. The decision addresses only the novel negligence theory advanced by the plaintiffs—the claim that Gilead was liable for delaying a safer alternative to a nondefective drug. Claims sounding in design defect, manufacturing defect, failure to warn, and fraud are unaffected. A plaintiff who can establish that a product was itself defective retains all of the traditional avenues for relief. This includes post-sale duties in jurisdictions that recognize that manufacturers who discover new safety risks after sale owe a duty to warn identifiable users and that manufacturers who voluntarily undertake recall or retrofit programs must execute those programs with reasonable care.[47]

Fourth, the Court's reasoning was closely tied to the unique features of pharmaceutical development: the FDA's regulatory role, the length and expense of clinical trials, the involvement of learned intermediaries, and the inherent scientific uncertainty of drug safety.[48] Whether the same analysis would apply outside the pharmaceutical context—for example, to consumer electronics, automotive technology, or industrial equipment—is an open question. The majority's reasoning may be persuasive by analogy in other industries, but the Court did not purport to announce a universal rule.

Finally, Justice Evans's dissent may serve as a roadmap for future plaintiffs. The dissent argued that the majority's analysis was flawed in several respects, including its treatment of foreseeability and its dismissal of the profit-motive allegations.[49] Future litigants may rely on the dissent's reasoning to argue for recognition of a duty in cases involving post-Phase III delay, patent-exclusivity-motivated withholding of approved products, or manufacturer conduct that more clearly crosses the line from legitimate business judgment to culpable indifference.

Conclusion

Gilead is a landmark decision, but it is not the last word on post-sale manufacturer duties. The California Supreme Court firmly rejected the duty to innovate and the proposition that a manufacturer can be held liable under a theory of negligence for a delay in its own research and development of a potentially safer alternative product. That holding is significant, but the decision is narrower than it may first appear.

For manufacturers, Gilead underscores the importance of robust post-sale monitoring programs, product traceability systems, and defensible (and well-documented) internal decision-making processes. The decision provides significant protection against novel theories of liability, but it does not insulate manufacturers from accountability for failing to act on information they possess. Manufacturers should ensure that their post-sale safety programs are designed not only to identify emerging risks but also to document the reasoning behind corrective action decisions—or decisions not to act.

The open questions Gilead leaves behind—whether defect is a categorical prerequisite, how later-stage development changes the calculus, and whether the reasoning extends beyond pharmaceuticals—ensure that post-sale duties will remain an active and evolving area of products liability law for years to come.

46 Id. at 410, 594 P.3d at 74.

47 See, e.g., Comstock v. Gen. Motors Corp., 358 Mich. 163, 177–78, 99 N.W.2d 627, 634 (1959) (holding that a manufacturer's duty to warn extends to "when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market"); Cover v. Cohen, 61 N.Y.2d 261, 275, 461 N.E.2d 864, 871 (1984) (holding that "risks thereafter revealed by user operation and brought to the attention of the manufacturer" may impose a duty to warn even where a product was "reasonably safe when manufactured and sold"); Blossman Gas Co. v. Williams, 189 Ga. App. 195, 198, 375 S.E.2d 117, 120 (1988) ("Although the dealer is not obligated to conduct the recall program, once it undertakes to do so a duty devolves upon the dealer to exercise ordinary care . . . .").

48 Gilead Tenofovir Cases, 20 Cal. 5th at 411–12, 594 P.3d at 74–75.

49 Id. at 458, 463, 594 P.3d at 107, 110 (Evans, J., dissenting).

The Duty to Innovate?

Evolving Risks in Post-Sale Manufacturing Obligations

PRESENTED BY

Stephanie Laws

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The Controversy





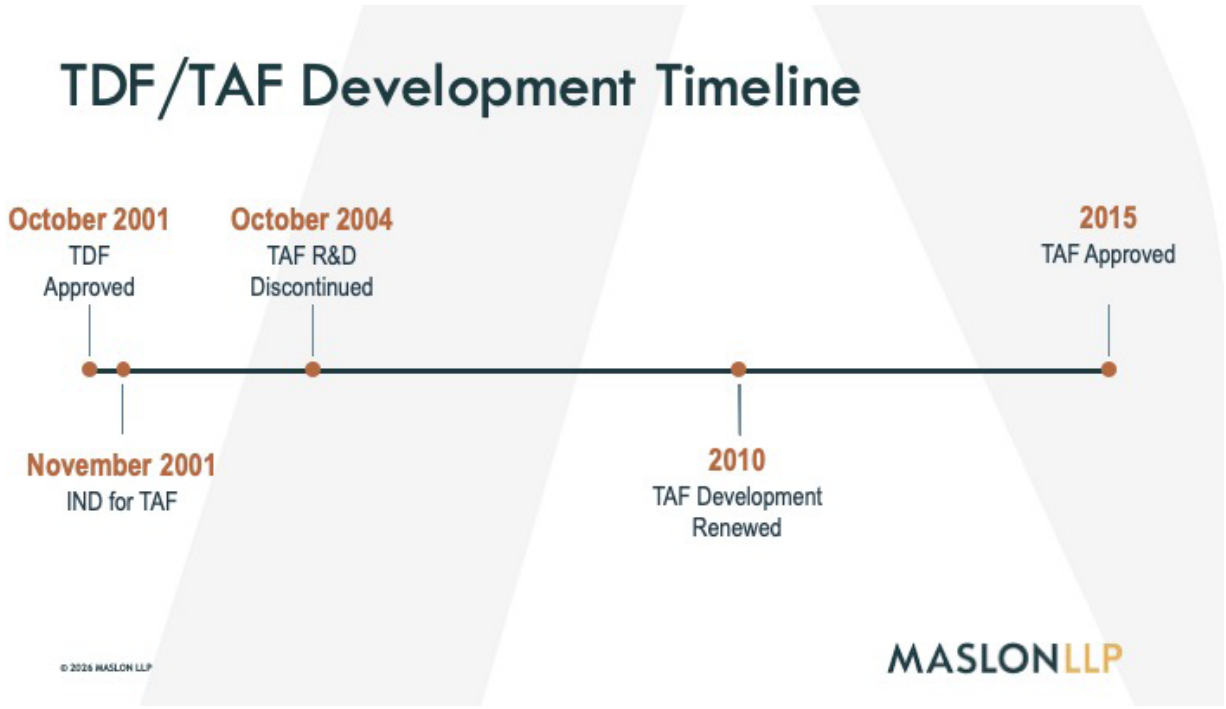
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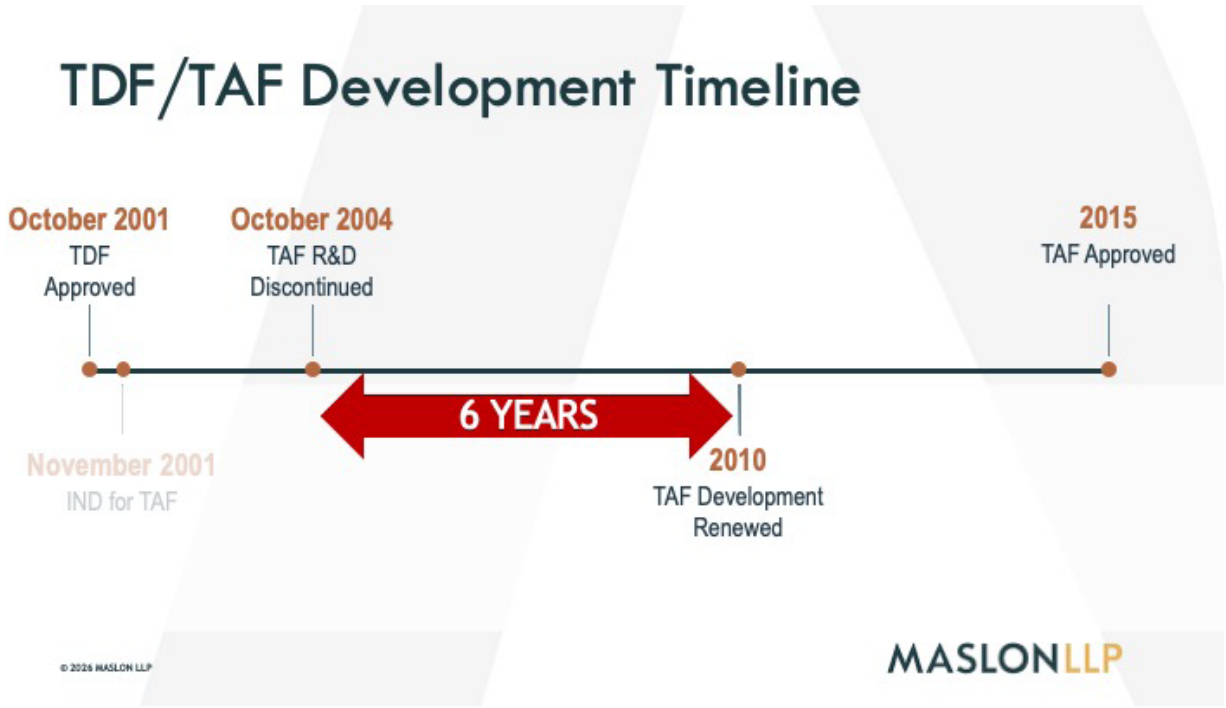
The poster child for drug company profiteering.



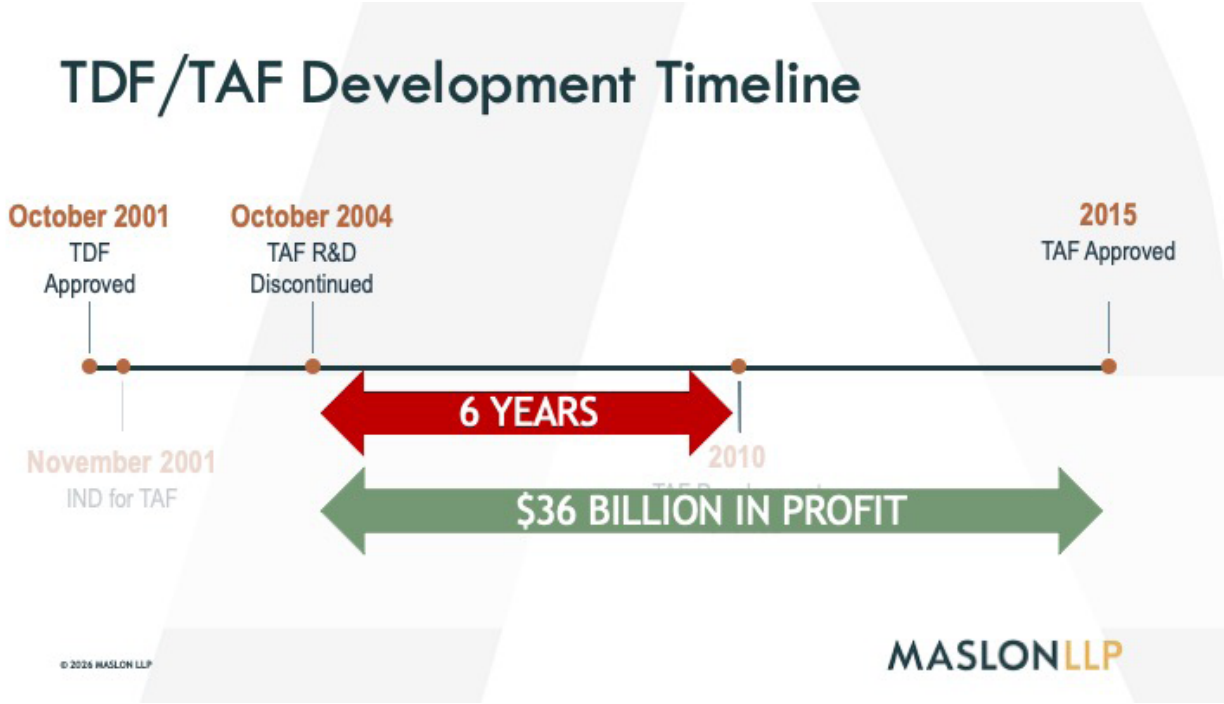
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TDF/TAF Development Timeline
October 2001
TDF
Approved
October 2004
TAF R&D
Discontinued
2015
TAF Approved
November 2001
IND for TAF
2010
TAF Development
Renewed
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TDF/TAF Development Timeline
October 2001
TDF
Approved
October 2004
TAF R&D
Discontinued
2015
TAF Approved
6 YEARS
November 2001
IND for TAF
2010
TAF Development
Renewed
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The Duty to Innovate? Evolving Risks in Post-Sale Manufacturing Obligations





The Allegations



18 TDF. Despite knowing of the disparity in safety between TDF and TAF, Gilead withheld
19 development of its safer product, TAF, to artificially and unreasonably maximize profits on its TDF-
20 based medications first. Despite the fact that Gilead owed its patients a duty to distribute the safest
21 drug available, it deliberately chose to sell its TDF drugs first so that Gilead could reap the benefits
22 of those sales and then later market its safer TAF drugs as a "product hop" or life cycle extension
23 that would effectively monetize both drugs.

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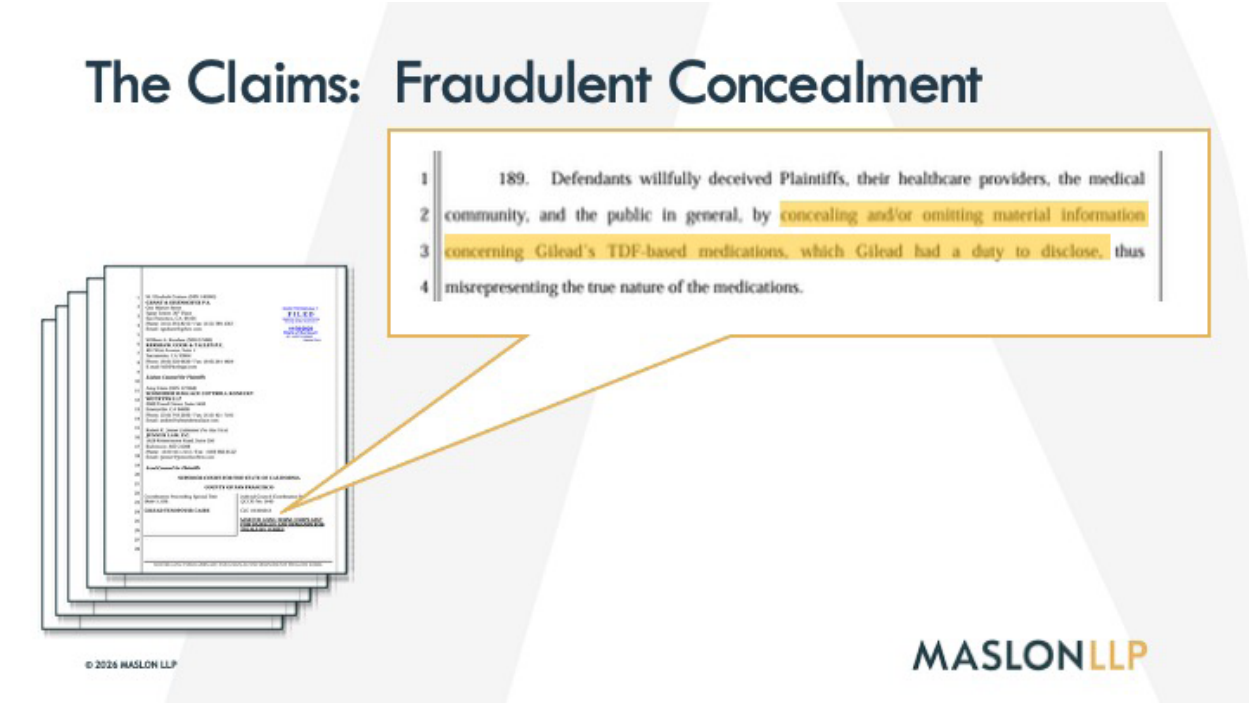
The Claims: Negligence



15 148. Gilead undertook to develop and market safe antiretroviral medications to sell to
16 wholesalers and other direct purchasers of pharmaceuticals, recognizing that its development and
17 marketing of such medications was for the protection of patients like Plaintiffs; however, in
18 abandoning the safer TAF design purely for monetary gain and misrepresenting why it was
19 abandoning the safer TAF design, Gilead failed to exercise reasonable care in the performance of
20 this undertaking that increased the risk of harm to patients and, in fact, directly, proximately and/or
21 substantially caused the Plaintiffs' injuries.

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The Claims: Fraudulent Concealment
189. Defendants willfully deceived Plaintiffs, their healthcare providers, the medical community, and the public in general, by concealing and/or omitting material information concerning Gilead's TDF-based medications, which Gilead had a duty to disclose, thus misrepresenting the true nature of the medications.
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The Litigation
In Re Gilead Tenofovir Cases, JCCP No. 5043 — California Supreme Court (S283805)
JCCP No. 5043 coordination established
2019
Gilead's summary judgment motion denied
Jun 2022
Court of Appeal recognizes duty to innovate
Jan 2024
CA Supreme Court: No duty to innovate
Aug 2026
Jul 2022
Gilead petitions CA Courts of Appeal
Feb 2024
Gilead petitions CA Supreme Court
24,000 Plaintiffs
5,000 Deaths
7 Years of Litigation

Anti-Corporate Bias

72% of Americans believe it is a juror's job to send a message to corporations to improve their behavior.



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Feasible Alternative Design

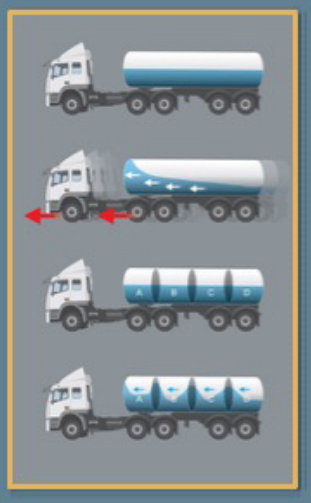
Instruction No. 3 (continued)

When determining whether **the benefits of the design outweigh the risks,** consider:

a. The feasibility of an **alternative safer design** at the time of manufacture;

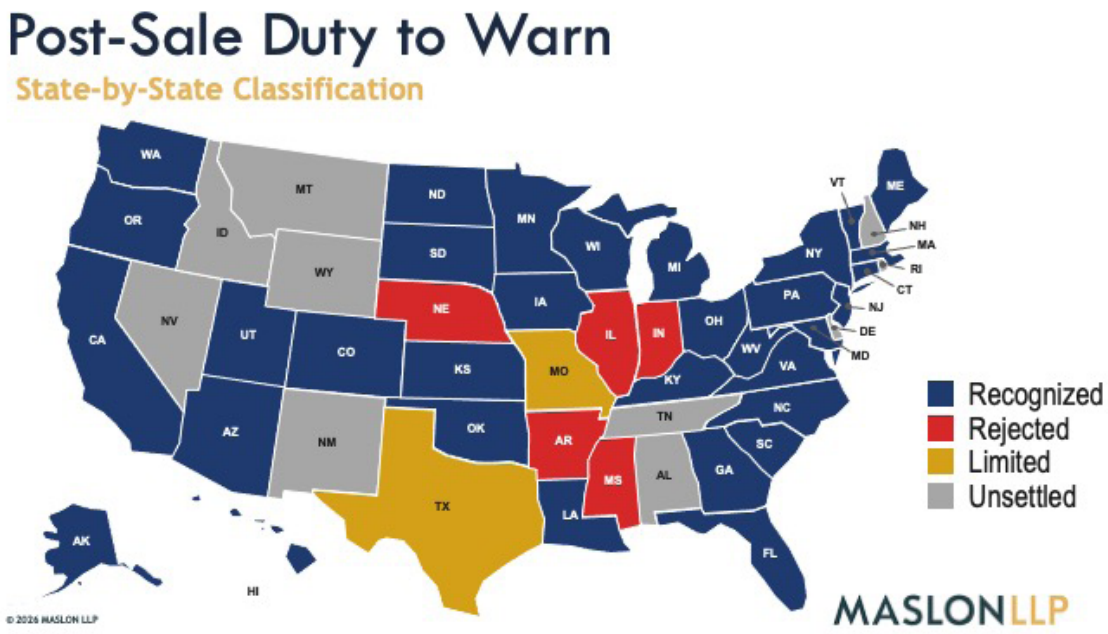
b. The cost of an **alternative design**; and

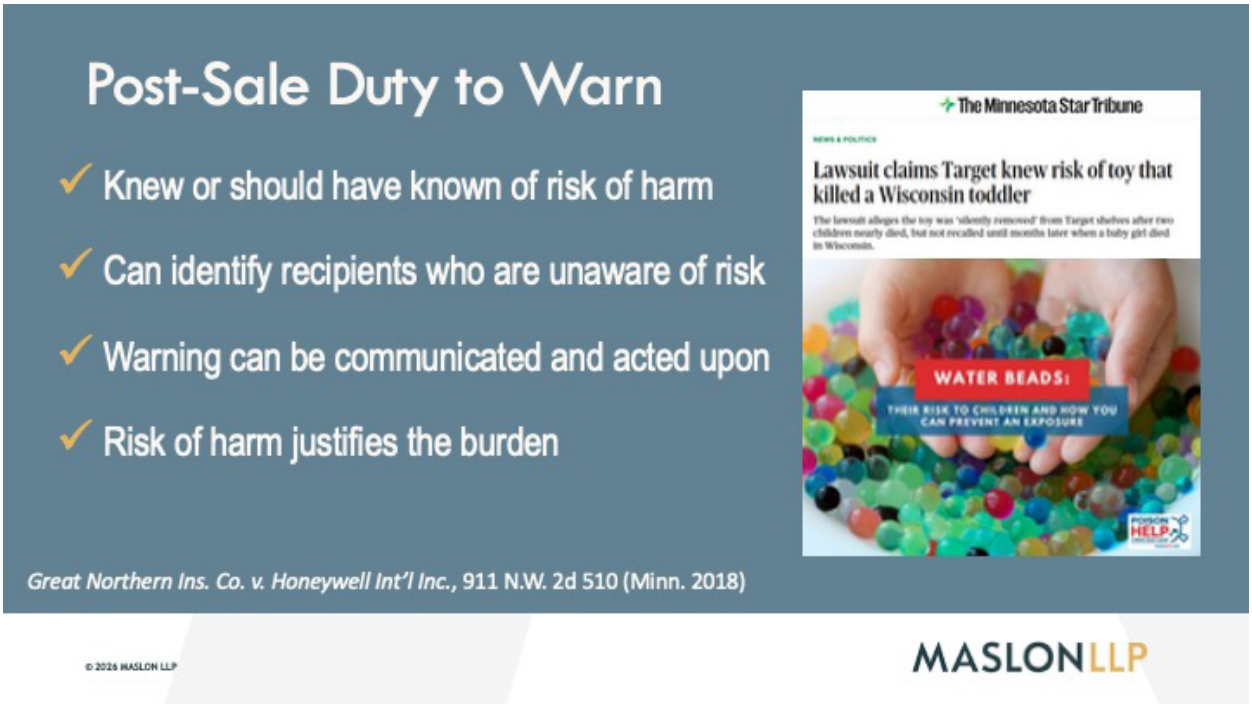
c. The disadvantages of an **alternative design**.

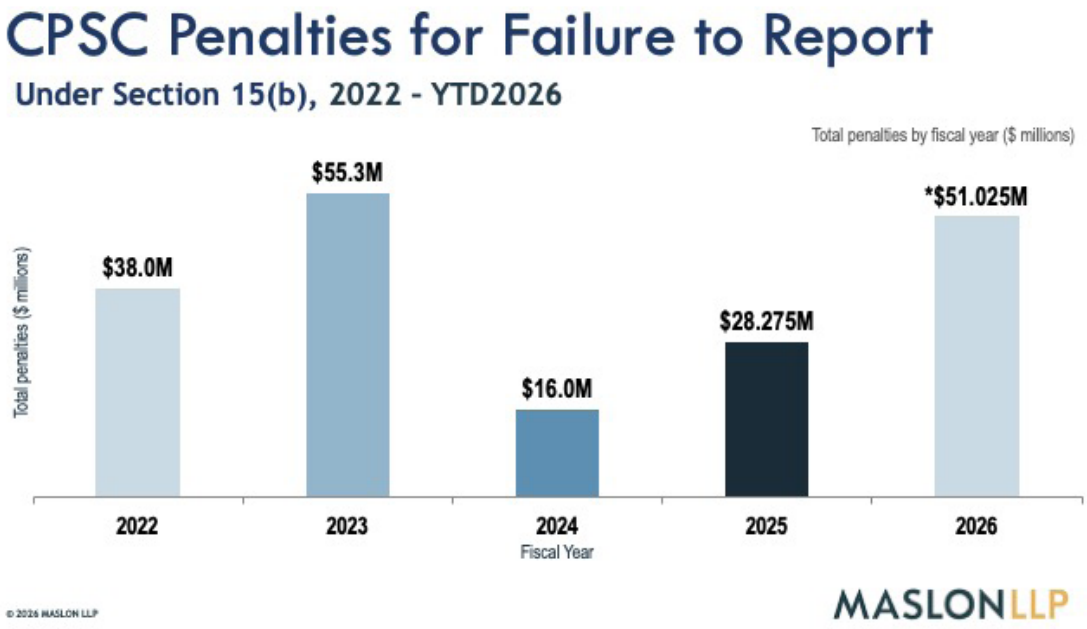


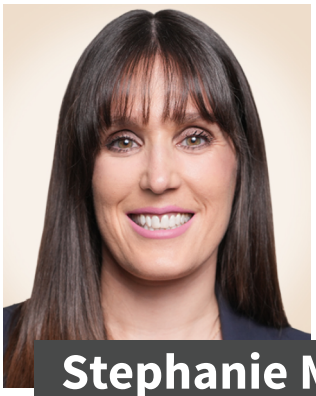
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Post-Sale Duty to Warn
State-by-State Classification
WA
OR
CA
ID
NV
MT
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
VT
ME
NH
MA
RI
CT
NJ
DE
MD
AK
HI
Recognized
Rejected
Limited
Unsettled
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Post-Sale Duty to Warn
✓ Knew or should have known of risk of harm
✓ Can identify recipients who are unaware of risk
✓ Warning can be communicated and acted upon
✓ Risk of harm justifies the burden
The Minnesota Star Tribune
Lawsuit claims Target knew risk of toy that killed a Wisconsin toddler
WATER BEADS:
THEIR RISK TO CHILDREN AND HOW YOU CAN PREVENT AN EXPOSURE
Great Northern Ins. Co. v. Honeywell Int'l Inc., 911 N.W. 2d 510 (Minn. 2018)
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CPSC Penalties for Failure to Report
Under Section 15(b), 2022 - YTD2026
Total penalties by fiscal year ($ millions)
Total penalties ($ millions)
$38.0M
$55.3M
$16.0M
$28.275M
*$51.025M
2022
2023
2024
2025
2026
Fiscal Year
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Stephanie M. 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.

Areas of Practice

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

Honors

- Ranked Band 1 in Chambers USA: America's Leading Lawyers for Business, Product Liability Litigation, Minnesota, 2026
- 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, 2023-2026 (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, 2019-2025 (The annual edition of the Top Women Attorneys in Minnesota list features attorneys selected for the previous year's Minnesota Super Lawyers® and Rising Stars lists.)
- Recognized as a Top Lawyer, Minnesota Monthly, 2024 (The research for the Top Lawyers list, created by Professional Research Services, is based on an online peer-review survey sent to all attorneys in Minnesota.)
- North Star Lawyer, Minnesota State Bar Association, 2017-2022, 2024 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.)

Education

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



Gone But Not Forgotten: Defending Former-Employee Depositions

Moheeb Murray
Bush Seyferth (Troy, MI)

Gone But Not Forgotten: Defending Former-Employee Depositions
Moheeb Murray

Employees Leave, But Litigation Risk Can Remain
A former employee can be the most useful witness in a case—or the most dangerous. The witness may know how a product was designed, why a safety decision was made, what an internal investigation found, or what company lawyers discussed with management. But once employment ends, many of the practical protections surrounding current employees fall away. The company cannot direct the witness, may receive no advance notice of an interview, and cannot assume continued alignment. It remains exposed, however, to damaging facts, harmful recollections, and the consequences of any privileged information the witness reveals.

The defense lawyer's job is not to "control" the former employee. It is to identify risk early, understand the governing law, make a deliberate representation decision, educate without coaching, preserve corporate privilege, and create a defensible deposition record. Because ethics rules and privilege doctrine vary by jurisdiction, the framework below uses the ABA Model Rules and federal decisions as a starting point. Counsel should still confirm the rules applied by the forum, the witness's location, and any court-specific authority.

Assume Opposing Counsel Will Track Down Former Employees And Talk With Them
Unprepared former employees can sometimes—wittingly or unwittingly—provide opposing counsel with admissions, impeachment material, institutional history, explanations of policies and practices, safety concerns, internal reactions after an event, and leads to other documents or witnesses that benefit your opponent's case. So, opposing counsel's incentive to talk to former employees without the company's counsel present is obvious. An informal interview may, in some instances, matter more than a deposition because it lets opposing counsel learn the witness's language, test themes, and select documents without defense counsel as a counterbalancing force. Company counsel should therefore assume the other side has already contacted the witness or will at some point during the case.

ABA Model Rule 4.2 generally prohibits a lawyer from communicating about the subject of a representation with a person the lawyer knows is represented in the matter. In plain terms, current high-level or matter-involved employees may be off limits because speaking with them is treated as speaking with the represented organization itself. Former employees are different. Comment 7 to Rule 4.2 states that consent of the organization's lawyer is not required before communicating with a former constituent. That means opposing counsel usually may contact an unrepresented former employee without first asking corporate counsel for permission. But that permission has limits: the lawyer may not misstate the lawyer's role, may not imply disinterest, and may not seek privileged communications between the former employee and corporate counsel. The practical point is simple: access to the witness is not access to the company's privilege.

Privilege Does Not Automatically End With Employment
Upjohn Co. v. United States, 449 U.S. 383 (1981), rejected a narrow "control group" approach and held that corporate privilege may protect confidential employee communications made to company counsel so counsel can provide legal advice to the corporation. Upjohn involved current employees, but Chief Justice Burger's concurrence suggested that the same functional considerations may extend to former employees when counsel needs information about conduct and knowledge acquired during employment.

Lower courts have not adopted a single rule. Decisions such as In re Allen, 106 F.3d 582 (4th Cir. 1997), Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999), respectively illustrate both broader or functionally limited protection for communications with former employees about matters within their former duties. Other courts reject blanket protection or limit it to communications that reveal prior privileged exchanges or are necessary

for counsel to obtain legal advice. Courts applying the Peralta framework, for example, often distinguish communications about the former employee's conduct and knowledge during employment from post-employment events or ordinary deposition preparation. See, e.g., Winthrop Resources Corp. v. CommScope, Inc., No. 5:11-CV-172, 2014 WL 5810457 (W.D.N.C. Nov. 7, 2014). Recent decisions also recognize that a former employee does not personally hold the corporation's privilege and therefore cannot waive it, even by mistakenly disclosing privileged information. See, e.g., Norris v. Fat Burgers Sports Bar & Grill, LLC, No. 7:22-CV-144-D, 2023 WL 8440507 (E.D.N.C. Nov. 9, 2023). The practical point is modest but important: termination does not destroy existing corporate privilege, but a new conversation with a former employee is not privileged merely because corporate counsel participates.

Facts Are Discoverable; Communications May Be Protected

Privilege protects qualifying communications, not the underlying facts. A former employee ordinarily may testify about what the witness saw, did, heard from nonlawyers, or knew during employment. The privilege question arises when testimony would reveal confidential communications made for legal advice, including what the employee told counsel, what counsel asked in a way that reveals legal strategy, or what legal advice counsel conveyed.

Preparation Communications Require Care

When corporate counsel does not represent the employee, counsel should not assume that a preparation session is categorically privileged. Some courts protect communications with a former employee when they concern the employee's actions or knowledge during employment and are necessary for the corporation's lawyers to advise the corporate client. Other courts distinguish protected historical communications from unprivileged post-employment discussions, particularly new facts learned after separation. Work-product protection may independently apply to counsel's notes, selection of documents, mental impressions, and litigation strategy, but it is not a substitute for careful handling of the witness conversation.

Protecting Corporate Privilege When the Witness Is Not Your Client

The central tension is simple: the corporation owns the privilege, but the former employee may possess information that could reveal it. Corporate counsel may appear solely for the corporation, while the witness remains unrepresented and free to disregard the company's preferences. Counsel should not blur that relationship. Instead, clarify roles, identify privilege categories, explain the difference between facts and communications, and be ready to assert the corporation's privilege on the record.

Map the Privilege Before Meeting the Witness

Review the internal investigation, prior interviews, legal-hold materials, and communications involving in-house or outside counsel. Build a short privilege map identifying the lawyers involved, the approximate time periods, the legal subjects, and the documents likely to trigger privileged communications. The map should guide objections without becoming a script for testimony. Keep it with counsel, not as a witness handout.

Start with a Clear Nonrepresentation Statement

At the outset, tell the former employee that you represent the company, not the witness, and that you cannot provide personal legal advice. Explain that the purpose of the contact is to discuss the anticipated deposition, identify any privileged company communications, and address logistics or possible representation. Avoid collective language such as "our case," and do not begin substantive preparation while the witness reasonably could believe you are acting as personal counsel.

Give a Narrow Privilege Orientation, Not Personal Advice

An unrepresented witness can be told that the corporation may assert privilege over confidential attorney communications and that the witness should pause before answering a question seeking legal advice or the substance of a communication with company counsel. Counsel also should tell the witness that underlying facts remain discoverable and that the witness must testify truthfully. This is an explanation of the corporation's position and deposition mechanics, not advice about the witness's personal rights. If the witness asks whether to answer, whether exposure exists, or what is best personally, stop and recommend independent counsel.

Investigate Prior Contact Without Invading Work Product

Ask whether the witness has spoken with counsel for another party, whether documents were shown, and whether communications with company lawyers or internal legal investigations were discussed. Do not demand the substance of opposing counsel's mental impressions or instruct the witness not to cooperate. The objective is to spot a privilege problem, not to reconstruct the adversary's interview.

Practice pointer: Treat the first witness call like a triage call, not a preparation session. Confirm contact information, ask whether the witness has counsel, explain who you represent, determine whether privileged subjects may

arise, and decide whether a separate representation discussion is needed before getting into the facts.

Appear for the Corporate Privilege Holder

If permitted by the tribunal and applicable procedure, corporate counsel can attend a deposition to protect the corporation's privilege even when counsel does not represent the witness. At the outset, place the limited appearance on the record: counsel represents the corporation only, does not represent the former employee, and is present to assert the corporation's attorney-client privilege, work-product protection, and any court-ordered confidentiality restrictions. That record matters. It helps prevent confusion about who may direct the witness, makes clear that any privilege assertion belongs to the company, and reduces the risk that ordinary deposition objections will be mistaken for personal representation or witness coaching. Counsel should also be prepared to explain the basis for being heard if challenged, because some tribunals, standing orders, or local practices may require advance notice, leave of court, or a protective order before non-party or separate corporate counsel participates in a deposition.

Two examples show how this works in practice. First, in a federal deposition, Federal Rule of Civil Procedure 30(c)(2) permits counsel to object on the record, but an instruction not to answer is proper only when necessary to preserve a privilege, enforce a court-ordered limitation, or present a motion under Rule 30(d)(3). That rule is useful because it gives corporate counsel a narrow, rule-based basis to stop testimony that would reveal privileged communications, while still requiring the witness to answer ordinary factual questions. Second, if the risk is foreseeable before the deposition—such as repeated questions about an internal investigation, communications with in-house counsel, or documents prepared at counsel's request—Rule 26(c) may support a targeted protective order establishing a protocol for privilege objections, sequestration of disputed testimony, or expedited presentation of privilege disputes to the court. State practice may have similar deposition-objection and protective-order procedures, so counsel should check the forum rule rather than assume the federal formulation applies automatically.

Plan for an Uncooperative Witness

A former employee may reject the company's privilege instruction or answer before counsel can object. Counsel should be ready to request a pause, state the basis for the corporate privilege, seek agreement to sequester or claw back the testimony, and, if necessary, suspend the relevant questioning long enough to seek judicial relief. A disclosure by a former employee does not necessarily establish that the corporation intentionally waived privilege, but the practical harm may be immediate even if formal waiver is later defeated. Prevention remains superior to remediation.

Example: During deposition, opposing counsel asks, "When you met with company counsel after the accident while you were still employed, what did she tell you the company did wrong?" Corporate counsel should promptly state that the corporation is the privilege holder, object on that basis, and instruct the witness not to answer to the extent the question seeks legal advice or privileged communications. If the question is reframed as, "What did you personally observe at the accident scene?" the witness should answer if otherwise able. Acting as the Former Employee's Attorney

Representation may protect the witness, improve preparation, and reduce accidental disclosure. But it also can create conflicts, prospective-client duties, solicitation concerns, and an appearance that the company hired counsel to shape testimony. The safest approach is phased and documented.

Phase One: Neutral Outreach

The first communication should identify the lawyer and company, explain the anticipated deposition, and request a conversation about logistics and representation options. Written outreach often provides useful breathing room and a reliable record. The message should not suggest that the witness must cooperate, that employment benefits depend on cooperation, or that company-selected counsel is the only option.

Phase Two: Explain Options Before Discussing Testimony

Tell the witness: (1) company counsel does not currently represent the witness; (2) the witness may proceed without counsel, retain independent counsel, or consider company-funded counsel if available; (3) the company may pay fees subject to a written arrangement; and (4) no choice changes the duty to testify truthfully. Do not obtain substantive confidences merely to decide whether representation is possible. Under Model Rule 1.18, a person consulting about possible representation is a prospective client, and significantly harmful information received during that consultation can create disqualification consequences.

Consider issues regarding client solicitation: Model Rule 7.3 defines solicitation as lawyer-initiated communication directed to a specific person known to need legal services in a particular matter that offers, or reasonably can be understood as offering, legal services. Live person-to-person solicitation is restricted when a significant motive is pecuniary gain, subject to listed exceptions,

and coercion, duress, or harassment are prohibited regardless. Whether company-sponsored outreach raises a Rule 7.3 issue depends on motive, method, prior relationship, local adoption, and the facts. The practical response is to separate information from persuasion: use noncoercive written outreach where feasible, explain alternatives, avoid pressure, disclose who will pay, allow time for reflection, and verify the controlling jurisdiction's rule.

Phase Three: Conflict and Third-Party-Payor Analysis
Before undertaking representation, evaluate whether the company might need to blame the former employee, whether the witness disputes corporate decisions, whether employment claims exist, and whether the witness faces individual exposure. Model Rule 1.7 governs concurrent conflicts. If the company pays, Model Rule 1.8(f) requires informed consent, no interference with professional judgment or the client-lawyer relationship, and protection of client information. A dual representation should not be treated as routine simply because interests presently appear aligned.

Phase Four: Document the Decision
If representation is accepted, use a written engagement letter defining the client, scope, payment arrangement, confidentiality, privilege ownership, potential conflicts, and withdrawal consequences. If declined, confirm that counsel represents only the corporation. A clean written record is often the best answer to a later claim that representation was imposed, misunderstood, or used to suppress testimony.

Engagement-letter checklist: identify the client; define the limited deposition-preparation scope; disclose who pays; state that the payor cannot direct the lawyer's judgment; address confidentiality; reserve conflict rights; and explain what happens if the company's and witness's interests later diverge.

Preparing For and Defending the Deposition
Preparation should educate the witness, not engineer testimony. Review the pleadings, chronology, prior statements, and likely exhibits. Ask what the witness remembers independently, what may refresh recollection, and what the witness does not know. Discuss the difference between company terminology and the witness's own words. If opposing counsel already interviewed the witness, prepare for appropriate questions about that contact without instructing the witness to conceal it.

Teach the Pause
The most useful privilege instruction is simple: if a question asks what a lawyer said, what the witness told a lawyer, why counsel requested something, or what legal advice drove a decision, pause before answering. Corporate counsel can then determine whether the question seeks discoverable facts or privileged communications. The pause should not become a signal for ordinary factual questions.

Make Narrow, Defensible Objections
At deposition, privilege objections should be specific enough to establish the basis without revealing the communication. Distinguish "What happened?" from "What did the company's lawyer tell you about what happened?" If only part of a question invades privilege, allow the factual portion and protect only the communication. Narrow objections are more credible, reduce motion practice, and make the record easier for a judge to resolve.

Know When to Seek Court Protection
Where anticipated questions threaten repeated disclosure, consider a pre-deposition protocol, protective order under Rule 26(c), or targeted motion addressing privilege boundaries. During the deposition, Rule 30(d)(3) provides a mechanism to move to terminate or limit a deposition conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses. Judicial relief should be calibrated to the actual risk; broad efforts to prevent all former-employee contact or testimony are unlikely to be persuasive.

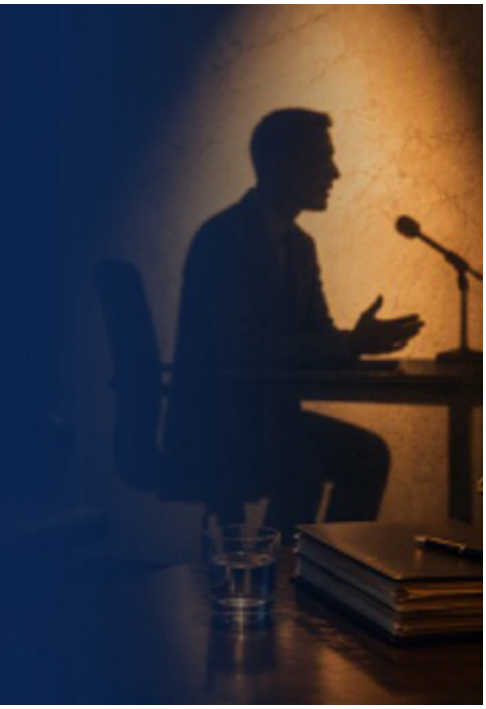
Practical Tips and Takeaways
- Identify high-risk former employees when litigation is anticipated, not when a subpoena arrives.
- Assume opposing counsel may have interviewed the witness before defense counsel learns of the contact.
- Confirm the forum's ethics rules and privilege law; the Model Rules and federal cases are a starting
- point, not a universal answer.
- Clarify in the first communication that company counsel represents the company, not the witness.
- Separate the representation discussion from substantive deposition preparation.
- Use neutral, preferably written outreach when offering representation, and avoid pressure, urgency, or promises tied to cooperation.
- Treat the witness as a prospective client once the conversation turns to possible representation; limit intake to what is necessary for conflicts and engagement.
- Analyze whether the company may later assign fault to the witness before undertaking dual or joint representation.
- Address third-party payment expressly and preserve the witness-lawyer's independent
- professional judgment.
- Create a privilege map identifying counsel, legal

subjects, time periods, and likely trigger documents.
- Teach the difference between discoverable facts and protected attorney communications.
- When counsel does not represent the witness, provide only a limited privilege orientation and recommend independent counsel for personal legal advice.
- Appear expressly for the corporate privilege holder and state the limited role on the deposition record.
- Use Rule 30(c)(2) instructions narrowly and only for privilege, court-ordered limits, or a Rule 30(d)(3) motion.
- Prepare a response plan for inadvertent disclosure, including a pause, record statement, sequestration request, and prompt judicial relief if needed.
- Remember the objective: truthful testimony, preserved privilege, and a defensible process.

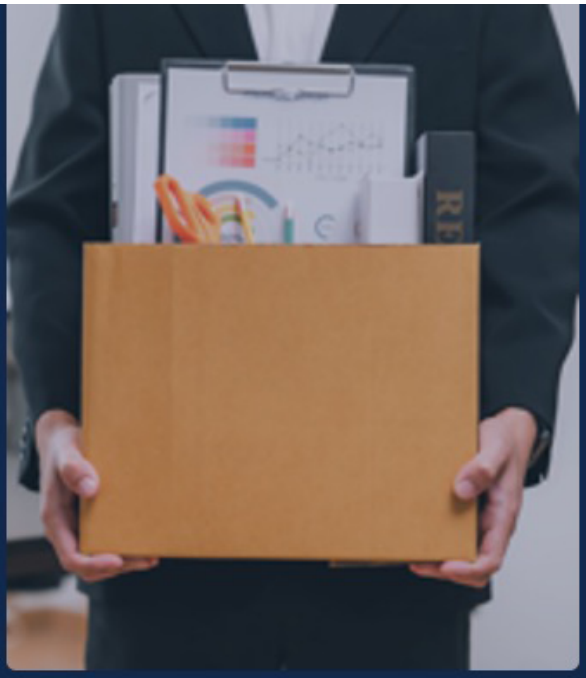
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Bush Seyferth

GONE BUT NOT FORGOTTEN

Defending Former-Employee Depositions



Moheeb Murray
Bush Seyferth | Troy, Michigan



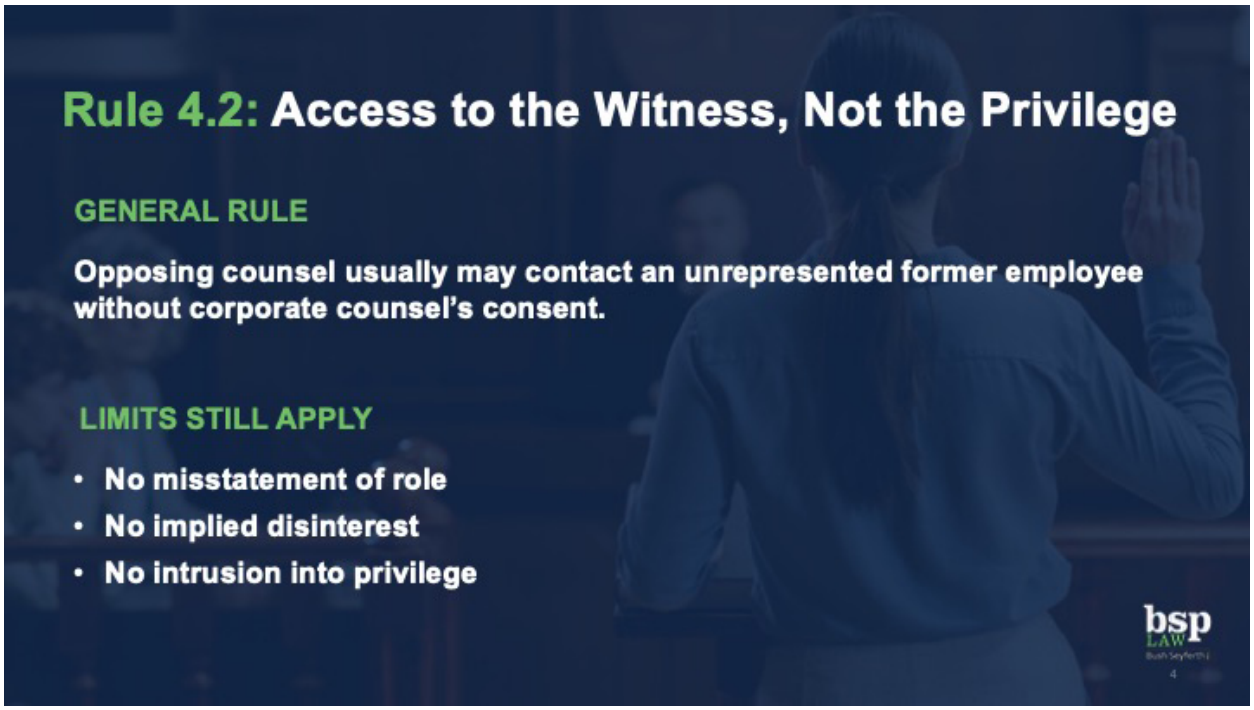
Employees leave.
Litigation risk remains.

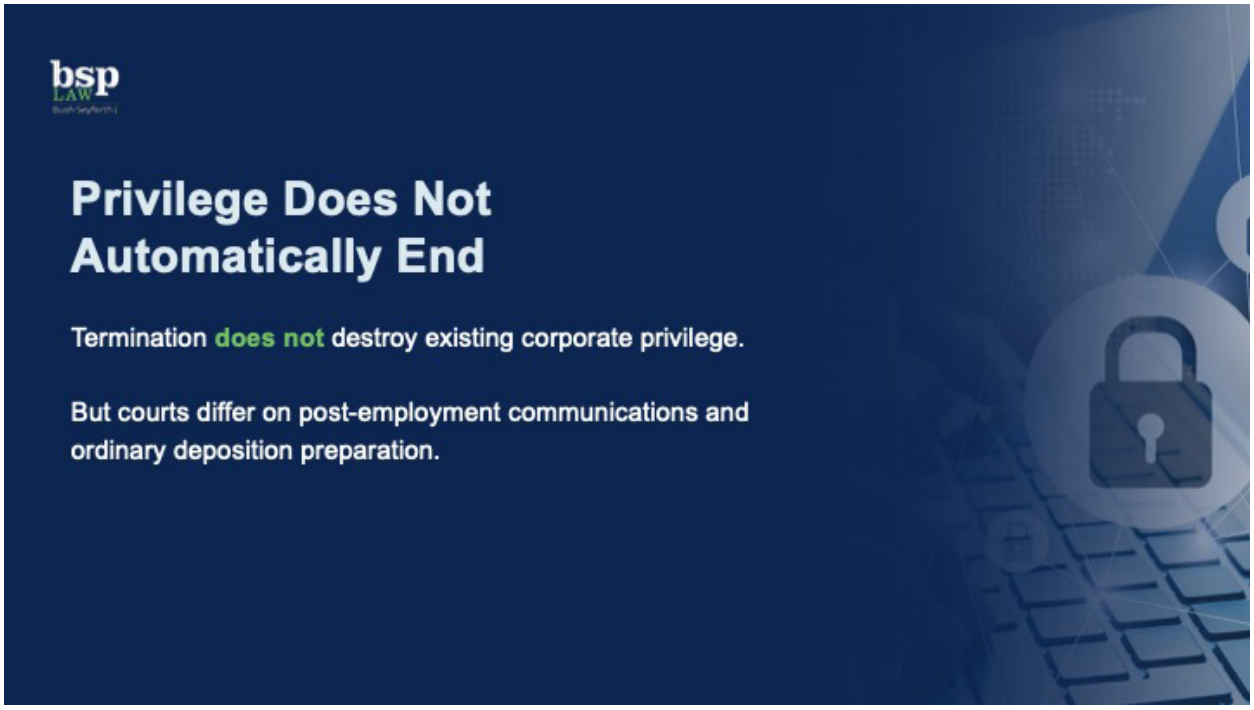
The company loses control, advance notice, and assumed alignment.

It remains exposed to the witness's facts, recollections, and privileged knowledge.

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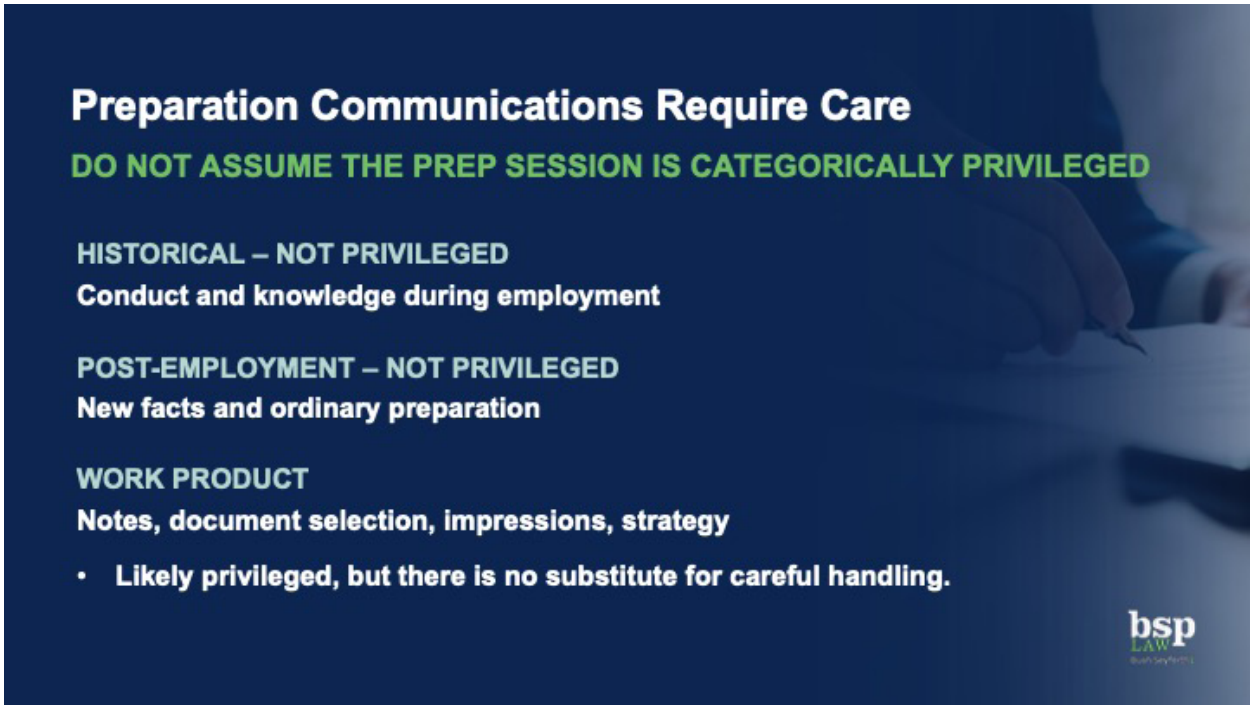

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ASSUME OPPOSING COUNSEL WILL FIND THEM
WHY FORMER EMPLOYEES MATTER
Impeachment
Institutional history
Safety concerns
Internal reactions
New leads
Policies
Admissions
Opposing counsel's informal interview could matter more than a deposition.

