For The Defense™

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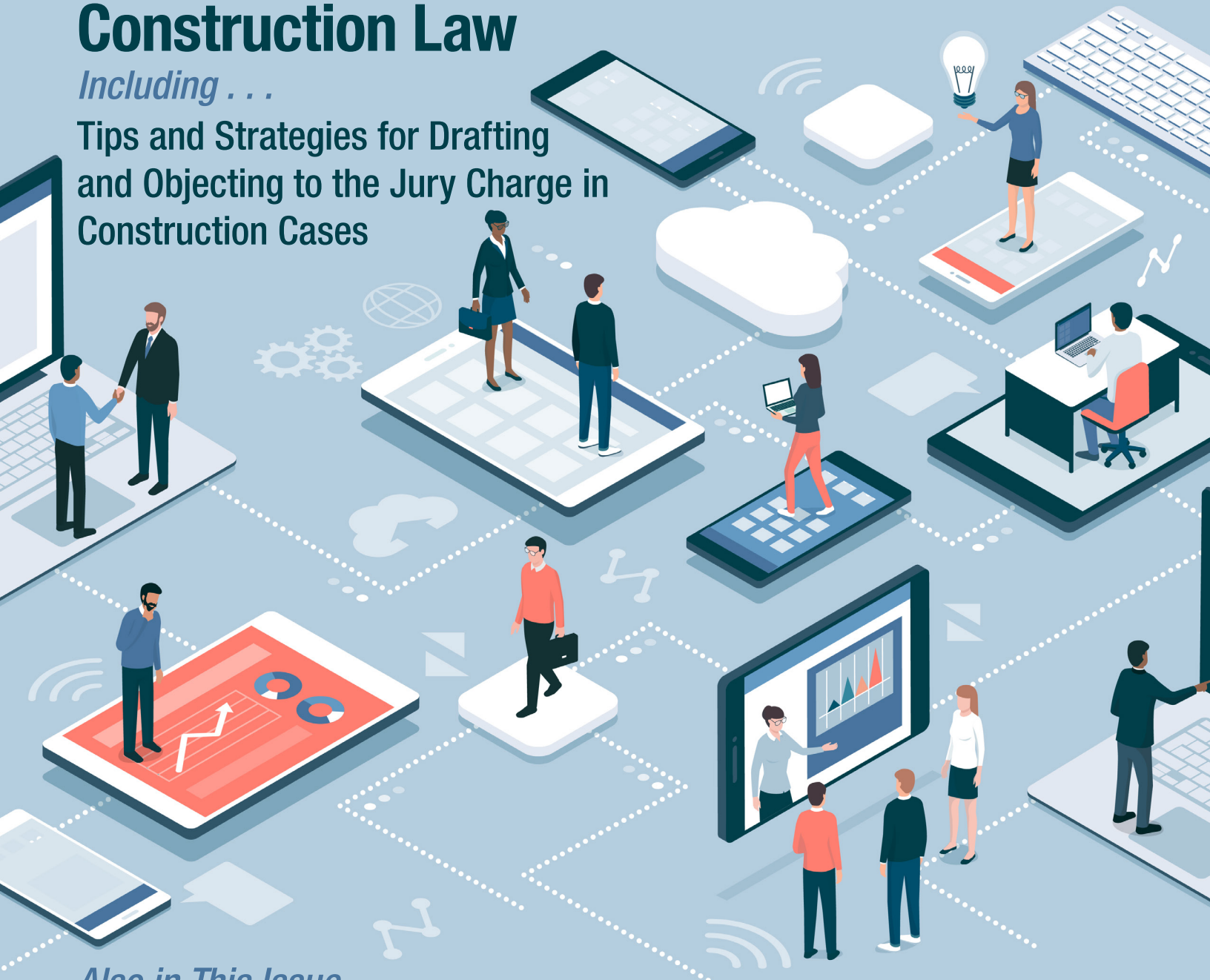
The magazine for defense, insurance and corporate counsel

February 2023

Construction Law

Including . . .

Tips and Strategies for Drafting and Objecting to the Jury Charge in Construction Cases



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Never Underestimate the Power of DRI in Your Career

Brett Tarver of Troutman Pepper Hamilton Sanders LLP is the Chair of the Young Lawyers Committee.

I just returned from attending the DRI Women in the Law Seminar for the first time, and I was again reminded just how much DRI has impacted my career for the better. Although it was my first WITL Seminar, I have attended many, many DRI events in my past nine years as an active member. Whenever I return from a DRI seminar, whether from the Young Lawyers Seminar, to the ones put on by the Drug and Medical Device and Product Liability, or from the recent WITL Seminar, I return as a stronger litigator, leader, and business professional. As I reflect on the current threat our clients and the defense bar overall continue to face, it is exactly this type of learning I need as a defense litigator to continue advancing my career (see DRI President Lana Olson's article from the November/December issue of For The Defense). If you have a heart for zealous advocacy for your clients and building up the defense bar, then engaging with DRI by attending a DRI seminar is imperative!

The programming at DRI seminars is top-notch. Whether you are seeking substantive learning on legal topics in your area of practice, skills-based training to help you advance in the courtroom and out, or inspiration from some of the nation's leading lawyers, you will find all this and more by attending a DRI seminar. Most defense litigators understand that the members of the plaintiffs' bar work together, sharing tactics and skills across the board to strengthen their matters against our clients. It is at DRI seminars that we as defense litigators have the opportunity to do the same thing – identify tactics, skills, and information that will strengthen our collective ability to defend our clients against a flexible and savvy plaintiffs' bar. That alone is reason enough for all defense litigators to get involved with DRI by attending DRI events – only through coordination can we stand as a united front against the plaintiffs' bar for our clients.

If you have a heart for zealous advocacy for your clients and building up the defense bar, then engaging with DRI by attending a DRI seminar is imperative!

Beyond the programming (which is excellent), the networking opportunities at a DRI seminar are unparalleled. While an important element of all of our practices, the ability to network and begin to build a national brand as a defense litigator is especially important for younger lawyers. Through networking with other engaged members at DRI events, I have had developed opportunities to publish, to speak, and to lead. All of these have helped as I worked towards building my brand as a skills-focused trial lawyer. As I have come up through DRI, several of my colleagues (who I met through DRI and are now dear friends), have moved to in-house positions. I know that the relationships I've built through DRI and the opportunities I have had to build my brand will result in these folks thinking of me first when they need a tested trial lawyer to handle their matters.

Even though the pandemic has enabled us to get quality CLE content from the comfort of our own homes, you cannot get the same career-changing impact from watching an online video that you can from attending an in-person event with DRI. If you have been on the fence about attending, I highly encourage you to attend at least one in 2023 and see what all of the buzz is about. You just might find the immense power DRI can have on advancing your career, as I have.

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Spotting A Sham

What You Need To Know About MEB/BD Business Certification Processes

By Marlon A. Primes and Steven C. Hemric

Navigating the certification process to take advantage of these opportunities can be daunting.

Minority and Women Owned Business Certification (MWBE) Programs were created by the federal government and officially began in the 1960s in response to the Civil Rights Movement. President John F. Kennedy issued Executive Order 10925, which created an Equal Opportunity Committee and mandated that projects financed with federal funds "take affirmative action" to ensure that hiring and employment practices are free of racial bias. President Lyndon B. Johnson issued Executive Order 11246, which requires government contractors to take specific measures to ensure equality in hiring and encourage employment of underrepresented groups, including minorities and women. Subsequently, during President Richard M. Nixon's Administration, the federal government established the Small Business Administration's (SBA) Section 8(a) program to enhance federal purchases from socially and economically disadvantaged owners of small businesses and created the Office of Minority Business Enterprise in order to provide minority business owners with more federal resources. (Shomari Benton, David Lloyd, You Down with MWBE? Yeah You Know Me: A Summary of the MBE, WBE, and DBE Programs in the State of Missouri, 2 Bus. Entrepreneurship & Tax L. Rev. 1 (2018)).

These federal programs and their state-level companion programs have created abundant opportunities for MWBE businesses on public construction projects. However, navigating the certification process to take advantage of these opportunities can be daunting. Also, some majority-owned companies have attempted to take advantage of the MWBE system by creating fraudulent "sham" companies and joint ventures that do not actually achieve the goals of MWBE programs and that hurt the industry as a whole. Disadvantaged Business Enterprise (DBE) fraud harms the integrity of the DBE program and law-abiding contractors, including many small businesses, by defeating efforts to ensure a level playing field in which all firms can compete fairly for contracts, according to Thomas J. Ullom, Regional Special Agent-in-Charge of the U.S. Department of Transportation (DOT) Office of Inspector General). (Nicholas Rivecca, Sr., and Sonag Ready Mix, LLC To Pay $629,732 To Resolve False Claims Act Allegations Regarding Disadvantaged Business Enterprises, 2018 WL 4358042).

The goal of this article is to discuss how to navigate the MWBE system the right way, which will allow businesses to utilize the MWBE system to help achieve its objectives of creating a more just and equitable society. Moreover, this article will focus on joint ventures between MWBEs and majority-owned companies under Section 8(a) of the Small Business Act and will discuss how to certify a business/joint venture properly in accordance with the certification standards, as well as how to avoid "shams," "fronts," or "fraudulent transaction[s]" when applying for MWBE and/or DBE certifications.

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Background Rules:

Executive Order 11246

Executive Order 11246 – Equal Employment Opportunity (Executive Order 11246, As Amended) prohibits federal contractors and federally-assisted construction contractors and subcontractors doing over $10,000 in government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. The Executive Order also requires government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Additionally, Executive Order 11246 prohibits federal contractors and subcontractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.

Qualifying as a MWBE

Section 8(a) of the Small Business Act empowers the SBA to arrange for the fulfillment of other federal agencies' procurement needs through contracts with qualifying small businesses. 15 U.S.C. § 637(a)(1)(A)–(B). "In order to qualify as a DBE, a company's management must be controlled by a socially or economically disadvantaged individual such as a woman or minority. The purpose of the program is to give an economic advantage to minorities and women who run their own companies. However, the manager of the DBE cannot also engage in employment that would prevent him or her from devoting sufficient attention to the affairs of the DBE." (Massachusetts Company Pleads Guilty In Connection With Disadvantaged Business Enterprise Fraud, 2016 WL 4591454). All federal agencies must set goals for awarding a percentage of their procurement contracts to 8(a)-qualifying firms. 15 U.S.C. § 644(g)(2). To qualify for these "8(a) set-aside" contracts, a small business must be owned and controlled by one or more "socially and economically disadvantaged individuals," *id.* § 637(a)(4), (a)(1)(C), a category defined to include certain racial minorities and members of

other historically disadvantaged groups, id. §§ 631(f)(1)(B)–(C), 637(a)(5)–(6); 13 C.F.R. §§ 124.103, 124.104. The 8(a) program, in other words, is an affirmative action contracting program.

The certification process is undertaken by states to ensure that the program "benefits only MBEs (DBEs) which are owned and controlled in both form and substance by one or more minorities or women." 49 CFR 23.51. The state is required to have procedures to verify information provided by an applicant to support its claim for DBE status. The state is the certifying agent and must make its determination based on eligibility standards set forth in Sec. 23.53. These include bona fide minority group membership and an entity that is an independent business. Highlights of the requirements include:

- "... The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership documents... DOT recipients shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial, equipment leasing, and other relationships with minority firms vary from industry practice.
- The minority or women owners shall also possess the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations....
- If the owners of the firm who are not minorities or women are disproportionately responsible for the operation of the firm, then the firm is not controlled by minorities or women and shall not be considered an MBE (DBE).
- Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can be considered as controlling the business." (Emphasis Added) 49 CFR 23.53(a). (Proposed Suspension of Mainelli (Hugo R.), Brown (Mariano J., Brenda Francis), Aetna Bridge Holding Co., B&F Excavating, Inc., DOTCAB No. 12, 1985 WL 17691 (D.O.T.C.A.B. July 22, 1985).

Similarly, pursuant to regulations adopted by the United States DOT at the direction of Congress, a state that receives federal funds for highway construction projects must set an annual goal for participation by disadvantaged business enterprises ("DBEs"). Prime contractors, in turn, must ensure that the subcontracts awarded in connection with a highway construction project meet the DBE participation goal for that project. A DBE is a for-profit small business that is at least 51 percent owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by at least one of those individuals. A DBE must be certified by the state in which it operates. In order to satisfy DBE participation goals, a DBE that is awarded a subcontract on a project must perform a commercially useful function—that is, the DBE itself must perform, manage, and supervise the subcontract work and must order and pay for the materials used. A contractor will not receive credit for DBE participation if the relationship between the contractor and the DBE "erodes the ownership, control, or independence of the DBE." *United States v. Bunn*, 26 F. App'x 139 (4th Cir. 2001).

Certification is an annual process, and generally is not project specific. Sec. 23.53(f). Certification is primarily a function of the state; however, it is subject to two kinds of reviews. The process adopted by the state is subject to review by the DOT model administration (in this case, Federal Highway Administration (FHWA), and the certification determinations are subject to appeal to U.S. DOT under Sec. 23.55. (Proposed Suspension of Mainelli (Hugo R.), Brown (Mariano J., Brenda Francis), Aetna Bridge Holding Co., B&F Excavating, Inc., DOTCAB No. 12, 1985 WL 17691 (D.O.T.C.A.B. July 22, 1985)).

To count towards the DBE participation goal in a contract, the DBE must perform a "commercially useful function on the contract." (citing 49 C.F.R. § 26.55). On past projects, it has been alleged that "[f]ailure by a contractor to carry out the requirements of 49 C.F.R. part 26," including the DBE conditions, "is a material breach of the contract." (citing 49 C.F.R. § 26.13(b)). *United States ex rel. Hedley v. Abhe & Svoboda, Inc.*, 199 F. Supp. 3d 945 (D. Md. 2016). For example, the Abhe Court determined:

- Relators alleged with sufficient particularity that contractor made false claims for payment to federal government.
- Relators alleged with sufficient particularity that contractor's alleged false statements regarding its use of certified disadvantaged business enterprise subcontractor were material to federal government's payment of funds; and
- Relators sufficiently alleged damages.

The Abhe holdings demonstrate the importance of following applicable guidelines and standards for the certification processes to minimize liability and substantial damages.