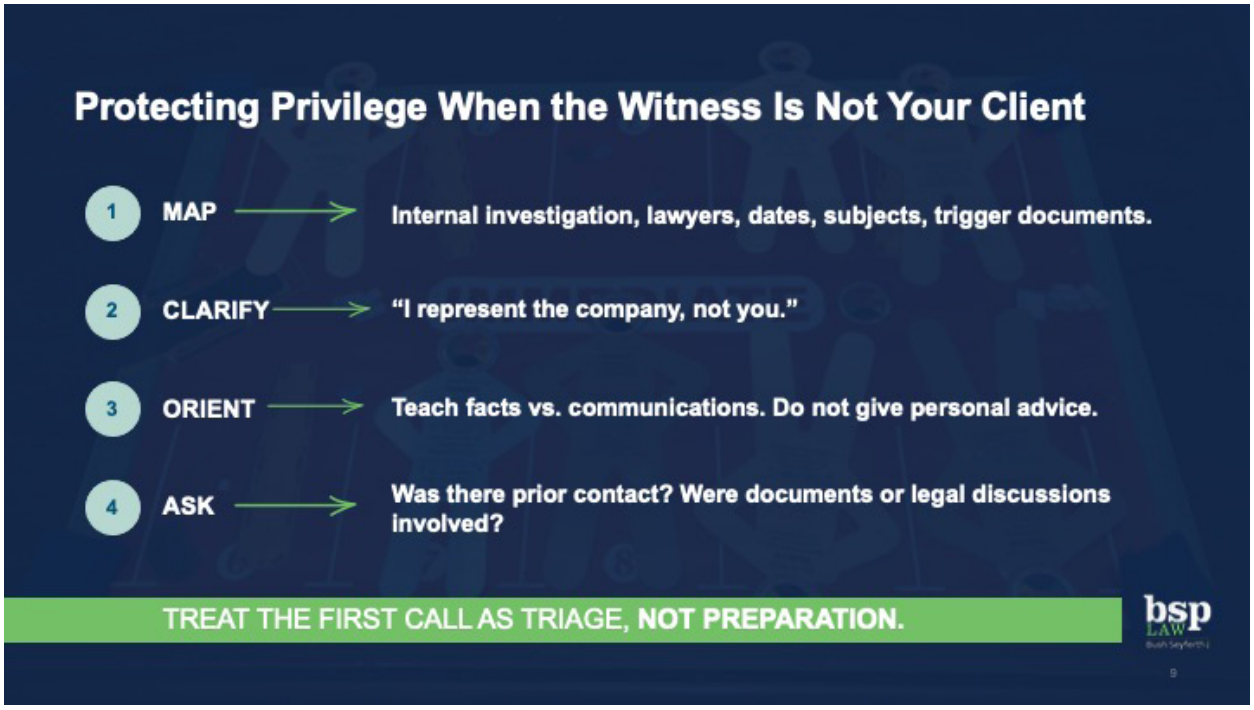

Rule 4.2: Access to the Witness, Not the Privilege
GENERAL RULE
Opposing counsel usually may contact an unrepresented former employee without corporate counsel's consent.
LIMITS STILL APPLY
• No misstatement of role
• No implied disinterest
• No intrusion into privilege
bsp LAW
4

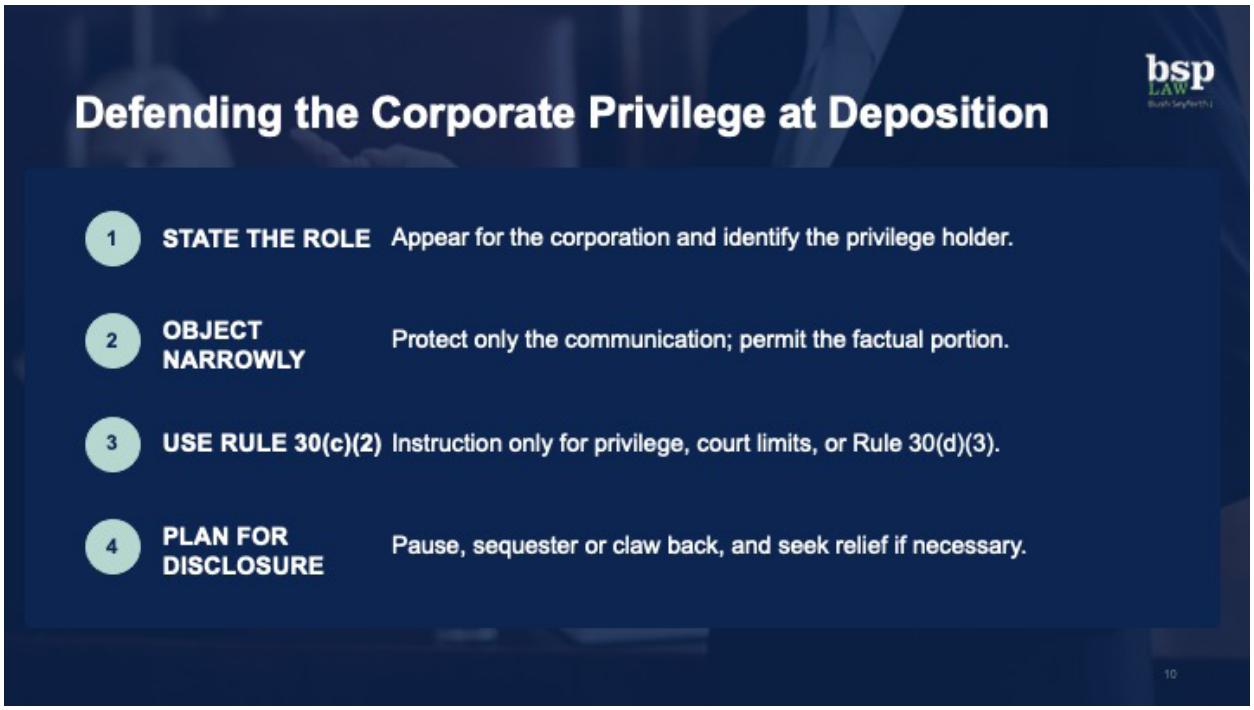

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Privilege Does Not Automatically End
Termination does not destroy existing corporate privilege.
But courts differ on post-employment communications and ordinary deposition preparation.

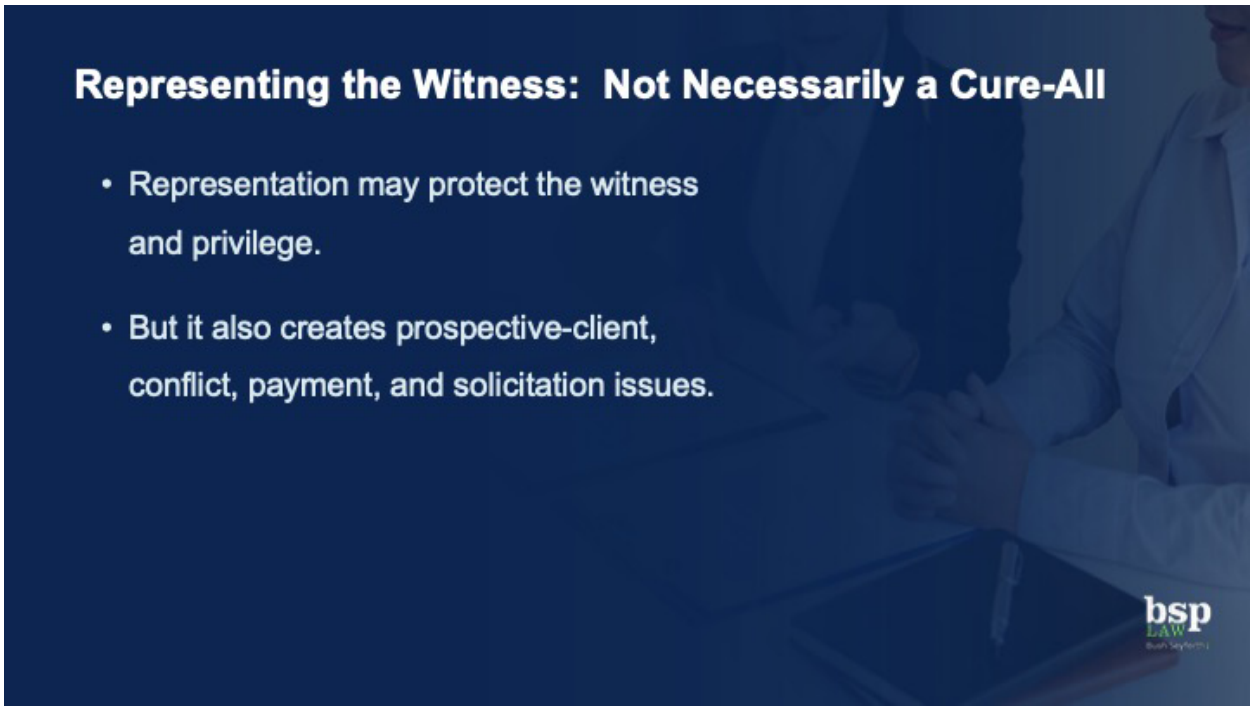

Facts Are Discoverable; Communications May Be Protected
FACTS
What the witness saw
What the witness did
What nonlawyers said
COMMUNICATIONS
What the witness told counsel
What counsel said
Legal advice or strategy
bsp
LAW

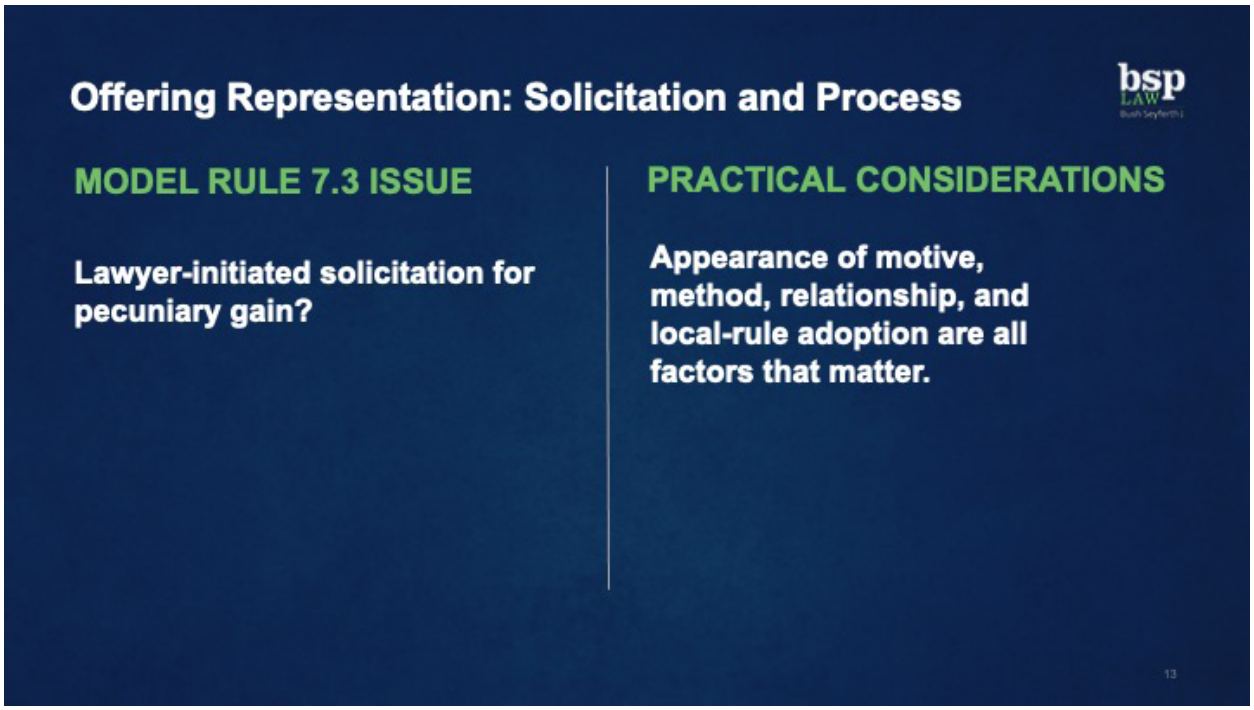

Examples of Courts' Views on Extent of Privilege Relative to Former Employees
bsp LAW
Upjohn Co. v. United States
(US. Sup. Ct.)
Functional corporate privilege
Allen v. Newman
(4th Cir.)
Broader protection for former-duty communications
Peralta v. Cendant Corp.
(D. Conn.)
Historical duties distinguished from post-employment events
Norris v. Fat Burgers Sports Bar & Grill, LLC
(E.D.N.C.)
Former employee does not personally hold or waive corporate privilege
Bottom line: the communication must still qualify for protection.

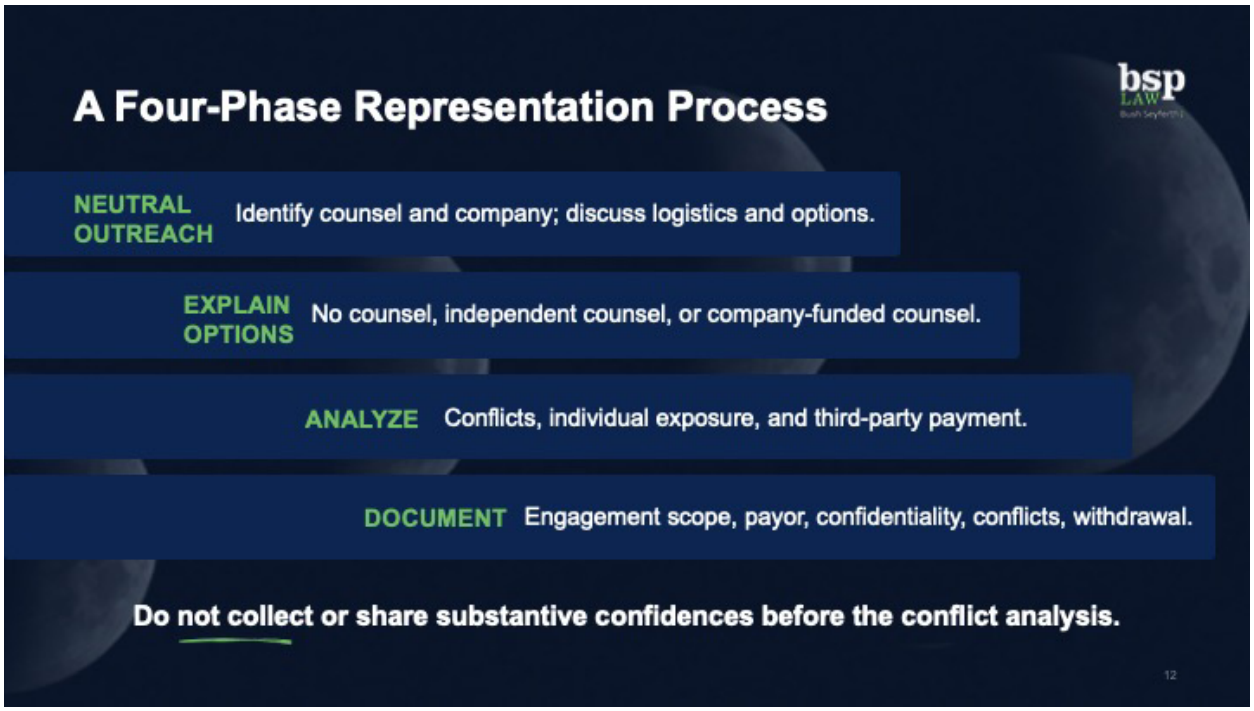

Preparation Communications Require Care
DO NOT ASSUME THE PREP SESSION IS CATEGORICALLY PRIVILEGED
HISTORICAL – NOT PRIVILEGED
Conduct and knowledge during employment
POST-EMPLOYMENT – NOT PRIVILEGED
New facts and ordinary preparation
WORK PRODUCT
Notes, document selection, impressions, strategy
• Likely privileged, but there is no substitute for careful handling.
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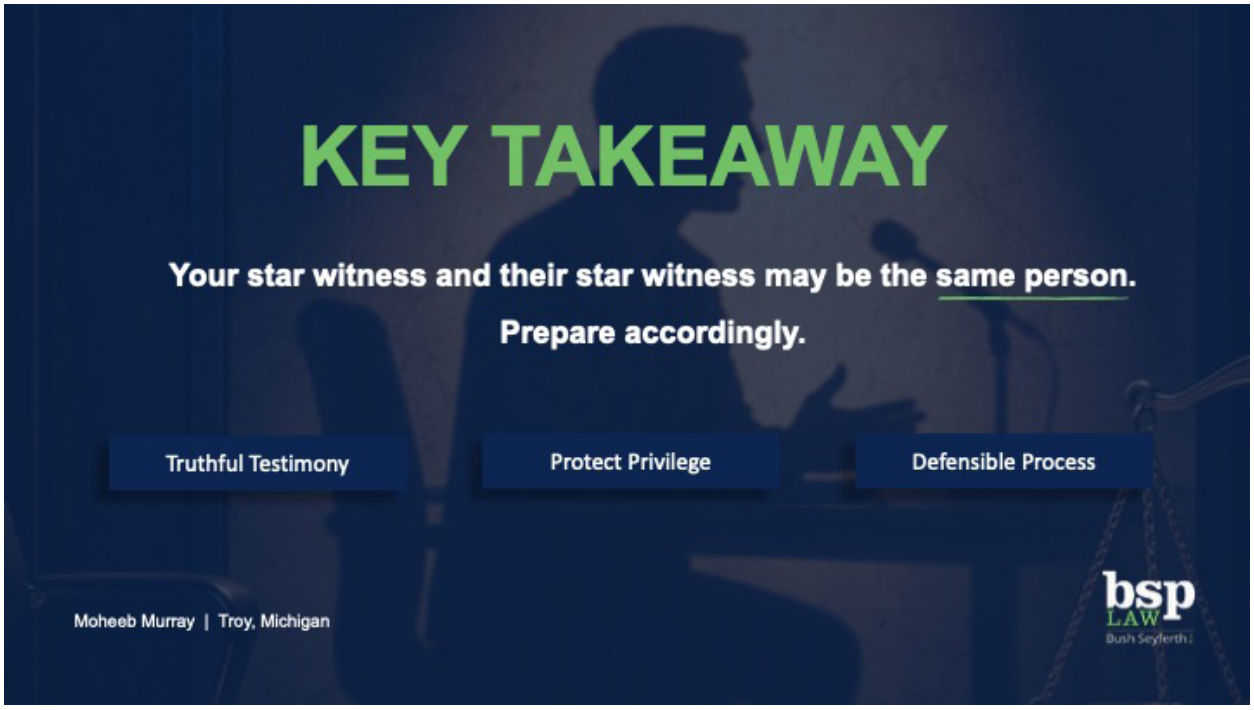

Protecting Privilege When the Witness Is Not Your Client
1 MAP → Internal investigation, lawyers, dates, subjects, trigger documents.
2 CLARIFY → "I represent the company, not you."
3 ORIENT → Teach facts vs. communications. Do not give personal advice.
4 ASK → Was there prior contact? Were documents or legal discussions involved?
TREAT THE FIRST CALL AS TRIAGE, NOT PREPARATION.
bsp LAW
9


Defending the Corporate Privilege at Deposition
bsp LAW
1 STATE THE ROLE Appear for the corporation and identify the privilege holder.
2 OBJECT NARROWLY Protect only the communication; permit the factual portion.
3 USE RULE 30(c)(2) Instruction only for privilege, court limits, or Rule 30(d)(3).
4 PLAN FOR DISCLOSURE Pause, sequester or claw back, and seek relief if necessary.
10


Representing the Witness: Not Necessarily a Cure-All
• Representation may protect the witness and privilege.
• But it also creates prospective-client, conflict, payment, and solicitation issues.
bsp LAW


Offering Representation: Solicitation and Process
bsp LAW
MODEL RULE 7.3 ISSUE
Lawyer-initiated solicitation for pecuniary gain?
PRACTICAL CONSIDERATIONS
Appearance of motive, method, relationship, and local-rule adoption are all factors that matter.
13


A Four-Phase Representation Process
bsp LAW
NEUTRAL OUTREACH
Identify counsel and company; discuss logistics and options.
EXPLAIN OPTIONS
No counsel, independent counsel, or company-funded counsel.
ANALYZE
Conflicts, individual exposure, and third-party payment.
DOCUMENT
Engagement scope, payor, confidentiality, conflicts, withdrawal.
Do not collect or share substantive confidences before the conflict analysis.
12


KEY TAKEAWAY
Your star witness and their star witness may be the same person.
Prepare accordingly.
Truthful Testimony
Protect Privilege
Defensible Process
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Moheeb Murray represents clients in complex commercial disputes, tort defense cases, insurance coverage matters, and construction litigation. He leads BSP's insurance coverage and construction litigation practice groups. In commercial litigation matters, his extensive experience includes complex breach of contract and breach of warranty claims, shareholder actions, and cases involving misappropriation of trade secrets and covenants not to compete. In his insurance coverage practice, Moheeb represents leading insurers in life, health, disability, ERISA, long-term care, annuity, P&C, commercial general liability, and auto-insurance no-fault matters.

He advises and represents clients from pre-litigation strategy through final verdict and on appeal. Moheeb has helped clients obtain favorable awards and outcomes at trial and in arbitrations involving claims of breach of contract, breach of warranty, construction, and design-professional malpractice. Moheeb is also a trained civil litigation mediator.

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- Michigan Super Lawyers (2018 – present)
- Benchmark Litigation, Litigation Star (2026)
- Chambers USA Guide, Insurance (Michigan) Band 1 (2024 – 2026)
- Michigan Lawyers Weekly, Go-To Lawyers Power List (2023)
- Michigan Lawyers Weekly, Go-To Lawyers for Business Law (2023)
- Oakland County Bar Association Committee of the Year Award (2023)
- Best Lawyers® Lawyer of the Year, Insurance Law (Troy, MI: 2023)
- DRI Lifetime Community Service Award (2019)
- Oakland County Bar Association Distinguished Service Award (2017)
- Oakland County Executive's Elite 40 Under 40 (2015)
- Michigan Super Lawyers, Rising Star (2011 – 2015)
- Michigan Lawyers Weekly, Leader in the Law (2014)
- American Arab Professional of the Year Award in the Legal Category (2013)
- Martindale Hubbel® AV Peer Review Rating

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- University of Michigan Ross School of Business, B.B.A., with high distinction, 1997 - James B. Angell Scholar; William J. Branstrom Freshman Prize for academic excellence



Think Like a Plaintiff: Corporate Recovery Through Affirmative Litigation

Katie Reilly
Wheeler Trigg O'Donnell (Denver, CO)

Thinking Like a Plaintiff: Corporate Recovery Through Affirmative Litigation - Strategic Opt-Out Litigation as a Core Component of Corporate Recovery
Katie Reilly

Corporate legal departments have long been viewed as cost centers that manage risk, defend against claims, and minimize the company's liability. That view is changing. Sophisticated in-house counsel are increasingly using affirmative litigation as a revenue-generating tool that treats the company's legal claims as valuable corporate assets to be identified and pursued when economically justified. For companies harmed by anticompetitive conduct, one potentially lucrative component of a broader corporate recovery strategy is the systematic use of opt-out litigation as a means of maximizing recoveries for antitrust claims.

This article explains how to integrate an opt-out litigation strategy into a corporate recovery program, focusing on the key considerations and steps that differentiate an effective and disciplined opt-out program from a series of cumbersome one-off decisions.

Why Opt-Out Litigation?

Corporate plaintiffs in commercial class actions have two options: stay in the class and participate in whatever class recovery is available or opt out to pursue their claims individually. The default for most corporate plaintiffs is the former—a safe choice that carries little risk and requires little or no resources. In contrast, opting out of a class action has obvious and immediate downsides: litigation is distracting, time-consuming, expensive, and unpredictable, with any potential recovery often years away.

Still, opt-out litigation is becoming increasingly popular, as opt-out claims have several features that make them good candidates for affirmative corporate recovery:

- Potentially significant recoveries. Under federal antitrust law, successful plaintiffs are entitled to treble damages and attorneys' fees. That means antitrust claims may generate substantial damages, often in the range of hundreds of thousands to tens of millions of dollars for individual claimants that made substantial affected purchases.
-
- Settlement dynamics favor large claimants. Defendants generally want finality, and large individual plaintiffs can offer defendants a way to resolve a meaningful slice of exposure directly. By leveraging their own claims, opt-out claimants often obtain substantially greater individual recoveries than they would have as class members.
- Class action proceedings offer a preview. Class action proceedings provide a testing ground for antitrust claims, thus allowing opt-out claimants a chance to evaluate the merits of those claims through active litigation. The existence of earlier class proceedings may also streamline the discovery process. Key rulings from class action proceedings can be binding in subsequent opt-out actions. And even when they are not, favorable merits-oriented rulings can help drive an early settlement of opt-out claims and may have considerable persuasive value in the case.

Building Opt-Out Litigation into the Corporate Recovery Program

Step 1: Monitor the Market
Take a proactive approach to identifying and monitoring relevant antitrust lawsuits; don't wait for a class settlement notice to investigate a potential claim. In-house counsel should keep track of significant antitrust developments involving anticompetitive conduct in industries in which the company participates, including state and federal investigations (which often spawn private lawsuits) and pending class actions. The most relevant claims will likely involve allegations of monopoly behavior or price-fixing and other collusive conduct that impacts the price of goods or services the company routinely buys (or sells), thus causing damages in the form of overcharges (or underpayments).

Assign someone to track class action filings, multidistrict litigation dockets, government investigations and pleas, and settlement notices pertaining to industries in which the company buys (or sells) significant volumes. Also check in regularly with business departments and employees, as procurement and category managers often hear about industry investigations before they become newsworthy. Outside counsel and other specialized firms can supplement these efforts with periodic reviews, but in-house counsel should own the process.

Step 2: Inventory Transaction Data

Understanding the company's transaction history and data is essential for evaluating opt-out opportunities and estimating potential damages. To this end, in-house counsel should confirm:

- What data exists and how is it stored. Knowing what data exists, where, for what time periods, and how it can be analyzed is essential to quickly assessing the potential value of an antitrust claim. Purchase records, invoices, contracts, and rebate information may sit in legacy systems, or may have been deleted under standard retention schedules. Take measures to preserve all relevant data once a potential opt-out claim is identified.
- Which entity holds the claim. Standing depends on which corporate entity made the relevant purchases (or sales). Corporate reorganizations, affiliates, acquired businesses, and buying groups may complicate this picture. If the company acquired a business that previously bought the affected product, check whether any antitrust claims would have transferred with it.
- How purchases were made. Determine whether the company purchased the relevant product directly from the defendants (or other co-conspirators) or from a distributor or middleman. Only direct purchasers have standing to sue under federal antitrust law, whereas some state antitrust laws also allow indirect purchasers to sue for damages. Purchases through distributors, cost-plus arrangements, and affiliated sellers raise questions about who qualifies as a direct purchaser, thus requiring further inquiry and analysis.

Step 3: Systematically Evaluate Opt-Out Opportunities

Developing and applying a consistent framework for evaluating opt-out claims is the critical component of an effective opt-out program. While that analysis will depend on the unique circumstances of each case, below are several key considerations:

- Potential damages. Engage an economic expert or outside counsel to assist in estimating potential damages, which generally calls for applying an overcharge to the affected volume of commerce. In-house counsel should work with relevant business teams to identify dates, prices, and volumes for impacted transactions over the relevant limitations period (e.g., how much product did the company buy, for what price, over what period, and from whom), which serves as the starting point for a damages estimate.
- Litigation factors. The strength of an opt-out claim will depend on a wide range of factors, including the potential jurisdiction, venue, and judge; the existence and outcome of government investigations; the strength of the class complaint; the ability to glean insights from rulings in the class proceedings (either merits- or discovery-related); the accessibility of existing expert analysis, and the possibility of contractual releases that affect the company's antitrust claims. Antitrust claims that have been tested in litigation and have survived dismissal or summary judgment may be particularly good candidates for opt-out litigation.
- Cost and duration. Work with outside counsel to estimate the potential costs and duration of litigation, including legal fees, expert fees, and discovery costs, as well as the likely burden of devoting internal resources to necessary discovery efforts. Outside counsel may also assist in evaluating the potential for an early settlement versus prolonged litigation.
- Other business considerations. Supplier and customer relationships may be impacted by pursuing an opt-out claim, and suing a trading partner may have costs beyond legal fees. Involve relevant business stakeholders early to understand these relationships and assess potential fallout.
- Timing. The applicable limitations period, tolling boundaries, the point at which delay may foreclose a claim entirely, and the opt-out deadline (once set) are all critical to evaluating an opt-out strategy, so calendaring those dates when a class action is first filed is useful. Class members can opt out of class actions by filing a formal opt-out notice before the court-determined opt-out deadline or by filing their own lawsuits at any time before that deadline. There are advantages and disadvantages to both, depending on the circumstances of each case.

Step 4: Managing Financial Risk

Surveys of in-house counsel indicate that companies often decline to opt out of class actions, despite having high-value claims, due to the high cost and uncertainty that comes with pursuing an antitrust claim as a lone plaintiff. But companies have several additional options for pursuing opt-out antitrust claims that offer various degrees of risk management and cost sharing. One

option is to negotiate an alternative fee arrangement that shifts some of the financial risk to outside counsel. Such arrangements may reduce a company's financial exposure while maximizing its control and independence in litigation. Another option is to join other like-minded corporate plaintiffs in filing individual claims as part of a group action, thus allowing each plaintiff to share litigation costs and financial risk. Litigation financing is yet another resource that can be used to offset litigation costs and generate capital, either through third-party financing arrangements or by monetizing of existing claims. Understanding these options and external resources will help in-house counsel evaluate the viability of opt-out opportunities.

The Bottom Line

For corporate class members with low-dollar claims, submitting a claim as part of the class recovery process—often just pennies on the dollar—is likely the safest and most efficient choice. But for companies with high-value claims, staying in the class can be a lost opportunity to maximize the company's recovery with otherwise manageable risk, thus leaving substantial value on the table. In that situation, it is incumbent on in-house counsel to carefully weigh the company's risk and cost tolerance against the potential value loss that comes with staying in the class. By developing a systematic approach to identifying and evaluating opt-out opportunities, including what tools might make an opt-out strategy viable, in-house counsel can streamline that process and make opt-out litigation a valuable component of a broader corporate recovery strategy.

Thinking Like A Plaintiff: Corporate Recovery Through Affirmative Litigation

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CLASSIFICATION: RESTRICTED

Affirmative Recovery Programs

- Contemplate a systematic approach to affirmative litigation, not an ad hoc pursuit of claims
- Generate revenue that adds to the company's bottom line
- Offer legal departments a way to offset the cost of defensive litigation

CLASSIFICATION: RESTRICTED

Identifying Recovery Opportunities

- **Understand the business**
  - Where is the company sustaining financial harm?
  - Which departments have valid legal claims?
  - Where are future claims likely to arise?
  - Are there recurring losses or problems?
- **Create internal alignment**
  - Educate relevant stakeholders about various options for pursuing recovery (e.g., full-blown litigation may not be necessary)
  - Identify and understand key business relationships to evaluate and mitigate the risk of negative impact

CLASSIFICATION: RESTRICTED

Identifying Recovery Opportunities

Common claims:

- Breach of contract and warranty
- Fraud, misrepresentation, and misappropriation
- Intellectual property infringement
- Insurance coverage disputes
- Opt-out litigation
  - Antitrust class actions
  - Securities class actions

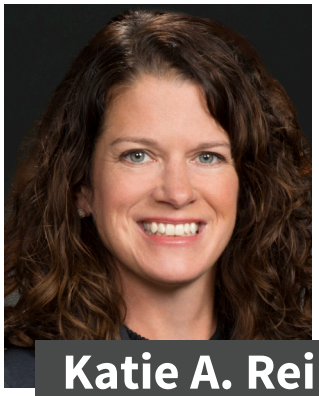
CLASSIFICATION: RESTRICTED

Evaluating Recovery Opportunities

Key Considerations	
Liability Strength	Cost and duration
Potential damages and collectability	Internal burdens (e.g., discovery)
Timing and limitations	Commercial consequences

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Mitigating Financial Risk
Contingency and hybrid fee arrangements
Group actions vs. individual actions
Third-party litigation funding
Claim monetization or assignment
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Practice Areas

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

Industries

- Healthcare
- Telecommunications
- Real Estate
- Consumer Products & Services
- Cannabis

Legal Memberships, Activities, and Honors

- Chambers USA - Band 1, General Commercial Litigation - Colorado, 2026; Band 2, General Commercial Litigation - Colorado, 2021-2025; Band 3, General Commercial Litigation - Colorado, 2020; Band 4, General Commercial Litigation - Colorado, 2018-2019; Up and Coming, General Commercial Litigation - Colorado, 2016-2017
- BTI Consulting - Client Service All-Star MVP, 2020, 2021, 2022, 2023; Client Service All-Star, 2019
- The Best Lawyers in America - Litigation - Antitrust Lawyer of the Year, Denver, 2021, 2023, 2025; Bet-the-Company Litigation, 2024-2027; Commercial Litigation, 2018-2027; Antitrust Litigation, 2018-2027; Mass Tort Litigation / Class Actions - Defendants, 2022-2027
- Benchmark Litigation - Top 250 Women in Litigation, 2025-2026; Litigation Star, 2025-2026; Under 40 Hot List, 2016-2017; Future Star, 2021-2024
- Lawdragon Leading Litigators of America, 2026
- The Legal 500 Denver: Litigation - Commercial Disputes, 2026
- 5280 Magazine - Top Lawyers Antitrust, 2020-2021, 2023-2026; Civil Litigation, 2021, 2023-2024
- Law Week Colorado - Top Women Lawyers, 2016; "People's Choice" Antitrust Lawyer, 2016-2018, 2020, 2023; "Barrister's Best" Antitrust Lawyer, 2019, 2026; "Barrister's Best" Commercial Litigation Lawyer, 2026; "Barrister's Best" Civil Litigator, 2026

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Funded, Taxed, or Banned: Litigation Finance Under Fire

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Third-Party Litigation Funding: Risks, Opportunities, and Evolving Regulatory Landscape
Vincent Levy

Third-party litigation funding ("TPLF") has emerged as one of the most consequential—and controversial—developments in the modern litigation landscape. Once a niche practice, the global litigation finance market has grown exponentially, and its influence now extends to commercial disputes, class actions, and patent litigation alike. For businesses and counsel alike, understanding TPLF is no longer optional: whether you encounter TPLF as a potential resource, face litigation from a funded adversary, or simply wish to engage as a stakeholder in the ongoing regulatory debates, the topic demands informed attention.

This article provides a practical overview of what TPLF is, the benefits it can offer, the risks it presents, and the rapidly evolving efforts to regulate it at the state and federal levels.

What Is Third-Party Litigation Funding and How Is It Used?

Third-party litigation funding is an arrangement in which a non-party funder provides capital to a litigant or law firm in exchange for a financial interest—typically a percentage—of the potential recovery from a civil proceeding.[1] The agreement will typically specify a waterfall that could prescribe minimum recoveries for funder or fundee. Funding is generally structured on a non-recourse basis: the funder recovers its investment only if the funded party obtains a favorable judgment or settlement, and if the case is unsuccessful, the funder loses its capital entirely.[2]

Third-party litigation funding is often viewed as a resource for the plaintiffs' contingency bar. But TPLF is not so one-sided in practice. TPLF also offers meaningful benefits to both corporate and individual clients in cases involving intellectual property and complex commercial disputes, including in private arbitrations between corporate entities.

Burford Capital—one of the largest, publicly traded third-party litigation funders in the United States—reports that more than 50% of its funding commitments go to corporate clients,[3] including, in one recent case, up to $325 million to a Fortune 500 client.[4] Major law firms are in the mix, too. In 2024, at least 37% of the largest 200 law firms utilized third-party litigation funding.[5]

Proponents of TPLF emphasize several important benefits:

Access to Justice. TPLF can enable small businesses and individuals who cannot otherwise afford litigation to pursue meritorious legal claims. Proponents emphasize that contingent fee arrangements have long played a similar role, and commercial TPLF extends this principle to a broader set of disputes.[6] Similarly, TPLF can offset the resource asymmetry that often exists between larger corporations and an otherwise less-funded adversary.[7]

Distribution of Risk. TPLF may allow litigants to shift the financial risk of litigation to third parties with greater capacity to absorb potential losses. In this way, TPLF is similar to insurance and other risk-allocation mechanisms accepted in the legal system.[8]

1 Am. Bar Ass'n, Best Practices for Third-Party Litigation Funding (Aug. 2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf; Signal Funding, LLC v. Sugar Felsenthal Grais & Helsinger LLP, 136 F.4th 718, 721 (7th Cir. 2025).

2 Third Party Litig. Funding Comm., Superior Court of Del., Report and Recommendations 3 (June 30, 2023), https://courts.delaware.gov/forms/download.aspx?id=265958.

3 See Burford Capital Limited, Annual Report (Form 20-F) (March 28, 2024), at 42, https://www.sec.gov/ix?doc=/Archives/edgar/data/1714174/000171417424000046/bur-20231231x20f.htm.

4 See Case Study: Using Legal Finance to Meet Business and Litigation Needs, Burford Capital, https://www.burfordcapital.com/what-we-do/case-studies/case-study-legal-finance-to-meet-business-and-litigation-needs/ (last visited Sept. 28, 2026).

5 See Westfield Advisors, 2024 Litigation Finance Market Report, The Westfield Insider, at 7 (2024), available at https://www.westfleetadvisors.com/westfleet-insider-2024-litigation-finance-report/.

6 Eric Helland & Daniel Klerman, Contingent Fees and Access to Justice, 102 Wash. U.L. Rev. Online 1, 22 (2024), https://washulawreview.org/contingent-fees-and-access-to-justice/.

7 Letter from Int'l Legal Fin. Ass'n to Comm. on Rules of Practice & Procedure, Re: Third-Party Litigation Finance, Rules Suggestion 25-CV-O, at 8–9 (Oct. 1, 2025), https://www.uscourts.gov/sites/default/files/document/25-cv-o_suggestion_from_international_legal_finance_association_-_tplf.pdf ("ILFA Rules Suggestion").

8 See id. at 3–7.

Case Screening. Many successful third-party litigation funders apply rigorous underwriting standards and conduct thorough due diligence, often funding fewer than 5% of cases proposed.[9] Proponents argue that, as a result of this practice—and the strong incentive for third-party litigation funders to recover their investment—litigation finance disciplines litigants and does not encourage frivolous suits.[10]

Corporate Finance Tool. For businesses and law firms, TPLF can be a balance-sheet decision analogous to issuing equity or obtaining a bank loan, preserving working capital for core operations. In some cases, even the largest corporations may find TPLF a valuable way to fund a portfolio of litigation—converting the legal department from a cost center to a profit center.[11] Businesses and law firms can also use litigation funding to monetize a claim.

Problems and Risks Presented by Third-Party Litigation Funding

A. Conflicts of Interest

Conflicts may arise when a funder's financial interests diverge from those of the litigant or attorney. Critics warn that TPLF can interfere with the attorney-client relationship and undermine professional independence. As the Chamber of Commerce explained in a recent amicus brief, "third-party funders often have different interests than the parties in the case, and this divergence of interests naturally incentivizes funders to take control of litigation in order to maximize the return on their investment."[12]

A striking illustration of this concern can be found in the dispute between Burford Capital—the third-party litigation funder noted above—and Sysco Corp., a corporate client whose antitrust litigation Burford agreed to fund. To finance the litigation, Sysco and Burford entered into a litigation funding agreement through which Burford invested more than $140 million in exchange for a share of the proceeds from a favorable settlement or judgment.[13] As a condition of that financing, the agreement required Sysco to immediately communicate any settlement offers to Burford and instructed that Sysco "shall not accept a settlement offer without [Burford Capital's] prior written consent, which shall not be unreasonably withheld."[14]

In August 2022, Sysco notified Burford that it had negotiated a settlement to resolve the litigation for $50 million.[15] Burford formally objected, citing the funding agreement.[16] Nonetheless, Sysco continued to formalize the settlement.[17] In response, Burford filed an expedited request for arbitration (pursuant to the funding agreement) and obtained an arbitral TRO preventing Sysco from executing the settlement agreement.[18] Months later, in March 2023, Burford won an arbitral preliminary injunction preventing Sysco from executing the proposed settlement.[19] At an impasse, Sysco and Burford settled their dispute, and Sysco assigned its claims to Carina Ventures LLC, a Burford affiliate that has continued to litigate the claims.[20]

As Judge Maldonado warned in her concurring opinion, "[t]his case is a cautionary tale to any party who seeks to fund its litigation through a third-party," as it "presents perhaps the foremost danger of litigation finance: funders aggressively interfering with, and exerting control over, ongoing litigation, while rejecting the funded party's preferences with the hope of maximizing returns."[21] And while in the Sysco matter the funder's role came to light, in many others it may remain undisclosed, and litigation may continue despite all formal parties' desire to settle.[22]

B. Unnecessary, Burdensome Litigation

Beyond disputes between funders and their clients, TPLF has also raised broader concerns about its effects on litigation volume and behavior. Critics contend that by lowering the financial barriers to filing suit, TPLF may increase the volume of litigation—including potentially abusive or speculative claims—while shifting the economics of dispute resolution in ways that disadvantage defendants.[23] As the President of the American Tort Reform Association observed, "TPLF can create litigation, not just fund it. Investments made by outside funders have enabled the growth of mass tort litigation by covering upfront costs for maximizing the number of claims to flood the courts and overwhelm defendants, and by spreading the risk of filing speculative lawsuits."[24]

9 Id. at 12. .

10 Id. at 13 (discussing Samuel Antill & Steven R. Grenadier, Financing the Litigation Arms Race, 149 J. Fin. Econ. 218 (2023)).

11 See What We Do for Businesses, Burford Capital, https://www.burfordcapital.com/what-we-do/for-businesses/ (last visited Sept. 28, 2026).

12 Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petition to Vacate the Arbitral Award at 2, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451, ECF No. 36 (N.D. Ill. Mar. 29, 2023).

13 In re Broiler Chicken Antitrust Litig., 167 F.4th 430, 434, 444–45 (7th Cir. 2026).

14 Id. at 434.

15 Id. at 436.

16 Id.

17 Id. at 436–37.

18 Id. at 436–37.

19 Id. at 437.

20 Id.

21 Id. at 444–45 (Maldonado, J., concurring).

22 See Maya Steinitz, Zombie Litigation: Claim Aggregation, Litigant Autonomy, and Funders' Intermeddling, 110 Cornell L. Rev. 1771 (2026), https://publications.lawschool.cornell.edu/lawreview/wp-content/uploads/sites/2/2026/05/Steinitz-final.pdf.

23 Mark Behrens, Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product That Is Transforming the Civil Justice System, 34 Cornell J.L. & Pub. Pol'y 1, 10–14 (2025), https://community.lawschool.cornell.edu/wp-content/uploads/2025/03/Behens-final.pdf.

24 Id. at 11.

Consider the recent example of mass arbitrations filed against corporations that include arbitration clauses in which the corporate entity is bound to pay for the costs of the arbitration. In recent years, a small number of firms—often backed by third-party funders—have weaponized this sort of clause by aggregating thousands of individual claims. That strategy—which is often inaccessible without third-party funding—is designed to make it rational to pay claimants to go away even if the claims have no value, just to avoid having to pay the costs of thousands of arbitrations.[25]

In addition to incentivizing new litigation, third-party litigation funding may impact a client's settlement calculus in ways that increase defense costs and prolong disputes. As noted above, funding arrangements can provide a waterfall allocating recoveries, and may (and often does) specify that the funder will receive the funded amount out of the first dollars received, together with a multiple. The effect of such a structure is that the funding arrangement will change settlement incentives for the client who retains ultimate authority to settle, and could lead to situations where the funding structure will make it rational for a client to reject settlements that fairly reflect the value of claims.

C. Other Issues

There are of course other potential issues to consider through regulation. A less commonly discussed—but increasingly urgent—concern is the potential for foreign actors to exploit TPLF arrangements to advance strategic objectives adverse to U.S. interests. Because TPLF agreements are not uniformly disclosed, foreign governments, sovereign wealth funds, or state-affiliated entities could finance U.S. litigation as a means of undermining American companies, acquiring proprietary or commercially sensitive information through the discovery process, or influencing political and governance outcomes—all without the knowledge of the court or opposing parties.[26]

On a far less dramatic scale, some have raised the concern that litigation funding should be disclosed to address potential conflicts of interest involving the judiciary. Burford is a public entity, and many other financiers have started offering litigation funding. In that context, and in the context of news articles raising questions about judicial conflicts, some have called for the disclosure of any funding arrangement to ensure that judges do not have an interest in the outcome of the dispute that they are tasked to consider.[27]

Efforts to Regulate Third-Party Litigation Funding

The regulatory response to TPLF is evolving rapidly—and on multiple fronts. Courts, legislatures, and federal agencies have each begun to grapple with the challenges that undisclosed funding creates for case management, settlement dynamics, judicial conflicts, and national security. The result is an increasingly complex patchwork of regulation that in-house counsel should monitor closely. Below is a summary of the principal regulatory developments as of the time of writing.

A. The Champerty Doctrine

Long before the current wave of TPLF regulation, the common-law champerty doctrine operated as a check on third-party involvement in litigation. At common law, it was prohibited to "maintain a suit in exchange for a financial interest in the outcome."[28] Today, the status of the champerty doctrine varies significantly across the country, with some states retaining it, others modifying it, and still others abolishing it entirely.[29] The erosion of champerty in many jurisdictions has been a key driver of TPLF's growth—and has amplified calls for modern regulatory frameworks to fill the resulting gap. Regardless, efforts to challenge TPLF as inconsistent with champerty law have failed.[30]

B. Federal Rulemaking

Perhaps the most closely watched regulatory development is the ongoing effort to amend the Federal Rules of Civil Procedure to require disclosure of TPLF.

In October 2024, the U.S. Judicial Conference's Advisory Committee on Civil Rules established a dedicated TPLF Subcommittee to examine whether federal disclosure rules should be amended to address litigation funding.[31] That work has attracted intense interest.

In March 2026, Lawyers for Civil Justice ("LCJ")—a

25 See Exhibit B to Complaint ("Mass Arbitration Strategy and Investment Opportunity"), Valve Corp. v. Zaiger, LLC, 23-cv-01819 (Super Ct. Wash., King Cnty. Nov. 27, 2023) (arguing, in pitch deck to potential third-party litigation funder, that "[a]ggregating claims makes entrance fee to just defend prohibitively expensive," so "Claimants' counsel will offer a settlement slightly less than the AAA charge . . . attempting to induce a quick resolution").

26 See generally Michael E. Leiter et al., A New Threat: The National Security Risk of Third Party Litigation Funding, ILR Briefly, U.S. Chamber of Commerce Institute for Legal Reform (November 2022), TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf.

27 See Letter from Lawyers for Civil Justice & U.S. Chamber of Commerce Inst. for Legal Reform to Advisory Comm. on Civil Rules, Re: A Revised Proposal: Amend Rule 26(a)(1)(A) to Guide Courts and Parties on TPLF Disclosure, Rules Suggestion 26-CV-8, at 5–6 (Mar. 10, 2026), https://www.uscourts.gov/sites/default/files/document/26-cv-8_suggestion_from_lcj_ilr_-_rule_26.pdf ("LCJ/ILR Rules Suggestion").

28 Gov't Emps. Ins. Co. v. MAO-MSO Recovery II, LLC, 491 Md. 221, 230 (2025).

29 See, e.g., Ky. Rev. Stat. § 372.060 (retaining champerty); Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997) (abolishing champerty doctrine).

30 E.g., Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 725-26 (N.D. Ill. 2014) (third-party litigation funding agreement not champertous where funders did not "'wickedly and willfully' tr[y] to stir up a suit" between the parties, but rather "were sought out by [the plaintiff] to enable it to continue with the litigation"); Odell v. Legal Bucks, LLC, 192 N.C. App. 298, 310 (2008) (refusing to find litigation funding agreement champertous under North Carolina statute); see also Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 237 – 241 (Minn. 2020) (abolishing Minnesota's common-law prohibition against champerty in response to challenge to third-party litigation funding agreement).

31 Nate Raymond, US Judicial Panel to Examine Litigation Finance Disclosure, Reuters (Oct. 10, 2024), https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10/.

national coalition of corporations, law firms, and defense trial lawyer organizations—together with the U.S. Chamber of Commerce Institute for Legal Reform ("ILR"), submitted a formal proposal to amend Rule 26(a)(1)(A) to require mandatory disclosure of any TPLF arrangement as part of a party's mandatory initial disclosures (along with the identity of witnesses and the availability of insurance to cover any claims).

Under the proposed amendment, parties would be required to identify "the name, address, and telephone number of any nonparty individual or entity (other than counsel of record) that, whether directly or indirectly, is providing funding for the action and has a financial interest therein," along with any agreements concerning the terms of the funding.[32] In September 2026, a coalition of 214 major companies—including household names such as Amazon, Google, Meta, Microsoft, Johnson & Johnson, and ExxonMobil—sent a letter to the Advisory Committee endorsing the LCJ/ILR proposal and urging adoption of a uniform TPLF disclosure rule.[33]

Separately, the U.S. International Trade Commission published a Notice of Proposed Rulemaking that would require parties and intervenors in Section 337 patent investigations to disclose entities with ownership or financial interests, including any entity that provides funding or whose approval is necessary for litigation or settlement decisions.[34]

C. Federal Legislation

While federal rulemaking focuses on procedural disclosure, Congress has pursued a broader regulatory agenda that extends to both transparency and taxation of litigation funding. Two bills pending in the 119th Congress illustrate the scope of recent efforts.

The Litigation Funding Transparency Act of 2026, introduced by Senate Judiciary Chairman Chuck Grassley, would require disclosure of TPLF in class actions, multidistrict litigation, and coordinated federal proceedings involving 100 or more cases.[35] The bill would also prohibit funder control over litigation strategy, decision-making, or settlement, and would require that certain information about foreign funders be published.[36] On the tax side, the Tackling Predatory Litigation Funding Act, introduced by Senator Thom Tillis, would impose a substantial withholding tax on litigation proceeds received by third-party funders.[37] The bill would close a perceived loophole in federal tax law that allows foreign funders to treat litigation returns as capital gains rather than ordinary income,[38] but proponents—including the bill's sponsors—have supported it on the ground that it would make litigation funding less profitable and therefore limit "unmeritorious lawsuits."[39]

Neither bill has been enacted as of this writing.

D. State Legislation: A Patchwork of Regulation

As of mid-2026, at least 23 states have enacted statutes or regulations specifically addressing TPLF, with thirteen states having signed TPLF-related laws in just the past two years.[40] The statutes generally fall into one or more of the following categories:

Outright Prohibition. North Carolina became the first—and, as of this writing, the only—state to ban TPLF outright. Governor Josh Stein signed the Prohibit Litigation Investments Act (H.B. 315) on June 22, 2026, making it unlawful to engage in litigation investment in the state or to furnish litigation investment to a party or attorney in a civil proceeding pending in that state. The law passed the House 112–0 and the Senate 45–1, imposes civil penalties of up to $50,000 per violation, and renders any violating contract automatically void.[41]

Disclosure Requirements. Wisconsin became the first state to require disclosure of TPLF agreements in all civil cases in 2018,[42] and Montana enacted one of the most comprehensive TPLF frameworks in 2023, requiring funder registration with the Secretary of State, mandatory disclosure of TPLF agreements, and full discoverability of agreements.[43] More recent legislation in Arizona, Kansas, Georgia, Ohio, Tennessee, and others includes varying combinations of disclosure at commencement of the action, in camera judicial review, and post-resolution

32 LCJ/ILR Rules Suggestion, at 5–6.

33 Letter from 214 Companies to Carolyn A. Dubay, Sec'y, Comm. on Rules of Practice & Procedure, Re: Disclosure of Nonparty Participation in Litigation, Rules Suggestion 26-CV-31 (Sept. 14, 2026), https://www.uscourts.gov/sites/default/files/document/26-cv-31_suggestion_from_214_companies_-_rule_26_third_party_litigation_funding.pdf.

34 Section 337 Adjudication and Enforcement, 91 Fed. Reg. 23,190 (proposed Apr. 30, 2026) (to be codified at 19 C.F.R. pt. 210), https://www.federalregister.gov/documents/2026/04/30/2026-08445/section-337-adjudication-and-enforcement.

35 Litigation Funding Transparency Act of 2026, S. 3826, 119th Cong. (2026), https://www.congress.gov/119/bills/s3826/BILLS-119s3826is.pdf (defining "Covered Civil Action").

36 Id.

37 Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025), https://www.congress.gov/119/bills/s1821/BILLS-119s1821is.pdf ("Any applicable person having the control, receipt, or custody of any proceeds from a civil action . . . with respect to which such person had entered into a litigation financing agreement shall deduct and withhold from such proceeds a tax equal to 50 percent of the applicable percentage . . . of any payments which are required to be made to a third party pursuant to such agreement.").

38 Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025); H.R. 3512, 119th Cong. (2025),

39 Press Release, Tillis Introduces Legislation to Target Predatory Litigation Funding Practices, Office of U.S. Senator Thom Tillis (May 22, 2025), https://www.tillis.senate.gov/2025/5/tillis-introduces-legislation-to-target-predatory-litigation-funding-practices.

40 See generally Verisk, Third-Party Litigation Funding Legislative Activity Map (last visited Sept. 28, 2026), https://core.verisk.com/Insights/Emerging-Issues/Third-Party-Litigation-Funding-Legislative-Activity-Map.

41 N.C. Gen. Stat. §§ 66-511 et seq. (Session Law 2026-14, H.B. 315); see also North Carolina General Assembly Bill Summary, House Bill 315 / SL 2026-14, https://www.ncleg.gov/BillLookUp/2025/H315 (last visited Sept. 28, 2026).

42 Wis. Stat. § 804.01(2)(bg) (2018).

43 Mont. Code Ann. §§ 31-4-101 et seq. (2025).

reporting to the state attorney general.[44]

Restrictions on Funder Control. Many state statutes prohibit funders from exercising control over litigation strategy, settlement decisions, or the hiring and firing of counsel. These provisions respond directly to concerns—illustrated by the Sysco/Burford case—that funders may prioritize their own financial interests over those of the litigant.

Foreign Funder Restrictions. A growing number of states have enacted provisions specifically targeting foreign-sourced litigation funding. Colorado, Georgia, Montana (via its 2025 amendment), Ohio, Oklahoma, and Utah all restrict or prohibit funding from certain foreign investors, including foreign adversaries, foreign persons of concern, or entities affiliated with foreign governments or sovereign wealth funds.[45]

E. Court Rules and Judicial Orders

Even in the absence of a uniform federal rule, many individual courts and judges have adopted local rules or standing orders, or issued case-specific directives, requiring varying degrees of TPLF disclosure.

Several federal courts have adopted local rules requiring automatic TPLF disclosure, including the Northern District of California, the District of New Jersey, and the U.S. Court of International Trade.[46]

Individual judges have also issued standing orders governing their dockets. Chief Judge Connolly of the District of Delaware, for instance, issued a standing order in April 2022 requiring disclosure of any third-party litigation funder and its role—though notably, the order does not require disclosure of the underlying funding agreement.[47] Similar orders have been issued by judges in other districts.[48]

In the MDL context, courts have issued case-specific disclosure orders in several high-profile proceedings. In In re National Prescription Opiate Litigation, Judge Polster ordered attorneys who had obtained third-party contingent litigation financing to submit the details of their arrangements to the court ex parte for in camera review.[49] A similar approach was taken in In re Zantac (Ranitidine) Products Liability Litigation in the Southern District of Florida.[50]

Litigants have also made discovery requests for disclosure of funding arrangements, with inconsistent results. Research conducted by the International Legal Finance Association ("ILFA") found that, of over 100 federal court orders resolving such discovery motions, approximately 40% required some form of disclosure (the majority of which arose in the patent context), while approximately 60% denied disclosure entirely.[51]

Conclusion

As the litigation funding landscape continues its rapid evolution, litigators and in-house counsel should keep the following points in mind:

Consider strategic opportunities to use TPLF. It is not only a tool of the plaintiff's class-action bar. Sophisticated corporations and law firms increasingly use litigation finance to manage risk and preserve working capital.