To become eligible to receive 8(a) set-aside contracts, a firm must participate in the SBA's business development program or otherwise obtain SBA approval.

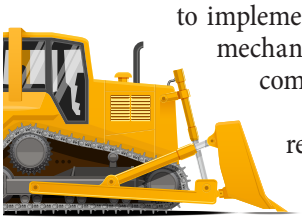
Examples of Fraudulent "Sham" MWBEs and Related Issues

As found in *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667 (7th Cir. 1987), "[s]ubstantial concern has been expressed about the infiltration of DOT-assisted programs by "fronts"—

businesses that claim to be owned and controlled by minorities, women, or other disadvantaged individuals, but which, in fact are ineligible for participation is [sic] DOT-assisted programs as MBEs, WBEs or disadvantaged businesses." In *Baja*, the DOT took the opportunity to reemphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. Moreover, it expressed that DOT strongly believes that states should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR Part 23 participate as MBEs, WBEs, or disadvantaged businesses in DOT-assisted programs. This guidance means not only that states should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible.

And, where it was adequately alleged throughout the First Amended Complaint in a claim under the False Claims Act that Defendants received sham minority business enterprise certifications which allowed them to participate in contracts that were set aside for small, disadvantaged businesses, the false claims as alleged are thus that but for this certification, Defendants would not have been entitled to the set-aside projects upon which they were paid). *United States ex rel. Lazo v. Vratsinas Constr. Co.*, No. SACV1800270JVSDFMX, 2019 WL 13078497 (C.D. Cal. Dec. 9, 2019).

Finally, on April 25, 2006, the Mine Safety and Health Administration (MSHA) invited the submission of bids to clean and repaint the Severn River Bridge. As a recipient of DOT funding, MSHA was "require[d]... establish annual statewide [Disadvantaged Business Enterprise ("DBE")] participation goals[.]" MSHA thus was obligated to "award the contract [for a project] only to a bidder or offeror who meets or makes good faith efforts to meet the [DBE] contract goal." (citing 49 C.F.R. § 26.53). MSHA was then "required to implement appropriate mechanisms to ensure compliance with regulatory requirements by all program participants, including DBEs and prime contractors." *Id.* (citing 49 C.F.R. § 26.37).



Joint Ventures in the M/WBE Context

Section 8(a) and Joint Ventures

To become eligible to receive 8(a) set-aside contracts, a firm must participate in the SBA's business development program or otherwise obtain SBA approval. 13 C.F.R. § 124.501(g). Once deemed eligible, an 8(a) firm can seek contracts either through the SBA or directly from the procuring agency. *Id.* § 124.501(d)–(e). Some awarded contracts are executed between the procuring agency and the 8(a) firm, while others include the SBA as a third party. *Id.* § 124.508(a). Contracts can be awarded under the 8(a) program either competitively among multiple eligible small businesses or non-competitively on a "sole source" basis. *Id.* § 124.501(b).

Where an 8(a) firm lacks capacity to perform a particular 8(a) set-aside contract on its own, it may enter into a joint venture agreement with a non–8(a) small business for the purpose of performing the contract. *Id.* § 124.513(a). This can be advantageous to both the MWBE and the majority-owned venturer because it can open up project opportunities that would not otherwise exist for either business. Joint ventures have often been used to pool talent and pursue projects of greater magnitude and of specialized natures, allowing all venturers to gain valuable experience and access to unique opportunities.

In the Section 8(a) context, the agreement must be approved by the SBA before any contracts are awarded to the joint venture, *id.* § 124.513(e), and the SBA's regulations warn that approval will be withheld where "an 8(a) concern brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status," *id.* § 124.513(a)(2). Federal regulations permit joint ventures between qualified 8(a) participants and non–8(a) participants for the purpose of obtaining work set aside for 8(a) participants, so long as a number of conditions are met. Such agreements are permitted only where the MWBE participant lacks the capacity to perform the contract on its own. 13 C.F.R. § 124.513(a)(2). Joint venture agreements must be approved by the SBA, which must conclude that the agreement is "fair and equitable and will be of substantial benefit to the 8(a) concern." 13 C.F.R. § 124.513. In addition, each joint venture agreement must contain a number of provisions:

1. The purpose of the joint venture;
2. Designation of the MWBE as the managing venture and a named employee of the MWBE as the manager with ultimate responsibility for performance of the contract;
3. A statement that, for joint ventures organized as a separate legal entity, the MWBE participant must own at least 51% of the JV entity;
4. Provision for the MWBE to receive profits either commensurate with the work it performs or exceeding the percentage commensurate with the work it performs;
5. Provision for the establishment and administration of a special bank account in the name of the joint venture;
6. Itemization of all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical;
7. Specification of the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the MWBE to the joint venture will meet the performance of work requirements, where practical;
8. Obligation to all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;
9. Designation that accounting and other administrative records relating to the joint venture be kept in the office of the managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;
10. Requirement that the final original records be retained by the managing venturer upon completion of the 8(a)-contract performed by the joint venture;
11. Statement that quarterly financial statements showing cumulative contract receipts and expenditures (including

salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

12. Statement that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

See 13 C.F.R. § 124.513(c).

The regulations also specify that the 8(a) firm participating in an 8(a) joint venture must perform 40% of the labor on each contract awarded to the joint venture. Bus. Dev./Small Disadvantaged Bus. Status Determinations, 76 Fed. Reg. 8222, 8242–44 (Feb. 11, 2011) (codified at 13 C.F.R. § 124.513(d)). Previously, SBA regulations had required that the 8(a) firm complete "a significant portion" of the work on the contract but did not specify a percentage. Id.; 13 C.F.R. § 124.513(d) (1999). *United States v. Harris*, 821 F.3d 589 (5th Cir. 2016); *see also*, *United States v. R.J. Zavoral & Sons, Inc.*, No. CIV. 12-668 MJD/JJK, 2014 WL 5361991 (D. Minn. Oct. 21, 2014). Both upon the completion of each contract and as part of its annual review, an 8(a)-firm participating in a joint venture must explain to the SBA how the labor-division requirement was satisfied for each contract awarded to the joint venture. *Id*. § 124.513(i). *United States v. Harris*, 821 F.3d 589 (5th Cir. 2016).

Key Considerations in Negotiating and Forming a Joint Venture

Joint ventures and their accompanying written agreements in the construction industry are unique legal creatures that straddle the line between construction contracts and corporate formations. The unique role served by joint venture agreements brings with it an expansive set of considerations parties should consider before entering into a joint venture and for which attorneys should account when assisting their clients. When these joint ventures occur in the MWBE space for purposes of pursing Section 8(a) work, additional liabilities and requirements also come into play, as discussed above.

Every joint venture agreement should be reduced to writing, a requirement in the Section 8(a) context. Several other considerations—many of which SBA requires for MWBE joint ventures for Section 8(a) projects—should be addressed in every joint venture agreement:

1. The date on which the JV is established;
2. The identities of the joint venturing businesses;
3. The name under which the joint venture will do business and whether a new corporate entity will be formed for purposes of carrying out the joint venture;
4. A full description of the JV purpose and the project(s) being pursued;
5. Establishment of a fund in a separate, dully controlled bank account by the venturers to finance the work and in which all payments related to the project will be deposited;
6. Provision for how additional capital contributions will be required, proportions to be contributed by each party, and impacts of failure by a party to contribute;
7. Declaration of the percentages of profits and losses to be borne by each party, which may or may not match the contribution percentages;
8. Description of any additional management or other fees to be paid to any of the parties, particularly the controlling venturer;
9. Which party is providing what equipment required for performance of the project;
10. Provisions addressing any specially acquired equipment and materials for purposes of the project, including division of payment responsibilities and disposal/distribution at the end of the project;
11. Which party is performing what work—and subcontracting what trades—for completion of the project;
12. Identification of the controlling/managing venturer, the scope of the managerial authority, and the procedures to be followed for decisions outside of the managerial authority;
13. Provisions addressing impacts of incapacity, death, bankruptcy, or insolvency of a venturer business or principal;
14. Who will acquire required licenses for the project in the name of the joint venture or for each venturer and allocation of the costs of those licenses;
15. Provisions addressing insurance that will be acquired for the joint venture, including types of coverage, in whose name the coverage will be held, whether any venturers need to be added as additional insureds on existing policies;
16. Addressing of what items will be considered costs and income of the joint venture for purposes of determining profits and losses, including what expenses are reimbursable and how to divide profits and losses;
17. When and how the joint venture will be terminated and procedures for windup of the joint venture entity, including how guarantees, warranties, insurance, and construction defects will be addressed following the project; and
18. Dispute resolution and choice of law/venue provisions.

Conclusion

Diversity programs that are designed to increase equal employment opportunities in the construction industry have been in existence for decades. Many construction businesses have used the 8(a) program and MWBE/DBE certifications to become successful and employ disadvantaged individuals. However, like any programs, there are individuals and businesses that have used these programs to create sham entities or sham joint ventures with non-minority companies. Consequently, government regulators are scrutinizing MWBE/DBE certifications to root out fraud, especially in the construction industry. To avoid issues, companies seeking MWBE/DBE certifications or joint ventures to obtain such certifications must seek experienced and competent legal counsel to guide them through the certification process, the recertification process, and the expansive process of creating joint ventures between majority and certified minority businesses.

Tips and Strategies for Drafting and Objecting to the Jury Charge in Construction Cases

By Marie Jamison

The jury charge is a crucial tool that should be drafted, revised, and used throughout a case.

The goal of this article is to provide some practical tips and strategies for drafting (and revising) the jury charge and objecting to the charge in construction litigation. The jury charge should not be viewed as one of the many pretrial filings to think about two weeks before trial. It is a crucial tool that should be drafted, revised, and used throughout a case. This is particularly true in construction cases where jurors must grasp not only difficult legal concepts but also complicated factual scenarios. The jury charge is important for several reasons.

First, the charge is important to understand and shape the scope of the parties' claims and defenses. The jury charge should be drafted and used as a roadmap in construction litigation. In the early stages of litigation, the charge can be helpful in identifying the affirmative claims and defenses, developing evidence to prove or disprove claims and defenses, and shaping the story counsel intends to tell the jury at trial. The charge is instrumental in crafting discovery requests and oral deposition questions, responding to discovery, analyzing fact and legal issues, and preparing summary judgment motions.

Second, the charge is important for trial preparation. The charge can be effective in identifying relevant evidence that is admissible at trial and evidence you need to be successful at trial. Use the jury charge to prepare fact and expert witnesses for trial and to draft pretrial motions, including motions to exclude evidence and experts.

Third, the charge is important for the trial and should be used throughout trial. The charge is a useful checklist at trial, to make sure you develop evidence of each affirmative defense and evidence you need to support submission of requested questions, instructions, and definitions. Use the charge in closing argument to inform the jury how the evidence squares with the questions they must answer in the charge.

Lastly, the charge is particularly important for a successful appeal. Preservation is crucial to presenting charge error to the court of appeals.

The Basics of Drafting the Jury Charge

Outline the claims and defenses.

Claims encountered in construction litigation have contract and tort implications. It is enormously helpful to take the time at the beginning of a case to outline the elements of the claims and defenses. This outline assists in preparing the initial draft of the jury charge and also provides a handy reference when analyzing essential elements to a claim, measures of damages, causation standards, and other aspects of each question. The best time to prepare this type of outline is at the outset of the case.

The first draft of the jury charge begins with a review of the live pleadings—petitions, answers, crossclaims, and counterclaims. Using the live pleadings, identify the claims and defenses and then outline the elements to each claim and defense. There may be other relevant allegations in the live pleadings to include in your outline. An allegation of a specific pre-bid obligation or unilateral mistake may require an additional instruction. These and other similar allegations should be added to your outline because they may affect how you

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craft the definitions and instructions in your draft charge.

Draft the initial jury charge using your outline, relevant caselaw, and Model Instructions.

The Construction Litigation Committee of the American Bar Association has published Model Jury Instructions ("Model Instructions"), which is a set of comprehensive instructions devoted to issues and claims found in construction disputes. The Model Instructions include common construction related claims and defenses and is an excellent starting point in preparing the first draft of the jury charge. Additionally, many state bar associations have published pattern or model jury instructions that provide guidance for basic contract and tort claims.

You will need to rely on caselaw and find cases that fit the facts of your case, and certain questions, instructions, or definitions must be crafted from the caselaw or relevant statutory language as applied to your circumstances. Good summaries of relevant law may be found in the various Restatements. Don't forget that many of the comments in the Model Instruction and state pattern jury charges discuss alternative language and modifications that should be made in a variety of circumstances. If those circumstances exist in your case, or are analogous to your case, consider changes that should be made to the pattern language in proposing questions, instructions, and definitions in your draft charge.

Using the relevant caselaw, Model Instructions, and state pattern jury charges, revise your instructions to provide clear and balanced instructions for presentation to the jury in your construction case.

Liability questions and instructions.

When preparing the original draft of the charge, craft a question for each theory of liability. This may include questions for

breach of contract (along with the doctrines of promissory estoppel, quantum meruit, and money had and received), implied and express duties and obligations of the parties to a construction contract, claims for extra work, claims against a design professional, and alternative tort liability (negligence, negligent misrepresentation, and fraud).

When drafting the liability questions, think about broad-form submission versus granulated questions. When the parties have pleaded multiple contract or negligence theories of liability, broad form should be avoided. This is because some of the theories may lack factual or legal support. A general, broad-form question (such as whether a party was negligent or breached a contract) may preclude meaningful appellate review because valid and invalid theories are commingled, and the reviewing court has no opportunity to determine which theories the jury actually considered in answering the general liability question. In turn, the reviewing court will not have an appellate record to reverse on the invalid theories of liability.

In determining whether broad-form submission is feasible and appropriate, examine the pleadings for distinct theories of liability. A single theory of liability may warrant general, broad-form submission. Multiple theories of liability may necessitate granulated questions.

Causation standard.
When drafting the causation standard, review the pleadings for allegations that may require a modified definition. An allegation of new and independent cause requires a different definition of proximate cause in a negligence case. Statutory claims may prescribe a causation standard that is different from the contract causation standard (natural, probable, and foreseeable consequence) and negligence causation standard (proximate cause).