Be mindful of the risks TPLF presents. Whether your company is a plaintiff or a defendant, issues of funder control, conflicts of interest, and "zombie litigation" deserve careful attention. If you are obtaining funding, try to address conflicts of interest by agreement. If you think your adversaries have funding, bear this in mind as it may affect the feasibility of resolving cases through settlement.

Monitor the evolving regulatory landscape. With at least 23 states now regulating TPLF, active federal rulemaking proposals, and pending federal legislation, the compliance environment is changing rapidly.

Assess disclosure obligations. Depending on the jurisdiction and forum, your company may already be subject to TPLF disclosure requirements—or may soon be. Proactive compliance planning is prudent.

44 H.B. 105, 136th Gen. Assemb., Reg. Session. (Ohio 2026); S.B. 1215, 57th Legislature, 1st Reg. Sess (Ariz. 2025); S.B. 69, 158th Gen. Assemb., Reg. Sess. (Ga. 2025); K.S.A. 2024 Supp. 60-226 (Kan. 2025); Tenn. Code § 47-16-101 (2025).

45 See, e.g., H.B. 25-1329, 75th Gen. Assemb., 1st Reg. Sess. (Colo. 2025); S.B. 69, 158th Gen. Assemb., Reg. Sess. (Ga. 2025); S.B. 511, 69th Gen. Assemb., Reg Sess. (Mont. 2025); H.B. 105, 136th Gen. Assemb., Reg. Session. (Ohio 2026); H.B. 2619, 60th Leg., 1st Reg. Sess. (Okla. 2025); H.B. 280, 2026 Gen. Sess. (Utah 2026).

46 N.D. Cal. Civ. Local R. 3-15; Dist. N.J. Civl. Local R. 7.1.1; U.S. Ct. Int'l Trade Form 13 ("Disclosure of Corporate Affiliations and Financial Interest).

47 Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf?_sp=2fe8e7a1-c517-4032-9c36-d7db5b82784c.

48 See, e.g., Rule 26(f) Report of the Parties (Judge Calabrese, N.D. Ohio), www.ohnd.uscourts.gov/sites/ohnd/files/Rule%2026%28f%29%20Report%20of%20the%20Parties%20%281.2.2026%29.pdf.

49 Order Regarding Third-Party Contingent Litigation Financing, Dkt. No. 363, In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804 (N.D. Ohio May 7, 2018).

50 Order Rescheduling Initial Conference, Establishing April Deliverables Team, and Scheduling Interviews for Leadership Applicants, Dkt. No. 557, In re Zantac (Ranitidine) Prods. Liab. Litig., No. 2924, 2020 U.S. Dist. LEXIS 62805 (S.D. Fla. Apr. 3, 2020).

51 ILFA Rules Suggestion, at 22.



Vincent Levy

HOLWELL SHUSTER & GOLDBERG LLP



Agenda

1. What Is Third-Party Litigation Funding?
2. What Benefits Does It Offer?
3. What Problems Does It Create?
4. What Are the Efforts to Regulate It?

3

What Is Third-Party Litigation Funding?

- ✓ Funding for litigation fees or expenses, or monetization
- ✓ Financial Interest in Recovery
- ✓ Non-Recourse Basis



LITIGATION FUNDING AGREEMENT

Date: September 4, 2023

BENCH WALK 23P, L.P.

SILVER BULL RESOURCES, INC.

4

What Is Third-Party Litigation Funding?

U.S. *Commercial* Litigation Finance Market:

- ✓ Number of Active Funders: **39**
- ✓ New Commitments to Deals: **$2.8B**
- ✓ Average Deal Size: **$8.1M**
- ✓ Number of New Deals: **346**

5

What Is Third-Party Litigation Funding?

FINANCIAL TIMES

US COMPANIES TECH MARKETS CLIMATE OPINION LEX WORK & CAREERS LIFE & ARTS HOW TO SPEND IT STOCKS GAME

Burford Capital Ltd + Add to myFT

Burford Capital could gain up to $1.4bn from Apple patent defeat

Litigation funder's share price jumps 9% after US jury's decision

NEW YORK, Sept 8 (Reuters) - Argentina suffered a big legal defeat on Friday as a U.S. judge ruled that the country must pay about $16 billion to minority shareholders of YPF (YPFD.BA) arising from the government's 2012 seizure of a majority stake in the oil and gas company.

U.S. District Judge Loretta Preska in Manhattan ruled in favor of Burford Capital (BURF.L), which funded the litigation brought by shareholders Petersen Energia Inversora and Eton Park Capital Management LP, and according to court papers was entitled to a respective 70% and 75% of their damages.

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Agenda

1. What Is Third-Party Litigation Funding?
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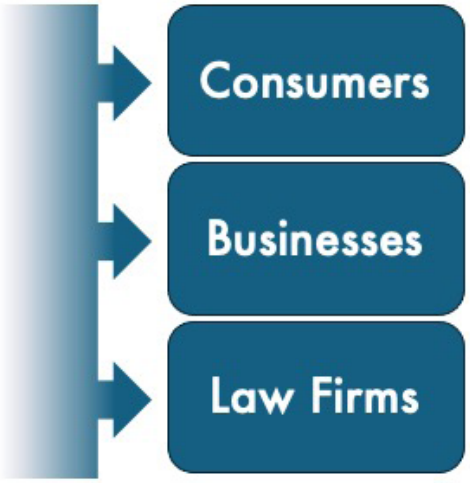
What Benefits Does It Offer?

- **Consumers** — **Consumer-focused funders** provide cash-flow to support contingency cases.
- **Businesses** — **Burford Capital** reports more than **50% of funding** to corporate clients; funded up to $325M to one Fortune 500 client.
- **Law Firms** — **At least 37% of "Big Law" firms** used litigation funding in 2024. **40%** of Burford Capital's funding went to law firms in 2024.

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What Benefits Does It Offer?

- Access to Justice
- Distribution of Risk
- Case Screening
- Corporate Finance Tool



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Agenda

1. What Is Third-Party Litigation Funding?
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What Problems Does It Create?

- Conflicts of Interest
- Unnecessary, Burdensome Litigation
- Other



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Conflicts of Interest

When Client and Funder Interests Diverge . . .

- Who controls the litigation?
- Who exercises settlement authority?
- Risk of "zombie litigation"

12

Conflicts of Interest: A Case Study



In the
United States Court of Appeals
For the Seventh Circuit

No. 25-1110
IN RE: BROILER CHICKEN ANTITRUST LITIGATION

CARINA VENTURES LLC,
Plaintiff-Appellant,

v.

PILGRIM'S PRIDE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:16-cv-08637 — **Thomas M. Durkin**, *Judge.*

ARGUED NOVEMBER 13, 2025 — DECIDED FEBRUARY 5, 2026

- Burford Capital funds Sysco Corp.'s antitrust litigation concerning broiler chickens.
- Funding agreement provides that Sysco "**shall not accept a settlement offer without [Burford's] prior written consent**, which shall not be unreasonably withheld."
- Sysco attempts to settle for $50M.
- **Burford objects**, files expedited request for arbitration, moves for and **wins arbitral TRO and preliminary injunction preventing Sysco from executing the settlement**.
- Burford and Sysco settle their dispute, with Sysco assigning claims to Burford's affiliate.

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Unnecessary, Burdensome Litigation

- Increase in High-Leverage Class Actions, Mass Arbitrations
- Higher Settlement Costs
- Lower Plaintiff Recoveries



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Unnecessary, Burdensome Litigation: A Case Study

FILED: NEW YORK COUNTY CLERK 05/09/2023 04:15 PM INDEX NO. 154124/2023
NYSCEF DOC. NO. 32 Case 2:24-cv-04717 Document 1-2 Filed 10/18/24 Page 2 of 15 RECEIVED NYSCEF: 05/09/2023



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Unnecessary, Burdensome Litigation: A Case Study

FILED: NEW YORK COUNTY CLERK 05/09/2023 04:15 PM INDEX NO. 154124/2023
NYSCEF DOC. NO. 32 Case 2:24-cv-04717 Document 1-2 Filed 10/18/24 Page 4 of 15 RECEIVED NYSCEF: 05/09/2023

Use of Mass Arbitration

- 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.

"a handful of firms ... have **weaponized consumer and employer arbitration clauses** with favorable terms by aggregating thousands of claims"

Aggregating claims makes **entrance fee to just defend prohibitively expensive** and the vast majority of such fees are non-refundable under recent precedent."

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Unnecessary, Burdensome Litigation: A Case Study

FILED: NEW YORK COUNTY CLERK 05/03/2021 04:25 PM INDEX NO. 154124/2023
NYSCEF DOC. NO. 32 Filed 10/18/24 Page 7 of 15 RECEIVED NYSCEF: 05/03/2023

Target and Claim Identification

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

"**Ideal targets** … have valuation of ~$10 billion – high enough so they aren't judgment proof and **can settle for hundreds of millions of dollars**, but low enough that $200 million+ in **arbitration fees creates an existential crisis forcing quick settlement**[.]"

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Unnecessary, Burdensome Litigation: A Case Study

FILED: NEW YORK COUNTY CLERK 05/03/2021 04:25 PM INDEX NO. 154124/2023
NYSCEF DOC. NO. 32 Filed 10/18/24 Page 10 of 15 RECEIVED NYSCEF: 05/03/2023

Potential Returns

- Based on estimated costs of bundling claims, the initial Uber case would have cost Black Diamond ~$6.5 million and returned $43.8 million in less than a year (574% ROI).
- We believe a merits-based leverage approach — which can be implemented flexibly if a particularly strong claim presents itself — increases potential for even higher returns.

Assumptions:

- There is a 50% chance of winning the first case.
- The expected win, if there is one, is for a $10,000 judgment.
- A loss results in an average of a 25% reduction in claim settlement value.

- That results in an expected settlement value of $427.7 million. Black Diamond's recovery for funding at 30% would be ~$128.3 million (1874% ROI on $6.5 million investment).

"Black Diamond's recovery for funding at 30% would be **~$128.3 million (1874% ROI on $6.5 million investment)**.

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Other: National Security

- Undisclosed Foreign Funding to Undermine U.S. Competitors
- Undisclosed Foreign Funding to Acquire Proprietary or Commercially Sensitive Information in Discovery
- Undisclosed Foreign Funding to Influence Political or Governance Issues



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Other: Judicial conflicts

> I'm aware of how my friend Judge ConnOolly does this in Delaware, and I don't think that's probably the best way. But I'll simply ask you, other than the parties to this litigation, is there any entity that is submitting financial aid and is going to share in the result, if successful?

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Other: Judicial conflicts

THE COURT: There's a reason behind this, which is, I think it was about 16, 17 months ago, the Wall Street Journal had a banner headline about judges hearing cases in which they have a financial interest. I think the financing group that was here last was something like Belvatier. And it turned out that they were in control of settlement and several other things. It turned out it was fine, because no one had ever heard of Belvatier, and Judge Zilly didn't have any concerns about having some interest in Belvatier.

On the other hand, I need to know that in order to make sure that I am not inadvertently hearing a case from some party that I may have -- you know, my best friend is the president of them; there are any number of options.

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Agenda

1. What Is Third-Party Litigation Funding?
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What Are the Efforts to Regulate?

- **Federal Rulemaking & Legislation**
  - Amending Initial Disclosures
  - Disclosure to U.S. International Trade Commission
  - Amending Tax Treatment
- **State Legislation**
  - Disclosure Rules
  - Limitations on Funder Control
  - Outright Prohibition
- **Court Rules & Rulings**

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Federal Rulemaking & Legislation: Rule 26

Proposed Amendment to Disclosures Under Fed. R. Civ. P. 26(a)(1)(A):

PROPOSED

> (v) the name, address, and telephone number of any nonparty individual or entity (other than counsel of record) that, whether directly or indirectly, is providing funding for the action and has a financial interest therein and, for inspection and copying as under Rule 34, any agreements or other documentation concerning the terms of the funding for the action or the financial interest therein.

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Federal Rulemaking & Legislation: ITC Disclosures

Notice of Proposed Rulemaking by the U.S. International Trade Commission:

PROPOSED

§ 210.14a Disclosure rule.

(a) Each nongovernment party to, or a nongovernment party who seeks to intervene, in a section 337 investigation shall file with the Secretary a disclosure statement that identifies:

(3) Any person or entity, not including counsel representing the party in the investigation:

(i) That provides funding specifically for the section 337 investigation, not including personal loan(s), bank loans, or insurance, or

(ii) Whose approval is necessary for litigation decisions or settlement decisions in the section 337 investigation, including the nature of the terms and conditions relating to that approval.

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Federal Rulemaking & Legislation: Transparency Act

Litigation Funding Transparency Act S. 3826, 119th Cong. (2026):

PROPOSED

- Disclosure of Funding Agreement
  - Class Actions
  - Multi-District Litigations
  - Coordinated Federal Proceedings
- Prohibition on Funder Control
- Disclosure of Foreign Funder



S. 3826

IN THE SENATE OF THE UNITED STATES

A BILL

To amend title 28, United States Code, to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Litigation Funding Transparency Act of 2026".

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Federal Rulemaking & Legislation: Taxation

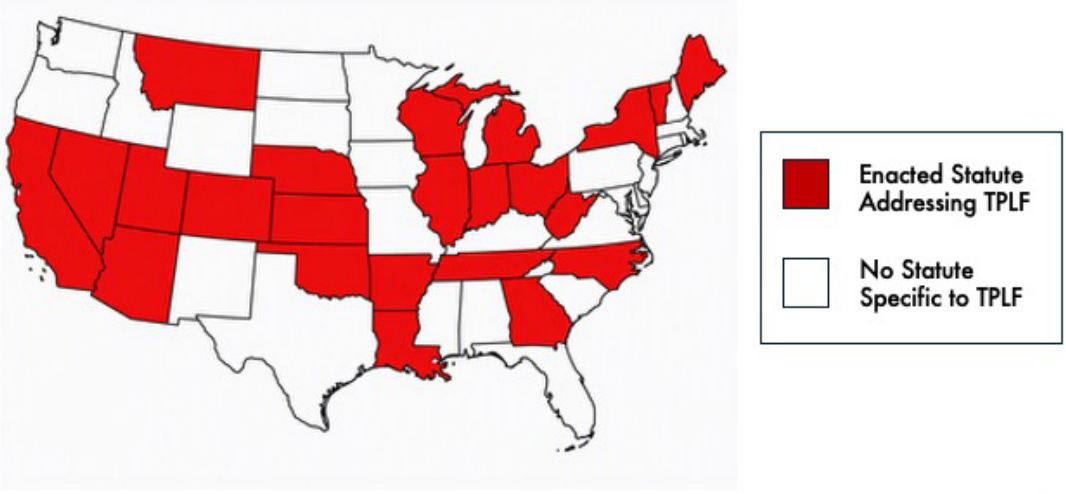
Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025):

PROPOSED

> **(a) Withholding of tax on litigation proceeds**
>
> Any applicable person having the control, receipt, or custody of any proceeds from a civil action (by settlement, judgment, or otherwise) with respect to which such person had entered into a litigation financing agreement shall deduct and withhold from such proceeds a tax equal to 50 percent of the applicable percentage (as determined under section 5000E–1(b)) of any payments which are required to be made to a third party pursuant to such agreement.

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State Legislation: A Patchwork of Regulation



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State Legislation: A Patchwork of Regulation

North Carolina



- Outright **Ban**

Montana



- **Automatic Disclosure** of Funding & Agreements
- Cap on **Funder Recovery**
- Prohibits Funder Control
- Prohibits Certain **Foreign Funding**

New York



- **No Disclosure** of Funding Required
- Cap on **Funder Recovery**
- Cap on **Total Funding**
- Prohibits Funder Control

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Court Rules & Rulings

- Local & Court Rules
  - Northern District of California Local Rule: Limited disclosure of funder (not agreement).
  - Chief Judge Connolly, D. Del., Standing Order: Limited disclosure of funder and its role (not agreement).
- Ad-Hoc Judicial Rulings
  - In-Camera Disclosure
  - Discovery Motions: Disclosure granted ~40% of the time, mostly in patent context.

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Key Takeaways

- **Consider strategic opportunities** to use third-party litigation funding; it is not only a tool of the plaintiff's bar.
- **Be mindful of risks** that third-party litigation funding brings—whether plaintiff or defendant.
- **Stay updated** regarding the evolving efforts to regulate at the state and federal level.

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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.

Notable Cases

- Presented argument at the U.S. Supreme Court and secured a unanimous win in favor of the petitioner in Waetzig Halliburton Energy Services, Inc., concerning the meaning and application of FRCP 60(b).
- Co-lead trial counsel and lead appellate 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 aircraft, and then obtaining reinstatement of the verdict in the Ninth Circuit after the district court set it aside (as well as an order reassigning the case to a different district judge for post-verdict proceedings). The case was reported upon in Forbes, Reuters, MSN, the Seattle Times, World IP Review, Aviation Week, and various legal publications.
- Presented argument in the Fifth Circuit on behalf of lenders disputing Serta uptier transaction, securing reversal of bankruptcy court's judgment in closely watched contract dispute over meaning of "open market purchase."
- Lead counsel for two members of the Board of the National Credit Union, obtaining summary judgment in district court finding their termination to be unlawful and rejecting the government's constitutional arguments.
- 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.
- Lead counsel for Portuguese-held company in commercial dispute with Republic of Angola and GE, in federal court and international-arbitration proceedings under the LCIA and ICC Rules, concerning the termination of contracts worth more than $1 billion and seizure of property.
-

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)



Telematics: Blessing or Curse?

Lee Hollis
Lightfoot Franklin & White (Birmingham, AL)

Telematics: Blessing or Curse?
Lee Hollis

More and more companies are installing telematics systems to track company vehicles, but the same technology that can prove a driver did nothing wrong can also be used as powerful evidence of liability. In this article, Lee Hollis will draw on his experience defending telematics cases to explore the technology's capabilities, benefits, and pitfalls, as well as legal implications companies should consider before implementation.

Introduction to Telematics Technology
The term telematics refers broadly to the "integration of telecommunications and informatics for intelligent applications in vehicles, such as fleet management."[1] In fleet operations, GPS-enabled devices and related sensors can transmit information about vehicle location and operation to a centralized platform. As telematics technology has evolved, its applications have expanded beyond electronic logging devices to encompass on-board diagnostic systems, driver-behavior monitoring tools, and vehicle-tracking technologies. The technology can track everything from vehicle location to speed to hard braking and acceleration to a driver's focus on the road.

For litigators and risk managers, the central point is that telematics creates an objective record of driver behavior. That record can help establish what happened in a collision, but it can also show what an employer knew about safety problems and whether it responded.

The Legal Framework: Negligent Hiring, Training, Supervision, and Entrustment
Negligent hiring, training, supervision, retention, and entrustment claims seek to impose liability on an employer for its own failure to use reasonable care in selecting, qualifying, training, monitoring, retaining, or entrusting a vehicle to an unsafe driver. Jones Express, Inc. v. Jackson, 86 So. 3d 298, 305 (Ala. 2010) ("Implicit in the tort of negligent hiring, retention, training, and supervision is the concept that, as a consequence of the employee's incompetence, the employee committed some sort of act, wrongdoing, or tort that caused the plaintiff's injury."). Federal regulations independently require carriers to maintain driver qualification files, conduct annual reviews of each driver's record, and consider evidence that the driver has violated any applicable FMCSR. 49 C.F.R. §§ 391.25, 391.51. That means telematics evidence of such violations is relevant not only to litigation but also to the carrier's existing regulatory obligations. These theories matter because they extend the case beyond the driver's direct negligence and ask what the company knew, what it should have known, and what it did (or failed to do) in response. See Remediation Res., Inc. v. Balding, 281 Ga. App. 31 (2006) (lack of driving policies and driver-history files supported negligent-training and supervision claims).

Telematics makes those questions concrete. Systems may assign driver safety scores and send alerts or emails to supervisors when they detect speeding, hard braking, distraction, or other dangerous behavior. A plaintiff's lawyer can use that record to argue that the employer knew (or should have known) the driver was unsafe and failed to coach, retrain, discipline, or remove the driver. Conversely, evidence that the company reviewed the data and took reasonable action can support a showing of due care.

Discoverability of Telematics Data
Telematics data is generally discoverable as electronically stored information, subject to relevance and proportionality. Fed. R. Civ. P. 26(b)(1), 34(a)(1)(A). Requests commonly seek data from the accident period, driver scorecards, alerts, and the policies governing the system. Courts have ordered production of telematics and ELD data when it bears on vehicle movements or operation. Smith-Percival v. MTA Bus Co., 232 A.D.3d 928 (N.Y. App. Div. 2024) (court ordered production of GPS records relevant to the accident's location and timing). Evidence of safety violations, GPS records,

1 National Highway Traffic Safety Administration, Cybersecurity Best Practices for the Safety of Modern Vehicles, U.S. Department of Transportation, 19 (2020), https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/vehicle_cybersecurity_best_practices_01072021.pdf.

dispatch records, and other electronic data is relevant in federal commercial vehicle cases involving negligent employment claims. Pate v. Royal Trucking Co., No. 7:13-cv-02306-HGD, 2014 U.S. Dist. LEXIS 201722, at *9-*13 (N.D. Ala. May 19, 2014) (holding such evidence relevant).

Courts differ on scope. Some judges impose reasonable limitations tied to the vehicle, driver, and a period before and after the accident. Others order production of everything sought, particularly when the data bears on negligent hiring, training, supervision, or entrustment. Proportionality and a defensible time-period limitation therefore matter, but a company should not assume that fleet-wide or historical data will be excluded. J.S.H. ex rel. Flores v. Ben E. Keith Co., 2013 WL 1704925 (D. Kan. April 19, 2013) (holding that six months of driver logs was overly broad and one week was sufficient to assess fatigue, but two years was reasonable for FMCSR/SMCSR violation records).

In Bramlett v. Hesselbein Tire Co., Inc., No. 7:22-cv-01315-ACA (N.D. Ala. 2023), Judge Annemarie Carney Axon granted the plaintiff's motion to compel and ordered the defendants to produce all Samsara telematics data on the driver for the six months before the accident, while noting that earlier Samsara data might also be ordered. When the defendants represented that pre-April 2022 data stored on the prior telematics system was unavailable, the court required an affidavit from the prior vendor attesting to that unavailability. The order, attached as Exhibit A to this paper, illustrates how a court can impose a defined scope while still requiring meaningful production. Data maintained by a third-party telematics provider is likewise ordinarily within the operator's possession, custody, or control when the operator can access it through a contractual dashboard. Tomlinson v. El Paso Corp., 245 F.R.D. 474, 476 (D. Colo. 2007) ("Control comprehends not only possession, but also the right, authority, or ability to obtain the documents.") (internal citations omitted).

Spoliation is a separate risk. Once litigation is reasonably anticipated, often immediately after a serious accident, the company should preserve relevant telematics data, suspend auto-deletion, and issue a litigation hold to the responsible custodians and providers. See, e.g., 3M Innovative Props. Co. v. Tomar Elecs., No. 05-756 MJD/AJB, 2006 U.S. Dist. LEXIS 80571, at *23 (D. Minn. July 21, 2006) (recognizing the need to institute a "litigation hold" upon receiving notice of litigation to ensure the preservation of relevant information and materials). Failure to preserve readily available data can lead to sanctions or adverse inferences. Willis v. Indiana Harbor Steamship Co., LLC, 790 N. W.2d 177, 184 (Minn. Ct. App. 2010) ("disposal of evidence may be subject to a spoliation sanction when a party knows or should know that the evidence should be preserved for pending or future litigation."); Cowan Systems, LLC v. Collier, 361 Ga. App. 823 (2021) (failure to preserve OmniTRAC GPS data supported a spoliation motion where the data was important to speeding and HOS claims).

Admissibility of Telematics Evidence

The usual foundation begins with Federal Rule of Evidence 901. A provider representative, fleet manager, or other knowledgeable witness can explain how the system collects, stores, and reports information, or the proponent can use system or process evidence under Rule 901(b)(9). Telematics records are often offered under the business-records exception because they are captured contemporaneously in the ordinary course of operations. Fed. R. Evid. 803(6). Courts also sometimes recognize a machine-generated-evidence theory: data produced entirely by automated sensors may not be a human statement and may require authentication without a separate hearsay foundation. See United States v. Lizarraga-Tirado, 789 F.3d 1107, 1109 (9th Cir. 2015) ("A tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay.").

Telematics as Evidence of Fault

A plaintiff's lawyer can use telematics as direct evidence of fault when it shows excessive speed, hard braking or failure to brake, unsafe following distance, erratic maneuvers, a failure to stop, or hours-of-service violations. Driver safety scores and recurring events can make the data more persuasive by showing that the incident was not isolated. Telematics paired with video can give a jury a vivid account of the seconds before a crash. DND Int'l, Inc. v. Fed. Motor Carrier Safety Administration, 843 F.3d 1153, 1155-56 (7th Cir. 2016) (compliance review after a crash found hours-of-service violations, falsified duty-status logs, and similar violations by other company drivers).

The same evidence can support negligent hiring, training, supervision, retention, or entrustment. Repeated alerts, poor scores, or patterns of unsafe behavior may show that the employer knew or should have known of a risk and failed to act. The plaintiff's narrative is strongest when company policies promise active monitoring but the records show little coaching, retraining, discipline, or follow-through. That gap can also support arguments framed around corporate indifference, and punitive damages. James v. Kelly Trucking Co., 377 S.C. 628, 629, 661 S.E.2d 329 (S.C. 2008) (negligent hiring, training, and supervision claim allowed to proceed alongside a vicarious liability claim based on the driver's

poor driving record); In re Sun Coast Res., Inc., 562 S.W.3d 138 (Tex. App. 2018) (plaintiffs generally entitled to discover evidence of a defendant's safety policies and practices as they relate to the circumstances involved in their allegations). In California, by contrast, an employer's admission of vicarious liability for the driver's negligence ordinarily bars separate negligent-entrustment, hiring, and supervision claims, but that bar does not extend to punitive damages. Where a viable punitive-damages claim is at issue, evidence of the employer's safety failures—including telematics records—remains admissible under Diaz v. Carcamo, 253 P.3d 535, 544 (Cal. 2011) and CRST, Inc. v. Superior Court, 218 Cal. Rptr. 3d 664, 672 (2017).

The practical question is not merely whether the company collected the information. It is whether the company used it consistently and can explain the response to significant events.

Telematics as Evidence Negating Fault and Supporting Due Care

Telematics can negate fault by showing that the driver was traveling at a reasonable speed, maintaining a safe following distance, braking appropriately, and otherwise operating safely when the accident occurred. Objective contemporaneous data may corroborate the driver's account, undermine an inaccurate eyewitness description, and shift the fault analysis to another actor. It can also be used briefly but effectively to impeach testimony that conflicts with the recorded events. Ren Yao v. World Wide Travel of Greater N.Y., Ltd., 226 A.D.3d 838 (N.Y. App. Div. 2024) (speed data from vehicle data modules demonstrated that it was physically impossible for the tractor-trailer to have caused the accident as alleged; summary judgment was granted for defendant). The data may also support due care by showing that the employer monitored drivers, reviewed safety scores and alerts, coached or retrained drivers, and imposed discipline when appropriate. The strongest record shows a closed loop from detection to review to documented action. Collecting data alone is not enough, but a consistent program can rebut negligent-supervision claims and show that the company responded reasonably to known risks.

Practical Considerations

Before implementation, companies should understand what these systems can capture, what safety scores are generated, how long the data is retained, and how auto-deletion operates. Usually, the systems can be customized so that each company can determine exactly what features it wants to utilize. It is important to make a conscious decision of what features to utilize and then to have policies in place to ensure that the information is reviewed and acted upon. Retention policies should be reasonable, documented, consistently applied, and coordinated with any regulatory requirements. When a serious incident occurs, counsel should promptly preserve the relevant data and issue a litigation hold before it is overwritten.

Telematics is a double-edged sword. It can identify unsafe conduct, reduce accidents, and demonstrate due care, but it can also be a powerful tool to establish liability. A company that deploys the technology should commit to reviewing the data and documenting reasonable responses. Collecting safety information and ignoring it can create more litigation risk than having no system at all.

Defending Your Driver:

Pros and Cons of Telematics in Service and Litigation

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What is Telematics?

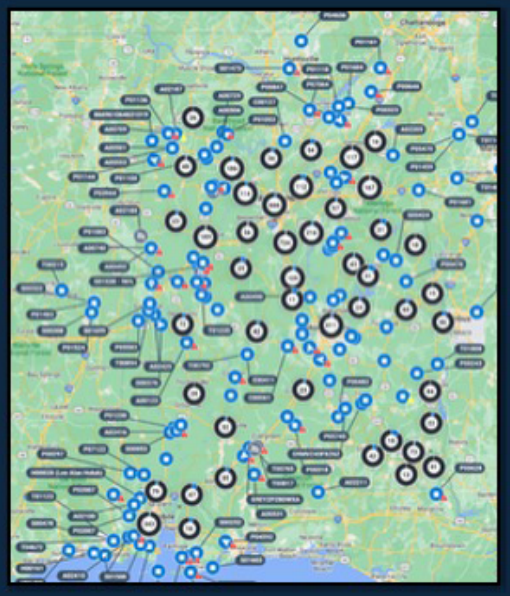
Telematics is a method of gathering data from our vehicle and equipment assets.

Uses GPS technology and on-board diagnostics (OBDII and J-1939) to capture and report on:

- Location, speed, heading
- Trip history
- Collision reconstruction
- Harsh event data
- Engine/vehicle status
- Seat belt use
- Mounted equipment use

Telematics data used for:

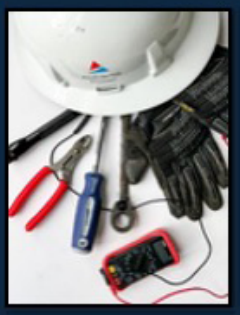
- Maintenance modernization
- Risk claims
- Security investigations
- Safety visibility
- Compliance
- EV home-charging
- Fleet optimization

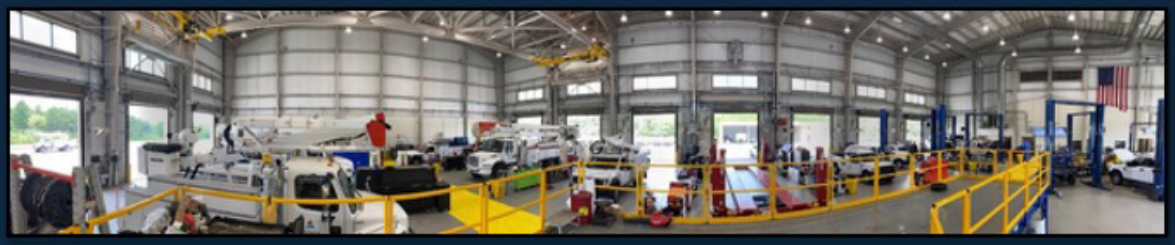


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Maintenance Modernization

- Real-time visibility of vehicle usage metrics
- Live diagnostics and remote troubleshooting
- Calendar-based → Usage-based maintenance
- Exploring predictive maintenance and AI insight

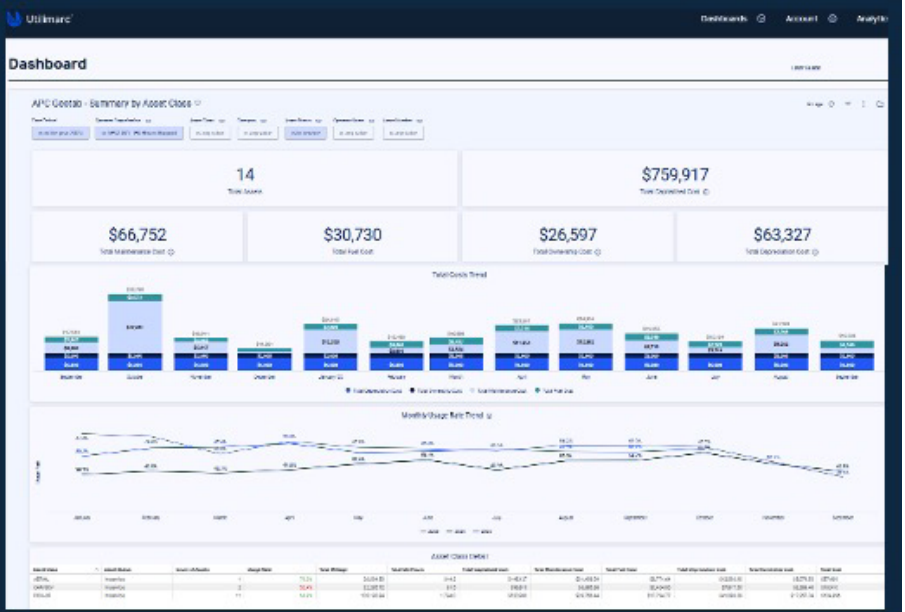




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Fleet Data Analytics

- Real-time usage insight
- Cost analysis
  - Maintenance
  - Damage
- Fuel reporting
- Life cycle optimization
- Fleet right-sizing



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Driver Safety Reporting



- Reports only show speeds at an excessive level over the posted limit and for a specified time duration
- The report also captures information if a vehicle is traveling at a pre-determined maximum speed
- Non-seat belt use will appear on reports when the drivers side seat belt is not connected, and the vehicle is being driven at a pre-determined speed

Driver Sign-in

Signing into a vehicle before driven enables accurate crash notification details and allows drivers to have access to their information



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External Video Capture



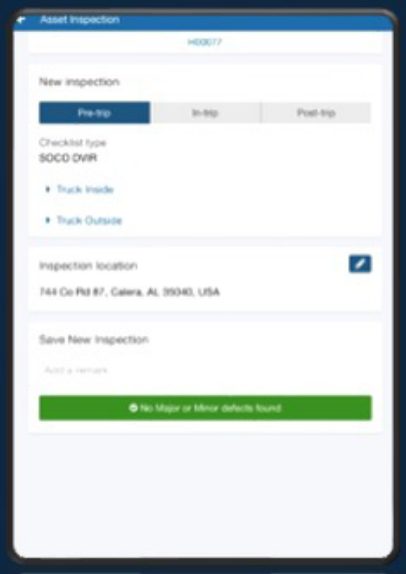
- Event-based video capture
- Driver-initiated capture
- External video only
  - Front and rear cameras on light vehicles
  - 360-degree capture on heavy vehicles

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Daily Pre-Operational Inspection Compliance

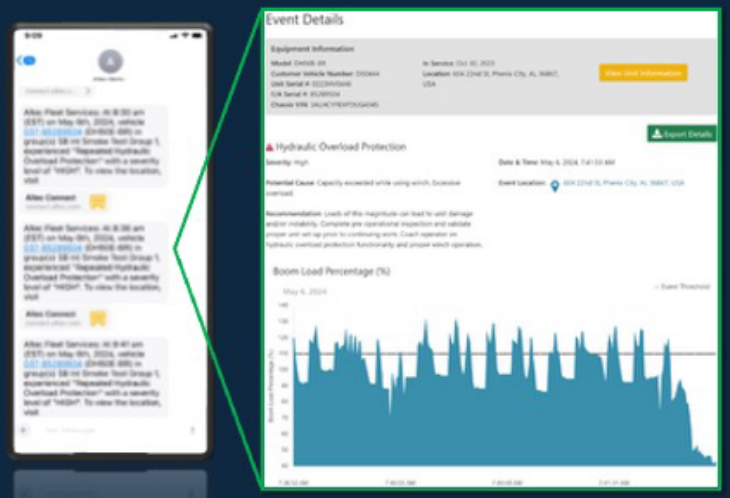
- Connected electronic daily inspections ensure:
  - Safety
  - Compliance
  - Reliability
  - Communication
- In-cab reminders and notifications

Geotab Drive



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Mechanized Equipment Safety



- Event-based notifications
- Real-time feedback to the field
- Employee safety and coaching
- Equipment reliability

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Telematics Data: A Double-Edged Sword in Litigation

A **tool** to vindicate the driver

A **weapon** to attack the company

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Specific Data Points That Clear the Driver

Pre-Crash Speed Data

Vehicle speed in 1-second increments (typically 5–10 seconds before impact).



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Specific Data Points That Clear the Driver

Brake Application & Timing

Exact millisecond the brake pedal was pressed and the corresponding brake pressure.

Azuga alert ([redacted] **Hard Braking Alert**) has been triggered for the following vehicle.

Vehicle	: 2568
Driver	: [redacted]
Braking Type	: Hard Braking
Initial Speed	: 20 MPH
Final Speed	: 2 MPH
Event Time	: Feb-21-2024, 09:54:56 AM CST
Address	: 204 Pineview Ave, Gadsden, AL 35905, USA
Latitude,Longitude	: Map it
Group	: Birmingham, AL

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Specific Data Points That Clear the Driver

Inward & Outward Facing Cameras

Dual-facing video capturing the driver's behavior and the road scene — recording the full sequence of events before, during, and after impact.

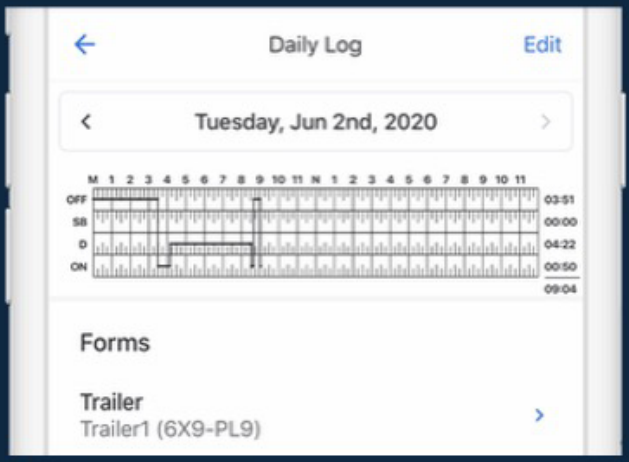


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Specific Data Points That Clear the Driver

Driver Logs & DOT Compliance

Time-stamped ELD records of driving hours, rest periods, pre-trip and post-trip inspections, and duty status changes.



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The Other Side of the Sword: How Plaintiffs Use Telematics Against You

Plaintiff's attorneys are increasingly sophisticated in weaponizing your own data.

- **Pattern-of-Negligence Mining**
  Plaintiff's attorneys request months of historical telematics data.
- **Negligent Supervision & Coaching Gaps**
  Attorneys seek to prove the company was aware a driver was flagged as "high-risk" but took no corrective action.
- **Data You Don't Monitor Still Hurts You**
  Willful ignorance of available data can be worse than not having it at all.



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Legal Implications

Negligent Training/Supervision Claim:

(1) The employee committed a tort;

(2) The employer had actual or constructive notice of the employee's incompetence or unfitness for the position;

(3) The employer failed to adequately respond to the notice.

Restatement (Second) of Agency § 213

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

...

(c) in the supervision of the activity.

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Legal Implications

Plaintiff's attorneys know this data exists.

17. All reports generated by the engine control module and/or GPS systems with which [redacted]'s truck pick up was equipped.

23. Produce all documents concerning or reflecting the electronic equipment onboard the subject commercial vehicle that you were operating on the day of the incident giving rise to this Complaint. This request includes, but is not limited to:

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Legal Implications

Ammunition for negligent entrustment and negligent training/supervision claims

and he was either distracted, poorly trained, etc.).[30] In reality, it was unsafe driving (speeding and a lack of attention) coupled with poor supervision and training that caused this wreck, all issues to which the driver data requested by Plaintiff speaks

construction zone down a street he could not see? Such *blatant incompetence* and/or an *egregious lack of training* would be clearly relevant to the Plaintiff's negligent employment claims – particularly if he showed signs of past unsafe driving.

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Key Issues: What Data is Available?



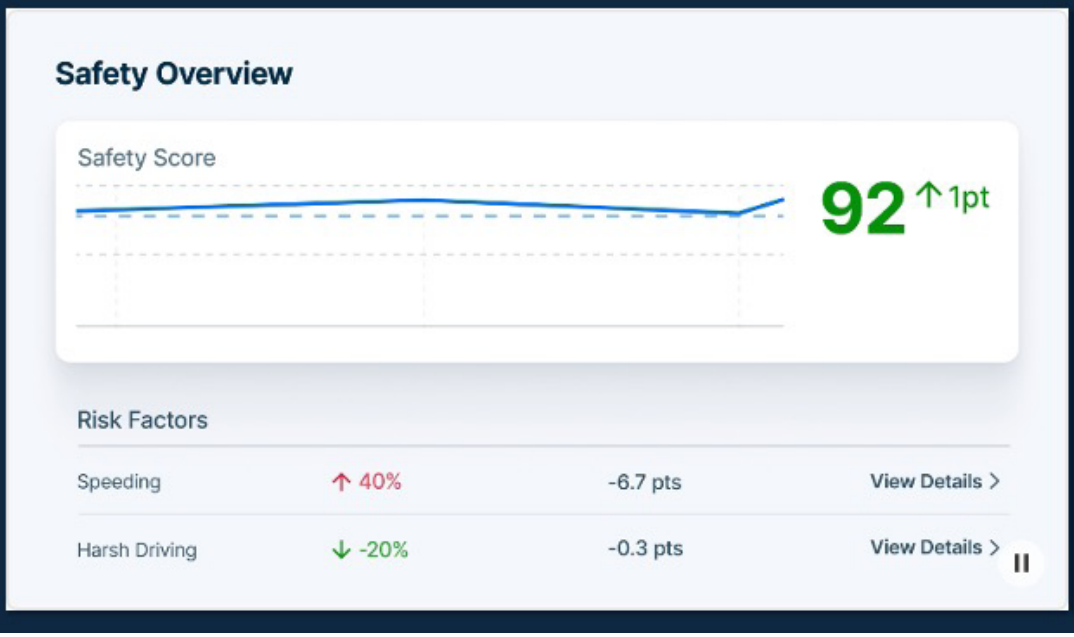
Know what types of data your system captures.

Potential Data Types:

- **Older software**
  - GPS location
  - Engine status (on/off)
  - Battery voltage
  - Heading
  - Distance/time of trip
  - Speed
- **Newer software** on the market
  - Increased accuracy of GPS data
  - Harsh event data
    - Aggressive acceleration
    - Harsh breaking
    - Harsh turns or cornering
  - Collision reconstruction and notification
  - "Inward/outward" facing cameras

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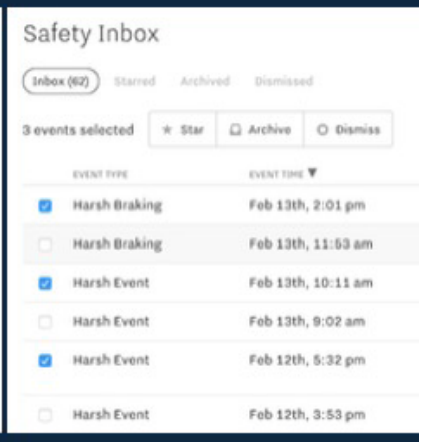
Key Issues: What Data is Available?



Key Issue: Is Data Being Monitored?







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Legal Implications

[redacted] — Safety Dashboard ☆

Safety Score Apr 1 - Sep 26

This Period: 0 ↓100 pts

Previous Period: N/A

Distance Driven	Time Driven	Coaching Sessions	Total Behaviors	Repeat Be
29,296 mi	510h 19m	0	134	128

Understand Your Score

The Safety Score is a grade out of 100. This is broken down into seven Risk Factors, so you can clearly see what is driving your overall score. Risk Factors accumulate negative points which lower your Safety Score.

Your Safety Score Configuration Settings will impact the weight of each Risk Factor and how this number is calculated.

Max Score	100
Crash	-6.1
Harsh Driving	-6.1
Distracted Driving	-4.9
Collision Risk	0
Traffic Signs & Signals	0
Speeding	-113.4
Policy Violations	0
Safety Score	0

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Key Issue: What Is the Company Doing with the Data?

What are your policies for supervision, coaching, and corrective action?

Are those policies being put into practice?

Time	Vehicle	Event	Status	Assigned Coach
Apr 27, 2022 1:51 PM CDT	Truck #36	INATTENTIVE DRIVING (R)	NEEDS REVIEW	Unassigned
Apr 27, 2022 12:10 PM CDT	Truck #36	INATTENTIVE DRIVING (R)	NEEDS REVIEW	Unassigned
Apr 27, 2022 11:17 AM CDT	Truck #36	INATTENTIVE DRIVING (R)	NEEDS REVIEW	Unassigned
Apr 26, 2022 12:21 PM CDT	Truck #36	INATTENTIVE DRIVING (R)	NEEDS REVIEW	Unassigned
Apr 26, 2022 12:20 PM CDT	Truck #36	INATTENTIVE DRIVING (R)	NEEDS REVIEW	Unassigned
Apr 26, 2022 4:53 PM CDT	Truck #36	INATTENTIVE DRIVING (R)	NEEDS REVIEW	Unassigned

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Key Takeaways

Know what kind of data you have

Determine how it is being monitored

Review policies on driver supervision; coaching

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Lee M. Hollis

Partner | Lightfoot Franklin & White (Birmingham. AL)

Over the course of 25+ years of practice, Lee Hollis has learned how to be Trial Tough and Solution Savvy®. Clients come to Lee because he is a problem-solver. Some of those problems can be solved through negotiation; others require motions, trials and appeals. Lee works with clients to determine their goals for each matter and develops a strategy to achieve them in the most efficient manner.

After successfully trying numerous product liability, personal injury and commercial cases to verdict and resolving countless more through motion practice or settlement in jurisdictions across the country, Lee has learned that if a client wants to settle a case short of trial, the best way to achieve the most favorable settlement is to be represented by an attorney with the experience, reputation and ability to take the case to trial. A credible trial threat gives the client a stronger position in settlement negotiations and the ability to take the case to trial when it can't be resolved. Too often, clients hire litigators who are happy to work a case up and settle it. When opposing counsel knows that attorney can't or won't try the case, they use that to extract a higher settlement or to obtain a large verdict at trial. The best way to prevent that situation is to hire a lawyer who is ready, willing and able to try the case if necessary.

Lee uses that Trial Tough and Solution Savvy® experience to put together the right team with the right experience and skill set needed for each case. That approach gives him leverage to negotiate favorable results for the client. But when negotiations fail, he is ready to take the case to trial and, if necessary, appeal.

Practice Areas

- Commercial Litigation
- Catastrophic Injury
- Product Liability
- Class Actions
- Corporate Plaintiff's Litigation
- Pharma & Medical Device
- Commercial Transportation

Awards

- Benchmark Litigation, "Local Litigation Star" — General Commercial, Personal Injury, Wrongful Death (2018-21), Product Liability (2020)
- Benchmark Litigation, "Litigation Star" (2022-24)
- Benchmark Litigation, "Future Star" (2011-17)
- The Best Lawyers in America© by BL Rankings, "Lawyer of the Year" for Birmingham — Personal Injury Litigation (2027)
- The Best Lawyers in America© by BL Rankings — Commercial Litigation, Personal Injury Litigation, Product Liability Litigation (2013-27)
- Chambers USA, "Leading Lawyer" for Litigation (Alabama)
- Martindale-Hubbell®, A-V Rating
- Mid-South Super Lawyers by Thomson Reuters — Personal Injury (2010-26)

Education

- Vanderbilt University Law School (J.D.)
- Washington & Lee University (B.S., cum laude)



From Cost Center to Revenue Generator: Strategies for In-House Legal Departments

Michelle Byers
Campbell Conroy & O'Neil (Boston, MA)

From Cost Center to Revenue Generator: Strategies for In-House Legal Departments
Michelle M. Byers

The legal department's most important wins are often events that never occur: a class never certified, a penalty never imposed, a profit margin never lost, or a license never surrendered. Yet leaders have long treated in-house counsel as overhead. That view is inaccurate. Legal departments are strategic contributors to revenue, profit margins, and corporate value. The challenge is to articulate the legal department's value in concrete financial terms.

This article presents four ways in-house counsel create measurable corporate value: preserving cost through litigation; protecting profit margins through contracts; preventing losses through compliance; and generating revenue through intellectual property. None makes legal departments a primary profit center. Each, however, can reposition the department from a cost center to a revenue generator when tracked and communicated effectively.

Litigation as Value Preservation
Litigation is the most visible setting in which legal departments protect business value, and the stakes are rising. Norton Rose Fulbright's 2025 Annual Litigation Trends Survey, based on responses from more than 400 general counsel and in-house litigation leaders, found that nearly half of corporate counsel expect the number of lawsuits and regulatory investigations to increase. Companies with more than $1 billion in revenue reported average litigation spending of $4.3 million in 2024, up from $3.9 million the prior year, while 56% said pretrial settlements had become more difficult.[1]

Those figures show why early case assessment and strategic action matters: counsel must evaluate merits, exposure, and resolution cost before a matter generates substantial outside-counsel fees. For example, identifying a jurisdictional issue at the outset can reduce unnecessary discovery, extract the company from unfavorable jurisdictions, and change the economics of defense and settlement before costs compound. Likewise, evaluating whether to package cases together for group settlement rather than defend on a case-by-case basis can limit the cost of outside counsel and the risk of multiple verdicts against the company. For the legal department seeking to build its value narrative, useful litigation-based measures include early case assessment, tracking the difference between initial demand and settlement, and outside-counsel performance against budget. Each translates a legal result into financial terms to create overall corporate value.

Contracts as a Tool to Protect Profit
If litigation is the legal department's most visible cost, contract management is its most pervasive. Procurement, sales, partnerships, and licensing all depend on contracts drafted or negotiated by legal departments. World Commerce & Contracting (WorldCC) found that poor contracting practices reduce annual revenue by an average of 8.6%, with the worst performers losing 15% or more.[2]

Contract management can be a blind spot for many organizations. A 2025 KPMG Law survey found that only 22% of U.S. organizations maintain one reliable central contract record;[3] data often are spread across numerous systems, and nearly 90% of business users find contracts difficult to understand.[4] WorldCC likewise reports that only 16% of commercial practitioners believe negotiations address the right issues and only 39% believe contracts deliver intended results.[5]

1 Norton Rose Fulbright, "2025 Annual Litigation Trends Survey," Jan. 2025, https://www.nortonrosefulbright.com/en/knowledge/publications/cc043475/2025-annual-litigation-trends-survey.

2 World Commerce & Contracting, "Contract Management: An Overlooked Driver of Business Agility and Financial Performance," Aug. 2025, https://info.worldcc.com/contract-management-aug-2025.

3 KPMG Law US, "The future of legal operations," 2025, https://kpmglawus.com/us/en/articles/the-future-of-legal-operations.html.

4 World Commerce & Contracting, "Contract Management: An Overlooked Driver of Business Agility and Financial Performance," Aug. 2025, https://info.worldcc.com/contract-management-aug-2025.

5 World Commerce & Contracting, "Contract Management: An Overlooked Driver of Business Agility and Financial Performance," Aug. 2025, https://info.worldcc.com/contract-management-aug-2025.

For in-house counsel, these findings represent both a problem and an opportunity. Legal departments that invest in contract management—standardized playbooks, clause libraries, AI-assisted review, and structured obligation tracking—can transform contracts from static legal documents into key agreements that protect a business's profits. Benefits include reducing contract cycle time, which can accelerate revenue; capturing auto-renewal and price-escalation obligations that would otherwise lapse; and negotiating liability caps and indemnification structures to reduce overall exposure to the company—all of which increase the legal department's value to the business.

The Value of Compliance

Corporate compliance is difficult to measure because its greatest successes are largely unadvertised: the investigation never opened, penalty never imposed, or consent decree never entered. Federal enforcement policy nevertheless makes the value of compliance more concrete.

The Department of Justice's Criminal Division encourages voluntary self-disclosure of potential wrongdoing at the earliest possible time. The Department of Justice's Corporate Enforcement and Voluntary Self-Disclosure Policy, updated through 2025 memoranda, links proactive compliance and reporting to measurable financial outcomes.[6] A company that voluntarily reports misconduct, fully cooperates, and promptly remediates may receive a presumption of declination. Even without a declination, the framework contemplates a non-prosecution agreement lasting fewer than three years, no independent monitor, and a 50%–75% penalty reduction from the low end of the Sentencing Guidelines fine range.[7]

A credible reporting system, prompt investigations, board-level disclosure analysis, and remediation aligned with DOJ expectations are therefore measurable protection. Legal departments can estimate the regulatory cost avoided against the relevant Sentencing Guidelines fine range and report that value to business leaders.

The exposure is growing: Norton Rose Fulbright reported average regulatory proceedings of 4.4 per respondent in 2024, up from 3.9 the prior year.[8] Against this backdrop, the legal department that demonstrates a track record of early detection, rapid escalation, and penalty mitigation enhances the business's bottom line.

Intellectual Property as a Source of Revenue

Intellectual property is the clearest area in which a legal department can function as a literal profit center. For companies with meaningful patent, trademark, copyright, or trade-secret portfolios, a legal department's work in protection and monetization can generate revenue directly. Case law supports this point. Harper & Row Publishers, Inc. v. Nation Enterprises offers an example of how legal protection of rights and licensing windows preserves actual revenue streams. When The Nation published verbatim unauthorized excerpts from President Ford's unpublished memoir, Time magazine canceled its projected $12,500 payment to the publisher for exclusive access to excerpts of the memoir.[9] The Supreme Court upheld the trial court's finding of actual damages, holding that the unauthorized publication constituted copyright infringement and that the lost licensing revenue was a direct, compensable harm.[10]

The Federal Circuit's jurisprudence provides the analytical framework for patent damages. Under State Industries v. Mor-Flo, Rite-Hite Corp. v. Kelley Co., and Brumfield v. IBG LLC, patent damages compensate the patentee for financial loss caused by infringement, with a floor of no less than a reasonable royalty—defined as the value of the use of the patented technology that the licensor and licensee would bargain for in a hypothetical negotiation. Lost profits may be available where the patentee can demonstrate it would have made the infringer's sales but for the infringement.[11] For in-house IP counsel, these principles underscore that diligent patent prosecution, licensing discipline, and enforcement strategy are not cost centers; they are direct investments in revenue protection and generation.

The Value Narrative

These strategies matter only if the department can explain them. KPMG Law found that only 30% of non-legal U.S. executives view legal as a critical partner.[12] This figure shows the importance of communicating value. For each of the four ways in which the legal department can create value, build a narrative around four elements: the baseline without the legal department's involvement; the intervention; the measurable financial outcome; and the operating model that can be repeated and expanded. These four elements can assist the business in understanding the important role of the legal department

6 U.S. DOJ Criminal Division, "Criminal Division Corporate Enforcement," https://www.justice.gov/criminal/criminal-division-corporate-enforcement; DOJ Corporate Crime, "Voluntary Self Disclosure and Monitor Selection Policies," https://www.justice.gov/corporate-crime/voluntary-self-disclosure-and-monitor-selection-policies.

7 U.S. DOJ Criminal Division, "Criminal Division Corporate Enforcement," https://www.justice.gov/criminal/criminal-division-corporate-enforcement; DOJ Corporate Crime, "Voluntary Self Disclosure and Monitor Selection Policies," https://www.justice.gov/corporate-crime/voluntary-self-disclosure-and-monitor-selection-policies.

8 Norton Rose Fulbright, "2025 Annual Litigation Trends Survey," Jan. 2025, https://www.nortonrosefulbright.com/en/knowledge/publications/cc043475/2025-annual-litigation-trends-survey.

9 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

10 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

11 Brumfield v. IBG LLC, 97 F.4th 854 (Fed. Cir. 2024); Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538 (Fed. Cir. 1995); State Indus. v. Mor-Flo, 883 F.2d 1573 (Fed. Cir. 1989).

12 KPMG Law US, "The future of legal operations," 2025, https://kpmglawus.com/us/en/articles/the-future-of-legal-operations.html.

as a revenue generator.

Recommendations

A legal department can be considered a profit center if it operates as one. The following recommendations provide a starting framework:

Track litigation value, not just cost. Measure changes in reserves, early-case-assessment time, the gap between initial demand and settlement, and outside-counsel performance against budget. Report these as savings to the company.

Treat contracts as profit-protection tools. Use lifecycle management, standard playbooks, and obligation tracking. Measure timing, losses avoided, and renewal value captured.

Measure compliance and reporting value against enforcement benchmarks. Compare compliance programs with DOJ self-disclosure and cooperation frameworks, and report to the business a value estimate tied to specific Sentencing Guidelines fine ranges.

Manage IP as a revenue-generating asset. Review IP portfolios regularly, identify licensing and enforcement opportunities, and track licensing revenue and prosecution costs against IP portfolio value.

Build and communicate the value narrative. For every major initiative, document the baseline, intervention, outcome, and repeatable operating model. Share with business leaders the value preserved by good legal work, revenue generated, and profits protected.

The legal profession has long assumed that good lawyering speaks for itself. In today's corporate environment, that is no longer enough. In-house counsel who translate their work into measurable business results will protect their budgets and earn the strategic seat at the table that that today's businesses require.



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Michelle M. Byers

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Michelle focuses her practice on a wide range of civil litigation matters, defending the firm's clients in product liability, premises liability, and personal injury/negligence matters, and has particular experience in the automotive industry.

She has experience in both state and federal courts around New England representing a wide range of national corporations and insurance companies in complex matters involving multiple parties, as well as small businesses and individuals in general liability disputes.

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

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

Industries
- Automotive
- Insurance Defense
- Construction Industry Litigation

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

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

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



Risk Transfer in Action: The Canton Mill Story

Mary Katherine Stukes
Moore & Van Allen (Charlotte, NC)

Risk Transfer in Action: Legal Lessons from the Sale of the Canton Mill
Mary Katherine Stukes

For more than a century, the pulp and paper mill in Canton, North Carolina, anchored the economy of Haywood County. The mill was established in 1908.[1] In May 2023, Pactiv Evergreen abruptly stopped papermaking there and laid off about 1,200 workers.[2] The later planned sale of the site to a demolition and redevelopment buyer was structured to shift a legacy industrial property, and its risks, to a party with remediation experience.[3] Then, an unexpected natural disaster struck days before closing. The litigation and resolution that followed offer important practical lessons for lawyers regarding environmental liability transfers and the use of risk-management tools such as insurance and brownfields protection.

The Transaction: Selling a Legacy Site "As Is"
Blue Ridge Paper Products LLC, a Pactiv Evergreen subsidiary, was the latest in a series of owners of the mill.[4] It agreed to sell the site to Two Banks, an entity affiliated with Missouri-based Spirtas Worldwide, a demolition and redevelopment company.[5] The sale covered the mill site, other associated Pactiv properties in Haywood County (including a wastewater treatment facility, a landfill, a lake, and an associated dam), and any remaining equipment.[6] Together, those assets were most recently valued at $239 million on the county tax rolls.[7] Leading up to the contract, more than 30 prospective buyers showed interest. The seller chose Spirtas because of its expertise in cleaning up and remediating abandoned industrial plants.[8] Pactiv Evergreen described the deal as a "fully negotiated and legally binding agreement" to acquire the site "as is."[9]

Choosing a buyer for its remediation capability is a common way to manage legacy liability for historic industrial assets like the Canton Mill. Here, though, the site carried continuing operational and regulatory obligations that made the transfer harder. Even after the mill closed, the seller kept running a wastewater treatment facility that had served the Town of Canton since 1964. It also kept operating a landfill and a dam on Lake Logan.[10] The seller was obligated to clean up black liquor seepage into the Pigeon River under a consent order with the USEPA. In other words, Pactiv's presence in the Town had continued after the mill ceased operations—an environment in which Spirtas was expected to act as steward going forward. The lesson is that when a seller's exit depends on a buyer taking over permits and public-service obligations, the buyer's regulatory and community acceptability becomes a deal risk in its own right.

Hurricane Helene and the Litigation
The deal was set to close on September 30, 2024.[11] On September 27, Hurricane Helene (by then Tropical Storm Helene) devastated western North Carolina, significantly flooded the mill site and much of the Town of Canton.[12] Not surprisingly, the deal did not close on schedule. Blue Ridge Paper Products then sued Two Banks Development and E.J. Spirtas Group in the Delaware Court of Chancery.[13] It asked the court to order the sale to proceed and to award damages, attorneys' fees, and interest.[14]

The seller's theory rested on how the contract allocated

1 Lawsuit tries to force sale of Canton mill after buyer backs out, https://www.citizen-times.com/story/news/local/2024/10/15/sale-of-canton-mill-in-question/75670852007/#:~:text=The%20Canton%20pulp%20and%20paper%20mill%20was%20established%20in%201908, October 15, 2024.

2 Id.

3 Id.

4 Id.

5 Mill deal in limbo: In lawsuit, each side blames the other, https://finance.yahoo.com/news/mill-deal-limbo-lawsuit-side-045900552.html?guccounter=1, December 18, 2024.

6 Mill deal in limbo, supra n. 5.

7 Canton paper mill sale stalled by Hurricane Helene, legal action, https://wlos.com/news/local/canton-paper-mill-sale-stalled-by-hurricane-helene-legal-action-spirtas-pactiv-evergreen-plant-court-two-banks-corporation-zeb-smathers, October 24, 2024.

8 Lawsuit tries to force sale, supra n. 1.

9 Id.

10 Id.

11 Mill deal in limbo, supra n. 5.

12 Id.

13 Lawsuit tries to force sale, supra n. 1.

14 Id.

risk. Blue Ridge argued that the buyers had expressly assumed the risk that the site could be destroyed or damaged before closing. It also pointed out that the purchase agreement had no force majeure clause allowing a party to walk away because of a natural disaster.[15] The complaint alleged that the buyer "decided to exploit the weather tragedy as a new excuse for their anticipatory breach."[16] It also alleged that the buyer had said it needed an almost 50% cut in the purchase price to close.[17] News reports tied that price demand to a dispute with the Town over a wastewater treatment services contract.[18]

Two Banks counterclaimed. It alleged that Pactiv had breached the contract by failing to provide insurance as the agreement allegedly required and had not dealt in good faith.[19] The buyer said it had received no proof that the property was insured when Helene hit.[20] It also argued that insurance underwriting had stopped after the storm and asked for access to inspect the damage and for copies of the seller's insurance policies referenced in the agreement.[21] As Eric Spirtas put it, "to get insurance on the property, we need access."[22] Both sides relied on the purchase agreement, but each seemed to rely on different provisions of it.[23] Both parties moved to dismiss, but the court denied both motions and ruled that the dispute would go to trial.[24]

The case never reached trial. On January 10, 2025, Pactiv Evergreen announced that it had completed the sale to Spirtas Worldwide.[25] Spirtas described a plan to turn the site into "a hub of industrial, commercial and residential activity."[26]

Insurance Considerations

The Canton dispute shows that assigning casualty risk in a contract is only as reliable as the insurance behind it. The seller said the buyer had assumed the risk of loss before closing.[27] The buyer focused on whether the seller actually had the insurance the agreement required.[28] Several practical points follow:

- Tie risk-of-loss provisions to specific insurance obligations. Contracts should state what coverage the seller must keep until closing and whether the buyer gets proceeds or an assignment of the policy if loss occurs.
- Plan for underwriting freezes. Insurers can stop binding new coverage in a disaster area, as happened in the wake of Hurricane Helene.[29] A buyer that needs coverage in place at closing should build in the right to extend closing or obtain other protections for such a situation.
- Secure pre-closing access and inspection rights. The buyer's demand for access to assess damage was central to the dispute.[30]
- Coordinate with regulatory insurance requirements. The EPA Region 4 on-scene coordinator said Pactiv had to show proof of insurance under the EPA's administrative order governing the site cleanup. If that insurance had been canceled, the company would have had to notify the EPA.[31] A lapse in coverage can therefore create regulatory exposure as well as contract claims.

Environmental Liability Transfer

Environmental liability is not limited to the cost of cleaning up soil or groundwater. Under CERCLA, liability can be strict, joint and several, and retroactive, and can reach current and former owners and operators, arrangers, and transporters, subject to statutory defenses. State analogs may impose similar obligations; RCRA can require corrective action; and toxic-tort and other third-party claims, as well as natural resource damages, can create additional exposure. The result is a liability profile that may persist long after operations cease and may not be fully known at closing.

An environmental risk transfer transaction addresses that profile by having the buyer or other transferee contractually assume the seller's known and unknown environmental liabilities, including remediation costs, regulatory obligations, and third-party claims. The allocation is typically supported by indemnities, financial assurance, environmental insurance, and—where permits, cleanup orders, or public obligations are

15 Canton paper mill sale stalled, supra n. 7.

16 Id.

17 Id.

18 Mill deal in limbo, supra n. 5.

19 Id.

20 Id.

21 Canton paper mill sale stalled, supra n. 7.

22 Mill deal in limbo, supra n. 5.

23 Id.

24 Pactiv Evergreen completes sale of former Canton paper mill to Spirtas Worldwide, https://www.bpr.org/bpr-news/2025-01-10/pactiv-evergreen-completes-sale-of-former-canton-paper-mill-to-spirtas-worldwide, Jan. 10, 2025.

25 Paper mill in Canton sale is finalized after Helene delays, https://spectrumlocalnews.com/nc/charlotte/news/2025/01/13/canton-mill-redevelopment-#:~:text=%22Our%20vision%20is%20to%20breathe%20new%20life%20into%20this%20dormant%20site%2C%20transforming%20it%20into%20a%20hub%20of%20industrial%2C%20commercial%2C%20and%20residential%20activity%20that%20will%20benefit%20the%20town%20of%20Canton%20and%20strengthen%20commerce%20in%20the%20area%2C%22%20said%20Spirtas, Jan. 13, 2025.

26 Mill deal in limbo, supra n. 5.

27 Canton paper mill sale stalled, supra n. 7.

28 Mill deal in limbo, supra n. 5.

29 Id.

30 Id.

31 Canton closed paper mill sale in doubt after Helene, https://carolinapublicpress.org/66527/canton-closed-paper-mill-sale-limbo-helene-flooding-nc-haywood/#:~:text=Though%20the%20mill%20has%20had%20some%20serious%20environmental%20issues%20over%20the%20years%2C%20it%20was%20once%20beloved%20by%20the%20people%20of%20Canton, Oct. 19, 2024.

involved—regulator participation, approval, or consent. The objective is to place responsibility for managing and funding the environmental risk with the party taking the site forward.

An environmental risk transfer goes beyond a simple "as is" sale. An as-is provision generally disclaims warranties and may shift some contractual risk between the parties, but it does not ordinarily eliminate the seller's statutory liability as a former owner or operator—for example, under CERCLA—or prevent regulators or third parties from pursuing the seller. A risk transfer instead affirmatively assigns the liabilities, requires the transferee to perform or fund the obligations, and indemnifies and otherwise protects the seller as between the parties. Those contractual protections do not by themselves bind regulators or eliminate non-waivable statutory liability, which is why financial assurance, insurance, and regulator involvement can be important.

The Canton mill illustrates these principles. Selling a legacy industrial site "as is" does not by itself end the seller's environmental or regulatory obligations. The mill had a long history of environmental issues and was subject to an EPA administrative order for cleanup of black liquor seeping into the Pigeon River.[32] The storm itself caused extensive damage to the wastewater plant, and Pactiv remained responsible for repairs while the sale was pending.[33] Umbrella environmental insurance can help cover unknown risks inherent in an environmental liability transfer transaction, protecting buyers against often long-term obligations arising from historical operations that remain with the property unless they are affirmatively allocated to a buyer by contract.

For deal counsel, the key issues include:

- Permit transfers and regulatory approvals. These should be treated as critical-path items, since some permits may not be transferable or may require extended negotiation with relevant governmental agencies.
- Continuity of public services during the transition. The Town's wastewater agreement with Pactiv was set to expire at the end of April 2025, and the parties needed to negotiate a new arrangement with the new owner.[34]
- Regulator-imposed obligations that survive the transfer. Financial assurance and insurance requirements under cleanup orders are examples.
- State brownfield programs. These programs can give a purchaser liability protection and other benefits.

Public Investment and Related Claims

Disputes over the mill's public incentives ran alongside the sale. In May 2024, the North Carolina Attorney General sued Pactiv Evergreen to recover $12 million in incentives paid under a 2014 job maintenance grant agreement.[35] That agreement required the company to maintain operations and at least 800 jobs at the mill through December 31, 2024.[36] In February 2025, the state settled the dispute for $6.25 million.[37] Under the settlement, about $3 million goes to Haywood County, about $2.7 million goes to Canton, and $500,000 goes to the state.[38] Pactiv also agreed to withdraw its property tax challenges and to waive its right to bill Canton for wastewater plant operating costs through early March.[39] Sellers exiting subsidized facilities should expect clawback exposure to shape both deal timing and negotiations with local governments.

Conclusion

The Canton transaction shows both how well-drafted risk transfer can work and where it can break down. The language in the contract around force majeure and the buyer's alleged assumption of casualty risk provided the seller with a viable position to enforce the deal. However, significant questions about insurance, site access, and ongoing public-service obligations gave the buyer grounds to push back. The deal closed despite a hurricane and months of litigation. For practitioners, the takeaway is to align risk-of-loss provisions, insurance covenants, permit transfers, and regulatory assurance requirements before closing, because those gaps tend to show up only after a disaster.

32 NCDEQ – Canton Paper Mill, https://www.deq.nc.gov/news/key-issues/canton-paper-mill#:~:text=Information%20and%20links%20to%20those%20permit%20files%20are%20provided%20on%20this%20page.

33 Pactiv Evergreen completes sale, supra n. 24.

34 Mill deal in limbo, supra n. 5.

35 Attorney General Josh Stein Sues Pactiv Evergreen – NCDOJ, https://ncdoj.gov/attorney-general-josh-stein-sues-pactiv-evergreen/#:~:text=The%20JMAC%20Agreement%20provided%20Pactiv%20Evergreen%20with%20%2412%20million%20in%20economic%20development%20incentives%20in%20exchange%20for%20a%20commitment%20to%20maintain%20operations%2C%20and%20at%20least%20800%20jobs%2C%20at%20-Pactiv%20Evergreen%E2%80%99s%20paper%20mill%20in%20Canton%2C%20North%20Carolina%20through%20December%2031%2C%202024.

36 Id.

37 NC settles Pactiv Evergreen, Canton paper mill lawsuit for $6.25M, https://www.bpr.org/bpr-news/2025-02-13/nc-settles-pactiv-evergreen-canton-paper-mill-lawsuit-for-6-25m, Feb. 13, 2025.

38 Id.

39 Id., Mill deal in limbo, supra n. 5.



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Mary Katherine helps manufacturers, real estate developers, lenders, local governments, and other clients find creative solutions in real estate, financing, and corporate transactions involving environmental risk.

Mary Katherine regularly leads her real estate clients through the process of obtaining brownfields agreements for redevelopment of contaminated properties. She negotiates agreements with environmental agencies and counsels clients on eligibility, assessment, tax benefits, and effective structuring of associated real estate and financing transactions.

She also counsels manufacturers, lenders, and other corporate clients on a broad range of environmental risk and compliance issues. Her work in this area includes release investigation and remediation oversight, incident closure, environmental permitting, audits, reporting, and self-disclosure, participation in CERCLA potentially responsible party (PRP) negotiations, appeals of agency orders and negotiation of consent orders, defense of notices of violation and enforcement actions, assistance with hazardous and solid waste and materials handling and disposal practices, stormwater and wastewater management issues, advice on the rapidly changing topics of emerging contaminants, state and federal wetlands and other natural resource issues, and other aspects of regulatory compliance across a variety of state and federal regulatory programs.

Capabilities

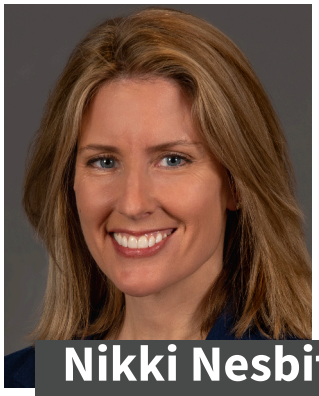
- Civil Litigation
- Commercial Real Estate
- Environmental
- Environmental, Social & Corporate Governance
- Litigation, Regulatory & White Collar
- PFAS
- Supply Chain, Transportation & Logistics
- Transportation

Notables

- Charlotte Business Journal, Honoree “Women In Business,” 2025
- Chambers USA – North Carolina, Environmental Law, 2017-2026
- Named to Lawdragon’s 500 Leading Environmental Lawyers in America list, 2025-2026
- Best Lawyers in America, Environmental Law, 2020-2027; Litigation - Environmental, 2023-2027; Litigation - Environmental, “Lawyer of the Year,” 2027
- NC Lawyers Weekly’s 50 Most Influential Women, 2025
- Best Lawyers in America, Environmental Law “Lawyer of the Year,” 2023
- Fellow of the American College of Environmental Lawyers, Class of 2023
- North Carolina Super Lawyers, Environmental, 2023-2026
- Business North Carolina’s, Legal Elite: Environmental, 2015-2016, 2018-2022; Hall of Fame 2023-2026
- Co-head, Women of Moore & Van Allen (WoMVA)
- Member, Moore & Van Allen Inclusion & Belonging Committee

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- B.A., Duke University, 2004



Always Happy to Accommodate? Navigating New and Novel Employee Accommodation Requests

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New Trends in Requests for Reasonable Accommodation in the Workplace
Nikki Nesbitt and Kelly Theard

Requests for reasonable accommodation have become increasingly complicated for employers and their counsel. The traditional Americans with Disabilities Act ("ADA") accommodation model—identifying a disability, determining the employee's limitations, engaging in an interactive process, and selecting an effective accommodation—remains intact. But several recent developments have materially changed the litigation and counseling landscape.

Three developments deserve particular attention. First, the Pregnant Workers Fairness Act ("PWFA") has created a separate federal accommodation regime for pregnancy, childbirth, and related medical conditions, with some important differences from the ADA. Second, the Supreme Court's decision in Groff v. DeJoy has materially altered the undue-hardship analysis for religious accommodations under Title VII, and the lower courts are now working through what evidence will satisfy the new standard. Third, post-pandemic requests for remote and hybrid work continue to generate litigation, but recent appellate decisions demonstrate that the COVID-era experience with remote work does not eliminate an employer's ability to establish physical presence as an essential job function.

A fourth development may be merely procedural but it is just as significant: courts are increasingly scrutinizing the employer's handling of the interactive process. Recent Fourth Circuit decisions emphasize that the process is not merely an opportunity for an employee to propose an accommodation; it is part of the employer's affirmative duty to identify an effective accommodation.

For defense counsel, the practical lesson is that accommodation litigation increasingly turns less on whether an employee made a facially reasonable request and more on whether the employer developed a sufficiently documented, individualized record explaining the employee's limitations, the essential functions of the position, the alternatives considered, and the reasons a particular accommodation was or was not effective.

The Accommodation Regime Under the PWFA
The most consequential recent statutory development is the PWFA, which took effect on June 27, 2023. The EEOC's final regulation became effective June 18, 2024. Unlike the Pregnancy Discrimination Act, which generally prohibits discrimination based on pregnancy, the PWFA affirmatively requires covered employers to reasonably accommodate a qualified employee's "known limitations" related to pregnancy, childbirth, or related medical conditions, absent undue hardship. 42 U.S.C. §§ 2000gg to 2000gg-6.

The statute creates several obligations that counsel should not simply import from existing ADA practice. Most notably, an employer generally may not require an employee to take leave if another reasonable accommodation is available, and an employer may not require an employee to accept an accommodation without engaging in an interactive process. 42 U.S.C. § 2000gg-1(4). The EEOC has also emphasized that documentation requests must be reasonable under the circumstances and identified a number of common pregnancy-related accommodations for which documentation generally should not be demanded. See EEOC, What You Should Know About the Pregnant Workers Fairness Act.[1]

The practical significance is substantial. An employer who responds to a pregnancy-related request by immediately directing the employee to FMLA leave, disability leave, or an employer's ordinary medical-documentation process may be creating a PWFA problem even if that same response would be permissible under another statute.

The EEOC's examples also demonstrate the breadth of requests that may fall within the statute. They include additional restroom or water breaks, schedule modifications, temporary reassignment, remote work,

1 https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act

temporary suspension of an essential function, light duty, and leave for pregnancy-related medical appointments or recovery. The PWFA therefore can require employers to analyze accommodation requests that historically might have been addressed through attendance policies, leave policies, or the PDA rather than through a formal accommodation process.

The developing case law reinforces the importance of the statute. In Thomas v. Montgomery County, the District Court for the District of Maryland allowed a PDA and PWFA claim concerning inadequate lactation facilities to proceed at the pleading stage, emphasizing the statute's accommodation requirement and its application to conditions related to childbirth. 2026 U.S. Dist. LEXIS 160772 **9-13 (D. Md. July 21, 2026). The case illustrates an important trend: accommodation disputes under the PWFA are not confined to pregnancy itself and extend to postpartum conditions and lactation, which the court considered to be "pregnancy-related conditions." Id. *9.

Defense counsel should also monitor litigation surrounding the EEOC's interpretation of the PWFA's coverage of abortion-related limitations. The EEOC has a regulation in place that defines the term "related medical conditions" under the PWFA to include abortion. The State of Tennessee, joined by 16 other states, challenged that regulation and sought a preliminary injunction on the grounds that it was at odds with state law prohibiting abortion under certain circumstances. The EEOC sought dismissal, arguing that the state did not have standing to bring such a challenge. The lower court agreed, dismissed the case and denied the preliminary injunction. But the Eighth Circuit reversed and remanded, finding that the states are subject to the regulation and therefore can challenge it. State of Tennessee v. EEOC, 129 F.4th 452, 457-58 (8th Cir. 2025). The decision did not resolve the underlying merits, but it demonstrates that the scope of the EEOC's PWFA regulation remains an active legal question.

In conclusion, employers should maintain a PWFA-specific accommodation protocol rather than simply treating pregnancy requests as ADA requests. Counsel should train Human Resources personnel to recognize that requests for schedule changes, breaks, remote work, temporary changes in duties, or leave may trigger PWFA obligations even when the employee does not use the words "reasonable accommodation."

Religious Accommodations After Groff: the Need for Greater Evidence to Establish the Undue Hardship Defense

The second major development is Groff v. DeJoy, 600 U.S. 447 (2023). The Supreme Court rejected the longstanding characterization of religious-accommodation hardship as requiring only a "more than de minimis" burden. Instead, an employer must show that granting the accommodation would result in substantial increased costs in relation to the conduct of its particular business, considering all relevant circumstances, including the accommodation's practical impact and the employer's size and operating costs.

Groff also emphasized that employers generally should consider alternative accommodations rather than simply rejecting the employee's proposed solution. The Court explained that Title VII requires reasonable accommodation of religious practice, not merely an assessment of whether one particular accommodation would be reasonable. Recent appellate decisions offer insight into what this means in practice.

In Hall v. Sheppard Pratt Health System, 155 F.4th 747 (4th Cir. 2025), the Fourth Circuit applied Groff to a hospital's denial of religious exemptions from a COVID-19 vaccination requirement. The court held that the employer established undue hardship based on the practical consequences of granting exemptions in a healthcare environment, including patient-safety concerns, transmission risks, operational disruption, and the aggregate effect of accommodating a significant number of employees. The court emphasized that both economic and non-economic costs can be relevant.

Similarly, in Petersen v. Snohomish Regional Fire & Rescue, 150 F.4th 1211 (9th Cir. 2025), the Ninth Circuit concluded that a fire-rescue employer demonstrated undue hardship in denying religious vaccination exemptions based on health and safety considerations, operational risks, widespread absences, and other consequences. The court applied Groff's contextual analysis rather than the former de-minimis standard.

But the post-Groff cases also demonstrate the danger of relying on generalized assertions of hardship. In Naylor v. County of Muscatine, 151 F.4th 973 (8th Cir. 2025), the Eighth Circuit rejected summary judgment where the employer's evidence of hardship was insufficiently concrete. The court emphasized that Groff requires "definitive evidence" of a "real" harm, rather than "theory" of how an accommodation would constitute a hardship. Id. at 977-978.

Likewise, in Smith v. City of Atlantic City, 138 F.4th 759 (3d Cir. 2025), the Third Circuit explained that an employer's good-faith handling of an accommodation request (exemption from the employer's no-beard policy for religious reasons) is relevant evidence but does not independently establish a defense. The defense

ultimately depends on demonstrating undue hardship as defined by Groff.

For defense counsel, the trend is clear: religious-accommodation defenses increasingly require an evidentiary record. Employers should document actual scheduling effects, staffing requirements, safety concerns, financial consequences, contractual requirements, and/or the consequences of granting similar accommodations to similarly-situated employees. General statements such as "this would inconvenience other employees" or "this would hurt morale" are increasingly vulnerable unless tied to concrete effects on the employer's business.

Continued Focus on Remote Work

The third noteworthy development involves remote work, which remains one of the most frequently litigated accommodation requests. The legal framework, however, has not shifted to a rule that remote work is presumptively reasonable merely because technology permits an employee to work from home.

The Fourth Circuit has recently provided particularly useful guidance. In Jones v. Fairfax County School Board, 2025 U.S. App. LEXIS 25778 *8 (4th Cir. Oct. 3, 2025), the court rejected a claim based on temporary total remote work where the employee conceded that the proposed accommodation would prevent her from performing all essential functions of her teaching position. The court specifically rejected the argument that the temporary nature of the accommodation made an otherwise ineffective accommodation reasonable.

The Fifth Circuit reached a similar conclusion in Hayes v. GSTEK, Inc., 175 F.4th 603, 608 (5th Cir. 2026). The court held that regular in-person attendance was an essential function of the plaintiff's position and that the employer was not required to convert the position into a fully remote job. Importantly, the court rejected the plaintiff's argument that temporary COVID-era remote work had permanently altered the position's essential functions to the point that permanent remote work was a reasonable accommodation. Id. at 608-09.

These cases should not, however, be read as creating a blanket defense to remote work requests. The EEOC has long recognized remote work as a potential reasonable accommodation where the essential functions can be performed remotely. The relevant inquiry remains individualized.

Moreover, the Fourth Circuit's decision in Herkert v. Bisignano illustrates the other side of the equation. 151 F.4th 157 (4th Cir. 2025). The employee requested scheduled remote work as an accommodation. After her request was denied, she was reassigned to a less desirable position in which remote work was permitted. The Fourth Circuit vacated summary judgment for the employer, concluding that factual disputes existed concerning whether the reassignment was voluntary and whether it constituted a disadvantageous change. Id. at 160. The court also emphasized the Fourth Circuit's earlier holding in Wirtes v. City of Newport News, 996 F.3d 234 (4th Cir. 2021), that involuntary reassignment is a strongly disfavored accommodation where the employee can perform the essential functions of the existing position with an accommodation. Herkert, 151 F.4th at 168.

For defense counsel, these cases suggest several best practices. First, preserve evidence establishing the essential functions of the job independent of the accommodation dispute. Second, distinguish between temporary pandemic policies and the actual requirements of the position. Third, document why physical presence is necessary—customer interaction, supervision, equipment, security, collaboration, regulatory requirements, or other concrete considerations. Finally, avoid assuming that a transfer to a position permitting remote work is necessarily a reasonable accommodation; whether the new position provides a meaningful equivalent opportunity remains relevant.

How the Interactive Process Impacts Litigation

Recent Fourth Circuit authority makes the interactive process particularly important for employers practicing in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

In Tarquinio v. Johns Hopkins University Applied Physics Laboratory, 141 F.4th 568 (4th Cir. 2025), the Fourth Circuit reversed an entry of summary judgment in favor of the employer, which had argued that it sufficiently engaged in the process of negotiating a reasonable accommodation for an employee but experienced a "breakdown" in the interactive process when the employee refused to sign paperwork. Id. at 573-74. The court described the ADA accommodation obligation as an affirmative duty and explained that an employer who does not engage in good faith may violate the ADA if a reasonable accommodation was available . It emphasized that the interactive process is not "an end in itself." Id. at 574. Rather, it is a mechanism through which the employer and employee identify the employee's limitations and potential accommodations. Id. The court rejected the notion that an employer automatically prevails merely by showing that the employee was responsible for some portion of the breakdown. Id.

The Fourth Circuit reinforced this principle in Dieng v.

Orkin, LLC, 2026 U.S. App. LEXIS 23480 (4th Cir. Aug. 5, 2026). There, the court reversed summary judgment on behalf of the employer, disagreeing with the district court's conclusion that giving the employee leave was an appropriate accommodation. The court held that, "[w]hile keeping an employee on indefinite unpaid leave may be a reasonable accommodation under certain circumstances, it was not here," id. *19, and, more importantly, the employer had not engaged in the interactive process in good faith," id. *21-22. The court again characterized the interactive process as a collaborative dialogue designed to identify effective accommodations. Id.

Other circuits are reaching similar conclusions. In Vasquez v. Union Pacific Railroad Co., 2025 U.S. App. LEXIS 28476 (5th Cir. Oct. 30, 2025), the Fifth Circuit emphasized that the interactive process should be ongoing rather than ending after the employer's first accommodation proposal. Id. **17-18. And in Strife v. Aldine Independent School District, 138 F.4th 237, 245-46 (5th Cir. 2025), the litigation illustrated the importance of continuing discussions where the employee maintains that the proposed accommodation is ineffective (quoting Taylor v. Principal Fin. Grp, 93 F.3d 155, 165 (5th Cir. 1996) in finding that "the responsibility for fashioning a reasonable accommodation is shared between the employee and employer.")

For employers, this means that a written denial letter is rarely the end of the analysis. Defense counsel should be asking:

1. What precisely are the employee's limitations?
2. What essential functions are affected?
3. What accommodation did the employee request?
4. What alternative accommodations were considered?
5. Why was each alternative rejected?
6. What evidence supports the employer's conclusions?
7. Did the employer revisit the analysis when circumstances changed?
8. If the accommodation proved ineffective, did the employer reopen the process?

A contemporaneous record answering those questions is likely to be more valuable at summary judgment than a generalized assertion that the employer "engaged in the interactive process."

New Scrutiny of Leave and Reassignment

Two traditional accommodation categories—leave and reassignment—remain important, but recent cases underscore their limits.

Indefinite leave remains generally unreasonable. See, e.g., Bueno v. Arhaus, LLC, 2024 U.S. Dist. LEXIS 170080 (11th Cir. July 29, 2025). The Eleventh Circuit reiterated that an employee must generally be able to perform the essential functions of the position presently or in the immediate future, and a leave request may be reasonable where it is finite and tied to an identifiable return-to-work date. Id. **12-13.

Reassignment remains a potential reasonable accommodation when an employee cannot perform the essential functions of the current position. But Herkert and Wirtes demonstrate that reassignment can create its own discrimination and accommodation issues, particularly if it results in a loss of supervisory responsibility, prestige, advancement opportunities, or other employment benefits. Herkert, 151 F.4th at 162; Wirtes, 996 F.3d at 240.

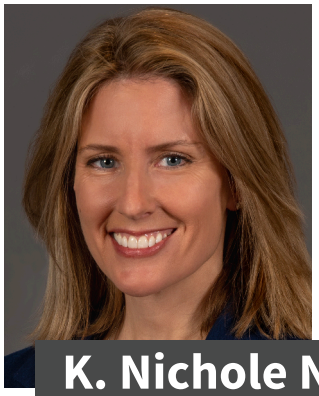
Counsel therefore should resist finding another job for the employee as the end of the inquiry. The relevant questions include whether the employee could have been accommodated in the existing position, whether the reassignment was truly voluntary, whether the new position is vacant and appropriate, and whether it provides a meaningful employment opportunity.

Conclusion

The accommodation landscape is becoming more individualized, not less. Four trends should command particular attention from defense employment counsel.

First, the PWFA has created a new and increasingly important accommodation regime that requires employers to analyze pregnancy-related requests independently from ordinary ADA practice. Second, Groff has raised the evidentiary burden associated with religious-accommodation defenses and makes generalized assertions of inconvenience increasingly inadequate. Third, remote work remains a viable accommodation but is not automatically reasonable; the critical issue remains whether the employee can perform the essential functions of the position remotely. Fourth, recent appellate decisions—particularly in the Fourth Circuit—demonstrate that the quality of the interactive process itself may determine whether an employer ultimately prevails.

The practical defense strategy is therefore straightforward: identify the employee's actual limitations, identify the actual essential functions of the job, document the alternatives considered, substantiate claims of undue hardship with concrete evidence, and revisit the analysis when circumstances change. Employers who can produce that individualized record will be substantially better positioned to defend accommodation litigation in the current environment.



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Practice Areas

- Medical Malpractice
- Medical Institutions Law
- Employer Liability
- Commercial and Business Tort Litigation
- Risk Management, Investigations, & Compliance

Representative Matters

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

Honors and Awards

- Benchmark Litigation – Litigation Star (2026)
- Best Lawyers in America - Commercial Litigation (2016-Present)
- Chambers USA - Litigation: Medical Malpractice Defense, Maryland, Band 3 (2023-2024); Band 2 (2025-2026); Healthcare, Maryland (2017)
- The Daily Record – Managing Partners Award (2026)
- The Daily Record – Leading Women Award (2011)
- Maryland Super Lawyers - Civil Litigation: Defense (2021-2026); Rising Stars (2009-2014)

Education

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Buc-ee's on Trial: Lessons from the Beaver

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Buc-ee's on Trial: Lessons from the Beaver
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Introduction: The Buc-ee's Phenomenon
A great trial theme, like a great brand, does not merely communicate a message. It makes the complex feel inevitable. It takes a sprawling, multi-witness, multi-exhibit dispute and compresses it into a single truth for a trier of fact. And if we are going to talk about building a brand—about creating something so distinctive, so emotionally resonant, and so relentlessly consistent that people become devoted followers—then we need to talk about Buc-ee's, "The Disney of Gas Stations."

For the uninitiated, Buc-ee's is a Texas-born chain of travel centers that has achieved something most businesses only dream of: a cult following. Drivers will bypass perfectly adequate gas stations, add miles to their route, and wait in lines that would test anyone's patience—all for the privilege of stopping at a Buc-ee's. The company does not advertise low fuel prices or a superior octane blend. Instead, it plants billboards for hundreds of miles along the highway—playful countdown signs, restroom puns, jokes featuring its beaver mascot—building anticipation until pulling off the interstate feels less like a choice and more like a destiny. And when you arrive, Buc-ee's delivers: the cleanest restrooms on the American highway, walls of jerky and candy, bins of pralines, and that absurdly cheerful beaver everywhere you look. Buc-ee's does not sell gas and snacks. It sells a road-trip identity.

Buc-ee's did not become a cultural phenomenon by selling better gasoline. It became a phenomenon by understanding that people do not buy products—they buy identities, experiences, and stories. The same principle applies in the courtroom. Trial lawyers who internalize this insight will find that their cases become more persuasive, their juries more engaged, and their results more favorable.

What is a Trial Theme?
So, what exactly is a trial theme? It is not a tagline. It is not a clever phrase you drop into an opening statement and then forget. It is the gravitational center of your entire case, the single organizing idea around which every witness, exhibit, and argument orbits. When done well, it gives jurors a framework for processing evidence as it comes in, a shorthand way for discussing the case in deliberations, and a reason to care about the outcome.

The reason this matters—and the insight that separates competent trial lawyers from truly persuasive ones—is that decision-makers process information the same way consumers do: through story, emotion, and repetition. This insight applies whether the decision-maker is a jury, a judge in a bench trial, or an arbitrator—and even in mediation, where a compelling trial theme can shape how a mediator perceives the merits and frames settlement discussions.

Cognitive science confirms what marketing and advertising agencies have known for decades. People do not make decisions by tallying facts on a spreadsheet. They construct narratives, assign roles (hero, villain, victim), and then filter new information through the story they have already begun to tell themselves. "[T]he primary role of the trial lawyer in any jury trial is the creation of meaning for jurors who know nothing about the case." The key insight is that meaning resides not in words themselves, but in the mental models that decision-makers construct. Robert V. Wells, Trial Technique: The Nature of Meaning: The Role of the Trial Lawyer in Creating and Shaping Meaning, 32 Am. J. Trial Advoc. 297, 297–301 (2008). The trial lawyer who understands this does not simply present evidence. That lawyer builds a brand.

The search for the right brand, trial theme, is "one of the most critical tasks facing a trial lawyer" in presenting a case to a trier of fact. Human beings do not absorb facts in the abstract. The theme "gives them the necessary perspective to understand the evidence" and provides them with the "moral center" of the case—the idea that what a dispute is about "in its simplest terms should be cast as a moral imperative." A good theme "brings

conciseness to an argument, provides a lens or filter through which to evaluate evidence, and ties into core values that may move the decision maker into agreement and even over into advocacy." Jonathan K. Van Patten, Themes and Persuasion, 56 S.D. L. Rev. 256, 256–59 (2011).

Let's return to Buc-ee's for an illustration. The company does not advertise restroom square footage or the thread count of its paper towels. It promises cleanliness—a moral commitment to the traveler's dignity. That promise is the brand's moral center. Trial themes must work the same way: the most powerful ones "appeal to a broad spectrum of humanity and tie into people's basic needs," which is why they stick in the mind the way a billboard does on a long stretch of highway. Id.

Buc-ee's success is not accidental. It rests on six principles, "beaver nuggets," that any trial lawyer can adapt: (1) simplicity above all; (2) consistency across every touchpoint; (3) emotional resonance over features; (4) the enemy narrative; (5) repetition without fatigue; and (6) category ownership. These six principles should guide how trial lawyers develop, refine, and deploy trial themes. What follows is an exploration of each—and a framework for building the kind of case presentation that makes a defense verdict feel not just reasonable, but inevitable—a destination.

Beaver Nugget 1: Simplicity Above All

Buc-ee's brand promise can be stated in nine words: Cleanest restrooms, freshest food, friendliest staff. That is it. It's not a mission statement drafted by committee or a three-page corporate values document. It takes only nine words to capture an entire philosophy and, critically, that any customer can repeat from memory after a single visit. A trial theme is the same concept as a brand statement—"a simple, clear theory of the case which in words, pictures, or in any other appropriate form tells the complete story as you view the event and which explains everything the jury is likely to hear." It is "the basic concept around which everything else revolves." Benjamine Reid, The Trial Lawyer as Storyteller: Reviving an Ancient Art, 24 Litigation, no. 3, 1998 at 8–9. A trial theme should mirror Buc-ee's nine-word brand promise: a single, memorable formulation extensive enough to encompass an entire philosophy yet concise enough for anyone to repeat. If your trial theme cannot pass that test—if it cannot be stated in a sentence and still capture the whole—it is not yet ready. Your trial theme must achieve this same simplicity as Buc-ee's brand statement—reducible to a single sentence.

This kind of simplicity is not a luxury. It is a necessity imposed by the cognitive habits of a modern audience. Research confirms that "in the past it was generally accepted that impressions were formed in a face-to-face interaction within the first 4-6 minutes. Today, most news stories last about 1 to 1½ minutes." Jurors are conditioned by a media environment in which attention is measured in seconds. They are "turned off by long winded openings" characterized by "long sentences, passive voice, legalese, unclear or nonexistent theme, no memorable tag line." Cynthia McGuinn and Daniel B. Pleasant, The Importance of 1st Impressions, in Practising Law Institute (PLI) Course Handbook. The simplicity that Buc-ee's achieves in nine words is a necessity imposed by the cognitive habits of a modern audience. If your theme cannot be stated in a sentence, it cannot compete with the neural pathways trained by decades of thirty-second commercials and two-minute news segments.

The framework is deceptively simple: "This is a case about [one idea]." This is a case about a company that followed every safety protocol in the book—and is being blamed because something went wrong anyway. This is a case about a doctor who made the best decision the evidence allowed and is being judged by a hindsight standard no physician could meet. This is a case about a business decision made in good faith that looks different only because the plaintiff's lawyer has the luxury of knowing how it turned out. Each sentence is a trial theme. Each tells the trier of fact what lens to use.

The danger of overcomplication cannot be overstated. Lawyers, by training and temperament, want to cover every base. They develop three themes, or five, hedging their bets in case one does not land. The result is predictable: too many themes equals no theme. The trier of fact hears competing narratives, none repeated with sufficient frequency to stick, and they are left to construct their own story from the wreckage. When a trier of fact constructs their own story, you have lost control of your case. Cognitive science explains why: meaning models are "comprised of a constellation of thoughts, feelings, and sensations," and they can only hold so much. When lawyers present multiple themes, they are asking jurors to construct multiple competing models simultaneously—an impossible cognitive task. Jurors default to "unconscious, repetitive thinking," falling back on pre-existing biases rather than engaging with the evidence. A single, simple theme works because it gives jurors one model to build, one framework to apply, one story to tell themselves and each other. Wells, The Nature of Meaning, 32 Am. J. Trial Advoc. at 317–18.

Think of your trial theme as a Buc-ee's billboard: a proposition stated simply enough to read at 70 miles an hour, yet powerful enough to organize an entire case. The billboard works not because it is clever but because

it is true in a way the audience already feels.

Beaver Nugget 2: Consistency Across Every Touchpoint

Walk into any Buc-ee's location—whether it is in Baytown, Texas, or Huber Heights, Ohio—and you will find an identical experience. The beaver mascot greets you at the entrance. The restrooms gleam. The wall of jerky stretches farther than seems reasonable. The branded merchandise occupies an entire wing. Buc-ee's does not improvise. Every location delivers the same promise, every time, without variation. This consistency is not an accident. It is the foundation of trust.

The litigation parallel is direct and unforgiving. Your trial theme must echo in every phase of trial: discovery, depositions, voir dire, opening statement, every witness examination, every exhibit, and closing argument. Reid, The Trial Lawyer as Storyteller, 24 Litigation at 8, 9, 11. By the time you reach closing argument, the theme should feel less like an argument and more like an observation—something the jury has already concluded on its own. This is the Buc-ee's model translated into litigation: the beaver mascot does not change from store to store, and the trial theme must not change from phase to phase. Indeed, a trial lawyer's opening and closing "should look a great deal alike" because both represent "storytelling in its purest form." Id. The thread must be continuous. Id.

Here is a useful diagnostic: if your trial theme does not appear in at least three phases of trial, it is not really your theme. It is a line from your opening statement. There is a difference. A line is something the lawyer says once. A theme is something the trier of fact believes. Buc-ee's understands this instinctively. The company does not mention "cleanest restrooms" on a single billboard and then hope customers remember it. The promise appears on highway signs, on the building facade, on employee uniforms, on merchandise, and in every sparkling tile of the restroom itself. By the time a traveler leaves the parking lot, the message has been reinforced so many times that it feels less like advertising and more like fact. Your trial theme must work the same way—woven into the entire fabric of your case until it stops being your argument and starts being the trier of fact's conclusion.

Beaver Nugget 3: Emotional Resonance Over Features

Drive south on Interstate 35 in Texas, and you will encounter Buc-ee's billboards for hundreds of miles before you reach the exit. The billboards do not list fuel prices. They do not advertise square footage or the number of pumps. Instead, they say things like "Only 262 miles to Buc-ee's!" and "Top two reasons to visit Buc-ee's: #1 and #2." The billboards build anticipation. They sell the feeling of arrival—the promise that the road ahead holds something worth reaching. By the time you see the exit sign, pulling in feels less like a decision and more like a foregone conclusion. A trial lawyer should "strive for analogies which make sense in [the jury's] world" and to use "plain language"—to "creat[e] a story from the world around you and your community." Reid, The Trial Lawyer as Storyteller, 24 Litigation at 8, 9, 12. Just as Buc-ee's billboards speak in the language of road-trip anticipation rather than fuel-industry jargon, the trial lawyer must translate legal concepts into emotional terms the trier of fact already understands. The feeling of arrival matters more than the feature list.

Trial lawyers should lead with the human story, not the legal standard. Jurors do not remember the third prong of your affirmative defense. They remember the plant manager who walked the jury through every safety check she performed that morning—the same checks she had performed without incident for fifteen years. They remember the small-business owner who took the stand and explained, without self-pity, how a meritless lawsuit has consumed three years of her life and threatened the jobs of every person in her company. They remember the surgeon who described the agonizing split-second decision in the operating room that the plaintiff's expert, working from the comfort of his office 18 months later, now calls negligent.

Like your trial theme, Buc-ee's billboards advertise the feeling: the anticipation of arrival, the promise of relief, the assurance that someone cares about your comfort on this long drive. The billboards work because they address what travelers actually want—the emotional experience of a worthy destination. The trial lawyer who leads with these human stories—rather than with a lecture on burden of proof—will own the emotional terrain of the trial the same way Buc-ee's owns the emotional terrain of the American highway.

This does not mean abandoning legal rigor. It means sequencing your presentation so that emotional resonance comes first and legal framework comes second. The legal framework is the scaffolding—necessary, structural, but invisible in the finished building. The emotional narrative is the architecture that people see and remember. Buc-ee's operates on exactly this principle. The company surely has supply chain logistics, fuel procurement contracts, and real estate development strategies—but no customer ever hears about them. The customer experiences the cleanest restroom on the interstate, the smell of fresh brisket, and the inexplicable joy of buying a beaver-shaped car air freshener. The operational infrastructure exists to deliver the emotional experience, not the other way around.

Your trial presentation should follow the same model: the legal elements are the infrastructure that supports the verdict, but the emotional narrative is what the jury actually experiences. When a juror walks out of the courthouse and someone asks, "What was that case about?" the answer will never be, "It was about the economic loss doctrine." It will be a story. Make sure it is your story.

Beaver Nugget 4: The Enemy Narrative

Every great brand defines itself in opposition to something. Buc-ee's positioned itself against every disgusting, understaffed, fluorescent-lit highway gas station that travelers have learned to dread. You know the ones—the restrooms with broken locks, the coffee that has been sitting for days on end, the cashier who regards your presence as a personal affront. Buc-ee's did not need to name its competitors. It simply built the opposite, and the contrast did the rest.

A compelling trial theme does the same thing by defining what you are fighting against. It is the theory the other side is asking the trier of fact to accept. The enemy might be hindsight bias—the deeply human tendency to assume that because something went wrong, someone must have done something wrong. It might be the hired-gun expert who testifies only for plaintiffs and has never met a product he could not criticize. It might be the litigation strategy that withholds context so that a single document, read in isolation, looks damning when the full picture tells a different story. It might be the assumption that a large corporation must be guilty simply because it is large. As one practitioner has observed, a trial lawyer too often tries to "poke holes in the plaintiff's case" rather than recognizing the opportunity "to tell your story and introduce your themes." Reid, The Trial Lawyer as Storyteller, 24 Litigation at 8, 9.

The defense that only reacts to the plaintiff's narrative has already ceded the most important ground. The "ultimate goal is to replace the opponent's story with yours"—which is the courtroom equivalent of Buc-ee's building the antithesis of every grimy highway gas station. Id. A trial lawyer's goal is to "enhance your theory of the case" while rendering "the opponent's theory of the case implausible." Id. at 8, 11–13. Every Buc-ee's billboard implicitly asks: do you really want to stop at that other place? Buc-ee's did not build their success by explaining why other gas stations are bad. It succeeded by building something so compelling that the competition became irrelevant. Trial lawyers must do the same.

The enemy narrative works because it transforms the trial from a referendum on your client's conduct into a referendum on the other side's theory. When you frame their case as built on hindsight, speculation, or sympathy rather than evidence, you are no longer asking the jury to excuse your client. You are asking them to hold the opposing party to the story you laid out to them. The psychological shift is enormous: the decision maker moves from evaluating whether your client did something wrong to evaluating whether your opponent has proven it.

This is exactly what Buc-ee's accomplishes. The company does not defend itself against accusations that its restrooms are mediocre or its beef jerky overpriced. It does not engage with the competition on the competition's terms. Instead, it implicitly reframes the question: the issue is not whether Buc-ee's is perfect, but whether you really want to take your chances at that other place—the one with the flickering lights and the bathroom you would rather not think about. You are not evaluating Buc-ee's against some abstract standard of gas station excellence. You are evaluating the alternative against Buc-ee's. The enemy narrative puts your opponent in the same position: defending their theory against yours, rather than the other way around.

Beaver Nugget 5: Repetition Without Fatigue

Buc-ee's billboards do not say the same thing for three hundred miles. They repeat the core message—Buc-ee's is ahead, and it is worth the wait—but with playful variations that keep the driver engaged. One billboard is a pun. The next is a mileage countdown. The next is a joke about the beaver. The message is always the same; the expression is always fresh. By the time you reach the exit, the brand has been reinforced dozens of times without ever feeling repetitive.

This is the challenge every trial lawyer faces: how do you repeat your theme enough times for it to stick without being boring or alienating? The answer lies in variation. Several techniques are available to the skilled advocate. Callbacks—referencing earlier testimony or exhibits with a phrase the jury has heard before—create a sense of coherence. Visual anchors—a timeline, a key document, a photograph that you return to repeatedly—give the jury a physical touchstone for the theme. Witness echoes—asking multiple witnesses questions that elicit answers reinforcing the same point—create the impression of independent corroboration, which is one of the most powerful persuasive forces available.

For example, when deliberations begin and a skeptical factfinder challenges your position, your advocates in the jury room need to be able to respond with the defense billboard—not a recitation of jury instructions, but a simple, emotionally anchored counter-narrative that reframes the entire dispute. That is what Buc-ee's framework delivers:

a theme so clear that your advocates in the jury room do not need to remember your closing argument. They need only repeat your story.

One commentator observed that "the teller now begins the story at the moment of first contact with the jury and continues it in modified form throughout every stage of the trial" and "repeats the message over and over." Reid, The Trial Lawyer as Storyteller, 24 Litigation at 9–13.
The medium should vary at each stage: during voir dire, the theme appears only in "sound bites"—key words and phrases woven into questions. Id. During opening, the full story is told for the first time. During direct examination, the story is retold "in segments" through witnesses. Id. During cross-examination, it is retold "in segments with contradiction." Id. And in closing, it reaches its final, most complete expression. Id. The message never changes; the vehicle always does—just as Buc-ee's billboards count down mileage, crack jokes, and tease the beaver mascot, but every one of them says the same thing: something worth stopping for is ahead.

Exhibits deserve special attention here. "In real trials, exhibits are far more than procedural requirements. They are storytelling tools. It isn't enough to simply display exhibits. Rather, the best lawyers use them to build the record and reinforce the narrative." Nicholas Steverson, Danielle Trujillo & Lisa DeCaro, Law School's Missed Lessons, Law360 (Mar. 4, 2026). The key is to weave exhibits into the theme rather than treating them as separate evidentiary hurdles. "Demonstratives—even simple timelines or handwritten annotations—help impose structure on a complex legal theory. Seasoned trial lawyers can turn dense records into clear road maps for witnesses and juries using nothing more than a highlighter and an overhead projector." Id. Technology has changed expectations, but "more technology isn't necessarily better. The medium should serve the point, not distract from it." Id.

The research on visual immersion is striking. Research has found that there was little difference between using no trial graphics, simple flipcharts, static graphics, or even animated graphics shown sporadically. What made the difference was immersion: "when the 'jurors' were immersed in graphics, meaning that the attorney always gave them something to see while presenting [their] argument, the effectiveness and persuasiveness of the presentation dramatically increased." Ryan H. Flax, Why Trial Graphics are an Essential Persuasion Tool for Litigators, in A2L Consulting, Storytelling for Litigators: Building a Great Narrative for Judge and Jury 15–16 (3d ed. 2014). The lesson is not that you need expensive technology. It is that you need consistency. A well-chosen exhibit, returned to throughout trial, functions exactly like a Buc-ee's beaver mascot—a recurring visual that reinforces the core message without requiring explanation. The medium matters less than the repetition.

The goal is not for the trier of fact to hear your theme once and remember it. The goal is for the trier of fact to hear it so many times, in so many ways, that it becomes the default framework through which they interpret every piece of evidence. Just as Buc-ee's builds anticipation, your theme should build certainty witness after witness until a verdict in your favor feels like the only sensible conclusion. Repetition makes your theme the most available explanation.

Beaver Nugget 6: Own the Category
A Buc-ee's is not a gas station. It is a destination—a place where the stop itself becomes part of the journey. The company understood that competing on price-per-gallon or pump speed was a losing game. There will always be a station with cheaper gas or a shorter line. But there is only one place with walls of beef jerky, bins of beaver nuggets, a beaver mascot on everything from T-shirts to waffle makers, and restrooms so clean they have become a cultural phenomenon. By reframing what a gas station could be, Buc-ee's made its competitors irrelevant. You cannot beat Buc-ee's at being Buc-ee's. You can only play a different game.

Trial lawyers must think the same way. Do not argue against opposing counsel's terms. If they frame the case as a David-and-Goliath morality play, the little guy crushed by the heartless corporation—do not accept that frame and argue that your corporation is actually quite nice. That is like Buc-ee's trying to convince travelers that its fuel prices are competitive. Even if true, it concedes that price is the battleground—and the battleground is already lost. Redefine the frame entirely. This case is not about big versus small. It is about whether a company that followed every rule, met every standard, and acted in good faith should be punished because something went wrong that no one could have prevented.