In addition, the causation linkage language is not always stated in the Model Instructions or state pattern jury charge. Some use the phrases "resulted from" or "because of." Be aware that these phrases may not limit the jury to the proper causation standard. Consider proposing a question or instruction with the proper legal causation term and an instruction defining that term. If the trial court refuses your proposed language, you may need to object and submit to the court your requested question or instruction in writing.

Affirmative defenses.
If you want to submit an affirmative defense to the jury, plead it in your answer or other pleadings. With few exceptions, a party usually is not entitled to submission of any question raised only by a general denial and not raised by an affirmative written pleading by that party. If an affirmative defense is tried by consent, you may be allowed to include it in the charge. The safer practice is to plead every affirmative defense you intend to request to be included in the charge.

Additional instructions and definitions.
Think about additional allegations that may warrant an instruction. For instance, include in the outline an instruction regarding conditions precedent or spoliation of evidence if it is pleaded. Include in your draft charge a proper instruction if a statutory provision has been pleaded by a party.

Damages questions and instructions.
Remember causation linkage in damages questions, as discussed above. The court's charge should include damages questions that are properly tied to the predicate liability questions. Consider necessary instructions (e.g., mitigation of damages), appropriate categories of damages, and the proper measure of damages.

Predication and conditioning.
Be sure to check any predication in the charge. Is the predicate language necessary and in the correct place in the charge? Also pay close attention to which questions you are linking together by conditioning language. Evaluate spots where conditioning may be needed to avoid possibly conflicting answers. Also analyze whether some questions should not be conditioned to eliminate the need for a new trial if one or more of the jury's answers is found to be without legal or evidentiary support. Sometimes a flow chart or decision tree can make this much clearer.

Think critically about which questions should be the basis for your conditioning in any punitive damages predicate and damages questions. Don't forget additional certificates, and remember to read the Model Instructions and state pattern jury charges comments.

Update and revise the jury charge throughout the lawsuit.
As the case progresses, update the draft of the jury charge. Throughout the case, use the charge to track the changing legal and factual issues. Update and use the charge to make sure your pleadings are in correct order—that you have pleaded each counterclaim you want to submit to the jury, each defense, each category of damages, and any other submission. Most state procedural rules permit submission of questions, instructions, and definitions only if raised by the written pleadings and evidence.

Prior to the charge conference, outline your objections and draft separate requests for each question, instruction, and definition you want the court to submit.

Again, the charge is an invaluable tool to assist with crafting written discovery requests and oral deposition questions, analyzing how issues requiring expert testimony fit into the bigger picture, and preparing summary judgment motions. Use the charge throughout the litigation to identify causes of action, defenses, or other legal issues that should be disposed of by the court before trial. Revising and updating the charge can be used to secure evidence to win summary judgment or overcome summary judgment. As claims are added and dismissed, revise the draft of the jury charge. By the time you file your proposed charge with the court, it should

correspond with the live pleadings and the evidence in the case.

The Basics of Objecting to the Court's Charge

Check your state's procedural rules regarding the types of charger error. For instance, in Texas, errors in the charge consist of (1) defective questions, instructions, and definitions actually submitted and (2) questions, instructions, and definitions that are omitted entirely. Objections are required to preserve error as to any defect in the charge.

The trial court should, and required by statute in many states to, give the final charge to each party for inspection and a reasonable time given to them to examine and present objections to the charge outside the presence of the jury. See FED. R. CIV. P. 51(b)(2); TEX. R. CIV. P. 272.

Objections to defective questions, instructions, and definitions.

Review your state's procedural rules to confirm whether objections must be in writing or may be dictated on the record. In some states and in federal court, each objection must be in writing or dictated to the court reporter in the presence of the court and opposing counsel. See FED. R. CIV. P. 51(c); TEX. R. CIV. P. 272. Also review your state's procedural rules for timing requirements and when objections must be made. In federal court and Texas, the objections must be asserted before the charge is read to the jury. FED. R. CIV. P. 51(c); TEX. R. CIV. P. 272. Thus, an objection must be made on the record, in the presence of the judge and opposing counsel, and before the charge is read to the jury. All objections not so presented may be waived. Make sure to get a ruling on each objection from the court.

Separately object to each question, instruction, and definition. Avoid adopting by reference objections to other portions of the charge. Likewise, avoid relying on or adopting another party's objections to the charge, particularly without obtaining court approval beforehand. Each party must make its own objections.

Additionally, an objection to a defective question, instruction, or definition must be specific. Stock objections will not suffice. Voluminous objections will not suffice. The party objecting to a charge must point out distinctly the objectionable matter and the grounds for the objection. The trial court must be made aware of the specific objection and alleged error. Common objections include:

- No pleading on file supporting submission.
- No evidence supporting submission.
- Variance between pleading and evidence.
- No or improper predication or conditioning.
- Duplicative questions.
- Burden of proof placed on improper party.
- Comment on the weight of the evidence.
- Advises jurors the effect of their answer.
- Disjunctive submission.
- Immaterial question.
- Question permits double recovery.

Additionally, lodge objections to a broad-form submission if there is a commingling of valid and invalid theories of liability.

Objections to questions, instructions, and definitions that are omitted entirely.

Many state procedural rules allow a party to present and request written questions, definitions, and instructions to be given to the jury. In some states, a request for a question, instruction, or definition must be in writing, while other states allow an attorney's oral request on the record. It is important to check your state's requirements on omitted questions or instructions.

Moreover, a request should be made separate and apart from a party's objections to the court's charge to make sure error is preserved. Accordingly, if a question, instruction, or definition is defective, make a specific objection as to the defect and submit a substantially correct written question, instruction, or definition. Tender to the court a separate request for each requested question, instruction, and definition. Each request that is denied should be marked so, signed by the court, and filed with the clerk.

As mentioned, many state bars have pattern jury charges that may contain guidance on perfecting charge error. In a Texas case, use the Texas Pattern Jury Charges comments as a guide to perfecting charge error. Texas Pattern Jury Charge 32.1 outlines when an objection, request, or both are required to preserve error and the party who has the burden to make such objection and request.

Additional considerations when making objections.

An objection may not equate to a request for an instruction in your jurisdiction. When in doubt as to whether both an objection and a request is required to preserve error, cautious counsel should choose to do both.

A common mistake to avoid is relying on the proposed charge you filed at pretrial for appellate preservation. Prior to the charge conference, outline your objections and draft separate requests for each question, instruction, and definition you want the court to submit.

Objections usually must be made to the *final* charge. Additionally, if the court gives you no or very little time to review the final charge and lodge objections to the final charge, ask for more time. The rules allow a party to object if the charge is not presented to counsel for inspection or if counsel is not given reasonable time to inspect and lodge objections. See FED. R. CIV. P. 51(b); TEX. R. CIV. P. 272.

Conclusion

Jury instructions have a significant role in construction litigation. Judges and lawyers must provide jurors with the legal guidance to find their way through the thicket of implied obligations, prime contracts, subcontracts, specifications, owners, architects, and design professionals. Jurors need to be able to understand the law that they must apply to the specific facts. Importantly, judges do not bear the full responsibility for crafting the jury charge; preservation of charge error is the lawyer's responsibility. The purpose of this article is to provide a framework around which you can develop your own instructions to fit your case. These tips and strategies are by no means all-inclusive and are meant to provide some ideas as a starting point in drafting and objecting to the jury charge.

Science on Trial - Again:

The False Prophets of Shoulder Dystocia and Neonatal Brachial Plexus Palsy Litigation

By Thomas P. Sartwelle and James C. Johnston

Can these "expert" allegations be debunked, and can these lawsuits be successfully defended?

"The trouble with the world is not that people know too little, it's that they know so many things that just aren't true." –Mark Twain

Coffee causes pancreatic cancer. Bendectin and birth defects. Breast implants and unidentified autoimmune disease that only gnostic like courtroom experts can diagnose. Thimerosal and vaccines cause Autism. Andrew Wakefield.

There are more. All are examples of courtroom "experts" who claimed medical harm cause and effect but who were not only wrong but dead wrong. Some even invented data to support their allegations against other health care providers. And trial lawyers profited from the falsehoods. *See, e.g.*, Seth Mnookin, *The Panic Virus: A True Story of Medicine, Science, and Fear.* Simon & Schuster, New York, New York (2011); Robert Goldberg, *Tabloid Medicine: How the Internet is Being Used to Hijack Medical Science for Fear and Profit*. Kaplan Publishing, New York, New York (2010); Paul Offit M.D., *Autism's False Prophets: Bad Science, Risky Medicine, and the Search for a Cure*. Columbia University Press, New York, New York (2008); Marcia Angell M.D., *Science On Trial: The Clash of Medical Evidence And The Law In The Breast Implant Case.* W.W. Norton & Company, New York, New York (1996).

Unsurprisingly, certain trial lawyer experts continue these wily ways today, testifying that neonatal shoulder dystocia leading to permanent neonatal brachial plexus

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palsy---Erb's Palsy, Klumpke's Palsy---is predictable, preventable, and when they occur is proof positive of birth attendant---physician, nurse, midwife---malpractice negligence. And these "experts" are wrong. Dead wrong. *E.g.*, G.J. Johnson, et al. *Pathophysiologic Origins of Brachial Plexus Injury.* 136(4) Obstet Gynecol 725-730 (2020) (hereinafter *Origins of Brachial Plexus Injury*); Am. College Obstet Gynecol Task Force. Neonatal Brachial Plexus Palsy (www.acog.org or sales.acog.org) (2014) (hereinafter *NBPP Task Force 2014*); H. M. Lerner, *Shoulder Dystocia: Facts, Evidence and Conclusions.* ***https://www.shoulderdystociainfo.com/shoulder_dystocia.htm*** (last visited December 29, 2022) (hereinafter *Lerner SD Facts and Evidence*).

But these lawsuits are hugely successful. Can these "expert" allegations be debunked, and can these lawsuits be successfully defended? After all, the emotional appeal of neonatal brachial plexus palsy injuries is unrelenting---undeserved permanent injuries to an innocent child by well insured defendants! Are judges and juries able to reject emotion and absorb the concrete science and medicine from decades of research proving that birth attendants can neither predict nor prevent neonatal shoulder dystocia or the resulting permanent palsies?

The answer is yes. But the road to success is complex and lengthy.

Shoulder Dystocia?

Shoulder dystocia (SD) is a true medical emergency. A normal delivery with no warning whatsoever suddenly turns into an obstetrical nightmare. The baby's head is delivered but suddenly retracts against the mother's perineum and reenters the birth canal. Referred to as the turtle sign, this head retraction means shoulder dystocia has occurred---a mechanical problem where the baby's anterior [upper] shoulder is blocked from delivery by the mother's pubic symphysis or less frequently the posterior [lower] shoulder is blocked from delivery by the maternal sacral promontory. *Id*; S. Politi, et al. *Shoulder Dystocia: An Evidence-Based Approach* 4(3) J Perinatal Med. 35-42 (2010) (hereinafter *Evidence Based Approach*).

Either way, the baby is stuck in the birth canal, and cannot be delivered. But most importantly cannot breathe on its own or receive blood by the umbilical cord. If the shoulder cannot be freed within about five minutes the baby will experience irreversible brain damage or death. *Id*.; T.Y. Leung et al., *Head-To-Body Interval and Risk of Fetal Acidosis and Hypoxic Ischaemic Encephalopathy in Shoulder Dystocia: A Retrospective Review.* 118(4) BJOG 474-479 (2011).

SD may lead to Erb's or Klumpke's Palsies, the two major neonatal brachial plexus injuries variably affecting the nerves originating from the spinal cord and traversing the neck and shoulder to provide motor and sensory function to the upper extremity, resulting in weakness or paralysis of the shoulder, arm, and/or hand. Neonatal brachial plexopathy represents one of the most common birth injuries with an incidence of 1 to 2 cases for every 1,000 births. *Origins of Brachial Plexus Injury,* supra; *Lerner SD Facts and Evidence*, supra.

For many decades medicine exclusively blamed BP injuries on excessive traction on a baby's head by birth attendants during delivery, especially excessive traction used to overcome SD. And SD was said to be predictable and preventable by birth attendants. E.g., *Id*.; R.J. Jennett, et al. *Brachial Plexus Palsy: An Old Problem Revisited*. 166 Am J Obstet Gynecol 1673-1677 (1992).

Shoulder dystocia has long been a part of birth, probably as long as babies have been delivered. Over time birth attendants developed multiple maneuvers to free the impacted shoulder, maneuvers still used today. None of these maneuvers reliably work or work without injury. G.G. Buttigieg, et al, *Shoulder Dystocia: Updating Some Medico-Legal Issues*, 90(1) Medico-Legal J. 13-16 (2022) (hereinafter *Updating Medical Legal Issues*).

Thus, even today, in the developed world, unrelieved shoulder dystocia can result in a wide spectrum of birth injuries including brain injury, spinal cord injury, or death to both mother and child. The injuries most often associated with SD are now referred to as neonatal brachial plexus palsies (NBPP) and are due to stretching or tearing of the C5-T1 nerve roots. Most are temporary resolving in three months to a year. Some NBPP injuries are more extensive and permanent, causing lifelong seriously disabling injuries to a child's shoulder, arm, and/or hand. These are the injuries most often the target of trial lawyers and their "experts." *Id*; S.P. Chauhan et al. *Neonatal Brachial Plexus Palsy: Obstetrical Factors Associated with Litigation*. 30(20) J Matern Fetal Neonatal Med 2428-2432 (2016); *Lerner SD Facts and Evidence,* supra.

For more than a century, injury, or death but especially any palsies following SD were blamed exclusively on physicians, nurses, and midwives. By 1927 the sole cause of any palsy was said to be "unphysiological forces imposed upon the foetus" by the birth attendant pulling on the head thereby stretching or severing the brachial plexus nerves. B. Crothers, et al. *Obstetrical Injuries of the Spinal Cord*. 6(1) Medicine. 41-126, at 41 (1927) (hereinafter *Spinal Cord Injuries*).

Often referred to as "traction" on the baby's head, this is still the most popular legal liability theory in the second most common and costly birth-related lawsuit after neurologic injury due to so called birth asphyxia: permanent brachial plexus injury is caused by negligent physicians, nurses, and midwives applying excessive downward traction on the fetal head to effect delivery, especially when SD is involved. *Updating Medical Legal Issues,* supra; *Lerner SD Facts and Evidence,* supra; *Evidence Based Approach,* supra.

But today clever trial lawyers have added two other common claims to NBPP lawsuits: The physician should have known that SD was going to occur because certain predictive risk factors were present during pregnancy/labor and the physician could have avoided the permanent injury by a simple, benign, elective cesarean section (C-section). Akin to the risk factor allegation is the informed consent argument: if the mother (parents) had only been informed that there was ***ANY*** risk of injury to the baby she (they) would have insisted on a C-section and thus the physician was negligent in not disclosing the SD risk and offering the patient a C-section instead of a vaginal delivery. *Updating Medical Legal Issues,* supra; *Lerner SD Facts and Evidence,* supra; H.M. Lerner. *Shoulder Dystocia: What Is The Legal Standard of Care?* OBG Management ***https://cdn.mdedge.com/***

files/s3fs=public/documents/september-2017/1808OBGM_Article1.pdf (last visited December 30, 2022) (hereinafter *Lerner Standard of Care*).

Are these theories successful? Yes, very successful. Trial lawyers and their courtroom "experts" in developed countries have pocketed huge fees from NBPP cases as well as other birth related lawsuits with obstetrical injury verdicts and settlements causing a worldwide birth injury litigation crisis. *Id*.; C.W.H. Yau, et al. *Clinical Negligence Costs: Taking Action to Safeguard NHS Sustainability.* BMJ 368:m552doi:10.1136/bmj.m552 (2020); B. Hanganu, et al. *Should We Be Afraid of Medical Malpractice Complaints? The Doctors' Perspective.* 28 Rom J Legal Med 189-194 (2020); A. Anderson. *Ten Years of Maternity Claims: An Analysis of the NHS Litigation Authority Data-Key Findings.* 19(1) Clinical Risk 24-31 (2013); S.M. Donn, et al. *Medico-Legal Implications of Hypoxic-Ischemic Birth Injury.* 19(5) Semn Fetal Neonatal Med 317-321 (2014); G.N. McAbee et al, *Medical and Legal Issues Related to Brachial Plexus Injuries in Neonates.* 106(4) JAOA 209-212 (2006). Trial lawyer success can be measured by worldwide internet lawyer advertising by "birth injury lawyers" touting their verdicts and settlements. Google "birth injury" for any developed country. The results are virtually all birth injury lawyer web sites.

Are these SD-NBPP lawsuits based on viable, modern medical theories and evidence or like others noted above, are they based on expert witness testimony that when finally scrutinized is found to be junk science? The answer is junk science. But if that is the answer, then the real questions are why are SD-NBPP lawsuits successful and why are hospitals, physicians, nurses, and midwives unable to defend these cases?

Lewis Carroll's Wonderland?

Physicians have speculated about the causes of SD and NBPP since at least a century and a half ago. *Lerner SD Facts and Evidence*, supra. The 1927 article previously mentioned was highly influential laying the blame on birth care givers and their deliberate imposition of unphysiological traction during delivery. At the same time these authors conceded that the medical literature was so sparce "that there is no established level of common knowledge from which to start." *Spinal Cord Injuries*, at 42, supra. Nevertheless, for the next half century care giver excessive deliberate traction primarily to overcome SD was said to be the sole cause of NBPP even though little in the way of empirical medical research supported any causation theory but in particular excessive traction. *Origins of Brachial Plexus Injury*, supra; *Updating Medical Legal Issues*, supra; *Lerner SD Facts and Evidence*, supra.

But shoulder dystocia was and is a biomechanical story related to size discrepancy. How does a full term 7-, 8-, 9-, 10-pound baby fit through a 10-centimeter cervix? Thus, trial lawyer experts began to emphasize size testifying that all shoulder dystocia could be anticipated, and the risk avoided by simple C-sections. These experts said the risk factors before labor included suspected big baby, gestational diabetes, large maternal weight gain, small pelvis, small maternal statute, no ultrasound for baby's weight in the days before labor. During labor the alleged risks included arrest of first stage of labor, prolonged second stage, use of Pitocin, vacuum, or forceps. L. Iffy. *Prevention of Brachial Plexus Injuries at Birth*. 1(1) J Gynecol Res Obstet 001-005 (2016) (hereinafter *Iffy Brachial Plexus Injuries at Birth*); L. Iffy. *Mechanism of Neonatal Brachial Plexus Injuries.* 3 J Women's Health Care 152-159 (2014); A.A. Hassan. *Shoulder Dystocia: Risk Factors and Prevention*. 28 Aust NZ Obstet Gynacol 107-109 (1988).

Until research in SD and NBPP began in earnest in the late 1980s, these theories impressed many courts and juries and in fact are still in vogue today despite decades of research proving these and all other theories of SD prediction and prevention bogus. *Origins of Brachial Plexus Injury,* supra; *NBPP Task Force 2014,* supra; *Lerner SD Facts and Evidence,* supra.

But if the theories are bogus why are trial lawyers profiting from these cases still today and why do courts allow such testimony?

Wizard of Oz Scarecrow Syndrome

The answer is multifactorial.

First, The emotional appeal of a lifelong injury to an innocent baby. Trial lawyers know the relationship between negligence, causation, and damages is not based on common sense or evidence of actual negligence. Bad injuries generating large recoveries in the absence of negligence has empirical support from several sources including the Harvard Medical Practice Study observing that disability results in payments and severe disability results in large payments regardless of negligence. T.A. Brennan, et al. *Relation Between Negligent Adverse Events and Outcomes of Medical Malpractice Litigation.* 335 N Engl J Med 1963-1967 (1996). Importantly, few hospitals, physicians, or care providers of any kind want to have a trial with a potential headline making verdict and subsequent adverse publicity the center piece of which is an impaired child. Thus, the incentive for confidential settlements is at a premium.

Second, the myth of excessive traction as the sole cause of NBPP is kept alive among the general public---the jury pool and judges---by trial lawyer advertising, articles, and blogs, especially on the internet. And internet "facts" are eternal. These examples and dozens of similar ones can be easily found on lawyer internet web sites today and, of course, none are supported by citation to any authority: "permanent brachial plexus injuries are almost always associated with shoulder dystocia;" "a spinal cord injury sustained during birth is often the result of medical negligence;" "nearly all obstetrical cases are preventable with proper technique;" "medical malpractice is alarmingly common in the United States;" "brachial plexus injuries are a leading cause of medical malpractice lawsuits;" "according to the medical literature, most obstetric brachial plexus birth injures are related to excessive traction applied by the OB/GYN or midwife during the birth."

Importantly, SD-NBPP trial lawyers have an expert cadre willing to ignore research and continue to blame their colleagues. *Updating Medical Legal Issues, supra; Lerner SD Facts and Evidence, supra; Lerner Standard of Care,* supra; A.S. Kesselheim, et al. *Characteristics of Physicians Who Frequently Act as Expert Witnesses in Neurologic Birth Injury Litigation.* 108(2) Obstet Gynecol 273-279 (2006). As we will see, there is some protection from these false prophets if defense lawyers find the appropriate research and informed

defense experts. And increasingly there is the opportunity for the defense to benefit from a Daubert challenge to the trial lawyer experts. Daubert challenges are complex because the medicine is dense, but as will be noted, some courts have been willing to sort through the complexities and apply the junk science label to the "experts'" traction and other unproven liability theories.

Part of the problem applying Daubert, however, is even some well-known commentators continue the traction myth. For example, Volpe's 2008 edition of *Neurology of the Newborn* says NBPP is thought to result from extreme lateral traction. Joseph J. Volpe, *Neurology of The Newborn*. 972 (5th ed 2008). *Avery's Neonatology* 2016 says NBPP is a common birth injury caused by lateral flexion applied to deliver the shoulder in large babies. *Avery's Neonatology* 1045 (Mhairi G. McDonald & Mary M.K. Seshia eds. 2016).

Part of the difficulty of defending SD-NBPP cases is some defense lawyers' lack of awareness of the research literature and experts available to defend liability.

Finally, part of the difficulty of defending SD-NBPP cases is some defense lawyers' lack of awareness of the research literature and experts available to defend liability. Partly this is a lack of wherewithal of insurers, hospitals, and medical schools to defend liability because the defense of these lawsuits is expert intense and expensive, and a settlement allows closure for all concerned as well as confidentially and as noted, avoidance of negative publicity.

All of these factors play a part in making these cases difficult but not impossible to defend. In times past there was very little research with which to rely on. That is not the case today.

Association is Not Causation

In 1981, a New Zealand orthopedist published a paper intent on establishing the incidence and prognosis of birth-related brachial plexus injuries. A.E. Hardy. *Birth Injuries of the Brachial Plexus: Incidence and Prognosis.* 63-B (1) J Bone and Joint Surgery British Volume 98-101 (1981). Without comment, he noted that of the 23 NBPP children studied, only 10 births involved shoulder dystocia.

It is unclear if this statistic is what set off what became a blizzard of SD-NBPP research but by the early 1990s until today, articles, books, guidelines, and bulletins proliferated worldwide on every aspect of SD-NBPP in particular prediction and prevention. As it turned out, actual medical research and analysis and more importantly biomechanical studies and models---physical, cadaveric, animal, and computer---demonstrated the "courtroom experts" were not just wrong but spectacularly so.

In the real world virtually no case of SD could be predicted or prevented by any courtroom expert's methodology, even their favorite remedy---cesarean section (C-section). Numerous studies reported transient and permanent NBPP including nerve root avulsion occurring at vaginal and C-section deliveries. *Origins of Brachial Plexus Injury*, supra; *Lerner Standard of Care*, supra; *Updating Medical Legal Issues*, supra; *Lerner SD Facts and Evidence*, supra. Moreover, after reviewing the world's literature, no published clinical or experimental data could be found to support the expert's favorite hypothesis---permanent NBPP (as compared to transient) proved that a birth attendant used excessive force at delivery. *NBPP Task Force 2014*, supra at 28.

The literature is too dense to be summarized here. Suffice it to say, that virtually every courtroom liability theory has been debunked. Numerous research articles, professional society bulletins and guidelines, and task force reports previously cited have extensive biographies of the studies addressing each aspect of the typical claims made by the "courtroom experts." The well-known textbook Williams Obstetrics put it best: "identification of individual instances [of SD] before the fact has proved to be impossible." *Williams Obstetrics* (F. Gary Cunningham et al eds. (23rd ed. 2018) at 520 (hereinafter *Williams Obstetrics*).

The most important of these resources is ACOG's *Neonatal Brachial Plexus Palsy* Task Force 2014 report. *NBPP* Task Force 2014, supra. Written in 2013 in collaboration with Ob-Gyn Society of Canada, it is updated regularly through society Practice Bulletins and Committee Opinions. Endorsed by ten worldwide professional societies, it is the most comprehensive medical/biomechanical study of SD-NBPP available.

Of particular importance is the biomechanical chapter (chapter 3). After all, as noted, SD and resulting NBPP is essentially a biomechanical issue of how a fetus' descent and emergence from the uterus and pelvis is a result of both natural endogenous (internal) and care giver exogenous (external) forces as is an injury to a nerve. Biomechanics is the essential means for lawyers, judges, and juries to understand that endogenous forces play the significant if not the dominate role in NBPP causation along with the fact that some neonates are susceptible to nerve injury. *NBPP Task Force 2014*, supra; H.M. Lerner, *A summary of the New ACOG Report on Neonatal Brachial Plexus Palsy Part 1: Can It Be Predicted?* 26(9) OBG Management 46-56 (2014); H.M. Lerner, *A Summary of the New ACOG Report on Neonatal Brachial Plexus Palsy Part 2: Pathophysiology and Causation*. 26(10) OBG Management 46-56 (2014). Thus, it stands to reason a knowledgeable SD medical/biomechanical expert may be the most important defense expert.

The lifesaving maneuvers used to free a shoulder and prevent fetal and maternal death which is inevitable if SD is not relieved do involve some abnormal exogenous forces even when properly performed. Most fetuses tolerate these forces without injury. The difficulty yesterday and today is knowing when SD will occur. All that is known is that SD risk is higher in women with diabetes, with a macrosomic fetus, maternal obesity, or previous SD. But the predictive value of these known factors is so low and the false positive rate so high they are clinically unreliable. Id.

NBPP Risk Factors: Causation?

The SD courtroom "experts" will point to various risk factors that have been described in association with NBPP, i.e., maternal obesity, maternal age, abnormal pelvis, fetal weight prediction by ultrasound, shoulder/chest/abdomen ratio, diabetes, oxytocin use, SD and a few other concepts and say SD was predictable. Except for SD none of these risk factors have been shown to be clinically significant predictors for NBPP. Greater than 80% of NBPP cases occur in women without known risk factors. *Origins of Brachial Plexus Injury*, supra; *NBPP Task Force 2014*, supra. And "although common risk factors shared by shoulder dystocia and brachial plexus injury result in frequent co-occurrence of these conditions, association cannot be interpreted as causation." *Origins of Brachial Plexus Injury*, supra, at 725.

The C-Section Canard

Perhaps the most difficult to counter claim is a pseudo-informed consent claim: there were so many SD risk factors present that mom should have been given the option of a C-section. This allegation is always accompanied by the mother's (and dad's) testimony that if she (they) had only known there was ***ANY*** risk of injury to the baby she (they) would have insisted on a C-section. Thus, the doctor defendant was negligent in failing to discuss and disclose the SD risks and not having given the option of a C-section. *Lerner SD Facts and Evidence, supra; Lerner Standard of Care*, supra.

Obviously, this claim is intertwined with the "you should have predicted SD would have occurred" claim but is more difficult to refute because it also involves informed consent and the lay public's (jury and judge) perception that C-section is almost risk free minor surgery. And in the courtroom the SD "experts" can perform a C-section that not only saves the child from a lifetime of a debilitating NBPP, but which never has real world C-section consequences and complications.