If your opponent frames the case as a story of betrayal, do not argue about the degree of betrayal. Redefine the category: this is a case about a deal that carried known risks, documented in a contract that both parties negotiated with the help of sophisticated counsel, and the plaintiff is now trying to use the courthouse to escape a bargain it freely made. When you reframe the battlefield, you force the plaintiff to fight on terrain you have chosen—just as Buc-ee's forces every other gas station to compete on cleanliness, selection, and experience rather than octane ratings.

When it comes to deposing or cross-examining the

opposing side's expert, rather than trying to destroy the expert on the expert's own terms—a frontal assault that "has more to do with the quality of the expert than the quality of the lawyer"— redefine what the cross-examination is about. Reid, The Trial Lawyer as Storyteller, 24 Litigation 8, 12–13. Recast the expert's opinion as "unwarranted revisionism," expose the expert's "selectiv[ity] in the use of evidence," and "realign" the evidence with your story. Id. "The key is to make sure that your story survives the opposing expert's appearance." Id. This is category ownership applied to a single witness: instead of competing on the expert's terrain (science, credentials, methodology), you redefine the encounter as a test of credibility and independence—a category where your fact witnesses and your narrative hold the advantage. Buc-ee's does the same thing every time a competitor opens a new travel plaza. The competitor may have more pumps or lower prices, but Buc-ee's never engages on those terms. It simply keeps building destinations so distinctively that the comparison becomes irrelevant.

Category ownership also means controlling the vocabulary of the case. Words matter enormously in trial. An "accident" implies no one is at fault. A "collision" implies physics and causation. A "policy decision" sounds bureaucratic and neutral. A "conscious choice" implies agency and responsibility. The lawyer who controls the language controls the narrative, and the lawyer who controls the narrative controls the verdict. Buc-ee's understood this instinctively. The company does not call its locations "gas stations" or "convenience stores." It calls them "travel centers"—a phrase that evokes destination rather than necessity, experience rather than transaction. The vocabulary shapes the expectation, and the expectation shapes the experience. Buc-ee's did not try to be the best gas station. It redefined the category entirely.

Putting It Into Practice: Case Study

The six principles above—simplicity, consistency, emotional resonance, the enemy narrative, repetition without fatigue, and category ownership—are powerful individually. Applied together, they form a comprehensive framework for developing trial themes that resonate, persist, and ultimately persuade. Start early. Theme development should begin at the pleadings stage, not the week before discovery closes, not the week before trial.

To illustrate, consider a commercial breach of contract dispute in which you represent the defendant—a national retailer accused of breaching an exclusive supply agreement with a mid-market manufacturer. The plaintiff will tell the jury it invested everything in the relationship and was devastated when your client sourced from a cheaper overseas supplier. The plaintiff's theme writes itself: "This is a case about a company that wanted the benefits of loyalty without the obligations." Your job is to build a Buc-ee's of your own—not to poke holes in the plaintiff's story, but to tell a better one.

Applying the Buc-ee's framework from the defense chair:

- Simplicity: "This is a case about a supplier that failed to keep up with the market and is asking a jury to guarantee its revenue."
- Consistency: Thread that idea from voir dire (asking jurors whether businesses should be forced to continue relationships that no longer work) through every witness and into closing.
- Emotional resonance: Lead with the story of the retailer's purchasing manager who flagged quality problems for months, sent emails begging the supplier to improve, and finally had no choice but to find a source that could meet the retailer's customers' expectations.
- The enemy narrative: The enemy is not the plaintiff's company; it is the plaintiff's theory that a contract entitles it to a customer's loyalty regardless of performance. Frame the lawsuit as an attempt to use the courthouse as a substitute for competing in the marketplace.
- Repetition: Return again and again to the supplier's own internal quality reports, which document the declining performance the supplier never fixed. Use them as your visual anchor the way Buc-ee's uses its beaver mascot—a recurring, unmistakable symbol of your core message.
- Category ownership: This is not a case about loyalty. It is a case about whether a company that stopped performing can force its customer to keep paying anyway.

Notice how the framework transforms the defense from a reactive posture—poking holes in the plaintiff's story—into an affirmative narrative with its own moral center, its own enemy, and its own billboard. This is exactly what Buc-ee's did to the travel center industry. Before Buc-ee's, the best a highway gas station could hope for was to be slightly less unpleasant than its competitors. The category was defined by low expectations: functional restrooms, passable coffee, adequate fuel. Buc-ee's did not try to win that game. It built an entirely new one—a game where cleanliness, selection, and experience were the only metrics that mattered. The plaintiff will walk into court with a compelling story about loyalty and betrayal.

If you have done your job, the jury will walk out with a different story entirely: a story about a company that demanded performance, got excuses, and is now being punished for refusing to accept mediocrity. The facts have

not changed. The evidence has not changed. But the jury's relationship to the case has changed completely—because you gave them a defense worth believing. Just as travelers now measure every highway stop against the Buc-ee's standard, the jury will measure the plaintiff's theory against the framework you built. And when the comparison is made on your terms, you have already won.

Conclusion: Identify Your Buc-ee's Billboard

Before your next trial, identify your Buc-ee's billboard. What is the one thing you want the jury to see from three hundred miles away—the single, compelling, emotionally resonant idea that will pull them inexorably toward a verdict in your client's favor? Find that billboard. Plant it early. Repeat it often. Make it impossible to ignore. And when the trial is over, the decision-maker will already know the answer, because you gave them a story that made a verdict in your favor feel not just reasonable, but right.

Buc-ee's on Trial: Lessons from the Beaver

Tony Rospert

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The Buc-ee's Phenomenon

- A trial theme is the unifying narrative that makes your case memorable and persuasive
- Triers of fact process information the same way consumers do—through story, emotion, and repetition
- The best trial lawyers operate like the best brand marketers



The Buc-ee's Phenomenon

- Buc-ee's has achieved a cult following
- Buc-ee's does not sell gas and snacks—it sells a road-trip identity
- Buc-ee's became a phenomenon by understanding that people buy experiences and stories.



3

What Is a Trial Theme?

- The gravitational center of your case
- Trial themes don't recite elements of a claim—they give your audience a reason to care
- People decide emotionally first, then justify rationally
- The trial lawyer who understands doesn't just present evidence—they build a brand



4

Beaver Nugget 1: Simplicity Above All

Buc-ee's Brand Promise

- Cleanest restrooms, freshest food, friendliest staff

Litigation Application

- Your theme must be reducible to a single sentence

Danger of Overcomplication

- Too many themes = no theme

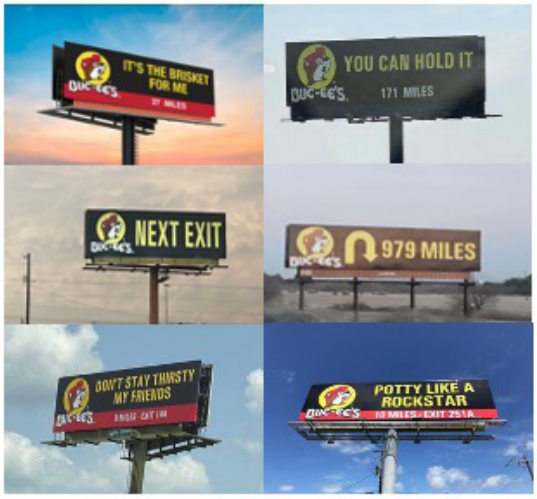
Beaver Nugget 2: Consistency Across Every Touchpoint



- Every Buc-ee's experience is identical across every location
- **Litigation Application**: Your theme must echo in every phase of the case
- Your theme should appear in every phase of the trial

Beaver Nugget 3:
Emotional Resonance Over Features

- Buc-ee's billboard campaigns build anticipation for hundreds of miles
- **Litigation Application:** Lead with the human story, not the legal standard
- Jurors remember how you made them feel, not the fourth element of your negligence claim



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Beaver Nugget 4: The Enemy Narrative

Buc-ee's positioned itself against every disgusting, understaffed highway gas station

Litigation Application: Every compelling trial theme defines what you are fighting against

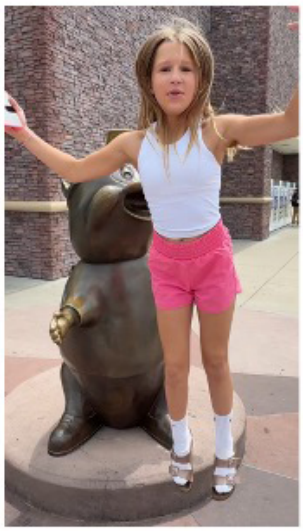
Replace your opponent's story with yours

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Beaver Nugget 5: Repetition Without Fatigue

- Buc-ee's billboards repeat for hundreds of highway miles with playful variations
- **Litigation Application**: Restate your theme in varied ways
- Techniques: callbacks, visual anchors, witness echoes, and demonstrative exhibits that reinforce the core message



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Beaver Nugget 6: Own the Category

- Buc-ee's didn't compete as a gas station; it redefined the category as a destination, making the stop itself part of the journey
- **Litigation Application:** Don't argue on your opponent's terms—reframe the battlefield
- Control the vocabulary—the trial lawyer who controls language controls the verdict



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Putting It Into Practice: Case Study

Start Early	Stress-Testing	Case Study
▪ Theme development should begin at the pleadings stage, not the week before trial	▪ If opposing counsel adopts your theme, does it still work for you?	▪ Commercial breach of contract—national retailer accused of breaching exclusive supply agreement with manufacturer; plaintiff's theme: "a company that wanted loyalty's benefits without its obligations"

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Putting It Into Practice: Case Study

Buc-ee's Framework



Simplicity
- "supplier that failed to keep up and wants guaranteed revenue"



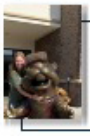
Consistency
- thread from voir dire through closing



Emotional resonance
- purchasing manager who begged supplier to improve



Enemy
- theory that contract entitles loyalty regardless of performance



Repetition
- supplier's own quality reports as visual anchor



Category ownership
- not about loyalty—about whether a non-performer can force its customer to keep paying

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Conclusion:
Identify Your Buc-ee's Billboard

- Call to Action: Before your next trial, identify your billboard
- Find that billboard, plant it early, repeat it often, make it impossible to ignore
- A great trial theme, like a great brand, makes the complex feel inevitable
- When the jury retires to deliberate, they should already know the answer



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Anthony J. Rospert

Partner | Thompson Hine (Cleveland, OH)

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

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

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

Litigation can be time-consuming and costly, so for many disputes it may be more effective to seek methods of resolution other than traditional court litigation. Although Tony has an impressive record of courtroom achievements, he seeks to optimize case outcomes while managing the costs, time and stress of a lawsuit by regularly using arbitration, mediation and other forms of alternative dispute resolution (ADR) as pragmatic ways to meet his clients' needs.

Outside the courtroom, Tony is a certified BBQ judge and judges 7-10 sanctioned competitions per year.

Focus Areas
- Business Litigation
- Securities & Shareholder Litigation

Recent Insights
- How I Made Trial Network Chair – Tony Rospert, American Lawyer, February 24, 2026
- Deposition breaks and attorney-client communications: Navigating the gray areas, Westlaw Today, September 25, 2025
- Representations and Warranties Insurance: Trends and Benefits, Business Litigation Update, March 31, 2020
- Mediation Opening Arguments Should Not Be A Throwdown, February 13, 2019

Distinctions
- Listed as a Recommended Lawyer in Legal 500 City Elite – Ohio for Commercial Disputes, 2026
- Benchmark Litigation's 40 & Under Litigation Hot List, 2019
- Crain's Cleveland Business Forty Under 40, Class of 2013
- Listed as an Ohio Super Lawyers® Rising Star in Business Litigation, 2009, 2010, 2013, 2016 and 2017

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



Ethical Discovery Minefields: AI, Hyperlinks, Cell Phones, and More

Katrina Smeltzer

Sandberg Phoenix & von Gontard (Kansas City, MO)

Ethical Discovery Minefields: AI, Hyperlinks, Cell Phones, and More
Katrina L. Smeltzer

Discovery typically accounts for 20% to 50% of total civil litigation expenses, and the landscape is shifting and expanding rapidly. The proliferation of artificial intelligence, collaboration platforms, and personal devices has introduced new categories of electronically stored information that existing rules and ethical frameworks were not necessarily designed to address. Courts are grappling with novel questions: When is AI-generated evidence reliable enough to be admitted at trial? Are a party's conversations with an AI chatbot discoverable or protected as work product? Must a responding party produce the contemporaneous version of a hyperlinked document that may have changed since it was shared? And does an employer have possession, custody, or control over text messages on an employee's personal phone? These questions implicate core ethical duties—competence, candor, and fairness—that govern every stage of discovery practice.

Common Issue: Ethics
Ethical obligations during discovery require an attorney to balance zealous client advocacy with honesty, fairness, and competence. The core ethical duties in discovery include the duty of competence (Rule 1.1), the duty of candor to the tribunal (Rule 3.3), and the duty of fairness to the opposing party and counsel (Rule 3.4). The duty of competence includes the responsibility to stay abreast of technology advancements. ABA Model Rule 1.1, comment 8 states, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]"

FRE 707
The use of AI to generate evidence for litigation is increasing rapidly. For example, in a medical malpractice lawsuit, one party might present a diagnostic report from an AI system that analyzes the plaintiff's symptoms and data, concluding that the physician missed a critical diagnosis. Is this admissible? Other potential applications include accident reconstruction, damages modeling, medical-record summarization, algorithmic scoring, video enhancement, and voice and image analysis.

In June 2025, the Judicial Conference Committee on Rules of Practice and Procedure, which drafts and amends the rules governing federal litigation, published proposed new Federal Rule of Evidence 707, designed to ensure the reliability of "machine-generated" evidence before it is admitted for use at trial. The proposed rule provided:

> Where machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court must find that the evidence satisfies the requirements of 702(a)-(d). This rule does not apply to the output of basic scientific instruments.

Federal Rule of Evidence 702(a)-(d) requires that before an expert witness' testimony is admissible the proponent must demonstrate the: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts and data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects reliable application of the principles and methods to the facts of the case. Thus, the proponent of machine-generated evidence would need to demonstrate these same factors before the evidence was found admissible. The Advisory Committee on Evidence Rules revised the proposal, declined to advance it, and sent it for further study. No version of Rule 707 can take effect before December 1, 2029.

Here are some suggestions on what to do while there is no rule:

> (1) Discover the rule, not the output. Send discovery requests on the vendor, product, version, the training data and the population it represents, validation

studies and who ran them, published error rates, and whether anyone independent of the developer evaluated it;

(2) Use Rules 26 and 16. Raise AI-derived evidence at the Rule 26(f) conference and get its disclosure and production put into the scheduling order. If the output comes in through a retained expert, Rule 26(a)(2)(B) already reaches the tool through facts or data considered. If it comes in without an expert witness, ask for a disclosure deadline on the software's provenance;

(3) Preserve the objection. Do not waive the objection that you cannot cross-examine a machine. Depose the sponsoring witness on what they know about the system and preserve your objections on the record. File a motion in limine. If the output comes into evidence, ask for a limiting instruction. The Committee Note suggested instructing that machine-generated evidence "is subject to error and … should not be assumed to be reliable simply because it was produced by a machine"; and

(4) Look for a local standing order from your judge. Many judges are starting to adopt their own standing orders on AI.

AI Prompts

The law in this area continues to evolve. In February 2026, in U.S. v. Heppner, 1:25-cr-00503 (S.D.N.Y. Feb. 17, 2026), a federal district court in New York held that a criminal defendant's legal strategy discussions with an AI platform that were not directed by counsel were discoverable. Also in February 2026, in Warner v. Gilbarco Inc., 2:24-cv-12333 (E.D. Mich. Feb. 10, 2026), a federal district court in Michigan held that a pro se litigant's use of AI was work product because it was used in anticipation of litigation and was not likely to reach an adversary's hands. In March 2026, in Fortis Advisors v. Krafton, Inc., C.A. No. 2025-0805, the Delaware Court of Chancery considered as evidence a CEO's AI discussions that involved legal strategy for the company to avoid paying an earnout obligation. Also in March 2026, in Morgan v. V2X, Inc., 1:25-cv-01991 (D. Col. March 30, 2026), a federal district court in Colorado held that a pro se litigant's use of AI was work product but required the litigant to disclose which AI platform was used. In June 2026, in Tate Group Automotive v. Legacy Automotive Capital, Cause No. 25-BC11B-0020, a Texas state court held that litigation materials the plaintiff uploaded to an AI platform were protected as work product but required the plaintiff to identify which documents were uploaded.

The emerging trend is that a non-lawyer litigant's AI prompts that are not directed by counsel could be discoverable, even if they involve legal strategy. By contrast, a lawyer's or pro se litigant's use of AI is more likely to be protected as work product.

Trial counsel should discuss the use of AI with the client and should consider including use of AI in any protective orders. In-house counsel should consider training its directors, managers, and employees on the use of AI in connection with obtaining legal advice. Consider implementing practices to mitigate this risk, including restricting use of AI for legal advice to closed, protected platforms or to in-house lawyers. Other considerations include making sure litigation holds involve AI prompts and outputs.

A related but distinct question is whether an expert's AI prompts and document uploads used to generate portions of an expert report are privileged work product or discoverable. Arguably, when an expert crafts prompts to query an AI system in the course of drafting a report, those prompts likely reflect the expert's analytical process and mental impressions—the type of material that receives the highest level of work product protection, much like report drafts in the federal courts.

However, the trend appears to be that when an expert uses AI, the prompts and discussions are discoverable. In Conservation Law Foundation, Inc. v. Shell Oil Co., 3:21-Cv-00933 (D. Conn. May 18, 2026), the court ordered disclosure of the AI prompts an expert used while producing her witness report. This was despite a discovery stipulation that there would be no discovery of each other's expert notes, drafts or communications. Trial attorneys should raise the issue of AI in expert engagement letters.

The stipulated ESI discovery order in Waterford Twp. Gen. Emps. Ret. Sys. v. Monolithic Power Sys., Inc., No. 2:25-CV-00220 (W.D. Wash. June 29, 2026), illustrates an early judicial approach in which the court excluded expert AI prompts and outputs from mandatory disclosure while preserving the right to cross-examine the expert about methodology and the reliability of AI-assisted analysis. Practitioners should consider addressing expert AI use in stipulated ESI protocols or the scheduling order at the outset of litigation.

Hyperlinked Content

Hyperlinks are web links or URLs that point to documents or files located online, rather than to an attachment embedded directly within an email or file. These files are usually not static like a traditional attachment.

There are several issues with hyperlinked content in

discovery. First, the linked document is not actually attached to the produced email but may still be relevant. Second, most hyperlinked documents can be edited after sharing, making it difficult and often burdensome to produce the version that existed when the link was sent. Software exists that can export hyperlinked documents and files; however, the process is imperfect and resource-intensive. Third, if the hyperlink points to public information or third-party content, the responding party may not have control over the document. Where the custodian does control the content of the hyperlink, the argument for treating it as an attachment is stronger.

Courts addressing production of contemporaneous hyperlinked documents typically weigh the benefit against the burden. See e.g., United Ass'n Nat'l Pension Fund v. Carvana, 2:22-cv-02126 (D. Ariz. Jan. 12, 2026); Huckabee v. Bloomberg, 1:23-cv-09152 (S.D.N.Y. March 23, 2026); In re Soc. Media Adolescent Addiction, 4:22-md-03047 (N.D. Cal. Nov. 13, 2025); In re Uber Tech. Passenger Sexual Assault Litig., 3:23-md-03084 (N.D. Cal. April 23, 2024). If your ESI protocol adopted at the beginning of the case does not already address production of hyperlinked documents, it should. Key questions to resolve include whether hyperlinked documents will be produced as attachments alongside the parent email and whether the producing party will provide the contemporaneous version or the version that existed at the time of collection.

For in-house counsel, it is important to know which collaboration platforms employees use and to keep outside counsel informed of those platforms. Provider agreements and terms of service should be reviewed to ensure that preservation obligations can be met.

Employee Cell Phones/Short Messages:

"The legal right to an employee's personal device does not arise simply based on the fact of employment or the employee's use of the device for work-related purposes." Alexa et al. v. City of Ann Arbor, No. 22-cv-13073, *6 (E.D. Mich. May 18, 2026). When considering whether an employer has "control" over communications on its employees' personal devices, courts have considered several factors that include (1) whether the employer issued the devices; (2) how frequently the devices were used for business purposes; (3) whether the employer had a legal right to obtain communications from the devices; and (4) whether company policies address access to communications on personal devices. Miramontes v. Peraton, Inc., No. 3:21-cv-3019-B (N.D. Tex. June 6, 2023).

Federal Rule 34 grants a party the authority to request another party's production of electronically stored information "in the responding party's possession, custody, or control[.]" Under the legal right standard, the question is "whether the responding party 'has the legal right to obtain the documents on demand from someone else,' which is 'understood to include the legal right to command release from the party with actual possession.'" Allergan, Inc. v. Revance Therapeutics, Inc., No. 3:23-cv-00431, at *4 (M.D. Tenn. March 17, 2025). The "practical ability" standard adopts a more expansive notion of control, finding that it extends to circumstances where a party has the "practical ability to obtain the documents from a nonparty to the action." Flagg v. City of Detroit, 252 F.R.D. 346, 353 n. 16 (E.D. Mich. 2008) (quoting Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 146 (S.D.N.Y. 1997)). It is the requesting party's burden to prove that the responding party has control.

Discovery of these communications usually hinges on the employer's mobile device policy, short messaging policy, search policy, or other relevant policies. Key questions include whether those policies authorize the employer to search employees' texts, short messages, or other communications, and whether the policy at issue applies to the specific custodians in the case. Some employers have different access policies depending on whether the employee uses a company-issued phone or a personal device.

Production of short messaging can be complex because native app formats are often difficult to review. The requesting party will usually seek production in a searchable format that maintains message order, emojis, attachments, and timestamps. Additionally, the metadata should be preserved for authentication purposes. Because individual short messages can lack meaning in isolation, consider requesting a context window, such as all messages sent on a particular day.

When working under a litigation hold, in-house counsel should consider whether employee text messages and short messages need to be preserved and whether existing protocols are adequate. The automatic destruction schedules for these communications are often very different from document or email destruction protocols. Additionally, if an employee's texts must be preserved, those texts should be imaged immediately rather than relying on the employee to retain them, to prevent unintentional destruction.

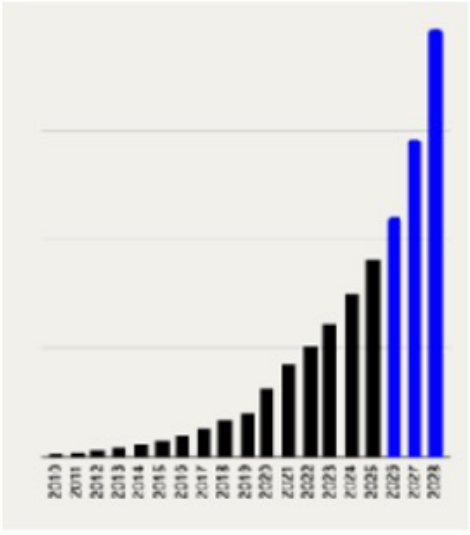
Conclusion

The discovery landscape is evolving faster than the rules that govern it. Artificial intelligence is generating evidence that no witness personally observed, proposed Federal Rule of Evidence 707 remains years away from adoption,

and courts are only beginning to sort out whether a litigant's AI prompts are discoverable or shielded as work product. At the same time, hyperlinked documents and employee cell phone communications present their own preservation and production challenges that many existing ESI protocols do not adequately address. Through it all, the ethical duties of competence, candor, and fairness remain the constants that should guide practitioner decision-making. Lawyers who stay current on these developments—and who build proactive strategies around litigation holds, ESI protocols, protective orders, and client training—will be best positioned to meet their obligations and effectively advocate for their clients in an increasingly complex discovery environment.

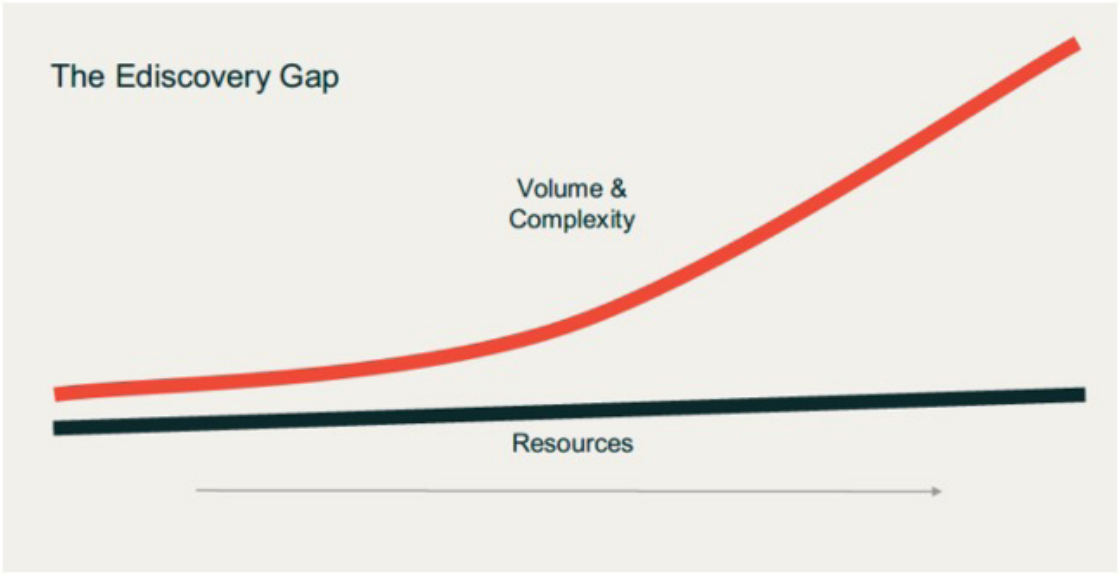
ETHICAL DISCOVERY MINEFIELDS: AI, HYPERLINKS, CELL PHONES, AND MORE



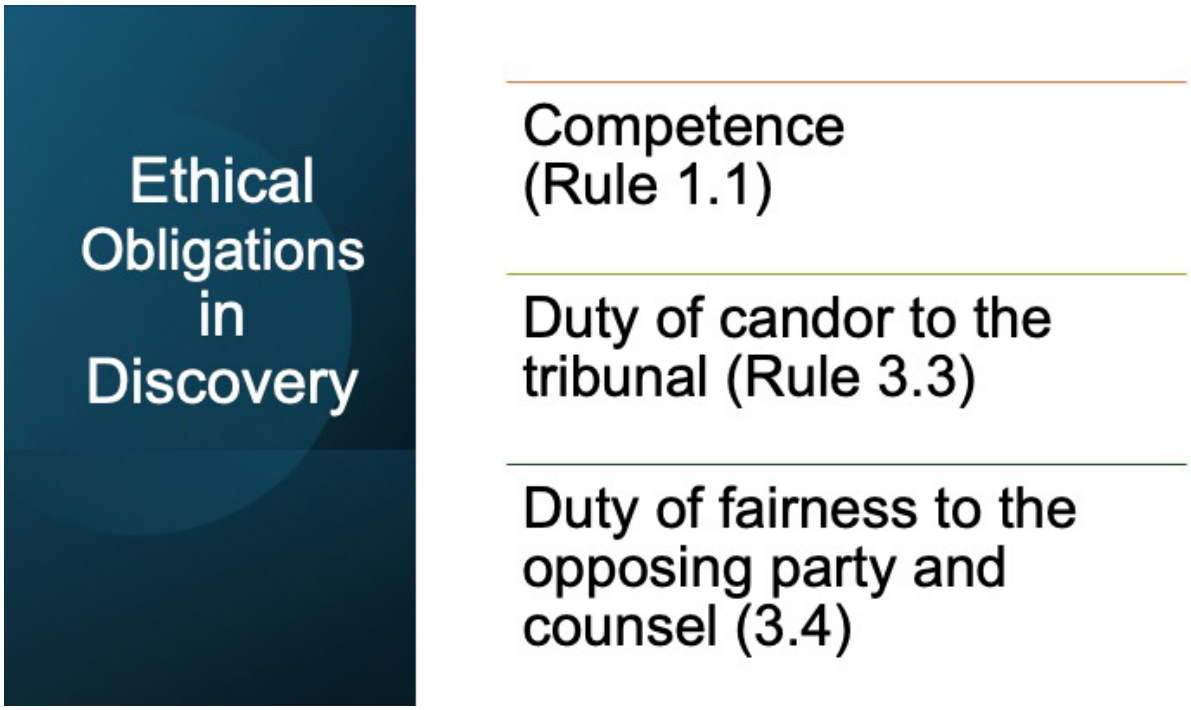


Evidence Grows in Volume and Complexity

Credit: Statistica



Credit: Everlaw



Machine-Generated Evidence

BACKGROUND

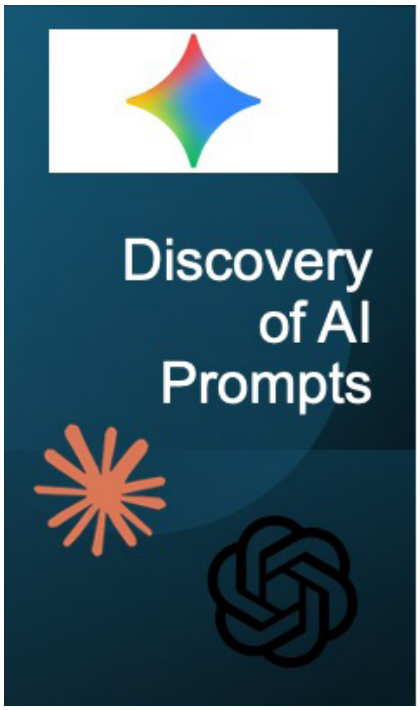
AI Evidence Is Growing

Proposed Rule 707

Current Status

WHAT NOW

1. **Discover the Rule**
2. **Rules 26 and 16**
3. **Preserve the Objection**
4. **Local Orders**



- EVOLVING…STAY TUNED
- NON-LAWYER PARTY
- LAWYER OR PRO SE PARTY
- EXPERT USE TO WRITE REPORT
- EXPERT USE TO FORM OPINIONS

Hyperlinks - Key Discovery Challenges

- Not a Traditional Attachment
- Relevant but Unattached
- Editable After Sharing
- Imperfect Export Tools
- Third-Party Content
- Custodian Control Matters

Hyperlinked Content
Best Practices

- Weigh Benefit Against Burden
- Address in ESI Protocols Early
- Resolve Key Production Questions





For In-House Counsel

- → Know Your Platforms
- → Keep Outside Counsel Informed
- → Review Provider Agreements

Possession, Custody, and Control

> *"The legal right to an employee's personal device does not arise simply based on the fact of employment or the employee's use of the device for work-related purposes."*

Four Factors for "Control"

1. Employer issued
2. How used
3. Legal right to obtain
4. Company policies

Short Messages

Policy and Production Challenges





- **Policy-Driven Discovery**
- **Key Policy Questions**
- **Varying Access Policies**

Production Guidance

- **Searchable Format**
- **Preserve Metadata**
- **Context Window**

Employee Cell Phones

Litigation Hold Best Practices

- **Evaluate Preservation Needs**
- **Different Destruction Schedules**
- **Image Immediately**



Act Now

Immediate imaging prevents unintentional destruction



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Katrina Smeltzer is part of the Business Litigation practice group, focusing her practice on representing professionals and representing and assisting insurance carriers.

Katrina is an experienced litigator, representing clients from many different industries on varied matters. She handles matters from the pre-suit investigative stage through trial. She also has significant writing experience and is a part of the firm's Appellate team.

Katrina chairs the Professional Liability team at Sandberg Phoenix. She represents insurance professionals, design and construction professionals, accountants, attorneys and real estate professionals when facing disputes and claims. She also counsels clients on a variety of pre-suit matters, with an eye toward minimizing risk and avoiding litigation.

Katrina additionally represents insurance carriers in insurance and bad faith cases, both in litigation and pre-suit. She assists clients with analysis of complex factual and legal coverage disputes involving various lines of commercial insurance.

Service Areas
- Appellate & Complex Litigation
- Insurance Coverage & Bad Faith
- Professional Liability
- Construction Litigation
- Correctional Medicine

Representative Experience
- Katrina obtained complete defense verdict following trial in Missouri state court for insurer in equitable garnishment/ bad faith lawsuit. Plaintiffs and insured were seeking over $10 million in damages and interest for a judgment relating to a fatal motor vehicle accident.
- Katrina obtained summary judgment for an insurance carrier in the U.S. District Court, Western District of Missouri in a coverage dispute involving a builder's risk policy.
- Katrina obtained summary judgment in favor of her client in a case pending in the District Court of Lane County, Kansas involving the interpretation of a trust document prepared in the 1970s. The judge agreed with the interpretation advocated by Katrina, and ordered judgment in favor of her client and other defendants.
- Katrina assisted in defending a specialty insurance broker in a case where the insured claimed millions of dollars in property damage and that the broker procured the wrong limits of insurance. Katrina assisted in performing pointed and effective discovery that helped achieve a favorable resolution at mediation.

Awards & Recognition
- 2024-2027 - Best Lawyers In America; Best Lawyer; Commercial Litigation, Insurance Law, Litigation - Insurance
- 2022 - Johnson County Bar Association; Community Service Award

Education
- J.D., Creighton University School of Law
- B.A., Creighton University



Litigating Commercial Disputes in an Era of Geopolitical Risk

Adam Stephens
Miller Thomson (Canada)

Litigating Commercial Disputes in an Era of Geopolitical Risk
Adam Stephens

International commercial relationships have always been exposed to political risk. Wars disrupt trade routes; governments impose tariffs and sanctions; regulatory regimes change; and political relationships between states deteriorate. What is notable about the current era is the interaction between renewed geopolitical fragmentation and a commercial economy that is deeply integrated across national borders. Businesses that have spent decades constructing international supply chains, markets, financing arrangements and investment structures increasingly find those relationships affected by unforeseen governmental decisions that may materially alter the conditions under which their contracts must be performed.

Baker McKenzie's Global Disputes Forecast 2026 captures the resulting tension. Based on a survey of 600 senior decision-makers responsible for disputes and investigations at large organizations in the United States, United Kingdom, Germany, Singapore, Hong Kong and Brazil, the report describes organizations that are "more globally connected than ever" while operating in an "increasingly fragmented and unpredictable geopolitical environment that is fundamentally altering risk calculations." [1] It observes that commercial relationships "can become compliance liabilities overnight as political alignments shift." 79 percent of respondents identified geopolitics and trade policy — including tariffs, sanctions and export controls — as a potential threat increasing their organization's exposure to disputes.[2]

These developments occur against a legal architecture designed, in significant part, to make international commerce more predictable. Parties choose the law governing their agreements, select the courts in which disputes will be heard and use international arbitration to provide a neutral means of resolving cross-border disputes. Courts have developed principles of comity and recognition that permit judgments and arbitral awards to operate across borders. These mechanisms allow commercial parties to create substantial legal and procedural certainty around transactions that cross national boundaries.

Geopolitical fragmentation places greater pressure on this architecture. Greater uncertainty may arise when rights, judgments and awards must operate across borders in circumstances involving divergent sovereign interests. A governing-law clause may now coexist with conflicting legislation. Another state may assert jurisdiction despite the parties' choice of forum. A judgment or award obtained in one jurisdiction may encounter new or heightened obstacles when recognition or enforcement is sought in another.

This article considers what these potential developments may mean for commercial litigators and in-house counsel. Geopolitical fragmentation may change the weight lawyers give to familiar considerations — including governing law, forum, arbitration, interim relief and the ultimate enforceability of a judgment or award. The objective remains predictability. The challenge is achieving as much of it as possible when governmental action affecting the parties' bargain has itself become less predictable.

Predictability and International Commercial Transactions

Predictability has long been a central objective of American jurisprudence concerning international commercial disputes. The United States Supreme Court's 1972 decision in The Bremen v. Zapata Off-Shore Co. ("Bremen") marked an important shift in the treatment of international forum-selection clauses. American courts had historically been reluctant to enforce contractual provisions selecting another forum, often viewing them as contrary to public policy or as attempts to "oust" domestic courts of jurisdiction. The Supreme Court rejected that approach in the context of an international commercial agreement.

1 Baker McKenzie, Global Disputes Forecast 2026 at 5–7.

2 Id. at 2.

Bremen arose from a contract between an American corporation and a German corporation to tow an offshore drilling rig from Louisiana to the Adriatic Sea. The parties agreed that disputes would be resolved before the High Court of Justice in London. When the rig was damaged in the Gulf of Mexico, the American party commenced proceedings in Florida. The Supreme Court enforced the clause, emphasizing that international commerce requires respect for reasonable agreements concerning where disputes will be heard. Chief Justice Burger rejected "a parochial concept that all disputes must be resolved under our laws and in our courts," observing:

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[3]

The Court viewed advance agreement on forum as "an indispensable element in international trade, commerce, and contracting."[4]

Two years later, in Scherk v. Alberto-Culver Co., the Court applied similar reasoning to an international arbitration agreement. It described uncertainty concerning the forum and applicable law as capable of producing "unseemly and mutually destructive jockeying" between parties seeking tactical advantage and warned that the resulting "legal no-man's-land" could damage international commerce. The ability of parties to agree in advance upon the legal architecture for resolving their disputes was therefore an important part of facilitating the underlying commercial relationship.[5]

Other commercial jurisdictions have developed along similar lines. The Supreme Court of Canada, for example, observed in Beals v. Saldanha that the "business community operates in a world economy" and that accommodating "the flow of wealth, skills and people across state lines" had become imperative.[6] The specifics of the doctrines differ among jurisdictions, but the broader objective is familiar: cross-border commerce is facilitated when legal systems respect legitimate private choices and give appropriate effect to adjudicative decisions made elsewhere.

There is an optimism in this jurisprudence that reads differently in 2026. These cases emerged during a period in which expanding international commerce, economic integration and greater legal cooperation could reasonably be viewed as mutually reinforcing. Governments today are making greater use of tariffs, sanctions, export controls, industrial policy and restrictions on access to markets, technology and capital to advance national economic and security objectives. International commercial law continues to seek certainty across borders while national policy increasingly emphasizes the significance of those borders.

Geopolitical Fragmentation and the Limits of Contractual Predictability

Recent developments in the United States-Canada trade relationship illustrate how quickly governmental action can alter the assumptions underlying an international commercial relationship. The United States-Mexico-Canada Agreement ("USMCA") entered into force in 2020, creating a detailed framework governing one of the world's most integrated trading relationships. The agreement contemplated a 16-year term, subject to a joint review after six years.[7] Yet, in July 2026, the President invoked section 338 of the Tariff Act of 1930, 19 U.S.C. § 1338—a statutory provision enacted more than 80 years earlier that had played no practical role in modern North American trade—to impose additional duties of 50 percent on specified Canadian products. The administration applied the additional duties to covered products notwithstanding their qualification for preferential treatment under USMCA.[8]

Consider a Canadian supplier and an American manufacturer who entered a long-term supply agreement after USMCA came into force. Both parties might reasonably have established their pricing, production arrangements, capital investment and other contractual commitments on the assumption that goods qualifying for preferential treatment under USMCA would continue to receive that treatment. The subsequent imposition of an unexpected 50 percent tariff under questionable statutory authority that had played no practical role in modern North American trade could fundamentally change the economics of the transaction. A mutually beneficial long-term agreement could become uneconomic almost immediately, although neither party changed its conduct and the goods, price and other contractual terms remained the same.

The resulting disputes would involve familiar legal doctrines. The contract may allocate the risk of tariffs or other governmental measures. Force majeure, change-in-law, or similar provisions may become important. The parties may disagree about foreseeability, causation, or whether the disruption falls within the risks they agreed

3 Bremen v. Zapata Off-Shote Co., 407 U.S. 1, 9 (1972).

4 Id. at 13.

5 Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–18 (1974).

6 Beals v. Saldanha, 2003 SCC 72, [2003] 3 S.C.R. 416 ¶ 26–27, quoting Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1098.

7 The United States-Mexico-Canada Agreement, 1 July 2020, art. 34.7.

8 Proclamation No. 140, 91 F.R. 46663 (July 23, 2026), invoking § 338 of the Tariff Act of 1930, 19 U.S.C. § 1338; White House, "Fact Sheet: President Donald J. Trump Imposes Additional Tariffs on Canada" (July 20, 2026), online: < https://www.whitehouse.gov/fact-sheets/2026/07/fact-sheet-president-donald-j-trump-imposes-additional-tariffs-on-canada/>.

to assume.[9]

What makes the current environment noteworthy is not the legal novelty of those doctrines, but the increasing frequency and magnitude of governmental actions capable of triggering them.

Tariffs are only one example. Other governmental measures may affect a party's ability to perform at all. Sanctions and export controls may prohibit a transaction that was lawful when made. Investment restrictions, licensing requirements, or other regulatory measures may prevent performance. More difficult still are situations in which different states impose inconsistent obligations, exposing a party to legal consequences regardless of the course it chooses.

The United Kingdom Supreme Court's 2026 decision in UniCredit Bank GmbH v. Constitution Aircraft Leasing (Ireland) 3 Ltd. illustrates the second problem. Irish companies had leased civilian aircraft to Russian airlines. Russian banks issued standby letters of credit as security for the airlines' obligations, and the London branch of the German bank UniCredit confirmed the letters of credit. They were denominated in U.S. dollars and governed by English law.[10]

The arrangements were lawful when made. Following Russia's invasion of Ukraine, the United Kingdom expanded its sanctions regime to include civilian aircraft. When the Russian airlines defaulted and the Irish lessors demanded payment under the letters of credit, UniCredit maintained that the amended sanctions prevented payment until the necessary governmental licenses were obtained. The parties had chosen English law and used irrevocable letters of credit backed by a major international bank. Those arrangements provided substantial contractual certainty, but subsequent governmental action changed the legal conditions under which the payment obligations could be performed.[11] The Supreme Court distinguished between the parties' private rights and the public purposes of the sanctions regime: the private rights remained, while the statutory regime affected their enforcement.[12]

More difficult still are circumstances in which different governments impose conflicting requirements. China's Anti-Foreign Sanctions Law, for example, provides that organizations and individuals may not assist in implementing discriminatory measures imposed by a foreign state against Chinese organizations or citizens. The legislation is intended to limit the effect in China of foreign sanctions and may apply notwithstanding contractual arrangements governed by foreign law and choice of venue.

Consider a carrier subject to foreign sanctions that prohibit or restrict performance of a contract involving a Chinese customer. Compliance with those sanctions may provide the carrier with a defense under the law governing the contract, while Chinese law may prohibit reliance on those same sanctions to justify non-performance. The result is a commercial party caught between competing governmental requirements: conduct intended to comply with the law or policy of one state may expose it to legal consequences in another.[13]

These examples illustrate a fundamental limit of contractual predictability. Parties may choose the law governing their contract, designate the forum for disputes, and allocate risks between themselves. However, they cannot prevent other states from regulating goods, payments, technology, assets, or performance necessary to carry out their bargain. As governments place greater emphasis on economic and national-security objectives, the distinction between risks the parties can allocate by contract and risks created by governmental action beyond their control becomes increasingly significant.

Governing Law: The Law Chosen by the Parties May Not Be The Only Law That Matters

A governing-law clause answers an important question in an international contract: which set of laws will determine the parties' contractual rights and obligations. That choice affects contract interpretation, enforceability, available remedies and the circumstances in which performance may be excused. By identifying the applicable law in advance, the parties hope to reduce uncertainty and can evaluate their bargain against a known legal framework. The value of these settled expectations remains substantial.

While a governing-law clause can govern the parties' private legal relationship, it will not necessarily determine every legal regime affecting the transaction itself. International transactions still may be subject to laws imposed by other states because of where the parties operate, where performance occurs, where goods or technology move, or how payments are made.

9 One can anticipate there may also be uncertainty over the legality of government actions, litigation challenging them – all of which acts as a multiplier of uncertainty.

10 UniCredit Bank GmbH, London Branch v. Constitution Aircraft Leasing (Ireland) 3 Ltd., [2026] UKSC 10 at ¶ 1, 21–29.

11 Id. at ¶ 67.

12 Id. at ¶ 28, 33–43.

13 A recent dispute before the Shanghai Maritime Court involving Hikvision Hong Kong and a Singaporean carrier illustrates the potential for such conflicts. The reported decision applied China's Anti-Foreign Sanctions Law notwithstanding the parties' choice of foreign law. (2023) Hu 72 Min Chu No. 1936 (Shanghai Maritime Court); See also B. Chen Zhu, Derik Rao, and Roxanne Chi Zhang, "China's Court Takes Expansive View in Applying the Anti-Foreign Sanctions Law, Overriding Contractual Choice of Foreign Law", Morrison Foerster (8 September 2026), online: < mofo.com/resources/insights/260908-china-s-court-takes-expansive-view-in-applying#_ftn1>

This distinction is illustrated in the caselaw above. English law governed the letters of credit in UniCredit, but UK sanctions affected whether payment could lawfully be made.

As sovereign regulation of international commerce becomes more consequential, the contrast between governing-law clauses and other applicable legal regimes assumes greater practical importance. A contract may be governed by New York law while performance occurs in Canada, goods transit through Europe, technology is subject to export controls elsewhere, and payment passes through financial institutions operating under multiple regulatory regimes. The governing-law clause continues to determine the parties' contractual rights. Yet, the transaction itself may remain subject to several other legal systems.

For parties negotiating contracts, the question is therefore broader than identifying the law governing the contract. Counsel must also identify the mandatory legal regimes capable of affecting performance and the jurisdictions applicable to them.

Forum Selection: Does Geography Matter More Again?

Forum-selection clauses provide another important source of predictability. They allow parties to determine in advance where disputes will be heard while assessing quality and experience of courts, procedural rules, discovery, cost, available remedies and efficiency.

In an international transaction, however, the selected forum may be only one of the jurisdictions in which a dispute ultimately matters.

The litigation between Google and Russian media company NAO Tsargrad Media provides a contemporary example. Google terminated Tsargrad's account in 2020, stating that U.S. sanctions required it to do so. Google's terms require disputes to be determined exclusively in the state or federal courts of Santa Clara County, California. Tsargrad nevertheless commenced proceedings in Russia and obtained a judgment requiring restoration of its account, together with escalating monetary penalties. Russian legislation enacted in 2020 permits Russian courts, in specified sanctions-related circumstances, to assume jurisdiction notwithstanding an agreement selecting a foreign court or arbitral tribunal.[14]

Google responded through proceedings in the United States. In March 2025, the United States District Court for the Northern District of California concluded, on Google's application for preliminary relief, that Tsargrad had likely obtained the Russian judgment in breach of the parties' forum-selection clause. The court granted an injunction restraining enforcement of the judgment outside Russia, while declining to restrain enforcement within Russia. The American court thus sought to limit the effect of the Russian judgment outside Russia. Whether courts in other jurisdictions would give effect to that relief may depend upon their own laws and their relationship with the competing sovereign interests. The contractual choice of California therefore remained important, but it did not prevent the dispute from being litigated elsewhere or eliminate the consequences of another sovereign's assertion of jurisdiction.[15]

The Google example highlights a broader consideration for litigators. The forum selected by the parties may determine their contractual dispute, while effective relief must be obtained elsewhere. Assets may be located in another country. Performance may occur there. Goods may need to be preserved or delivered there. A party may require interim relief from a court capable of exercising coercive authority where the relevant conduct or property is located. Ultimately, a judgment may have to be recognized and enforced by another country's courts.

These considerations may assume greater importance when the dispute itself arises from divergent governmental policies. Forum selection therefore involves more than identifying the court best suited to decide the merits. Its effectiveness may further depend on the relationship between the selected forum and the other jurisdictions where relief may be required or the resulting judgment must be enforced.

Arbitration and the Changing Meaning of Neutrality

The conventional alternative to national-court litigation is international arbitration. Arbitration offers parties greater control over the selection of the decision-maker and the legal framework for resolving their dispute. In a more fragmented geopolitical environment, however, the concept of arbitral neutrality itself warrants closer consideration.

One attraction of international arbitration is the ability of parties to select the decision-maker who will resolve their dispute. Neutrality is central to that attraction. The 2026 International Chamber of Commerce ("ICC") Arbitration Rules require arbitrators to be independent and impartial and direct the ICC Court, when making appointments, to consider factors including the prospective arbitrator's nationality, residence, experience and expertise. Where the ICC Court appoints a sole arbitrator or the president

14 Google LLC v. NAO Tsargrad Media, No. 5:24-cv-05423-EJD (N.D. Cal. Mar. 31, 2025), at 1–3; Arbitrazh Procedural Code of the Russian Federation, art. 248.1 (introduced by Federal Law No. 171-FZ of June 8, 2020).

15 Google LLC v. NAO Tsargrad Media, No. 5:24-cv-05423-EJD (N.D. Cal. Mar. 31, 2025), Order Granting in Part Motion for Preliminary Injunction.

of a three-member tribunal, that person ordinarily must not share the nationality of any party.[16] The ICC explains that the purpose of the latter rule is to ensure that the sole arbitrator or tribunal president is "fully neutral from the parties."[17]

The use of nationality as an indicator of neutrality is itself receiving renewed attention. At the International Bar Association ("IBA") Annual Conference in Toronto in November 2025, the IBA Arbitration Committee convened a session entitled "Independence and impartiality: reconsidering the role of nationality." The panel considered the continuing relevance of nationality as an indicator of independence and impartiality in a profession where practitioners increasingly have qualifications, residences and professional experience spanning several jurisdictions.[18] In 2026, the IBA established a task force on "The Nationality of the Arbitrator as a Proxy for Independence and Impartiality."[19]

These concerns are already affecting behavior. A 2025 Queen Mary University of London survey found that 30 percent of respondents changed their choice of arbitral seat in new agreements specifically because of geopolitical developments and economic sanctions. Recent practitioner commentary describes parties as reassessing not only seats, but arbitral institutions and arbitrators themselves through the lens of geopolitical neutrality.[20]

Geopolitical fragmentation adds another dimension to arbitration inquiries. Consider a long-term supply agreement between a German manufacturer and an American purchaser. The parties agree to arbitration and select an experienced Singaporean commercial lawyer as sole arbitrator. A dispute subsequently arises after U.S. tariffs materially alter the economics of the supply relationship. The Singaporean arbitrator is independent of both parties and nationally neutral. Yet the same period of trade conflict may have affected Singaporean businesses and the broader Asian economy, contributing to views about contemporary U.S. trade policy. The arbitrator may also have views about protectionism, governmental intervention in international commerce or the predictability of the international trading system.

An arbitrator's perspective may become particularly relevant where disputes require judgments about foreseeability, commercial reasonableness, mitigation or the allocation of an unexpected governmental risk. Professional experience, industry background, residence, exposure to different legal and commercial systems and publicly expressed views concerning relevant governmental policies or geopolitical developments may provide a fuller picture of the perspective a potential decision-maker will bring to the dispute. Counsel selecting an arbitrator in a geopolitically sensitive dispute may therefore have reason to consider more than nationality and conventional conflicts.

The neutrality of the tribunal only addresses one part of the dispute-resolution landscape. Arbitration also remains connected to national legal systems. A 2025 decision of the Frankfurt Higher Regional Court illustrates the continuing importance of national legal systems.[21]

A Russian purchaser obtained an arbitral award from Russia requiring a German seller to return an advance payment for goods that had not been delivered following the imposition of European Union sanctions. When the Russian company sought to have the award declared enforceable in Germany, the court refused. It concluded that enforcement would conflict with German public policy because the relevant EU sanctions formed part of that public policy. The goods fell within EU Regulations which prohibited the sales of products for use in Russia. Geopolitical fragmentation may increase the attraction of arbitration while also making the choices surrounding it more consequential: the selection of the arbitrator and seat, the relationship with national courts, and the jurisdictions in which the resulting award will ultimately need to take effect.

Geopolitical Disruption and Contractual Performance

The contractual consequences of geopolitical disruption will often be determined through familiar legal principles. Kyocera Corp. v. Hemlock Semiconductor LLC provides a useful baseline. Kyocera, a Japanese solar-panel manufacturer, entered into a ten-year take-or-pay agreement with a Michigan polysilicon producer during a period of global polysilicon shortages. The subsequent expansion of the Chinese solar industry, Chinese governmental support for domestic producers, and U.S. anti-subsidy and anti-dumping measures materially altered the global market. By 2015, the contract price substantially exceeded the prevailing market price, and Kyocera invoked a force majeure provision that expressly referred to "acts of the Government."[22]

16 ICC Rules of Arbitration (2026), arts. 12(1), 14(1), 14(5).

17 ICC, Note to Parties and Arbitral Tribunals on the Conduct of ICC Arbitration ¶ 51 (June 1, 2026).

18 International Bar Association, "Independence and impartiality: reconsidering the role of nationality," IBA Annual Conference Toronto 2025, November 5, 2025.

19 International Bar Association, Arbitration Committee Newsletter, August 2026, "Nationality of arbitrators."

20 Herbert Smith Freehills Kramer, "Geopolitical risk and international arbitration: Is neutrality under threat?" (Mar. 25, 2026), discussing the 2025 Queen Mary University of London International Arbitration Survey.

21 OLG Frankfurt, 12 June 2025, 26 Sch 12/24, CISG-online No 7573.

22 Kyocera Corp. v. Hemlock Semiconductor LLC, 313 Mich. App. 437, 441–47, 886 N.W.2d 445 (2015).

The Michigan Court of Appeals rejected the argument. The governmental developments had materially affected the economics of the transaction, but they had not prevented Kyocera from performing. Kyocera had assumed the market risk associated with its long-term take-or-pay agreement and could not, the court held, "by judicial action manufacture a contractual limitation that it may in hindsight desire."[23]

The result is unsurprising under traditional contract principles. Increased cost or an unprofitable bargain will not ordinarily excuse contractual performance where the agreement allocates that risk to the party seeking relief. The current geopolitical environment raises harder questions about the boundaries of that principle.

Return to the example of a long-term agreement between a Canadian supplier and an American manufacturer. A substantial tariff imposed after contracting changes the economics of the agreement and the Canadian supplier seeks to be relieved from performance. The American party responds that tariffs are a risk of international commerce and that the contract places that risk on the supplier. That argument closely resembles the conventional risk-allocation analysis in Kyocera.