Informed consent theory and requirements vary from state to state so that this allegation has no one size fits all solution. However, as Learner points out there is some consensus that levels of risks required to be discussed with a patient are roughly 1 in 100 whereas NBPP risks in high-risk cases are 1 in 450. *Lerner Standard of Care*, supra; H.M. Lerner, *Three Typical Claims in Shoulder Dystocia Lawsuits*. 25(3) Forum (CRICO/RMF) 15-17 (2007).

Perhaps the most important facts to bring to the fact finder is evidence that C-sections have immediate risks to mothers including death, infection, bleeding, blood transfusion, embolisms, anesthesia reactions, surgical injury, admission to ICU, and prophylactic and required antibiotics. Long term risks include significant risks to future pregnancies---C-sections for life, life threating uterine rupture, and placenta previa and accrete. Jacqueline H. Wolf, *Cesarean Section, An American History of Risk, Technology, and Consequence.* Johns Hopkins University Press, Baltimore, Maryland (2018); H.M. Silver et al., *Placenta Accreta Spectrum*. 378(16) N. Engl Med 1529-1536 (2018); K.D. Gregory, *Cesarean Versus Vaginal Delivery: Whose Risk?* 29 Am J Perinatol 7-18 (2012); J. Villar et al., *Maternal and Neonatal Individual Risk and Benefit Associated With Caesarean Delivery: MultiCentre Prospective Study*. 335 BMJ 1025-1032 (2007); Teresa Morris, *Cut It Out: The C-Section Epidemic In America*. New York University Press, New York, New York (2013). And these adverse events occur more frequently than permanent NBPP. *Lerner Standard of Care,* supra.

There is also emerging evidence of significant long-term consequences for children born by C-section including future chronic disease---obesity, asthma, autoimmune disease, juvenile arthritis, inflammatory bowel disease, and neuropsychiatric disorders. B.E. Brett et al., *The Microbiota-Gut-Brain Axis: A Promising Avenue to Foster Healthy Developmental Outcomes*. 61(5) Dev Psychobiol 772-782 (2019); A. Sevelsted et al., *Cesarean Section and Chronic Immune Disorders*. 135 Pediatrics e92-e98 (2015); M.J. Friedrich, *Unraveling the Influence of Gut Microbes on the Mind*. 313(17) JAMA 1699-1701 (2015); M. Almgren, et al., *Cesarean Delivery and Hematopoietic Stem Cell Epigenetics in the Newborn Infant: Implications for Future Health?* 211(5) Am J Obstet Gynecol 502.e 1-8 (2015).

An elective C-section for suspected fetal macrosomia is as inadvisable as is prophylactic labor induction for fetal macrosomia in nondiabetic women when the estimated fetal weight is less than 5000 grams in women without diabetes and less than 4500 grams in women with diabetes. *Williams Obstetrics*, supra at 520, 859. The challenge is, of course, showing the fact finder how a clinician must balance the clinical facts and make a decision, which turned out to be wrong, before the outcome is known.

Rouse and colleagues demonstrated that even in the highest risk categories of permanent NBPP, 99.8% would not experience a permanent injury when delivered vaginally and that prophylactic C-sections for macrosomia (4500 grams) required 3,695 C-sections to prevent one permanent injury at a cost of 8.7 million for each injury avoided. D.J. Rouse et al, *The Effectiveness and costs of Elective Cesarean Delivery for Fetal Macrosomia Diagnosed by Ultrasound*. 276(18) JAMA 1480-1486); D.J. Rouse et al, *Prophylactic Cesarean Delivery for Macrosomia Diagnosed by Means of Ultrasonography---A Faustian Bargain?* 181(2) Am J Obstet Gynecol 332-338 (1999).

Trial Lawyer Response to the SD-NBPP Research

The usual trial lawyer response to any research that has the potential to overcome a cash cow litigation topic is to claim that the research and resulting publications are a conspiracy among clinicians to corrupt the medical literature to protect physicians in court and fend off the meritorious claims of deserving injured victims of obvious medical malpractice (never mentioning the lawyer who received 40% or more of the victim's recovery). E.g., *Iffy Brachial Plexus Injuries at Birth, supra; D.L. Zaslow, Deconstructing the Brachial Plexus Injury Case*. May 11, 2011 Trial 34-39 (2011); *See also*, T.P. Sartwelle, *Defending A Neurologic Birth Injury: Asphyxia Neonatorum Redux* 30 J Legal Med 181-247 at 232-238 (2009) (hereinafter *Neurologic Birth Injury*) (discuss-

ing the plaintiff bar's identical response to the medical research related to asphyxia as a non-cause of cerebral palsy and other birth related neurologic maladies). There is of course no documentation sustaining the conspiracy charge, nor has there ever been a whistleblower exposing the conspiracy, nor is any credible current research ever produced in opposition. What trial lawyers and their experts rely on are the biases inherent in all medical malpractice litigation---outcome bias and hindsight bias---being smart after the event when the outcome is known. *Neurologic Birth Injury*, supra at 242-244.

Daubert Challenge

Several billion words have been written on how courts are to discern what are reliable expert opinions and exclude unreliable expert testimony. And while this article is not a primer on *Daubert* it is important to understand this essential tool in defending SD-NBPP lawsuits.

Although results from opinions are seemingly inconsistent due to different case facts and the variation in application of these requirements from judge to judge, the overwhelmingly favorable SD-NBPP medical literature from the past three decades compels a *Daubert* challenge to virtually every SD-NBPP case. Examples from a number of recent federal court opinions serve as guides to a successful challenge.

For example, *M.D.R. vs. Temple University Hospital*, Civil Action No. 22-621 U.S. Dist. Ct. E.D. Penn. (Oct. 26, 2022). The opinions of two plaintiff "experts" were excluded as unreliable and the case dismissed. The "experts" opined that the child's permanent neonatal brachial plexus injury could only occur as a result of the doctor applying excessive traction to the baby's head and could not have occurred by natural forces of labor. Thus, since permanent NBPP occurred it had to be a result of negligence.

In reply, the defendant presented the testimony of the birth attendants, all of whom testified no excessive traction was used, and presented the testimony of Dr. Robert Gherman, Chair of the NBPP Task Force, who explained the Task Force report and medical literature and distinguished the literature replied on by the plaintiff "experts."

The court's opinion is lengthy and detailed. This court analyzed a large volume of medical literature as well as the details of the expert testimony, placing particular reliance on the ACOG Task Force Report concluding that NBPP cannot be attributed only to traction applied by the birth attendant.

There are a number of recent federal SD-NBPP cases with similar results that serve as Daubert challenge examples. *Lawrey v. Good Samaritan Hospital et al.* 751 F3d 947 (8th Cir. 2014); *U.G. BNF Asseta Nanema v. United States of America.* No. 21-CV-2615(VEC). U.S. Dist. Ct. S.D. New York (Oct. 13, 2022); *Williams v. United States of America.* No. 17-CV-13118. U.S. Dist. Ct. E.D. Michigan, S. Div. (April 17,2020).

Clinical Practice

As can be seen from the above cases, it is important that there be testimony, if true, that no excessive traction was used in the delivery. Hopefully there will also be documentation. As is emphasized in every malpractice case documentation is often the key to a successful defense. There are many articles and web sites with dedicated shoulder dystocia forms. *Lerner SD Facts and Evidence,* supra; *Lerner Standard of Care,* supra; L.C. Zuckerwise, et al. *Effect of Implementing a Standardize Shoulder Dystocia Documentation Form on Quality of Delivery Notes.* 16(4) J Patient Saf. 259-263 (2020). SD-NBPP lawsuits are often filed years after delivery and the birth care givers may not even remember the delivery. Documentation takes some effort and time but may pay huge dividends when litigation is implemented.

An obstetrician's or midwife's training to deal with SD is important. But just as important is the training of the L & D nurses-staff. Because SD is rare and occurs without warning, training is essential. Available personnel must be able to quickly summon help and assist in performing the SD cardinal maneuvers. It never hurts to have proof that physicians and staff attended didactic lectures and/or periodic SD drills in preparation for that rare emergency.

Conclusion

SD-NBPP cases are difficult to defend. Convincing a lay jury or judge that a child with an undeniable lifelong disability was not injured by someone's negligence is a challenge to say the least. But with extensive preparation and familiarity with the available literature and the help of quality expert witnesses it can be done. And as illustrated by the cases discussed above, it can sometimes be done short of a trial.

Managing The Evolving Workforce:

Preparing For The Future Conditions Of Law Firm Operations

By Lisa J. Black and Brian Kennel

While we have learned that we must be prepared to navigate turbulence in the business environment, law firm leaders still struggle to make strategic adjustments in the pandemic-influenced workplace.

The COVID-19 pandemic has taught us many lessons. In the workplace, we have collectively learned that regardless of industry, businesses must stay ready for disruption, be open to change, and be willing to accept new ways of operating. Because law firms are typically slow to adapt, these lessons came hard for many in the legal industry. When the pandemic hit, many firms were unprepared to navigate the challenges resulting from a drastic shift in people management and operations. While we have learned that we must be prepared to navigate turbulence in the business environment, law firm leaders still struggle to make strategic adjustments in the pandemic-influenced workplace. Many find it challenging to decipher which industry trends are temporary and which are here to stay.

A long-term strategy that considers industry-wide developments is key to positioning your firm to thrive in the future. It should address mastering people management, learning to use tools and resources to optimize workflows, and utilizing data analytics to measure and adjust performance. Knowing how to do these things will keep your firm competitive, innovative, and ready for the future.

External Influences and the Priorities of the Modern Workforce

Firm leaders must stay on top of managing the ever-evolving, modern workforce and consider all the dynamics that influence how we work, when we work, and where we work. External economic, social, and technological developments beyond our control indirectly impact the organization, whereas internal operations directly have a controllable direct impact. Both macro- and micro-level forces influence the behaviors of the people in the firm.

The pandemic turned out to be the catalyst that pushed the momentum of macro-level developments while simultaneously bringing micro-level nuances of the traditional law firm's work environment to the forefront of the legal workforce's attention. Many have started to seriously evaluate how they live, carefully consider where they choose to work and push for their work experience to be more attuned to lives they want to cultivate, where authenticity, autonomy, and balance are respected.

Macro-Level Influences

The workforce has strengthened as the economy recovers from the impact of the COVID-19 pandemic. However, with rising costs of living, wages are losing value, leading people to seek higher compensation. The shortage of available workers to fill job openings has empowered workers engaged in salary negotiations. At the same time, firms face higher operating costs and strained budgets. We see many firms scrambling to reconfigure their financial models to stay competitive in the compensation market to meet the demands of the workforce.

We are living in an era of significant social restructuring. Social movements are flowing into the workplace; these movements are no longer "social interest" or

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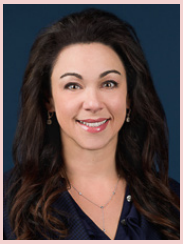

"political views" that can simply be barred by the human resources department. Diversity, equity, and inclusion initiatives have become serious priorities in the workplace as employees demand respect for their authentic selves, and companies learn to acknowledge differences and create space for the needs and perspectives everyone brings to the table. While many industries are shifting toward being intentionally active in DEI, many law firms remain unengaged or superficial in creating and supporting such initiatives.

As workers seek profound authenticity, they look for work that speaks to who they are and what they care about. Gone are the days when there was a clear social divide between work and personal life. Workers have shifted to viewing and accepting the workplace, where they spend most of their time, as a part of their lives. With that perspective, workers expect the employee experience to be a positive, fulfilling piece of their lives that amalgamates with their other priorities. This expectation of a balanced life transmits to the trending desire for meaningful work and workplace flexibility. In progressive law firms, we see shifting work models that create space for remote and hybrid workers.

Technology, coined "the great equalizer," has become a tool of empowerment for workers. Continuously evolving systems and tools advance productivity and human connectivity and broaden the realm of possibilities for the way we work. As a result, people are increasingly learning how to use technology to find or even create opportunities to earn a living in ways that fulfill their needs for purpose, flexibility, and adequate compensation.

Micro-level Influences

Internal workplace factors like leadership, administrative matters, workflow processes, technology infrastructure, and interpersonal relations strongly influence the firm's day-to-day operations and the

employee experience. These factors are the building blocks of the firm's culture. When employees enter the workplace, they must be equipped to work in an environment conducive to productivity.

Leadership is the most impactful micro-level influence on people management and firm operations. Knowing how to make good choices and guiding the firm in the right direction is monumental to creating an environment conducive to productivity. In law firms, leadership often consists of founding partners and rainmakers. The traditional function of law firm leaders is to bring in and maintain originations and provide work for lower-level attorneys and staff. As workers seek higher levels of engagement with leadership, the traditional approach to law firm leadership is being pushed for change. Rainmaking is not enough; younger attorneys and staff seek regular communication, mentorship, training, feedback, and support. Firm leaders are expected to come out of their offices and work across the table with their people to share knowledge and foster connection. The modern workforce cares about efficiency, productivity, and consistency, so being left to figure things out with little or no direction from leadership will not suffice.

Aside from firm leadership, firm administration directly impacts the day-to-day operation and work environment. Hence, administrative teams play a significant role in creating a productive organization. How they navigate finance, human resource/people management, client intake, external vendors, and general office management determines the firm's position to function and work to flow. To be competitive, administration teams must stay updated with the latest developments in law firm operations. They should always keep track of the tools and resources available to help make workflows more efficient.

Technological infrastructure is paramount to efficiency and long-term competitiveness. An outdated system creates unnecessary obstacles to getting work done. Investing in robust, accessible networks and advanced practice management software is the way to eliminate waste, simplify tasks and increase productivity.

The physical workspace must be appropriate for work. Especially firms that require workers to return to the office should ensure that everyone has adequate space, equipment, and supplies to perform their job functions. The environment should be healthy, safe, and inviting. When assessing the sufficiency of the environment, leaders should consider the physical and psychological aspects of a healthy and safe workspace. The same should be considered for remote work. Firms providing similarly adequate equipment to ensure an equally productive remote environment will likely see a return on investment from their employees.

Interpersonal relationships weigh heavily on the modern workforce. In search of fulfilling work, employees are less inclined to stay with an organization if they experience a trend of negative encounters with others in the workplace. Don't lose talent due to a culture that permits low emotional intelligence, poor communication, and low morale. Firm leaders that both encourage and display equal respect for all employees regardless of title help to promote a positive firm culture.

Challenges and Negatives Outcomes

Macro-level influences have set the stage for challenges like quiet quitting, employee poaching, industry hopping, and, thus, high turnover. It has become a vicious cycle that is fueling an industry-wide talent shortage. Many law firms are engaged in aggressive recruiting initiatives and compensation battles for legal talent. With all these dynamics coming into play, it is easy to see how organizations with traditional work models may struggle to keep up with the demands of the modern workforce.

As the legal industry has not been proactive on the micro-level to address expectations stemming from economic, social, and technological developments, law firms are now facing growing challenges in managing their workforce successfully. These include lack of collaboration, inefficient processes, limited reporting capabilities, ill-defined firm cultures, and non-competitive compensation models. These challenges have become significant problems in many cases, leading to negative outcomes such as higher turnover, difficulty attracting talent, and reduced productivity.

So, what can law firms do to overcome these obstacles and successfully manage their workforce in the long run?

Managing the Modern Workforce and Recognizing Opportunities to Optimize Firm Operations

Firm leaders must recognize strategic opportunities to advance operations amidst industry turbulence. It is critical to understand that the priorities of the modern workforce are here to stay, and they may continue to evolve. Know that you have to be open to making changes when change is needed. Then optimize your organization for the future.

The first element is to create a culture of care. The second is to develop a structured environment with systems, resources, policies, and procedures designed to bring out the best in your people. The third is to apply data analytics and KPIs to set high-level goals and map out strategic initiatives.

New opportunities for firm advancement could stem from simply creating a more balanced work environment.

Opportunity 1: Build a strong firm culture. To prepare your firm to be a high-performance organization well into the future, leaders must start by fostering a strong firm culture. When your people show up, the firm should too, and vice versa. Recognize the opportunity to be a more vital, more connected organization. Taking advantage of this opportunity will require firm leaders to know how to show up for their people.

Show up financially. You will need to adequately structure your firm's budget to compensate employees with a competitive salary and benefits package. The compensation model is essential to attracting and

retaining the right talent. Having the right compensation mix is imperative to cultivating a positive employee experience. Your people need to know they are remunerated fairly for their labor.

Show up respectfully. The next part should go without saying, but interpersonal interactions within the organization should be positive. Treat people with respect and encourage everyone in the organization to do the same.

Show up as a leader. Strong leadership is key to sustaining culture. The impact of solid leadership resonates in all aspects of firm operations. Aside from the decisions leaders make, the way they communicate has the most influence on the people in the firm. Strong leaders should be able to stimulate motivation within the firm by connecting the firm's values, mission, and vision. A purposeful connection will keep employees engaged when satisfaction generated from compensation diminishes. Aside from motivating the organization, leaders should be able to communicate firm goals and performance expectations. When leaders set expectations for performance, they should also have a planned approach with smart goals to reach success. Attorneys and staff should receive support and have continuous learning opportunities from leadership to build an authentic connection with the people in your firm.

Show up flexibly. Leaders should also foster a flexible, collaborative environment. As mentioned earlier, flexibility is now a priority in the workplace. While many firm leaders prefer in-person work models, firm leaders must recognize that offering a flexible work environment establishes a competitive advantage. The key is to find a way to integrate flexibility into your work model. This does not always mean remote or hybrid work. Law firms can establish flexibility by implementing policies that allow workers more autonomy over how, when, or where they work.

Show up as a team. When you have a flexible work model, you should emphasize collaboration strongly to develop well-connected teams. However, collaboration isn't only about connecting people in a flexible work environment to get the work done. It is about putting minds together and bringing different perspectives to the table. Building strong teams requires all voices to be heard and opinions valued. Taking advantage of the need to collaborate allows your firm to bring authentic action to DEI initiatives. Encourage and facilitate collaboration by bringing your people together to fill in knowledge gaps and solve problems more efficiently.

By building a strong culture rooted in meeting the needs of the people who work for the firm, the organization is positioned to get a strong buy-in from its people. When employees feel supported and cared for, the connection and commitment to the organization will come naturally. Your attorneys and staff will come to work with the mindset that they want to do their part to make the organization successful because it has established that it is equally invested.

Opportunity 2: Bring structure to the workflow.

How work gets done can be structured to improve efficiency and avoid burnout. Burnout is caused by dysfunctional workplace dynamics like lack of autonomy, unrealistic performance expectations, or unclear work processes. Structuring workflows should enhance work efficiency, reduce stress levels, and empower employees to recognize their value as part of the organization. To achieve this, firm leaders should implement processes and systems that bring clarity and order to operations while increasing productivity.

Pay attention to the talent and skills your people possess and place them in roles that best suit them. Through regular communication and collaboration, leaders can assess individual strengths and weaknesses, understand what motivates their people, and track what kind of work they perform best and enjoy. Grant autonomy when possible to allow people to choose their work type. However, have a training plan in place that comprehensively covers all of the base-level performance progression criteria. The training plan should ensure attorneys (and staff) can develop all the necessary skills to perform at a high level.

High-level performance does not equate to overworking. The goal is to set your people up to deliver high-quality work efficiently. Performance requirements should be set with realistic expectations for skill progression and billable hour requirements to avoid burnout and high turnover. When setting performance goals, the firm should not primarily focus on overachievers. Instead, it should aim at eliminating underachievement by curating a balanced, inclusive approach to attorney development. Managers can use data analytics to make inferences about workload balance to avoid over and underutilizing individuals.

Performance evaluations and career development paths should be directly aligned with the skill development goals outlined in the training plan and performance goals set by the firm. The firm should have an in-depth performance evaluation and feedback system that consistently and accurately assesses employee performance, address challenges proactively, and ensures productive communication between the supervisor and the evaluee. The firm should also have a clear career progression path that outlines expectations and opportunities for career advancement. Attorneys and staff should have a clear understanding of their growth potential with the firm. It also positions people to be proactive in setting their professional goals.

To improve productivity, firms should strive to make processes more efficient. Law firms should properly define workflows and standard operating procedures for each functional area. Once processes and procedures are defined, roles and task responsibilities can be assigned to ensure the best use of talent. Collaboration is an important factor in reducing inefficiencies in workload distribution. If overutilization is detected with no way to balance responsibilities, outsourcing roles to external support is a great option. Finding specialists to relieve responsibilities or even fill knowledge gaps can be rewarding because specialists can delve deeper than an internal person with many other duties. New opportunities for firm advancement could stem from simply creating a more balanced work environment.

Another great way to bring more balance to firm operations is to automate tasks through legal technology, including case/project management apps, billing and accounting software, and document management programs. A robust technology infrastructure system will reduce workflow bottlenecks and allow the firm to advance in professionalism and strategy.

Firms should encourage consistent use of case and practice management software to help attorneys manage cases efficiently. Leaders can apply technology to balance workloads, identify areas that need support and ensure projects and tasks are advancing according to plan. When selecting practice management software, firm leaders should seek systems that enhance collaborative communication, task distribution, deadline management, and utilization monitoring. These functions will position the firm for high performance and optimized operations.

Opportunity 3: Take advantage of data analytics and KPIs.

A well-rounded stack of KPIs will allow law firms to define goals and measure performance against them that go past simple short-term financial objectives.

Most law firms take a relatively narrow approach to formulating their goals. They define success with a handful of financial metrics and focus mainly on profit maximization, with billable hours as the most important performance indicator.

However, this approach limits strategic planning, ignores the potential long-term implications of in-the-moment business decisions, and, in turn, reinforces shallow and ill-defined goals. Instead of a rigid short-term focus, law firms are encouraged to expand their success metrics and establish more comprehensive performance reviews using a well-rounded set of key performance indicators (KPIs) that measure success beyond short-term profitability.

For clarification, metrics are general performance indicators, and KPIs are a subset of metrics used to measure performance towards specific objectives.

Reporting and Data Analytics

Law firms should review their capability (reporting and knowledge) and take the necessary steps to gain a more nuanced assessment of essential metrics related to productivity, return on investment, profitability, and qualitative results.

An effective data analytics function consists of the following elements:

1. Data capture: Which tools are in use and which policies are in place to ensure accurate and complete data capture?
2. Data analysis: Which reports are automated, whereas which ones require manual input, and who is in charge of analyzing them?
3. Modeling: Is there qualified in-house or outsourced staff in place to forecast future results?
4. Action Steps: What is the procedure for addressing findings, and who is in charge of strategic plan development?

With a comprehensive reporting system, law firms can capture the correct data to identify what is happening and better understand why it is happening. They can focus on metrics contributing to a healthy work environment while ensuring financial and cultural stability.

Law firms should look at four types of data analysis: descriptive, diagnostic, predictive, and prescriptive.

1. Descriptive: This analysis is based on historical data and focuses on your past performance.
2. Diagnostic: This analysis indicates why your performance is the way it is.
3. Predictive: This analysis gives insight into what will happen.
4. Prescriptive: This analysis helps determine what to do to improve performance.

Descriptive and diagnostic analyses focus solely on past performance, whereas predictive and prescriptive analyses are used to forecast and model future performance.

Basic, Intermediate, and Advanced Metrics

Law firms need to understand the various metrics they can apply to perform the different types of data analysis. Consider the following categories of metrics: basic, intermediate, and advanced.

Grouping metrics by function or purpose is also helpful. For example, financial, operational, marketing, client service, cultural/social, workforce, etc. For this presentation, they are grouped into financial and non-financial sets to keep it simple.

Almost all responsible firms at least look at a basic list of metrics on their reports. For the firm as a whole, those include:

- Fees, expenses, and net income
- Accounts receivable (AR) and work in progress (WIP)
- Cash flow, debt, and equity levels
- Billable hours, billable value, billings, and collections (non-hourly firms tend to focus on gross dollars collected)

For timekeepers (revenue generators), the key metrics include:

- Productivity
- Billable Value
- Billings
- Collections
- Bill Rates and Realization
- Profitability (sometimes if they have a robust system)

Beyond the standard financial reports, firms sometimes also look at capacity and demand-related metrics such as:

- Case count
- New cases vs. closed cases over a defined period
- New clients and clients lost/finished
- Timeliness and compliance with client guidelines and requirements as well as firm processes

Intermediate financial reporting includes:

- Financial KPIs (average bill rates, billable hours, and collections per TKPR), with robust sorting features that provide insights into performance by position, practice area, experience, tenure, client, and team
- Average profit and profit margin per timekeeper with the same sorting capability

- Compensation and overhead benchmarks by experience, position type, qualitative scores, and market ranges

Intermediate non-financial reporting includes:

- Average days files are open
- Files opened and closed per week/month
- Associate and paralegal leverage per client/case
- Average time spent on case, client, task, etc.
- Utilization rate
- Marketing KPIs include client conversion rate, client retention rate, new clients vs. lost clients

Rarely do law firms turn to advanced metrics that fully capture the underlying causes of performance outcomes.

Advanced financial metrics include:

- Profit by client and matter
- Aged Accounts receivable by client
- Payroll and overhead per hour
- Profit Per Hour
- Return on invested capital

Reporting levels typically include firm, client, matter, case, and assignment.

On the non-financial side, only a few firms consider measuring qualitative metrics or their correlation with performance, such as:

- Job satisfaction
- Quality of the work environment
- Management efficiency (direct reflection of productivity, operations metrics, turnover rate)
- Turnover rate
- Staffing efficiency
- Training quality
- Organizational stability (summary of the metrics above)

There is a wide range of measures law firms can track to assess their performance. Without a comprehensive set of metrics, law firm managers have an incomplete picture of the health of their organizations. Their ability to analyze the underlying factors for financial or operational challenges and to identify patterns or create models to forecast future performance is limited.

Defining KPIs

Choosing the right mix of metrics to serve as KPIs depends on a multitude of factors, including:

- Vision, goals, expectations, and timing
- Business cycle phase (Startup, Growth, Maturity, Decline)
- Firm culture
- Size/Scale
- Organizational structure
- Operational systems and processes
- Location
- Utilization of space

Goal setting has a significant impact on which KPIs are important. Devoting time to formulating a vision, goals, and objectives is critical to determine which performance metrics matter. All firms should incorporate basic, intermediate, and advanced KPIs into their reporting habits.

While some of the more advanced elements may need to be tracked informally in smaller organizations, the idea is to compile a list of metrics that managers can trust to adequately reflect the firm's performance measured against specific goals and expectations.

A well-rounded stack of KPIs will allow law firms to define goals and measure performance against them that go past simple short-term financial objectives. A firm that sets goals in the interest of all stakeholders while measuring its performance comprehensively through various financial and operational metrics is prepared to overcome challenges and prosper.

Conclusion

Managing the evolving workforce in law firms successfully takes work. Firm managers need to recognize and acknowledge developments in the external and internal environment of the legal industry and their organizations. Growth mindset, willingness to change and accepting new ways of operating a law firm will be critical for those who want to acquire and retain talent, offer excellent service levels, and remain competitive in the future. That does not mean leaders must scrap their approach to running a firm. It means they should be open to refining and enhancing their model. It means taking a close look at the ever-evolving environment they operate in, being open to new technology that helps to streamline processes and create efficiency, learning how they can best motivate their people, and use available systems and tools to understand, control, and adjust their performance to deliver high-quality legal services.

Why *Can't* I Have a Billboard on My Own Property?

By Philip W. Savrin and Allison Chandler

As in any other constitutional realm, the only certainty is that the jurisprudence will continually develop as cases are heard by future compositions of the Supreme Court.

Almost nothing is more American than the freedom to speak without government interference or retribution. The freedom to speak one's mind, to participate in the marketplace of ideas, lies at the heart of the Bill of Rights that is enshrined in the American psyche. As with any other constitutional right, however, the freedom to speak is not absolute. Most understand, for example, that speech that incites violence, or yelling "fire!" in a crowded movie theater, cannot be tolerated in a civil society. At the same time, there is a recognized need to regulate where and how legitimate speech can take place so that we don't drown each other out and our individual or collective voices can be heard.

Regulation of speech in terms of signage presents especial issues because signs invade the physical space, sometimes on a permanent basis, which can lead to physical clutter and distraction. To accommodate the governmental interests in aesthetics and safety, First Amendment law has developed to allow regulations of the time, place, and manner of speech, provided that the regulations do not restrict the content of the ideas or messages that the speaker wishes to convey. Because the freedom to speak is considered a "fundamental" right, the Supreme Court applies either "strict scrutiny" to laws that regulate content or "intermediate scrutiny" to laws that do not. Determining whether a regulation is content-based is not always an easy task, however, frequently resulting in Supreme Court decisions with multiple opinions that need to be pieced together to determine the majority holding.