The analysis becomes more difficult where the governmental intervention itself is extraordinary or legally contested. Is a party that assumes the ordinary risk of changes in tariffs also taken to assume the risk of a measure imposed through a statutory authority that had not previously been used for this purpose, or on a basis subsequently determined to exceed the government's legal authority? Does the magnitude or legal character of the intervention affect foreseeability or the interpretation of the risk the parties allocated between themselves? At what point does describing the event simply as a "tariff" obscure the nature of the risk that actually materializes? Recent U.S. events make these questions concrete. In 2025, the President imposed tariffs on Canadian goods under the International Emergency Economic Powers Act (the "IEEPA") on the stated basis that drug trafficking across the northern border constituted an unusual and extraordinary threat to U.S. national security and foreign policy. [24]

The tariffs were challenged in U.S. courts, raising the narrow legal question of whether the IEEPA could be used to authorize their imposition. [25]

The difficulty extends beyond the legal authority for the tariffs. The factual premise advanced for their imposition bore little resemblance to established evidence concerning the flow of fentanyl into the United States. The asserted threat from Canada had not previously been raised with the Canadian government as a material concern. Whatever the outer limits of IEEPA, a more fundamental contractual question therefore arises: can a commercial party reasonably be taken, when contracting, to have assumed the risk that extraordinary governmental powers would later be invoked on a dubious factual premise? The example illustrates the potential difference between foreseeing that tariff rates may change during the life of an international contract and allocating the risk of governmental action that departs materially from the legal and institutional assumptions prevailing when the agreement was made.

This provides two distinct places at which geopolitical fragmentation matters. The first is the merits of the contractual dispute: what risk did the parties agree to bear? The second is when the resulting judgment crosses a border: what effect will another sovereign give to that determination?

Practical Implications for Commercial Litiagators

The considerations discussed above may affect litigation strategy once an international commercial dispute arises. Several considerations warrant particular attention.

1. Involve Specialized Counsel Early

International disputes may engage several legal systems, not simply the law governing the contract or the forum in which the merits will be determined. Where another jurisdiction is materially connected to the dispute, experienced counsel in that jurisdiction should be involved early.

Local counsel may identify mandatory laws affecting performance, jurisdictional issues, the availability of interim or protective relief, the risk of parallel proceedings, or other features of the local legal and regulatory environment that may not be apparent from the contract itself. Those issues can affect litigation strategy well before enforcement becomes relevant. In a dispute involving potentially conflicting governmental policies, local counsel may also provide important context concerning how the foreign measure, and the response to it, are likely to be understood by courts in that jurisdiction.

Enforcement provides a particularly important example. Where a judgment or award will ultimately need to operate in another jurisdiction, local counsel can identify the recognition test that will be applied, available grounds

23 Id. at 453–57.

24 International Emergency Economic Powers Act, 50 USC § 1702.

25 Learning Resources Inc. et Al. v Trump. President of the United States et al., 607 U.S. 229 (2026) consolidated with Trump, President of the United States, et al. v. V.O.S. Selections, Inc., et al., (Docket No. 25-250).

for resisting enforcement, and aspects of the underlying dispute that may engage mandatory law or public policy. That advice may influence the process followed, the evidence developed, the findings sought from the court or tribunal and the characterization of the issues. Where the underlying governmental action is controversial in the enforcement jurisdiction, the party expecting to enforce may want the decision to rest clearly upon ordinary contractual rights and risk allocation. The party anticipating resistance may have a different interest in developing the evidentiary record concerning the nature, legality and consequences of the governmental action.
The broader objective is to avoid treating foreign law as an issue to be addressed only when the dispute reaches the foreign jurisdiction. Where another legal system can materially affect the dispute, counsel familiar with that system may appropriately influence the litigation strategy from the outset.

2. Look Beyond the Contractual Forum
An agreed forum remains the natural starting point for a dispute, but it may represent only one part of the litigation strategy. Counsel should consider at an early stage all jurisdictions capable of materially affecting the outcome: where the parties operate, where performance is occurring, where meaningful assets are located, and where effective interim or enforcement relief can be obtained.

The point assumes greater significance where geopolitical considerations are involved. Google/Tsargrad demonstrates that another state may assert jurisdiction notwithstanding an exclusive forum clause, requiring a response in more than one jurisdiction. A recent empirical study provides a more dramatic illustration of the potential importance of enforcement geography. Examining commercial judgments and arbitral awards following Russia's 2014 annexation of Crimea, the authors found that enforcement of Ukrainian decisions in Russia fell by 26 percent, while enforcement of Russian decisions in Ukraine fell by 33 percent. Before the annexation, cross-border enforcement rates had been high; the formal enforcement regime remained unchanged; and decisions from other countries did not experience a comparable decline.

Litigation strategy should therefore account for the jurisdictions in which the result must ultimately operate. Where the obvious enforcement route presents material legal or geopolitical risk, counsel should consider whether other assets, jurisdictions or remedies provide a more effective route to recovery. Interim relief may form part of the same analysis where goods, assets or continued performance matter more to the client than an eventual damages award.

3. Take a Broader View of Arbitrator Selection
In many international arbitrations, the arbitrators are selected after the dispute has arisen. Counsel therefore knows considerably more when constituting the tribunal than the parties knew when negotiating the arbitration clause: the nature of the dispute, the governmental measures involved, the countries affected and the issues the tribunal will have to decide.

Geopolitical context should form part of that selection exercise. Expertise, experience, independence, conflicts and nationality remain important. But nationality may be an incomplete proxy for the perspective a decision-maker brings to a geopolitically sensitive dispute. An arbitrator from a formally neutral country may have professional experience, economic interests, publicly expressed views or broader perspectives shaped by the same geopolitical events underlying the dispute.

The inquiry may therefore extend to the prospective arbitrator's professional history, writings, speeches, prior decisions where available, industry experience and connections to jurisdictions materially affected by the dispute. This is particularly relevant where the governing legal standards involve judgment, foreseeability, commercial reasonableness, mitigation, causation or the allocation of an unusual governmental risk. The objective is to understand, as far as reasonably possible, the perspective the proposed decision-maker may bring to issues on which the parties are likely to diverge. This broader approach is consistent with the developments in the arbitration community described above.

4.When Resisting Enforcement, Look Behind the Judgment or Award
A foreign judgment may appear on its face to be an entirely conventional application of contract law. Counsel resisting enforcement should consider whether the governmental action underlying the contractual liability has independent significance under public policy or other recognition rules of the enforcement jurisdiction.

The Canada-U.S. hypothetical considered above illustrates the need for this consideration. A U.S. court may conclude that a Canadian supplier assumed the risk of increased tariffs and remains bound by its contract. If enforcement is subsequently sought against Canadian assets, counsel for the supplier should consider whether the analysis ends with the orthodox contractual character of the judgment. The legal basis, character and validity of the governmental measure that transformed the economics of the bargain may provide a public-policy or related argument against recognition.

Public-policy exceptions are presently generally narrow,

and the availability of the argument will depend upon the law of the enforcement jurisdiction. The point is to test the doctrine against the governmental action underlying the judgment rather than assume that the private-law form of the judgment necessarily ends the inquiry.

One further finding from the Russia-Ukraine study is particularly noteworthy in this respect. Following the annexation of Crimea, Russian courts increased their use of the public-policy exception to deny enforcement of Ukrainian decisions by 14.8 percentage points; Ukrainian courts increased their use of the exception against Russian decisions by 9.5 percentage points.[26] The formal enforcement rules remained unchanged. The Frankfurt decision provides a different example in the arbitral context, where EU sanctions formed part of German public policy and prevented enforcement of an arbitral award.

The broader question is how much deference courts will continue to afford foreign decisions when the geopolitical relationship between the states, or confidence in the foreign legal system itself, has materially deteriorated.

5. Bring the Litigation Experience Back to the Contract

The same developments have implications for future contracting. Dispute-resolution provisions can be tested against the problems that have emerged in recent international disputes: whether effective interim relief will be available where it is required; whether the chosen forum or arbitral seat remains appropriate if relations among relevant states deteriorate; and where the resulting judgment or award is likely to require enforcement. Recent evidence that parties are reconsidering traditional arbitral seats because of geopolitical conditions suggests that this process has already begun.[27]

Conclusion

International commercial law remains built around a powerful objective: enabling parties doing business across borders to create as much predictability as possible for their commercial relationships. Governing-law clauses, forum-selection clauses, international arbitration, and the recognition and enforcement of judgments and awards continue to serve that objective and remain essential features of cross-border commerce.

What has changed is the environment in which those tools operate. Governments are making greater use of tariffs, sanctions, export controls, investment restrictions, and other forms of economic regulation to advance national objectives. Those measures can alter the economics of a transaction, affect the legality of performance, create conflicting legal obligations, and influence the ability of judgments and awards to function across borders. The legal architecture of international commerce may remain intact while the geopolitical environment surrounding it changes materially.

The challenge for commercial litigators is to approach the traditional tools of international dispute resolution with a broader appreciation of the governmental interests and legal systems capable of affecting the parties' bargain. In a more fragmented geopolitical environment, predictability depends not only on the choices parties make for themselves, but on how those choices will interact with the legal and political systems capable of affecting performance, adjudication and enforcement.

26 Dmitrii Shchetinin & Stanislav Avdeev, "The impact of international conflict on cross-border commercial dispute resolution," Journal of Public Economics 260 (2026) 105708, at 8.

27 Herbert Smith Freehills Kramer, supra note 21.

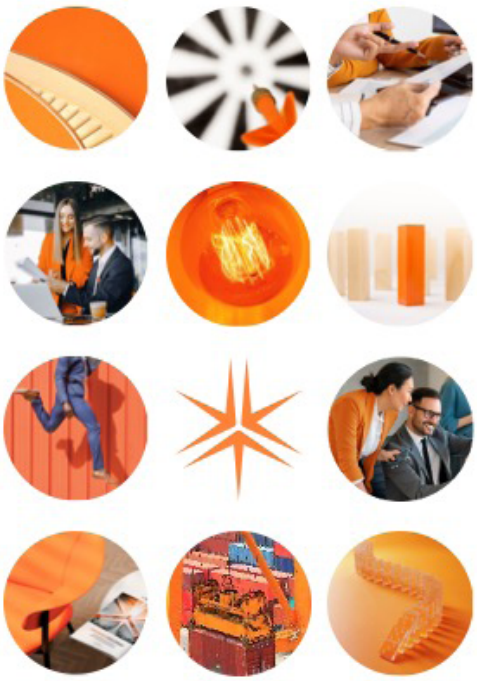
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Litigating Commercial Disputes in an Era of Geopolitical Risk

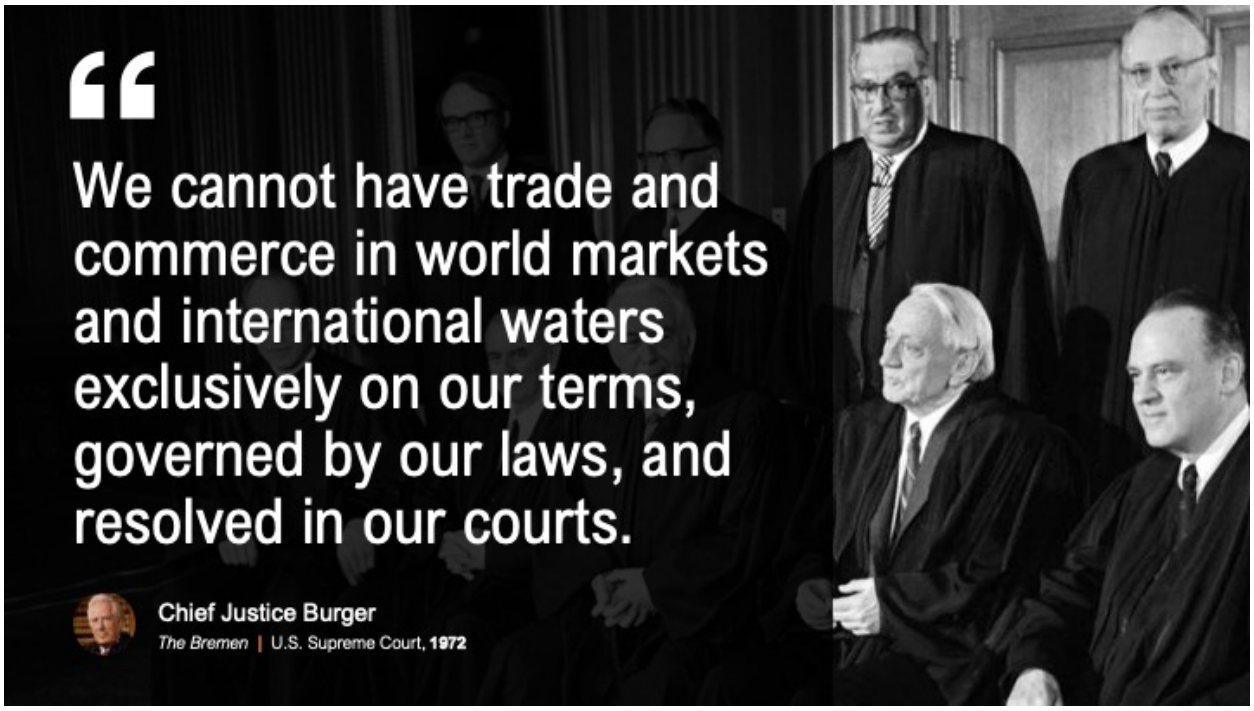


Adam Stephens
Chair, Disputes

NOVEMBER 6, 2026

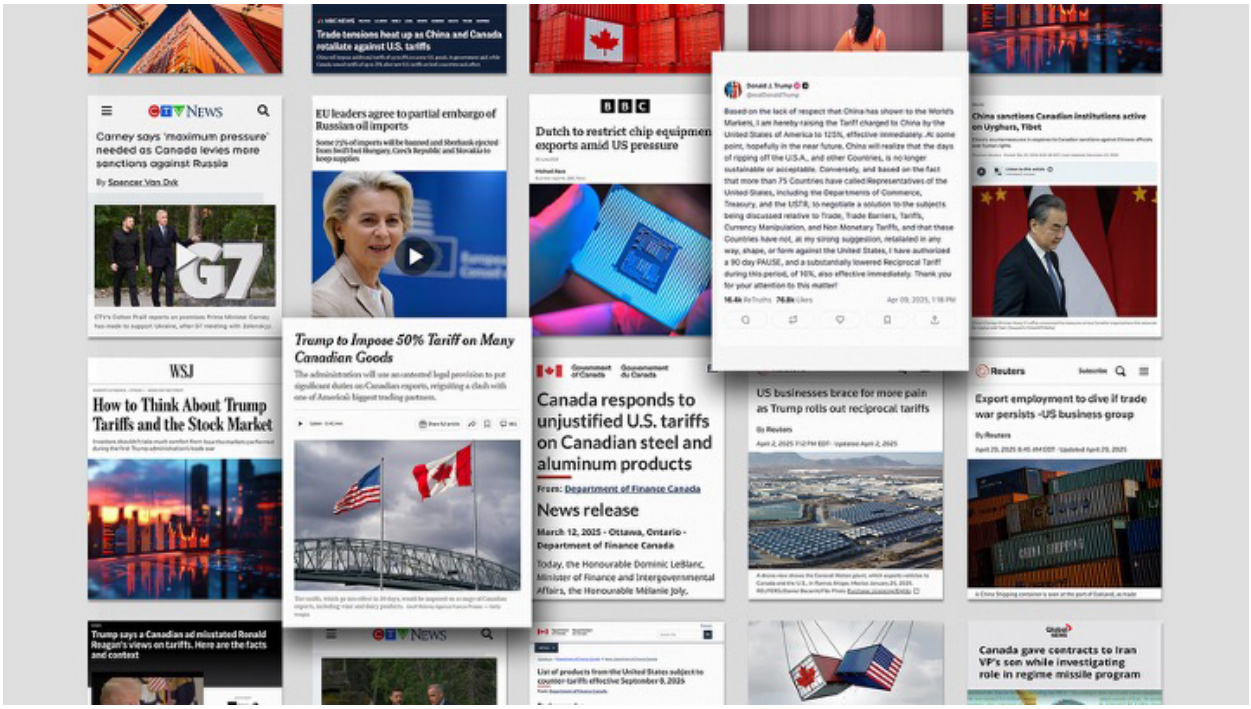


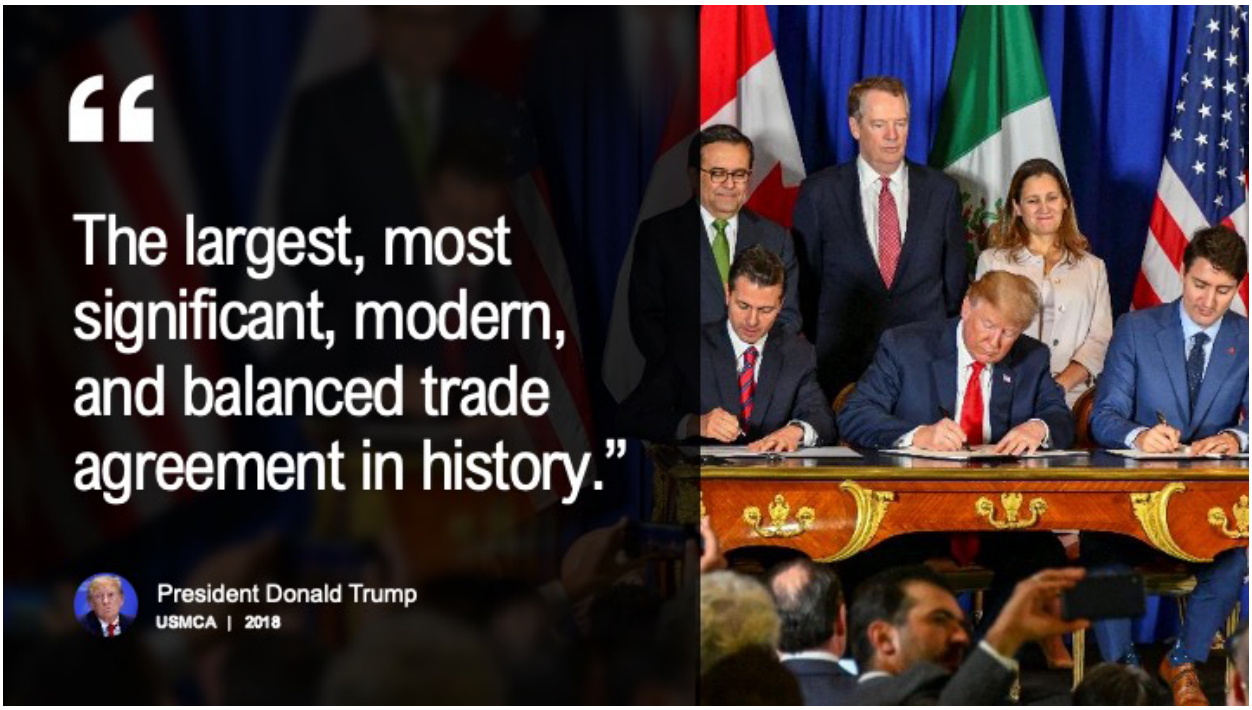


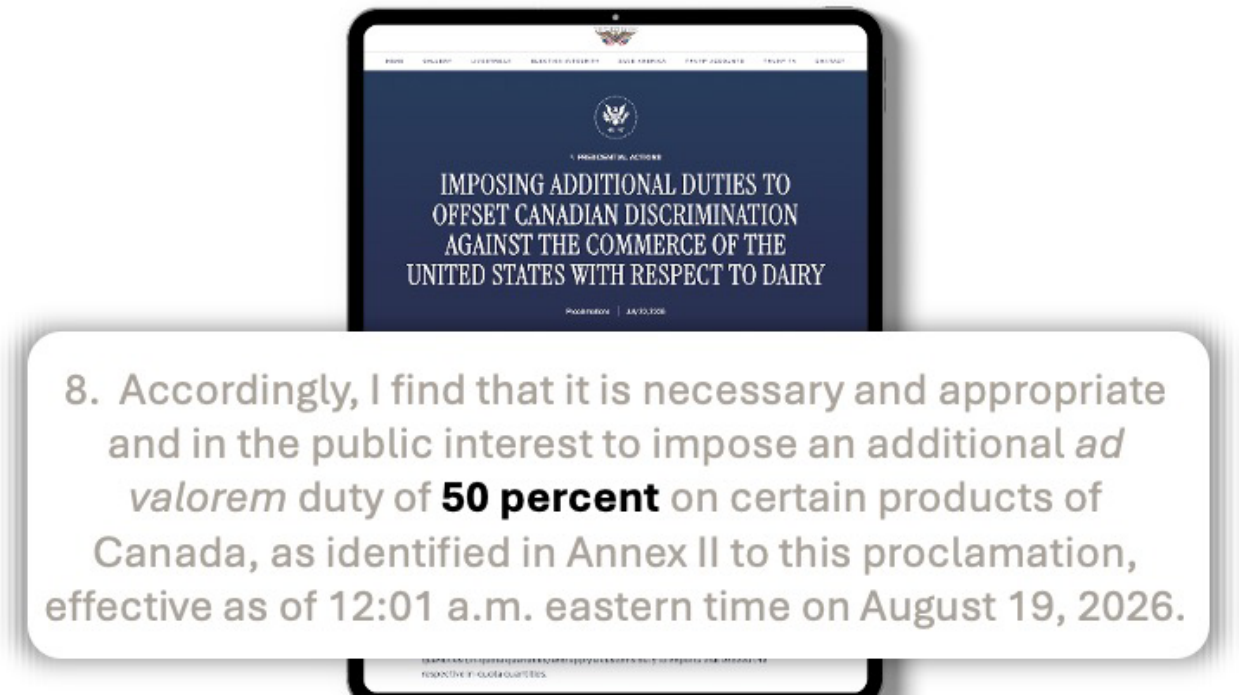




Integration → Predictability


Trade tensions heat up as China and Canada retaliate against U.S. tariffs
CTV NEWS
Carney says 'maximum pressure' needed as Canada levies more sanctions against Russia
By Spencer Van Dyk
G7
EU leaders agree to partial embargo of Russian oil imports
BBC
Dutch to restrict chip equipment exports amid US pressure
Donald J. Trump
Based on the lack of respect that China has shown to the World's Markets, I am hereby raising the Tariff charged to China by the United States of America to 125%, effective immediately. At some point, hopefully in the near future, China will realize that the days of ripping off the U.S.A., and other Countries, is no longer sustainable or acceptable. Conversely, and based on the fact that more than 75 Countries have called Representatives of the United States, including the Departments of Commerce, Treasury, and the USTR, to negotiate a solution to the subjects being discussed relative to Trade, Trade Barriers, Tariffs, Currency Manipulation, and Non Monetary Tariffs, and that these Countries have not, at my strong suggestion, retaliated in any way, shape, or form against the United States, I have authorized a 90 day PAUSE, and a substantially lowered Reciprocal Tariff during this period, of 10%, also effective immediately. Thank you for your attention to this matter!
China sanctions Canadian institutions active on Uyghurs, Tibet
WSJ
How to Think About Trump Tariffs and the Stock Market
Trump to Impose 50% Tariff on Many Canadian Goods
Canada responds to unjustified U.S. tariffs on Canadian steel and aluminum products
From: Department of Finance Canada
News release
March 12, 2025 - Ottawa, Ontario - Department of Finance Canada
US businesses brace for more pain as Trump rolls out reciprocal tariffs
Reuters
Export employment to dive if trade war persists -US business group
Trump says a Canadian ad misstated Ronald Reagan's views on tariffs. Here are the facts and context
Canada gave contracts to Iran VP's son while investigating role in regime missile program


“
The largest, most significant, modern, and balanced trade agreement in history.”
President Donald Trump
USMCA | 2018

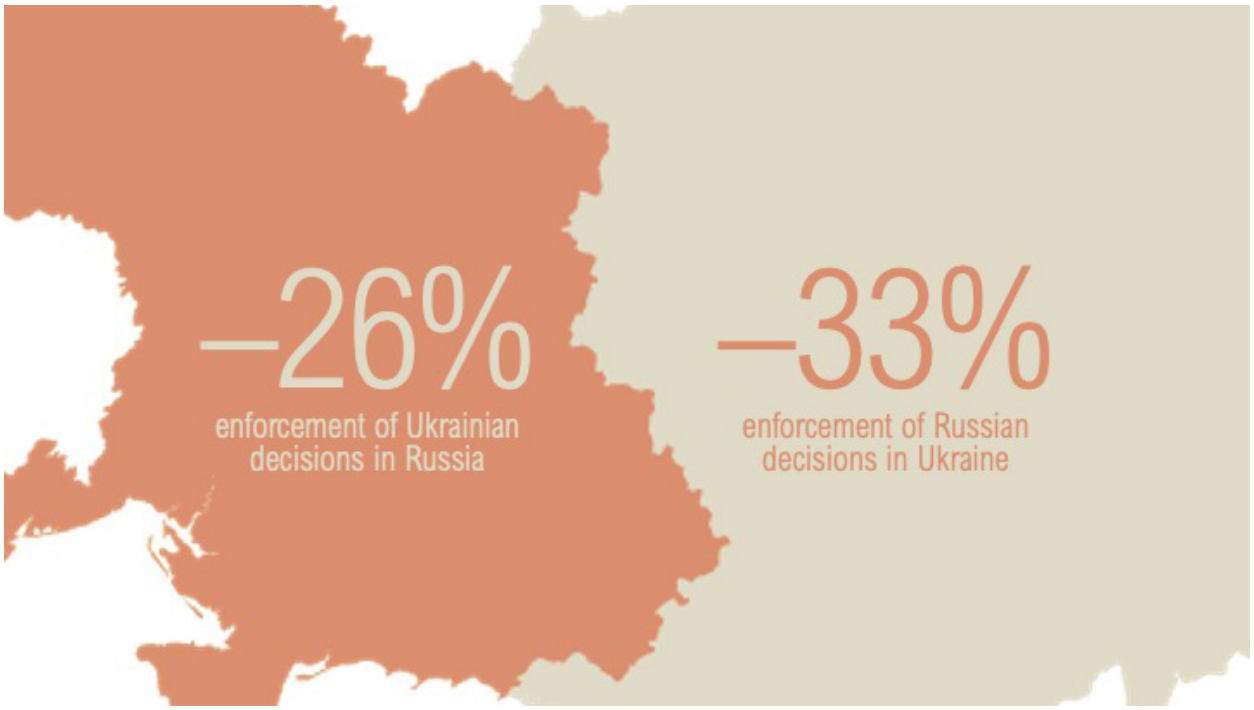

IMPOSING ADDITIONAL DUTIES TO OFFSET CANADIAN DISCRIMINATION AGAINST THE COMMERCE OF THE UNITED STATES WITH RESPECT TO DAIRY
8. Accordingly, I find that it is necessary and appropriate and in the public interest to impose an additional *ad valorem* duty of **50 percent** on certain products of Canada, as identified in Annex II to this proclamation, effective as of 12:01 a.m. eastern time on August 19, 2026.


1930


COMPLY / DON'T COMPLY


"EXCLUSIVE" JURISDICTION


NEUTRAL?
NEW YORK
SINGAPORE
FRANKFURT


–26%
enforcement of Ukrainian decisions in Russia
–33%
enforcement of Russian decisions in Ukraine


WHAT OTHER COUNTRY *MATTERS?*
WHERE ARE THE *ASSETS?*
WHO IS DECIDING?
WHERE MUST THE RESULT WORK?


WHAT HAPPENS WHEN GOVERNMENTS
Tariffs
Sanctions
INSIST ON THEIR OWN TERMS?



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

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

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

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- Real Estate
- Municipal, Planning and Land Development
- Insurance and Risk Management

Thought Leadership
- "Director & Officer Insurance Trends in Canada", Global Access, May 18, 2021
- "Event Cancellations, Virtual Meetings and Regulatory Updates for Canadian Charities and Not-for-Profits", OBA, August 8, 2020
- "Good Faith in Leasing", Presented at Duties of Good Faith: Recent Developments in the Law and Practical Implications – June 9, 2016 (LEXPERT Professional Development)

Recognition
- The Best Lawyers in Canada – Corporate and Commercial Litigation, 2021-2027
- The Canadian Legal Lexpert Directory, Litigation – Corporate Commercial, 2023, 2025-2026
- Benchmark Canada, Litigation Star: General Commercial, 2019-2026
- Fellow, Litigation Counsel of America

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It Ends With Us: When Crisis PR is the Crisis

Andrea Christman
Poston Communications

How Did It End Like This?
Andrea Christman and Briana Willson

Roughly three and a half years ago, Blake Lively and Justin Baldoni were trading jokes and supportive text messages during pre-production of It Ends With Us, the film adaptation of Colleen Hoover's bestselling novel[1]. Since then, both stars have taken nearly two years of reputational hits as they litigated and relitigated their competing versions of what happened on set and during the promotional run. So how exactly did it end up here? How did a movie about domestic violence and female triumph leave both of its stars looking significantly worse?

The Production
In 2019, Baldoni, an actor best known for his role on the TV series Jane the Virgin, optioned Hoover's massively popular book[2]. Baldoni co-founded Wayfarer Studios with Steve Sarowitz, and in 2022 the studio, led by CEO Jamey Heath, partnered with Sony Pictures to produce and distribute the film[3]. Lively signed on to play the lead at the end of 2022[4]. Both sides agreed that the early meetings and discussions about the film were collaborative[5]. Production began in May 2023, and from there, Lively and Baldoni tell very different stories about what happened on set and what led to their public legal battle in 2024.

In her complaint with the California Civil Rights Department, Lively alleged that Baldoni and Heath subjected the cast and crew to "invasive, unwelcome, unprofessional and sexually inappropriate behavior" during the first phase of production[6]. That phase ran from May to June 2023, when Hollywood strikes halted filming. Before filming resumed, the parties held an "all-hands" meeting to address the work environment and set out the changes required before production could restart[7]. All parties agreed to the conditions, and filming wrapped in February 2024[8].

Lively alleged that in the run-up to the film's release, she and her co-stars followed the agreed-upon marketing plan, which emphasized themes of strength, resilience and hope[9]. According to Lively, Baldoni then pivoted away from that message and focused on the film's domestic violence themes to explain his distance from other members of the cast[10].

Lively alleged that this was the start of a coordinated plan to "destroy" her reputation[11]. She claimed Baldoni and his associates planned to use their unlimited resources to retaliate against her for raising misconduct allegations[12]. Baldoni's countersuit denied the harassment allegations and described a different problem on set: an attempt by Lively and her husband, actor Ryan Reynolds, to use their considerable star power to take the movie out from under him[13].

Baldoni claimed that Lively began asserting creative control early on over many parts of the project, from the script to her costumes to the soundtrack[14]. He claimed that when filming paused and then resumed after the strikes, he was virtually powerless to stop her, because she threatened to withhold promotional support if her demands were not met[15].

1 Reeves Wiedeman, Regretting 'Us' How the Feud Between Blake Lively and Justin Baldoni Led to a $300 Million Trial that Could Torch Both their Carers, VULTURE, (May 4, 2026), https://www.vulture.com/article/justin-baldoni-blake-lively-hollywood-feud-taylor-swift-ryan-reynolds.html

2 First Amended Complaint, at 11, Lively v. Wayfarer Studios LLC et al, No. 1:24-cv-10045 (S.D.N.Y. Jan. 31, 2025).

3 Id. At 17.

4 Id.

5 Wiedeman, supra note 1.

6 Complaint, Lively v. Wayfarer Studios LLC (Cal. Civ. Rts. Dep't filed Dec. 20, 2024), https://www.nytimes.com/interactive/2024/12/21/us/complaint-of-blake-lively-v-wayfarer-studios-llc-….

7 Id. At 2.

8 Id. At 4.

9 Id.

10 Id.

11 Complaint, supra Note 6 at 5.

12 Id. At 12.

13 First Amended Complaint, supra Note 2, at 4-5.

14 Id. At 6.

15 Id. At 81.

When the movie premiered in August 2024, observers noted visible tension among the cast[16]. Lively also drew criticism for her promotion of the film, which some viewed as downplaying the seriousness of domestic violence[17]. Even so, the film was a box office success[18].

The Lawsuits

Four months after the film's release, in December 2024, Lively filed a complaint with the California Civil Rights Department alleging sexual harassment and retaliation by Baldoni and Heath[19]. The filing set off a wave of litigation that would dominate headlines for the next year and a half and damage everyone's reputation in the process.

Lively's complaint detailed several alleged instances of inappropriate conduct on set. She alleged that intimate scenes were not handled to industry standards, that Baldoni and Heath discussed their sex lives in front of her, that they asked her intimate questions and entered her trailer unannounced while she was undressed or breastfeeding, among other things[20]. Lively also claimed that a smear campaign was then designed and launched to damage her reputation and to get ahead of any information about her harassment claims becoming public[21].

One day after Lively's California filing, The New York Times published an in-depth investigation into the production of It Ends With Us, Lively's allegations, and the mechanics of the alleged smear campaign against her[22]. Much of the article's content tracked closely with Lively's filing.

On December 24, 2024, Stephanie Jones, the former publicist for Baldoni and Wayfarer, sued Baldoni, Heath, Wayfarer Studios and publicists Jennifer Abel and Melissa Nathan, alleging breach of contract, tortious interference, and defamation[23]. Jones claimed that Abel and Nathan conspired to create the smear campaign against Lively and planned to blame Jones for their alleged misconduct[24]. Abel, a former employee of Jones, had worked with her on the Baldoni and Wayfarer account. Nathan was hired around the time of the film's release.

On the last day of 2024, both sides escalated. Lively filed a federal lawsuit against Baldoni, the Wayfarer parties, Abel and Nathan, with claims mirroring her California complaint. That same day, Baldoni sued The New York Times for defamation in California state court. He later dropped the California suit and brought his claims against the Times in the U.S. District Court for the Southern District of New York, as part of a broader suit against Lively, Reynolds and their publicist, Leslie Sloane. The court consolidated that suit with Lively's case.

Over the following months, both sides fought over discovery and litigated the case in court and in the court of public opinion. Parties were added and dropped. The court eventually dismissed Baldoni's claims against the Times, Lively, Reynolds and Sloane[25] [26] [27]. The court later dismissed most of Lively's claims, including her sexual harassment claims, leaving only her retaliation claims for trial[28]. Then, two weeks before trial and after nearly 18 months of legal maneuvering, the parties settled.

After the settlement, both sides claimed victory and vindication. What is clear, however, is that neither Lively nor Baldoni is walking away unscathed.

Two Courtrooms, One Record

In January 2025, I attended my first Trial Network business meeting and was lucky enough to land at a dinner table of leading women trial lawyers. At one point the conversation turned to Lively v. Baldoni, which had been filed just weeks earlier. At that point, everything I knew about the case came from The New York Times investigation published right before the lawsuit, with its detailed text messages among Baldoni, Wayfarer and their publicists.

The views were strong and they were split. By dessert, it was clear to me that this case was as much a communications battle as a legal one, and that the two strategies were bound together in ways that neither side seemed to fully appreciate.

Eighteen months later, that first impression has held up. In a public dispute, the PR strategy and the litigation strategy produce one shared record. Here is what trial lawyers and in-house counsel can take from the wreckage.

16 Mike McIntire, Julie Tate, and Megan Twohey, 'We Can Bury Anyone': Inside a Hollywood Smear Machine, THE NEW YORK TIMES, (Dec. 22, 2024).

17 First Amended Complaint, supra Note 2, at 119.

18 'We Can Bury Anyone': Inside a Hollywood Smear Machine, supra Note 16.

19 Complaint, supra Note 6 at 12.

20 Id. At 13, 16, and 19.

21 Id. At 29. ("As early as May 2024, Mr. Baldoni told his team that they needed a plan to get ahead of the claims against him, in the event they were to go public.")

22 'We Can Bury Anyone': Inside a Hollywood Smear Machine, supra Note 16.

23 Complaint, Jones et al v. Abel et al, No. 659849/2024 (Sup. Ct. N.Y. County, 2024). (Case was removed to federal court, see Notice of Removal, Jones et al v. Abel et al, No. 1:25-cv-00779 (S.D.N.Y Jan. 27, 2025).

24 Id. At 1

25 Opinion and Order, Lively v. Wayfarer Studios LLC et al, at 71, No. 1:24-cv-10049 (S.D.N.Y June 9, 2025). Baldoni and the Wayfarer parties claim for civil extortion was dismissed because they failed to show that there was a wrongful threat, constituting duress, to which the plaintiff acquiesced, causing damages.

26 Id. At 80. Baldoni and the Wayfarer parties could not bring defamation claims against Lively, Reynolds, or Sloane because her statements were protected under California law, and Reynolds and Sloane had only repeated Lively's versions of events which they had no reason to doubt.

27 Id. At 83. The judge ruled that the Times was protected by fair reporting privilege.

28 Opinion and Order, Lively v. Wayfarer Studios LLC et al, at 151, No. 1:24-cv-10049 (S.D.N.Y Apr. 2, 2026)

Lesson 1: Know Your Endgame Before You Engage

We can only speculate what Lively and Baldoni hoped to achieve, but the results are a matter of record. The court dismissed Wayfarer's libel claim against the Times and later ordered the studio to pay the newspaper roughly $171,616 in fees[29]. Baldoni's claims against Lively, Reynolds and Sloane were dismissed in June 2025[30]. Most of Lively's claims, including sexual harassment, were dismissed in April 2026[31]. When the case finally settled two weeks before trial, Variety reported that no money changed hands as part of the agreement. However, Lively sought roughly $8 million in attorney fees and was awarded about $400,000[32].

After 18 months, millions in legal fees and a steady stream of damaging headlines, both parties ended up roughly where a quiet negotiated resolution might have left them in early 2025.

Crisis communicators get this request all the time. A client under public attack wants to file a defamation suit to "clear their name." We almost always advise against it. Such a suit rarely clears anyone's name quickly. It restarts the news cycle, repeats the harmful allegations in court filings and invites the other side to prove its claims through discovery. If you're going to fight a pig, you're going to get dirty.

Before a client goes public or sues, advisers should answer three questions. What outcome is the client seeking: vindication, money, a change in behavior or simply for the story to go away? What is the client willing to have made public to get it? And is litigation the fastest route to that outcome, or the slowest?

Lesson 2: Assume Every Strategy Message Is a Future Exhibit

The most damaging material in this case came from the public relation team's own text messages. The Times story, headlined "'We Can Bury Anyone,'" was built on communications obtained through a subpoena, including a publicist's message that Baldoni "wants to feel like she can be buried." Baldoni's side has argued that those messages were taken out of context[33]. Even so, they defined the public story before his lawyers filed a single response.

The case also showed a risk counsel rarely plans for: the PR team becoming a litigant. Stephanie Jones's lawsuit against her former colleagues and clients put the inner workings of the communications strategy at the center of a separate case, with its own filings, discovery and headlines. A communications team that falls out with itself, or with its client, can become a source of evidence all on its own. Neither side's communications team stayed out of the record. Baldoni's countersuit accused Lively's publicist, Leslie Sloane, of spreading damaging claims about him to the press, allegations that the court later dismissed, along with the rest of his claims.

Structure, which we will revisit later, is the first line of defense and disciplined writing is the second. Privilege protection for communications consultants varies by jurisdiction and can be lost, so every text, Slack message, and strategy memo should be written as if opposing counsel might read it aloud to a jury. Set that expectation in writing at the start of the engagement. Agree on which channels the team will use and who belongs on each message. Keep strategy discussions separate from casual conversation.

Lesson 3: Where You Get Your Information Shapes What You Believe

In high-profile disputes, the channel often shapes the story as much as the facts do. My own first impression of this case came almost entirely from The New York Times investigation, with its detailed text messages and its account of an alleged smear campaign. Someone who first met the story through social media would likely have had a very different first impression. There, clips from the 2024 press tour that were critical of Lively were circulating months before any lawsuit was filed.

That difference was also part of the case. In August 2024, Nathan, Baldoni's crisis publicist, brought in digital consultant Jed Wallace. Wallace says his role was limited to monitoring social media. Lively alleged much more: that he ran a "digital army" to seed and amplify negative content[34]. Her filings cited Wallace's alleged message to Nathan that "we are crushing it on Reddit[35]." Her lawyers estimated at least $34 million in reputational harm, based on 65 million negative social media impressions. Wallace denied the claims and sued Lively for defamation. Courts in New York and Texas dismissed both suits on jurisdictional grounds, so neither side's claims were tested on the merits.

Whatever Wallace did or didn't do, the tools exist. Digital firms can boost or bury content on algorithm-driven platforms. Counsel should assume that a well-funded opponent may be using those tools to shape how

29 Decision and Order on Motion, The New York Times Company v. Wayfarer Studios LLC, at 8, No. 162963/2025 (N.Y. Sup. Ct. July 27, 2026).

30 Opinion and Order, supra Note 25, at 71.

31 Opinion and Order, supra Note 28 at 151.

32 Opinion and Order, Lively v. Wayfarer Studios LLC et al, at 20, No. 1:24-cv-10049 (S.D.N.Y Aug. 25, 2026).

33 First Amended Complaint, supra Note 2, at 3-4.

34 Complaint, Lively v. Wayfarer Studios LLC et al, at 53, No. 1:24-cv-10049 (S.D.N.Y Dec. 31, 2024).

35 Id. At 53.

potential jurors see the case.

My review of the coverage also suggests some differences in how the story was told in each channel. Legacy outlets tended to frame it around Lively's filings. Social video and creator commentary gave more attention to Baldoni's perspective and to criticism of Lively. That difference is neither clean nor consistent, so it would be a mistake to treat it as a rule. Plenty of Times readers sided with Baldoni, just as plenty of TikTok users sided with Lively. Still, each channel told the story with its own emphasis, tone, and cast of commentators, and audiences largely took in the version they were shown.

For trial lawyers, the implication goes beyond celebrity feuds. Your jury pool no longer gets its news from one place. A story that looks settled on the front page of a national newspaper may be told very differently in the feeds your jurors scroll, where people with a stake in the outcome may be shaping what they see. A litigation communications plan should map where each relevant audience gets its information, whether that audience is jurors, regulators, employees, investors, or customers. It also shouldn't assume that winning the narrative in one channel means winning it everywhere.

Lesson 4: Goodwill Is a Bank Account, and Crises Are Withdrawals

Reputation going into a dispute carries as much weight as the strategy used during it. Lively entered the public fight with her goodwill already drained by a promotional tour that many viewers found tone-deaf given the film's subject matter. When her allegations became public, a meaningful share of the audience was primed to doubt her.

Lively's own filings acknowledged the damage. Her amended complaint alleged a "significant spike in the volume of negative sentiment" around August 8 and August 14, 2024, in the middle of the press tour[36]. Her legal team blamed that decline on a coordinated campaign by Baldoni's publicists, while critics pointed to her own promotional choices. Either way, the point for counsel is the same: reputation is built or spent long before a lawsuit is filed.

Baldoni had the opposite problem. He had built a large reserve of goodwill through years of public advocacy on healthy masculinity, including his "Man Enough" platform. That reserve bought him public patience, but the brand also raised the stakes, because any evidence of a coordinated smear campaign contradicted everything he had built. He now has a significantly less favorable reputation. If he faces another public controversy, he'll have much less to draw on.

For in-house counsel especially, the lesson is to measure brand goodwill before choosing a litigation communications posture. An aggressive public strategy that a trusted brand can absorb may be disastrous for one that is already under strain.

Lesson 5: Your Allies, and Their Silence, Are Part of the Message

In high-profile disputes, the public reads the people around the parties as closely as the parties themselves. Taylor Swift, one of Lively's closest friends, stayed publicly silent on Lively's behalf throughout the litigation. Her only public comment came through a spokesperson, who distanced Swift from the film after Baldoni's team subpoenaed her, a subpoena later withdrawn. Her texts with Lively still surfaced in court filings. For some observers, that silence was the deciding factor. If Lively's most powerful friend wasn't publicly standing behind her, why should they?

Counsel rarely controls third parties, but the communications plan should anticipate them. Who will speak up for the client? Who is expected to and won't? Can silence be explained or offset? And, as this case showed, could bringing an ally into the legal fight through subpoenas, filings or discovery cost you the very support you need?

Lesson 6: Put PR Under Counsel, and Keep It Ethical

When a dispute is headed toward litigation, my advice is consistent: outside counsel should retain the communications firm, which should then work under counsel's direction. That structure gives the client the best chance of keeping strategy discussions out of the public record. It also means counsel and the communications team build their plans together.

The legal foundation goes back to United States v. Kovel, a 1961 decision by the U.S. Court of Appeals for the Second Circuit. The court extended attorney-client privilege to an accountant hired to help a lawyer give legal advice. Courts have since applied similar reasoning to communications consultants. In In re Grand Jury Subpoenas Dated March 24, 2003, which arose from the Martha Stewart investigation, the U.S. District Court for the Southern District of New York protected communications with a PR firm that counsel had hired to support its legal strategy[37]. Other courts have been less willing. The same court reached the opposite result in Calvin Klein Trademark Trust v. Wachner, declining to protect a PR firm's work that it viewed as ordinary

36 Complaint, Supra Note 34, at 68.

37 In re Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

publicity rather than help with legal advice[38].

These cases suggest three conditions for protection:
- The engagement should come from counsel.
- The work should support the legal representation.
- Even then, protection varies by jurisdiction and is never guaranteed.

This dispute shows what can happen without that structure. As far as the public record shows, the publicists worked for the parties themselves, and their private strategy texts became the public story. We can't know whether privilege would have protected those messages. A counsel-led structure would have added a layer of protection, though. Just as important, a lawyer would have reviewed the strategy before anyone put it in writing. The structure has benefits beyond privilege. When counsel directs the communications team, public statements can be vetted for trial publicity concerns and defamation risk before they go out under the American Bar Association Model Rules of Professional Conduct, Rule 3.6. Every message can be tested against the case's endgame. And the client hears one coordinated recommendation instead of two advisers pulling in different directions.

There is one situation where that structure is the wrong choice: when the communications strategy itself would create a legal ethics problem, such as spreading false information or running covert attacks on a witness or opposing party. Under Model Rules 5.3 and 8.4(a), a lawyer who directs that work may be held responsible for it. A covert campaign to seed negative content about the other side, like the one Lively alleged, would put any supervising lawyer in a very difficult position. The answer is to drop the tactic and keep the PR team under counsel. If a strategy can't survive a lawyer's supervision, the strategy is the problem. A tactic that raises legal ethics concerns would also be questionable under the communications profession's own ethical standards.

How Did It End Like This?

It Ends With Us was supposed to be a story about recognizing a harmful cycle and choosing to break it. The litigation it produced followed a cycle of its own: public allegations, public counterattacks, lawsuits filed partly as messaging, discovery turning private strategy into public record, and a settlement both sides called vindication and almost no one else did.

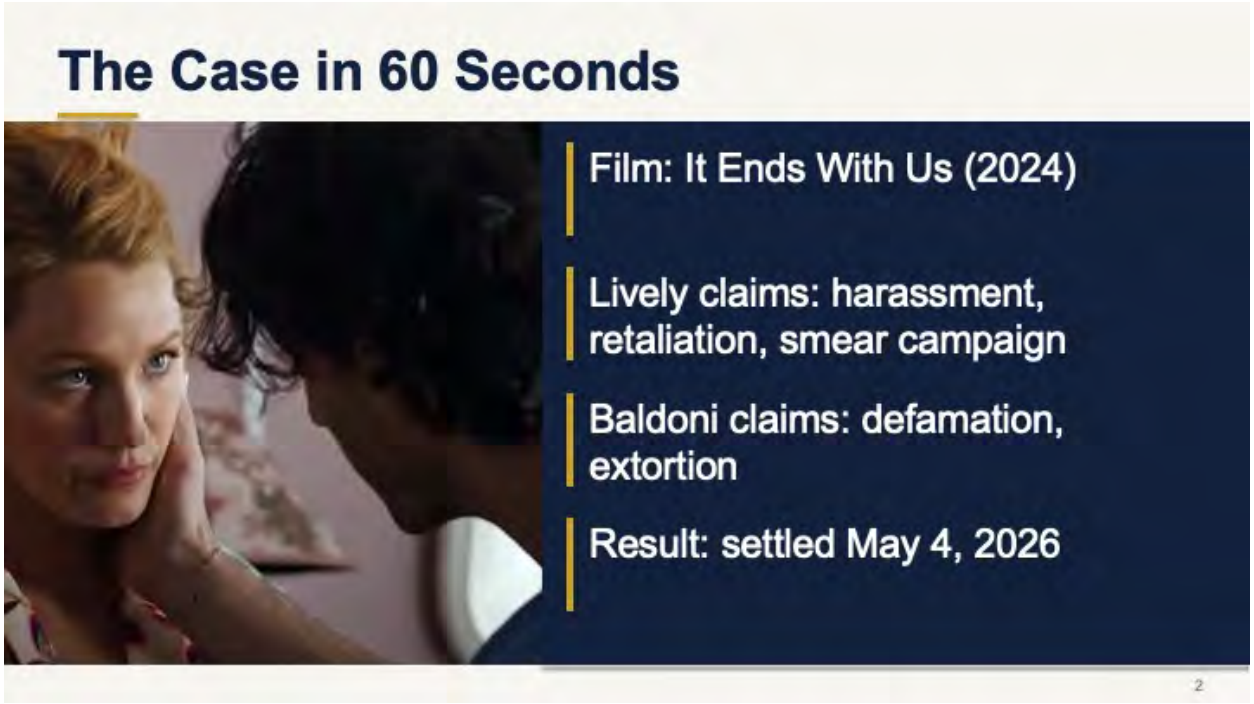
Here, much of that cycle goes back to one decision about structure: the communications strategy and the legal strategy ran on separate tracks. The better model puts communications professionals under the direction of counsel from the start. That structure offers the best available protection for strategy discussions and keeps both teams working toward the same endgame. The only reason to depart from it is a strategy that couldn't survive a lawyer's supervision. In that case, change the strategy and keep the structure.

For lawyers and in-house counsel handling a dispute in the public eye, breaking the cycle means:
- Bring communications counsel in early and through counsel. Doing so allows for legal and communications strategy to be built together from the first day.
- Define the endgame first. Test every decision against it.
- Structure for privilege, but write as if it will be discovered. Privilege protection varies by jurisdiction and is never guaranteed.
- Choose your channels deliberately. Know where your audiences, including your jury pool, get their information.
- Take stock of goodwill and allies first. Then decide how aggressive to be.
- Draw a bright ethical line. Communications should be truthful, attributable and defensible in front of a judge.

The courtroom and the court of public opinion are two stages for the same story. The parties who give their legal and communications teams one plan, one endgame and one set of ethical boundaries are far less likely to become the story themselves.

38 Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000).


It Ends With Us:
When Crisis PR Is the Crisis
Poston
COMMUNICATIONS
Arriving at Manhattan federal court, Feb. 11, 2026. Photo: People


The Case in 60 Seconds
Film: It Ends With Us (2024)
Lively claims: harassment, retaliation, smear campaign
Baldoni claims: defamation, extortion
Result: settled May 4, 2026
2

AUDIENCE POLL

Whose account did you find more believable?

- A Blake Lively
- B Justin Baldoni
- C Neither, both lost
- D Too close to call

Poll QR code

Live results

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Who's Who



Blake Lively
Actor, producer



Justin Baldoni
Director, co-star, Wayfarer

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Five Legal Fronts

1. Lively's California Civil Rights Department complaint
2. Lively v. Wayfarer Studios LLC
3. Wayfarer Studios LLC et al. v. The New York Times Company
4. Wayfarer Studios LLC et al. v. Lively et al.
5. Jones v. Abel / Baldoni v. Jones

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On Set and On Screen



Filming begins, Jersey City, May 2023. Photo: People



Production resumes, Jan. 2024. Photo: People



Film still. Photo: Nicole Rivelli / Sony Pictures

On screen: romance. Behind the scenes: tension.