In 2015, the Supreme Court decided *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), in which the majority seemed to apply a bright-line rule that a law is content-based (and thus subject to strict scrutiny) if one needs to read the sign to apply the regulation. There were three concurring opinions, however, which cast doubt on the rigidity of that rule or even if strict scrutiny applied in the first place to the ordinance at issue. Not surprisingly, *Reed* spawned a conflict in the circuit courts as to whether prohibitions of signs that pertain to off-premises activities are content based. On one hand, one would need to read the sign to know whether it was permitted; on the other hand, several justices had joined a concurring opinion by Justice Alito that specifically exempted distinctions between on- and off-premises signs from being considered content based so as to trigger strict scrutiny review.

In 2022, the Supreme Court addressed that precise question in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022), finding—for the most part—that *Reed* should not be read literally to require strict scrutiny review of regulations that prohibit off-premises signage Writing for the majority, Justice Sotomayor reasoned that:

> The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation.

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Id. at 1466. The ruling was not absolute, however, as the majority opinion includes a caveat that "[i]f there is evidence that an impermissible purpose or justification underpins a facially content- neutral restriction, for example, that restriction may be content-based." *Id*. Also, the decision was far from unanimous, as one justice concurred, another concurred in part and dissented in part, and three justices dissented altogether. Thus, although *Austin* resolves the limited question at least for now that off-premises distinctions are not always content-based, it does not end the debate over the extent to which governments can regulate signs consistent with the limitations of the First Amendment. This paper explores the concepts that underlie the ruling and where the law may develop from here.

The Intersection of Free Speech and Governmental Regulation

General Tenets of Government Regulation of Speech

The First Amendment to the United States Constitution states simply: "Congress shall make no law . . . abridging the freedom of speech." The United States Supreme Court has recognized that this right to freedom of speech is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925). Yet even as the Supreme Court recognized in *Gitlow* that the First Amendment protects the right to speech from State action as it does from an act of Congress, the Supreme Court acknowledged that this freedom is not an "absolute right to speak," and that, in the exercise of its police power, a State "may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace." *Id*. at 666-67.

Fifteen years later, the Supreme Court explained that the exercise of one's civil liberties, like freedom of speech, cannot occur if there are no regulations in place as a check against the "excesses of unrestrained abuses" by others that would wreak havoc on public order. *Cox v. State of New Hampshire*, 312 U.S. 569, 574 (1941). Rather than curtailing the exercise of fundamental rights, state and municipal laws that regulate those rights work as a safeguard for the order and convenience of the public generally, and without which there would be no space for speech to take place. *See id*. For instance, the Court in *Cox* upheld a conviction for violation of a New Hampshire statute requiring a license for a parade or procession upon a public street. *Id*. at 578. The Court found that because a city "has authority to control the use of its public streets for parades or processions," it also had the authority to consider (and to regulate) the "time, place and manner" of the exercise of the parade or speech in relation to other uses of its streets. *Id*. at 576. This ability of the government to regulate the "time, place and manner" of speech became an important defense to allow governmental restriction on speech. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

Judicial Review of Government Speech Regulation

A municipal sign code, or ordinances regulating the construction, maintenance, and removal of signs within a city, is subject to judicial review regarding its compatibility with the First Amendment.

Because there is no absolute right to speak, and thus the government may lawfully regulate speech to some degree, the question then becomes the standard a reviewing court will apply in determining if the government's regulation is constitutionally sound. To determine whether a law passes First Amendment muster, the Supreme Court applies one of two levels of review. The level that applies turns on whether the law at issue regulates content or whether it is content-neutral. *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its ***content***.").

If a law restricts the "content" of speech, then strict scrutiny is applied, under which the government must overcome the presumption of unconstitutionality and show the law is "necessary to serve a compelling governmental interest." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). Laws that are subject to strict scrutiny are highly unlikely to be found constitutional. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) ("it is the rare case in which we have held that a law survives strict scrutiny."). On the other hand, if the law is content-neutral, then the Court applies intermediate scrutiny, under which laws are upheld if they are "narrowly tailored to serve a significant governmental interest, and if they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted). A law that merely sets parameters on the time, place, and manner of speech is subject to intermediate scrutiny review. *Id*.

Following the Supreme Court's general pronouncements against the government restricting speech based on its content, a circuit split eventually developed regarding how a court was to determine whether a city's sign code was content-based or content-neutral:

- The First, Second, Eighth, and Eleventh Circuit used a text-based test to analyze whether a sign ordinance was content-neutral. In these circuits, codes that exempted from the permitting requirement or offered other favorable treatment to certain categories of signs on the face of the regulations were content based, notwithstanding any assertion by city officials that they were enacted for a content-neutral reason. *E.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005) (finding exemption for flags and insignia of a "government, religious, charitable, fraternal, or other organization" content-based); *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011) (code that exempted certain categories of signs from permit requirement was content-based); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (sign code found content-based where it facially banned political signs but permitted for sale, professional office, and religious and charitable cause signs, noting the distinction between commercial and non-commercial speech); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir. 1990) (sign code found content-based because it facially exempted political signs and signs identifying a grand opening, parade, festival, fund drive or

similar occasion from a general sign ban).

- The Fourth, Sixth, and Ninth Circuits followed a three-part test: An ordinance is not a content-based regulation of speech if (1) the regulation controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech. *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621 (6th Cir. 2009). A sign code could permissible even if it regulated speech based on content if the government's motives in drawing the distinctions were content-neutral and not intended to censor any particular opinion. *See, e.g., Brown v. Town of Cary*, 706 F.3d 294, 306 (4th Cir. 2013) (sign code that exempted "holiday decorations," "public art," and six other categories of signs from numeric and size limitations found content-neutral because it was not "adopted because of a disagreement with the message conveyed"); *H.D.V.-Greektown, LLC*, 568 F.3d at 621 (code that contained separate definitions for advertising signs, business signs, and political signs and imposed varying height restrictions depending on category upheld where there was "nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another"); *Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1072 (9th Cir. 2013) (finding that the Town's interest in regulating certain signs was unrelated to the content of the sign itself and instead was a regulation of where some speech could occur).
- The Third Circuit utilized a complicated multi-factor test that took into account the context of any government regulation on speech. *See Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1065 (3d Cir. 1994) (content-based distinctions among signs were upheld where the following conditions are met: (1) the government exempts a sign from general sign regulations where "there is a significant relationship between the content of particular speech and a specific location or its use," (2) the exemption was not made "in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate," (3) "the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation," (4) "the exception is no broader than necessary to advance the special

goal," and (5) "the exception is narrowly drawn so as to impinge as little as possible on the overall goal.").

This also seemingly allowed cities to draw distinctions between on-premises and off- premises signs. *Off-premises signs* are signs directing the reader to a business *off* the premises, such as a traditional billboard advertising a business that is located somewhere else. In contrast, *on-premises signs* direct the reader to a business or activity occurring *on* the premises. In many cases, this distinction involved regulating between commercial and non-commercial signs, as billboards (or off-premises commercial signs) were regulated differently or altogether banned. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (upholding the City of San Diego's ban on offsite billboards containing commercial speech); *Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992) (where municipal ordinance limiting or prohibiting off- premises signs (signs directing the reader to a business *off* the premises) was enacted for reasons of aesthetics, safety, and uniformity, for example, such law was deemed content-neutral).

The Court, in an opinion written by Justice Thomas, ultimately adopted the formulaic approach advocated by the petitioners.

The Supreme Court Answers the ... Question in *Reed v. Town of Gilbert* – Or Does It?

The Supreme Court's Decision in *Reed*

In *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the Town of Gilbert, Arizona limited "Temporary Directional Signs," or signs that directed individuals to a qualifying event, to 6 square feet in area. *Id*. at 160-61. Such signs could be displayed from 12 hours before the event until 1 hour afterwards. *Id*. at 161. By contrast, "Ideological Signs" were to be no greater than 20 square feet in area and could be placed in all zoning districts without time limits. *Id*. at 159-60. Further, "Political Signs" could be 16 square feet on residentially zoned property and up to 32 square feet on nonresidential use property, undeveloped property, and Town rights-of-way. *Id*. at 160. Political Signs also had to be removed no later than 15 days following the election. *Id*.

After receiving citations for the failure to remove Temporary Directional Signs timely, plaintiffs/petitioners Pastor Clyde Reed and Good News Community Church sued the Town for violating their First Amendment rights. 576 U.S. at 161-62. The petitioners argued to the Supreme Court that the Town's Sign Code was content-based, and thus subject to strict scrutiny, because enforcement officials had to read a sign and determine what it said to decide what limitations applied. In response, the Town reasoned that since the Sign Code provisions did not favor or censor viewpoints or ideas, the intermediate level of scrutiny should apply. The Town also rejected the petitioners' "absolutist" approach, warning the Court that "[i]f a simplistic if-you-have-to-read-it-it-is-content-based test were adopted, virtually all distinctions in sign laws would be subject to strict scrutiny, thereby eviscerating sign regulations that have been repeatedly upheld under the First Amendment as serving important governmental interests such as safety and aesthetics." *Respondents' Br. at 35.*. The Supreme Court posed the question of whether the Town's lack of discriminatory motive could render the sign code content-neutral even though it was facially content-based.

The Court, in an opinion written by Justice Thomas, ultimately adopted the formulaic approach advocated by the petitioners. The Court held that the Town's Sign Code was content-based on its face since its restrictions that would "apply to any given sign thus depend entirely on the communicative content of the sign." 576 U.S. at 164. Because the Church's signs inviting the public to attend services were "treated differently from signs conveying other types of ideas," the Town's Sign Code was a content-based regulation of speech and subjected to strict scrutiny. *Id*. The majority opinion found it irrelevant that the Sign Code did not discriminate among various viewpoints on a topic since the regulation was aimed at, and distinguished between, entire topics altogether. *Id*. at 169, 171. Therefore, "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 171. And as the Town had no valid governmental interest – much less the requisite *compelling* interest – behind its distinctions, the Sign Code failed strict scrutiny. *Id*. at 172.

A number of justices authoring concurring opinions took heed of the Town's warning and saw the inherent problems with the majority's rigid approach to determining whether a law is content based. Justice Alito, joined by Justices Kennedy and Sotomayor, provided a list of "rules" regarding signs that would not be content-based – among them are "[r]ules distinguishing between on-premises and off-premises signs." 576 U.S. at 175 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring). Three additional justices wrote separately to object to any "automatic 'strict scrutiny' trigger" of the type that could result from deeming a law content-based. 576 U.S. at 176 (Breyer, J., concurring); *see also id*. at 181 (Kagan, Breyer, and Ginsburg, JJ., concurring in the judgment). Justice Kagan specifically recognized the "unenviable bind" that cities across the nation would face if ordinances that are facially content-based are automatically subject to strict scrutiny:

> I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." Ante, at 2231. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained

> why the vindication of First Amendment values requires that result.

Reed, 576 U.S. at 185 (Kagan, J., concurring in the judgment).

Reaction to *Reed*

To some extent, Justice Kagan was exactly right about what might happen following *Reed*. The *Reed* majority opinion's broad language deeming a law content-based due to "the topic discussed or the idea or message expressed," particularly compared with Justice Alito's samples of possibly content-neutral rules in his concurrence, left district courts and the courts of appeals grappling with *Reed's* application to commercial speech, particularly by way of traditional billboards, and to ordinances distinguishing between on-premises and off-premises signs. Not surprisingly, the courts examining these issues in light of *Reed* came to vastly different conclusions. Advocates for a hardline reading of *Reed* contended that, to determine whether a sign regulation applied, one must read the sign and determine its content and the message expressed therein. This reading requirement renders the law content-based since the application of the law necessarily turns on the sign's content. *See, e.g., Reagan Nat'l Advert. of Austin*, Inc. v. City of Austin, 972 F.3d 696, 707 (5th Cir. 2020) ("To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it. This is an 'obvious content- based inquiry,' and it 'does not evade strict scrutiny' simply because a location is involved."); *Thomas v. Bright*, 937 F.3d 721, 730 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 194, 207 L. Ed. 2d 1119 (2020) ("Therefore, to determine whether the on-premises exception does or does not apply (i.e., whether the sign satisfies or violates the Act), the Tennessee official must read the message written on the sign and determine its meaning, function, or purpose. The Supreme Court has made plain that a purpose component in a scheme such as this is content-based[.]").

In the other camp, governmental entities argued against such a simplistic application of *Reed's* holding, claiming that neither *Reed*, nor any other Supreme Court precedent, has held that a mere "cursory examination" of a sign simply to determine what regulation applies to it does not equate to a content-based restriction. *See, e.g., Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.*, 846 F.3d 391, 404 (D.C. Cir. 2017) ("So, too, the fact that a District of Columbia official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the District's lamppost regulation content based."). Further , several courts found the inclusion of on-premises signs in Justice Alito's list of content-neutral regulations in his concurrence meant *Reed* did not apply to sign laws distinguishing between on-premises and off-premises signs that implicated commercial speech. *See Adams Outdoor Advert. Ltd. P'ship by Adams Outdoor GP, LLC v. Pennsylvania Dep't of Transportation*, 930 F.3d 199, 207 n.1 (3d Cir. 2019) (noting *Reed* "did not establish a legal standard by which to evaluate laws that distinguish between on-premise and off-premise"); *Contest Promotions, LLC v. City & Cty. of San Francisco*, 704 F. App'x 665, 667 (9th Cir. 2017) (finding *Reed* did not apply to commercial speech regulations).

Off-Premises Signs and the City of Austin

In *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022), the City of Austin, Texas distinguished between on-premises and off-premises signs in its sign code in order to "protect the aesthetic value of the city and to protect public safety." For instance, no new off-premises signs could be built. Existing off-premises signs could remain as grandfathered non-conforming signs. Further, off-premises signs could not be digitized, while on-premised signs could be. Reagan National Advertising and Lamar Advertising sought permits to digitize some of their off-premises billboards. After the city denied the applications, Reagan National sued, and Lamar later joined in.

The District Court for the Western District of Texas found for the city. The court explained that "the on/off-premises distinction [did] not impose greater restrictions for political messages, religious messages, or any other subject matter," and "d[id] not require a viewer to evaluate the topic, idea, or viewpoint on the sign." Instead, it required the viewer only "to determine whether the subject matter is located on the same property as the sign." The court therefore held that the distinction was a facially content-neutral "regulation based on location."

The Fifth Circuit reversed. Relying on *Reed*, the Court endorsed the if-you-have-to-read- it-it's-content-based theory: "The fact that a government official ha[s] to read a sign's message to determine the sign's purpose [i]s enough to" render a regulation content-based and "subject [it] to strict scrutiny." Austin's on-premises/off-premises distinctions were thus subjected to strict scrutiny, which they failed.

The Supreme Court granted certiorari on June 28, 2021. Following oral argument on November 10, 2021, the Court's decision was issued on April 21, 2022. Justice Sotomayor delivered the opinion. The opinion noted the widespread and longstanding tradition of local governments regulating signs: "[T]housands of jurisdictions around the country . . . regulate[ ] outdoor advertisements," which they have done "for well over a century." The opinion chided the Fifth Circuit for applying *Reed* too literally by its interpretation that if a reader must ask "who the speaker is and what the speaker is saying" to apply a regulation, then the regulation is automatically content-based. The Court found that such a "rule, which holds that a regulation cannot be content-neutral if it requires reading the sign at issue, is **too extreme** an interpretation of this Court's precedent." The Court explained that the Court in *Reed* "confronted a very different regulatory scheme" where sign content was clearly involved. Yet in this case, Austin's on/off-premises distinction was "**agnostic as to content**." The distinction thus was really based on **location**, not content:

> A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions.
>
> *City of Austin*, 142 S. Ct. at 1472-73.

The Court also rejected the application of *Reed's* "function or purpose" language to this case. A subtle distinction defined regulated speech by its "function or purpose." For example, the function or purpose of a "political sign" is to influence the outcome of an election. But that does not mean that any classification that considers function or purpose is *always* content-based.

Impact of City of Austin and Lingering Questions

While generally heralded as a win for governments, it should be borne in mind that *City of Austin* was a close call. Although the decision is reported as a 6-3 decision, but it is really more of a 5-4 decision because Justices Thomas, Gorsuch, and Barrett dissented, and Justice Alito concurred in the judgment only while dissenting in part. Concerning the main holding, Justice Alito wrote the following:

> Today's decision, however, goes further and holds flatly that "[t]he sign code provisions challenged here do not discriminate" on the basis of "'the topic discussed or the idea or message expressed,'" and that categorical statement is incorrect. The provisions defining on- and off-premises signs clearly discriminate on those grounds, and at least as applied in some situations, strict scrutiny should be required.
>
> 142 S. Ct. 1464, 1480 (Alito, J., concurring in the judgment).

Importantly, the definition of an "off-premises sign" in Austin's sign code was "a sign *advertising* a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." The *City of Austin* majority did not address the constitutionality of any distinctions between commercial and noncommercial speech, the latter of which has traditionally received much more First Amendment protection. Thus, it is unclear whether *City of Austin* applies only to distinctions between on- premises and off-premises *commercial* speech – a point made by Justice Alito and the dissenters. Many courts have held that *Reed* was, in contrast, a case about noncommercial speech.

Furthermore, the Court's finding that Austin's on/off premise distinction was content- neutral was just the first step in the First Amendment analysis. A regulation may still be content-based if there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest." Because the Supreme Court declined to find the on/off premise distinction as content-based, and thus subject to strict scrutiny, the case had to be remanded since the Fifth Circuit had applied this level of review.

Conclusion

For the time being at least, the Supreme Court has determined that absent an improper purpose behind its enactment, a law that distinguishes between on- and off-premises signs is not considered content-based to trigger strict scrutiny review. Even then, questions abound as to whether distinctions by other categories such as holiday signs or types of flags would likewise be considered content-neutral and therefore subject to intermediate scrutiny to determine its constitutionality. Looming even larger is whether the distinction between commercial and noncommercial speech, which was recognized as legitimate for First Amendment purposes by *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), will stand the test of time. As in any other constitutional realm, the only certainty is that the jurisprudence will continually develop as cases are heard by future compositions of the Supreme Court.

Keeping Your Police Clients Out of the Doghouse After K-9 Apprehensions

By Caren L. Pollack

This article will prepare you to deal with and defend the issues which arise following a difficult K-9 apprehension and to mitigate the public perception problems which accompany them.

Police use of force in today's climate is scrutinized like never before, and public opinion often finds an officer liable for wrongdoing before a lawsuit is ever filed. This article will prepare you to deal with and defend the issues which arise following a difficult K-9 apprehension and to mitigate the public perception problems which accompany them.

Legal Standard

The use of a police K-9 is one type of force which can be utilized by police officers. It is evaluated in the same manner as any other type of force.

Specifically, it must be objectively reasonable as set forth by the United States Supreme Court in *Graham vs. Connor* 490 U.S. 386, 109 S.Ct. 1865 (1999). Pursuant to the Fourth Amendment, a police officer must not use excessive force in the course of an arrest. Likewise, a police officer with the ability to do so must intervene to stop another police officer's use of excessive force. A police officer's use of force should be reviewed for "objective reasonableness."

The *Graham* Court instructed that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interest at stake." *Id*., at 396, 109 S.Ct. at 1871.

The proper application of the standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the other officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*., 109 S.Ct. at 1872. The review for reasonableness must be done "without regard to [the police officers'] underlying intent or motivation" as "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force." *Id*., at 396-97, 109 S.Ct. at 1872.

Practical Application

In reality, the optics of a police dog bite case are often much worse than other police uses of force when broadcasted locally or nationally following an apprehension. In Indianapolis, the local newspaper's 2021 exposé of the Indianapolis Metropolitan Police Department's use of K-9s to apprehend suspects earned the authors a Pulitzer Prize. Some of the more eye-catching subheadings from that series follow:

- "Mauled: When police dogs are weapons"
- "The standard for being the worst: IMPD's dogs bite more than other big cities"
- "Teach him a lesson for running"
- "When humans are the prey"
- "Bloody head, missing scalp, cut artery"
- "A symbol of terror for nonwhite people"
- "IMPD says dogs are better than bullets"
- "This dog did whatever he wanted to do"
- "Oh Jesus, he's got my leg"
- "Elderly IMPD dog bite victim describes attack"
- "Most people were unarmed"
- "The Wild West"
- "Felt like I was being eaten"

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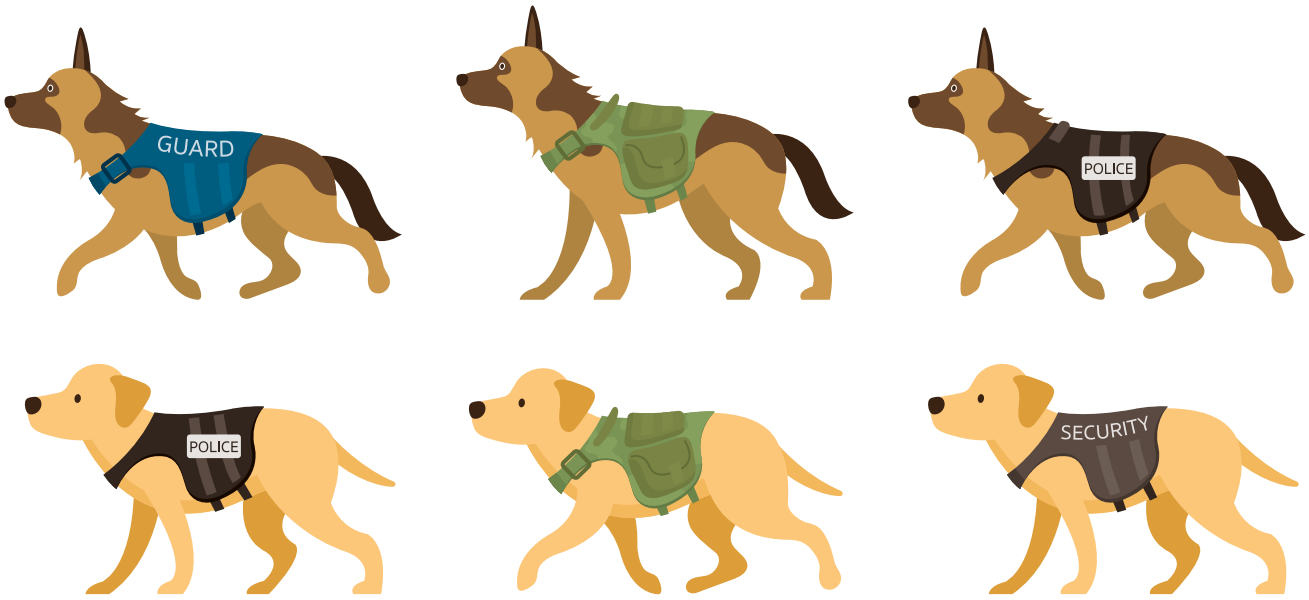

At the close of the first installment of the article, the authors promised that the following topics were coming soon:

- For Black residents, police dogs have a tortured history
- She went out for a walk. Then she encountered a police dog
- How a run of bites brought the FBI to a small town in Alabama

With this type of publicity, the reality is that K-9 apprehensions are scrutinized differently than other types of apprehensions which employ Tasers, chemical sprays, or batons. The IndyStar article referenced above opined that the reason these types of apprehensions are more inflammatory than others is because of the unsettling history of dogs as used against nonwhite people.

One of the concerns raised in the IndyStar article was how officers disproportionately utilize their dogs on African Americans. The article noted that issues regarding K-9 apprehensions date back to when dogs were used to hunt enslaved people who had escaped, all the way through the Civil Rights Movement in the 1960's, when police attacked demonstrators with dogs.

The Pulitzer Prize-winning IndyStar series noted that dogs have been used as a tool of state violence against people because of their race historically and the "utilization of a K-9 against a Black suspect harkens back to an era where Black people were viewed as a lower order of human."

How to Defend K-9 Bite Cases

How do you combat the visual perception that the use of a K-9 by a police officer to apprehend a suspect must have been racist or otherwise violative of the suspect's constitutional rights?

You need to immediately obtain and analyze the following:

1. All body camera and dashcam video footage taken at the scene from the K-9 Officer and any other responding officers.

There may be statements made in the heat of the moment which do not reflect well on the officers, but evidence of the officers' subjective intent does not change the *Graham v. Connor* analysis. However, if the officers made racist or otherwise insensitive comments, summary judgment becomes more important than ever because the comment(s) will not play be well-received by a jury at trial.

When viewing the video, you are looking for critical information including the following:

- Did the officer give an appropriate warning before ordering the dog to bite and hold the suspect?
- Was the suspect fleeing?
- Was the suspect presenting a danger to the officers or others?
- Was the suspect handcuffed?
- Was the suspect hiding?

2. Written policies and procedures of the department with respect to use of force generally and use of K-9s specifically.

You will need to analyze these to determine whether the officer deploying the K-9 complied with the department's use of force policy and whether the policy is constitutionally sound. If not, separate counsel will likely be needed for the officer and the employer. This also lets you know the likelihood of a *Monell* claim against the employer. *Monell vs. Department of Soc. Svcs.* 436 U.S. 658 (1978).

3. All incident reports relating to the arrest.

It will be important to determine the reason the suspect was being pursued and the nature of the crime for which he or she was being arrested. The more serious or violent the crime, the more justifiable the use of a K-9 is in apprehending the suspect. It is difficult to justify a severe dog bite when the suspect was only being pursued for shoplifting a pack of gum or another minor offense.

4. Disposition of the suspect's criminal charges.

Obviously, if the suspect pleads guilty to resisting arrest or a serious underlying crime for which he was being pursued, this is some evidence that the use of a dog to apprehend him or her was justified.

Further, if a finding that the use of the K-9 at the time of arrest would invalidate the arrest, and the guilty plea or conviction stands, there may be a *Heck* bar to Plaintiff's excessive force claim. *Heck v. Humphrey* 512 U.S. 477, 114 S.Ct. 2364. If the plaintiff stipulated to the lawfulness of the dog bite as part of his guilty plea, or was found guilty of resisting arrest, then he cannot use the very same act to allege excessive force under §1983.

> Success on such a claim would necessarily imply that his conviction was invalid. Heck, 512 U.S. at 487; Sanders v. City of Pittsburg, 14 F.4th 968 (9th Cir. 2021).

5. Get a copy of the officer's personnel and disciplinary files. When reviewing them, ask yourself:

- Was the officer fully trained on K-9 use of force?
- Had he or she previously been disciplined regarding use of force generally or dogs specifically?
- How many previous citizen complaints did he or she have regarding use of force? How were they handled?

This gives you some insight as to whether you could have a *Monell* problem for inadequate training or deliberate indifference to an over-aggressive officer or whether punitive damages are likely to be sought and even awarded against the individual officer.

Controlling the Narrative

Before gathering the evidence discussed above, the most important thing to do is to oversee public statements made by your client. After unfavorable reporting of a police incident, the Chief of Police or Sheriff often understandably wants to respond. You must explain to him or her the importance of running any proposed statement by you before releasing it. Any statements will be fair game once there is a lawsuit and could be used against the municipality to pursue a *Monell* claim or against a police officer who was involved and who may be under investigation internally or criminally for his or her actions.

If a statement can be avoided, then avoid it. If not, you will want any statement to focus on the officer's and the K-9's extensive training, the importance of apprehending the fleeing suspect to safeguard the community and the danger with which the officer was faced. Keep it short; do not **try** your case in the media.

Conclusion

Attorneys defending police officers who have injured or killed a suspect using any type of force have to collect and preserve critical evidence in anticipation of legal action. The same steps should be taken whether the force used was by Taser, baton or canine. Notwithstanding the optics and resulting bad publicity surrounding a police K-9 bite to a suspect, or worse, to an innocent bystander, the standard remains one of objective reasonableness. This standard is more likely to be met when K-9 officers have been extensively and properly trained before being deployed.