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Summer 2024

Aug. 2
"She can be buried" text

NEWS
Aug. 6
NY premiere

NEWS
Aug. 9
Film opens, backlash

■ COURT FILING ■ NEWS COVERAGE

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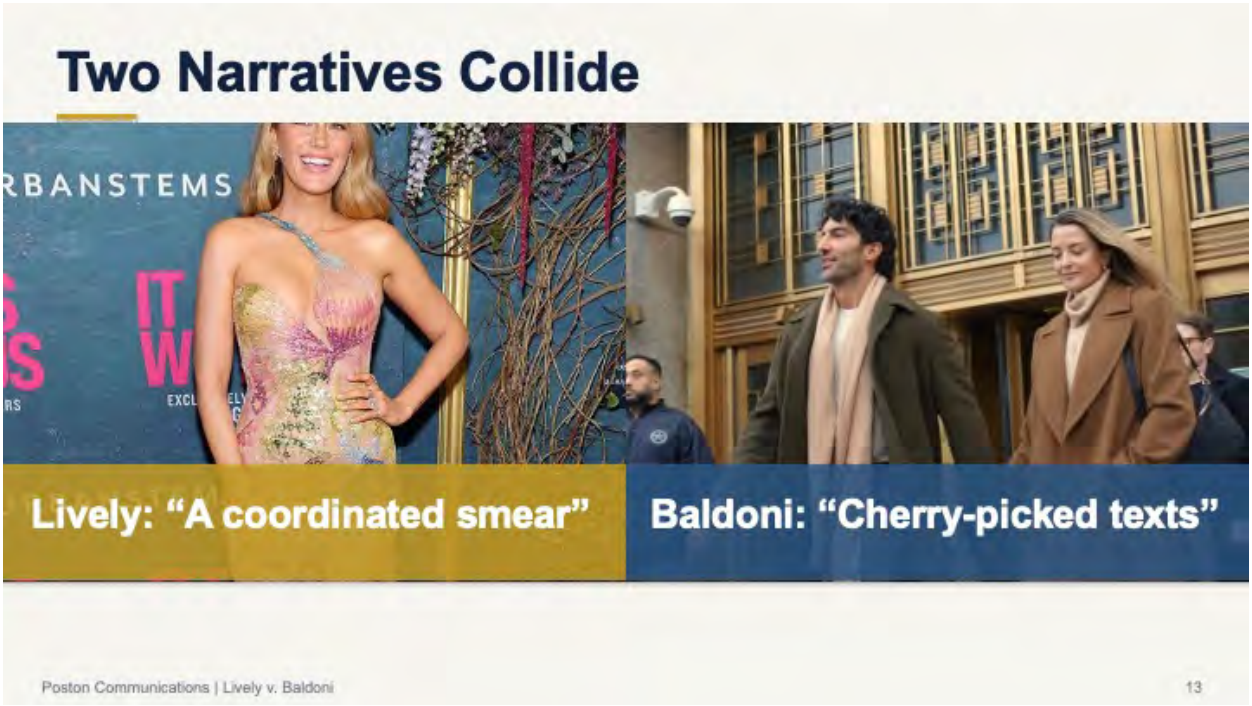
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Phase 2: The Flashpoint | Dec. 2024




Dec. 20 to 24, 2024
COURT FILING
Dec. 20
Civil rights complaint
COURT FILING
Dec. 24
Jones sues Abel
NEWS
Dec. 21
NYT: "We Can Bury Anyone"
COURT FILING
NEWS COVERAGE
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Dec. 31, 2024: Dueling Lawsuits
COURT FILING
Dec. 31
Lively files federal suit
COURT FILING
Dec. 31
Baldoni sues NYT
NEWS
Dec. 31
Coverage explodes
COURT FILING
NEWS COVERAGE
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Two Narratives Collide
RBANSTEMS
Lively: “A coordinated smear”
Baldoni: “Cherry-picked texts”
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Phase 3: The Counterattack | 2025


Jan. 2025
COURT FILING
Jan. 16
$400M suit filed by Wayfarer
COURT FILING
Jan. 27
Trial set for March 2026
NEWS
Jan. 21
Raw set footage
COURT FILING
NEWS COVERAGE
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Feb. to Mar. 2025
COURT FILING
Feb. to June
Discovery wars
COURT FILING
Mar. 21
Baldoni sues Jones
NEWS
Feb. 1
Evidence website
COURT FILING
NEWS COVERAGE
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Phase 4: First Round of Court Rulings

June to Dec. 2025

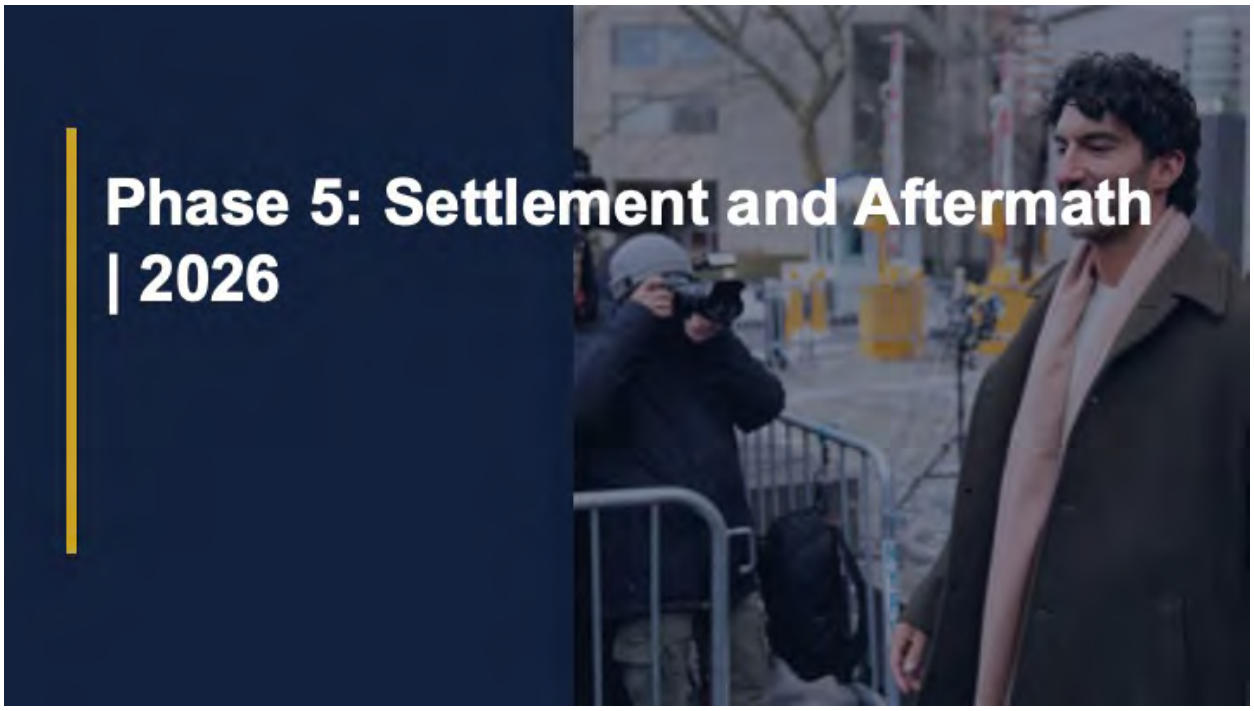
COURT FILING
June 9
$400M + NYT suits dismissed

COURT FILING
June 23
No refiling

COURT FILING
Dec.
Trial moved to May 2026

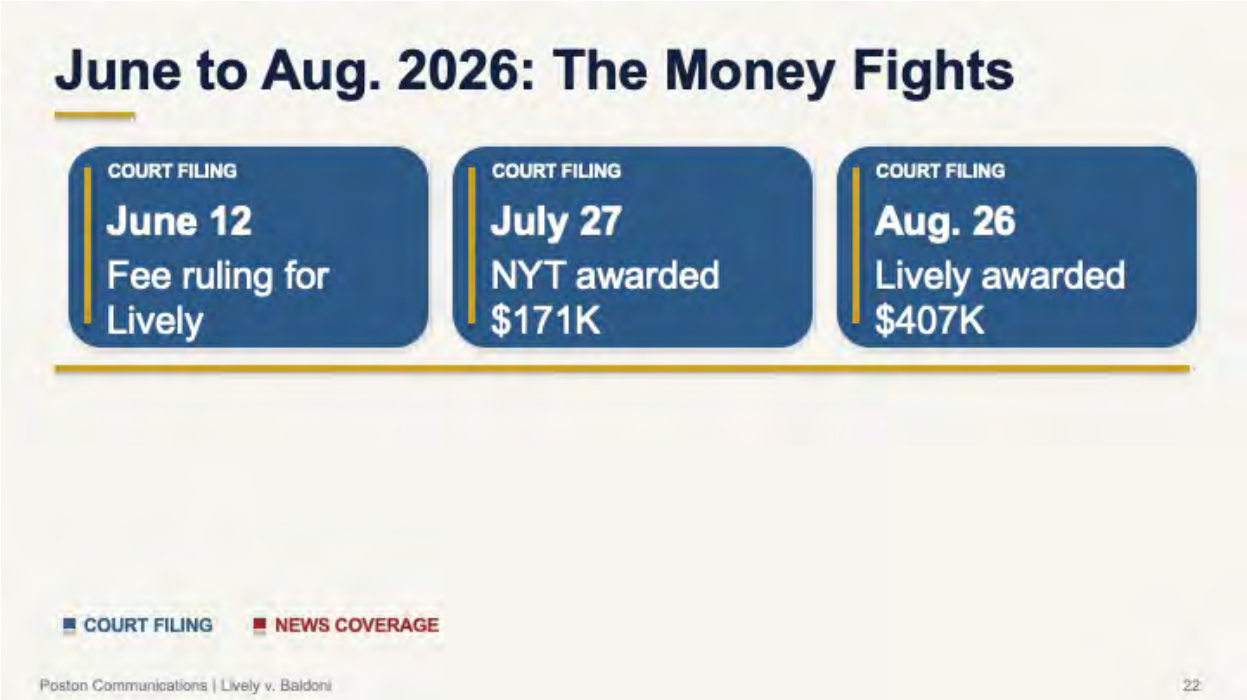
■ COURT FILING ■ NEWS COVERAGE

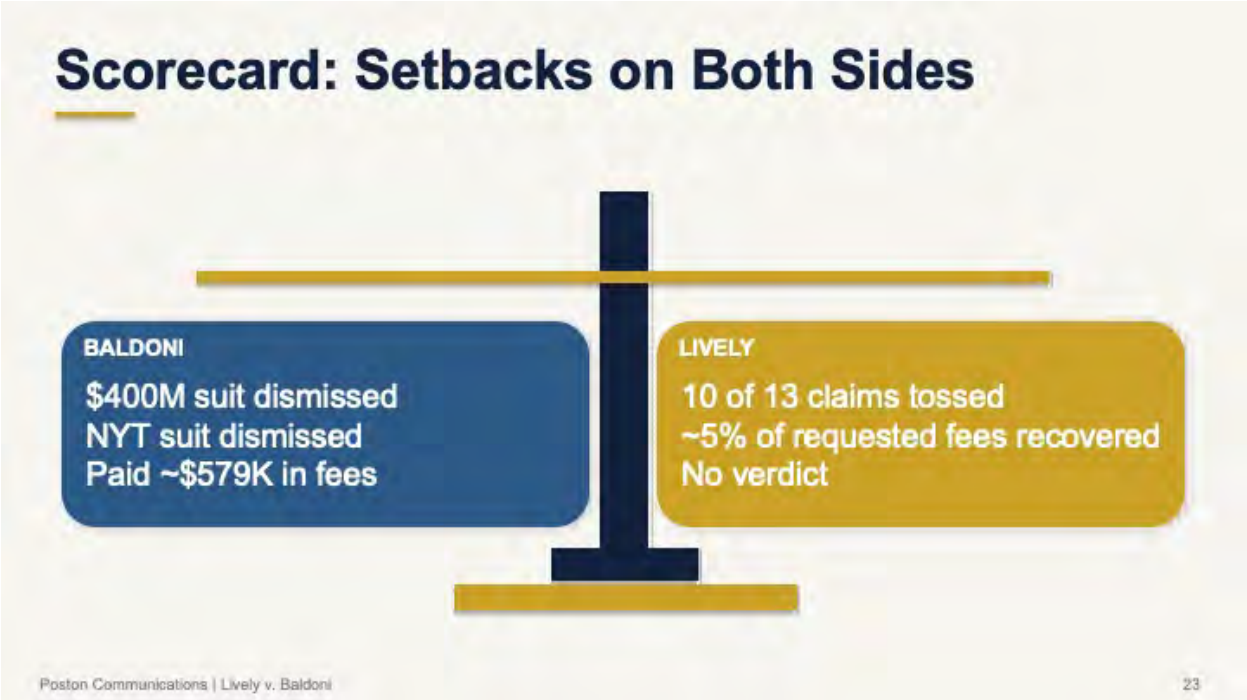
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Phase 5: Settlement and Aftermath | 2026

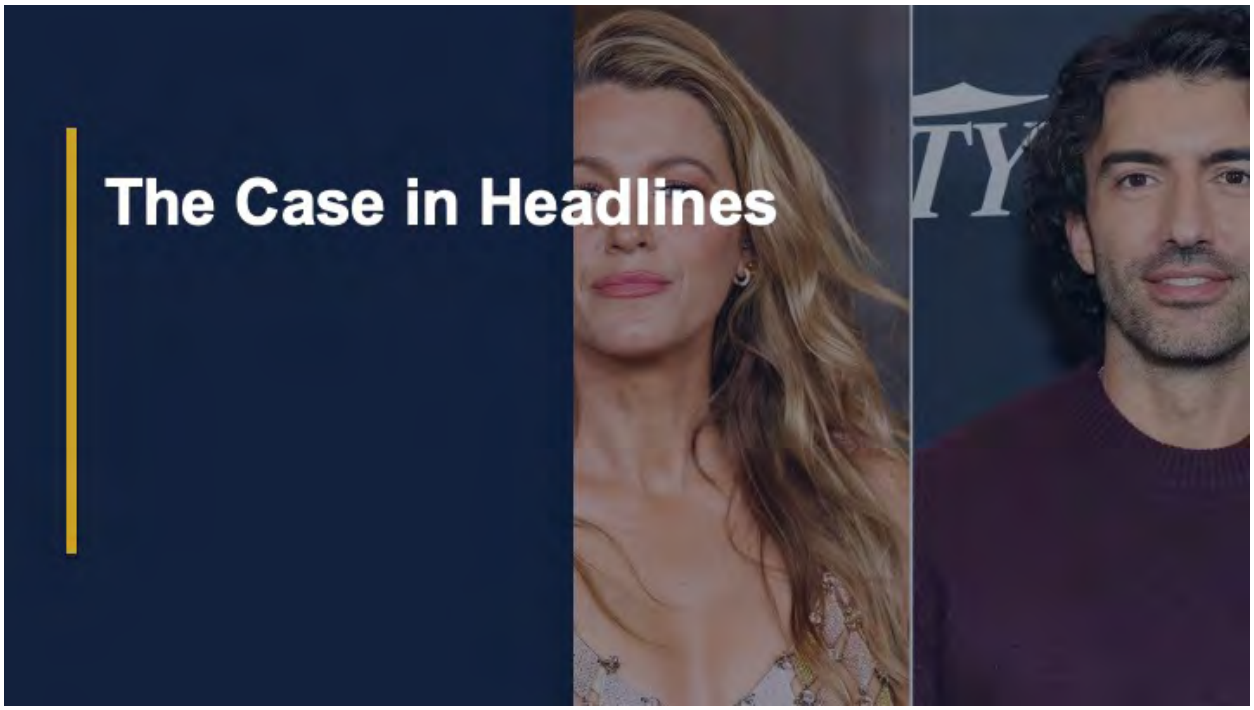

Arriving at Court: Feb. 11, 2026
Hartford Courant / AP
Jefferson Siegel / Sipa USA / Alamy; Variety
First face-to-face in court. No deal.
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Apr. to May 2026
COURT FILING
Apr. 2
10 of 13 claims tossed
COURT FILING
May 4
Settlement
NEWS
May
Both claim victory
COURT FILING
NEWS COVERAGE
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June to Aug. 2026: The Money Fights
COURT FILING
June 12
Fee ruling for Lively
COURT FILING
July 27
NYT awarded $171K
COURT FILING
Aug. 26
Lively awarded $407K
COURT FILING
NEWS COVERAGE
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Scorecard: Setbacks on Both Sides
BALDONI
$400M suit dismissed
NYT suit dismissed
Paid ~$579K in fees
LIVELY
10 of 13 claims tossed
~5% of requested fees recovered
No verdict
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Full Timeline at a Glance
Aug 9 2024
Film opens
Dec 21
NYT story
Dec 31
Dueling suits
Jan 16 2025
$400M suit
Jun 9
Suits
dismissed
Feb 11 2026
Court
conference
Apr 2
Claims
narrowed
May 4
Settlement
Jul 27
NYT fees
Aug 26
Fee award
2024
2025
2026
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The Story Breaks

The New York Times



[“We Can Bury Anyone”: Inside a Hollywood Smear Machine]

Dec. 21, 2024

Los Angeles Times



[Justin Baldoni countersues Blake Lively, Ryan Reynolds for $400 million in damages]

Jan. 16, 2025

ABC News



[Blake Lively, Justin Baldoni’s “It Ends with Us” legal battle: A timeline]

Jan. 2025

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The Narrative Turns

The New Yorker



Blake Lively, Justin Baldoni, and the Collapse of the Hollywood #MeToo Era

Jan. 2025

Business Insider



Public sentiment turns negative for both: 52% negative for both

Jan. 2025

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The Endgame

Deadline



Case still headed to trial as judge tosses actress' sexual harassment claims

Apr. 2, 2026

The Hollywood Reporter



Blake Lively to keep fighting as most of Justin Baldoni case dismissed

Apr. 2, 2026

Reuters



Blake Lively, Justin Baldoni settle lawsuit over "It Ends With Us"

May 4, 2026

TMZ



Blake Lively awarded $400K in attorneys' fees for Justin Baldoni case

Aug. 26, 2026

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Same Day, Different Story

People



Blake Lively and Justin Baldoni's Wayfarer settle "It Ends With Us" lawsuit

May 4, 2026

"A resounding victory."

Lively's team

"A total victory."

Wayfarer counsel

Both sides claimed the win.

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AUDIENCE POLL

How did you follow the case, and who did you find more believable?

A Traditional news, found Lively more believable

B Traditional news, found Baldoni more believable

C Social media, found Lively more believable

D Social media, found Baldoni more believable

E Neither, or didn't follow

Poll QR code

Live results

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What Counsel Can Take From the Wreckage
In a public dispute, PR strategy and litigation strategy produce one shared record.
1
Know your endgame before you engage
After 18 months, both sides landed about where a quiet settlement in early 2025 might have left them.
2
Every strategy text is a future exhibit
"We can bury anyone" defined the story before Baldoni's lawyers filed a single response.
3
The channel shapes the story
Legacy media and social feeds told different versions. Jurors scroll both.
4
Goodwill is a bank account
Lively's press tour drained her reserves. Baldoni's "Man Enough" brand raised the stakes.
5
Allies, and their silence, send a message
Taylor Swift's public silence and the subpoena sent to her became part of the narrative.
6
Put PR under counsel, and keep it ethical
Separate legal and communications tracks drove the whole cycle.
STRATEGY
PROTECTING THE RECORD
Poston Communications | Lively v. Baldoni
24



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Andrea Christman is a managing director at Poston Communications, where she counsels law firm and corporate leaders on complex crisis, litigation and strategic communications matters. A trusted advisor in high-risk situations, she helps organizations navigate reputational challenges, align communications with legal strategy and communicate with clarity under pressure. Her work spans crisis communications, litigation PR, reputation strategy and media relations, with a focus on protecting institutional credibility and supporting long-term growth and resilience.

With more than 20 years of experience, Andrea has held senior leadership roles at one of the world's largest law firms, where she served as a key communications leader during complex, high-visibility and high-risk matters. She has also held leadership positions within public relations agencies, advising law firms and their clients through sensitive situations that required strategic judgment, discretion and close coordination with legal teams.

Andrea earned her bachelor's degree in public relations and communications from Southern Adventist University. She currently lives in Bozeman, Montana with her daughter, and enjoys spending her time outdoors.



Death by a Thousand Cuts: Navigating Modern Layoffs

Kerri Wright

Porzio Bromberg & Newman (Parsippany, NJ)

Death by a Thousand Cuts: Navigating the Minefield of Modern Layoffs
Kerri Wright

When Congress enacted the Worker Adjustment and Retraining Notification Act (WARN)[1] in 1988, it established the first comprehensive federal framework requiring employers to provide advance notice before plant closings and mass layoffs.[2] At the time, the sixty-day notice mandate represented a significant new compliance obligation for large employers. In the decades since, the regulatory landscape has grown more complex. A patchwork of state «mini-WARN» Acts has emerged3[3] -- each imposing its own thresholds, notice periods, triggering events, and remedies that frequently diverge from, and often exceed, the federal statute's requirements.

The metaphor of "death by a thousand cuts" aptly captures the predicament facing employers who undertake a reduction in force in 2026. The danger is not a single, obvious violation of a well-known federal statute. Instead, liability accumulates through the myriad smaller obligations imposed by state and local laws -- a lower employee threshold here, a longer notice period there, an expanded definition of a triggering event elsewhere. An employer that meticulously complies with federal WARN may nonetheless find itself exposed to claims under the laws of New York, California, New Jersey, Illinois, and a growing number of other jurisdictions.

New Jersey's recent amendments to its WARN Act, for example, now impose mandatory severance pay in addition to advance notice--a remedy with no federal analog.[4] Class action litigation under both federal and state WARN statutes has become a growth area, with plaintiffs' counsel increasingly alert to the interplay between overlapping regimes. For management-side counsel, mastering this landscape is essential to protecting clients from the cascading liability that a poorly planned reduction in force can generate.

This article provides a survey of the federal WARN Act and the state mini-WARN statutes that have transformed workforce reduction compliance into a multi-jurisdictional puzzle. It examines the key areas of divergence between federal and state law, identifies the litigation trends shaping how courts interpret these overlapping regimes, and offers practical guidance for management-side counsel advising employer clients through the increasingly perilous process of planning and executing a reduction in force.

The Federal WARN Act

A. Covered Employers and Triggering Events

The federal WARN Act applies to employers with 100 or more full-time employees, or 100 or more employees (including part-time workers) who collectively work at least 4,000 hours per week.[5] The statute is triggered by two categories of events. A "plant closing" occurs when the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within that site, results in an employment loss for 50 or more full-time employees during any 30-day period.[6] A "mass layoff" is a reduction in force--not resulting from a plant closing--that causes employment loss at a single site for either 500 or more employees, or for at least 50 employees constituting at least 33% of the workforce at that site.[7]

When either triggering event occurs, the employer must provide at least 60 days' advance written notice to affected employees or their representatives, to the state dislocated worker unit, and to the appropriate unit

1 Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-2109 (1988).

2 20 C.F.R. Part 639 (implementing regulations).

3 As of 2026, at least fourteen states and several local jurisdictions have enacted their own plant closing or mass layoff notification statutes. See, e.g., N.Y. Lab. Law §§ 860 et seq.; Cal. Lab. Code §§ 1400-1408; N.J. Stat. Ann. §§ 34:21-1 et seq.; 820 Ill. Comp. Stat. Ann. 65/1 et seq.

4 See N.J. Stat. Ann. § 34:21-2 (imposing mandatory severance of one week's pay per full year of employment in addition to the 90-day notice requirement).

5 29 U.S.C. § 2101(a)(1) (defining "employer" as any business enterprise that employs 100 or more employees, excluding part-time employees, or 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime).

6 29 U.S.C. § 2101(a)(2).

7 29 U.S.C. § 2101(a)(3).

of local government.[8] The notice to affected employees must include specific information about the anticipated separation, including whether the action is expected to be permanent or temporary, the expected date of the first separation, and whether bumping rights exist.[9]

A threshold question in many WARN cases is the identification of the "single site of employment" because the statute's numerical triggers are measured at that level. The implementing regulations define a single site of employment as either a single location or a group of contiguous locations, including groups of facilities forming an industrial park or campus, or separate facilities across the street from one another.[10] The definition also includes separate buildings or areas which are not directly connected or in immediate proximity if "they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment."[11]

B. The Aggregation Problem and the 90-Day Lookback

The WARN Act contains an aggregation provision designed to prevent employers from evading the statute by conducting a series of smaller layoffs that individually fall below the numerical thresholds. Under Section 2102(d), if an employer conducts two or more groups of employment losses within any 90-day period, each of which falls below the threshold but in the aggregate exceed the threshold, the losses will be considered to be a plant closing or mass layoff unless the employer can demonstrate that the separate losses resulted from separate and distinct actions and causes and are not an attempt to evade the requirements of the statute.[12] This provision has spawned litigation, as courts grapple with the question of when a series of layoffs constitutes a deliberate attempt to circumvent WARN and when it reflects a genuinely independent business decision.

C. The Statutory Exceptions

The WARN Act provides three narrow exceptions that may reduce the 60-day notice period. The faltering company exception permits shortened notice where the employer was actively seeking capital or business that, if obtained, would have enabled the employer to avoid or postpone the shutdown, and where the employer reasonably and in good faith believed that giving notice would have jeopardized the opportunity to obtain that capital or business.[13]

The unforeseeable business circumstances exception permit reduced notice when the closing or layoff is caused by business circumstances that were not reasonably foreseeable at the time that notice would have been required.[14] In Roquet v. Arthur Andersen LLP, the Seventh Circuit confronted this exception in the aftermath of Arthur Andersen's collapse following the Enron scandal.[15] The court held that the sudden loss of clients following the firm›s indictment constituted unforeseeable business circumstances, applying an objective test focused on whether a similarly situated employer, exercising commercially reasonable business judgment, could have foreseen the circumstances that necessitated the layoff at the time the notice would have been required. The decision illustrates both the exception›s potential breadth and the rigorous factual showing required to invoke it. The third exception, for natural disasters, permits reduced notice when a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, or drought.[16]

It is essential to note that even when one of these exceptions applies, the employer is not excused from providing notice altogether. Rather, the employer must give as much notice as is practicable under the circumstances and must include in the notice a brief statement of the basis for reducing the notification period.[17] The exceptions thus operate as a partial defense to liability, not as a complete safe harbor, and their invocation is sure to be scrutinized by plaintiffs› counsel and the courts alike.

D. Remedies and Enforcement

An employer that violates the WARN Act is liable to each affected employee for back pay and the cost of benefits for each day of violation, up to a maximum of 60 days "but in no event for more than one-half the number of days the employee was employed by the employer."[18] Additionally, employers that fail to provide notice to the appropriate local government may be assessed a civil penalty of up to $500 per day of violation.[19] The statute permits employers to offset WARN liability with any wages or unconditional payments made to the employee during the violation period, as well as any payments made by the employer to a third party or trustee on behalf of the employee for the period of the violation.[20] This offset provision has become a key consideration in settlement negotiations,

8 29 U.S.C. § 2102(a).

9 20 C.F.R. § 639.7(d).

10 20 C.F.R. § 639.3(i)(1). But see 20 C.F.R. § 639.3(i)(5) (noting that "[c]ontiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.").

11 20 C.F.R. § 639.3(i)(3).

12 29 U.S.C. § 2102(d).

13 29 U.S.C. § 2102(b)(1) (faltering company exception).

14 29 U.S.C. § 2102(b)(2)(A) (unforeseeable business circumstances exception).

15 Roquet v. Arthur Andersen LLP, 398 F.3d 585, 588-91 (7th Cir. 2005).

16 29 U.S.C. § 2102(b)(2)(B) (natural disaster exception).

17 29 U.S.C. § 2102(b)(3).

18 29 U.S.C. § 2104(a)(1).

19 29 U.S.C. § 2104(a)(3). This penalty does not apply "if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff." Id.

20 29 U.S.C. § 2104(a)(2).

as employers seek to credit severance payments against potential WARN liability.

The Rise of State Mini-WARN Acts

While the federal WARN Act established a baseline for advance notification, a growing number of states have concluded that federal protections are insufficient. At least fourteen states have enacted their own plant closing and mass layoff notification statutes, commonly known as mini-WARN Acts, that expand upon the federal framework in significant ways. These state statutes diverge from federal WARN along virtually every axis of the regulatory framework: the size of employers covered, the number of employees whose separation triggers notice, the length of the notice period, the scope of covered events, and the remedies available to affected workers. For management counsel, these divergences create compliance traps that must be identified and addressed before announcing any reduction in force.

A. New York WARN Act

New York's WARN Act[21] represents one of the most employee-protective state notification statutes in the nation. The statute applies to employers with 50 or more full-time employees and triggers notice obligations at significantly lower thresholds than its federal counterpart. A mass layoff under New York law is triggered by the layoff of 25 or more full-time employees representing at least 33% of the workforce at the site, or 250 or more full-time employees regardless of percentage thresholds that are half of the federal counterparts.[22]

Perhaps most significantly, New York requires 90 days of advance notice, 50% longer than the federal 60-day requirement.[23] The statute also covers relocations, defined as the removal of all or substantially all of the industrial or commercial operations to a different location 50 miles or more away, which are not independently addressed by the federal WARN Act.[24] For employers planning a multi-state reduction in force, New York›s lower thresholds and longer notice period frequently surprise counsel who are focused exclusively on federal compliance. A layoff that falls comfortably below the federal triggers may nonetheless violate the New York statute, exposing the employer to liability for the additional 30-day notice period.

B. California WARN Act

California's WARN Act[25] applies to covered establishments employing 75 or more persons within the preceding 12 months, which is a lower threshold than the federal 100-employee minimum.[26] While California›s notice period matches the federal 60-day standard, the state statute is broader in several important respects. California WARN covers relocations, defined as the removal of operations to a location 100 miles or more from the current site,[27] as an independent triggering event. The statute also defines a covered "mass layoff" as the layoff of 50 or more employees during any 30-day period, regardless of the percentage of the workforce affected, thus diverging from the federal statute's alternative 33% threshold that can shield smaller layoffs from coverage.[28]

California's remedial scheme imposes significant liability, including back pay and the cost of benefits for each day of the violation period.[29] California courts have also applied the statute›s provisions with characteristic rigor, making the state a particularly challenging jurisdiction for employers defending WARN claims.

C. New Jersey WARN Act

The recent amendments to the New Jersey WARN Act[30] represent the single most significant state-level expansion of plant closing notification requirements in recent memory. The amended statute extends the notice period from 60 to 90 days[31] and, in a departure that has no federal analog, mandates that employers provide severance pay equal to one week›s pay for each full year of employment to every affected worker.[32] This mandatory severance requirement transforms the New Jersey WARN Act from a notice statute into something more closely resembling a European-style social plan obligation, imposing direct financial consequences on employers that go far beyond the back-pay remedies available under federal law.

The 2023 amendments also broadened the definition of triggering events, covering the termination of 50 or more employees at or reporting to a single establishment

21 N.Y. Lab. Law §§ 860-860-i.

22 N.Y. Lab. Law § 860-a(3) (defining covered employer as an employer that employs 50 or more full-time employees or fifty or more employees that work in the aggregate at least two thousand hours per week); N.Y. Lab. Law § 860-a(4) (defining mass layoff as being triggered by the layoff of 25 or more full-time employees, which represents at least 33% of the full-time employees at the site, or the layoff of 250 or more full-time employees regardless of percentage).

23 N.Y. Lab. Law § 860-b (requiring 90 days' advance written notice of a mass layoff, plant closing, or relocation).

24 N.Y. Lab. Law § 860-a(8).

25 Cal. Lab. Code §§ 1400-1408.

26 Cal. Lab. Code § 1400.5(a) (defining covered establishment as any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons).

27 Cal. Lab. Code § 1400.5(e) (defining "relocation" as the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away).

28 Cal. Lab. Code § 1400.5(d).

29 Cal. Lab. Code § 1402(a) (providing that an employer who fails to give the required notice is liable for back pay and the value of benefits for each day of the violation).

30 N.J. Stat. Ann. §§ 34:21-1 to 34:21-6.

31 N.J. Stat. Ann. § 34:21-2(a) (requiring 90 days' advance notice).

32 N.J. Stat. Ann. § 34:21-2(b) (mandating severance pay of one week of pay for each full year of employment).

during any 30-day period.[33] The expanded definition of "establishment" and the potential inclusion of remote employees who "report[] to" a New Jersey site have particular implications for employers with distributed workforces. New Jersey›s statute now represents perhaps the most aggressive state-level WARN regime in the country and employers planning layoffs affecting New Jersey employees ignore it at their peril.

D. Illinois WARN Act

The Illinois WARN Act[34] applies to employers with 75 or more full-time employees or 75 or more employees of any kind who in the aggregate work at least 4,000 hours per week (excluding overtime) which is, again, a lower threshold than the federal 100-employee standard.[35] Like the federal statute, Illinois requires 60 days› advance notice,[36] but the state statute covers relocations as an independent triggering event.[37] Illinois defines a mass layoff as a reduction in force that results in employment loss for at least 25 employees representing at least one-third of the full-time employees at the site, or at least 250 employees, during any 30-day period.[38]

E. Other State Mini-WARN Statutes

Beyond the major jurisdictions discussed above, numerous other states impose their own notification requirements that management counsel must account for when planning a multi-state reduction in force or a relocation of operations. Maine mandates severance of one week per year of service after a closing or mass layoff, a provision that anticipated New Jersey's 2023 mandatory severance approach by decades.[39] Other states, including Tennessee, New Hampshire, and Iowa, maintain their own notification frameworks with varying triggers, notice periods, and covered events. The proliferation of these statutes means that no single set of rules governs the entirety of a multi-state reduction in force, and each represents an independent source of potential liability that management counsel must map before announcing any layoff.

The Multi-Jurisdictional Compliance Challenge

For the employer with operations in multiple states, which today includes any company with a distributed or remote workforce, a single reduction in force can trigger notification obligations under the federal WARN Act and the mini-WARN statutes of every state in which affected employees work. The resulting compliance challenge is complex because the various statutes differ not only in their substantive requirements but also in ways that create affirmative conflicts, forcing employers to navigate contradictory obligations simultaneously.

A. Overlapping Triggers and Conflicting Notice Periods

Consider a hypothetical employer with 200 employees distributed across offices in New York, New Jersey, California, and Illinois. If the employer plans to eliminate 30 positions in New York, 25 in New Jersey, 20 in California, and 15 in Illinois, the compliance analysis requires a separate evaluation under the federal WARN Act and the mini-WARN statute of each state in which employees will be affected. The federal statute requires 60 days' notice if the aggregate layoffs at a single site meet the threshold; New York and New Jersey each require 90 days.[40] The employer must determine for each jurisdiction whether the number of affected employees meets the state›s threshold, which may differ from the federal standard and varies from state to state.[41]

The practical consequence of these overlapping regimes is that the employer must comply with the most demanding notice period applicable to any affected jurisdiction. If even a handful of employees are located in New York or New Jersey, the entire reduction in force may need to proceed on a 90-day timeline, because staggering the notice by jurisdiction creates both operational havoc and the risk that earlier-notified employees will depart before the planned separation date, destabilizing the workforce reduction. The aggregation problem compounds this challenge: each state's statute may employ its own lookback period for determining whether a series of smaller layoffs constitutes a covered event. An employer that conducts a phased reduction over several months may find that layoffs falling below the federal threshold are nonetheless aggregated to exceed a state threshold. The interaction between federal and state aggregation windows creates a matrix of potential exposure that requires careful temporal mapping of each planned separation against each applicable statute's lookback period.

B. Remote Work and the Question of Applicable Law

The dramatic expansion of remote work since 2020 has introduced a novel and largely unresolved dimension to WARN compliance. The federal WARN Act and most state mini-WARN statutes were drafted with brick-and-mortar workplaces in mind, tying coverage to physical locations-

33 N.J. Stat. Ann. § 34:21-1 (defining "mass layoff" to mean the termination of employment of 50 or more employees at or reporting to a single establishment during any 30-day period). The 2023 amendments broadened the definition of "establishment" by removing the contiguity requirement for different locations.

34 820 Ill. Comp. Stat. Ann. 65/1 to 65/99.

35 820 Ill. Comp. Stat. Ann. 65/5(c).

36 820 Ill. Comp. Stat. Ann. 65/10(a).

37 Id.

38 820 Ill. Comp. Stat. Ann. 65/5(d).

39 Me. Rev. Stat. Ann. tit. 26, § 625-B(2).

40 Compare 29 U.S.C. § 2102(a) (60-day federal notice requirement), with N.Y. Lab. Law § 860-b (90-day notice), and N.J. Stat. Ann. § 34:21-2(a) (90-day notice).

41 See, e.g., Cal. Lab. Code § 1400.5(a) (75-employee threshold); N.Y. Lab. Law § 860-a(3) (50-employee threshold); 820 Ill. Comp. Stat. Ann. 65/5(c) (75-employee threshold).

-a "single site of employment" or "establishment."[42] When employees work remotely from their homes, potentially in a different state from the employer›s office, the question of which state›s mini-WARN Act applies becomes genuinely difficult. Does a remote employee working from home in New York, for an employer based in Texas, trigger New York WARN obligations when that employee is laid off as part of a broader reduction?

Some states have begun to address this question. New Jersey's amendments, for example, refer to the termination of employees "at or reporting to the establishment," a definition that could be interpreted to encompass remote workers who report to a New Jersey-based supervisor or business unit.[43] Other states have not yet addressed the issue, leaving employers to navigate uncharted waters. For litigators, the remote-work question presents a novel theory of liability for plaintiffs› counsel. The resolution of this issue will likely vary by jurisdiction and will be shaped by how courts interpret state statutes that predate the remote-work revolution.

Litigation Trends and Key Issues

WARN Act litigation has matured significantly since the statute's enactment, and the proliferation of state mini-WARN Acts has accelerated its growth. For management-side counsel, understanding the current litigation landscape is essential to advising clients on the risks inherent in any workforce reduction and to construct effective defenses when claims arise.

WARN claims are inherently collective in nature, as a covered plant closing or mass layoff, by definition, affects a substantial number of employees simultaneously. The federal WARN Act provides for enforcement through private actions in federal district court.[44] In practice, WARN claims can be litigated as class actions, with the common questions of law and fact inherent in these cases--whether a triggering event occurred, whether the employer met the numerical thresholds, whether an exception applies--making class certification relatively straightforward. The class action posture demands that defense counsel give early and rigorous attention to the factual record, as any deficiency in the employer›s compliance will be magnified across every affected worker.

A. The "Rolling Layoff" Problem

The rolling layoff, a series of smaller workforce reductions conducted over a period of weeks or months, is a recurring source of WARN litigation. The effect is that an employer that conducts a series of layoffs, each individually below the WARN threshold, may trigger WARN obligations if the cumulative total within any 90-day window exceeds the threshold unless the employer can demonstrate that each separate group of layoffs resulted from distinct and independent causes.[45]

State mini-WARN statutes may employ their own aggregation windows, some longer than the federal 90 days. An employer that carefully structures its layoffs to avoid triggering the federal 90-day window may nonetheless exceed a state's aggregation threshold, particularly in states with lower numerical triggers. For management counsel, meticulous documentation of the separate and distinct business reasons for each phase of a layoff is essential to rebutting the aggregation presumption. Plaintiffs' counsel have become adept at using the rolling layoff theory to sweep into WARN coverage layoffs that the employer believed were too small or too dispersed to trigger notice obligations.

B. Damages, Offsets, and the Release Question

The federal statute permits employers to offset WARN liability with wages paid during the violation period, any voluntary or unconditional payments, and any payment to a third party or trustee on behalf of the employee (such as insurance premiums).[46] The offset provision has generated litigation over what constitutes a "voluntary and unconditional" payment and, in particular, whether severance payments conditioned on the execution of a release of claims qualify for the offset. Courts have generally held that a payment conditioned on a release is not «unconditional» for offset purposes, though the analysis varies by jurisdiction.[47]

The interaction between federal WARN damages and state mini-WARN remedies adds additional complexity. In jurisdictions like New Jersey, where the state statute mandates severance pay independent of any federal remedy, the employer may face both a federal WARN back-pay liability and a state-mandated severance obligation. Whether the state severance payment offsets the federal WARN liability or vice versa depends on the jurisdiction and the specific terms of the employer's separation agreements. Management counsel must also carefully structure separation agreements and releases. Employers routinely condition severance payments on the execution of broad releases, but courts have expressed skepticism about WARN waivers executed in the context of a mass layoff, and payments conditioned on a release

42 See 20 C.F.R. § 639.3(i) (defining single site of employment). The regulations note that workers who travel regularly, such as salespersons, are assigned to a home base from which they are assigned their work. See id. § 639.3(i)(6).

43 See N.J. Stat. Ann. § 34:21-1.

44 29 U.S.C. § 2104(a)(5) (providing for enforcement through an action brought in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business).

45 29 U.S.C. 2102(d).

46 29 U.S.C. § 2104(a)(2).

47 See Castro v. Chicago Hous. Auth., 360 F.3d 721, 733 (7th Cir. 2004).

may not qualify as "unconditional" for offset purposes. These considerations make it essential that management counsel map the interaction between federal and state damages before structuring any severance program.

Conclusion

The proliferation of state mini-WARN Acts has transformed the legal landscape of workforce reductions from a manageable single-statute compliance exercise into a multi-jurisdictional minefield. An employer that achieves perfect compliance with the federal WARN Act may nonetheless face substantial liability under the laws of New York, New Jersey, California, Illinois, and a growing list of other states. Management counsel who take a proactive, compliance-oriented approach conducting thorough multi-jurisdictional analyses before any layoff is announced, documenting the basis for any exception, and ensuring that notices satisfy the requirements of every applicable jurisdiction will position their clients to survive the inevitable scrutiny that follows any significant workforce reduction. The trend toward more aggressive state regulation shows no signs of abating, and New Jersey's 2023 mandatory severance requirement may well be a harbinger of further expansion.

The views expressed in this article are those of the author and do not constitute legal advice. Employers and their counsel should consult with qualified legal professionals regarding the specific WARN Act obligations applicable to any particular workforce reduction.

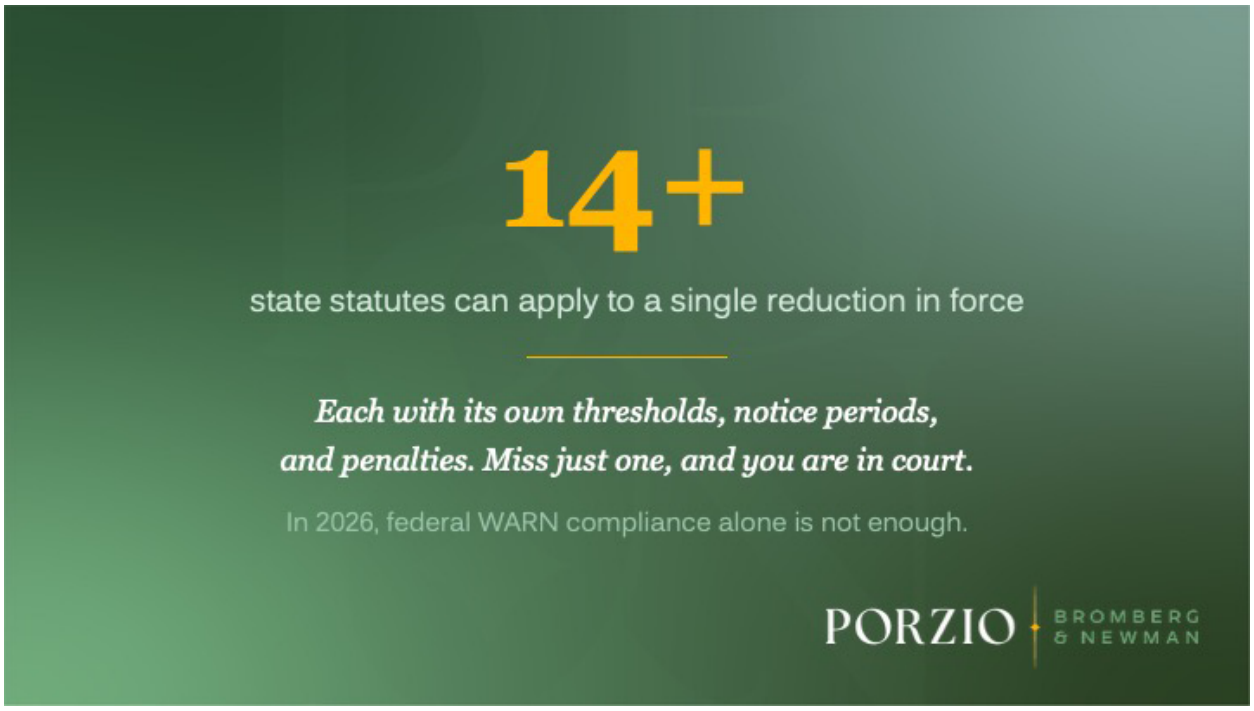
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Death by a Thousand Cuts:

Navigating the Minefield of Modern Layoffs

KERRI WRIGHT, ESQ.
Porzio | Litigation Symposium 2026 | The Trial Network




14+
state statutes can apply to a single reduction in force
Each with its own thresholds, notice periods,
and penalties. Miss just one, and you are in court.
In 2026, federal WARN compliance alone is not enough.
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Federal WARN Act Overview

29 U.S.C. §§ 2101–2109 | Enacted 1988

COVERED EMPLOYERS

100+ employees (full-time or 4,000+ hrs/wk aggregate)

PLANT CLOSING

50+ employees lose jobs at a single site (30-day period)

MASS LAYOFF

500+ employees, or 50+ at 33% of workforce

60-day advance written notice required to employees, state agency, and local government

The Three WARN Exceptions

Faltering Company

Plant closings only. Employer actively seeking capital; reasonably believes notice would jeopardize it.

In re APA Transp. Corp. Consol. Litig., 541 F.3d 233, 246-47 (3d Cir. 2008).

Unforeseeable Business Circumstances

Both triggers. Circumstances not reasonably foreseeable when notice due.

Roquet v. Arthur Andersen LLP, 398 F.3d 585, 588-89 (7th Cir. 2005)

Natural Disaster

Both triggers. Closing/layoff is the direct result of a natural disaster.

Flood, earthquake, drought, etc.

Remember: Exceptions reduce the notice period. They do not eliminate it. Employer must still give as much notice as practicable.

Remedies Under Federal WARN

Back Pay + Benefits
Up to 60 days per affected employee

Civil Penalties
Up to $500/day to local government

Available Offsets
Unconditional payments made to employees

KEY CASE

Loc. Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands,

244 F.3d 1152 (9th Cir. 2001).

"Because 'back pay' under the WARN Act is a make-whole compensatory remedy, damages under the Act should compensate employees for the money they would have earned but for the premature closure in violation of the WARN Act."

PART II

The Explosion of State Mini-WARN Acts

PORZIO | BROMBERG & NEWMAN

The State WARN Patchwork

Each state is its own compliance universe

THRESHOLDS	NOTICE PERIODS	TRIGGERS	REMEDIES	EMPLOYEE DEFINITIONS
As low as 25 employees	60 to 90 days	Relocations, partial closings	Mandatory severance	Part-time workers included

14 states have enacted their own versions

State Comparison: Thresholds & Notice

Jurisdiction	Employer Threshold	Notice Period	Key Difference
Federal WARN	100	60 days	Baseline federal standard
New York	50	90 days	Triggers at just 25 layoffs
California	75	60 days	Covers relocations; broader triggers
New Jersey	100	90 days	MANDATORY SEVERANCE
Illinois	75	60 days	Lower threshold; covers relocations

Sources: N.Y. Lab. Law §§ 860 to 860-i; Cal. Lab. Code §§ 1400-1408; N.J. Stat. Ann. §§ 34:21-1 to 34:21-20; 820 ILCS 65/1 to 65/99

New Jersey: The Game-Changer

Recent Amendments to the NJ WARN Act | N.J. Stat. Ann. §§ 34:21-1 et seq.

MANDATORY SEVERANCE

One week's pay for each full year of employment
No federal analog

- 90-day notice period (up from 60)
- Broadened "establishment" definition
- Most aggressive state regime in the nation

Other States to Watch

Maryland
60-day notice; the greater of 25% of workforce or 15 employees within 3 months
Md. Code, Lab. & Empl. §§ 11-301 to 11-306.

New York
25 employees rep'ing 33% of workforce; 90-day notice
N.Y. Lab. Law §§ 860-860-i.

California
50+ employees; relocations over 100 miles
Cal. Lab. Code §§ 1400-1408

Tennessee
Notice to Commissioner and affected employees; no private right of action
Tenn. Code Ann. §§ 50-1-601 to 50-1-604

Maine
Severance: 1 week per year of service
Me. Rev. Stat. Ann. tit. 26, § 625-B(2)

Others
Iowa, New Hampshire
Each with unique provisions

Maine anticipated NJ's mandatory severance by decades



The "Single Site of Employment" Question

Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1281 (8th Cir. 1996) ("[S]haring of staff and equipment, and sharing the same operational purpose are appropriate criteria for determining whether two non-contiguous sites comprise a 'single site' under the WARN Act.").

Facts to Consider:

- Geographic proximity of facilities
- Operational interdependence
- Whether facilities share a single purpose
- Common management and staffing

KEY TAKEAWAY

It is not just about the address.

Functional integration between facilities can make geographically separate buildings a single site for WARN purposes.

Aggregation & the Remote Work Puzzle

THE AGGREGATION PROBLEM

- Federal: 90-day rolling lookback window
- States may have their own windows
- Phased layoffs: each phase aggregated
- Burden on employer to prove distinct causes

REMOTE WORK

Which state's law applies to a remote employee?

NJ says "report to" = covered, even if working from another state.

Federal regulations were written for brick-and-mortar workplaces.

This is largely unresolved in most jurisdictions.

Damages, Offsets & Waivers

DAMAGES

Back pay x violation days (up to 60)
x number of affected employees

OFFSETS

Only "unconditional" payments qualify.
Payments conditioned on release
may NOT offset WARN liability.

WAIVERS

Can WARN claims be waived via general release? Courts are skeptical.
Conditional notice may be insufficient.

Class Action Exposure Under WARN

- WARN claims are inherently collective in nature
- Class certification is straightforward in most cases
- Rolling layoffs = powerful plaintiff aggregation tool

KEY CASE

Day v. Celadon Trucking Servs., Inc., 827 F.3d 817, 833 (8th Cir. 2016) ("The WARN Act contemplates class-action adjudication.")

PART V

Practical Takeaways for Litigators

PORZIO | BROMBERG & NEWMAN

Management Considerations

- Pre-layoff: Conduct a 50-state survey under privilege BEFORE announcing any RIF
- Document everything contemporaneously — exceptions require real-time evidence
- Prepare jurisdiction-specific notices (one size does NOT fit all)
- Calculate severance before implementing layoffs
- Provide maximum notice, even when exceptions may apply
- Maintain a compliance log: date, method, and recipients of every notice served
- Evaluate offsets carefully — conditioned payments may not qualify



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Kerri A. Wright

Principal | Porzio Bromberg & Newman (Parsippany, NJ)

Kerri Wright is a principal of Porzio, Bromberg & Newman, P.C. and a member of the firm's Litigation Practice Group, where she co-chairs the Education and Employment Team. She focuses her practice in the areas of education law and employment law, specifically in representation of management in both employment counseling and employment litigation.

Kerri handles a variety of employment law matters for the firm's public and private sector clients in state and federal courts as well as before administrative agencies, including the EEOC and the New Jersey Department of Labor. She has litigation and counseling experience in numerous areas of employment law, including issues involving wage and hour claims, restrictive covenants, harassment, discrimination, and whistleblowing. She has successfully defended management in class-action wage and hour lawsuits and has handled numerous investigations by management into allegations of employee wrongdoing.

Kerri has significant experience representing and counseling school boards, charter schools, private schools and colleges in a variety of areas. She is one of the leading attorneys in the field of reconfiguring school districts, including the creation and dissolution of regional school districts and the creation and termination of sending-receiving relationships.

Practice Areas and Areas of Focus

- Education Law
- Employment & Labor
- Litigation
- Disability Accommodations & Leaves of Absence
- Discrimination, Harassment & Retaliation
- Employment Counseling
- HR Training & Policy Development
- Immigration
- Professional Development Training Program
- Restrictive Covenants
- Traditional Labor
- Wage & Hour

Recognitions

- The Best Lawyers in America® – Litigation - Labor and Employment (2025-2027)
- New Jersey Law Journal - Women Lawyers of the Year honoree (2022)
- New Jersey School Boards Association - New Jersey Board Member of the Year (2021-2022)
- New Jersey Super Lawyers® (2017-2026)
- New Jersey Rising Stars® (2012-2015)
- New Jersey Law Journal - New Leaders of the Bar (2016)
- NJBIZ - Leading Women in Business Honoree (2025)

Education

- Emory University School of Law - J.D., 2005; cum laude
- Seton Hall University - M.P.Adm., 2002
- Seton Hall University - B.A., 2001; magna cum laude



Betting on Preemption: Prediction Market Wars May Become Your Company's Problem

Todd Williams
Corr Cronin (Seattle, WA)

Betting on Preemption: Prediction Markets and the Contest Over Their Regulation
Todd Williams

In April and May 2026, the Department of Justice and the Commodity Futures Trading Commission (CFTC) filed parallel insider trading charges in the Southern District of New York against two defendants: a soldier and a Google engineer. Neither traded a share of stock. Neither worked in finance. Neither breached a duty to shareholders. They traded "event contracts" on prediction-market platforms and the government charged both under theories any securities lawyer would recognize. Those cases, the first of their kind, mark the arrival of a category of exposure that most corporate compliance programs were never designed to address, at companies that never considered themselves within an insider trading regulator's field of vision.

Prediction markets processed more than fifty billion dollars in monthly notional volume at their 2026 peak. While federal regulators are taking increasingly aggressive stances on predictive market insider trading, a foundational question of who regulates these markets is playing out in the background. A pronounced federal circuit split on who can regulate prediction markets is now likely headed to the Supreme Court.

I. What Prediction Markets Are
A prediction market is an exchange on which participants buy and sell contracts tied to the outcome of a future event. Examples include whether a drug will receive FDA approval, which party will win an election, what the Federal Reserve will do at its next meeting, or which team will win a given match. Each contract resolves in binary fashion: if the specified event occurs, the contract pays a fixed amount; if it does not, the contract expires worthless. Before resolution, the contract's price fluctuates with the market's collective estimate of the probability of the outcome, so participants may also trade in and out of positions for profit, much as they would trade a security. Key participants in the prediction market space are Kalshi, Polymarket, Robinhood, and Crypto,com.

II. The Contest Over Who Regulates Prediction Markets
A. The Statutory Framework
The dispute centers on the Commodity Exchange Act (CEA). The Dodd-Frank Act of 2010 amended the CEA to define "swap" broadly to include agreements that provide for payment dependent on the occurrence or nonoccurrence of an event associated with a potential financial, economic, or commercial consequence, and the CEA grants the CFTC exclusive jurisdiction over such instruments when traded on a designated contract market. If an event contract is a swap traded on a Designated Contract Market ("DCM"), the platforms argue, state gambling laws are preempted; if it is not, the contract falls within the states' traditional police power over wagering, a field the states have occupied since before the founding of the republic.

Congress complicated the picture with a special rule, CEA section 5c(c)(5)(C), which authorizes the CFTC to prohibit event contracts that "involve" enumerated activities, including activity unlawful under state or federal law and "gaming," upon a determination that they are contrary to the public interest. The statute does not define "gaming," and until recently the CFTC had not exercised its review authority over sports contracts at all.

B. The Circuit Split
Two courts of appeals have now addressed the question of whether prediction market contracts are exclusively regulated by the CFTC, in irreconcilable ways. On April 6, 2026, a divided Third Circuit panel held that Kalshi's sports event contracts fit the CEA's definition of "swaps," that the Act's grant of exclusive jurisdiction to the CFTC occupies the field of regulating trading on designated contract markets, and that New Jersey's sports-wagering laws are both field- and conflict-preempted as applied.[1]

On August 28, 2026, the Ninth Circuit, announcing that "Kalshi has a gambling problem," applied a narrower textual reading of the statute to conclude that Kalshi's

1 KalshiEX, LLC v. Flaherty, 172 F.4th 220 (3d Cir. 2026).

sports event contracts were likely not swaps at all and that Nevada could accordingly enforce its gaming laws.[2] The court emphasized that the CFTC had never affirmatively approved the contracts through its statutory review process and observed that the agency is not a national gambling regulator.

Within a week of the Ninth Circuit's ruling, New Jersey filed its certiorari petition, Flaherty v. KalshiEX, LLC, presenting the question of whether Dodd-Frank preempts states from regulating sports bets occurring within their jurisdictions when those bets are offered on CFTC-registered markets. Additional rulings remain pending in the Fourth, Sixth, and Second Circuits and in the Massachusetts Supreme Judicial Court, each of which may deepen or narrow the split before the Justices act.

C. Escalation on Other Fronts

While the states' authority to regulate remains in question, the CFTC has gone on offense, suing at least seven states for declaratory judgments that their enforcement actions are preempted. In Michigan, the conflict became direct: after a state court ordered Kalshi to void executed trades, the CFTC instructed the company not to comply, placing a private party between contradictory commands of two sovereigns.[3] On the other side, a bipartisan coalition of thirty-eight state attorneys general has urged the Massachusetts high court to reject the platforms' preemption theory.[4]

Several legislatures have begun to pivot from banning prediction markets to monetizing them: North Carolina has advanced a tax on prediction-market revenue, and Pennsylvania has proposed a tax-and-regulatory-sandbox framework. Tribal governments have opened yet another front, suing platforms under the Indian Gaming Regulatory Act on the theory that event contracts infringe exclusive tribal gaming rights. The consequence of all this simultaneous activity is a regulatory environment in which the governing law depends not only on what the product is, but on where the trader sits, which sovereign moved most recently, and which courthouse heard the argument.

III. What Companies Should Be Mindful of Going Forward

Insider trading doctrine has crossed into event contracts through the CEA's antifraud provisions. Section 6(c)(1) and CFTC Rule 180.1 prohibit manipulative and deceptive devices, including misappropriation-based trading on material nonpublic information. The CFTC's February 2026 advisory made the agency's position explicit.[5]

The spring 2026 prosecutions referenced above (parallel criminal and civil proceedings against the soldier, United States v. Van Dyke, and the Google engineer, United States v. Spagnuolo, both in the Southern District of New York) demonstrate the model: classified government information in one case, nonpublic internal corporate data in the other, each monetized through event contracts rather than securities. Any employee with advance knowledge of an outcome that is the subject of a listed contract (e.g., a release date, an earnings figure, a regulatory decision, a personnel announcement) can generate federal exposure for himself and an investigation for his employer. Because CFTC-registered exchanges conduct trade surveillance and refer suspicious activity to law enforcement, companies should assume that anomalous trading by their personnel will surface.

Steps that companies can take to guard against this risk include: (1) defining material nonpublic information in trading policies to encompass facts relevant to event contracts; (2) prohibiting employees from trading contracts on subjects connected to the employer or to role-based knowledge, not merely company stock; (3) extending blackout and pre-clearance procedures to prediction-market platforms; (4) requiring disclosure of platform accounts for employees in sensitive functions; and (5) revising annual training to address the misconception that these platforms are casual betting applications beyond the reach of the law.

Conclusion

Prediction markets present a case study in what happens when a novel product outruns the regulatory categories built to contain it. Two federal courts of appeals examined the identical product five months apart; one saw a swap regulated by the CFTC, the other saw a bet, subject to state law. The Supreme Court has been asked to choose and states are enforcing, taxing, and suing in the interim. Corporate counsel cannot control any of that. What they can control is whether their organizations treat event-contract exposure as the present-tense compliance obligation it has become.

2 KalshiEX, LLC v. Assad, 25-7516, 2026 WL 2543846 (9th Cir. Aug. 28, 2026).

3 https://www.cftc.gov/PressRoom/PressReleases/9267-26.

4 https://azcapitoltimes.com/news/2026/04/27/38-state-ags-sign-amicus-brief-supporting-mass-in-kalshi-lawsuit/.

5 https://www.cftc.gov/PressRoom/PressReleases/9185-26.

Betting on Preemption

Prediction Market Wars May Become Your Company's Problem

Todd Williams | Partner, Corr Cronin LLP | Seattle, WA

November 2026

A Tuesday Morning Phone Call

"We need a list of every employee who had access to your company's unannounced product release date."

— CFTC Division of Enforcement

Not your earnings. Not an acquisition. **A release date — because somebody bet on it.**

What Are Prediction Markets?

How they work

- Buy and sell contracts tied to the outcome of a future event — pays in full if the event happens, nothing if it doesn't.
- Prices float with the market's view of the odds — trade in and out for profit, like a stock.
- Functionally: shares tied to a real-world outcome instead of a company's performance.
- No "house" — prices emerge from participant trading, not a bookmaker. That distinction drives the whole legal fight.

The platforms

- Kalshi — CFTC-designated exchange at the center of the litigation
- Polymarket — back in the U.S. after its 2022 CFTC settlement
- Robinhood & Crypto.com — event contracts inside trading apps
- PredictIt — the academic survivor

$50B+

combined monthly volume during the 2026 World Cup

What's Traded Today — Consequential to Comical

MEDICINE

Will the FDA approve a new breast-cancer drug?

MACRO

Will the Executive Branch confirm that aliens exist by Dec 31?

M&A

When will two public companies merge?

PRODUCTS

Grand Theft Auto VI release date

CULTURE

Who wins Love Island USA?

CORPORATE

What will the CEO say on the next earnings call?

The point: the Love Island contract and the FDA approval contract trade on the same platforms, under the same rules — and both can be the subject of a federal insider trading case.



Same Product. Five Months. Opposite Answers.

THIRD CIRCUIT

April 6, 2026 • 2–1

"Swaps."

- Kalshi's sports contracts are swaps under the CEA
- Field and conflict preemption bar New Jersey's gambling laws
- Dissent: products are "virtually indistinguishable" from sportsbook bets

NINTH CIRCUIT

August 28, 2026 • 3–0

"Sports bets."

- Not swaps — Nevada may enforce its gaming laws
- Opinion opens: "Kalshi has a gambling problem"
- CFTC never approved the contracts — and is not a national gambling regulator
- **Now stayed:** Kalshi petitioned for en banc rehearing Sept 9, freezing enforcement elsewhere in the circuit

Both rulings arose at the preliminary-injunction stage, not final merits.

The Race to the Supreme Court



Flaherty v. KalshiEX, LLC

- Question presented: whether Dodd-Frank preempts states from regulating sports bets offered on CFTC-registered markets
- Two petitions from opposite sides of the split: New Jersey (Flaherty, docketed Sept 8) and Robinhood (Assad, filed Sept 9)
- Kalshi's en banc bid stays the 9th Cir. ruling — a grant would slow SCOTUS, a denial would speed it. Also pending: 2d, 4th, 6th, 7th & 10th Cirs.; Mass. SJC
- If granted: argument likely late 2027, decision 2028 — years of uncertainty either way

Meanwhile: Regulatory Chaos

~20
states have challenged the platforms

4
state injunctions: NV • MA • MI • WA

9
states sued by the CFTC to block enforcement

The Michigan standoff — and the Washington ban

A Michigan court ordered Kalshi to void executed trades. The CFTC ordered Kalshi ***not to comply***. Two sovereigns, contradictory commands, one company — federalism conflict in its rawest form.

A Washington judge barred Kalshi's sports, election, politics, entertainment, culture, tech and "mentions" contracts in Washington — geofenced since Sept 2. Utah, Iowa and Montana courts have also sided with the states, and the 10th Cir. denied Kalshi emergency relief.

It's Not Just Wall Street

A software company employee who knows the unannounced release date of an upcoming game title and bets on that date in an event-contract market is misusing MNPI — **that is insider trading, regardless of the platform.**

Who Is Exposed

Product, engineering, finance, legal, HR, and executive staff — anyone with advance, nonpublic knowledge of a company decision or event.

What Counts

Product launches, earnings, M&A, regulatory decisions, election-adjacent corporate news — any data tied to a live event contract.

The Exposure

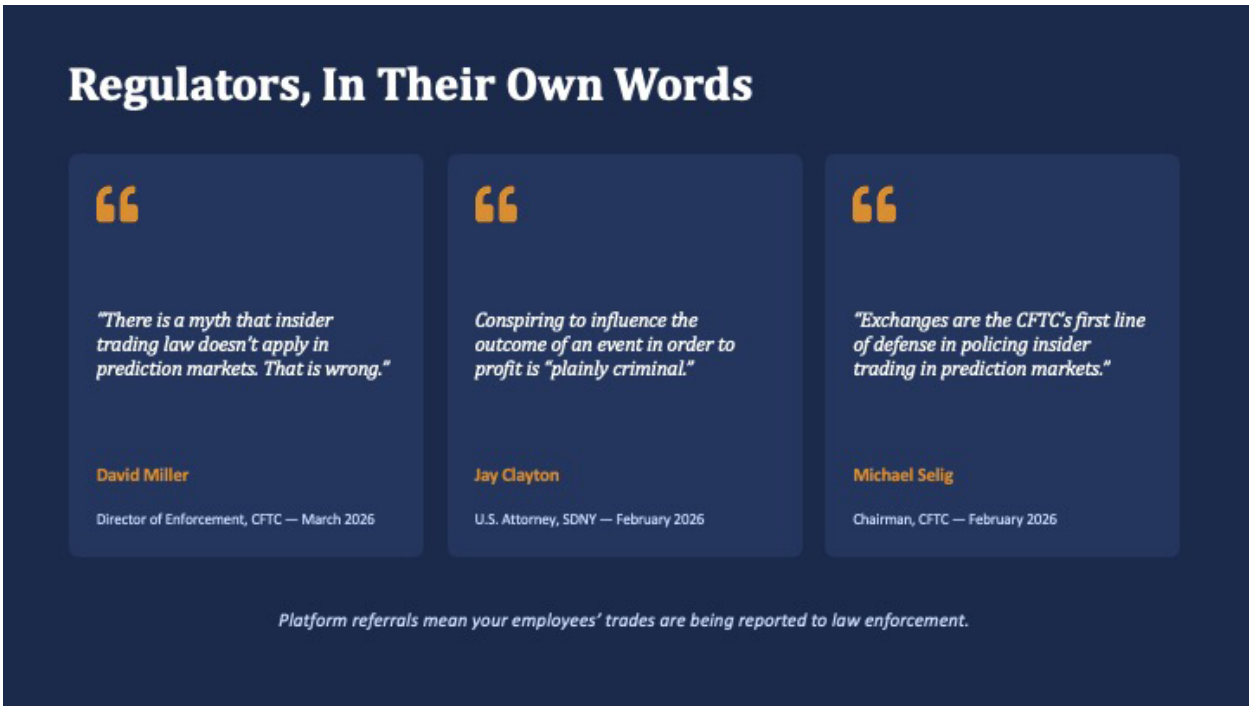
Criminal prosecution, civil enforcement, platform-initiated referrals, reputational and employment consequences — even for a single trade.

Why This Is Different from Traditional Insider Trading

	THE EXPOSURE YOU ALREADY MANAGE	THE EXPOSURE ARRIVING NOW
INSTRUMENT	**Securities** — the company's own stock and debt, under the securities laws	**Event contracts under the CEA** — no security required; private companies are fully in scope
INFORMATION	**Financial MNPI** — earnings, deals, guidance	**Any operational fact** overlapping a listed contract — release dates, regulatory submissions, internal datasets
WHO'S AT RISK	**Officers, directors, finance & deal teams** — already on trading windows and pre-clearance lists	**Anyone with advance knowledge of anything** — engineers, marketers, comms, HR

The gap: a policy that prohibits trading company stock on MNPI does not speak to an engineer betting on his own product's launch date.


The Enforcement Wave Is Already Here
Insider trading doctrine transfers to event contracts — CEA § 6(c)(1) & Rule 180.1 (misappropriation)
U.S. v. Van Dyke (SDNY)
April 2026
Soldier charged by DOJ and CFTC for trading Venezuela-related event contracts on classified information — the first federal insider trading case on prediction markets. Parallel criminal and civil proceedings.
U.S. v. Spagnuolo (SDNY)
May 2026
Google engineer charged for using nonpublic "Year in Search" data to profit on search-trend contracts. Criminal and civil enforcement moved together — same severity as securities fraud.
CFTC February 2026 Advisory — platforms are referring their own users
A political candidate traded on his own candidacy; a YouTube editor traded on advance knowledge of unposted videos. None of these defendants worked on Wall Street.

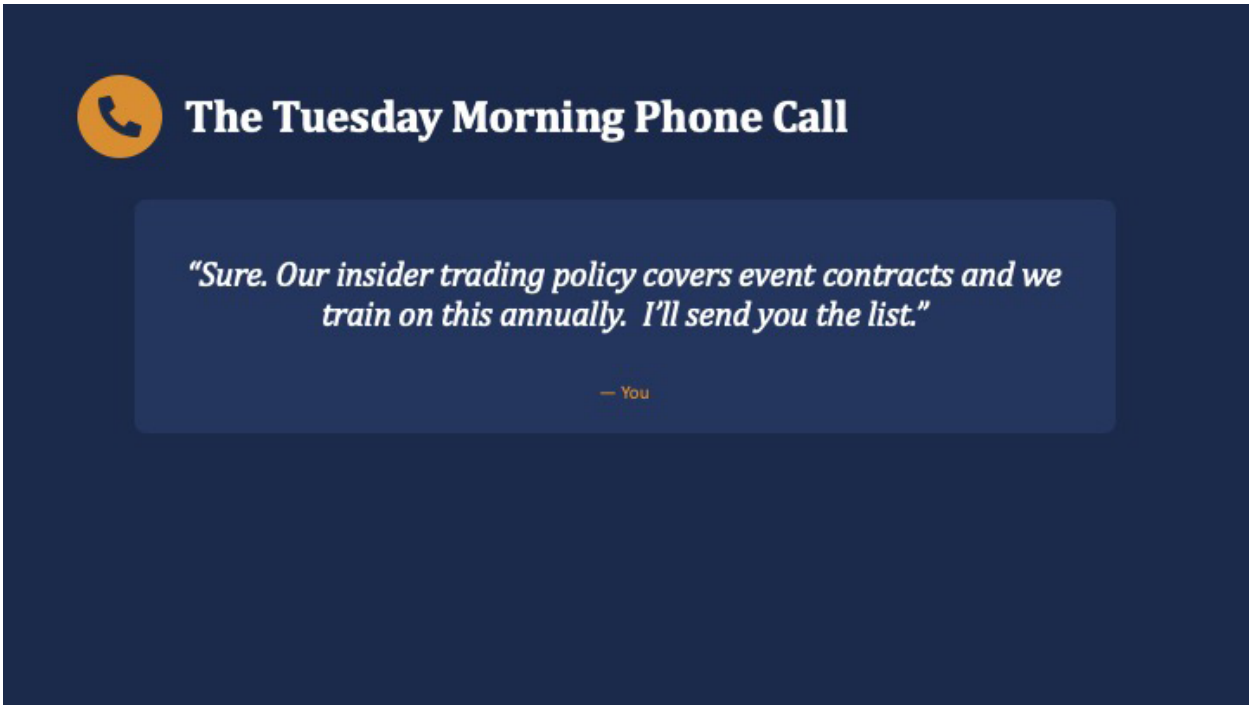

Regulators, In Their Own Words
"There is a myth that insider trading law doesn't apply in prediction markets. That is wrong."
David Miller
Director of Enforcement, CFTC — March 2026
Conspiring to influence the outcome of an event in order to profit is "plainly criminal."
Jay Clayton
U.S. Attorney, SDNY — February 2026
"Exchanges are the CFTC's first line of defense in policing insider trading in prediction markets."
Michael Selig
Chairman, CFTC — February 2026
Platform referrals mean your employees' trades are being reported to law enforcement.

Updating Your Policies: A Starting Checklist

1. Define MNPI to explicitly include facts relevant to event contracts — product launches, financial results, deals, regulatory actions
2. Prohibit trading event contracts on subjects tied to the employer or role-based knowledge — not just company stock
3. Extend blackout-period and pre-clearance procedures to prediction market platforms
4. Require disclosure of prediction-market accounts for sensitive roles (R&D, executive, finance, legal, regulatory affairs)
5. Refresh annual training to directly attack the "it's just a betting app" misconception — using these real enforcement cases

What Happens Next — The Watch List

Cert: Flaherty (NJ) & Robinhood (Assad)	Two petitions docketed; first look at the Sept 28 long conference. Grant, denial, or CVSG could come any week — unless the 9th Cir. takes Kalshi's case en banc first
Circuit split deepens — on two theories	2d, 4th, 6th, 7th & 10th Circuits + Mass. SJC still pending — and the 9th Cir.'s Sept 16 IGRA ruling for California tribes opens a second theory the CEA doesn't displace
A final CFTC rule	Outcome contracts in, single-play / injury / officiating out — plus the quorum challenge it may draw
Congress	Prediction Markets Are Gambling Act & PREDICT Act pending; midterm politics could move them
The next enforcement frontier	First contested insider trading trial in this space — and more platform referrals


The Tuesday Morning Phone Call
"Sure. Our insider trading policy covers event contracts and we train on this annually. I'll send you the list."
— You



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Todd Williams

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Todd Williams is a partner at Corr Cronin whose practice focuses on high-stakes litigation involving complex commercial, business, and personal injury disputes in trial and appellate courts. He regularly represents clients in cases concerning trade secrets, securities litigation, regulatory compliance, employment litigation, fraud, class action, professional negligence, and business contract disputes. Todd has experience representing professionals and consumers in cryptocurrency and blockchain-related disputes. Todd also represents individuals and companies involved in government investigations and enforcement actions. Todd has significant civil trial experience in state and federal courts in Washington and around the country.

As of 2026, Todd is rated by Benchmark Litigation – one of fewer than 100 lawyers in Washington to be individually recognized. He has been named a “Rising Star” by Super Lawyers since 2016. And he has been recognized by Best Lawyers as “One to Watch” since 2021.

Practice Areas

- Business Litigation
- Employment Law
- Intellectual Property
- Personal Injury
- Products Liability
- Professional Liability
- Securities Litigation
- White Collar Investigations

Featured Cases

- Project Thunder v. TNS (King County Superior Court) - Represented telecommunications company against multi-million-dollar claims of breach of contract and wrongful termination stemming from an acquisition; obtained favorable settlement at trial.
- Municipality of Anchorage v. ICRC et al. (U.S. District Court, District of Alaska) - Successfully defended engineering firm against claims of professional negligence in connection with $500 million development project.
- Somerset v. Wall to Wall (U.S. District Court, Western District of Washington) - Represented corporate executives against allegations of securities fraud; obtained favorable settlement after trial.
- McKibben v. Colacurcio Jr. et. al. (King County Superior Court) - Represented former business owner against claims of breach of contract and breach of fiduciary duty. Obtained a complete defense verdict after a two week trial.
- Business Sale Litigation - Successfully prosecuted breach of contract action seeking hundreds of thousands of dollars owed following sale of business. Obtained complete victory and award of attorney’s fees following three-day arbitration hearing.

Education

- J.D., with Honors, University of Washington School of Law - Moot Court Honor Board, Vice President
- M.A. International Studies, Jackson School of International Studies, University of Washington
- B.A., Government and Legal Studies, Bowdoin College



Asymmetric Commercial Litigation: Why Large Companies Lose, and How to Avoid It

Priyanka Timblo
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Asymmetric Commercial Litigation: Why Large Companies Lose, and How to Avoid It
Priyanka Timblo

This article provides the written foundation for a breakout session examining why sophisticated, well-resourced companies sometimes lose high-stakes commercial disputes against much smaller adversaries. The discussion will be based on case studies from two verdicts handed down in 2024 — one against Boeing and one against Walmart — in cases where a plaintiff's verdict was widely considered a long shot. Both defendants were represented by excellent, well-credentialed counsel and vastly larger legal teams. Both lost anyway, and both lost in their own backyards.

In Zunum Aero, Inc. v. The Boeing Company,[1] a nine-member federal jury in the Western District of Washington unanimously found that Boeing willfully misappropriated eleven of nineteen alleged trade secrets belonging to Zunum, a Seattle-area electric-aircraft startup. The total verdict was approximately $81 million. Zunum's core theory was that Boeing exploited its access to Zunum's proprietary hybrid-electric aircraft technology to advance Boeing's own competing program, while simultaneously leveraging its industry influence to dissuade other investors, ultimately forcing Zunum to cease operations.
In London Luxury LLC v. Walmart Inc,.[2] an eleven-day trial in the Western District of Arkansas ended with a jury awarding London Luxury $101,218,680 in damages for Walmart's breach of a contract to purchase more than $500 million in personal protective equipment — specifically, 72 million boxes of nitrile examination gloves — during the COVID-19 pandemic. London Luxury persuaded the jury that Walmart cancelled the deal not because of quality or delivery problems on London Luxury's end, but because Walmart's secondary plan to resell the gloves to a medical equipment supplier at a substantial markup had fallen through. The jury also found, on Walmart's counterclaim, that London Luxury's CEO had engaged in tortious interference with a Walmart employee, awarding Walmart $350,000 — a pyrrhic victory against the backdrop of a nine-figure adverse verdict.

Drawing on the details and dynamics of these two trials, this article identifies mistakes in defense strategy when facing small plaintiffs — in case framing, witness preparation, forum strategy, pleading decisions, and trial presentation — and offers practical strategies for avoiding them.

Avoid the "David and Goliath" Setup
When a large, sophisticated company is accused of wrongdoing by a much smaller adversary, there is sometimes a tendency among the defendant's executives and counsel to be contemptuous of the plaintiff, i.e., to dismiss the seriousness of the claim based on the plaintiff's size, resources, reputation, or perceived lack of sophistication. That instinct is a mistake.

Juries are acutely sensitive to the dynamic between a large defendant and a small plaintiff. Many jurors have witnessed, in their own professional lives, large companies bullying smaller ones—particularly suppliers or startups. That lived experience predisposes certain jurors to sympathize with the "little guy," and any visible contempt or condescension from defense witnesses reinforces the narrative.

Both the Boeing and Walmart cases illustrated this risk. In Zunum, the plaintiff was a defunct startup suing one of the world's largest aerospace manufacturers — a classic David-and-Goliath setup. Zunum's CEO framed the case as a fight on behalf of "every American innovator who dares to challenge the status quo." In London Luxury, a small New Rochelle, New York home goods supplier took on the world's largest retailer. In both instances, the plaintiffs' counsel leaned into the asymmetry, and the defense's apparent dismissiveness of the plaintiff played into the narrative that the larger company believed it could act with impunity.

1 Zunum Aero, Inc. v. The Boeing Co., No. 2:21-cv-00896 (W.D. Wash.).

2 London Luxury LLC v. Walmart Inc., No. 5:22-cv-5059 (W.D. Ark.).

This dynamic should be addressed proactively. During witness preparation, defense counsel should sensitize testifying executives to the danger of projecting any contempt toward the plaintiff. Direct examinations should be framed so that the defendant's witnesses demonstrate respect for the smaller companies with which the defendant does business, rather than treating the plaintiff as beneath notice.

Defense counsel should resist the temptation to build the entire case around discrediting the plaintiff's witnesses, even if certain plaintiff witnesses are unsympathetic or lack credibility. If defense counsel stakes everything on personal attacks, the jury may feel misled, particularly if the plaintiff's lawyers have already "owned" their witnesses' flaws. (Skilled plaintiffs' counsel will know their own witnesses' weaknesses and will account for them.) Opening and closing statements should avoid belittling the plaintiff. Attacks on the plaintiff's case should remain tethered to the heart of the commercial dispute and should never become so personal or far afield that the jury perceives them as deflection from the main issues.

Jury selection is also critical. Consider voir dire questions designed to identify jurors who have worked for small companies or startups, and whether those jurors felt that the business was at the mercy of a large purchaser or supplier that held all the bargaining power. Those jurors should be struck whenever possible.

Defense counsel should be mindful of the optics in the courtroom. If the plaintiff's legal team is small, having a large defense contingent at counsel's table every day — visually reinforcing the resource imbalance — can send the wrong message.

The Myth of Hometown Advantage

The prevailing wisdom in commercial litigation often counsels defendants to transfer venue to their home states if possible, and both Boeing and Walmart litigated their cases in courts near their respective headquarters. This strategy seems logical: the defendant employs a large number of people in its home state, and there should be natural goodwill — and perhaps a latent sense of economic self-interest among jurors — from trying a case in the company's backyard.

But for large, established companies, the hometown advantage can be overstated. The venire in a home state may not necessarily view the company favorably, particularly if the company has been through significant reductions in force, has moved its manufacturing base elsewhere, or has been the subject of negative press coverage. Walmart's situation is case in point: while the company remains the area's dominant employer, the jury pool in northwest Arkansas is not monolithically pro-Walmart, and the jurors who had the strongest personal ties to the company (current or former employees, or their family members) were the most likely to be struck for cause or by peremptory challenge. What remains on the panel is a group of jurors with no meaningful relationship to the defendant, and who may in fact view the defendant's dominant presence in the community as a mixed blessing. It bears noting that in London Luxury, Walmart filed a motion to change the venue from New York to Arkansas, only to ultimately lose in its home court. If the plaintiff files suit outside the defendant's home state, defense counsel should not reflexively move to transfer venue. Ideally, the defense would conduct focus group testing in both the home state and the state where the plaintiff filed suit to determine which juror pool holds less negative sentiment toward the defendant. Counsel should also be attentive to any large recent verdicts returned against the defendant in its home state; those prior results can signal that the supposedly friendly jury pool may be anything but.

With Counterclaims, Be Careful What You Wish For

Filing counterclaims against the plaintiff is a classic defensive maneuver, and there are often legitimate strategic reasons for doing so: counterclaims can put the plaintiff on the defensive, can introduce evidence of the plaintiff's own misconduct, and can provide leverage in settlement discussions. But the London Luxury verdict offers a cautionary tale about the unintended strategic consequences of counterclaims.

In that case, Walmart filed counterclaims alleging that London Luxury's CEO had corrupted a Walmart employee by offering financial incentives and a promised future business relationship to induce the employee to enter into the contract and overlook breaches. The theory was not implausible, and the jury ultimately agreed with Walmart on this point, awarding $350,000 on the tortious interference counterclaim.

But the counterclaims came at a steep price. By putting at issue whether Walmart's in-house lawyers had approved the underlying contract, the counterclaims opened the door to a privilege waiver. The judge ruled that Walmart had waived attorney-client privilege over internal legal communications concerning the contract's formation and validity. This handed London Luxury's counsel a trove of damaging internal documents. London Luxury used these privileged communications to show that Walmart employees had internally discussed and validated the enforceability of the very agreement Walmart was trying to repudiate. The contrast between those internal documents and the testimony of Walmart's trial witnesses — who denied that Walmart had a binding commitment —

created a credibility gap that the jury could not overlook.

Walmart's counterclaim may have also helped the jury justify awarding London Luxury a large verdict in the face of evidence of its own misconduct. Jurors were able to signal their disapproval of the behavior of London Luxury's CEO by finding in Walmart's favor on the $350,000 counterclaim, while simultaneously finding against Walmart on the contract dispute — a "split the baby" result that still resulted in a resounding plaintiff's verdict.

Before filing counterclaims, counsel should assess what those counterclaims will mean for the defendant's own discovery exposure. Will the counterclaims put at issue categories of documents or communications that the defendant would prefer to keep shielded? Could they result in a privilege waiver? And if the counterclaims involve relatively small dollar amounts, is the strategic benefit really worth the risk?

Focus Your Impeachment on the Issues That Matter

The trial examination of an adverse witness — especially a plaintiff or plaintiff's key representative — is a pivotal moment in any case, and there is a temptation to score every available point. But the Zunum Aero trial illustrates how even technically proficient cross-examination can backfire if it is not disciplined in its focus

During the cross-examination of Zunum's key witnesses, Boeing's lawyers focused on secondary or even tertiary issues rather than the core disputes in the case. For example, within the first five minutes, defense counsel pulled up deposition transcripts to impeach on the issue of whether Zunum's first employee was a full-time employee or an "intern" — a point that had nothing to do with the core issues. When a large, well-resourced defendant uses its trial time to nitpick small inconsistencies rather than confronting the substance of the plaintiff's case, jurors may conclude that the defendant is deflecting — that it lacks a real answer on the merits and is instead trying to distract the jury with character attacks. This approach feeds into the David-and-Goliath narrative. Impeachment should be tightly focused on the issues that will actually determine the verdict.

Don't Stake Your Credibility on a Losing Issue

Closely related to the impeachment problem is a broader strategic error that surfaced in both the Boeing and Walmart trials: staking the defense's credibility on a factual position the jury is unlikely to accept.

In Zunum Aero, a trade secrets dispute, a key issue was of course whether Boeing had used Zunum's proprietary information. The evidence at trial, including Boeing's own internal communications and expert testimony identifying specific similarities between Zunum's technology and Boeing's hybrid-electric aircraft program, strongly suggested that Boeing had, in fact, used the information. The more defensible position for Boeing was that any such use was authorized under the parties' agreements—that is, the real issue was misuse, not use. Boeing had a substantially stronger case on that framing. But instead, Boeing's witnesses took the stand and denied any use whatsoever. When the jury concluded—as it apparently did—that those denials were not credible, the damage extended far beyond the use issue. A jury that believes it is being lied to about one issue may punish the defendant on other issues where the defendant's position is objectively stronger. Worse still, Boeing's focus on denying use distracted from potentially more fruitful arguments on causation and damages—arguments that, if successful, could have "zeroed out" the plaintiff's recovery entirely, just as effective as the "no use" defense.

The London Luxury case presented a parallel problem. Walmart's core trial narrative was that its employees had been duped by London Luxury (which was not a particularly sophisticated company) into believing London Luxury could supply the gloves in a timely manner, and that a low-level Walmart employee served as a double agent who pulled the wool over the eyes of Walmart senior executives. But the documentary evidence showed that Walmart's senior executives were closely tracking every aspect of the deal and its timing—as one would expect highly paid, highly experienced senior executives to do in a deal worth half a billion dollars. When those executives testified at trial that they were essentially in the dark, it was simply not credible.

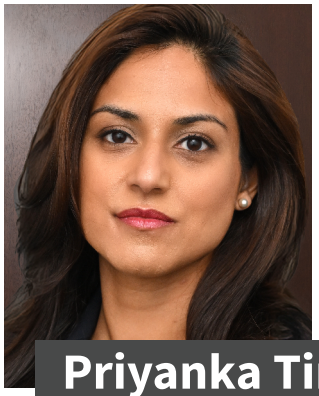
In both cases, the defendants' mistake was not merely a matter of jury focus or the credibility of individual witnesses: it went to the credibility of the entire defense case. Scattering your credibility and the jury's attention across multiple losing positions is the litigation equivalent of dividing your forces.

It's Not Over Until It's Over

The final lesson from these case studies concerns the risk of overconfidence during trial itself. In London Luxury, Walmart's counsel made several promises to the jury during opening statements about witnesses who would be called to testify. But as the trial unfolded, Walmart changed course and did not call those witnesses (perhaps because the defense team concluded it was winning on the strength of the "bribery" narrative and did not need additional witnesses). Walmart did not even call many of its rebuttal experts, apparently calculating that the jury

would not care about the contractual merits once it heard the corruption allegations against London Luxury's CEO. As the verdict demonstrates, that calculation proved wrong. Moreover, in closing statements, London Luxury's counsel highlighted that Walmart had failed to keep the promises it made in opening, i.e., that witnesses the jury had been told would appear never materialized. Broken promises in a trial are potent, because they invite the jury to wonder why the promised evidence was not forthcoming.

While it is common to adjust witness strategy during the course of a trial, if counsel has promised particular witnesses or evidence to the jury in opening statements, the cost of breaking those promises may exceed whatever efficiency is gained by streamlining the defense presentation. And unless the defense is actively testing a shadow jury during trial, it is a dangerous proposition assume you are winning and truncate your defense.



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Priyanka Timblo is a nationally recognized trial lawyer who represents clients in high-stakes commercial litigation and arbitration on both sides of the "v." She has secured eight-and nine-figure judgments on behalf of her clients, in bench and jury trials. Recognized by Chambers USA for general commercial litigation in New York, clients and peers state that Priyanka is "an absolute dynamo," "an amazing trial lawyer," "tough as nails" and "extremely effective in the courtroom." In 2025, Bloomberg Law named her one of 32 "Unrivaled Litigators" nationwide, an award recognizing "winning trial lawyers at the top of their game" who "lead the legal profession in high-stakes and impactful trials." She has also been named Litigator of the Week by The American Lawyer; a Rising Star by The New York Law Journal; one of the top 250 women in litigation by Benchmark Litigation; a Notable Woman in Law by Crain's New York Business; to Lawdragon 500 X – The Next Generation list (2026); and to Bloomberg Law's "They've Got Next: The 40 under 40" list.

Priyanka is a generalist trial lawyer, though she has particular experience in antitrust and breach of contract disputes. She is skilled at crafting case narratives, developing trial strategy from the outset of a case, and preparing and examining witnesses.

Noteworthy

- Named to Benchmark Litigation's Top 250 Women in Litigation List 2026
- Named to Benchmark Litigation National 2026 40 & Under List
- Recognized in 2026 Legal 500 Guide
- Named a Notable Woman in Law by Crain's New York Business
- Named to Lawdragon's Leading Global Antitrust Lawyers List (2025-2026)
- Named a Future Star by Benchmark Litigation
- Named a Rising Star by New York Law Journal
- Named to Benchmark Litigation National 2025 40 & Under List
- Recognized on 2025 Lawdragon 500 X – The Next Generation List
- Recognized as an "amazing trial lawyer" by Legal 500
- Received Bloomberg Law's Unrivaled Litigators Award
- Honored with Benchmark Litigation Impact Case Award for winning a $101 million jury verdict against Walmart in London Luxury LLC v. Walmart Inc.
- Named as a Finalist for The National Law Journal's "National Winning Litigators" Award
- Named to Benchmark Litigation National 40 & Under List
- Named Litigator of the Week by The American Lawyer for Winning $101 Million Jury Verdict Against Walmart
- Named to Bloomberg Law's "They've Got Next: 40 Under 40" List
- Named to Lawdragon's 500 X – The Next Generation List
- Secured $70 Million Win in Financial Dispute Against Fallen Hedge Fund Star Philip Falcone
- Recognized on Benchmark Litigation's 40 & Under List
- Presented at ABA Antitrust Spring Meeting Two Years in a Row
- Named to Profiles in Diversity Journal's Women Worth Watching List
- Named to National Women's Law Center's Leadership Advisory Committee

Education

- McGill University Faculty of Law (LL.B., B.C.L., 2012; Senior Editor, McGill Law Journal; first-place brief, Laskin Moot Court Competition)
- University of Miami (B.A., 2008)



When AI Goes In-House: How Artificial Intelligence Is Redefining the Lawyer-Client Relationship

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When AI Goes In-House: How Artificial Intelligence Is Redefining the Lawyer-Client Relationship
Juan Ramirez

AI is increasingly entrenched in the legal domain. Prognostications of catastrophic AI-induced "doom and gloom," while troubling, underscore the fact that AI is here to stay. When it comes to the legal profession—whether you are in-house or at a law firm—if you are not on the AI train, it is time to get onboard or be left behind.

This article explores the potential fruits of responsible AI usage in legal practice and how this fast-evolving technology enables lawyers to deliver more cost-effective service without compromising professional judgment, ethical standards, or client trust. In particular, it examines AI's transformative impact on the dynamic between in-house and outside counsel and outlines strategic implications for firms striving to meet client demands for greater value, cost savings, and genuine partnership in a world of increased (AI-supported) in-house counsel capacity.

The AI Era Is Now
Whether you are an in-house practitioner or law firm lawyer, the rapid integration of AI into the legal profession has been a gamechanger. The practical benefits are well established and the data is compelling. According to a 2026 Harvey survey of 200 legal professionals, 80% of lawyers incorporate AI into their weekly practice, and 40% use it multiple times per day. The top uses of AI include research and information gathering (80%), drafting and summarizing data (66%), idea generation or brainstorming (52%), and data and document review (52%). Another survey published in The 2026 Legal Industry Report by 8am™ found that AI usage among law firms has more than doubled since 2025, from 31% to 69% in 2026.[1] AI is here to stay, and it will only grow in usage, sophistication, and—if used well—value.

The Benefits and Challenges of AI
In a profession long defined by performing rote, time-consuming work, the obvious benefits of AI have been speed, enhanced quality and accuracy, increased efficiency, and giving lawyers the ability to do in minutes what used to take days and hours to complete. AI platforms have fundamentally transformed the way we practice, and, in many ways, they have given us precious time back to focus our attention on performing higher value, strategically important work. But with great power comes great responsibility. While the upside of AI may seem obvious, AI is not without its risks. Although beyond the scope of this article, those risks include catastrophic "hallucinations" that have sunk the credibility of entire law firms and lawyers failing to independently verify results. Courts and state bars across the country are ratcheting up the sanctions applicable to litigants who fail to catch AI-generated hallucinations, escalating from censures to substantial monetary fees, disqualification of experts, barring attorneys from practicing, and outright dismissal of cases.

How In-House Legal Teams Are Leading The Way
Research shows that in-house teams are outpacing their law firm counterparts when it comes to embracing and deploying AI. They account for 19.5% of total corporate AI usage-the highest of any department. The Harvey survey also showed that 53% of in-house teams use AI multiple times a day compared with just 32% of law firm lawyers.

Several factors may explain the disparity, including the risk-averse nature of law firms, the heightened concerns about data protection and cybersecurity, and, in some instances, firms' stubborn adherence to the billable hour-a model that is often antithetical to AI's promise of efficiency. Far from backing down, our in-house partners—at times unfairly regarded by their respective organizations as cost (vs. profit) centers—are deliberately doubling down on the rapid deployment of AI across a broad range of legal functions to cut costs. They are under increasing pressure from their businesses and leadership to scale back legal spending and staffing while shifting more

1 8am™ surveyed over 1300 legal practitioners about the continued rise and use of AI in legal workflows. See 2026 Legal Industry Report, Nicole Black (May 5, 2026).

work in-house. This trend is likely to continue, and the expectation that law firms must meet their in-house counterparts where they are, will only grow.

What Clients Expect And Demand From Outside Counsel

General counsels and in-house leaders expect and demand that outside counsel will leverage AI tools to deliver more value and cost savings. They are specifically demanding:

A. Efficiency. The drive to reduce outside counsel spend is not new; what is new is the expectation that outside counsel leverage AI to deliver better, faster, and more efficient and effective legal services that translate into fewer billable hours and less legal spend. Clients are driving this progress by adopting and incorporating AI throughout the litigation cycle. They are increasingly using AI to insist on lower fees, and crafting engagement letters that clearly delineate acceptable forms of AI use. This includes demanding the use of AI tools to access and leverage proprietary data and work product within the firm or company's infrastructure. Firms that rise to the challenge of responsibly adopting AI gain a competitive advantage: the ability to engage in transparent and informed discussions about how and when AI use can and should generate cost savings and when, by contrast, it might actually increase time spent on certain types of tasks. For example, AI can now expedite factual review of background documents in a relatively low risk way, which saves time. But it can also be deployed for critiquing or red-teaming draft work product, enabling the lawyer to anticipate and bolster against potential deficiencies, but requiring additional layers of review and revision.

B. Greater Transparency and Protection of Client Data. Clients are demanding greater visibility into how our firms plan on using their data and pricing AI into the terms of engagement, and how their data will be protected in the process. This expectation demands robust disclosure of the firm's AI use, data infrastructure, and guardrails put in place to protect client confidentiality and privacy. And as legal pricing develops in the era of AI, clients and outside counsel will increasingly discuss how to share and allocate the costs and risks of AI use. For example, clients demanding savings from outside counsel should be open to sharing—or at least discussing—the corresponding cost burden of AI licenses for best-in-class legal AI tools and whether such use is factored into fees. If AI turns a ten hour project into a two hour one, but the law firm is paying significant license fees in order to have access to the AI, this creates a cost the client should arguably share, especially if they re also receiving the benefits in the form of lower billable hours.

C. Better Analytics. Clients are demanding more sophisticated analytics with respect to assessing risk, crafting litigation strategy, forecasting costs, and achieving desired outcomes. But this type of AI-supported legal work relies on a nuanced application of human judgment and AI-distilled data and requires experienced humans in the loop far more than other applications of AI.

D. Technological savvy. With in-house teams often outpacing firms in the adoption of AI platforms, firms can ill afford to be technological laggards. The expectation is that lawyers will demonstrate technological competence when incorporating AI into their practices without ever sacrificing their professional judgment or ethics. This is equally true for understanding and reacting to AI use by others in litigation—including adversaries, courts, clients, experts, and witnesses. AI is permeating all aspects of litigation and lawyers—in-house or external—who fail to upskill and learn to understand and spot its uses will ultimately fail to meet their duty of competence

In short, for all the promise AI brings to the table, it is potentially fraught with peril, and the continued need for seasoned human judgment means that outside counsel will need to both learn how to apply it responsibly and how to reach a meeting of the minds with his or her in-house partners about its use.

What Law Firms Can And Must Do To Remain Effective And Valuable Partners

Law firms cannot afford to sit on the sidelines; rather, they must proactively embrace and incorporate AI if they want to compete and deliver the highest caliber customer service. This includes strategically incorporating AI into core workflows, including research, drafting, document review, contract analysis, deposition prep, risk assessment, and other routine tasks for which AI is well-suited. They must do all of this with the client's blessing and understanding without sacrificing sacrosanct ethical duties of competence, confidentiality, client communication, diligence, and candor before the tribunal.[2] Practical steps to foster and enhance partnership with clients include:

A. Develop And Follow Clearly Written Policies And Ensure Robust Governance Around AI Use. Successful integration of AI requires written policies and controls aimed at mitigating and avoiding risks, protecting client information, and providing oversight and guidance to users. Clearly written policies guide practitioners on who has access to AI tools, what the acceptable or permitted uses for AI are within the organization, and when and how

2 In July 2024, the ABA issued Formal Opinion 512, which provides comprehensive guidance on lawyers' ethical obligations when using generative AI. Formal Opinion 512: Generative Artificial Intelligence Tools, at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf (July 29, 2024).

AI can and should be operationalized to drive efficiency, consistency in use, and positive outcomes. Beyond risk avoidance, AI policies and responsible governance should allow organizations to scale and operationalize AI with confidence. But policies are just the beginning. They need to be followed and enforced. When the New York Times[3] and other newspapers published Sullivan Cromwell's mea culpa for filing papers with dozens of inaccurate citations and fabricated (or hallucinated) cases, most outlets emphasized the firm's failure to independently verify its sources when the original sin was failing to follow its own AI policies.

B. Invest in Training And Sharing Best Practices Internally To Ensure Technological Competence. Law firms and legal departments should give strong consideration to comprehensive training that not only covers how to use and implement AI, but how and when to integrate AI tools into existing workflows without jeopardizing data security, client confidentiality, or privacy. Policies without training are just words on a page, and the untrained use of technology without guardrails or guidance is a recipe for disaster. One of the key features I have grown to appreciate about my firm's AI strategy is the frequent training and sharing of best practices within the firm, including scheduling training with vendors dedicated to helping us enhance and improve AI use and client service.

C. Clearly Communicate AI Use And Obtain Client's Informed Consent. As lawyers we operate in the service of clients and the public. ABA Model Rule 1.4 imposes a duty on lawyers to reasonably consult clients about the means and methods by which the client's objectives are to be accomplished. Lawyers should disclose how the firm incorporates AI into client representation, why AI is being used on the client's behalf, and arguably mandates seeking the clients' informed consent before deploying AI tools on their behalf. It behooves lawyers to consult IT professionals on the process in order to better understand the limitations of the AI technology employed and the risks certain platforms pose to client data. My firm incorporates the AI discussion at the point of engagement, a practice that facilitates early communication and setting expectations.

D. Trust But Verify AI Outputs. For all of its power to do good and improve the practice of law, AI is still rife with risk. This is a closing reminder that as lawyers, we all have a non-delegable duty to use independent judgment and skill when representing clients. This includes independently verifying each citation and AI output in each and every filing. AI was never designed to substitute that judgment nor grant you or I license to abdicate our professional responsibilities to technology. Remember: You are the lawyer, AI is the tool, not the other way around.

Conclusion

AI is rapidly transforming the legal profession, including how we practice and interact with our clients who are adopting and leveraging AI at an accelerated pace. Firms that embrace AI thoughtfully will strengthen their client relationships and market position. Firms that resist or delay will find themselves losing ground to both AI-enabled competitors and increasingly capable in-house teams.

The path forward requires a balanced approach: embracing AI's transformative potential while maintaining the ethical standards, professional judgment, and client-centered focus that define the legal profession at its best. Law firms that achieve this balance will not only survive the AI revolution; they will lead it and become better partners to their clients in the process.

3 Santul Nerkar, A.I. 'Hallucinations' Created Errors in Court Filing, Top Law Firm Says, New York Times (April 21, 2026) at https://www.nytimes.com/2026/04/21/nyregion/sullivan-cromwell-ai-hallucination.html.



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Juan Ramirez brings clients a wealth of experience in both defending catastrophic torts and leading complex commercial litigation and appellate advocacy. Juan represents companies and consumer product manufacturers against existential litigation threats and government investigations at home and abroad. He helps clients protect their reputations, employees, and assets, including through affirmative claims against suppliers, distributors, and competitors.

Juan's experience leading the litigation functions of two international, Fortune 150 corporations means that he truly appreciates the pressures his clients face: from plaintiffs, courts, regulators, and public perception. Juan brings that awareness and know-how to meet his clients where they are—and lead them to higher ground—when they face major litigation.

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

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

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

Honors
- The Best Lawyers in America - Commercial Litigation, 2025-2027
- Kimberly-Clark, General Counsel's "X" Award for Excellent Results
- Nominated for 2020 First Chair Award for Top In-House Talent
- Wisconsin Law Journal "2010 Up & Coming Lawyer"

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



Under Pressure: The Science Behind Better Trial Outcomes

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Under Pressure: The Science Behind Better Trial Outcomes
Maria Marinakis and Roman Lifson

Experienced trial lawyers are exceptionally good at focusing. They have to be. Litigation rewards the ability to absorb enormous amounts of information, identify what matters, recognize patterns, anticipate an opponent's next move, make decisions with incomplete information, and keep moving while the stakes continue to rise.

But there is a paradox inside that expertise: the same ability to focus intensely on what matters can make it harder to notice what falls outside that focus. That does not mean experienced litigators become poor decision-makers under pressure. Nor does it mean expertise disappears when the stakes are high. It means something more useful: pressure can change the conditions under which even very good decision-makers think.

Think of attention as the beam of a flashlight. Whatever falls inside the beam becomes easier to see and examine. Details emerge. Patterns become visible. Problems can be analyzed and solved. Yet, everything outside the beam still exists.

In litigation, what sits outside that beam can matter enormously. It may be the fact that does not fit the prevailing case theory; the witness whose testimony is strong on paper but lands differently in the room; the email the trial team has read dozens of times but a juror reads only once; the emotional story jurors construct while the lawyers are concentrating on the legal one; or the assumption that became so familiar during years of litigation that no one remembers it was ever an assumption at all. The question, then, is not whether trial lawyers should focus less. It is whether they know when to widen the beam.

Focus Has a Cost

Human attention is selective by design and necessity. We cannot give equal cognitive priority and attention to every fact, voice, deadline, facial expression, document, and competing demand around us. Focus allows us to direct limited attention toward the task at hand. The tradeoff is that information outside that focus may receive little attention, even when it is visible and potentially important.[1]

One of the most striking demonstrations comes from a study of experts. Researchers asked 24 radiologists to perform a familiar lung-nodule detection task while examining CT scans. In the final case, the researchers inserted the image of a gorilla that was 48 times larger than the average nodule. Eighty-three percent of the radiologists did not report seeing it. Eye tracking showed that most of those who missed the gorilla had looked directly at its location.[2]

The point is not that radiologists are inattentive. It's actually quite the opposite. They were experts performing the task they had been trained to perform, and their attention was directed toward finding what the task told them mattered. Their expertise did not make them immune to inattentional blindness. In the end, their brain functioned as designed.

Trial practice creates its own versions of this scenario. A team may become so focused on defeating a damages model that it gives too little attention to the story jurors conjure and may use to decide the amount of damages to award. Lawyers may concentrate on whether a witness can withstand cross-examination while underestimating how the witness comes across before a question is ever challenged. Or a team may spend months refining a case theme only to discover in jury research that jurors are organizing the facts around a different question entirely.
Focus is not the enemy. In fact, it is required. The useful question is: What is receiving our attention, and what might be sitting outside the beam?

1 Daniel J. Simons & Christopher F. Chabris, "Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events," 28 Perception 1059, 1059–1074 (1999), doi:10.1068/p281059.

2 Trafton Drew, Melissa L.-H. Võ & Jeremy M. Wolfe, "The Invisible Gorilla Strikes Again: Sustained Inattentional Blindness in Expert Observers," 24 Psychological Science 1848, 1848–1853 (2013), doi:10.1177/0956797613479386.

When a Working Hypothesis Becomes a Conclusion

Litigators must form hypotheses. They evaluate incomplete facts, test competing explanations, predict how evidence will develop, and construct theories of the case. Without that ability, strategic decision-making would be impossible. The vulnerability arises when a working hypothesis quietly becomes a conclusion.

Psychologist Raymond Nickerson described confirmation bias as the tendency to seek or interpret evidence in ways that favor existing beliefs, expectations, or a hypothesis already in hand.[3] In litigation, this does not require anyone to ignore evidence deliberately. It can operate much more subtly: which facts receive attention, which questions get asked, which inconsistencies seem important, which explanations feel plausible, and which new information is treated as signal rather than noise.

Experience makes this especially interesting. Pattern recognition is one of the great benefits of expertise. An experienced lawyer has seen witnesses unravel, jurors react strongly to particular facts, experts lose a room, and seemingly powerful themes fall flat. That history creates a valuable library of patterns. But a familiar pattern can also make an unfamiliar explanation harder to see.

A useful question would be, "When did our working hypothesis quietly become our conclusion?" Followed by: "What evidence would cause us to change our minds?" Although certainty may feel efficient, curiosity requires reopening the search.

Pressure Changes the Decision Environment

High-stakes litigation rarely offers the luxury of examining one problem at a time. Trial lawyers are simultaneously managing evidence, witnesses, experts, clients, opposing counsel, deadlines, settlement considerations, team dynamics, courtroom demands, and the consequences of being wrong. The issue is not merely "stress" in the everyday sense. It is a decision environment characterized by competing demands, uncertainty, limited time, and substantial consequences.

Stress affects decision-making, but not in one simple or universal direction. A review of human studies concluded that whether stress helps or harms an outcome depends on the specific task or situation.[4] A later meta-analysis of decisions under uncertainty found a small overall shift under stress toward choices characterized as more disadvantageous, more reward-seeking, and more risk-taking, while also finding that the effects differed with the decision situation and type of stressor.[5]

The conditions surrounding a decision can influence how the decision gets made. For trial teams, that is enough reason to pay attention to the decision environment itself. The practical concern is familiar. A consequential strategic decision may be made while a lawyer is preparing a witness, answering a client, reviewing late-breaking evidence, managing a team, anticipating opposing counsel, and watching the trial clock. In that environment, the familiar answer can become especially attractive and easy to accept. Sometimes that efficiency is exactly what expertise is for, but sometimes, yesterday's successful strategy becomes today's blind spot.

The goal is not to distrust experience. It is to create deliberate moments in which experience can be examined rather than simply obeyed.

Three Deliberate Interruptions

If these limitations are predictable, trial teams can build simple practices that interrupt them and do not require an elaborate decision system. They require enough distance from the immediate task to see the case differently.

First, pause before certainty. Before a consequential strategic decision, ask what the team is assuming, what evidence would change its mind, and what plausible alternative has not received serious consideration. The purpose here is to distinguish: 1) confidence that has survived testing from; 2) certainty produced by familiarity. Second, widen the beam. Ask what is receiving most of the team's attention and what may be receiving too little. A team immersed in doctrine may need to examine the human story jurors are likely to construct from the same facts. A team captivated by a sympathetic witness may need to ask which facts jurors will use to test that sympathy. A team convinced that a key document "speaks for itself" may need to discover what it says to people who have not lived with the case for three years. Third, borrow another brain. Some blind spots are extraordinarily difficult to identify from inside the perspective that created them. The most useful additional perspective is often someone who does not share the team's assumptions, history with the case, incentives, or professional lens.

This is one reason jury research and behavioral consultation can add value beyond asking which side "wins" a mock trial. The useful finding may be an interpretation the legal team never considered, a witness

3 Raymond S. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises," 2 Review of General Psychology 175, 175–220 (1998), doi:10.1037/1089-2680.2.2.175.

4 Katrin Starcke & Matthias Brand, "Decision Making Under Stress: A Selective Review," 36 Neuroscience & Biobehavioral Reviews 1228, 1228–1248 (2012), doi:10.1016/j.neubiorev.2012.02.003.

5 Katrin Starcke & Matthias Brand, "Effects of Stress on Decisions Under Uncertainty: A Meta-Analysis," 142 Psychological Bulletin 909, 909–933 (2016), doi:10.1037/bul0000060. Correction, 142 Psychological Bulletin 933 (2016), doi:10.1037/bul0000068.

reaction no one anticipated, a theme jurors understood differently than intended, or a question jurors kept asking that the lawyers assumed had already been answered. The value is not that an outsider is automatically right. The value is that the outsider is not standing inside the same beam.

The same principle applies within the trial team. A colleague, junior lawyer, paralegal, client representative, consultant, or other team member may notice something precisely because his or her attention is directed differently. One of the most productive questions a leader can ask is also one of the simplest: “What are you seeing that I’m not?”

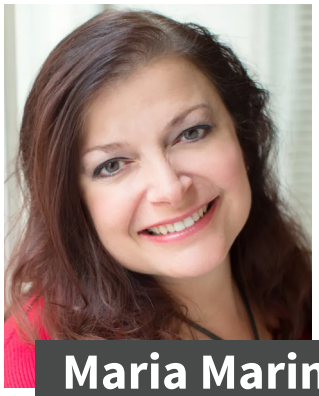
Better Trial Outcomes Begin Before the Verdict

Better trial outcomes are not produced by eliminating human bias or pretending skilled advocates can become perfectly objective. Neither is realistic. Better decisions become possible when trial teams recognize that attention is selective, hypotheses can harden into conclusions, and pressure can change the environment in which judgment occurs.

That recognition creates an opportunity to pause before certainty, deliberately widen the beam, and invite perspectives from people who are not looking at the case through precisely the same lens.

The goal is not to eliminate focus. Trial lawyers could not do what they do without it. The danger is believing that something doesn’t exist because it is not illuminated by the beam.

Experience, expertise, and focus matter; sometimes, the better decision begins with one question: What aren’t we seeing?



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Maria Marinakis is a seasoned mental health and forensic professional with over two decades of experience supporting victims of crime and working alongside multidisciplinary teams, including law enforcement, attorneys, judges, and medical experts. With a background in counseling psychology and a career spanning child welfare, forensic assessment, and trauma-informed practice, Maria brings a unique, comprehensive lens to jury consulting.

Her work has involved in-depth case analysis, behavioral profiling, and courtroom collaboration—skills that directly inform her ability to evaluate juror biases, forecast group dynamics, and craft persuasive trial strategies. As an active member of FBI-led and multidisciplinary Sexual Assault Intervention Teams, Maria contributed to investigations and victim-centered protocols that prioritized integrity, clarity, and trauma-informed accuracy—an approach she now brings to jury selection and trial preparation.

Maria's forensic strengths are rooted in years of conducting psychological and developmental assessments, preparing expert recommendations for court proceedings, and training professionals in child abuse investigation, cross-cultural issues, and neuro-linguistic communication techniques. Her ability to translate complex psychological concepts into actionable strategies makes her a valuable asset in voir dire analysis, witness preparation, and narrative framing for attorneys.

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